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The Use and Influence of Comparative Law in ‘Wrongful Life’ Cases

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1. Introduction**

1.1. Comparable stories of great grief

In 1993, a South African boy named Brian Stewart was born severely handicapped. He suffers from ‘spina bifida’, a congenital defect to the lower spine, which negatively affects the nerve supply to the lower limbs, bladder and bowel. He suffers from a brain defect as well.¹ In 1994, a Dutch girl named Kelly Molenaar was also born severely handicapped. By the time she was two-and-half-years old she was diagnosed as being retarded, autistic, not fully grown, not able to walk or talk, suffering from heart disease, bad hearing and poor eyesight and she was not able, at that time, to recognize her parents. She had been admitted to hospital on nine occasions due to continuous crying, believed to be caused by pain.² Comparable stories about severely handicapped children can be found in several other countries as well.

Both Brian and Kelly were not supposed to have been born in the sense that their mothers would have chosen for an abortion had they known in time about the birth defects their children would suffer. Brian’s mother would have undergone a termination of her pregnancy had the obstetrician and gynaecologist she consulted detected any abnormalities in the foetus and advised her thereof. Kelly’s mother had asked the obstetrician she consulted to carry out some tests regarding possible hereditary diseases and genetic defects, because she had decided to terminate the pregnancy if the tests on the foetus would show severe disabilities. She did so because there was a history of chromosome defects in her husband’s family and she herself had already suffered two miscarriages previously.

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** An earlier paper on the topic of wrongful life (and wrongful birth) was presented as a public lecture at Rhodes University, Grahamstown (21 August 2008) and subsequently published (see: I. Giesen, ‘Of wrongful birth, wrongful life, comparative law and the politics of tort law systems’, 2009 *THRHR* 72, pp. 257-273). This contribution builds on that lecture but has been substantially revised and rewritten. Many thanks to the participants of the HiIL Workshop on ‘The Changing Role of Highest Courts in an Internationalising World’, held in Bologna on 20-21 November 2009 and in Utrecht on 27 January 2011. Many thanks also to Annebel Weghorst and Frederique Bos for their outstanding research assistance.

1 See *Stewart v Botha* 2007 6 SA 247 (C); 2007 9 BCLR 1012; 2007 3 All SA 440. An earlier (lower court) South African decision (denying a claim) was *Friedman v Glicksman* 1996 1 SA 1134 (F).

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

1.2. The topic at hand: wrongful life in a comparative fashion

The facts described above of course point to two cases on the issue of 'wrongful life,' a highly debated topic within the field of both medical law and tort law (or the law of 'delict' as it is called elsewhere).³ This is the theme of this paper and it is so, firstly, for that very reason: it is highly debated all over the world; it leads to differences of opinion and differences in the outcomes (in South Africa the Supreme Court of Appeal handed down a decision on this matter in 2008, not recognizing this sort of claim,⁴ while, for instance, the Dutch legal system is one of the few legal systems that does allow such a claim, see below); it challenges our academic thinking, our legal notions, our moral standing and our beliefs, in either the ethical or religious sense of the term. This, in turn, raises the question as to what is so different between these (and other) legal systems. Why are the views around the world so diverse on this theme, while private law matters are usually dealt with in a rather comparable manner?

Related to those difficult substantive questions,⁵ we are faced with – because we naturally and wisely tend to compare legal systems in hard cases such as these – issues of comparative law methodology and the use of (the outcomes of) that methodology when shaping the law, either through legislators, but certainly also through the (highest) courts. For instance, what has comparative law to offer in this respect? Will it bring us closer together? Can it do so? In what sense and on what level (as to outcomes; on the level of the decisive arguments)? These are the sort of questions that lie at the heart of the Utrecht-Cambridge-Bologna project, funded by the Hague Institute for the Internationalisation of Law (HiIL, The Hague) on *'The Changing Role of Highest Courts in an Internationalising World'*. And these methodological questions form the central part of this contribution.

1.3. Research hypothesis

To be more precise, in this paper I will investigate what (amount of) comparative information and arguments were used and what influence, if any and if detectable, they had in different jurisdictions as regards the topic of *wrongful life*. This topic is especially interesting to use as an example with a view to learning about the argumentative force of comparative law, because it concerns – as stated above – a topic that has led to much controversy around the world and to rather diverging views, while at the same time it is a topic that has been studied extensively, also from a comparative perspective. This makes it a perfect theme for the purposes of finding out what role comparative law does in fact play or can play in sensitive cases such as these.

As stated, in deciding and analyzing wrongful life cases, comparative law is used rather extensively. What is less clear, though, is what weight is then attached to those arguments by courts when deciding a case in a given national system. The underlying *hypothesis* for this paper is that it might not be so much the outcomes and arguments found elsewhere through comparative law that are decisive (at least in cases such as those concerning wrongful life), but that instead it is something else (in my opinion most notably the cultural background and/or the legal policy reasons within a certain tort law/medical liability law system) that decides the issue, irrespective of how the comparative law arguments sound.⁶ This hypothesis would be strengthened if the comparative materials and arguments found can and are used 'in both directions' in the sense of supporting either the recognition or denial of a claim of this type. In other words, is it not the case that a national court will choose those comparative arguments that fit well with the solution aimed for based on other grounds?

3 See e.g. C. Herrmann & G. Kern, "Wrongful life' claims and the absolute value of human life: a contradiction?", in G. Brüggemeier et al. (eds.), *Fundamental rights and private law in the European Union. II. Comparative analyses of selected case patterns*, 2010, p. 269. There is a wealth of (mostly also comparative) literature available on wrongful life, too much to mention in fact. The sources cited hereafter will provide further references. See also, in a comparative fashion: S.C.J.J. Kortmann & B.C.J. Hamel (eds.), *Wrongful birth en Wrongful life*, 2004.

4 See *Stewart v Botha*, supra note 1.

5 See recently Herrmann & Kern 2010, supra note 3, pp. 249 et seq.; B.C. Steiniger, 'Wrongful Birth and Wrongful Life: Basic Questions', 2010 *JETL*, no. 2, pp. 125 et seq., and A. Ruda, "'I Didn't Ask to be Born': Wrongful Life from a Comparative Perspective", 2010 *JETL*, no. 2, pp. 204 et seq.

6 More generally on cultural diversity and tort law: C. van Dam, 'Who's afraid of Diversity? Cultural Diversity, European Co-operation, and European Tort Law', 2009 *King's Law Journal* 20, no. 2, p. 281.

1.4. Testing the hypothesis

In this paper this hypothesis is tested by carrying out a comparative survey of wrongful life cases decided in several jurisdictions (see Section 4). Some other jurisdictions are mentioned briefly if and when the information can be attained in a language that is accessible to me (in Section 2). I also include a short discussion on the Draft Common Frame of Reference and the Principles of European Tort Law in the analysis because they might shed some light on what is considered to be common ground in this respect (if there is any).

In Section 4 the leading cases from several jurisdictions will be examined as to the use of comparative law. Is the comparative law method used? At what level, where and how? Was the comparative argument decisive or not? Can we tell how the judges obtained the comparative information? Are they using their networks, consisting of other judges from across the globe? The final aim would be, of course, to contribute with these wrongful life cases – as merely one case study – to the development of a more conceptual scheme on the argumentative function of comparative law methodology.

1.5. The further set-up of this paper

Hereafter, I will first make a few remarks on terminology (Section 1.6) and then lay bare (some of) the legal and moral issues involved (Section 1.7). Thereafter I will show how some of the legal systems in the world deal with the issue of wrongful life in terms of outcomes (Section 2) and then continue to deal with some of the important legal and moral problems raised in wrongful life cases, as well as the possible answers given in response (Section 3). Having thus sketched not only the outcomes reached in several jurisdictions but also (some of) the main lines of reasoning used by the courts, Section 4 deals with the principal question of this paper, i.e. to what extent are the outcomes actually based on or influenced by comparative law insights? I will defend the position (Sections 5 and 6) that the use of comparative law is of influence to some extent – in some systems more than in others, while this influence is often not very explicit – and is certainly very useful and intellectually challenging. But I will also conclude that comparative law is not capable of providing a definite answer to the question of which arguments are the most valid, most convincing and decisive, at least not in tort law issues of the magnitude of wrongful life claims. It is instead the weight which a certain argument receives in a certain *cultural setting* or *background*, in a certain environment drenched in ages of promoting specific legal policies that seems to decide the matter. Hence, it is what I call the *politics of a tort law system* that governs the outcomes and the solutions reached in these sorts of cases. This, of course, can be traced back to a wider characteristic of the law of torts, its political nature.⁷

Before I embark on a brief tour around the world, let us focus, first, on what wrongful life claims are actually all about, both as regards terminology and the key questions that arise.

1.6. Terminology⁸

The topic of this paper encompasses a cause of action for damages against medical practitioners.⁹ A *wrongful life* claim is a claim *by a child*, and this will always be a disabled child, issued by its representatives, i.e. most notably the parents, against a doctor or obstetrician for having to live a life full of suffering because of a handicap while the child was not supposed to have been born at all but was born anyway because of a negligent act by the doctor or an assistant. If one fails to order or correctly perform prenatal tests as to the state of health of the foetus, if for instance a chromosome test is not carried out properly (a case of wrongful genetic counselling), a handicapped child might be born where otherwise, had the testing been done correctly, the pregnancy would have been terminated by the parents. Had the testing been performed correctly, they would have known the child would be born severely disabled and then

7 Even then, to be sure, comparative law is (of course) still indispensable because one needs to be able to show at least how legal systems work and what arguments are used before one can get to their political nature.

