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DINA SÕRITSA

The Health-care Provider's Civil Liability in Cases of Prenatal Damages

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The Health-care Provider's Civil Liability in Cases of Prenatal Damages

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School of Law, University of Tartu, Estonia

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I 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* Vol. 21/2 (2014), pp. 141–160.

II D. Sõritsa 'The Health-care Provider's Civil Liability in the Cases of Wrongful Life. An Estonian Perspective'. *Juridica International* Vol. 23 (2015), pp. 43–51.

III 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* Vol. 4 No. 2 (2016) pp. 95–111.

IV D. Sõritsa 'Damages Subject to Compensation in Cases of Wrongful Birth: A Solution to Suit Estonia'. *Juridica International* Vol. 24 (2016), pp. 105–115.

ANALYTICAL COMPENDIUM TO A CUMULATIVE DISSERTATION

1. INTRODUCTION

The benefit of family planning is nowadays considered self-evident. It enables parents to appropriately time their personal relationship, self-development and career goals, as well as to ensure that they have the necessary resources to welcome a child into their family and provide him or her with the best conditions for his or her care and development. Undoubtedly, unexpected parenthood may become very burdensome for the whole family, both financially and emotionally. It could be even more difficult for the parents to accept that their child, even if awaited with eager anticipation, is born severely disabled. Parents may feel that the enormous financial burden and frustration overshadows the otherwise happy and joyous event of becoming a parent.

In their choices regarding family planning, parents are in many ways dependent on the health-care services and the information they receive from the health-care provider.

The health-care provider can perform the necessary procedures to prevent the pregnancy (e.g. advise and offer contraception methods, perform sterilisation, etc.) or terminate the pregnancy. Also, the health-care provider can perform prenatal testing before gestation or during the pregnancy to give the parents information regarding the (potential) condition of the future child's health. Expectations regarding the accuracy of such information have increased with the scientific and medical advances of recent times. With the necessary information at hand, parents can make a decision as to the continuation or otherwise of pregnancy.

Medical error or misdiagnosis on the part of the health-care provider in the aforementioned procedures may result in unwanted pregnancy or the birth of a disabled child. However, it is clear that the health-care provider cannot be liable for every unsuccessful medical attempt to prevent the pregnancy or the birth of a disabled child.

Nevertheless, even in the case of negligent acts by health-care providers, the obligation to compensate for the damages due to unwanted pregnancy or the birth of a disabled child has made courts across the world face uncomfortable decisions over ethical dilemmas.

The unwanted pregnancy and birth of an unwanted child give rise to several claims of pecuniary and non-pecuniary damage against the health-care provider that have been recognised in the case law of several countries.[1] The parents'

[1] With regard to case law in European countries, see e.g. the comparative report by B. A. Koch with reference to the case law regarding the cases of prenatal damages in B. Winiger *et al*. *Digest of European Tort Law, Volume 2: Essential Cases on Damages*. Berlin & Boston: Walter de Gruyter GmbH & Co. KG 2011, at pp. 875–903, from p. 900 (about wrongful

claim of damages in the cases of unwanted pregnancy is also known as a **wrongful conception** claim. The parents' claim of damages in the case of birth of an unwanted disabled child due to the health-care provider's misdiagnosis is known as a **wrongful birth** claim. In case of the birth of an unwanted disabled child, a **wrongful life** claim is also recognised, where the child issues a claim against the health-care provider alleging the existence of damages through having been born disabled for reason of negligence by the health-care provider in failing to diagnose or warn about the disability or risk of disability.[2] In this dissertation, the cases of wrongful conception, wrongful birth and wrongful life are also referred to as cases of prenatal damages.

In Estonia, the specific regulation concerning the health-care provider's liability on the basis of contract for provision of health-care services entered into force on July 1st 2002 with the enforcement of the Law of Obligations Act (LOA).[3] Before this date, claims against health-care providers were resolved under the Civil Code of the Estonian Soviet Socialist Republic under the general grounds of obligations arising from the infliction of damage.[4]

This dissertation concerns the health-care provider's civil liability in cases of wrongful conception, wrongful birth and wrongful life particularly under the LOA health-care provider's obligation to compensate for damages on the basis of contractual and delictual liability.

In this dissertation, the person accountable for the damage is mainly referred to as a health-care provider. According to LOA § 758 (1), the health-care provider is a person in whose professional activities provides health-care service to a patient.

The current compendium is based on the author's four publications:

- 'The Possibility of Compensation for Damages in Cases of Wrongful Conception, Wrongful Birth and Wrongful Life. An Estonian Perspective'.[5] The authors of the article are Dina Sõritsa and Janno Lahe. Dina Sõritsa

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conception claims), at pp. 905–935, from p. 932 (about wrongful birth claims), at pp. 937–960, from p. 958 (about wrongful life claims). –
DOI: http://dx.doi.org/10.1515/9783110248494

[2] Different authors give different meanings to the terms *wrongful conception*, *wrongful birth* and *wrongful life*. For example, the wrongful conception cases (also known as wrongful pregnancy cases) has been regarded as a subtype of wrongful birth cases. Additionally, See B. C. Steininger. Wrongful Birth and Wrongful Life: Basic Questions. – *Journal of European Tort Law*, Vol. 1/2, 2010, pp. 125–126; DOI: http://dx.doi.org/10.1515/JETL.2010.125. I. Giesen. Of wrongful birth, wrongful life, comparative law and the politics of tort law systems. – *Utrecht Law Review*, Vol. 72, 2009, p. 259.

[3] Law of Obligations Act. State Gazette (in Estonian *Riigi Teataja*) I 2001, 81, 487. Estonian legal acts are available also in English: www.riigiteataja.ee

[4] P. Varul *et al*. Võlaõigusseadus III. Komm vlj (Law of Obligations Act III. Commented Edition). Juura 2009, p. 293. Civil Code of the Estonian Soviet Socialist Republic. – ESSR Supreme Council Gazette (in Estonian *ENSV Ülemnõukogu Teataja*) 1964, 25, 115.

[5] European Journal of Health Law, Vol. 21/2 (2014), pp. 141–160. –
DOI: http://dx.doi.org/10.1163/15718093-12341311

worked through the source materials for the article and composed the main part of the text.
- 'The Health-care Provider's Civil Liability in the Cases of Wrongful Life. An Estonian Perspective'.[6]
- 'Damages Subject to Compensation in Cases of Wrongful Birth: A Solution to Suit Estonia'.[7]
- 'The Obligation of the Health-care Provider to Compensate for Damages in Case of Wrongful Conception: a Model to Suit Estonian Law'.[8] The authors of the article are Dina Sõritsa and Janno Lahe. Dina Sõritsa worked through the source materials for the article and composed the main part of the text.

The above articles analyse, whether and what kind of damages should be compensable in cases of wrongful conception, wrongful birth and wrongful life. The author has analysed the grounds and the possibility of health-care provider's liability in these cases under contract law and under the law of delicts.

The article 'The Possibility of Compensation for Damages in Cases of Wrongful Conception, Wrongful Birth and Wrongful Life. An Estonian Perspective' explains the Estonian legal framework of the contractual and delictual basis for compensation for the damages and presents the preliminary argumentation regarding the health-care provider's liability in the named three cases. The other three articles delve into the specific arguments regarding each case and focus on the analysis of the recoverable damage and the limits to the compensation.

[6] Juridica International, Vol. 23, 2015, pp. 43–51. – DOI: http://dx.doi.org/10.12697/JI.2015.23.05

[7] Juridica International, Vol. 24, 2016, pp. 105–115. – DOI: http://dx.doi.org/10.12697/JI.2016.24.11

[8] Journal of Medical Law and Ethics, Vol. 4, No. 2, 2016, pp. 95–111. – DOI: http://dx.doi.org/10.7590/221354016X14690151940745

2. POSING AND DEFINING THE RESEARCH PROBLEM

2.1. Posing the Research Problem

Termination of pregnancy in Estonia is legal. According to Termination of Pregnancy and Sterilisation Act (TPSA)[9] § 6 (1), the pregnancy may be terminated if it has lasted less than 12 weeks. The same article also enacts the special cases when the law allows for the termination of a pregnancy which has lasted for more than 12 but less than 22 weeks. One of the special cases to justify late abortion is if there is a possibility that the unborn child has a severe mental or physical impairment to its health (TPSA § 6 (2) subsection 2). Therefore, the information obtained from the health-care provider regarding the pregnancy and the state of health of the foetus is essential to make an informed decision as to whether to terminate or continue the pregnancy.

The case law in the cases of wrongful conception, wrongful birth and wrongful life is still completely missing in Estonia. This could be explained by the country's small population, as well as the high controversy and emotionality of these cases, paired with the parents' unwillingness to undertake the tiresome and expensive proceedings in court.[10] However, the lack of case law in Estonia does not confirm the absence of facts that could in principle give rise to the claims under the rubrics of wrongful conception, wrongful birth and wrongful life. For example, according to data on neonatal morbidity collected from maternity hospitals in Estonia, in the year 2015 there were 266.4 cases of sick newborn, including 51.2 cases of congenital malformations, deformations and chromosomal abnormalities per 1000 live births.[11]

The health-care provider's liability in these cases is particularly controversial, which has been repeatedly pointed out by lawyers and case law all over

[9] Termination of Pregnancy and Sterilisation Act. State Gazette I 1998, 107, 1766.

[10] Also, the absence of case law does not exclude the possibility of parties settling the dispute out of court. According to Health Services Organisation Act (HSOA) § 50^2 (1), the expert committee on quality of health services is competent to assess the quality of health services provided to patients and to make proposals arising from the assessment to the Health Board, the Estonian Health Insurance Fund and the health care providers. Health Services Organisation Act (HSOA). State Gazette I 2001, 50, 284. Thus, the patients can rely on the opinion of the expert committee on quality of health services and the existence of medical error or misdiagnosis can be determined without the need to issue a claim in court. The existence of a reliable opinion provides the necessary information for negotiation with the health-care provider regarding the compensation for the damages.

[11] In 2010, the numbers of sick newborn and congenital malformations and abnormalities per 1000 live births were slightly lower (respectively 239.7 sick newborn and 39.4 cases of congenital abnormalities), according to the data from the database of Health Statistics and Health Research by the Estonian National Institute of Health Development. Available at: http://pxweb.tai.ee/esf/pxweb2008/Database/Haigestumus/01Esmashaigestumus/01Esmashaigestumus.asp (27.03.2017).

the world.[12] Some countries have chosen an extreme solution and have prohibited by law the issuing of claims in the cases of wrongful birth and wrongful life.[13] This is another indication of the relevance of this topic.

It can be alleged that in the situations of unwanted pregnancy or the birth of a disabled child the causal link chain originates from the parents' decisions regarding reproduction and thus transferring the adverse consequences onto the health-care provider is unjust. However, the core of the parents' claim in the cases of wrongful conception and wrongful birth (or in case of wrongful life by issuing a claim on behalf of the child) is that the health-care provider's negligence deprived them of the opportunity to have a choice regarding family planning. Thus, these claims have potential only in case of misdiagnosis or breach of other contractual obligations (primarily the breach of the health-care provider's obligation to inform the patient). In this regard, these cases can in principle be treated as any other case of health-care provider's liability, where the damage has been caused by the health-care provider's negligent act.[14]

However, the existence of damage as a prerequisite for the health care provider's liability, as well as the damage subject to compensation, remain the central problems that have not found uniform solutions.

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,

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[12] The so-called prenatal delicts have been deliberately left unregulated in DCFR (*Draft Common Frame of Reference*, VI book) and these delicts are not regarded as infliction of damage to health. However, if the child is damaged before his or her birth, upon reaching the legal capacity the child could have a claim against the tortfeasor. von Bar, C. *Principles of European Law. Study Group on a European Civil Code. Non-Contractual Liability Arising out of Damage Caused to Another* (PEL Liab. Dam.). Sellier. European law publishers Gmbh, Munich, Study Group on a European Civil Code 2009. DCFR 2:201, commentary no 1.

[13] E.g. wrongful life actions have been barred in French law for disabled children born after 7 March 2002. The so-called *anti-Perruche* provision was enacted after the notorious decision of the French *Cour de cassation* of 17 November 2000, by which the court satisfied the wrongful life claim issued in the name of Nicolas Perruche, a boy who was born suffering from an extremely severe handicap. B. Winiger *et al* (see Note 1), pp. 940–942. After the stipulation of the *anti-Perruche* provision under French law in case of birth of a disabled child, parents are able to seek damages from health-care providers only in respect of harm suffered by the parents (i.e. emotional harm), but not the pecuniary damage resulting from the child's disability. See also N. M. Priaulx, Conceptualising harm in the case of the 'unwanted' child. – *European Journal of Health Law*, Vol. 9/4, 2002, pp. 339–340. P. Lewis, 'The necessary implications of wrongful life claims: lessons from France', European Journal of Health Law, 12/2005, p. 136.

[14] E.g. in *Gildiner v. Thomas Jefferson University Hospital* the U.S. District Court for the Eastern District of Pennsylvania stated that the parents' cause of action for damages caused by negligence in the performance and interpretation of an amniocentesis (i.e. the case of wrongful birth) involves the application of the doctrine of negligence to a recently developed medical procedure. *Gildiner v. Thomas Jefferson University Hospital*, 451 F. Supp. 692 (E.D. Pa. 1978).

considering an outcome that seeks to balance the interests of the child, his or her parents and the health-care provider.

In order to achieve the objective of the work, the author poses the following **research questions**:

1. Is the health-care provider's contractual or delictual liability or both under Estonian law possible in the cases of prenatal damages?
2. Should the damage be compensated in the cases of wrongful conception, and if so, what kind of damage is reasonable to compensate?
3. Should the damage be compensated in the cases of wrongful birth, and if so, what kind of damage is reasonable to compensate?
4. Should the maintenance costs be compensated in the cases of wrongful conception and wrongful birth?
5. Whether (and to what extent) the scope of compensating the damages in the cases of wrongful conception and wrongful birth is affected by the principle that the injured person's benefits should be deducted from the compensation?
6. Whether (and to what extent), as the injured party, the parents' part in the caused damage should be taken into account in establishing the scope of compensating the damages in the cases of wrongful conception and wrongful birth?

The first research question considers primarily Estonian law. The rest of the research questions are of a universal character.

2.2. Defining the topic

2.2.1. The health-care provider as an obliged subject to compensate for damages

The starting point of the health-care provider's liability in the cases of prenatal damages under Estonian law is the breach of contract for provision of health-care services. In order to establish the circle of persons who could be held liable for the damage arising from the unwanted pregnancy or the birth of an unwanted child, it is necessary to define the concept of the health-care provider.[15]

[15] In Estonian law, the concept of the health-care provider is enacted in HSOA and in LOA. In these acts, the health-care provider is defined differently regarding the health-care professional. According to HSOA, health-care professionals (i.e. doctors, dentists, nurses and midwives) are also health-care providers (HSOA § 3 [1]), whereas under LOA, the health-care professionals are not regarded as health-care providers. According to LOA, the health-care professionals are persons who participate in the provision of health-care services, operating on the basis of an employment contract or other similar contract with the health-care provider (LOA § 758 [2]). It has been stated that the regulation of the health-care

In this dissertation, the regulation in LOA is taken as the basis for the concept of the health-care provider. According to LOA § 758 (1), a health-care provider is a person in whose professional activities provides health-care service to a patient. LOA § 758 (2) regards qualified doctors and dentists, and nurses or midwives providing health care services independently as persons participating in the provision of health-care services. Generally, a health-care provider in the meaning of LOA is a legal person who runs a hospital or a sole proprietor.[16] A natural person can also be a health-care provider if he operates in the form of a sole proprietor (e.g. family physician, see HSOA Section 7 (2)) or if the contract between the person providing health-care services and the health-care provider is other than an employment contract or other similar contract.[17] For example in Germany, analogously to Estonia, the health-care provider is understood as a legal person (e.g. state and private hospitals) or a natural person (e.g. the health-care professional providing the health-care services independently in the private sector).[18]

Although the contract for provision of health-care services is concluded between the patient and the health-care provider, the persons participating in providing the health-care services shall also be personally liable besides the health-care provider for performance of a contract for the provision of health care services (LOA § 758 (2)).[19] It has been explained that the legislator has aimed to increase the doctor's civil liability because the patient trusts his most fundamental and valuable objects of utility in the hands of the doctor. At the same time, as an employee, the doctor's pecuniary liability is limited and thus in reality, the doctor's liability is not extensive.[20]

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provider in HSOA is unsuccessful and confusing (A. Nõmper, J. Sootak. Meditsiiniõigus [Medical Law]. Juura 2007 [in Estonian], p. 57).

[16] P. Varul *et al* (see Note 4), p. 295, para 3.2. The Republic of Estonia can be also regarded as a health-care provider, if the health-care service is provided in prison. See e.g. the Supreme Court's decision 3-2-4-1-16 of 8 December 2016.

[17] A. Nõmper, J. Sootak (see Note 15), p. 57.

[18] M. S. Stauch. Medical malpractice and compensation in Germany. – *Chicago-Kent Law Review*, Vol. 86/3, 2011, p. 1140.

[19] Besides the persons providing or participating in the provision of health care services, the liability of other persons is not excluded in the case of unwanted pregnancy or the birth of a disabled child. For instance, the parent(s) could also rely e.g. on the product liability of a drug company. Also, in principle the child could have a claim against the parents, if the disability was caused due to the parent's behaviour during the pregnancy (e.g. unhealthy habits of the mother, injuring the foetus during the pregnancy). However, this dissertation concentrates on contractual and delictual liability of the persons providing or participating in provision of health care services, and potential liability of other persons is not analysed. The dissertation also does not cover the health-care provider's liability should the disability of the child have been caused by the health-care provider, e.g. should the child's disability have been caused by the health-care provider's negligently performed delivery of the child. Still, the general framework of the prerequisites of the health-care provider's obligation to compensate for the damages analysed is applicable to all the cases of the health-care provider's liability (see para 2.2.2.).

[20] P. Varul *et al* (see Note 4), p. 296, para 3.3.

If the prerequisites for the personal liability of the persons participating in the provision of health-care services are fulfilled, they are liable in front of the patient together with the health-care provider as solidary obligors.[21]

In addition to the health-care provider's own liability (LOA § 770 (1)), the health-care provider is also liable under LOA § 770 (2) for the actions of the persons assisting in providing health-care services (i.e. persons assisting the health-care provider who are not personally liable under LOA § 758 (2)). The main difference as regards the health-care provider's liability in this regard is that fault is a prerequisite for a liability only under the meaning of liability set forth in LOA § 770 (1).[22]

LOA § 770 (2) basically repeats the regulation in General Part of the Civil Code Act (GPCCA)[23] § 132 (1), according to which a person shall be liable for the conduct of and circumstances arising from another person as for the person's own conduct and circumstances arising from the person if the person uses the other person on a continuous basis in the economic or professional activity of the person and the conduct of and circumstances arising from the other person are related to such economic or professional activity.[24]

The activity of the person participating in providing the health-care services (e.g. doctor) should be attributed to the health-care provider according to GPCCA) § 132 (1). If the doctor and the health-care provider have concluded an employment contract or other similar contract (contract for provision of a service), according to which the doctor provides the service to the health care provider, it means using the doctor on a continuous basis in the economic or professional activity of the health-care provider. Another prerequisite to attribute the doctor's activity to the health-care provider is the relation of the activity or omission to the economic or professional activity.[25] If the doctor as the health-care provider's employee provides the health-care service to the patient, there shall be no doubt that provision of these services is related to the health-care provider's economic or professional activity, because this activity is directly related to the contract concluded between the doctor and the health-care provider.[26]

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[21] This means that in the case of breach of contract for provision of health-care services, the patient may claim damages from all the obligors jointly and severally (LOA § 65 [1]).

[22] See more at para 2.2.1.

[23] General Part of the Civil Code Act. State Gazette I 2002, 35, 216.

[24] See also I. Luik. Tervishoiuteenuse osutaja ja arsti vastutus. Tervishoiuteenuse osutamise leping XXII (The liability of health-care provider and of the doctor. The contract for provision of health-care services XXII). – *Lege Artis* 11/2004, p. 34.

[25] P. Varul *et al* (eds). Tsiviilseadustiku üldosa seadus. Komm vlj. (The General Part of the Civil Code Act). Tallinn: Juura 2010 (in Estonian), pp. 386–387.

[26] To apply GPCCA § 132 (1) person A must have behaved in a way that can be reproached with person B who uses person A in his economic or professional activity in the context of the contract concluded between them. The Supreme Court's decision 3-2-1-92-05 of 13 October 2005, para 17. Decisions of the Supreme Court of Estonia are available at www.nc.ee (in Estonian).

If the doctor's unlawful activity is not related to the performing of the health-care provider's contractual obligations and the doctor does not breach these obligations, the activity can be attributed under LOA § 1054 (1) on the grounds of delictual liability.[27] As both legal person and natural person can commit a delict, both can be liable on the grounds of the law of delicts.[28]

I. Luik-Tamme has stated that the doctor's liability is delictual in its legal nature.[29] In the opinion of the author of this dissertation, the aforenamed allegation cannot be correct in the context of LOA § 758 (2). 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. Thus it can be alleged that the obligations arising from the abovementioned contract extend to the doctor, who is also personally liable for breach of these obligations according to LOA § 758 (2). In addition, the doctor's liability under LOA § 758 (2) does not exclude his delictual liability, but it has been stated that claim on the delictual basis should be regarded as rather exceptional, because the claim under the law of delict is generally issued against the health-care provider and not the doctor participating in providing the health-care services.[30]

2.2.2. The general framework of the prerequisites of the health-care provider's obligation to compensate for damages

As the health-care provider shall not promise a patient that an operation will be successful (LOA § 766 (2)), the basis of the health-care provider's liability does not lie in a negative outcome to the provision of health-care services.[31]

According to the Estonian Supreme Court, the general prerequisites of the contractual liability and the obligation to compensate for the damages are the following:

1) The obligor has breached the contract (LOA § 115 (1));
2) The obligor is liable for the breach of contract (LOA § 115 (1));
3) Obligee has suffered or suffers damages (LOA § 127 (1), § 128);
4) The damage is covered by the protective purpose of the breached obligation (LOA § 127 (2));
5) The damage as a possible result of the breach of obligation was foreseeable for the obligor upon the entry into the contract, except for infliction of damage intentionally or due to gross negligence (LOA § 127 (3));

[27] P. Varul *et al* (see Note 25), pp. 387–388.
[28] P. Varul *et al* (see Note 4) pp. 629–630, para 3.4.1.
[29] I. Luik. Tervishoiuteenuse osutaja ja arsti vastutus. Tervishoiuteenuse osutamise leping XXI (The health-care provider's and the doctor's liability. The contract for provision of health-care services XXI). – Lege Artis 11/2004, p. 34.
[30] A. Nõmper, J. Sootak, (see Note 15), p. 137.
[31] P. Varul *et al* (see Note 4), p. 305, para 3.3.

6) There is a causal link between the breach of obligation and the damage (LOA § 127 (4)).[32]

Under the Estonian LOA, the **breach of obligation by the health-care provider (LOA § 770 (1) and (2))** is the central basis for the health-care provider's obligation to compensate for the damage arising from the contract (LOA § 115).

The performance of the health-care provider's obligations must be evaluated considering the first sentence of LOA § 762, which states that health care services shall at the very least conform to the general level of medical science at the time the services are provided and the services shall be provided with a level of care which can normally be expected of providers of health care services. The Estonian Supreme Court has stated that if the quality of the doctor's actions is less than that of an educated and experienced specialist in the specific field, this could be considered a medical error.[33]

The basis for the health care provider's liability can also be the breach of obligations caused by the health-care provider's assisting personnel, as well as errors of equipment used during the provision of health care services (LOA § 770 (2)) and organisational errors, such as failure to prevent hospital infections.[34]

In addition to the breach of obligation**, the damage and the causal link** between the damage and the breach of obligation should also precede the obligation to compensate for the damage. If it is determined that there is an error in diagnosis or treatment and a patient develops a health disorder which could probably have been avoided by ordinary treatment, the damage is presumed to have resulted from the error (LOA § 770 (4)).

In addition, the prerequisite for liability is the health care provider's **fault**, i.e. he must have breached the obligation culpably (LOA § 770 (1)).[35] The Estonian Supreme Court has explained that if the health-care provider's breach of obligation lies in misdiagnosis or medical error, the existence of fault consists of negligently or intentionally assigning an incorrect diagnosis or treatment, including failure to assign a correct diagnosis and treatment.[36] In principle, the health-care provider's fault could be excluded if the health-care provider is not able to influence the course of events.[37]

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[32] The Supreme Court's decision in case no 3-2-1-130-15 of 25 November 2015, para 11.

[33] The Supreme Court's decision in case no 3-2-1-78-06 of 3 October 2006, para 12.

[34] P. Varul *et al* (see Note 4), p. 312, para 3.2.

[35] Fault is not a prerequisite for the health-care provider's liability if the basis of liability is LOA § 770 (2). P. Varul *et al* (see Note 4), p. 312, para 3.2.

[36] The Supreme Court's decision in case no 3-2-1-171-10 of 8 April 2011, para 17.

[37] P. Varul *et al* (see Note 4), p. 312, para 3.2. I. Luik-Tamme and K. Pormeister have stated that it is incorrect to regard fault as not decisive in establishing the health-care provider's liability. In their opinion, whether or not the health-care provider could be reproached for the negligence should be determined on the basis of establishing the fault, not on the basis of breach of obligation. See more at I. Luik-Tamme, K. Pormeister. Kas süü tervishoiuteenuse

In the occurrence of these prerequisites of the health-care provider's contractual liability it is possible to move to the next stage and assess which kind of damage should be compensable to the patient.

The existence of the health-care provider's contractual liability does not exclude the application of the liability under the law of delicts. Under LOA § 1044 (3) the tortfeasor shall be liable for the breach of contractual obligation also under tort law, if as a result of the violation of this obligation death, bodily injury or damage to the health of the patient was caused. In such a situation, the victim has a choice as to the legal basis on which he wants to issue a claim. The Estonian Supreme Court has affirmed the existence of such a right to choose.[38] Additionally, the claim under tort law is present when the aim of the breached contractual obligation was other than preventing such damage for which compensation is claimed (LOA § 1044 (2) second sentence).

The general prerequisites for delictual liability in Estonia (LOA § 1043 *et seq*) are the objective elements of tort (*der objektive Tatbestand*: the tortfeasor's act, harming the victim's legally protected right and a causal relation between them), unlawfulness and the fault of the tortfeasor.

Considering proving the causal link, the Supreme Court has held that if the person's death is caused by bodily injury due to the defendant's negligence or alternatively by circumstances that do not relate to the defendant's act (e.g. the poor condition of a person's health), then the claimant should only prove that the infliction of damage by the defendant's act was a possible cause of the damage.[39] Similarly to contractual liability, in the case of the damage claim on the basis of the law of delict, after establishing the prerequisites for the liability it is necessary to analyse whether the victim has suffered compensable damage under the law of delict.

According to LOA § 1045 (1), the causing of damage is unlawful if, above all, the damage is caused by: 1) causing of the death of the victim; 2) causing of bodily injury to or harm to the health of the victim; 3) deprivation of the victim of his or her liberty; 4) violation of a personality right of the victim; 5) violation of the right of ownership or a similar right, or a right of possession, of the victim; 6) interference with a person's economic or professional activities; 7) behaviour that violates a duty arising from the law; or 8) intentional behaviour contrary to good morals. In LOA § 1045 (1), paras. 1–3 and 5, the unlawfulness of the act is defined in terms of consequences of the tortfeasor's act or inaction.[40] The grounds for unlawfulness under LOA § 1045 (1), paras. 6–8, necessitate the evaluation of the tortfeasor's act or inaction and not the consequence.[41]

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osutaja lepingulise vastutuse eeldusena on iseseisev või sisutühi kontseptsioon? (Is the fault as a prerequisite for the health-care provider's liability an independent or an empty conception?). – *Juridica*, Vol. X, 2014 (in Estonian).

[38] The Supreme Court's decision in case no 3-2-1-171-10 of 8 April 2011, para 12.

[39] The Supreme Court's decision in case no 3-2-1-53-06 of 26 September 2006, para 11.

[40] T. Tampuu. Lepinguvälised võlasuhted (Non-contractual obligations). Juura 2012 (in Estonian), p. 203.

[41] P. Varul *et al* (see Note 4), p. 641.

Another prerequisite for delictual liability is fault[42], which is established on two stages. Firstly, the intentional or negligent infliction of damage should be established (LOA § 1050 (1)). Then, in case of negligent infliction of damage, it is evaluated whether the negligence is subjectively excusable (LOA § 1050 (2)).[43] The latter means the assessment of the situation, age, education, knowledge, abilities and other personal characteristics of a person (LOA § 1050 (2)). However, according to Estonian case law, the fault of the health-care provider as a professional is not evaluated under LOA § 1050 (2).[44]

If the prerequisites for contractual or delictual liability have been established, it can provide a **basis for compensation of both pecuniary and non-pecuniary damage.** The general rules of compensation for the damages are applicable equally regardless of the basis of the health-care provider's obligation to compensate for the damages (LOA § 115 or § 1043).[45]

The compensable pecuniary damage can be a direct damage (LOA § 128 (3)) or a loss of profit (LOA § 128 (4)). Non-pecuniary damage involves primarily the physical and emotional distress and suffering caused to the aggrieved (LOA § 128 (5)).[46]

According to the Estonian LOA, **the aim for compensation for damage** is to place the aggrieved person in a situation as near as possible to that in which he or she would have been if the circumstances that are the basis for the compensation obligation had not occurred (LOA § 127 (1)). However, the principle of complete compensation of the damage is limited by several provisions.

The purpose of the breached obligation or the protective provision should be taken into account according to § 127 (2) irrespective of the legal basis for compensation for the damage. LOA § 127 (2) stipulates that the damage shall not be compensated to the extent that prevention of damage was not the purpose of the obligation or provision due to the non-performance of which the compensation obligation arose.[47] In the case of liability arising from breach of contract, the law does not allow for the compensation of damage which could

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[42] See also J. Lahe. Süü deliktiõiguses (Fault in the Law of Delict). Dissertation. Tartu 2005. – Available at http://dspace.utlib.ee/dspace/bitstream/handle/10062/686/lahejanno.pdf?sequence=5 (27.03.2017)

[43] T. Tampuu (see Note 40), pp. 230–231.

[44] Decision in case no 3-2-1-78-06 of the Civil Chamber of the Supreme Court of 3 October 2006, para 12. See also J. Lahe. The Concept of Fault of the Tortfeasor in Estonian Tort Law: A Comparative Perspective. – *Review of Central and East European Law*, Vol. 38, 2, 2013, p. 153.

[45] P. Varul *et al*. Võlaõigusseadus I. Üldosa (§§ 1–207) Komm vlj (Law of Obligations Act I, General part: A Commentary). Juura 2016 (in Estonian), p. 652.

[46] It should be added that LOA (§ 134 in particular) has exhaustively regulated the cases in which the non-pecuniary damage should be compensated. See also the Supreme Court's decision in case no 3-2-1-43-08 of 28 May 2008, para 14.

[47] The person who has breached the contract is not regarded as responsible for the kind of damage, the arising of which the performance of the contract was not aimed to prevent. The Supreme Court's decision in case no 3-2-1-171-10 of 8 April 2011, para 15.

not have been foreseeable to the non-conforming party at the time of entering into the contract (LOA § 127 (3)).[48] Also, LOA § 127 (5) has to be taken into account, under which any gain received by the injured party as a result of the damage caused, particularly the costs avoided by the injured party, shall be deducted from the compensation for the damage unless deduction is contrary to the purpose of the compensation.

The compensation for the damage could also be reduced if the damage was caused in part due to the victim's behaviour or if the complete compensation would not be fair towards the tortfeasor. LOA § 139 (1) stipulates that if damage is caused in part by circumstances dependent on the injured party or due to a risk borne by the injured party, the amount of compensation for the damage shall be reduced to the extent that such circumstances or risk contributed to the damage. The second section of the same provision enables the reduction of the amount of compensation, if the aggrieved person failed to draw the attention of the person causing the damage to an unusually high risk of damage or to prevent the risk of damage or to perform any act which would have reduced the damage caused if the aggrieved person could have reasonably been expected to do so.[49] LOA § 140 (1) enacts that the court may reduce the amount of compensation for damage if compensation in full would be grossly unfair with regard to the obligated person or not reasonably acceptable for any other reason. In such case, all circumstances, in particular the nature of the liability, relationships between the persons and their economic situations, including insurance coverage, shall be taken into account.

2.2.3. Cases of prenatal damages

2.2.3.1. Wrongful conception

Wrongful conception cases (also known as wrongful pregnancy cases) involve the parent's or parents' claim against the health care provider to compensate for damages arising from the birth of an unwanted but healthy child due to the health care provider's negligence. Cases of wrongful conception are thus characterised by the fact that the parents had wanted to avoid pregnancy, but due to an error on the part of the health-care provider the parents were not able to prevent the birth of a child.[50]

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[48] The Supreme Court in the decision in case no 3-2-1-53-06 of 26 September 2006 has noted that LOA § 127 (2) and (3) therefore enable the court to disregard these negative consequences of the breach of contractual obligation, which are in the causal relation to the breach of the contract, but are extraordinary in the view of a reasonable person.

[49] It should be therefore added that in the case of causing the person's death or bodily harm the compensation could be reduced under LOA § 139 (1) only if the injured person's intent or gross negligence contributed to the injury suffered (LOA § 139 [3]).

[50] E.g. the health-care provider negligently performs a sterilisation procedure and, as a proximate result of that negligence, the patient conceives a child. See e.g. the decision of the Supreme Court of Virginia in the case *Nunnally v. Artis,* 254 Va. 247; 492 S.E.2d 126 (1997).

In case of unwanted pregnancy, the conduct alleged against the health-care provider could lie in the negligence in procedures preventing or terminating the pregnancy[51] or pregnancy diagnoses.[52] Also, the health care provider may err in advice or recommendation on contraception method or give an incorrect diagnosis of fertility.[53] The health-care provider's negligent behaviour could also lie in pre-operative counselling, the operation itself, post-operative testing or post-operative counselling (e.g. if there is, for instance, a failure to warn of the need to use contraceptives until sperm tests after vasectomy have proved negative).[54]

S. D. Pattinson has alleged that in wrongful conception cases, the major ethical tension is over the value to be attached to the autonomous decision of those whose opportunity to avoid having a child has been lost.[55]

In Estonia, TPSA § 6 (1) permits the abortion of pregnancy that has not lasted longer than 11 weeks. Therefore, in a situation where the woman is carrying a healthy, though unwanted, baby, the law enables a decision to be made in favour of either termination of pregnancy regardless of reason. However, if the existence of pregnancy is not detected in a timely manner (i.e. prior to the 11 week mark), then in case of a unwanted pregnancy the possibility to choose to abort the carrying of a healthy baby is only allowed if good reason exists.[56]

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[51] Estonian Supreme Court has held that since this is a medical intervention into a woman's bodily integrity, the termination of the pregnancy can be considered as providing health-care. The Supreme Court's decision in case no. 3-2-1-31-11 of 11 May 2011, para 11.

[52] See J. K. Mason, G. T. Laurie, M. Aziz. *Law and Medical Ethics*. 8th Edition, Oxford University Press 2011, pp. 340–341. E.g. according to the decision of the Supreme Court of North Carolina in the case of *Jackson v. Bumgardner*, the unplanned child was born after the health-care provider had failed to reinsert a contraceptive intrauterine device after a surgical procedure of dilation and curettage, but reassured the patient that she would continue to be protected by the intrauterine device (*Jackson v. Bumgardner*, No. 670A84, 318 N.C. 172; 3478 S. E. 2d 743 [1986]).

[53] S. D. Pattinson. *Medical Law and Ethics*. Second Edition, Thomson Reuters (Legal) Limited 2009, p. 311.

[54] A. Grubb, J. Laing, J. McHale. *Principles of Medical Law*. 3rd Edition. Oxford University Press 2010, pp. 295–296.

[55] S. D. Pattinson (see Note 53), p. 333.

[56] According to TPSA § 6 (2), pregnancy which has lasted for more than 12 but less than 22 weeks may be terminated if: 1) the pregnancy endangers the pregnant woman's health; 2) the unborn child may have a severe mental or physical damage to health; 3) the illness or health problem of a pregnant woman hinders the raising of a child; 4) the pregnant woman is below the age of 15; 5) the pregnant woman is over the age of 45.

2.2.3.2. Wrongful birth

In a case of wrongful birth, the parents seek compensation for any damage related to birth of the disabled child, a situation that would have been prevented had the parents been correctly informed.[57] The main difference between a case of wrongful conception and one of wrongful birth is that in the latter the birth of a child was sought.[58] It should be noted that the combination of the mentioned two cases is also possible if a woman becomes pregnant e.g. due to negligent sterilisation or abortion (which leads to a wrongful conception claim), and gives birth to a disabled child (which stems from a negligent diagnosis and leads to a wrongful birth claim).

There are various invasive and non-invasive methods of prenatal testing for the detection of possible foetal defects.[59] However, it should be clear that the health-care provider cannot always prevent the birth of a disabled child even when the testing is performed 100% correctly. Although prenatal genetic testing is considered highly accurate, the potential for errors still exists.[60]

It is important to emphasise that in these cases the health-care provider has not caused the disability. Rather the conduct alleged against the health-care provider lies in negligence in performing genetic or prenatal testing, the following misdiagnosis regarding the foetus' health condition and the consequent loss of opportunity of the mother to terminate the pregnancy in a timely manner.[61]

The cases of wrongful birth raise several ethical and moral concerns, which lead to the main question of whether these cases should be accepted as perspective causes of action. Some countries have chosen to bar these claims.[62]

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[57] It should be noted that various authors apply different meanings to the term wrongful birth. E.g. M. Hogg regards the claims in respect of both healthy and disabled children as claims under the rubric of wrongful birth. See M. Hogg. Damages for pecuniary loss in cases of wrongful birth. – *Journal of European Tort Law*, Vol. 1/2, 2010.

[58] B. Winiger *et al* (eds.) (see Note 1), p. 934

[59] On the possibilities and risks of prenatal testing methods, see J. K. Mason *et al* (see Note 52), pp. 215–216; D. W. Whitney, K. N. Rosenbaum. Recovery of damages for wrongful birth. – *The Journal of Legal Medicine*, Vol. 32/2, 2011., pp. 168–169; P. L. Barber. Prenatal diagnosis: An ethical and regulatory dilemma. – Houston *Journal of Health Law & Policy*, Vol. 13/2, 2013, pp. 330–332, 345.

[60] For more information, see D. W. Whitney, K. N. Rosenbaum (see Note 59), p. 170.

[61] E.g. according to the decision of the Supreme Court of New Jersey in the case of *Berman v. Allan* the health-care provider had failed to inform the patient of the existence of a procedure known as amniocentesis, which would have enabled the discovery that the child would suffer from Down's Syndrome (*Berman v. Allan*, 80 N.J. 421 (1979) 404 A.2d 8). According to the decision of the Supreme Court of New Jersey in the case of *Gleitman v. Cosgrove*, the parents of a rubella syndrome child brought an action against a physician who allegedly had advised them that the mother's contraction of rubella during pregnancy would not affect the foetus (*Gleitman v. Cosgrove*, 49 N.J. 22 (1967) 227 A.2d 689).

[62] E.g. the statues of U.S. several states prohibit wrongful birth claims, focusing on barring plaintiffs from making the argument that, but for the negligence of the defendant, the plaintiff would have chosen to terminate the pregnancy. C. Harris has concluded that although the policy behind wrongful birth claims are politically and morally controversial,

According to S.D. Pattinson, in cases of wrongful birth, the major ethics-related tension is over the value to be attached to the autonomous decision of those who have been deprived of the opportunity to avoid having a child with particular traits.[63] The parents' right to make an informed decision on whether or not to abort a child with potential birth defects is opposed by the distasteful potential to create 'designer babies' and for discrimination against disabled people.[64] This leads to the need to evaluate what conditions are 'medically relevant' and could accordingly give rise to a wrongful-birth cause of action. Moral concerns as to the status of foetal life remain, alongside the fact that in absolute terms pregnancy has been actually sought in the cases at issue.[65]

In case of the birth of a disabled child the parents could be obliged to face the heavy burden of pecuniary and non-pecuniary damage through deprivation of their right to choose due to the health-care provider's negligence. However, the compensation of named damages depends on the fulfilment of the pre-requisites of the health-care provider's liability.