8 On the terminology used, see for instance also C. van Dam, *European Tort Law*, 2006, p. 156, p. 161 (distinguishing cases of prenatal harm) and p. 162, as well as Steiniger 2010, *supra* note 5, pp. 125-126. Since there are as many definitions around as there are commentators, or so it seems, I decided to use my own descriptions (see note 13, *infra*).

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

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

This type of action needs to be separated from a so-called *wrongful birth* claim. This involves a claim for damages *by the parents* of a child for, basically, the costs of bringing up the child and for having to go through a pregnancy and giving birth (a head of damages for the mother only, of course). The claim is filed because the parents did not want any (more) children, for whatever reason, or did not want the child in question to be born (because of a genetic disability detected during pregnancy), but (again) became parents anyway because of the fault of a third person, i.e. the doctor, by not preventing the conception from occurring (a.k.a. wrongful conception: failing to implant a contraceptive device in the right manner, not warning about the risks of becoming pregnant anyway, etc.), by not terminating the pregnancy correctly after it has come about (a failed abortion) or by not correctly performing the necessary genetic tests. An example is of course the situation in which a birth control operation is performed on either him or her but that turned out to be unsuccessful because of an unlawful act by the doctor. In these cases the child being born can thus either be a healthy or a disabled child. This, in principle, is of no consequence to the possibilities of a wrongful birth action¹³ as such although in some legal systems this fact is considered to be relevant. The most important heads of damages are the cost of raising the child (which is considered to be purely economic loss¹⁴) and non-pecuniary losses (in principle for both the mother and the father for interference with family life).

1.7. The key questions in wrongful life cases

The key questions¹⁵ when dealing with the issues at hand are legal or moral in nature. 'Legal' in the sense that (both wrongful birth and) wrongful life claims seem to cut right through the legal categories within our system that we usually work from. They are about contract law and/or tort law (Can both apply?),¹⁶ about wrongfulness and fault (Is there a duty? Is it breached?), about damages (What is the damage here? How does one assess it? Can one do that at all?), about factual causation (Who caused the damage if there is a natural handicap for the foetus such as a chromosome failure?) and about public policy.

The moral questions that arise do so because these claims touch upon the way we think about life in general, about newborn life specifically, about the possibilities of modern medicine but also upon religious or ethical aspects (Is all life sacred, no matter what?). More specifically for the issue of wrongful birth the major moral issue is: can a child ever be considered a source of damage (and not a blessing)?¹⁷

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

11 As to the nature of the losses in a wrongful life action (are they purely economic or not?) relating to the upbringing of the child, of course the question is whether these costs are *unrelated* to the injuries the child suffers. Since its disabilities are not injuries inflicted upon it by the doctor, in the same way these injuries would be inflicted on someone in, for instance, a motor vehicle collision, but rather caused by a genetic defect I would say that these costs are purely economic. However, one could also argue that the doctor did not prevent the injuries from occurring and thus he caused the injuries that now lead to financial loss. Had he conducted proper prenatal testing, the disabilities would have been discovered, and an abortion would have been performed. In that sense, the losses incurred here are not *purely* economic in character. The first reasoning seems to be more plausible to me, however.

12 Remember also that a wrongful life claim by the child can be joined by a wrongful birth claim by its parents; the two can go together. Of course, the cost of raising the child can be claimed only once.

13 Although one could call the action in the case of a healthy child being born a case of 'wrongful conception' and label the birth of a disabled child as a (true) wrongful birth claim. Cf. B. Cleaver, 'Wrongful birth – The dawning of a new action', 1991 *SALJ* 108, no. 1, p. 47, at note 2. For me, the main difference between the possible causes of actions in wrongful birth and life cases lies not in the possible heads of damages (they may differ, even within the category of wrongful birth cases) but in who is actually suing: the parents or the child itself.

14 Cf. J. Murphy, *Street on Torts*, 2005, p. 227; J. Neethling et al., *Law of Delict*, 2006, p. 275, at note 185. However, C. Roederer, 'Wrongly conceiving wrongful conception: distributive vs. corrective justice', 2001 *SALJ* 118, no. 2, p. 350, challenges this because the actual harm is in his view the infringement of the right to choose. This is in my view indeed the case (see I. Giesen, 'Of wrongful birth, wrongful life, comparative law and the politics of tort law systems', 2009 *THRHR* 72, pp. 268-269) but even then the loss suffered from that infringement is (also) purely economic in nature (as Roederer also seems to indicate).

15 See also Steiniger 2010, *supra* note 5, pp. 150 et seq.; Ruda 2010, *supra* note 5, pp. 204 et seq.

16 R. Perry, 'It's a wonderful life', 2008 *Cornell L. Rev.* 93, no. 2, p. 329, seeks a solution to wrongful life claims in the contractual setting with the child as the intended third-party beneficiary.

17 Van Dam 2006, *supra* note 8, p. 157; Herrmann & Kern 2010, *supra* note 3, p. 269. A variation on the issue so raised is that compensation

And for wrongful life claims, the question becomes twofold. First, can a disabled child after its birth sue the mother and claim that the mother should have had an abortion? Second, is handicapped life of less value?¹⁸ And if it is not, which is of course the only sensible answer, is that not still the message that these claims are sending out to the world? Or, as Snyder, J. stated in *Stewart v Botha*:¹⁹

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

2. The state of the law: outcomes of cases from across the globe on wrongful life

Now that we have the issues out in the open, what is the current state of the law in this regard? How are wrongful life claims resolved? I will consider this issue briefly here, by means of an overview of outcomes only, but I will come back to the arguments used later.²⁰

In the Netherlands a wrongful life case has been upheld. This was decided in 2005 by the Supreme Court (*Hoge Raad*) in the *Kelly* case. The court granted her the cost of living (i.e. her upbringing), as well as the extra costs related to her handicaps and non-pecuniary losses for her suffering.²¹ The Dutch legislator has not subsequently intervened, not even when asked specifically to think about doing so, basically stating that this Supreme Court decision seemed to have been handed down in accordance with the rules of private law in the Netherlands and that there was no apparent reason for the legislator to decide otherwise on this issue.²²

The German legal system denied the possibility of issuing a wrongful life claim in a *Bundesgerichtshof* case of a foetus being exposed to the rubella disease contracted by the mother: there is no direct duty to prevent the birth of a foreseeable handicapped child because human life might appear valueless if one was to accept such a duty.²³

In English law Section 1 of the Congenital Disabilities (Civil Liability) Act 1976 does allow a prenatal harm claim for a child if it is born alive and disabled if the defendant was liable towards either parent for the act which led to the disability.²⁴ This wording however excludes cases of *naturally* resulting handicaps, such as a genetic defect not having been detected because it was not properly tested for. So, here the legislator stepped in rather early to prohibit (future) wrongful life claims.²⁵ The courts agree with this position. In *McKay v Essex Area Health Authority*, again a case of undetected rubella, the wrongful life claim was rejected on public policy grounds: there is no duty to abort a disabled child, accepting that it

would be contrary to the dignity of the child.

18 Van Dam 2006, supra note 8, p. 163 and p. 165.

19 *Stewart v Botha*, supra note 1, at para. 11. On the attempt to integrate moral and legal perspectives in this regard, see M.A. Loth, *Limits of Private Law*, 2007.

20 See also Ruda 2010, supra note 5, pp. 205-207; Herrmann & Kern 2010, supra note 3, pp. 249 et seq.; Perry 2008, supra note 16, pp. 336 et seq.

21 See *Kelly*, supra note 2. The comments on the decision (as well as the lower courts' decisions) have been numerous; see for example M.A.J.M. Buijsen, 'In overeenstemming met de aard van de schade?', 2005 *Nederlands Juristenblad*, no. 16, pp. 835 et seq.; T. Hartlief, 'Hollandse toestanden: de Hoge Raad over 'wrongful life'', 2005 *Nederlands Tijdschrift voor Burgerlijk Recht*, no. 6, pp. 232 et seq.; C.H. Sieburgh, 'Schadevergoeding en leven – Compositie met rood, geel en blauw', 2005 *Weekblad voor Privaatrecht, Notariaat en Registratie* 6637, pp. 755 et seq.; H.J. van Kooten & H.M. Wattendorff, 'Het belang niet geboren te worden', in H.J. van Kooten et al. (eds.), *Hartkampvarianties*, 2006, pp. 41 et seq.; (all contributions in M. Buijsen (ed.), *Onrechtmatig leven?*, 2006); E. Hondius, 'The Kelly Case. Compensation for undue damage for wrongful treatment', in J.K.M. Gevers et al. (eds.), *Health Law, Human Rights and the Biomedicine Convention. Essays in honour of Henriëtte Roscam Abbing*, 2005, pp. 105 et seq.; A. Mukheibir, 'Wrongful life claims in the Netherlands – The Hoge Raad decides', 2005 *Obiter* 26, no. 3, pp. 753 et seq. (from a South African perspective); B.C. van Beers, *Persoon en lichaam in het recht*, 2009, pp. 289-363, and F.B. Bakels, 'Baby Kelly en het gehandicapte leven', in A.G. Castermans et al. (eds.), *Ex Libris Hans Nieuwenhuis*, 2009.

22 See *Kamerstukken II* (Parliamentary Proceedings) 2004-2005, 29 323, no. 11. The Dutch Government had already issued a preliminary, not final opinion on the matter after the Court of Appeal decision but before the Supreme Court ruled in the *Kelly* case, see *Kamerstukken II* (Parliamentary Proceedings) 2003-2004, 29 200 VI, no. 61.