2.2.3.3. Wrongful life

By the claim of wrongful life, the child alleges that he/she has suffered damage through having been born disabled for reason of misdiagnosis and the consequent loss of opportunity of the mother to terminate the pregnancy in a timely manner. The facts underlying the wrongful life case are generally the same as in case of wrongful birth. Wrongful life cases are distinguished from wrongful birth cases by the fact that the child born disabled is the one who issues a claim against the health care provider for the inflicted damage.[66]

Wrongful-life claims are the most controversial among the cases of prenatal damages. In the U.S., only a few states allow such claims.[67] In Germany, it has

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the essential tenets of the claim are the same as those for medical malpractice. Thus, these claims should be decided by the judicial system and should not be interfered by the state legislatures by prohibiting the claims. C. Harris. Statutory Prohibitions on Wrongful Birth Claims and Their Dangerous Effects on Parents. – *Boston College Journal of Law & Social Justice*, Vol. 34/2, 2014, p. 377, 391.

[63] S. D. Pattinson (see Note 53), p. 333.

[64] P. L. Barber (see Note 59), pp. 347, 349.

[65] J. K. Mason *et al* (see Note 52), p. 353.

[66] About differentiating the cases of prenatal damages, see also B. A. Koch 'Medical Liability in Europe: Comparative Analysis' in B. A. Koch (ed.). *Medical Liability in Europe. A Comparison of Selected Jurisdictions*. Berlin, Boston: De Gruyter, 2011, pp. 611–691, at p. 672; K. A. Mahoney. Malpractice Claims Resulting from Negligent Preconception Genetic Testing: Do These Claims Present a Strain of Wrongful Birth or Wrongful Conception, and Does the Categorization Even Matter? – *Suffolk University Law Review*, Vol. 39, 2006, p. 773.

[67] Claims of wrongful life are allowed in California (e.g., *Turpin v. Sortini*, 643 P.2d 954, 966 (Cal. 1982), New Jersey (e.g., *Moscatello v. Univ. of Med. and Dentistry of N. J.*, 776 A.2d 874, 881 N.J. Super. Ct. App. Div. 2001), and Washington (e.g., *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 495 Wash. 1983).

been stated that as a matter of principle, a human being has to accept his life as nature endowed him and has no claim against others to be born or eliminated. Thus the child's existence cannot be classified as damage.[68]

The fact that the claimant in the wrongful life claim is the child, who at the time of the health-care provider's negligent act was not yet born, poses complex ethical and philosophical problems regarding the existence of the health-care provider's obligations towards the child, the existence of the damage suffered and the health-care provider's subsequent liability. The courts that satisfy wrongful life claims tend to look past the ethical and philosophical obstacles and concentrate on the medical needs and corresponding expenses of a disabled child.[69]

The main obstacle in satisfying the claim lies in the question of whether the child has suffered a **legally cognisable damage** and whether it is possible to overcome the **non-existence paradox**.[70] The non-existence paradox is created by the comparison of the states of being born disabled and not being born at all.

[68] N. M. Priaulx (see Note 13), p. 339.

[69] K. Wevers. Prenatal torts and pre-implantation genetic diagnosis. – *Harvard Journal of Law & Technology*, Vol. 24/1, 2010, p. 266.

[70] E.g *Gleitman v. Cosgrove* (see Note 61).

3. CURRENT STATUS OF THE FIELD OF RESEARCH AND THE POSITION OF THE RESEARCH PROBLEM THEREIN

Although it could be alleged that the cases of prenatal damages are very specific due to the nature of occurring damage and thus constitute a very narrow part of the health-care provider's liability, these cases have received remarkable attention in the discussions all over the world. For example, the compositions analysing the law of delict in its entirety have devoted whole chapters to the cases of wrongful conception, wrongful birth and wrongful life.[71] Thus the named cases represent an intriguing research subject. What makes these cases even more interesting is the fact that debate over the matter is not limited to legal questions, but broadens to fundamental questions of morals and ethics. The answers to the questions concerning the health-care provider's liability and the obligation to compensate for the damages and the scope of recoverable damages have not been uniform. Consequently, the relevance of seeking solutions to the named cases exists also in Estonia.

The cases of prenatal damages have received remarkable attention in several countries. On the contrary, in Estonia the question of the health-care provider's liability in these specific cases has not been analysed at all.

After the stipulation of provisions regarding the contract for provision of health-care services in LOA, the health-care provider's contractual liability has been analysed in the Estonian legal literature. Ants Nõmper composed the commentary to chapter 41 ('Contract for the Provision of Health-care Services') of LOA[72] and in conjunction with Professor Jaan Sootak the book 'Medical law'.[73] Another major contributor to analysis of the health-care provider's liability has been Ingeri Luik-Tamme, who published a series of articles regarding the contract for provision of health-care services.[74]

The main contributors to the analysis of the Estonian law of delicts are Professor Janno Lahe and *magister iuris* Tambet Tampuu, who have thoroughly analysed the law of non-contractual obligations and the prerequisites of delictual liability.[75]

Alike the absence of case law in Estonia regarding the cases of wrongful conception, wrongful birth and wrongful life, these cases have not at all been analysed in the Estonian legal literature. In the book 'Medical law', Ants Nõmper and Jaan Sootak have referred to the complexity of the question of the health-care provider's liability and the compensation for the damages in the

[71] B. Winiger *et al*. *Digest of European Tort Law. Volume 1: Essential Cases on Natural Causation*. Springer-Verlag/Wien 2007; B. Winiger *et al* (see Note 1).
[72] P. Varul *et al* (see Note 4), pp. 293–315.
[73] A. Nõmper, J. Sootak (see Note 15).
[74] E.g. I. Luik (see Note 24), I. Luik (see Note 29), I. Luik-Tamme, K. Pormeister (see Note 37).
[75] E.g. T. Tampuu (see Note 40). J. Lahe (see Note 42).

cases of failure to perform abortion or unsuccessful sterilisation or termination of pregnancy.[76]

Also, there is no exhaustive analysis regarding the health-care provider's liability under the law of delicts, although the Estonian Supreme Court has not excluded the possibility of the health-care provider's delictual liability.[77]

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[76] A. Nõmper, J. Sootak (see Note 15), p. 154–156.
[77] See above para 2.2.2.

4. METHODS

The main research method of this dissertation is the comparative method. The use of the named method is expressed in analysing the research questions comparatively in Estonian, German and U.S. law.

Despite the availability of the legal grounds to issue a claim against the health-care provider in the cases of damage to the patient, the Estonian courts have not had the possibility to tackle the specific legal questions arising in the cases of wrongful conception, wrongful birth and wrongful life.

In contrast, the debate over the questions in the cases of prenatal damages has been continuous in Germany. There is also numerous court practice in these cases in Germany. In addition, the German legal system, including German law (and also the standpoints established in case law and theoretical sources), has set an important example for the creation of Estonian civil law.[78] Also the German Civil Code (BGB) was the main model law for the Estonian Law of Obligations Act.

U.S. law as an example of common law was selected in expectation of finding discussions of universal character that would be applicable also in Estonian case law. The U.S. has also numerous case law in the cases of prenatal damages.

Due to the absence of the court practice in the cases of wrongful conception, wrongful birth and wrongful life in Estonia, it is not possible to analyse the standpoints of the Estonian courts in these cases. Thus, the author has analysed the court practice in German and U.S. courts. The experience of the legal studies and the case law in the countries under comparison enable us to find solutions to the analysed cases also under Estonian law.

More specifically, the analysis of the judicial practice has given examples of the circumstances under which the health-care provider has been held liable in these cases and the courts' argumentation pro or contra compensation for the different kinds of damages. The analysis of the legal literature enabled the study of the findings regarding the tendency and direction of the case law in these cases, also the broader approach to the legal problems, as well as moral and ethical concerns in the cases of prenatal damages.

As a result of setting the parallels in law and judicial practice in the countries under comparison, the author has been able to ascertain the main arguments regarding the compensation for the damages in cases of wrongful conception, wrongful birth and wrongful life and the effect of these arguments in the context of the Estonian LOA. However, the author does not aim to copy over into the Estonian context the standpoints established in German and the U.S. case law, but rather evaluate the suitability of the offered solutions for Estonian law. Furthermore, the author has evaluated the solutions proposed by German and U.S. law in the light of Estonian case law regarding compensation for the damages and the prerequisites for the health-care provider's liability.

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[78] See P. Varul *et al*. Tsiviilõiguse üldosa (General Part of Civil Law). Juura 2012, p. 25 (in Estonian).

5. SUMMARY OF THE MAIN CONCLUSIONS OF THE PUBLICATIONS INCLUDED IN THIS COMPENDIUM

5.1. The health-care provider's contractual and delictual liability

5.1.1. The obligation of the health-care provider to compensate for damages under contract law and under the law of delicts in case of wrongful conception

Description of the Problem

The question of the health-care provider's liability in the cases of wrongful conception raises a legitimate doubt: whether an unwanted pregnancy can constitute an injury, which can be followed by the health-care provider's obligation to compensate the consequent damage.

As M. Ramsay has pointed out, some authors and judges still question whether pregnancy as a natural condition can be considered a genuine injury.[79] This dissertation is based on the assumption that unwanted pregnancy in the cases of wrongful conception is the result of the health-care provider's negligence (i.e. medical error or misdiagnosis) and constitutes an injury.

According to Estonian law, the conclusion of the contract for the provision of health care services can be alleged at all times if the health-care provider has provided health care services (LOA § 759). Thus, if the health-care provider performs e.g. the procedure of termination of pregnancy, the existence of the contract between the patient and the health-care provider can be alleged.[80] As the contract for provision of health-care services is generally concluded with the patient who receives medical counselling or treatment, the question of who is entitled to issue a wrongful conception claim also arises.

The liability of the health-care provider depends on whether the prerequisites of the contractual and/or delictual liability are met. According to Estonian law, it is not clear, whether the health-care provider's basis of liability is contractual or delictual or both.

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[79] M. Ramsay, Wrongful pregnancy and the offset/benefits approach. – *Canadian Journal of Law & Jurisprudence*, Vol. 28/1, 2015, p. 131. It has been found that pregnancy could be considered as health damage, if the pregnancy is unwanted. See D. Nolan. New forms of damage in negligence. – The Modern Law Review, Vol. 70/1, 2007, pp. 73–75.

[80] The Estonian Supreme Court has held that the termination of pregnancy is allowed to the extent that a woman's right to free self-realisation, including self-determination, outweighs in the meaning of § 19 of the Constitution of the Republic of Estonia the unborn child's right to life in the meaning of § 16 of the constitution. Since this is a medical intervention into a woman's bodily integrity, the termination of the pregnancy can be considered as a provision of health care. Decision in case no 3-2-1-31-11 of the Civil Chamber of the Supreme Court of 11 May 2011, para. 11.

Statement set forth for defence
Under Estonian law, the health-care provider should be liable under contract law and in certain circumstances under the law of delicts in cases of wrongful conception.

Reasoning
Neither Estonian case law nor legal literature have taken a position as to whether unwanted pregnancy could be regarded as damage to a woman's health. It has simply been found that the abnormality occurring in the human body could be regarded as health damage.[81] The present author is of the opinion that with the aim of giving the victim a freedom of choice (whether to qualify the claim as contractual or delictual), the possibility to regard an unwanted pregnancy as bodily injury cannot be excluded. Analogously to the German discussion, under Estonian law the consideration of the existence of a foetus as damage to the health is not reasoned[82], but rather the fact that a person was deprived of possibility to decide over one's body. Though the commentary to LOA states that a person's bodily self-determination is one's personal right,[83] causing the unwanted pregnancy could as an exception be regarded as both a violation of personal right and health damage.

In U.S. case law, the Supreme Court of New Mexico has stated that the injury in the case of wrongful conception lies in the mother's continued fertility given her desire and effort to be sterilised, and that the doctor's negligence in performing the sterilisation operation and failing to inform the mother of the unsuccessful outcome constitutes a tort.[84]

As the unwanted pregnancy in the cases of wrongful conception is generally the consequence of a medical error or misdiagnosis, due to which the procedure is unsuccessful (i.e. there is a **breach of contract** for provision of health care services on the health-care provider's part), the legal basis for the liability of health-care providers could primarily be contractual.

Although the contract for provision of health-care services is generally concluded with the patient who receives medical counselling or treatment, the effects of the contract should not be limited to the parties only. For example, the German Supreme Court has found that the contractual obligation to perform the sterilisation procedure protects both parties, even if only one of the parents was a party to the contract.[85]

Under Estonian law, the question of whether the parent who is not a party to the contract is entitled to the compensation for the damages depends foremost on whether the health-care provider had to recognise that the contract was also

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[81] P. Varul *et al* (see Note 4), p. 645.
[82] As to whether the unwanted pregnancy can be regarded as bodily injury, see also A. Grubb, J. Laing, J. McHale (see Note 54), 298–301, 5.102; 5.107–5.109.
[83] P. Varul *et al* (see Note 4), p. 646.
[84] See e.g. *Lovelace Medical Center v. Mendez*, 805 P.2d 603 (N.M. 1991). In the same case it was stated that the financial security of the family is a legally protected interest.
[85] BGH, NJW 1995, 2407 ff.

directed at the protection of the third party's (the second parent's) interests and rights (LOA § 81 – contract with protective effect for third party); e.g. if the patient informs the doctor that they and their partner do not wish to have any more children, and conclude the contract, it can seemingly be alleged that the health care provider should also have recognised the interests of the patient's partner and the aim of said patient to also protect their partner's interests. **Thus in principle both parents can claim damages in the case of wrongful conception**.

According to LOA § 766 (2), as a rule, a health care provider shall not promise that a patient will recover or that an operation will be successful. However, if the object of the contract for provision of health care services is the termination of pregnancy or a pregnancy prevention-oriented procedure, then an unsuccessful procedure constitutes as a rule a medical mistake on the part of the health care provider. In such a case, it can be alleged that the health care service did not conform to the general level of medical science at the time the services are provided and the services were not provided with the care which can normally be expected of providers of health care services (LOA § 762).[86]

The breach of obligation has to be in causal relation to the damage caused to the patient. In the cases of wrongful conception, it should be proved at first that due to certain reasons (e.g. financial difficulties or a wish to limit the size of the family) the parents did not want any more children.[87] The health-care provider's fault should also be established through the evaluation of the health-care provider's behaviour.

Accordingly, establishing the grounds for the health care provider's contractual liability under LOA § 770 (1) or (2) should not be problematic in the cases of unwanted pregnancy. As pointed out above (see para 2.2.2.), the health-care provider's contractual liability does not exclude the application of liability under the law of delicts. German BGH has also considered possible liability on both a contractual and a non-contractual basis in the case of failed sterilisation.[88]

In the meaning of the law of delicts, it is important to distinguish the health-care provider's acts which aimed at preventing the pregnancy. As stated above, causing an unwanted pregnancy as a result of unsuccessful procedure of

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[86] In the opinion of the Estonian Supreme Court, if the quality of the doctor's actions is lower than that of an educated and experienced specialist in the specific field, this could be a medical error. Decision in case no 3-2-1-78-06 of the Civil Chamber of the Supreme Court of 3 October 2006, para 12. According to TPSA § 13 (1), the doctor having established the existence and duration of pregnancy shall perform all the examinations and acts corresponding to the relevant treatment standard prior to referral for termination of pregnancy. The list of examinations and acts prior to and following the termination of pregnancy are established by a regulation of the minister responsible for the area.

[87] I. Giesen (see Note 2), p. 265.

[88] BGH decision of 18 March 1980, BGHZ 76, 249. See also H. Oetker, 'Art und Umfang des Schadenersatzes', in F.J. Säcker and R.Rixecker (eds). *Münchener Kommentar. Bürgerliches Gesetzbuch. Schuldrecht. Allgemeiner Teil*. 5.Auflage. München: Verlag C.H.Beck, 2007, 288–431, at p. 299.

termination of pregnancy (i.e. the health-care provider's active intervention into the patient's body) can in principle be regarded as causing bodily injury to the patient, which is unlawful under LOA § 1045 (1) 2. Delictual liability should not follow if the patient relies on the fact that the unwanted pregnancy was a result of misdiagnosis or insufficient counselling. In case of establishing the diagnosis or counselling, the health-care provider does not intervene into the patient's body (in contrast to e.g. the procedure of sterilisation).

Accordingly, under Estonian law, delictual liability in case of unwanted pregnancy could be affirmed foremost under LOA § 1045 (1) subsection 2 if alleged that the health-care provider has caused damage to the patient's health.

In cases of misdiagnosis, the Estonian Supreme Court has affirmed, in principle, the patient's claim against the health-care provider also on the basis of the law of delict.[89] However, Estonian courts have not appraised whether misdiagnosis constitutes a delict. In the present author's opinion, failing to prevent the pregnancy by insufficient counselling or by failure to diagnose the existence of pregnancy cannot constitute an unlawful act in the meaning of the law of delict, because there is no protective provision that entails an obligation on the part of a health-care provider to prevent the pregnancy or diagnose its existence. It is highly doubtful preventing or diagnosing the pregnancy could be expected from the health-care provider on the grounds of general duty to maintain safety (general rules of behaviour developed by case law, which are aimed at ensuring safety[90]).

Neither can failure to inform the patient as such be considered unlawful according to LOA § 1045. The objective behind the obligation to inform the patient is not to prevent harm to the patient's life or health but rather primarily to prevent violation of personality rights.[91]

In principle, the health-care provider's delictual liability could follow from breach of the parents' personality right(s). However, relying on intervention in family planning as violation of personal right (LOA § 1045 (1) p 4) should not bring about delictual liability according to Estonian law, because in such case under LOA § 1044 (2) the existence of contract supersedes the delictual liability.

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[89] Decision in case no 3-2-1-171-10 of the Civil Chamber of the Supreme Court of 8 April 2011, para 18.

[90] I. Nõmm. Käibekohustuse rikkumisel põhinev deliktiõiguslik vastutus (Delictual Liability Based on the Breach of the Duty to Maintain Safety). Dissertation. Tartu Ülikooli Kirjastus. Tartu, 2013. (in Estonian) – Available at: http://dspace.ut.ee/bitstream/handle/10062/29910/n6mm_iko.pdf?sequence=1&isAllowed=y (27.03.2017)

[91] P. Varul *et al* (see Note 4), p. 293. Violation of personality rights in the meaning of the Estonian LOA may lie in e.g. unlawful depriving a person of liberty, defamation, unjustified use of the person's name or image of the person, the breaching the inviolability of the private life, right to free self-realisation, etc. P. Varul *et al* (see Note 43), p. 463–464.

5.1.2. The obligation of the health-care provider to compensate for damages under contract law and under the law of delicts in case of wrongful birth

Description of the Problem

Similarly to the cases of wrongful conception, in the cases of wrongful birth the existence of a contract for provision of health-care services shall be presumed under LOA § 759, if an expectant mother undergoes prenatal testing in order to avoid the birth of a disabled child.

As the contract for provision of health-care services is generally concluded with the patient who receives medical counselling or treatment, the question of who is entitled to issue a wrongful birth claim also arises similarly to the cases of wrongful conception.

Another question to be answered is which kind of conditions justify the issuing of the claim. It should be clear that the health-care provider should not be liable for failure to diagnose every disability regardless of its significance.

J. T. Stein has stated that despite the ethical and moral concerns involved, claims of wrongful birth should be permitted. Otherwise, the parents would be unjustly left with the heavy burden of pecuniary and non-pecuniary damage incurred through deprivation of their right to choose due to the health-care provider's negligence.[92] The author of this dissertation agrees.

Thus it is interesting to analyse, whether the liability of the health-care provider is possible on the basis of contractual or delictual liability.

Statement set forth for defence

Under Estonian law the health-care provider should be liable under contract law in cases of wrongful birth. Delictual liability does not apply due to the absence of an unlawful act in the meaning of LOA § 1045.

Reasoning

In the cases of wrongful birth, the health-care provider's negligence lies in misdiagnosis and the consequent failure to inform the patient that the future child may be born disabled. This constitutes a **breach of contract** for provision of health care services on the health-care provider's part. Thus the health-care provider's liability could primarily be contractual in nature.[93]

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[92] For more information about the parents' right to procreative autonomy, see J. T. Stein. Backdoor eugenics: The troubling implications of certain damages awards in wrongful birth and wrongful life claims. – *Seton Hall Law Review*, Vol. 40/3, 2010, pp. 1120–1128.

[93] The same has been proposed by Janno Lahe and Tambet Tampuu in B. Winiger *et al* (see Note 1), p. 954. – DOI: http://dx.doi.org/10.1515/9783110248494

German law too allows wrongful-birth claims only on a contractual basis.[94] Liability for wrongful birth is also allowable in the U.S.[95]

Similarly to the cases of wrongful conception, the **question of the person entitled to issue the claim** arises also in cases of wrongful birth. In the author's opinion, if the patient informs the doctor of said patient's and their partner's wish to prevent the birth of a disabled child and concludes the contract, it can be alleged that the health-care provider should have recognised the interests of the patient's partner and the aim of the patient to protect said partner's interests. Thus, it can be presumed that both parents have a claim for damages under the rubric of wrongful birth.