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

24 Van Dam 2006, supra note 8, p. 162.

25 See W.V.H. Rogers, *Winfield and Jolowicz on Tort*, 2006, p. 1041.

would be a violation of the sanctity of human life, and the assessment of damages (comparing the situation of a disabled child with that of a 'not born foetus') is impossible.²⁶

The *Cour de cassation* made room for a wrongful life claim under French law for the costs of the handicap in the famous *Perruche* case. Nicolas Perruche was born severely handicapped because his mother had contracted rubella thinking, because her physician had told her so, that she had been immunized against it.²⁷ Thereafter the French legislator intervened by deciding that nobody can be indemnified for his birth, even if handicapped. This so-called '*Loi Anti Perruche*' from 2002 thus overruled the *Cour de cassation*.²⁸ The same Act also set up a fund to compensate parents of handicapped children, but that fund has not had a good start. More than a year after its creation no money had yet been put into the fund.²⁹

Moreover, the European Court of Human Rights has considered this French Act to constitute a deprivation of property under Article 1 First Protocol to the European Convention on Human Rights (protection of property/ownership) because the Act has retroactively taken away the possibility of issuing civil liability claims which are considered to be property issues.³⁰ This, in turn, has inspired the *Cour de cassation* to still allow wrongful life claims based on facts that occurred prior to the entry into force of the Act.³¹

A legislative rule similar to the French one was proposed in Belgium in January 2002 but that legislative intervention³² never became law; a new Act dealing with the reimbursement of damages as a result of health care, envisaged through the creation of a special fund, did become law on 31 March 2010,³³ but that Act does not regulate wrongful life claims. Meanwhile, the first instance court of Brussels has twice allowed a wrongful life claim under Belgian general tort law, quoting the French *Perruche* case,³⁴ and the Brussels' Court of Appeal has recently allowed a claim as well (without referring to comparative materials, however).³⁵ The defendant hospital has lodged an appeal at the Belgian Supreme Court but that appeal is still to be heard. Of course, this means that the position of the Belgian law in this regard is actually not entirely clear.

26 See *McKay v Essex Area Health Authority* [1982] All ER 771 (CA); J.L. Powell & R. Stewart (eds.), *Jackson & Powell on Professional Negligence*, 2002, pp. 12-302; Rogers 2006, supra note 25, p. 1040, and Murphy 2005, supra note 14, p. 217.

27 CdC Ass. Plén., 17 November 2000, *Dalloz*. 2001, 332, with comments by Mazeaud & Jourdain; J. Viney & P. Jourdain, *Traité de droit civil. Les conditions de la responsabilité*, 2006, no. 249-6.

28 See Loi no. 2002-303 du 04 mars 2002 relative aux droits des malades et à la qualité du système de santé. It states in Art. 1: '*Nul ne peut se prévaloir d'un préjudice du seul fait de sa naissance.*' For more information, see Viney & Jourdain 2006, supra note 27, no. 249-7.

29 See B. Pitcho, 'Wrongful birth and Wrongful life regarding French law', in S.C.J.J. Kortmann & B.C.J. Hamel (eds.), *Wrongful birth en Wrongful life*, 2004, p. 105.

30 See the case of *Maurice v France*: ECtHR 6 October 2005, 2006 *Nederlandse Jurisprudentie*, 464, with comments by P.J. Boon, and Viney & Jourdain 2006, supra note 27, no. 249-7, at p. 29.

31 See CdC 1re Civ., 24 January 2006, JCP 2006, II, 10062, and CdC 1re Civ., 8 July 2008, Arrêt n° 796. <http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/> (last visited 13 November 2011); Viney & Jourdain 2006, supra note 27, no. 249-7, p. 29; O. Moreteau, 'France', in H. Koziol & B.S. Steiniger, *European Tort Law 2006*, 2008, no. 12-19.

32 See D. Droshout, 'Belgium', in H. Koziol & B.S. Steiniger, *European Tort Law 2002*, 2003, no. 16 and D. Droshout, 'Belgium', in H. Koziol & B.S. Steiniger, *European Tort Law 2003*, 2004, no. 20. It read in Art. 5, § 2: '*Niemand kan schadevergoeding vorderen enkel wegens het feit dat hij geboren is.*'

33 See the '*Wet betreffende de vergoeding van schade als gevolg van gezondheidszorg*', dated 31 March 2010, B.S. 2 April 2010, no. 2010-1083, 19913.

34 See Rb. Brussel 7 June 2002, *TBBR* 2002, 483; Rb. Brussel 21 April 2004, J.T. 2004, 6150, 716 (*F./Cliniques Universitaires Saint-Luc*). See also E. de Kezel, 'Wrongful birth en wrongful life. Een stand van zaken' 2004 *Nieuw Juridisch Weekblad* 70, pp. 546-551; D. Droshout, 'Belgium', in H. Koziol & B.S. Steiniger, *European Tort Law 2002*, 2003, no. 53-55; Steiniger 2010, supra note 5, p. 151 (with further references).

35 Cour d'Appel Bruxelles, 21 September 2010, R.G. 2009/AR/1392 (*VU Brussel/Unal*).

The French legislator's decision is in line with what has basically been decided across continental Europe,³⁶ as we have seen, with Greece,³⁷ Italy,³⁸ Austria,³⁹ Poland⁴⁰ and Portugal⁴¹ being mentioned as other countries rejecting the claim. However, both Israel⁴² and the Netherlands (as mentioned above) are exceptions to this line of thought. The Spanish Supreme Court did allow an action in 2006⁴³ but has retreated from that position (or: the runaway decision, as Ruda calls it) later on.⁴⁴ Although one could thus of course still speak of a vast European majority declining this cause of action, this is not a position which has been reached unanimously or without changes along the way.

The fact that some systems have been 'swinging' back and forth (France, Spain) is highlighted by the acceptance of wrongful life cases in earlier days in Hungary,⁴⁵ but by now that legal system has changed its position once again, through a unifying resolution issued by its Supreme Court; now it is firmly established that wrongful life claims cannot be accepted under Hungarian law.⁴⁶

Canadian⁴⁷ and (most) American⁴⁸ courts have however turned down this cause of action. In the US, the states of California, New Jersey and Washington are the exceptions.⁴⁹ In Australia⁵⁰ the case of *Harriton v Stephens* was (again) about a doctor who had failed to diagnose the mother's rubella infection during pregnancy and who had failed to warn the mother of the risk of serious disability as a conse-

36 As to the European view, see B.A. Koch, 'Comparative overview', in H. Koziol & B.S. Steiniger (eds), *European tort law 2005*, 2006, no. 27. See also W. van Gerven et al., *Tort Law*, 2000, pp. 82-83, pp. 90 et seq., pp. 114 et seq. (Germany, England, France).

37 See K. Kerameus, 'Greece', in U. Magnus (ed.), *Unification of Tort Law: Damages*, 2001, p. 114, although with reservations and qualifications (ordinary living expenses not recoverable, additional expenses are recoverable). Cf. also Ruda 2010, supra note 5, p. 205 and p. 218, with reference to a Greek case.

38 See Herrmann & Kern 2010, supra note 3, pp. 266-268, referring to Corte di Cassazione 29 July 2004, no. 14488, (2005) *Danno e resp.* p. 379. See also Perry 2008, supra note 16, p. 343.

39 OGH 25 May 1999, JBl. 1999, 593. See K. Oliphant, 'Comparative Report', in H. Koziol & B.S. Steiniger, *European Tort Law 2008*, 2009, no. 19.

40 E. Baginska, 'Poland', in H. Koziol & B.S. Steiniger, *European Tort Law 2004*, 2005, no. 19 et seq. From E. Baginska, 'Poland', in H. Koziol & B.S. Steiniger, *European Tort Law 2006*, 2008, no. 52. I gather, however, that Polish law (at least the lower courts) would not principally exclude the claim. The same seems to follow from the account in E. Baginska, 'Poland', in H. Koziol & B.S. Steiniger, *European Tort Law 2005*, 2006, no. 83.

41 See A.G. Dias Perreira, 'Portugal', in H. Koziol & B.S. Steiniger, *European Tort Law 2002*, 2003, no. 21-28; B.A. Koch, 'Comparative Report', in H. Koziol & B.S. Steiniger, *European Tort Law 2002*, 2003, no. 45, and Herrmann & Kern 2010, supra note 3, pp. 264-266 (who note that the Portuguese court referred to US law).

42 See *Zeitoff v Katz* (1986) 40(ii) P.D. 85, and on that case D. Heyd, 'Are 'Wrongful life' claims philosophically valid', 1986 *Israel L. Rev.* 21, no. 3/4, p. 574; A. Shapira, 'Wrongful life lawsuits for faulty genetic counselling: should the impaired newborn be entitled to sue?', 1998 *J. of Med Ethics* 24, no. 6, pp. 369-375; Van Kooten & Wattendorff 2006, supra note 21, p. 47; Mukheibir 2005, supra note 21, p. 756; Crennan, J. in the Australian case of *Harriton v Stephens* [2006] HCA 15; (2006) 226 CLR 52; (2006) 226 ALR 391; (2006) 80 ALJR 791 (9 May 2006) and Van Beers 2009, supra note 21, p. 292 and p. 294, also mention this Israeli Supreme Court majority decision (dated 18 February 1986), allowing a wrongful life claim.

43 See STS 18-5-2006, RJ 2006, 4724, as noted and commented upon by A. Ruda, 'Spain', in H. Koziol & B.S. Steiniger, *European Tort Law 2006*, 2008, no. 31-36 and by K. Oliphant, 'Comparative Report', in H. Koziol & B.S. Steiniger, *European Tort Law 2006*, 2008, no. 12, and K. Oliphant, 'Comparative Report', in H. Koziol & B.S. Steiniger, *European Tort Law 2008*, 2009, no. 19.