As the health-care provider's negligence in the cases of wrongful birth lies primarily in misdiagnosis, the central question concerning liability is whether the diagnosis corresponded to the **general level of medical science** and was performed according to general duty of care expected from the health care provider (LOA § 762). Due to misdiagnosis the health care provider fails to warn the parents about the fact that the child might be born disabled and thus breaches the obligation to inform the patient.[96] The Estonian Supreme Court has explained that giving an incorrect diagnosis can be regarded as a breach of obligation arising from the contract for provision of health-care services. Consequently, the health-care provider must compensate for the damage that has evolved as a result of misdiagnosis if a correct diagnosis was possible when

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94 BGH NJW 1997, 1638, 1640; BGH NJW 2002, 886; NJW 2002, 2636, 2637; NJW 2005, 891, 892. See also BGB § 823, Schadensersatzpflicht (Liability for damages); H.-G. Bamberger, H. Roth. *Beck'scher Online-Kommentar BGB*, 37th ed. 2013, p. 756. Available at https://beck-online.beck.de/ (27.03.2017)

95 Although the majority of US states recognise the wrongful-birth cause of action, several states have statutorily barred these claims. J.K. Mason *et al* (see Note 52), p. 353. In the U.S., the wrongful birth cases are generally approached as a type of medical malpractice claim. Medical malpractice tort under the U.S. law has the following prerequisites: 1) a duty, 2) a breach of duty, and 3) an injury 4) proximately caused by the breach. See, for example, *Keel v. Banach*, 624 So.2d 1022 (1993). However, in *Grubbs ex rel. Grubbs v. Barbourville Family Health Center*, the breach-of-contract cause of action was recognised with the statement that a physician who contracts and charges for a service, such as a prenatal ultrasound scan and consequent opinion as to the results of that scan, is liable for any breach of contract in this regard. See *Grubbs ex rel. Grubbs v. Barbourville Family Health Ctr., P.S.C.*, 120 S.W.3d (2003).

96 According to LOA § 766 (1) the health-care provider shall inform the patient of the results of the examination of the patient and the state of his or her health, any possible illnesses and the development thereof, the availability, nature and purpose of the health care services required, the risks and consequences associated with the provision of such health care services and of other available health care services. The health-care provider's obligation to inform the patient has also been recognised in U.S. case law; e.g. in *Smith v. Cote*, the court stated that the relevant standard of obligation for informing the patient does not require a physician to identify every possible birth defect without regard to its significance (*Smith v. Cote*, 128 N.H. 231 [1986]). See also *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10, 17 (Minn. 1986); *Reed v. Campagnolo*, 630 A.2d 1145 (Md. 1993).

the general level of medical science and the general duty of care at the time are taken into account.[97]

Aside the evaluation of whether the diagnosis corresponded to the general level of medical science, **the gravity of the disability** shall be taken into consideration. It should be clear that a wrongful-birth claim should not be allowable in consequence to every birth defect, no matter its significance. When the child's disability is mild or treatable or not related to the child's health (e.g. due to the incorrect selection of embryo the child is of an unwanted race), it is much more difficult to argue that the parents have suffered damage.[98] The question of what conditions are 'medically relevant' and could accordingly give rise to a wrongful-birth cause of action is complicated.

In Estonia, the set of 'medically relevant' traits that give rise to a wrongful-birth cause of action should at least include those traits that would justify late-term abortion under TPSA § 6 (2) subsection 2. The gravity of the child's disability should be evaluated on a case-by-case basis, with regard to the child's functional limitations and the extent of his or her suffering.[99]

In a wrongful-birth case, the plaintiff must, *inter alia*, prove that the child would have been aborted if the plaintiff had been made aware of the foetus's deformities.[100] The difficulty of establishing **causation** has justified dismissal of wrongful-birth action in several cases in the U.S.[101] Nevertheless, the majority of courts both in Germany and in the U.S have affirmed the existence of a claim of wrongful birth.

If the prerequisites stated above for contractual liability are met, the health-care provider shall be liable in wrongful-birth cases under the Estonian LOA. In every case, the central question is whether the health-care provider has breached the contractual obligation.

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[97] The Supreme Court's decision in case no 3-2-1-171-10 of 8 April 2011, para 14.

[98] In the case of *Cramblett v. Midwest Sperm Bank* the complaint was filed against a sperm bank alleging that the defendant mistakenly gave the plaintiff vials of sperm from an African-American donor even though the plaintiff had requested the sperm of a white donor with blond hair and blue eyes. The claim was based on wrongful birth, arguing that the child's 'wrong' race should be considered to the equivalent of a disability or birth defect. The court dismissed the claim. A. Bernabe analysed the issue of using race as an element in a tort law claim and concluded that recognizing race, as a disability for which the law provides a remedy, is wrong as a matter of public policy. See more at A. Bernabe. Do Black Lives Matter? Race as a Measure of Injury in Tort Law. – 18 Scholar: St. Mary's Law Review & Social Justice 41 (2016).

[99] See also W. F. Hensel. The disabling impact of wrongful birth and wrongful life actions. – *Harvard Civil Rights – Civil Liberties Law Review*, Vol. 40/1, 2005, pp. 181–190; P. L. Barber (see Note 57), pp. 347–350.

[100] *Reed v. Campagnolo*, 630 A.2d 1145 (Md. 1993); *McKenney v. Jersey City Medical Center*, 771 A.2d 1153 (2001).

[101] E.g., *Wilson v. Kuenzi*, 751 S.W.2d 741 (1988). Ivo Giesen finds it doubtful that the parents could prove that, had they known about the child's disability, they would have decided to terminate the pregnancy. See I. Giesen (see Note 2), pp. 257–273.

In principle, the patient could also issue a claim on the grounds of delictual liability. However, in the author's opinion, failing to diagnose a child's disability cannot constitute an unlawful act in the meaning of the law of delict, because there is no protective provision that entails an obligation on the part of a health-care provider to diagnose a child's disability.

As the health-care provider's breach of obligation is not the cause of the child's disability, it is also not possible to rely exclusively on LOA § 1045 (1) 2, according to which the infliction of damage is unlawful if the damage stems from the causing of bodily injury or damage to the health of the victim. In addition, the Estonian Supreme Court has stated that, according to § 130 (1) of LOA, only the aggrieved person (and no other person) can claim damages arising from health damage or bodily injury.[102] Therefore, the parents cannot rely on LOA § 1045 (1) subsection 2 when stating that they have suffered damage due to their child's health condition.

In principle, the health-care provider's delictual liability could follow from breach of the parents' personality right(s). Relying on intervention in family planning as violation of personality rights (see LOA § 1045 (1) subsection 4) should not bring about delictual liability under Estonian law, because in such a case the existence of a contract supersedes the delictual liability.[103]

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

5.1.3. The obligation of the health-care provider to compensate for damages under contract law and under the law of delicts in case of wrongful life

Description of the Problem

Among the cases of prenatal damages, probably the most complex problems concerning health-care provider's liability arise in the cases of wrongful life. B.A. Koch has concluded that in Europe the courts do not generally satisfy such claims. The foetus does not have the right to decide that an abortion be undertaken, because it concerns his/her mother's right of self-determination, not that of the foetus. Also, there is no 'right not to be born'.[104] In the U.S. case law it has been mostly concluded that there is no rational way to measure non-

[102] The Supreme Court's decision 3-2-1-174-10 of 9 March 2011, para. 12.

[103] Besides intervention in family planning, the birth of a disabled child could, in principle, entail breach of other personality rights of the parents, as in spousal loss of consortium. In case of wrongful birth, this kind of damage (loss of society, affection, assistance, and conjugal fellowship suffered by the marital unit) can be alleged as a result of the shock of not being adequately informed and prepared for the birth of the disabled child. D.W. Whitney, K.N. Rosenbaum have concluded that damages for loss of consortium may be recoverable in a wrongful birth case even if damages for emotional distress are also awarded to both parents. D.W. Whitney, K.N. Rosenbaum (see Note 59), p. 196.

[104] B. Winiger et al (eds.) (see Note 1), pp. 958–960.

existence.[105] Thus, the wrongful life claims are generally unsuccessful both in the U.S. and in European courts.

The cases of wrongful life entail the non-existence paradox: without the health-care provider's negligence the child would not have been born at all. Thus, the comparison is made between being born with a disability and not being born at all.

The opponents of compensation for the damage in the cases of wrongful life find that compensation for the damage means ascribing to the view that it would have been better had the child not been born at all. The proponents emphasise the importance of compensation for the child and supporting the value of the child through compensation.[106] Still, in solving the claim under the rubric of wrongful life, the existence of cognisable damage is the central question.

Statement set forth for defence

Under Estonian law, the health-care provider should not be liable under contract law or under the law of delicts in cases of wrongful life.

Reasoning

According to LOA § 127 (1), the purpose of compensation for damage is to place the aggrieved person in a situation as near as possible to that in which the person would have been if the circumstances which are the basis for the compensation obligation had not occurred. Thus, in case of wrongful life, the states of being born disabled and not being born at all should be compared, which creates the situation of the non-existence paradox.

The health-care provider's contractual liability in case of wrongful life depends on whether the health care provider owes a duty to the child under a contract for provision of health-care services. In the U.S., a legal duty to a child not yet conceived but foreseeably harmed by the negligent delivery of health-care services to the child's parents has been affirmed.[107] On the contrary, under German law, the contract for provision of health-care services concluded by a mother does not prevent the child from living with a disability if this disability could have been prevented only via termination of pregnancy.[108]

Theoretically, under Estonian law, the contract between the child's mother and the health care provider could be regarded as a contract with protective effect for a third party in the meaning of LOA § 81. Affirming this possibility according to Estonian law would mean that the child would be able to rely on breach of obligation by the health-care provider. However, in the present

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[105] E.g. *Becker v. Schwartz* 386 N.E.2d 807 (N.Y. 1978).

[106] B. C. Steininger (see Note 2), p. 152

[107] R. Perry. It's a wonderful life. – *Cornell Law Review* 93 (2007) /2 (Nov.), p. 392.

[108] P. Gottwald. Vertrag zugunsten Dritter. – F.J. Säcker, R. Rixecker (eds). *Münchener Kommentar zum Bürgerliches Gesetzbuch. Schuldrecht. Allgemeiner Teil*. 7. Auflage (*Munich Commentary to German Civil Code. Law of Obligations. General part*. 7th Edition). Munich: Verlag C. H. Beck, Published online 2016, Rn. 208. – Available at https://beck-online.beck.de/ (27.03.2017)

author's opinion, it is doubtful whether the child's interests are linked to the contract with the same intensity as are the interests of the parents.

Regarding the health-care provider's delictual liability, the standpoint should be taken of whether the misdiagnosis by the health-care provider constitutes a delict. The main question is whether there is a **cognisable interest of the child** that has been harmed by the health-care provider. It should be borne in mind that in cases of wrongful life, the child's disability is not caused by the health-care provider, but the health-care provider's negligence lies in misdiagnosis. Thus, the health-care provider's act is not unlawful on the grounds of causing bodily injury or damage to the health of the child (LOA § 1045 (1) subsection 2). Also, there is no harm to the child's personality right (LOA, § 1045 (1) subsection 4) or violation of duty arising from the law (LOA, § 1045 (1) subsection 7). Though TPSA § 6 (2) subsection 2 allows abortion on account of risk of disability, it does not entail a duty to the parent and cannot constitute a duty to the health-care provider.

For example, German courts deny the claim in the cases of wrongful life, stating that in these cases it is impossible to collate the situations before and after causing the damage. BGH has noted that the claimant does not have a claim either on the basis of the law of delict or on the basis of contract law. There is no delictual obligation to prevent the birth of a disabled child; moreover, the birth of a child does not violate the legal interests enacted in BGB § 823 (1). An obligation arising from the contract between the defendant and the claimant's mother to prevent the birth of the claimant does not have a protective effect towards the claimant.[109]

U.S. jurisdictions which allow the claims of wrongful life the courts set aside the philosophical problems that these cases contain and instead prioritise the medical needs of a disabled child. Allowing the claims is also explained by general endeavour to prevent negligent provision of health-care services.[110]

According to Estonian law, if the health-care provider has not caused the disability, it cannot be stated that health-care provider has violated the claimant's interests. Similarly, the health care provider is under no obligation under the law or duty to maintain safety such to prevent the birth of a disabled child.

In the present author's opinion, the non-existence paradox cannot be overcome by existing legislation. Thus, in the cases of wrongful life the health-care provider should not be liable and should not bear the consequences of the birth of a disabled child.

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[109] BGH decision of 18 January 1983, BGHZ 86, 240.

[110] K. Wevers (see Note 69), p. 266. It has also been found that in cases of wrongful life the health-care provider's delictual liability should apply because the birth of a disabled child as a delict corresponds to the traditional meaning of negligence. W. F. Hensel (see Note 99), p. 143.

5.2. Scope of compensation for damages in cases of wrongful conception

Description of the Problem

In the cases of wrongful conception, the damages entail the consequences of the unwanted pregnancy and the birth of an unplanned but healthy child.

In case of the mother there could be loss of income, the costs of medical expenses and non-pecuniary damage. The damage to both parents could lie in child-rearing costs, additional expenses due to certain circumstances (e.g. child's condition); they could also suffer non-pecuniary damage relating to unwanted parenting and intervention in family planning.[111]

In Estonia, the recoverable damage in cases of wrongful conception should be established on the basis of the relevant provisions of LOA (see above para 2.2.2).

In the case of damages arising from the unwanted pregnancy, in addition to the specific basis of compensation of pecuniary or non-pecuniary damage, it should be evaluated according to LOA § 127 (2) whether the aim of the breached obligation or provision was to prevent damage like that which occurred in the case in question. In case of the claim arising from a breach of contract, foreseeability of damage should be taken into consideration (LOA § 127 (3)). Actually, the provisions mentioned leave the court a great deal of discretion in deciding which kind of damage is recoverable in case of an unwanted pregnancy, i.e. which kind of damage compensation is equitable.

Statement set forth for defence

Under Estonian law, LOA § 127 (2) and (3) give the court much discretion in deciding which kind of damage is recoverable in case of an unwanted pregnancy. The medical expenses and loss of income shall be compensated in the cases of wrongful conception, as well as the costs of a new procedure, which is aimed at accomplishing the purpose of the failed procedure. Under LOA § 134 (2) non-pecuniary damage shall be compensated if the unwanted pregnancy is regarded as health damage. In addition, non-pecuniary damage shall be awarded in case of intervention into family planning as a breach of personal right.

Reasoning

The corresponding European case law has been summarised by assessment that in Europe the damage arising from carrying an unplanned baby and childbirth would be compensated with a high probability, but there is a lower probability that the child's maintenance costs and other costs concerning fulfilling parental

[111] B. Winiger *et al* (see Note 1), p. 901.

obligations would be compensated.[112] In this dissertation, the question of compensating the child's maintenance costs is analysed separately (see para 5.4).

In U.S. case law it has been stated that the medical expenses incurred by the parents as a result of the pregnancy are compensated as pecuniary damage. Any additional damages would tend to be extremely speculative in nature, and awarding such damages could have a significant impact on the stability of the family unit and the child in question. The recoverable non-pecuniary damage may lie in the physical pain and suffering, and mental anguish of the mother arising from her pregnancy, and the loss to the husband of the comfort, companionship, services, and consortium of the wife during her pregnancy and immediately after the birth.[113]

In Germany, pecuniary damage (e.g. loss of profit and related financial damages) is also compensated. In addition, non-pecuniary damage is compensated to the mother; German law provides compensation for such a loss on the grounds that she suffered physical injury (*Körperverletzung*), which relates to the pregnancy and delivery of the child.[114]

LOA § 130 (1) enacts the compensation for damage in case of health damage or bodily injury. Hence, if regarding **unwanted pregnancy as health damage**, LOA § 130 (1) enables the mother to easily claim both medical expenses and damage consequent to decrease in income. These are the damages that directly result from the unsuccessful procedure of preventing or terminating the pregnancy and carrying the unwanted child.

In Estonian case law, the costs of an unsuccessful procedure have been compensated as pecuniary damage.[115] However, it is questionable to regard the costs of the initial procedure as the patient's damage because these costs did not arise from failure of the procedure. Rather, the costs of a new procedure (which is aimed at accomplishing the purpose of the failed procedure) could be considered as recoverable damage.

In addition to pecuniary damage, the compensation of non-pecuniary damage could also be possible under the Estonian LOA in cases of wrongful

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[112] B. Winiger *et al* (see Note 1), p. 902. About the recoverability of the child's maintenance costs in European countries see also U. Magnus. *Unification of Tort Law: Damages*. The Hague, London, Boston: Kluwer Law International, 2001.

[113] *Boone v. Mullendore*, No. 80–423, 416 So. 2d 718 (1982). Similar types of damages were compensated in *Fulton-DeKalb Hospital Authority v. Graves,* where the Supreme Court of Georgia stated that the cost of raising a child could not be recovered. *Fulton-DeKalb Hospital Authority v. Graves*, No. 40588, 314 S. E. 2d 653 (1984), see also *Jackson v. Bumgardner*, No. 670A84, 318 N.C. 172; 347 S. E. 2d 743 (1986). In *Girdley v. Coats*, the Supreme Court of Missouri explained that wrongful conception gives rise to compensatory damages that are measurable. *Girdley v. Coats*, No. 74029, 825 S. W. 2d 295 (1992).

[114] BGH decision of 27 June 1995, NJW 1995, 2407; BGH decision of 25 June 1985, NJW 1985, 2749. See also C. van Dam. *European Tort Law*. Oxford University Press Inc., New York 2006, p. 159.

[115] Decision in case no 2-09-15036 of 15 February 2010 of Harju County Court. Court decisions of Estonian courts of first instance and courts of appeal are available at https://www.riigiteataja.ee/kohtulahendid/koik_menetlused.html (in Estonian).

conception. If the unwanted pregnancy is regarded as health damage, LOA § 134 (2) should be applied, which states that in the case of causing bodily injuries or damage to the health of a person or violation of other personal rights, the aggrieved person shall be paid a reasonable amount of money as compensation for non-pecuniary damage. The aforesaid means that non-pecuniary damage accompanies health damage automatically.

As it has been repeatedly noted, the Estonian courts have not stated which kind of legal right is violated in case of unwanted pregnancy. If the court finds that intervention into family planning or unwanted pregnancy is a breach of personal right, non-pecuniary damage could be claimed under LOA § 134 (2).[116]

It should be noted that if the claim for non-pecuniary damages is issued on the basis of the breach of contract, the damage may only be claimed if the purpose of the contractual obligation was to pursue a non-pecuniary interest and the obligor was aware or should have been aware that non-performance could cause non-pecuniary damage (LOA § 134 (1)).

It could be alleged that the obligation to perform the procedures of termination or prevention of pregnancy is primarily addressed at pursuing non-pecuniary interest; however, at the same time material interest can follow.

5.3. Scope of compensation for damages in cases of wrongful birth

Description of the Problem

In the cases of wrongful birth, the types of damages that arise are in principle similar to those in the cases of wrongful conception. Additional damages lie in the expenses due to the child's disability.

The birth of a disabled child may cause both pecuniary and non-pecuniary damage. Pecuniary damage may include medical expenses associated with pregnancy and delivery, unexpected maintenance costs due to the child's disability (i.e., costs associated with the infant's and adult's case-specific care and treatment requirements), and loss of income. Non-pecuniary loss may lie in the pain caused to the mother in the course of pregnancy and birth, the interference with one's family planning, and the mental suffering due to having to care for a disabled child.[117]

Statement set forth for defence

Under Estonian law, LOA § 127 (2) and (3) give the court broad discretion in deciding which kind of damage is recoverable in case of birth of a disabled child. The medical expenses associated with pregnancy and delivery, loss of income during pregnancy and after the birth of a disabled child that arises from

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[116] In several European countries the damages associated with intervention in family planning is compensated. See more in B. Winiger *et al* (eds.) (see Note 1), p. 903.

[117] B. C. Steininger (see Note 2), p. 128.

the need to take care of the child shall be compensated in the cases of wrongful birth, as well as the costs of a new procedure, which is aimed at accomplishing the purpose of the failed procedure. The question of compensation of the child's maintenance costs is analysed in para 5.4. The non-pecuniary damage to the mother arising from the pain and inconvenience suffered during pregnancy and childbirth, interference with family planning – primarily under the LOA § 134 (1) – and witnessing the child's suffering and consequent death could be also subject to compensation.