44 See Ruda 2010, supra note 5, pp. 206, 225 and most notably p. 238, referring to more recent case law (STS 23 November 2007, RJ 2008, 24; STS 6 July 2007, RJ 2007, 3658; STS 24 October 2008, RJ 2008, 5793).

45 I have reached this rather loose conclusion from A. Menyhard, 'Hungary', in H. Koziol & B.S. Steiniger, *European Tort Law 2006*, 2008, no. 26 and 34, and from more convincing remarks about a rather inadequately reasoned Hungarian case mentioned by A. Menyhard, 'Hungary', in H. Koziol & B.S. Steiniger, *European Tort Law 2005*, 2006, no. 10.

46 See the Unificatory Resolution of the Hungarian Supreme Court no. 1/2008 (12 March 2008), Magyar Közlöny no. 2008/50 (26 March 2008), commented upon by A. Menyhard, 'Hungary', in H. Koziol & B.S. Steiniger, *European Tort Law 2008*, 2009, no. 11-15. This 'move' might be explained by the fact that it is considered to be important to the Hungarian legal system that it is seen as being up to date and up to speed in comparison with other EU legal systems and thus seen as part of the democratic community in the world. On that phenomenon, see C. Dupré, *Importing the Law in Post-Communist Transitions*, 2003. Cf. also B. Flanagan & S. Ahern, 'Judicial Decision-Making and Transnational Law: A Survey of Common Law Supreme Court Judges', 2011 *ICLQ*, no. 1, pp. 1-28.

47 See the Manitoba Court of Appeal decision in the case of *Lacroix (Litigation Guardian of) v Dominique* (2000), 202 D.L.R. (4th) 121, at para. 31, considered in *Bovingdon v Hergott*, 2008 ONCA 2, a Court of Appeal of Ontario decision dated 7 January 2008. See also Perry 2008, supra note 16, p. 339.

48 See W. Page Keeton (ed.), *Prosser and Keeton on the Law of Torts*, 2002, pp. 370-371; Mukheibir 2005, supra note 21, pp. 756-757; Perry 2008, supra note 16, pp. 336-338. The account of American law in *Stewart v Botha*, supra note 1, para. 14, is not completely accurate, so it would seem. In the Australian case of *Harriton v Stephens*, supra note 42, at no. 232-234, the state of the law in the US (mostly denying claims) is also described.

49 Cf. Perry 2008, supra note 16, pp. 336-338, who also mentions that the legislature in Maine has accepted this type of claim, and that the law in Connecticut is still undecided; Van Beers 2009, supra note 21, p. 292.

50 See *Harriton v Stephens*, supra note 42. See however also the eloquent (and to my mind convincing) dissenting opinion by Kirby, J. On the same day, two further cases were decided on basically the same grounds and reasons, see *Waller v James* and *Waller v Hoolahan* [2006] HCA 16; (2006) 226 CLR 136; (2006) 226 ALR 457; (2006) 80 ALJR 846. The position of the law before this decision is described in P. Stewart & A. Stuhmcke, *Australian Principles of Tort Law*, 2005, pp. 275-279.

quence of that infection. The High Court of Australia decided by majority that the wrongful life claim should be denied. The same fate befell a claim lodged in Singapore⁵¹ and a claim filed in Korea.⁵²

In *Friedman v Glicksman*, Goldblatt, J. at the Witwatersrand Local Division upheld a wrongful birth claim under South African law, in line with the state of the law mentioned earlier, but he denied the admissibility of the wrongful life claim initiated by the mother in that case on behalf of her child.⁵³ The same solution, a denial of the wrongful life claim on public policy grounds, was handed down by the Supreme Court of Appeal in *Stewart v Botha*.⁵⁴

The 'Principles of European Tort Law' as developed by the 'Spier/Koziol Group' are silent on both these issues; no 'Principle' has been designed for either wrongful birth or life cases. But, because a claim for the reimbursement of the cost of rearing a child is a claim for pure economic loss damages, in principle what applies to purely economic loss in general would also apply to the wrongful birth and life claims, and thus (at least to some limited extent) compensation would then be possible along those lines.

The 'Draft Common Frame of Reference' introduced by the 'Study Group on a European Civil Code' and the 'Acquis Group' is equally silent on both the wrongful life and wrongful birth issues. There are no specific provisions on this. Again, the pure economic loss part of a wrongful birth and life claim might be compensated, however, according to the rules that have been developed for such cases.⁵⁵ Of course this relative silence might reinforce the working hypothesis that comparative law arguments do not provide (solid and universally acclaimed) answers to legal questions in hard cases.⁵⁶

3. The main problems in wrongful life cases

3.1. Introduction

Now that we have been given a survey of where the law stands in several parts of the globe, and more importantly in order to be able to ascertain properly what sort of influence comparative law reasoning might have had in the jurisdictions under review, it seems wise to delve somewhat deeper into the heart of the substantive matter and to find some arguments and answers, albeit only tentatively, to the key questions raised above.⁵⁷

I will first (Section 3.2) deal with the *legal questions* surrounding wrongful life cases. I will sketch these briefly, together with (some of) the possible answers thereto. In doing so, attention is given especially

51 See *JU v See Tho Kai Yin* [2005] 4 SLR 96, as mentioned in *Harriton v Stephens*, supra note 42, by Kirby in his dissenting opinion. Cf. also Bakels 2009, supra note 21, p. 441.

52 See Y.-R. Um, 'A Critique of a "Wrongful Life" Lawsuit in Korea', 2000 *Nursing Ethics* 7, no. 3, pp. 252-253 (see also <<http://nej.sagepub.com/content/7/3/250.full.pdf+html>> (last visited: 13 November 2011), referring to a decision (not accessible to the present author) of the Supreme Court of Korea [1999.6.11. 98Da22857] 1999.

53 See *Friedman v Glicksman*, supra note 1. On that case, see M. Blackbeard, 'Actions for wrongful birth and wrongful life', 1996 *THRHR* 711; F. Pearson, 'Liability for so-called wrongful pregnancy, wrongful birth and wrongful life', 1997 *SALJ* 114, no. 1, pp. 105 et seq.; Mukheibir 2005, supra note 21, pp. 759 et seq.; Neethling et al. 2006, supra note 14, p. 255. As to the position of the law in South Africa (also with regard to wrongful birth) before the decisions referred to in this paragraph were handed down, see N.J.B. Claassen & T. Verschoor, *Medical Negligence in South Africa*, 1992, pp. 79 et seq.

54 *Stewart v Botha*, supra note 1. This contribution is in no way intended to be an overall comment on the *Stewart v Botha* case, if only because I would not be able to do so due to a lack of knowledge of South African delict law and constitutional law (Art. 11 of the South African Constitution is for instance considered in this case).

55 See in general the following two publications: European Group on Tort Law, *Principles of European Tort Law. Text and Comments*, 2005, and Study Group on a European Civil Code/Research Group on EC Private Law (Acquis Group), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Interim Outline Edition*, 2008.

56 Although one could say that this reasoning does provide some sort of preliminary answer, this rather 'indirect' way of reasoning by both harmonization groups shows, I think, that these European harmonization projects seem to lean towards 'silence' if the really 'hard cases' come up, if cases on which systems disagree (both as to their outcome and as to the reasoning) are to be dealt with. The 'designers' of these harmonization efforts need to do something here, in my view. They will have to reach some kind of decision in these sorts of cases, because their silence does not help the harmonization effort they so vigorously aim towards. Of course, not doing anything will also result in the principles being already outdated and incomplete.

57 This contribution built upon an earlier analysis of Dutch and South African law, as mentioned above, which explains the preliminary focus on those two legal systems in this section (and this article in general). Since the issues raised and the arguments used as regards wrongful life claims are basically the same everywhere, I decided not to overburden the footnotes by also including references to all or some of the other legal systems under review hereafter (in Section 4). In light of the aim of this article (finding where the use of comparative law has been an inspiration) and the function of this section in relation to that goal, including additional references would not add a great deal of value to the argument made.

to the way the Dutch Supreme Court handled these issues in its *Kelly* decision.⁵⁸ I have chosen this case as a starting point because it is the one case I know best and because it actually accepts the cause of action. In the following section (3.3) I will sketch my own reasoning to some of the moral issues raised.