Reasoning

Courts in the U.S. and Germany have not taken a uniform stance as to what kinds of damages should be awarded in cases of wrongful birth if the claim as such is allowed. As regards the non-pecuniary damages, in German law the mother can recover non-pecuniary damages for pain and suffering attendant on childbirth only if that pain and suffering 'exceeds the inflictions which accompany a birth without complications'.[118] Those U.S. courts that refuse to allow the recovery of emotional distress damages have typically relied on the assertion that emotional trauma has not been accompanied by physical injury or that the recovery of such damages is too speculative.[119] It has been pointed out that damages for parents' loss of the child's services and companionship are not recoverable, and neither are damages for maternal pain and suffering due to childbirth.[120]

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

Under LOA § 130 (1), compensating for the pecuniary damage associated with the patient's own health should apparently not be problematic. In the case of misdiagnosis and consequent breach of the obligation to inform the patient, the cost of unsuccessful procedures could be compensated for.[121] Hence, the expenses for the unsuccessful prenatal testing should be compensated for, as should the medical expenses associated with pregnancy and delivery. Loss of income during pregnancy and after the birth of a disabled child that arises from the need to take care of the child could also be subject to compensation.

As the purpose of the health-care provider's contractual obligation in these cases is also to pursue a non-pecuniary interest, therefore, under the LOA's § 134 (2), claiming non-pecuniary damage due to the breach of personality rights is also possible. However, issuing the claim for non-pecuniary damages

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[118] BGH decision of 18 January 1983, BGHZ 86, 240 = NJW 1983, 1371 = JZ 1983, 447; N. M. Priaulx (see Note 13), p. 349.

[119] D.W. Whitney, K.N. Rosenbaum (see Note 59), p. 191.

[120] D.W. Whitney, K.N. Rosenbaum (see Note 59), p. 195.

[121] Such a standpoint has already been adopted in Estonian case law in cases of medical error. See the decision in case no. 2-09-15036, of 15 February 2010, of Harju County Court.

on grounds of breach of contractual obligation is considerably limited according to Estonian case law.[122]

With regard to interference with the parents' personality rights, the success of a claim for non-pecuniary damages in Estonia depends on whether deciding to terminate the pregnancy, if there is a possibility of the child's disability, according to TPSA § 6 (2) subsection 2, should be affirmed as a person's right of self-determination.[123] Regarding the right to family planning or procreation as a personality right presumes alleging that the possibility of aborting the pregnancy within the 12th–22nd week if the unborn child may suffer severe mental or physical harm to its health[124] is aimed at protecting the above-mentioned interests. In the present author's opinion, deciding to terminate the pregnancy if there is a possibility of the child being born with a disability should be affirmed as a personal right of self-determination. Consequently, there should be compensation for the non-pecuniary damage arising from the interference with family planning.

The Estonian Supreme Court has generally allowed compensation for non-pecuniary damage arising from physical and mental pain and suffering due to misdiagnosis or medical error by the health-care provider.[125] Compensation for non-pecuniary damage due to disappointment and frustration arising from the situation of unexpectedly becoming a parent of a disabled child, however, would be highly debatable in Estonian courts.

However, there are other grounds for non-pecuniary damage-compensation claims, that are not based on the parents' disappointment with having to raise a disabled child. According to J.T. Stein, compensation for non-pecuniary damage is possible on the grounds that the parents have to watch their child die. This is the case if the genetic disease suffered by the child causes him or her to die at a very young age and the parents suffer emotional distress as witnesses to this.[126] LOA § 134 (3) stipulates that in the case of an obligation to compensate for damage arising from the death of a person or serious bodily injury or health damage caused to that person, the persons closest to the deceased or the aggrieved person may also claim compensation for non-pecuniary damage if payment of such compensation is justified by exceptional circumstances.

The condition of exceptional circumstances in the sense of LOA § 134 (3) is not met merely by the abstract fact of death and consequent grief and loss. The Estonian Supreme Court has explained that these exceptional circumstances are

[122] Decision in case no. 3-2-1-71-14 of the Supreme Court *en banc* of 15 December 2015, para. 131.

[123] Awarding compensation for interference with reproductive autonomy presupposes that the latter is classified as an interest protected by the legal order. B.C. Steininger (see Note 2), p. 150.

[124] See TPSA Section 6 (2) 2. For example, the U.S. courts have held that deciding to terminate the pregnancy falls within the mother's right of self-determination (*Canesi v. Wilson*, 730 A.2d 805 [1999]).

[125] The Supreme Court's decision in case no 3-2-1-171-10 of 8 April 2011, para 15.

[126] J.T. Stein (see Note 92), p. 1161.

affirmed in the event of the plaintiff's spatial proximity to the deceased or severely injured person at the time of or after the accident.[127] Compensation under § 134 (3) would, therefore, be justified only if the parents were to witness the child's death (i.e., be in spatial proximity during it) or, for example, experience emotional distress as a result of seeing their child suffer.

However, awarding pecuniary and non-pecuniary damages is not automatically justifiable in full. The Estonian LOA stipulates several possible limits to the compensation and the extent of the damages.

5.4. Scope of compensation of the child's maintenance costs in cases of wrongful conception and wrongful birth

Description of the Problem

It could be alleged that the main object of discussion in the cases of prenatal damages has been foremost the question of whether the child's maintenance costs are subject to compensation. It should not be surprising that Estonian law also does not enact *expressis verbis* whether the child's maintenance costs are recoverable damage.

In case of wrongful conception, without the health care provider's negligence the child's upbringing expenses would not have arisen. As pointed out above (see para. 2.2.3.2.), in contrast to the cases of wrongful conception, in the case of unexpected birth of a disabled child (i.e. *wrongful birth*), the birth of a (healthy) child was actually sought. Thus, in the cases of wrongful birth there could be a presumption that the parents were ready to bear at least the maintenance costs of the expected healthy child and, hence, that only non-recoverability of the extra costs associated with disability could harm the interests of the parents.[128] However, this approach does not take into account the possibility that the parents, had they been informed in a timely manner of the child's disability, might not have decided to keep the child and so would not have had to bear the child's maintenance costs at all.[129] It could therefore be alleged, according to the *conditio sine qua non* rule, that were it not for the health-care provider's negligence, the child in question would not have been born at all and the parents would have avoided the expenses attendant to the birth of a child.

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[127] The Supreme Court's decision 3-2-1-19-08 of 9 April 2008, paras 16–17.

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

[129] B. Winiger *et al* (see Note 1), p. 960. The compensation for depriving the parents of the possibility to choose is similar to compensation under the principle of loss of chance. For discussion of compensation for lost chance in various European countries, see B. Winiger *et al* (see Note 69), pp. 545–592.

Nevertheless, there are several contra-arguments opposing the application of merely the *conditio sine qua non* rule. M. Hogg has noted that despite the existence of a causal link, the creation of the parent's maintenance obligation as a result of the third party's negligence is not sufficient for transition of maintenance obligation as a fundamental value to the third party.[130]

In several cases the opponents to the compensation of the maintenance costs have relied on the argument that if the child's maintenance costs are compensated, this is asserting that the child (or their birth) is the harmful event, which is not seen an ethical stance. This leads to a negative value judgement being attached to the child and would inflict psychological damage on the child should he learn about the parents' claim against the health care provider. Another argument *contra* awarding the child's maintenance costs is the attachment of a negative value judgement to the child and infliction of psychological harm on the child if he or she learns about the parents' claim against the health-care provider. At the same time it should be taken into account that satisfying the child's maintenance costs claim could be in the interests of the child himself and the whole family.[131]

The author agrees with H. Koziol's opinion that after all, the main question of the corresponding dispute is not whether the child can be regarded as damage, but whether the child's maintenance costs should be compensated.[132] B. C. Steininger too finds that the damage does not lie in having a child as such, but in the obligation to bear his upbringing expenses.[133]

Statement set forth for defence

Under Estonian law, the child's maintenance costs shall not be compensated in cases of wrongful conception. In cases of wrongful birth, the child's maintenance costs shall be compensated in full.

Reasoning

Recovery of **the maintenance costs of a healthy child** has been variously addressed in German case law. *Bundesgerichtshof* has stated that the birth of a child and their maintenance should be kept separate. The latter is a recoverable damage.[134] This standpoint has been criticised by the second *Senat* of the Federal Constitutional Court of Germany (*Bundesverfassungsgericht*, or BVerfG) which considered compensation for costs of maintenance to be contrary to the dignity of the child and thus a violation of article 1 § 1 *Grundgesetz* (Basic Law).[135]

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[130] M. Hogg. Damages for Pecuniary Loss in Cases of Wrongful Birth. – *Journal of European Tort Law*, Vol. 1/2, 2010, p. 161.

[131] B.C. Steininger (see Note 2), p. 129–130.

[132] H. Koziol. *Basic Questions of Tort Law from Germanic Perspective*. Jan Sramek Verlag, 2012, pp. 125–126.

[133] B.C. Steininger (see Note 2), p. 133.

[134] BGH decision of 18 March 1980, BGHZ 76, 249.

[135] BVerfG decision of 28 May 1993, NJW 1993, 1751; BVerfG (Zweiter Senat) decision of 22 October 1997, NJW 1998, 523; JZ 1998, 356.

However, the standpoint of *Bundesgerichtshof* was supported by BVerfG's first *Senat*, given that the contract for provision of health-care services is lawful. The contract would not be lawful, e.g., if the termination of pregnancy was against the law.[136] Summarising the corresponding German case law, C. van Dam has noted that although *Bundesgerichtshof* principally acknowledged the right to compensation for costs of maintenance, the position of the second *Senat* indicates that it requires serious and thorough discussion.[137] According to BGH case law, only the average costs of the child's maintenance could be awarded, but not the expenses of the specific child, or full expenses. BGH has stated that the family's social or economic position should not be taken into account when deciding compensation.[138]

In the U.S., the case law regarding the recoverable damage differs from state to state. The courts of some states have found that the blessing of having a child cannot be regarded as damaging the parents.[139] In two states the child-rearing expenses are also compensated.[140]

According to H. Koziol, the answer to the question of whether the child's maintenance costs should be compensated depends on whether the approach is taken from the perspective of family law or the law of compensation of damages. The first is based on the logic that all the consequences associated with the birth of the child are in whole governed by family law, with which the law of compensation of damages cannot interfere.[141] H. Koziol and B.C. Steininger are both of the opinion that the tortfeasor in a case involving unwanted pregnancy does not only cause the maintenance obligation, but also a comprehensive family law relationship whereby the material and non-material elements are inextricably intertwined.[142]

In short, the answer to the question requires a value judgement on the part of the court. However, even if the court finds that the right to damages in this case falls back from family law, it is not a convincing argument against compensating maintenance costs. Although the tortfeasor has caused a comprehensive family law relationship, the obligation to give maintenance to the child does not

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[136] BVerfG decision of 12 November 1997, BVerfGE 96, 375; NJW 1998, 519; JZ 1998, 352.
[137] C. van Dam (see Note 114), p. 157.
[138] BGH decision of 4 March 1997, NJW 1997, 1638 and BGH decision of 25 February 1997, NJW 1997, 1640.
[139] *Public Health Trust v Brown* 388 So. 2d 1084 (1980); *Sutkin v Beck* 629 SW 2d 131 (1982).
[140] *Lovelace Medical Center v Mendez* 805 p. 2d 603 (1991); *Sherlock v Stillwater Clinic* 260 NW 2d 169 (1977). J. K. Mason, G. T. Laurie and M. Aziz summarised that the majority of states have allowed recovery for all losses excluding those attributable to bringing up a healthy child. Interestingly, Mason and McCall Smith have noted that the proportion of the cases in which compensation for the birth of a healthy child is allowed seems to increase the more recent the case. J. K. Mason *et al* (see Note 52), pp. 343–344. See also K. Wevers (see Note 69), p. 263.
[141] H. Koziol (see Note 132), p. 125–126.
[142] H. Koziol (see Note 132), p. 130; B.C. Steininger (see Note 2), p. 133.

disappear. Moreover, the court needs more specific arguments to reason the decision.

While according to the general approach only the same type of benefit can be taken into account, it has been placed in doubt by H. Koziol in the context of these cases, because it does not enable the evaluation of the event as whole.[143] It might therefore be concluded that in denying recovery of child maintenance costs the court is required to make a value judgment, which is based on the fact that as a special case the non-material benefit obtained from child rearing negates the child's upbringing expenses. Moreover, LOA § 127 (5) does not stipulate that only the same type of benefits should necessarily be taken into account.[144]

As an additional argument, it is possible to rely on LOA § 127 (2) and allege that the prevention of the child's maintenance costs was not the purpose of the obligation to perform the procedure of terminate or prevention of pregnancy. This argument is more easily applied if there was a therapeutic indication for the contraception or termination of pregnancy. On the other hand, if the aim of prevention or termination of pregnancy was the family's poor economic condition, due to which the parents wish to limit the number of dependents, the question of foreseeability of the expenses related to the child's upbringing should not be problematic.

In the author's opinion, the maintenance costs of a healthy child shall not be compensated. With regard to expenses related to the upbringing of the child in wrongful conception cases, it is not easy to justify (at least among the provisions governing compensation) why the child's maintenance costs should be left uncompensated by the health-care provider. However, in the author's opinion, compensation of the child's maintenance costs is contrary to the principle of reasonableness and *ratio legis* of the right to compensation. Karin Sein has also referred to the claim maintenance costs of the unwanted child as damage that the Estonian courts would probably not satisfy, because the question of compensating such damage is ethically very problematic.[145]

As regards the **cases of wrongful birth**, the disabled child's maintenance costs may be compensated in full in Germany. The health-care provider is responsible not only for the additional expenses connected to the child's disability, but also for the child's maintenance costs in full. Hence, maintenance costs are awarded irrespective of the state of the child.[146] The Federal Court of Justice of Germany has stated that the health-care provider who advises a woman about the possibility of amniocentesis and dangers to the child is held

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[143] H. Koziol (see Note 132), p. 129, 130.

[144] See para. 5.5.

[145] K. Sein, Ettenähtavus ja rikutud kohustuse eesmärk kui lepingulise kahjuhüvitise piiramise alused [Foreseeability and the purpose of the obligation theory as grounds for limitation of damages in contractual relationships]. Doktoritöö [Dissertation]. Tartu Ülikooli Kirjastus 2007, p. 39. Available at http://dspace.utlib.ee/dspace/bitstream/handle/10062/1813/seinkarin.pdf (in Estonian) (27.03.2017)

[146] BGHZ 89, 95, 105; BGHZ 124, 128, 145. See also N. M. Priaulx (see Note 13), p. 349.

liable for the subsequent maintenance costs if, for reason of lack of information, that woman gives birth to a disabled child.[147]

In contrast to the German case law, in the U.S. claims by the parents for recovery of ordinary child-raising costs are rarely successful.[148] Most jurisdictions in the U.S. accept the recovery of extraordinary expenses, including hospital and medical costs that are necessary for treating the birth defect, along with additional medical or educational costs attributable to the birth defect. However, the lifetime expense of caring for a disabled individual depends on the birth defect and its development, thereby making preparation of a lifetime care plan both complex and challenging.[149]

According to the Estonian Family Law Act (FLA)[150] § 97 subsection 3, a descendant or ascendant who needs assistance and is unable to maintain him- or herself is also entitled to receive maintenance. In the author's opinion, the possible negative value judgement concurrent with the compensation for maintenance costs is outweighed by the benefits to the child. Awarding damages to the parents would only help them provide the necessary care to their child; hence, it would be favourable for the disabled child.

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

5.5. Offsetting the benefits of birth and maintenance of a child in the cases of wrongful conception and wrongful birth

Description of the Problem

Clearly, in the cases of unwanted pregnancy the parents may gain material and immaterial benefits. The question is how this can be taken into consideration in compensating the pecuniary or non-pecuniary damage. Estonian LOA § 127 (5) constitutes that any gain received by the injured party as a result of the damage caused, particularly the costs avoided by the injured party, shall be deducted from the compensation for the damage unless deduction is contrary to the purpose of the compensation.

C. van Dam has successfully summarised that the main objection to the benefit offset in cases of wrongful conception is that the costs are material

[147] BGHZ 89, 95 2923; NJW 1997, pp. 1638, 1640. Amniocentesis is a medical procedure that is regarded as the 'gold standard' in prenatal testing, with accuracy approaching 100%. It is performed through the maternal abdomen. See also D. W. Whitney, K. N. Rosenbaum (see Note 57), p. 168.

[148] D.W. Whitney, K.N. Rosenbaum (see Note 59), p. 176.

[149] D.W. Whitney, K.N. Rosenbaum (see Note 59), p. 174.

[150] Family Law Act. State Gazette I 2009, 60, 395.

whereas the joy is immaterial. This is an argument to only offsetting the non-pecuniary loss by the value of the benefits.[151]

According to the general approach, only damage of the same type can be taken into account, i.e. material benefit cannot be deducted from non-pecuniary damage; likewise, non-pecuniary damage cannot be deducted from pecuniary damage.[152] For example, in Germany it has been found that in establishing the amount of pecuniary damages it is not possible to take into account the accompanying non-material benefit.[153]

Statement set forth for defence

The benefits of birth and maintenance of a child shall be taken into account in the cases of birth of an unplanned healthy child. The birth of a disabled child shall not bring about the benefits that could be offset according to LOA § 127 (5).

Reasoning

Benefit offset has been applied in German case law. However, it has been emphasised that offset is only possible with respect to damages of the same kind: because the 'benefit' of raising a child is non-pecuniary, primarily offsetting of non-pecuniary damage could be discussed.[154]

The U.S. courts have also applied the benefit offset principle.[155] However, according to U.S. case law, the application of the benefit rule depends on the reasons for which the parents decided to avoid the pregnancy. If they wanted to avoid having any more children (and by this, the benefit of another child), it would be unjust to apply the benefit rule.[156] According to K. C. Vikingstad, in the U.S. the courts have misused the benefit rule in wrongful parentage cases either by using a severely modified form of the rule or improperly allowing benefits to be used to reduce or eliminate actual damages, rather than

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[151] C. van Dam (see Note 114), p. 158.

[152] H. Koziol (see Note 132), p. 129.

[153] B.C. Steininger (see Note 2), p. 137. About the child-birth as non-material benefit deduction see also N. M. Priaulx. Health, Disability & Parental Interests: Adopting a Contextual Approach in Reproductive Torts. – *European Journal of Health Law*, Vol. 12/3, 2005, p. 218.

[154] B.C. Steininger (see Note 2), p. 137. On receiving a child as a non-pecuniary benefit, see also N. M. Priaulx (see Note 153), p. 218. It should be noted that, in principle, the child's possible obligation to support his or her parents in future (see the FLA § 96–97) could be regarded as a pecuniary benefit against which some of the damages could be offset. However, in the case of a disabled child, the child's own obligation to provide support is questionable, when that child's health condition is taken into account.

[155] E.g. in the case of *Burke v. Rivo* The Massachusetts Supreme Judicial Court stated that any benefits conferred on the parents as a result of the birth of the child should be offset from the compensation. *Burke v. Rivo*, 551 N.E.2d I (Mass. 1990).

[156] E.g. the Supreme Court of Wisconsin stated that it was not equitable to apply the benefit rule because it was precisely to avoid the benefit of another child that the plaintiffs sought out the defendant in the first place. *Marciniak v. Lundborg*, 153 Wis.2d 59; 450 N.W.2d 243 (1989).

considering, as the rule intends, benefits in assessing the extent of actual damages to an interest.[157] M. Ramsay argues that the alleged benefits of unplanned healthy children are irrelevant to the tortfeasor-victim relationship and these benefits should not block or reduce victims' claims to child-rearing damages.[158]

The author is of the opinion that the benefit offset argument is sufficiently convincing to justify not compensating the non-pecuniary damage which relates to unwilling parenthood or intervention in family planning. It could be alleged that the damage inflicted by intervention in family planning conflates into joy and non-material value, which is offered by the upbringing of the child.

Another question is whether this joy is able to 'neutralise' also the physical pain and discomfort associated with pregnancy and childbirth. The author finds that the joy cannot 'neutralise' the physical effect to the full extent. Therefore, the child's mother could be entitled to a reasonable (if not to say symbolic) amount of compensation for her physical suffering.

What kind of material benefit could accompany the birth of an unwanted child? First and foremost, the potential material benefit accompanying the birth of an unwanted child is the child's possible obligation to support his parents in future (FLA § 96–97). However, at the time of compensation it is not known in advance whether the child will have such an obligation. Therefore, it is very questionable, whether the child's theoretical obligation to support his parents in future could be taken into account in establishing the amount of damages.