3.2. The most pivotal legal questions and arguments used

For wrongful life actions, one of the biggest reasons for controversy⁵⁹ is raised by the question of what is actually the *cause* of the suffering and disabilities of the child in question. At first glance, the answer is obvious: the genetic defect, the ‘flaw’ in the development of the child due to a bad chromosome is the cause. Of course that is true, no doubt about that, but at the same time Brian’s or Kelly’s suffering has also been caused by the doctor’s or obstetrician’s fault. Without that fault being made, the genetic information sought would have been acquired and that information would then have led, so we assume for present purposes, but this has to be proven as well,⁶⁰ to the mother having an abortion instead of giving birth to the child. In that event, there would not have been a child to feed and clothe and thus there would have been no cost of maintenance. The *conditio sine qua non* test as regards factual causation (causation by way of non-feasance) is then fulfilled by the doctor’s fault as well.⁶¹

Another major topic of discussion is the issue of *damages*. Can we say there is any damage in a wrongful life case, and if so, how can we assess that? Is the usual method of comparison to assess damages workable? What should then be compared with what? The ‘non-existence’ or ‘not being’ of a child cannot be materialized in monetary terms, so no true comparison of ‘non-existence’, on the one hand, and ‘life with certain disabilities’, on the other, is possible.⁶² However, according to the Dutch Supreme Court this reasoning is flawed.⁶³ One can indeed and must compare the cost of raising the child at this point in time, given the fact that the child has been born as it is, with the hypothetical situation that would have ensued if no fault had been committed. That would of course have been a situation in which these costs would not have been made. So a comparison is possible here.⁶⁴ If need be, the exact amount of damages can be determined by taking an ‘educated guess’, which of course happens more often and is usually allowed (see for instance Article 6:97 Dutch Civil Code for the Netherlands).⁶⁵ Thus, this ‘technical-judicial reason’ is not accepted.⁶⁶

A further pivotal issue concerns the question whether allowing wrongful life claims would entail that *claims of children* born disabled issued *against their mother* would also become possible. Instead of suing the doctor for being born the child would then sue its mother for not having an abortion, if she decided not to undergo one while being aware of the genetic defect before giving birth. As elsewhere,

58 On the substantive arguments used in the debate, see especially the thorough analyses made by (several of the contributions in) Buijsen 2006, supra note 21; Herrmann & Kern 2010, supra note 3; Steiniger 2010, supra note 5; Ruda 2010, supra note 5. Mukheibir 2005, supra note 21, p. 761, notes that the Dutch Supreme Court ‘circumvented’ the potential ethical and legal criticisms. I would say that the Court chose to deal with the matter in a rather ‘technical’ manner, cf. N. Huls, ‘CO3/206 HR is gesloten, het debat gaat door’, in Buijsen 2006, supra note 21, pp. 79 et seq., but it did so without neglecting the moral issues (cf. Ruda 2010, supra note 5, p. 240) raised. According to Ruda 2010, supra note 5, p. 240, it did so with ‘proper argumentation’.

59 The public policy argument (e.g. *McKay v Essex Area Health Authority* [1982] Q.B. 1166, at 1184; [1982] All ER 771 (CA); *Gleitman v Cosgrove* (1967) 49 N.J. 22; 227 A.2d 689; see also Huls 2006, supra note 58) is not dealt with separately here because this is usually no more than a convenient summary of other reasons and arguments without any further elaboration (except that public policy ‘requires’ the outcome reached). For a rebuttal of the public policy argument, see also *Curlender v Bio-Science Laboratories* (1980) 106 Cal. App. 3d 811; 165 Cal. Rptr. 477.

60 Cf. Pearson 1997, supra note 53, p. 107.

61 See Bakels 2009, supra note 21, p. 432. Again, a complete listing of each court and author that has dealt with this issue would be next to impossible, but see Viney & Jourdain 2006, supra note 27, no. 249-6 at p. 25. Note also that Louw, J. used this causation requirement to turn down the possibility of a South African wrongful life suit (at first instance) in *Stewart v Botha*, supra note 1, where he was otherwise much more sympathetic to allowing the action. Cf. also para. 16 of Snyders’ judgment in *Stewart v Botha*, supra note 1.

62 For most courts denying the possibilities of a claim, this is a very important argument, cf. *Stewart v Botha*, supra note 1, para. 17; *Friedman v Glicksman*, supra note 1, at 1143 (B-C), and Pearson 1997, supra note 53, p. 105. See also *Gleitman v Cosgrove*, supra note 59, and *McKay v Essex Area Health Authority* [1982] Q.B. 1166, at 1181; [1982] All ER 771 (CA). Van Beers 2009, supra note 21, p. 320 labels this as the most important argument against allowing a claim.

63 See *Kelly*, supra note 2, at para. 4.15. For Louw, J. the issue was not so much about the comparison being impossible but about the question whether there was damage at all, see *Stewart v Botha*, supra note 1.

64 See also Viney & Jourdain 2006, supra note 27, no. 249-6, at p. 25; Hartlief 2005, supra note 21, p. 243; Pearson 1997, supra note 53, p. 106, and Van Kooten & Wattendorff 2006, supra note 21, p. 50 (who rightly point to the fact that the comparison to be made in assessing damages is *always* related to a hypothetical situation).

65 Cf. Mukheibir 2005, supra note 21, p. 758.

66 Van Beers 2009, supra note 21, p. 321, quoting *procureur-generaal Hartkamp* from his conclusion to the *Hoge Raad*, no. 53.

this argument has been forcefully rejected by the Dutch Supreme Court.⁶⁷ The court stated, basically, that abortion is a right for the mother if certain requirements posed by law are fulfilled, but it is not an obligation for her and thus it cannot be a 'right' for the child on which a claim can be grounded. So, the 'omission' to abort will never amount to negligence because there is no duty towards the child to positively act in that way. Snyders, J. reasoned along the same lines in *Stewart v Botha*.⁶⁸

The following argument is also raised in the discussion. Obstetricians, doctors and hospitals owe a duty of care towards the foetus, and not only the mother (and father) if one is to accept a wrongful life claim.⁶⁹ This is then the duty to carry out prenatal tests if needed according to medical opinion and to do so correctly according to medical standards. That duty is of course breached if such tests are not carried out (properly) while they should have been carried out (better).

The concern then becomes whether this will lead to a form of *defensive medicine*, in this case: carrying out too many tests just to be sure and of advising abortions on too many occasions for the same reason. The difficulty with this argument is that these kinds of fears are never actually empirically proven or refuted so it is difficult to pass judgment thereon. I do not attach too much weight to it, because for any form of liability at least a fault of some sort (or another justification for strict liability) is needed. That requirement means that as long as people act and behave as reasonable persons, there is nothing to fear in this respect because there will be no liability.⁷⁰

A somewhat less important but still interesting issue is whether a wrongful life claim is *still needed next to a wrongful birth* claim of the parents being accepted (as it is in most jurisdictions). The issue was raised in the Dutch *Kelly* case and the court reasoned that the child does indeed need an independent claim because otherwise it becomes too dependent on the parents (who might not always be around, who might become insolvent or who have no legal duty to care for the child after its 21st birthday, which means that they would no longer have a claim for costs after their child reaches that age).⁷¹

Related to this is another question: *can one accept wrongful birth claims without also accepting wrongful life claims* as well? Of course this has indeed happened, so the easy answer is 'Yes, apparently'. But taking a closer look one can truly ask: if you give the parents a claim in case of a handicapped child being born how can you then not give the child itself also a claim? Is it not in fact the child that in the end suffers most? Would it then not be strange to grant the parents a claim while not accepting a claim by the child? The same argument is basically put forward by Louw, J. in his first instance decision in *Stewart v Botha*. He asks, principally: how can it be that the sanctity of life argument does not preclude a wrongful birth claim but would preclude a wrongful life claim?⁷² Of course, by posing the question in such a manner, we are already entering the realm of morality.

3.3 Two moral issues

Of course, I will not be able to solve, once and for all, the moral questions raised before, if only because 'my moral judgment' is not the same as that of someone else. Be that as it may, the most important moral issue in wrongful life cases – i.e. is handicapped life of less value? – can be answered as far as I am concerned by saying: of course not, and the fact that damages are awarded does not imply this either. Why not? Because what allowing a claim for the child will do is to give Brian and Kelly a (better) chance of building a life for themselves which is as good as possible, given the condition they have been born with.

67 See *Kelly*, supra note 2 at para. 4.13. It was accepted, however, in *McKay v Essex Area Health Authority* [1982] Q.B. 1166, per Stephenson L.J. at 1181, although it was rejected by Griffiths L.J. at 1192.

68 See *Stewart v Botha*, supra note 1, para. 19. See also Ruda 2010, supra note 5, pp. 231-232; Viney & Jourdain 2006, supra note 27, no. 249-6, at p. 26. However, the issue was raised and taken seriously in *Friedman v Glicksman*, supra note 1, at 1142 but was waived away in *Stewart v Botha*, supra note 1, at para. 23.

69 E.g. *McKay v Essex Area Health Authority* [1982] Q.B. 1166, at 1180; [1982] All ER 771 (CA).

70 In the *Kelly* case, supra note 2, at para. 4.17, the Dutch Supreme Court reasoned in a similar vein. In *Stewart v Botha*, supra note 1, para. 20, J. Snyders seems to agree. See also Cleaver 1991, supra note 13, p. 66, and on the validity of this sort of reasoning in a somewhat different context I. Giesen, 'Regulating Regulators through Liability: the Case for Applying Normal Tort Rules on Supervisors', 2006 *Utrecht Law Review* 2, no. 1, pp. 22-24, as well as (but much more in favour of allowing empirical arguments to be used) J. Stapleton, 'Benefits of Comparative Tort Reasoning: Lost in Translation', 2007 *Journal of Tort Law* 1, no. 3, Art. 6, pp. 10-12 (also published in M. Andenas & D. Fairgrieve, *Tom Bingham and the Transformation of the Law. A Liber Amicorum*, 2009, pp. 773 et seq.).

71 See *Kelly*, supra note 2, at para. 4.20.

72 See *Stewart v Botha*, supra note 1, at para. 20. In the same vein also Viney & Jourdain 2006, supra note 27, no. 249-6 at pp. 25-26.

Allowing a claim will help these disabled children to grow up as comfortably as possible because certain needs can be fulfilled.⁷³

The other moral issue raised before, i.e. that an abortion might become a duty for the mother, has been turned down so many times (and again by the Dutch Supreme Court, see above) that I would not consider this to be a real issue any longer. What is important, though, is that this goes to show that even moral issues like this *can* be resolved in a like manner across the world (even though the issue as such is not dealt with similarly everywhere⁷⁴).