In summary, it is not so easy to find the arguments against compensating the healthy child's maintenance costs on the basis of gained benefit. As an exception, the non-material benefit related to the upbringing of a child could offset the child's upbringing expenses as pecuniary damage.

At the same time, the gained benefit allows the 'reduction' of a considerable amount of non-pecuniary damage.

W.F. Hensel has pointed out that, while the courts emphasise the inherent benefits of rearing a healthy child, many courts ignore these benefits if a child is born with a genetic defect.[159] However, in the author's opinion, the grave consequences of having to raise a disabled child cannot be diminished by the fact that the parents still obtained a child (though not the child they expected). D. W. Whitney and K. N. Rosenbaum too find that the benefit offset theory should not be applicable in the cases of wrongful birth.[160] The author alleges that it is disputable whether the joy of a healthy child can be cast in parallel with the consequences of raising and caring for a disabled child. Hence, it is complicated to presume that damages arising from the birth of a disabled child can be offset by the accompanying benefits having a child brings under LOA § 127 (5).

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[157] See more at K. C. Vikingstad. The use and abuse of the tort benefit rule in wrongful parentage cases. – *Chicago-Kent Law Review*, Vol. 82/2, 2007.
[158] See more at M. Ramsay (see Note 79).
[159] W. F. Hensel (see Note 99), p. 154. About the case law and for analysis of application of the benefit rule, see K. C. Vikingstad (see Note 157), p. 1087.
[160] D.W. Whitney, K.N. Rosenbaum (see Note 59), pp. 178–179.

5.6. Reduction of amount of compensation due to parents' part in causing damage

Description of the Problem

Analysis of the compensability of the damages both in the cases of wrongful conception and wrongful birth also gives rise to the question of whether the parents have caused these expenses themselves (at least in part).

It could be alleged that the parents have failed to prevent the damage by not deciding in favour of termination of pregnancy at the time of discovering the unwanted pregnancy. Another allegation is that the parents had the possibility to avoid the arising of the maintenance obligation by putting the child up for adoption. The same arguments have been used both in the cases of wrongful conception and wrongful birth.[161]

The aggrieved person's part in causing damage can be taken into account according to LOA § 139, the first section of which states that if damage is caused in part by circumstances dependent on the injured party or due to a risk borne by the injured party, the amount of compensation for the damage shall be reduced to the extent that such circumstances or risk contributed to the damage. The question is whether the reduction of amount of compensation due to parents' part in causing damage is possible in the cases of wrongful conception and wrongful birth.

Statement set forth for defence

Damages in the cases of wrongful conception or wrongful birth shall not be denied or reduced on the grounds of the existence of parental opportunity to avoid damage by terminating the pregnancy or putting the child up for adoption.

Reasoning

The aggrieved person's opportunities to avoid or reduce the damage and their effect on the compensation for the damages are generally recognised in both German and U.S. law. However, in cases of wrongful birth, German case law rejects the idea that refusal to opt for abortion or adoption should cause the claim to fail.[162] The principle of mitigation of damages on the above-mentioned grounds in wrongful-birth cases has also not been applied by the U.S. courts.[163]

The controversy over the argument lies in the fact that, on one hand, it is stated that the child is unwanted and the child-rearing expenses should be allowable yet, on the other hand, the parents have chosen to keep their child.[164]

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[161] E.g., *Rieck v. Medical Protective Co.*, 64 Wis. 2d 514 (1974) 219 N.W.2d 242.

[162] H. Oetker (see Note 88), p. 302.

[163] See, for example, *Cockrum v. Baumgartner*, 95 Ill.2d 193 (1983) 447 N.E.2d 385.

[164] A. Jackson. Wrongful life and wrongful birth. – *Journal of Legal Medicine*, Vol. 17/3, 1996, p. 377. – DOI: http://dx.doi.org/10.1080/01947649609511013

B.C. Steininger explains that the fact that the child was unplanned does not prejudice the parents' relationship to the child once it is born.[165]

In consideration of the possibility of aborting the child, it could be stated that the existence of grounds to terminate the pregnancy does not create an obligation to undertake abortion. Affirming such an obligation (through reduction of damages in cases of wrongful birth) would constitute an enormous invasion of privacy.[166] On a similar account, it would be highly unreasonable to state that damages could be mitigated by putting the child up for adoption.[167]

A. Jackson has noted that the claim that the parents should have aborted the foetus or once born put the child up for adoption is particularly controversial. In situations in which parents are pleased to keep their children it is suggested that such action puts under strain the the argument that the parents have suffered an 'injury' because of the birth of the child.[168] For example, in *Boone v. Mullendore* the Supreme Court of Alabama denied the argument that the parents should have decided in favour of abortion or adoption.[169]

According to A. Keirse and M. Schaub, the above-named allegations do not relieve the health-care provider from the claim to compensate the maintenance costs of an unplanned child. If refusing to terminate the pregnancy had to be considered unreasonable and the aggrieved person should have reduced the damage, then the liability should be divided between the health care provider and the patient, but definitely the unreasonable refusal to terminate the pregnancy does not release the health care provider from liability completely.[170]

Also, in the opinion of the author, it is not correct to deny the compensation of the healthy or disabled child's maintenance costs on the grounds that the parents have caused the costs themselves. Apparently it would be contrary to the principle of good faith (LOA § 6) if the health care provider relied on the existence of parent's possibility to avoid damage by terminating the pregnancy or putting the child up for adoption.

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[165] B. C. Steininger (see Note 2), p. 133.

[166] See also *Rivera v. State of New York*, 404 N.Y.S.2d (1978).

[167] See, for example, *Troppi v. Scarf*, 187 N.W.2d 511 (Mich. App. 1971).

[168] A. Jackson (see Note 164), p. 377.

[169] *Boone v. Mullendore,* No. 80–423, 416 So. 2d 718; (1982)

[170] A. Keirse, M. Schaub. Self-Determination with a Price Tag; The Legal and Financial Consequences of Wrongful Conception and Wrongful Birth and the Decision of the Parents to Keep the Child. – *Journal of European Tort Law*, Vol. 1/3, 2010, p. 252–253. –
DOI: https://doi.org/10.1515/jetl.2010.243

5.7. Scope of compensation for damages in cases of wrongful life

Description of the Problem

Although the author is of the opinion that the health-care provider should not be liable under Estonian law in the cases of wrongful life, the author analyses whether the disabled child's expenses and damage could in principle be compensated under LOA. The condition of the child's health entails additional expenses, which could be subject to compensation if the prerequisites for the health-care provider's liability are fulfilled.

Statement set forth for defence

If the prerequisites for the health-care provider's liability in the case of wrongful life were theoretically fulfilled, the child's extraordinary expenses shall be compensated to the child under the Estonian LOA.

Reasoning

As stated above (see para. 5.1.3.), the German courts deny the claim in the cases of wrongful life. Thus there is no case law regarding the damages subject to compensation the cases of wrongful life.

In the U.S., the courts that approve the health-care provider's liability in the cases of wrongful life award only extraordinary expenses related to the necessary medical treatment, and educational expenses that follow directly from the child's disability.[171] Non-pecuniary damages (e.g., damages for emotional distress) are not granted to the parents or the disabled child.[172] It should be noted that, unlike in, for instance, *Curlender v. Bio-Science Laboratories*, in *Turpin v. Sortini* the court rejected the claim for general damages (made on grounds of being deprived of the fundamental right of a child to be born as a whole, functional human being) and awarded the child compensation for the extraordinary expenses of special teaching, training, and hearing equipment.

In Estonia, if the prerequisites for the health-care provider's liability were met, the child's extraordinary expenses could be subject to compensation according to LOA § 130 (1). While non-pecuniary damage is difficult to measure, pecuniary damages can be established precisely. As regards the scope of compensation, the author agrees with the statement made in U.S. case law that as the disability does not disappear when the child reaches adulthood, the disabled child's medical expenses should be recovered further upon reaching of the age of majority.[173]

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[171] K. Wevers (see Note 69), p. 266. See, for instance, *Turpin v. Sortini*, 182 Cal. Rptr. 377 (1982); *Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984); *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 495 (Wash. 1983).

[172] J. T. Stein (see Note 92), p. 1157.

[173] *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 495 (Wash. 1983).

In *Procanik v. Cillo*, the court emphasised that recovery of the cost of extraordinary medical expenses is possible for either parents or the infant, but not both. In *Turpin v. Sortini*, the court specified that if the parents have made a recovery via a wrongful-birth suit, the child should recover only special costs incurred during his adulthood through a wrongful-life suit, so as to avoid double-counting.[174]

In the author's opinion, the argument that the child's damages are recovered under the parents' wrongful-birth claim does not exclude the child's claim made on the basis of wrongful life. The partial overlap of the claims affects the extent of the damage and not the grounds for compensation.

In *Turpin v. Sortini*, the court stated that the fact that the child has obtained a physical existence with the capacity both to receive and give love and pleasure and to experience pain and suffering should be treated as a benefit that should be offset against compensable damage.[175] As W.F. Hensel has pointed out, while courts emphasise the inherent benefits of rearing a healthy child, many courts ignore these benefits if a child is born with a genetic defect.[176]

In the case of wrongful life, the life as a benefit cannot be deducted from the compensation for the child's extraordinary expenses. For a disabled child, being alive could be regarded as unsolicited enrichment that he actually aimed to avoid.

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[174] M. Strasser. Wrongful life, wrongful birth, wrongful death, and the right to refuse treatment: Can reasonable jurisdictions recognize all but one? – *Missouri Law Review*, Vol. 64/1, 1999, pp. 849–850.

[175] *Turpin v. Sortini*, 643 P.2d 954, 966 (Cal. 1982).

[176] I. Kennedy, A. Grubb. Medical Law. London; Edinburgh; Dublin: Reed Elsevier (UK) Ltd 2000, p. 154. Also, S. R. Fueger has stated that the distinction between wrongful-life and wrongful-pregnancy claims is unjustifiable. She alleges that the focus should be on the duty owed to the plaintiff, rather than on the victim. For example, in *Hickman v. Myers* (632 S.W.2d 869, 870 (Tex. Ct. App. 1982)), it was discussed that the benefits of parenthood are one of the reasons to disallow claims of wrongful pregnancy. However, such a rationale is not used for refusing compensation for damages in cases of wrongful-life claims. For further discussion, see S. R. Fueger. The unexamined life is not worth living... or is it? Preserving the sanctity of life in American courtrooms. – *Southern Illinois University Law Journal*, Vol. 33/3, 2009, pp. 588–589.

CONCLUSIONS

Lawyers in different countries have discussed the question of compensation for damages in cases of wrongful conception, wrongful birth and wrongful life for a long time. Considering the fundamental legal and ethical questions in these cases, the final settlement of debate in the cases of prenatal damages is highly unlikely. On the contrary, with the medical advancement and broadening of the availability of prenatal testing, the debate is likely to continue and find a wider audience.

The present author has analysed the health-care provider's possible obligation to compensate for damages on the basis of the health-care provider's contractual and delictual liability under the Estonian LOA.

The author has found that in **cases of wrongful conception** under Estonian law, the health-care provider should be liable under contract law and in certain circumstances under the law of delicts. Regarding the damages in the cases of wrongful conception, the Estonian courts have broad discretion according to LOA § 127 (2) and (3) to decide which kind of damage is recoverable in case of an unwanted pregnancy. In the author's opinion, the medical expenses and loss of income shall be compensated, as well as the costs of a new procedure, which is aimed at accomplishing the purpose of the failed procedure.

In the author's opinion, the child's maintenance costs should not be compensated as damage; as a special case the standpoint should be taken that the non-material benefit related to the upbringing of a child offsets the child's upbringing expenses as pecuniary damage.

As a non-pecuniary damage, the mother should be awarded a reasonable amount of money for the discomfort and pain related to the pregnancy and childbirth. Other damage (e.g. intervention in family planning), however, is balanced by the joy resulting from bringing up a child.

Regarding the **cases of wrongful birth**, the author has come to the conclusion that the need to make moral judgements and to solve ethical dilemmas in connection to preventing the birth of a disabled child shall not exclude the settlement of wrongful-birth claims. The parents should be allowed to file a wrongful-birth claim against a health-care provider if the health-care provider negligently failed to inform the parents in a timely manner of their future child's severe health condition, which would have given them the possibility to terminate the pregnancy under TPSA § 6 (2) para. 2.

Similarly to the cases of wrongful conception, the Estonian courts have relatively broad discretion in specifying the recoverable damages in the cases of wrongful birth, as well as in determining the limits of this compensation.

The author concludes that it is reasonable to compensate for pecuniary damage arising from the birth of a disabled child, e.g., the parents' loss of income, along with medical expenses. The maintenance costs (both the expected costs of a healthy child and the additional expenses due to the disability) could also be compensated for under the Estonian LOA. A value

attributable to the benefit of the birth of a child may in principle be subtracted from the amount of recoverable damages.

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

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

The author is of the opinion that in **cases of wrongful life** the health-care provider should not be liable under contract law or under the law of delicts under Estonian law. While TPSA § 6 (2) 2 provides for an abortion in circumstances where there exists the risk of a child being born with a severe physical or mental abnormality, it could be concluded that the child himself is unlikely to have a successful wrongful-life claim.

The obstacles in overcoming the non-existence paradox, as well as problems in establishing the prerequisites for the health-care provider's civil liability on a delictual or contractual basis, lead to the assertion that satisfying these claims in Estonian courts would be unlikely, similarly to German and a majority of U.S. courts.

However, if the prerequisites of the health-care provider's liability in the case of wrongful life are fulfilled, the child's extraordinary expenses shall be compensated to the child under Estonian LOA.

Undoubtedly, the cases of prenatal damages raise ethical and moral concerns. However, the named concerns should not prevent the finding of a solution in these cases, considering an outcome that seeks to balance the interests of the child, his or her parents and the health-care provider. Although the claims of wrongful life, wrongful conception and wrongful birth have not yet reached Estonian courtrooms, the author hopes that the solutions offered in this dissertation could be helpful to the courts and serve as guidelines in developing case law.

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ABBREVIATIONS

BGB	German Civil Code [Bürgerliches Gesetzbuch]
BGH	German Federal Court of Justice [*Bundesgerichtshof*]
BVerfGE	German Constitutional Court [*Bundesverfassungsgerichts*]
FLA	Family Law Act [perekonnaseadus]
GPCCA	General Part of the Civil Code Act [tsiviilseadustiku üldosa seadus]
HSOA	Health Services Organisation Act [tervishoiuteenuste korraldamise seadus]
LOA	Law of Obligations Act [võlaõigusseadus]
TPSA	Termination of Pregnancy and Sterilisation Act [raseduse katkestamise ja steriliseerimise seadus]

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SUMMARY IN ESTONIAN

Tervishoiuteenuse osutaja tsiviilõiguslik vastutus sünnieelsete kahjustuste kaasustes

Käesolevas väitekirjas käsitletakse tervishoiuteenuse osutaja lepingulist ja deliktiõiguslikku vastutust lapse vanemate ees soovimatu raseduse (ingl. k. *wrongful conception*) ja soovimatu puudega lapse sünni (ingl. k. *wrongful birth*) korral ning tervishoiuteenuse osutaja võimalikku vastutust lapse ees tema puudega sünni korral (nn. soovimatu elu kaasus, ingl. k. *wrongful life*). Eelnimetatud kolme kaasust nimetatakse väitekirjas kokkuvõtlikult sünnieelsete kahjustuste kaasusteks.

Käesolev väitekiri põhineb autori poolt avaldatud neljal õigusteaduslikul artiklil:

- "The Possibility of Compensation for Damages in Cases of Wrongful Conception, Wrongful Birth and Wrongful Life. An Estonian Perspective".[178] Nimetatud artiklis selgitatakse Eesti tervishoiuteenuse osutaja lepingulise ja deliktilise vastutuse õiguslikku raamistikku ja analüüsitakse peamisi õiguslikke probleeme käsitlevates kaasustes.
- "The Health-care Provider's Civil Liability in the Cases of Wrongful Life. An Estonian Perspective".[179] Artikkel keskendub Eesti tervishoiuteenuse osutaja tsiviilõigusliku vastutuse võimalikkuse hindamisele puudega lapse nõude alusel.
- "Damages Subject to Compensation in Cases of Wrongful Birth: A Solution to Suit Estonia".[180] Artiklis analüüsitakse, milline kahju võiks kuuluda Eesti võlaõigusseaduse alusel hüvitamisele puudega lapse sünni korral.
- "The Obligation of the Health-care Provider to Compensate for Damages in Case of Wrongful Conception: a Model to Suit Estonian Law".[181] Artikkel käsitleb Eesti tervishoiuteenuse osutaja kahju hüvitamise kohustust soovimatu raseduse korral.

Väitekirja **eesmärgiks** on selgitada välja, kas ja millises ulatuses peaks tervishoiuteenuse osutaja vastutama Eesti tsiviilõiguse järgi soovimatu raseduse, soovimatu puudega lapse sünni ja nn. soovimatu elu kaasustes, et tagatud oleks nii lapse, tema vanemate kui ka tervishoiuteenuse osutaja huvidega arvestamine.

Töö eesmärgi saavutamiseks uuris autor alljärgnevaid uurimisküsimusi:

[178] European Journal of Health Law, Vol. 21/2, 2014, pp. 141–160.
[179] Juridica International, Vol. 23, 2015, pp. 43–51.
[180] Juridica International, Vol. 24, 2016, pp. 105–115.
[181] Journal of Medical Law and Ethics, Vol. 4 No. 2, 2016, pp. 95–111.

1. Kas Eesti õiguse järgi on sünnieelsete kahjustuste korral võimalik tervishoiuteenuse osutaja lepinguõiguslik vastutus või deliktiõiguslik vastutus või mõlemad?
2. Kas ja millise kahju hüvitamine on põhjendatud soovimatu raseduse kaasuste puhul?
3. Kas ja millise kahju hüvitamine on põhjendatud puudega lapse sünni kaasuste puhul?
4. Kas ja mis ulatuses on põhjendatud soovimatu raseduse ja puudega lapse sünni kaasuste puhul lapse ülalpidamiskulude hüvitamine?
5. Kas ja mis ulatuses mõjutab kahjuhüvitise ulatust soovimatu raseduse ja puudega lapse sünni kaasuste puhul põhimõte, et kahjuhüvitisest tuleb maha arvata kannatanu poolt saadud kasu?
6. Kas ja mis ulatuses tuleks arvestada soovimatu raseduse ja puudega lapse sünni kaasuste puhul kahjuhüvitise ulatuse juures vanemate kui kannatanute osaga kahju tekkimisel?

Autor on kasutanud väitekirjas peamiselt võrdlevat uurimismeetodit: Eesti õigust võrreldakse Saksa ja Ameerika Ühendriikide õiguse ja kohtupraktikaga. Saksa õigus on valitud võrdlusmaterjaliks seetõttu, et germaani õigusperekonna mudel, sh eelkõige Saksa õigus (kuid ka kohtupraktikas väljakujunenud seisukohad ja teoreetilised allikad) on olnud Eesti tsiviilõiguse loomisel üheks oluliseks eeskujuks. Ameerika Ühendriikide õigus on aga valitud ootuses leida sealt käsitlusi, mis oleksid universaalse iseloomuga, st rakendatavad muuhulgas ka nt Eesti kohtupraktikas. Võrdluse tulemusel on autor jõudnud järeldusteni, kas ja millises ulatuses on otstarbekas ja mõistlik hüvitada kahju sünnieelsete kahjustuste korral.

Väitekirja uurimisobjekt on piiritletud vanema(te) ja lapse enda kahju hüvitamise nõuetega tervishoiuteenuse osutaja vastu olukorras, kus tervishoiuteenuse osutaja hooletuse (ravivea või diagnoosivea ja sellest tuleneva teabe andmise kohustuse rikkumise) tulemusel on vanemad jäänud ilma võimalusest realiseerida oma pere planeerimisõigust ja langetada õigeaegselt otsus raseduse jätkamiseks või katkestamiseks.

Väitekiri ei käsitle eeltoodud asjaoludel tõusetuvaid muid võimalikke nõudeid (nt lapse nõuet vanemate vastu, vanemate omavahelisi nõudeid, nõudeid ravimitootja vastu jne). Samuti jäävad käsitletavate kaasuste piiridest välja olukorrad, kus lapse puue on põhjustatud tervishoiuteenuse osutaja enda hooletusest.

Alljärgnevalt esitab autor kokkuvõtte töös esitatud väidetest ja nende põhjendustest.

1. Tervishoiuteenuse osutaja kahju hüvitamise kohustus lepinguõiguse ja deliktiõiguse alusel soovimatu raseduse korral

Kaitsmisele kuuluv väide:
Soovimatu raseduse korral saab Eesti õiguse järgi tervishoiuteenuse osutajat võtta vastutusele nii lepingu rikkumisest tulenevalt, kuid teatud juhtudel ka deliktiõiguse alusel.

Probleemi kirjeldus ja põhjendused:
Soovimatu raseduse kaasuste all peetakse silmas lapse vanema või vanemate nõuet tervishoiuteenuse osutaja vastu viimase hooletuse tõttu soovimatu, ehkki terve lapse sündimisega seotud kahju hüvitamiseks. Soovimatu raseduse kaasusi iseloomustab seega asjaolu, et lapse vanemad on soovinud rasedust vältida, kuid tervishoiuteenuse osutaja vea tõttu on vanemad kaotanud võimaluse realiseerida oma pereplaneerimise õigust ning otsustada last mitte saada.

Eesti õiguse alusel saab väita, et alati, kui tervishoiuteenuse osutaja on osutanud patsiendile tervishoiuteenust, on nende vahel sõlmitud ka tervishoiuteenuse osutamise leping (VÕS § 759). Kuivõrd raseduse ennetamisele või raseduse katkestamisele suunatud protseduuri ebaõnnestumine on üldjuhul tervishoiuteenuse osutamise lepingust tuleneva kohustuse rikkumise tagajärg, saab tervishoiuteenuse osutaja vastutuse õigusliku alusena tulla esmajoones kõne alla lepinguõiguslik vastutus (VÕS § 770 lg 1 ja 2).

Lepinguõigusliku vastutuse keskseks eelduseks on kohustuse rikkumine. Soovimatu raseduse korral võib see kohustuse rikkumine seisneda nt ebaõnnestunud steriliseerimise või raseduse katkestamise protseduuris või raseduse diagnoosimata jätmises. Samuti võib tegemist olla kohustuse rikkumisega rasedusvastase nõuande andmisel või vahendi soovitamisel või fertiilsuse ebaõige diagnoosimisega. Lisaks võib kohustuse rikkumine seisneda ka hooletuses operatsioonieelsel või -järgsel nõustamisel. Eesti õiguse alusel tuleb nimetatud kohustusi hinnata VÕS § 762 alusel, mille esimese lause kohaselt peab tervishoiuteenus vastama vähemalt arstiteaduse üldisele tasemele teenuse osutamise ajal ja seda tuleb osutada tervishoiuteenuse osutajalt tavaliselt oodatava hoolega. Riigikohus on 3. oktoobri 2006 otsuses kohtuasjas nr 3-2-1-78-06 punktis 12 selgitanud, et kui ravivõtet kasutanud arsti tegutsemise kvaliteet on madalam kui vastava eriala haritud ja kogenud arsti oma, siis võib tegemist olla raviveaga.

Lisaks kohustuse rikkumisele peab kahju hüvitamise kohustuse üldiste eeldustena esinema loomulikult ka kahju ning põhjuslik seos kahju ja kohustuse rikkumise vahel. Eesti õiguse järgi on tervishoiuteenuse osutaja vastutuse eelduseks VÕS § 770 lg 1 alusel lisaks ka tema süü (vastutuse korral VÕS § 770 lg 2 alusel teda abistavate isikute tegevuse eest ei ole süü tervishoiuteenuse osutaja vastutuse eelduseks). Ehkki reeglina ei või tervishoiuteenuse osutaja lubada patsiendi paranemist või operatsiooni edukust (VÕS § 766 lg 2), siis juhul, kui tervishoiuteenuse osutamise lepingu esemeks on raseduse ennetamisele või raseduse katkestamisele suunatud protseduuri läbiviimine,

kujutab sellise protseduuri ebaõnnestumine endast raviviga tervishoiuteenuse osutaja poolt.

Seega võib väita, et VÕS-i alusel ei tohiks tervishoiuteenuse osutaja lepinguõigusliku vastutuse eelduste tuvastamine olla soovimatu raseduse korral üldiselt problemaatiline. Omaette probleemide ring seondub küsimusega, keda vastav tervishoiuteenuse osutamise leping kaitseb, st kas kahju hüvitamise nõue tervishoiuteenuse osutaja vastu võib tekkida ka teisel vanemal, kes ei olnud tervishoiuteenuse osutamise lepingu pooleks. Autori arvates saab soovimatu raseduse kaasuste puhul väita, et tervishoiuteenuse osutaja peab üldjuhul ära tundma, et tervishoiuteenuse osutamise leping on suunatud ka kolmanda isiku (teise vanema) huvide ja õiguste kaitsmisele (VÕS § 81).

Soovimatu raseduse kaasustes võivad olla lisaks lepingulise vastutuse eeldustele olla samaaegselt täidetud ka deliktiõigusliku vastutuse eeldused. Eesti õiguses reguleerib lepingulise ja deliktiõigusliku vastutuse konkurentsiprobleeme VÕS § 1044.

Deliktiõigusliku vastutuse puhul on oluline eristada, mida tegi tervishoiuteenuse osutaja soovimatu raseduse ärahoidmiseks. Deliktiõiguslik vastutus on soovimatu raseduse puhul võimalik aktiivse ja vahetu käitumisega patsiendi kehasse sekkumise korral (nt ebaõnnestunud operatsioon), millega on tekitatud patsiendi tervisekahjustus, mis on õigusvastane VÕS § 1045 lg 1 p 2 kohaselt. Eesti kohtupraktikas ega õiguskirjanduses ei ole küsimuses, kas soovimatu rasedus kujutab endast kehavigastust, seisukohta võetud. Autor on seisukohal, et kannatanule valikuvabaduse andmise eesmärgil (kas kvalifitseerida oma nõue lepingu rikkumisest või deliktist tulenevalt) ei ole välistatud soovimatu raseduse põhjustamist kehavigastusena käsitleda. Kindlasti ei ole põhjendatud käsitleda tervisekahjustusena loote olemasolu, vaid pigem seda, et isik jäeti ilma võimalusest otsustada oma keha üle. Soovimatu raseduse põhjustamine võib kujutada endast nii isikliku õiguse rikkumist kui ka tervisekahjustust.

Juhul, kui tervishoiuteenuse osutaja patsiendi kehasse aktiivselt ei sekku ja tervishoiuteenuse osutajale etteheidetav käitumine seisneb ebaõige diagnoosi ja ravi määrmises või patsiendi teavitamise kohustuse rikkumises (nt ebaõiges nõustamises), tuleks deliktiõigusliku vastutuse jaatamiseks leida mingisugune kohustus, mida tervishoiuteenuse osutaja on rikkunud. Diagnoosiviga või teavitamiskohustuse rikkumine kui selline ei kujuta autori arvates endast õigusvastast käitumist VÕS § 1045 mõttes. Autori arvates on väga kaheldav, kas tervishoiuteenuse osutaja võiks olla ka üldisest käibekohustusest tulenevalt kohustatud rasedust ennetama või ära hoidma. Seega, kui tervishoiuteenuse osutaja aktiivselt patsiendi kehasse ei sekku, deliktiõiguslik vastutus üldjuhul ei rakendu.

Pelgalt pereplaneerimisõigusesse sekkumisele kui isikuõiguse rikkumisele (VÕS § 1045 lg 1 p 4) tuginemine ei tohiks samuti üldjuhul deliktilist vastutust kaasa tuua, sest nimetatud juhul tõrjub lepingu olemasolu deliktiõigusliku vastutuse VÕS § 1044 lg 2 alusel välja.

2. Tervishoiuteenuse osutaja kahju hüvitamise kohustus lepinguõiguse ja deliktiõiguse alusel puudega lapse sünni korral

Kaitsmisele kuuluv väide:

Puudega lapse sünni korral saab Eesti õiguse järgi tervishoiuteenuse osutajat võtta vastutusele lepinguõiguslikul alusel. Deliktiõiguslikku vastutust ei saa järgneda õigusvastasuse puudumise tõttu VÕS § 1045 mõttes.

Probleemi kirjeldus ja põhjendused:

Kui soovimatu raseduse kaasuste puhul on soovinud vanemad rasedust ja lapse sündi ära hoida, siis soovimatu puudega lapse sünni kaasuste puhul on vanemad küll soovinud last, kuid mitte puudega last. Puudega lapse sünni kaasuste puhul nõuavad lapse vanem(ad) tervishoiuteenuse osutajalt viimase hooletuse tõttu puudega lapse sündimisega seotud kahju hüvitamist, heites tervishoiuteenuse osutajale ette loote tervisliku seisundi õigeaegset diagnoosimata jätmist.

RKSS § 6 lg 2 p 2 kohaselt võib kauem kui 12 ning vähem kui 22 nädalat kestnud raseduse katkestada, kui sündival lapsel võib olla raske vaimne või kehaline tervisekahjustus. Tervishoiuteenuse osutaja hooletuse tõttu ei teki vanematel võimalust langetada õigeaegselt otsus, kas loote tervisliku seisundi tõttu rasedusega jätkata või see katkestada. Siinkohal on oluline rõhutada, et lapse puude põhjustajaks ei ole tervishoiuteenuse osutaja.

Puudega lapse sünni korral võib kohustuse rikkumine tervishoiuteenuse osutaja poolt seisneda diagnoosiveas ja sellele järgnevas teavitamiskohustuse rikkumises. Diagnoosivea tõttu ei hoiata tervishoiuteenuse osutaja vanemaid ette, et nende laps võib sündida puudega, mida vanematel olnuks võimalik RKSS § 6 lg 2 p 2 kohaselt vältida. Keskne küsimus on selles, kas tervishoiuteenuse osutaja tegevus vastas temalt oodatavale tervishoiuteenuse osutamise kvaliteedile (VÕS § 762).

Nii soovimatu raseduse kaasustes kui ka puudega lapse sünni kaasustes küsimus sellest, keda tervishoiuteenuse osutamise leping kaitseb, st kas kahju hüvitamise nõue tervishoiuteenuse osutaja vastu võib tekkida ka teisel vanemal, kes ei olnud tervishoiuteenuse osutamise lepingu pooleks. Autori arvates saab ka puudega lapse sünni kaasuste puhul väita, et tervishoiuteenuse osutaja pidi üldjuhul ära tundma, et tervishoiuteenuse osutamise leping on suunatud ka kolmanda isiku (teise vanema) huvide ja õiguste kaitsmisele (VÕS § 81).

Lisaks tuleb tervishoiuteenuse osutaja vastutuse kindlaksmääramisel võtta arvesse lapse puude raskusastet. Peaks olema selge, et puudega lapse sünni kaasustes ei anna nõude esitamiseks alust igasugune defekt, vaid eelkõige selline tervislik seisund, mis andnuks alust raseduse katkestamiseks RKSS § 6 lg 2 p 2 alusel, s.o raske vaimne või kehaline tervisekahjustus. Seda, kas konkreetne defekt annab alust nõude esitamiseks puudega lapse sünni kaasustes, tuleks igakordselt kaasusepõhiselt hinnata.

Muuhulgas peaks hageja puudega lapse sünni kaasuses tõendama, et hageja oleks raseduse katkestanud, kui ta oleks olnud teadlik sellest, et laps võib sündida puudega. Ehkki eeltoodu tõendamine on ilmselt keeruline, on sellest

hoolimata enamus kohtutest Saksamaal ja Ameerika Ühendriikides jaatanud vanemate nõuet puudega lapse sünni korral ning tervishoiuteenuse osutaja vastavat vastutust. Süü puudumine välistaks tervishoiuteenuse osutaja vastutuse vaid juhul, kui tal ei olnud võimalik sündmuste käiku mõjutada.

Kui eeltoodud lepingulise vastutuse eeldused on täidetud, vastutab tervishoiuteenuse osutaja puudega lapse sünni korral lepingu rikkumisest tulenevalt. Lisaks ei välista lepinguline vastutus vastutust deliktiõiguslikul alusel. Siiski on autor seisukohal, et puudega lapse sünni kaasustes ei ole alust tervishoiuteenuse osutaja deliktiõiguslikuks vastutuseks.

Deliktiõiguslik vastutus sõltub VÕS § 1044 lg 2 tõlgendamisest ja hinnangust, millise kahju tekkimist sooviti lepingulise kohustusega ära hoida. Autor on seisukohal, et kuna tervishoiuteenuse osutaja ei põhjusta lapse puuet, siis ei saa deliktiõigusliku vastutuse aluseks olla VÕS § 1045 lg 1 p-st 2 tulenev õigusvastasus. Samuti ei ole teavitamiskohustuse rikkumine iseenesest õigusvastane VÕS § 1045 alusel. Teavitamiskohustuse täitmise eesmärk on hoida ära patsiendi isiklike õiguste kahjustamine. Ka pereplaneerimisse sekkumine kui isikliku õiguse kahjustamine ei too kaasa deliktiõiguslikku vastutust, sest lepinguõiguslik vastutus tõrjub sel juhul deliktiõigusliku vastutuse välja (VÕS § 1044 lg 2). Samal põhjusel ei vastuta tervishoiuteenuse osutaja deliktiõiguslikul alusel ka vanematevahelise suhte kui isikliku õiguse võimaliku kahjustamise eest.

3. Tervishoiuteenuse osutaja kahju hüvitamise kohustus lepinguõiguse ja deliktiõiguse alusel soovimatu elu kaasustes

Kaitsmisele kuuluv väide:

Puudega lapse sünni korral ei vastuta tervishoiuteenuse osutaja lapse ees ei lepinguõiguse ega deliktiõiguse alusel.

Probleemi kirjeldus ja põhjendused:

VÕS § 127 lg 1 alusel on kahju hüvitamise eesmärgiks kahjustatud isiku asetamine olukorda, mis on võimalikult lähedane olukorrale, milles ta oleks olnud, kui kahju hüvitamise kohustuse aluseks olevat asjaolu ei oleks esinenud. Puudega lapse enda kahju hüvitamise nõude puhul tähendaks eeltoodu, et võrrelda tuleb olukorda, kus laps on sündinud puudega, olukorraga, kus laps ei oleks üldse sündinud. Nimetatu tekitab aga nn mitte-eksisteerimise paradoksi situatsiooni, mille tõttu ei kuulu puudega lapse esitatud nõuded tervishoiuteenuse osutaja vastu Saksamaal ega ka enamikus Ameerika Ühendriikide osariikides rahuldamisele. Autori arvates ei ole ka Eesti õiguse alusel võimalik ületada puudega lapse enda kahju hüvitamise nõude puhul nn mitte-eksisteerimise paradoksi.

Teoreetiliselt oleks Eesti õiguse alusel võimalik lapse ema ja tervishoiuteenuse osutaja vahelist lepingut pidada kolmandat isikut kaitsvaks lepinguks VÕS § 81 mõttes olenemata sellest, et lepingu sõlmimise ajal ei olnud laps veel

sündinud. Siiski ei saa laps olla lepinguga kaitstud isikuks selles mõttes, et leping pidanuks ära hoidma tema sünni. Lisaks ei ole autori arvates lapse huvid seotud lepinguga samal määral kui tema ema või vanemate huvid. Seega ei ole autori arvates alust rakendada lapse nõude puhul tervishoiuteenuse osutaja lepingulist vastutust.

Autori arvates ei vastuta tervishoiuteenuse osutaja ka deliktiõiguslikul alusel, sest on väga vaieldav, kas lapse seadusega kaitstud mingisugune huvi saab kahjustada sellega, et ta sünnib puudega. Nagu ka vanemate nõude puhul puudega lapse sünni korral, tuleb ka samadel asjaoludel esitatava lapse nõude puhul pidada silmas, et tervishoiuteenuse osutaja ei põhjusta lapse puuet (seega ei ole tema tegu õigusvastane VÕS § 1045 lg 1 p 2 mõttes), vaid tervishoiuteenuse osutajale etteheidetav tegu seisneb diagnoosiveas. Lisaks ei ole ka alust jaatada lapse isikuõiguse kahjustamist (VÕS § 1045 lg 1 p 4) ega seadusest tuleneva kohustuse rikkumist (VÕS § 1045 lg 1 p 7) tervishoiuteenuse osutaja poolt. Lapse puude diagnoosimata jätmine ei saa kujutada endast õigusvastast kahju tekitamist, sest ei ole deliktiõiguslikku kaitsenormi, mis kohustaks tervishoiuteenuse osutajat lapse puuet diagnoosima. RKSS § 6 lg 2 p 2 ei tekita kohustust vanemale ega tervishoiuteenuse osutajale ning ei tekita lapsele endale õigust/huvi raseduse katkestamiseks. Järelikult ei ole alust ka deliktiõigusliku vastutuse rakendamiseks.

4. Kahju hüvitamise ulatus soovimatu raseduse korral

Kaitsmisele kuuluv väide:

Soovimatu raseduse korral annavad VÕS § 127 lg 2 ja 3 kohtutele laia diskretsiooni otsustamaks, milline kahju kuulub vanematele hüvitamisele. Hüvitamisele peaksid kuuluma ravikulud ja sissetuleku vähenemine, samuti ebaõnnestunud protseduuri eesmärgi saavutamisele suunatud uue protseduuri kulu. VÕS § 134 lg 2 alusel on hüvitatav ka mittevaraline kahju, kui käsitleda soovimatut rasedust naise tervisekahjustusena. Lisaks on iseenesest hüvitatav mittevaraline kahju seoses pereplaneerimisesse sekkumise kui isikliku õiguse rikkumisega.

Probleemi kirjeldus ja põhjendused:

Lisaks ravikuludele ja sissetuleku kaotusele tuleb soovimatu raseduse puhul varalise kahjuna kõne alla lapse ülalpidamiskulude hüvitamine, mida käesolevas töös on autor eraldi analüüsinud (vt p. 6).

Kui käsitleda soovimatut rasedust naise tervisekahjustusena, võimaldab VÕS § 130 lg 1 nõuda emal hõlpsalt nii ravikulude kui sissetuleku vähenemisest tingitud kahju hüvitamist. Hüvitamisele kuuluva kahju üle otsustamisel tuleb arvestada lisaks ka üldiste kahju hüvitamise piirangutega. Nii tuleb VÕS § 127 lg 2 alusel arvestada sellega, kas rikutud kohustuse või normi eesmärk oli hoida ära just sellist kahju nagu antud juhul tekkis. Lepinguõiguse alusel esitatava nõude puhul tuleb arvestada ka kahju ettenähtavusega (VÕS § 127

lg 3). Nimetatud sätted jätavad kohtule tegelikult laia diskretsiooni otsustamaks, milline kahju soovimatu raseduse puhul hüvitamisele kuulub, st millise kahju väljamõistmine on õiglane.

Esialgse ebaõnnestunud protseduuri kulude käsitlemine patsiendi kahjuna on küsitav, sest vastavad kulud ei tekkinud protseduuri ebaõnnestumise tagajärjel. Pigem saaksid kahjuna olla käsitletavad need kulud, mis tekivad uuest protseduurist (millega nt püütakse algse ebaõnnestunud protseduuri eesmärki saavutada).

Lisaks varalisele kahjule tuleb soovimatu raseduse kaasustes Eesti VÕS-i järgi kõne alla ka mittevaralise kahju hüvitamise nõue. Juhul, kui soovimatut rasedust käsitleda tervisekahju põhjustamisena, tuleks kohaldada VÕS § 134 lg-t 2, millest tulenevalt kaasneb tervisekahjustusega mittevaralise kahju hüvitis automaatselt. Mittevaralise kahjuna tuleks emale sellisel juhul hüvitada mõistlik summa füüsiliste ebamugavuste ja valu eest.

VÕS § 134 lg 2 võimaldab nõuda mittevaralise kahju hüvitamist ka üksnes isikuõiguse rikkumise korral. Seega on võimalik kohtul rahuldada mittevaralise kahju hüvitamise nõue VÕS § 134 lg 2 alusel eelkõige juhul, kui kohus leiab, et pereplaneerimisse sekkumine on käsitletav isikuõiguse rikkumisena. Nimetatud säte saab olla nõude rahuldamise aluseks ka juhul, kui Eesti kohtupraktikas peaks asutama seisukohale, et soovimatu rasedus ei ole käsitletav naise tervisekahjustusena, vaid üksnes tema isikuõiguse – otsustada ise oma keha üle – rikkumisena.