4. Comparative inspiration (?) for the outcomes reached and the arguments used

4.1. Introduction

The key question for this paper is of course to what extent the answers given and the outcomes reached in the different legal systems are based on truly comparative reasoning and comparative arguments. Hereafter, I will analyze more closely – mainly by way of trying to trace the relevant source for a specific argument – the most important cases⁷⁵ handed down in several of the jurisdictions mentioned above. In doing so I will focus (a) on the actual arguments used in those cases for either allowing or rejecting a claim, as well as (b) on the source(s) underlying these arguments.

The main question in that respect will be: was the particular court under scrutiny influenced in any discernable way by information drawn from comparative law?

4.2. The Netherlands

The Dutch Supreme Court did not of itself use any comparative source when deciding on and reasoning the *Kelly* case.⁷⁶ This, as such, was not a great surprise since the court never cites doctrinal works (only previous case law and legislative history) and hardly ever uses explicit references to what comparative insights bring to the floor,⁷⁷ except when the Court has to adjudicate on a matter of unified private law such as the provision of the CMR Treaty.⁷⁸

Comparative influences are thus, at least in the majority of (non-unified private law) cases, received implicitly, at most, and the way this works is that the court will take notice of and thus possibly be influenced by the preliminary conclusion (an advice) written for the court, in each case it decides, by the ‘*procureur-generaal*’ (P-G) or one of his subsidiaries (an ‘*advocaat-generaal*’, A-G). These conclusions can contain comparative remarks, sources, arguments, etc., and usually do contain such information if it con-

73 See *Kelly*, supra note 2, at para. 4.15; Van Dam 2006, supra note 8, p. 165, and critically Loth 2007, supra note 19, pp. 28-30. Cf. also Bakels 2009, supra note 21, pp. 432-433. If we would only compensate for the extra costs related to the handicap, which is also a solution that has been defended and used (cf. J.G. Fleming, *The Law of Torts*, 1998, p. 184; the *Perruche*-case, CdC Ass. Plén., 17 November 2000, *Dalloz*. 2001, 332, with comments by Mazeaud & Jourdain; Van Dam 2006, supra note 8, p. 158 and p. 165), but which was turned down in the *Kelly* case (at paras. 4.5 and 4.6, the parents’ claim), and rightly so, I think, the perceived problem of not being able to determine the amount of damages is gone because we can compare the cost of raising a healthy child with those of a disabled child. However, here a causation problem arises because allowing the claim presupposes that there would have been an abortion and if that is the case, the comparison mentioned cannot be made because there would not have been any child at all.

74 On this argument e.g. Herrmann & Kern 2010, supra note 3, p. 273. The English case of *McKay v Essex Area Health Authority* [1982] Q.B. 1166; [1982] All ER 771 (CA) seems to be an exception.

75 It was impossible to deal with all the wrongful life cases from all jurisdictions, so the decision was made to analyze only the most important one(s) per legal system, i.e. the cases in which the claim was either denied or accepted for a certain legal system.

76 See *Kelly*, supra note 2.

77 The most notable exceptions are probably the case in which compensation for non-pecuniary loss was accepted (HR 21 May 1943, *Nederlandse Jurisprudentie* 1943, 455 (*Van Kreuningen/Bessem*) and the case in which the Supreme Court allowed lower courts to also take into account the awards of compensation offered for non-pecuniary losses in other countries when deciding on the quantum of such damages, even though these figures cannot be decisive (as the court immediately adds), see HR 17 November 2001, *Nederlandse Jurisprudentie* 2001, 215 (*Druiff/B.C.E. Bouw*). See also Asser-Vranken, *Algemeen Deel*** 1995, no. 201; the case note by A.R. Bloembergen in *Nederlandse Jurisprudentie* 2000, 431, concerning a case on prescription which the court decided while taking into account legal opinions elsewhere (which was not further specified); E.H. Hondius, ‘Rechtsvergelijking door de rechter’, in I. Boone et al. (eds.), *Dare la Luce. Liber Amicorum Hubert Bocken*, 2009, p. 492.

78 See for example HR 18 December 2009, *Nederlandse Jurisprudentie* 2010, 481 (*Fortis Corporate Insurance/Uni-Data Logistics*), dealing with Art. 32 CMR Treaty in which the *Hoge Raad* used the English and French texts of the treaty and cited German and Austrian case law. For a more general view on this topic of using comparative law when interpreting international treaties, see the most recent biannual report from the Dutch Supreme Court: *Hoge Raad der Nederlanden, Verslag over 2009-2010*, 2011, p. 17-18.

cerns a novel and important topic.⁷⁹ That the Supreme Court, or at least its private law division, is in fact influenced by these conclusions has been admitted by the court itself.⁸⁰ The court has also admitted to sometimes carrying out its own supplementary research into foreign sources, assisted by the law clerks.⁸¹

In his advice concerning the wrongful life case, P-G Hartkamp supplied a thorough comparative report on the matter to the court,⁸² dealing with German law, English law, French law, as well as, less extensively, Belgian, Israeli and US law. The court took this information into account – no doubt, considering what was said above – when deciding the matter. What argument, if any, or what rebuttal of whichever counter-argument was in the end decisive for the court, cannot be ascertained, however, because it is not made explicit. The court itself, as stated, did not compare or use any foreign legal systems and the deciding judges may not speak about their non-public deliberations in chambers when taking the decision.

One feature remains in this respect. The main argument, in my view,⁸³ for the Dutch court in allowing the claim was that in the court's view a handicapped life is of no less value than a 'regular' life; even with a handicap a dignified and happy life is possible. Thus, non-existence is not better than a handicapped existence but that does not diminish the fact that a handicapped life is difficult for people to bear. An award in damages can help in this respect and support and improve one's life and living conditions. Since this reasoning was rather novel and not yet widely followed, it would of course have been hard to use comparative insights.

4.3. South Africa

In the South African wrongful life decision in *Stewart v Botha*⁸⁴ Snyders, J., used comparative materials. References can be found to the Dutch *Kelly* case, and to England and Wales, Canada, Australia, Israel, France, Germany (only in a footnote, however) and the US (paras. 12-14). The main argument against allowing a claim stems from what is positioned from the outset by Snyders, speaking for the unanimous court, as the 'deeply existential question' that is 'at the core' of these cases, i.e. whether it was preferable for the child not to have been born at all (see para. 11). This same point is raised again in no. 16, at the starting point of the judge's enquiry after having stated the law elsewhere, in a quotation from an American case (*Speck v Finegold*⁸⁵). Then this starting point is tied to the well known argument that damages cannot be assessed unless, according to Snyders, it is first decided that non-existence is preferable over life. After considering some of the other arguments usually raised, Snyders again returns to the same point in para. 28 when concluding the decision. What was the decisive argument here is thus rather obvious and support for building the argument was found in the US (but could certainly have been found elsewhere as well). But that is not the end of what we can learn from this case.

As to the influence comparative law can have – or rather: sometimes will not be allowed to have – it is also very interesting to read what Snyders, J., said towards the end of her judgment:⁸⁶

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

79 The parties to the proceedings are allowed to react to the conclusion of the P-G or A-G, also concerning the comparative observations in those conclusions, see HR 27 November 2009, *Rechtspraak van de Week* 2009, 1403 (VEB/World Online).

80 In the biannual report Hoge Raad der Nederlanden, *Verslag 2007 en 2008*, 2009, p. 55 states: '*Aldus berusten uitspraken van de Hoge Raad regelmatig op rechtsvergelijkend onderzoek dat in de conclusies van het parket is neergelegd.*' See also the paper by Elaine Mak in this volume (E. Mak, 'Reference to Foreign Law in the Supreme Courts of Britain and the Netherlands: Explaining the Development of Judicial Practices', 2012 *Utrecht Law Review* 8, no. 2, pp. 20-34).

81 See Hoge Raad der Nederlanden, *Verslag 2007 en 2008*, 2009, p. 56, citing two cases in which it has done so. To be sure: those cases were about the interpretation of certain rules in international treaties.

82 See his conclusion preceding *Kelly*, supra note 2, at no. 29 et seq.

83 I concur in this respect with Vranken, note under the *Kelly* case, supra note 2, who points to the end of para. 4.15 of the Court's reasoning.

84 *Stewart v Botha*, supra note 1.

85 *Speck v Finegold* (1979) 268 Pa Super. 342; 408 A.2d 496.

86 See *Stewart v Botha*, supra note 1, para. 27.

life and the dignity of the child, but involves an arbitrary, subjective preference for some policy considerations and the denial of others.’

This is a sharp conviction of judicial practice elsewhere, no more and no less. If one is to allow a claim like this, says the judge, one has not resolved a dispute but just favoured a particular policy-orientated answer that does not strike the right balance. In my opinion this statement contains an unwarranted amount of dismay for anyone disagreeing with the view defended by this particular court. It presumes, unjustly as far as I am concerned, that there is only one right answer in cases such as these.⁸⁷

What is more important for present purposes, however, is that if we were to consider this to be the way to deal with (clearly unwanted) solutions and arguments from abroad, the conclusion could only be that comparative law can only support a decision taken along the same lines based on other grounds. Only reassuring comparative insights could then ever be of any influence (but certainly not needed, nor decisive for the decision would be prompted by other arguments anyway). Although this is probably not a commonly held belief as to the value of comparing legal systems (and accepting differences) it does raise the question of whether comparative arguments are really taken seriously.