Juhul, kui mittevaralise kahju hüvitamise nõue esitatakse lepingu rikkumisest tulenevalt, tuleb kohaldada ka VÕS § 134 lg-t 1, mille kohaselt tuleb hinnata, kas lepingu täitmine oli suunatud ka mittevaralise huvi järgimisele. Autori arvates saab väita, et kohustus viia läbi protseduurid, mille eesmärgiks on raseduse ärahoidmine või katkestamine, on suunatud eelkõige mittevaralise huvi järgimisele, kuigi võib samaaegselt järgida ka varalist huvi.

Eeltoodu ei välista iseenesest lapse sünnist ja kasvatamisest saadava kasu mahaarvamist kahjuhüvitisest (VÕS § 127 lg 5) ja kahjustatud isiku enda osa arvestamist kahju tekkimisel (VÕS § 139 lg 1), mida autor on eraldi analüüsinud (vt p-d 7 ja 8).

5. Kahju hüvitamise ulatus puudega lapse sünni korral

Kaitsmisele kuuluv väide:

Puudega lapse sünni kaasustes annavad VÕS § 127 lg 2 ja 3 kohtutele laia diskretsiooni otsustamaks, milline kahju kuulub vanematele hüvitamisele. Hüvitamisele peaksid kuuluma ravikulud ja sissetuleku vähenemine raseduse ajal ja tingituna vajadusest hoolitseda puudega lapse eest, samuti ebaõnnestunud protseduuri eesmärgi saavutamisele suunatud uue protseduuri kulu. VÕS § 134 lg 2 alusel on hüvitatav ka mittevaraline kahju seoses valu ja kannatustega raseduse ja sünnituse ajal. Samuti on hüvitatav mittevaraline kahju seoses pereplaneerimisse sekkumise kui isikliku õiguse rikkumisega ja mittevaraline kahju

juhul, kui vanem(ad) on vahetuks tunnistajaks lapse kannatustele ja järgnevale surmale.

Probleemi kirjeldus ja põhjendused:
Saksamaal ega Ameerika Ühendriikides ei ole kohtud asunud ühtsele seisukohale, milline kahju tuleks hüvitada puudega lapse sünni korral.

Autori arvates on tervishoiuteenuse osutamise leping, mille sisuks on sünnieelne diagnostika tuvastamaks loote võimalikud defektid, suunatud nii varalise kui ka mittevaralise huvi järgimisele. Nagu ka soovimatu raseduse puhul, annavad VÕS § 127 lg 2 ja 3 kohtutele puudega lapse sünni kaasustes laia diskretsiooni otsustamaks, milline kahju kuulub vanematele hüvitamisele.

VÕS § 130 lg 1 alusel on emal võimalik hõlpsalt nõuda nii ravikulude kui sissetuleku vähenemisest tingitud kahju (mis võib seonduda ka puudega lapse eest hoolitsemisega) hüvitamist. Lisaks tuleks hüvitada ebaõnnestunud sünnieelse diagnostika kulud.

Lisaks varalisele kahjule tuleb puudega lapse sünni kaasustes Eesti VÕS-i järgi kõne alla ka mittevaralise kahju hüvitamise nõue. Kuna tervishoiuteenuse osutaja lepingulise kohustuse eesmärgiks on ka järgida patsiendi mittevaralist huvi, on VÕS § 134 lg 2 alusel võimalik nõuda mittevaralise kahju hüvitist ka isikuõiguste rikkumise korral. Sellise nõude edukus sõltub sellest, kas RKSS § 6 lg 2 p-st 2 tulenevat õigust katkestada rasedus, kui sündival lapsel võib olla raske vaimne või kehaline tervisekahjustus, saab pidada isiku enesemääramise õiguseks. Autori arvates saab RKSS § 6 lg 2 p-st 2 tulenevat õigust pidada isiku enesemääramise õiguseks. Järelikult tuleks hüvitada mittevaraline kahju seonduvalt pereplaneerimisse sekkumisega.

Mittevaralise kahjuna ei kuulu hüvitamisele vanemate võimalik frustratsioon ja pettumus seoses ootamatult puudega lapse vanemaks saamisega. Küll on aga mittevaralise kahju hüvitamine võimalik VÕS § 134 lg 3 alusel, kui vanemad on nt tunnistajaks lapse surmale ja kogevad valu ja kannatust, nähes oma lapse kannatusi.

Siiski ei ole varalise ja mittevaralise kahju hüvitamine täies ulatuses automaatne, vaid kahju täielikku hüvitamist piiravad VÕS-i mitmed sätted, mida analüüsitakse allpool (vt p-d 7 ja 8).

6. Lapse ülalpidamiskulude hüvitamise põhjendatus soovimatu raseduse ja puudega lapse sünni korral

Kaitsmisele kuuluv väide:
Terve lapse ülalpidamiskulud ei kuulu hüvitamisele soovimatu raseduse kaasustes. Puudega lapse sünni korral tuleks vanematele hüvitada puudega lapse ülalpidamiskulud täies ulatuses.

Probleemi kirjeldus ja põhjendused:
Võib väita, et põhiliseks diskussiooniobjektiks soovimatu raseduse ja puudega lapse sünni kaasuste puhul on olnud eelkõige küsimus, kas hüvitatavaks kahjuks on lapse ülalpidamiskulud. Saksamaa kohtupraktikas on leitud, et terve lapse keskmised ülalpidamiskulud tuleb hüvitada. Ameerika Ühendriikides on vaid mõned osariigid, mille kohtud leiavad, et terve lapse keskmised ülalpidamiskulud kuuluvad hüvitamisele.

Kui alustada lapse ülalpidamiskulude hüvitamise põhjendatuse hindamist põhjusliku seose kindlakstegemisest, siis tuleks võtta lähtealuseks *conditio sine qua non* reegel: ilma tervishoiuteenuse osutaja veata ei oleks vanematel tekkinud ka lapse ülalpidamise kulusid. Seega on tervishoiuteenuse osutaja eksimus igal juhul põhjustanud lapse ülalpidamiskulud. Eelnimetatud reeglist lähtumisele on siiski mitmeid vastuargumente, sh et vanema ülalpidamiskohustuse kui ühe fundamentaalse väärtuse tekkimine kolmanda isiku hooletuse tõttu ei ole piisav selleks, et ülalpidamiskohustus läheks üle kolmandale isikule. Samuti saab väita, et lapse ülalpidamiskulude hüvitamine viib negatiivse väärtushinnangu andmiseni lapsele ja tekitab talle psühholoogilist kahju, kui ta saab teada vanemate nõudest tervishoiuteenuse osutaja vastu. Samal ajal tuleb aga arvestada sellega, et ülalpidamiskulude hüvitamise nõude rahuldamine võib siiski olla nii lapse enda kui ka terve perekonna huvides.

Autori arvates ei ole lihtne leida õigustust vähemalt kahju hüvitamist reguleerivate sätete seast, miks tuleks jätta lapse üleskasvatamise kulud tervishoiuteenuse osutajalt välja mõistmata. Siiski läheb ülalpidamiskulude hüvitamine autori arvates vastuollu mõistlikkuse põhimõtte ja kahju hüvitamise õiguse *ratio legis*`ega. Sisuliselt nõuab küsimuse lahendus kohtult väärtusotsustuse tegemist.

Autori arvates võiks probleemi lahendust otsida kasu mahaarvamise argumendist. Kuigi üldise käsitluse järgi saab arvesse võtta üksnes samaliigilist kasu, ei võimalda soovimatu raseduse kaasuses eelnimetatud põhimõtte järgimine hinnata juhtunut tervikuna. Lapse üleskasvatamise kulude väljamõistmata jätmiseks on autori arvates kohtul tarvis teha väärtusotsustus, mis lähtub sellest, et lapse kasvatamisest saadav mittevaraline kasu tasakaalustab erijuhtumina tema ülalpidamise kulud kui kahju. Pealegi ei sätesta VÕS § 127 lg 5, et arvesse tuleks tingimata võtta üksnes samaliigilist kasu.

Lisaargumendina saaks toetuda VÕS § 127 lg-le 2 ja väita, et rikutud kohustuse eesmärgiks konkreetsel juhul ei olnud lapse ülalpidamiskulude tekkimise ärahoidmine. Seda argumenti on lihtsam kasutada juhul, kui raseduse ärahoidmise või katkestamise soovi tingisid meditsiinilised näidustused. Teisalt, kui raseduse katkestamise või ennetamise põhjuseks on nt perekonna halb majanduslik seisund, mille tõttu soovitakse ülalpeetavate arvu piirata, siis on keeruline väita, et rikutud kohustuse eesmärgiks ei olnud ära hoida lapse ülalpidamiskohustusega kaasnevaid kulutusi. Sellise kahju ettenähtavus ei tohiks üldjuhul probleemiks kujuneda.

Kokkuvõttes ei peaks autori arvates soovimatu raseduse kaasustes olema hüvitatavad terve lapse ülalpidamiskulud.

Mis puudutab puudega lapse ülalpidamiskulude hüvitamist vanematele, siis sellised ülalpidamiskulud hüvitatakse Saksamaa kohtupraktikas täies ulatuses. Ameerika Ühendriikide kohtupraktikas peetakse põhjendatuks aga üksnes lapse puudest tingitud lisakulude hüvitamise.

Perekonnaseaduse § 97 p 3 kohaselt on ülalpidamist õigustatud saama ka muu abivajav alaneja või üleneja sugulane, kes ei ole võimeline ennast ise ülal pidama. Autori arvates ei kaalu võimalik negatiivse väärtushinnangu omistamine lapsele, mis kaasneb puudega lapse ülalpidamiskulude hüvitamisega üles nende kulude hüvitamisest saadavat kasu lapse jaoks. Puudega lapse ülalpidamiskulude hüvitamine aitab vanematel pakkuda lapsele paremat vajalikku ravi ja hoolitsust. Seega nii puudest tingitud lisakulutused kui ka üldine ülalpidamiskulu tuleks puudega lapse sünni puhul hüvitada. Kasu mahaarvamise argument ei ole puudega lapse ülalpidamiskulude hüvitamise juures autori arvates relevantne.

7. Lapse sünnist ja kasvatamisest saadava kasu mahaarvamine kahjuhüvitisest soovimatu raseduse ja puudega lapse sünni kaasustes

Kaitsmisele kuuluv väide:

Lapse sünnist ja kasvatamisest saadavat kasu vanematele tuleb võtta arvesse soovimatu raseduse korral, st terve lapse sünni korral. Puudega lapse sünd ei too kaasa kasu, mis oleks VÕS § 127 lg 5 alusel maha arvatav vanematele väljamõistmisele kuuluvast hüvitisest.

Probleemi kirjeldus ja põhjendused:

Soovimatu raseduse juhtumitel võib vanematel lisaks kahjule tekkida siiski ka varalist ja mittevaralist kasu. Küsimuseks on, kuidas seda arvesse võtta ja kas terve lapse sünnist saadav kasu tuleks VÕS § 127 lg 5 alusel maha arvata vanematele väljamõistmisele kuuluvast hüvitisest.

Saksamaal saab kahjuhüvitisest arvata maha vaid samaliigilist kasu, st varalise kahju hüvitisest varalist kasu ja mittevaralise kahju hüvitisest mittevaralist kasu. Ameerika Ühendriikide kohtupraktikas aga lähtutakse eelkõige sellest, millistel põhjustel on vanemad soovinud rasedust vältida.

Autor on seisukohal, et mittevaralise kahju, mis seondub vastu tahtmist vanemaks olemise või pereplaneerimisse sekkumisega, mittehüvitamise õigustamiseks on kasu mahaarvamise argument üsna veenev. Võiks väita, et kahju, mis väljendub pereplaneerimisse sekkumises, sulandub selles rõõmus ja mittevaralises väärtuses, mida pakub lapse kasvatamine. Omaette küsimus on, kas see rõõm peaks suutma "sulatada" ka raseduse ja sünnitusega kaasnevat ebamugavust ja füüsilist valu. Autori arvates mitte täiel määral, mistõttu lapse emal võiks olla õigus mõistlikus suuruses (et mitte öelda sümboolsele) hüvitisele füüsiliste kannatuste eest.

Keerulisem on olukord varalise kahju "tasaarvestamisega". Kui mõelda sellele, et millist varalist kasu võib soovimatu lapse sünd kaasa tuua, siis eel-

kõige saab jutt olla sellest, et laps võib olla tulevikus kohustatud oma vanemaid ülal pidama (Perekonnaseaduse §-d 96-97). Kahjuhüvitise väljamõistmisel ei ole siiski ette teada, kas lapsel tekib tulevikus kohustus oma vanemaid ülal pidada. Seega on väga küsitav, kas sellist teoreetilist kasu saab kahjuhüvitise määramisel arvesse võtta.

Kokkuvõtvalt on autor seisukohal, et ei ole sugugi lihtne leida argumente, mis õigustaks ülalpidamiskulude välja mõistmata jätmist saadavale kasule tuginedes. Mittevaraline väärtus, mida pakub lapse kasvatamine, võiks erandina tasakaalustada ülalpidamiskulud kui varalise kahju.

Puudega lapse sünni korral on autori arvates väga kaheldav, kas sellise lapse sünni ja kasvatamisega seonduv rõõm on võrreldav terve lapse kasvatamise ja tema eest hoolitsemisega kaasneva rõõmuga. Autori arvates ei ole puudega lapse sünni korral alust VÕS § 127 lg 5 alusel kasu mahaarvamiseks vanematele väljamõistmisele kuuluvast hüvitisest.

8. Kahjuhüvitise vähendamine vanemate enda osa tõttu kahju tekkimisel

Kaitsmisele kuuluv väide:

Soovimatu raseduse või puudega lapse sünni kaasustes ei ole põhjendatud kahjuhüvitise vähendamine põhjusel, et vanemad oleks saanud rasedust katkestades või last lapsendamiseks ära andes kahju suurust vähendada või kahju üldse vältida.

Probleemi kirjeldus ja põhjendused:

Lapse ülalpidamiskulude hüvitamise üle otsustamisel võib sageli tõusetuda ka küsimus, kas vanemad ei ole neid kulusid endale ise põhjustanud (vähemalt osaliselt). Kannatanu osa kahju tekkimisel võimaldab arvesse võtta VÕS § 139 lg 1.

Kahjuhüvitise vähendamise küsimus soovimatu raseduse puhul saab tõusetuda eelkõige juhtudel, kus naisel oli soovimatu raseduse avastamisel veel võimalus otsustada abordi kasuks, kuid ta ei teinud seda. Samamoodi võib kannatanu osa küsimuse tõstatada väitega, et vanematel oli võimalik ülalpidamiskohustuse tekkimist vältida, kui nad oleksid otsustanud anda lapse ära adopteerimiseks.

Nii Saksamaal kui ka Ameerika Ühendriikides on kahjuhüvitise vähendamine isiku enda osa tõttu kahju tekkimisel iseenesest võimalik, kuid sünnieelse kahju kaasustes ei anna ülalnimetatud väited nende riikide kohtutes alust kahjuhüvitise vähendamiseks.

Käesoleva töö autori arvates ei ole õige jätta kahjuhüvitist sünnieelse kahju kaasustes välja mõistmata põhjendusega, et vanemad on need endale ise põhjustanud. Ilmselt oleks kahju tekitaja tuginemine sellele, et vanemad oleksid saanud kahju abordi tegemise või lapse adopteerimiseks äraandmise teel ära hoida, vastuolus hea usu põhimõttega (VÕS § 6).

9. Kahju hüvitamise ulatus soovimatu elu korral

Kaitsmisele kuuluv väide:
Juhul kui tervishoiuteenuse osutaja hüpoteetiliselt vastutaks lapse ees tema puudega sünni korral, tuleks lapsele hüvitada tema puudest tingitud lisakulud.

Probleemi kirjeldus ja põhjendused:
Ehkki autor leidis, et tervishoiuteenuse osutaja vastutuse eeldused lapse ees tema puudega sünni korral ei ole täidetud, on autor analüüsinud, kas lapsele väidetavalt tekkinud kahju hüvitamine oleks VÕS-i alusel võimalik.

Kuna Saksamaal nendes kaasustes eitatakse tervishoiuteenuse osutaja vastutust lapse ees, siis ei ole Saksamaa kohtutes ka analüüsitud hüvitamisele kuuluvat kahju. Vähestes Ameerika Ühendriikide kohtutes, kus lapse nõue tema puudega sünni korral kuulub rahuldamisele, hüvitatakse üksnes lisakulutusi seoses ravi ja hooldusega, mis on vahetult seotud lapse puudega. Mittevaralist kahju Ameerika Ühendriikide kohtud lapsele nendes kaasustes ei hüvita.

Autor on seisukohal, et VÕS § 130 lg 1 alusel oleksid lapse puudest tingitud lisakulud hüvitatavad ka Eestis. Erinevalt mittevaralisest kahjust on puudest tingitud lisakulud mõõdetavad ja need ei kao lapse täisealiseks saamisel, mistõttu tuleks kulude hüvitamist jätkata ka pärast lapse täisealiseks saamist. Juhul kui puudega lapse sünni korral on oma nõude esitanud samadel asjaoludel ka lapse vanemad, ei välista see iseenesest lapse enda nõude rahuldamist.

Autori arvates ei ole puudega lapse sünni kaasustes lapse enda nõude puhul põhjust lapse enda kulusid vähendada VÕS § 127 lg 5 alusel. Puudega lapse elu kui puudega sündimisest saadud „kasu“ kujutab nendes kaasustes lapsele sisuliselt pealesunnitud kasu, mida ta tegelikult soovis vältida.

10. Hüvitamisele kuuluv kahju sünnieelsete kahjustuste kaasustes

Autor on seisukohal, et arvestades eespool ülalpidamiskulude, kasu mahaarvamise ja kannatanu enda osa arvestamise kohta märgitut, on VÕS-i järgi sünnieelsete kahjustuste kaasustes põhjendatud kokkuvõtvalt järgmise kahju hüvitamine.

Soovimatu raseduse puhul tuleks varalise kahjuna hüvitada ravikulud ja sissetuleku kaotus, samuti kulutused uuele protseduurile, mis oli vajalik algse ebaõnnestunud protseduuri eesmärgi saavutamiseks. Autori arvates ei peaks olema hüvitatavad terve lapse ülalpidamiskulud. Mittevaraline väärtus, mida pakub lapse kasvatamine, võiks erandina tasakaalustada ülalpidamiskulud kui varalise kahju.

Mittevaralise kahjuna tuleks lapse emale hüvitada mõistlik rahasumma raseduse ja sünnituse käigus kogetud füüsiliste ebamugavuste ja valu eest. Muu mittevaralise kahju (nt pereplaneerimisse sekkumine) peaks tasakaalustama rõõm lapse kasvatamisest.

Puudega lapse sünni puhul tuleks varalise kahjuna hüvitada ravikulud ja sissetuleku vähenemine raseduse ajal ja tingituna vajadusest hoolitseda puudega lapse eest, samuti ebaõnnestunud protseduuri eesmärgi saavutamisele suunatud

uue protseduuri kulu. Lapse ülalpidamiskulud (s.o nii ootuspärased terve lapse ülalpidamiskulu kui ka lapse puudest tingitud lisakulu) võiksid samuti kuuluda hüvitamisele VÕS-i alusel. Lapse sünnist tuleneva võimaliku kasu on põhimõtteliselt võimalik hüvitatavast kahjust maha arvata.

Mittevaralise kahjuna on hüvitatav mittevaraline kahju seoses valu ja kannatustega raseduse ja sünnituse ajal. Lisaks on hüvitatav mittevaraline kahju seoses pereplaneerimisse sekkumisega (eelkõige VÕS § 134 lg 1 alusel) ja mittevaraline kahju juhul, kui vanem(ad) on vahetuks tunnistajaks lapse kannatustele ja järgnevale surmale.

Juhul kui tervishoiuteenuse osutaja hüpoteetiliselt vastutaks lapse ees tema puudega sünni korral, tuleks lapsele hüvitada tema puudest tingitud lisakulud.

Olgu märgitud, et Eesti kohtutel saab olema suhteliselt lai kaalutlusõigus hüvitamisele kuuluva kahju ja selle ulatuse määratlemisel.

PUBLICATIONS

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The Health-care Provider's Civil Liability in the Cases of Wrongful Life. An Estonian Perspective. *Juridica International* Vol. 23 (2015), pp 43–51.

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* Vol. 4 Nr. 2 (2016) pp 95–111.

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The Possibility of Compensation for Damages in Cases of Wrongful Conception, Wrongful Birth and Wrongful Life. An Estonian Perspective. *European Journal of Health Law* Vol. 21/2 (2014), pp 141–160.

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Damages Subject to Compensation in Cases of Wrongful Birth: A Solution to Suit Estonia. *Juridica International* Vol. 24 (2016), pp 105–115.

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