What is important to note is that the words as quoted are misleading. First, because in the Netherlands (to which Snyders, J., of course refers) the issue as such as well as the ‘impossible comparison’ mentioned has been resolved by allowing the claim; the debate is basically over.⁸⁸ And second because the Dutch Supreme Court certainly did not just favour some selected policy considerations but indeed tried to do justice to the debate by extensively dealing with all the (moral) arguments raised.⁸⁹ And the judges did not disregard the sanctity of human life but in fact addressed that issue explicitly.⁹⁰ Of course, in the end there was a subjective preference for some considerations which led to the decision being taken as it was. But Snyders herself does exactly what she accuses her ‘opponents’ of, i.e. subjectively preferring some policies above others. She apparently just values other considerations more highly. As far as I am concerned she may do so but she should then also allow other courts to decide matters in their own way.

But all this – troubling as it may be – is actually of less concern to the topic and aim of this paper. What is important here, however, is that this line of reasoning shows that the debate suddenly moves away from the arguments into plain and simple rhetoric. The reason for that shift is probably that the arguments as such in the end do not decide these hard cases; it is the policy decisions based on culturally determined basic notions underlying a legal system that do so (see Section 5 below). Such as: more or less progressive ways of dealing with life and death issues, like abortion; the general scope of protection of tort law and the law of damages; etc.⁹¹ The statement quoted clearly points to a political decision being taken, and not to one based on comparative law notions, weighing the pros and cons of all the arguments. In fact, the weight of the arguments is without relevance because the predominant political view will win anyway. Even more so, because Snyder holds a different political view on this matter than the Dutch Supreme Court, the Justices in the Dutch court could never have balanced the policy considerations correctly according to her (South African) standards and still have reached their own (Dutch) solution.

This conclusion is supported, I feel, by the following statement somewhat later on in the decision, a statement referring to what seems to be, as we saw earlier, Snyders’ main argument:

87 To be sure, even within any given legal system the specific weight which a specific argument receives can vary widely between and among legal authors, judges, legislators and the general population, cf. Vranken in his note under the *Kelly* case (supra note 2), no. 8: not one argument is strong enough to place the others in its shadow. Comparable remarks can be found, surprisingly, in Snyders’ South African judgment at para. 15. According to Perry 2008, supra note 16, we are dealing with equally legitimate subjective beliefs rather than objective truths.

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

89 The court was backed up by a very extensive and comparative preliminary advice to the court written by *procureur-generaal* Arthur Hartkamp, as he then was. See the publication of the *Kelly* case in the *Nederlandse Jurisprudentie*, mentioned before (note 66).

90 Cf. Hartlief 2005, supra note 21, p. 247. Of course, I am inclined to say, those parts of the judgment being criticised, see Loth 2007, supra note 19, pp. 28-30; Hartlief 2005, supra note 21, p. 248.

91 The statement by Van Dam 2006, supra note 8, p. 160, that whenever the House of Lords uses public policy arguments, they dismiss a claim, would support the foregoing since the basic notion underlying English tort law is to extend tort law only incrementally, if at all, because doing otherwise would impair the notion of individual freedom too much. There are, however, also cases in which public policy has been used when upholding a claim (e.g. *White v Jones* [1995] 1 All ER 691).

'I have pointed out that from whatever perspective one views the matter the essential question that a court will be called upon to answer (...) is whether the particular child should have been born at all. That is a question that goes so deeply to the heart of what it is to be human that it should not even be asked of the law.'⁹²

What is undoubtedly clear from this quotation is that the validity and strength of the legal arguments used in the debate is no longer a real issue. They have been brushed out of the political arena. Instead, an appeal is made to notions of morality.

4.4. Australia

The High Court of Australia decided by majority that a wrongful life claim should be denied by holding, amongst other reasons, in *Harriton v Stephens*:

'A duty of care cannot be clearly stated in circumstances where the appellant can never prove (and the trier of fact can never apprehend) the actual damage claimed, the essential ingredient in the tort of negligence.'⁹³

The majority relied (in part) on, or at least used or mentioned precedents from England and Wales, the US, Canada, Israel, Germany, France and the Netherlands.

In the reasoning of Crennan, J., for the 6 to 1 majority, specific mention is made of England and California with respect to the argument that allowing a claim would or might lead to the risk of a parent being sued for not having an abortion. This argument is, however, presented as a 'further consideration' and thus does not seem to have been of vital importance.⁹⁴ Further explicit references to foreign sources are almost entirely lacking in the judgment,⁹⁵ except for when it comes to the issue of assessing damages which is troubled by the fact that the necessary comparison between life with a handicap and not living at all cannot be made. The Israeli solution is here brushed off the table, while the American solution to set the issue aside on grounds of policy in fact admits, in Crennan's view, her point that a comparison is not possible.

Kirby, J. has supplied the legal world with a very forceful dissenting opinion in *Harriton v Stephens* in which he concluded:⁹⁶

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

In reaching that decision he (also) made use of authorities from the England and Wales, Canada, Singapore and the US.

92 See Snyders, J. in *Stewart v Botha*, supra note 1, at para. 28. I wholeheartedly disagree with this statement. Snyders denies, in my view, the very essence of the law. Law, and tort law in particular, is about people, their choices, human conduct and about regulating that human conduct. This is by no means different if that involves solving difficult problems. Denying an answer because the law should not deal with certain questions equals a denial of doing justice once the question as such has been raised. From the moment a certain issue, however difficult it may be, has been brought up, the law must step up to the plate and do what it does best, i.e. decide highly controversial societal issues through the courts. It must do so without exception and therefore also in wrongful life claims in order to keep the members of society from deciding the issue themselves by taking the law into their own hands. Furthermore, deciding, as Snyders did in the *Stewart* case, *not to decide* on a certain topic and *not to regulate* a certain issue (by denying a claim) is also a form of regulation because without any recognition of the claim, there is no claim in law and thus no right to damages for the damaged party. Not impairing individual freedom might have then been the regulators' goal in such an instance.

93 See the leading opinion by Crennan, J., in *Harriton v Stephens*, supra note 42, at para. 276.

94 See Crennan in *Harriton v Stephens*, supra note 42, at para. 250.

95 If we neglect the references to Aristotelian notions of corrective and distributive justice. Aristotle is of course a 'world citizen' in every sense.

96 See Kirby, J. in *Harriton v Stephens*, supra note 42, at para. 153.

The first thing to notice then is that some legal systems are mentioned by both opponents, while the judges opposing the action do mention countries that would allow the claim, while the judge opposing the majority ruling cites cases that would deny the claim (and not mentioned by his adversary). Secondly, it is interesting to see that Crennan, J. uses some of the *pro* wrongful life cases to illustrate the point that the assessment of damages is impossible in these cases and that if this is neglected by a court and a claim is accepted anyhow, such a decision rests on policy reasons.⁹⁷ Why that would be such an awful thing to do, and thus an argument against the action, is an entirely different matter, but one that is not further explained. On the contrary, this is presented as self-explicatory. I fail to see the apparently obvious here, but that may be my apparently mistaken belief that tort law is indeed also about policy issues.

4.5. United States of America

The US legal system of course consists of a multiple of private law systems on the State and Federal levels. Therefore, not all cases from all the different states accepting or denying the wrongful life claim can be dealt with here; instead, I decided to analyze only six rather important cases (see below), cases in which the claim was (by means of an exception) accepted and cases that are acknowledged as important precedents when denying the cause of action. In general one can safely say that in the US claims for wrongful life are denied by the courts and/or state legislators. This is the case in a vast majority of states, although state courts change their opinions once in a while.⁹⁸

In what is probably the most famous wrongful life case in the US, *Gleitman v Cosgrove*,⁹⁹ the Supreme Court of New Jersey turned down the cause of action, resulting in a denial of a wrongful life claim. In that 1967 case, there is one interesting reference, namely to an article in the *Israel Law Review*,¹⁰⁰ but only for a quote that reaffirms what the court had already stated. No further comparative inspiration is found in that case, which is not surprising, of course, since it is a very early case. In its later (at least partial) reversal of this decision in *Procanik v Cillo*,¹⁰¹ the New Jersey Supreme Court, allowing the recovery of special damages, mentions several cases but only cases from other American jurisdictions.¹⁰² The same applies to the Pennsylvanian case of *Speck v Finegold*¹⁰³ which only mentions, again, the same Israeli law journal article.

Exceptional damage awards for special damages through wrongful life claims are, next to New Jersey, also accepted in California and Washington. In the Californian cases of *Curlender v Bio-Science Laboratories* and *Turpin v Sortini* no mention is made of foreign law.¹⁰⁴ The Washington case of *Harbeson v Parke-Davis* follows the *Turpin* case; it does not cite any foreign materials either.¹⁰⁵

4.6. France

The French *Cour de cassation* only hands down decisions that are characterized by their lack of detailed explication for the outcome reached. The legal rule at issue is exposed, this is related to the facts mentioned and then the outcome is given, but nothing more. The *Perruche* case¹⁰⁶ thus does not give us any clue as to any possible comparative influence; nor does the preliminary report (by Sargos). Since the French legal culture is still, in general, rather inward looking, it would be safe to assume that there has not been any real foreign influence on this case and the topic as such.

97 See Crennan in *Harriton v Stephens*, supra note 42, paras. 264-266.

98 See the recent overview by Ruda 2010, supra note 5, p. 206, and Perry 2008, supra note 16, pp. 336-337.

99 *Gleitman v Cosgrove*, supra note 59.

100 The court refers to G. Tedeschi, 'On Tort Liability for Wrongful Life', 1966 *Israel L. Rev.* 513, 1, which is an article written from a comparative viewpoint.

101 See *Procanik v Cillo* (1984) 97 N.J. 339; 478 A.2d 755.

102 Of course, this could be considered to be 'comparative work', but using cases from another state and thus jurisdiction within one country (here the US) is not considered 'comparative law' for the purposes of this article. Here, I try to find out whether judges use materials from foreign jurisdictions.

103 *Speck v Finegold*, supra note 85.

104 See *Curlender v Bio-Science Laboratories* (1980) 106 Cal. App. 3d 811; 165 Cal. Rptr. 477, and *Turpin v Sortini* (1982) 31 Cal. 3d 220; 643 P.2d 954; 182 Cal. Rptr. 337.

105 *Harbeson v Parke-Davis* (1983) 98 Wash. 2d 460; 656 P.2d 483. In New York, a lower court once allowed a claim but was later overruled, see Perry 2008, supra note 16, p. 337.

106 CdC Ass. Plén., 17 November 2000, *Dalloz*. 2001, 332, with comments by Mazeaud & Jourdain.

4.7. Germany

In Germany the position seems to be rather well settled. In its 1983 wrongful life case¹⁰⁷ the *Bundesgerichtshof* (BGH) rather explicitly stated that foreign judgments could only be of limited relevance since these cases were based on different laws.¹⁰⁸ Thereafter the court did mention however the non-acceptance of these claims in England and Wales and the US (or rather: California, which back then still denied claims), before turning to the opinions of legal writers. It seems clear to me that the German Supreme Court thus did in fact take notice of what was happening elsewhere but decided to follow its own course.

4.8. Austria

Somewhat surprising, maybe, after much of the foregoing, it turns out that the Austrian Supreme Court¹⁰⁹ had no reluctance whatsoever in shedding light on its main source of inspiration when denying the wrongful life action. Less surprisingly it alluded to German case law, basically accepting the reasoning followed there. It stated in its judgment that the German case law mentioned above (Section 4.7) has denied claims of this kind with *convincing arguments* ('mit überzeugenden Argumenten') such as: the doctor did not cause the child's condition; there is no duty to prevent the birth of a disabled child; the doctor should not pass judgment on the value of human life; we cannot judge on whether life with serious disabilities represents harm in the legal sense as compared to an alternative.

Thereafter the Austrian court stated its (probably) main concern as follows:

'In Fällen, wie dem hier vorliegendem, sind die Grenzen erreicht, innerhalb derer eine rechtliche Anspruchsregelung möglich ist. Der Mensch hat grundsätzlich sein Leben so hinzunehmen, wie es von der Natur gestaltet ist, und er hat keinen Anspruch auf dessen Verhütung oder Vernichtung durch andere.'

This statement is then immediately followed by the reasoning that advocates of wrongful life claims cannot argue anything really valid against the argument of the BGH – which is in every way convincing ('in jeder Weise überzeugenden Argumentation (...) nichts wirklich Stichhaltiges entgegenzuhalten') – regarding the fact that allowing a claim against a doctor would also mean having to allow a claim by a child against its parents. Of course, that argument has been refuted elsewhere, but that is besides the point here, that point being that in Austrian law the influence of German law, and thus the comparative argument is apparently extensive on this point.

It should be noted, however, that both countries are neighbours, share the same (legal) language and a large part of their history, and that the German legal system is a far bigger one (more courts, lawyers, doctrinal works, etc.) than its Austrian equivalent, making it rather obvious that it would at least take due note of the decision of its German counterpart.

4.9. England and Wales

When denying the possibility of a wrongful life claim under the law of England and Wales, basically based on the (legal) arguments dealt with above, Stephenson L.J. was happy to find support for his view 'in the strong current of American authority', which:¹¹⁰

'Are of no more than persuasive authority but contain valuable material and with one exception would rule out the infant plaintiff's claim in our case.'

Hereafter, Stephenson dealt with the case of *Gleitman v Cosgrove* and mentioned several other American cases, including the Californian case of *Curlender v Bio-Science Laboratories*, which in fact allowed the claim, but which did not persuade him: he found no answer in that case to the reasoned objections to

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

108 This is the usual way to go about it in these matters, see Hondius 2009, *supra* note 77, p. 492.

109 See OGH 25 May 1999, JBl. 1999, 593, mentioned above in Section 2 (note 39).

110 See *McKay v Essex Area Health Authority* [1982] Q.B. 1166, at 1182; [1982] All ER 771 (CA).

this cause of action as found in Gleitman's case. Since Stephenson summarized the American position and the authorities for that position, and dealt with objections raised by McKay, one can safely say that the comparative information was taken seriously, was weighed and was used.¹¹¹ However, the judge had basically already reached his decision before embarking on his (common law¹¹²) comparative field trip, using the American cases only to find support for what was decided on its own merits.

4.10. Belgium

Probably not all that surprisingly, the Belgian legislature was planning on following the French legislative intervention in this regard. But that has not yet occurred, and thus there is no rule disallowing claims (as yet). Until now at least one court has recognized wrongful life claims, and doing so by explicitly following the former French case law. The comparative inspiration is thus taken from a source that no longer represents the state of the law in the system looked at, which is remarkable to say the least.

4.11. Intermediate conclusion and possible explanations

Summarizing the results from the previous sections in Table 1, the following picture emerges as regards the mentioning of other jurisdictions by courts deciding on wrongful life claims in the nine countries dealt with previously.

Table 1 Referrals by courts to other legal systems in wrongful life cases

Country of decision/ Countries referred to in the decision	NL	SA	AUS	US	FR	GER	AUT	EN	BE	Wrongful life accepted? (Y/N) Other jurisdictions mentioned?
The Netherlands (NL) ^A				X	X	X		X	X	Y Israel
South Africa (SA)	X		X	X	X	X ^B		X		N Canada, Israel
Australia (AUS)	X			X	X	X		X		N Canada, Israel, Singapore ^C
US ^D										N, for most states (exceptions are California, New Jersey, Washington)
France (FR)										N
Germany (GER)				X				X		N
Austria (AUT)						X				N
England and Wales (EN)				X						N
Belgium (BE)					X					Y, but still uncertain due to former legislative intervention not being followed up and unsettled case law

A The comparative references are made in the preliminary advice by the procureur-generaal, not by the Supreme Court itself, see Section 4.2 above.

B Mentioned in a footnote only.

C References in the dissenting opinion are also mentioned.

D Use is only made of the cases dealt with above, in Section 4.5.

111 Ackner, L.J. also mentioned the American position, *ibid.* at 1186, even in his final conclusion (*ibid.* at 1189): 'For the above reason, which are reflected in one or more of the American decisions to which Stephenson K.J. has referred, I conclude (...). Griffiths, L.J., did the same, mentioning the US (*ibid.* at 1192) and agreeing with an American court in his final sentence that if society feels compensation is needed, the legislator should step in (*ibid.* at 1193).

112 Stapleton 2007, *supra* note 70, urges us to compare English law only with other common law systems but she is much less enthusiastic (see pp. 30-37) about the (use and possibilities) of a comparison with civil law systems, although she does not exclude this entirely. This position is of course understandable in terms of being able to incorporate new solutions from elsewhere, but for the most part, in my view, this is a rather 'secluded' opinion (why would one exclude possible inspiration from more than half of the world?).

Notwithstanding the fact that usually several other legal systems are mentioned in or around the highest court cases dealing with wrongful life, as indicated in Table 1, the actual influence of these other systems on a decision by a court elsewhere is less easy to grasp or document. Merely pointing to countries reaching the same decision as in countries mentioned or cited is not enough, since the reason for reaching that decision can and might well be based on completely different grounds, which would mean that the comparative angle was of no influence at all, or at least not of decisive influence. In fact, if there would indeed have been a direct relationship between legal systems along the lines of 'all systems follow the other systems mentioned', no legal system would have been given the freedom to accept claims (if only temporarily, as has also happened) after the first rejection.¹¹³ This is not what happened in fact (e.g. the Netherlands deviated), and thus there is no valid causal connection to be made across the board.

As an intermediate conclusion from the foregoing analysis one can safely assume that in more the half of the countries under review, comparing (outcomes of) wrongful life cases elsewhere does *not* provide an (explicit) important (i.e. decisive) reason or argument for choosing a certain solution (the Netherlands, France, the US, England and Wales, Germany, Australia), although exceptions to this rule of thumb do seem to exist, for instance in South Africa, (to a lesser extent) Belgium, and most notably Austria as well as Hungary.

To be sure, the former Hungarian solution of allowing a claim was an 'obvious deviation' from the trend elsewhere and this was a reason to change the law (see Section 2 above), according to Menyhard.¹¹⁴ He also informs us that the court was 'obviously influenced' by the majority practice elsewhere and had a 'clear intention' of harmonizing Hungary with (most of) the other European systems.¹¹⁵ But also the internal Hungarian court decisions needed to be harmonized. In reaction to this development, Oliphant¹¹⁶ noted that the 'influence of comparative tort law here is clearly apparent'. Be that as it may, elsewhere this influence is to a large extent lacking when such decisions are being made.

The explanation for that phenomenon could be related to the fact that it has been mainly those small¹¹⁷ (and thus less important and less influential) jurisdictions (Hungary, the Netherlands, Israel) with unfamiliar and thus inaccessible languages that have accepted at one point in time the wrongful life action.¹¹⁸ However, Spanish is for large parts of the world a very accessible language, but in Spain a wrongful life claim was only accepted in one case, and denied soon thereafter (see above). On the other hand, the few American states that accepted wrongful life of course could have easily performed the function of spreading that solution across the globe. Thus, the explanation can only be found elsewhere and not in a possible lack of global impact of cases accepting claims.¹¹⁹

5. For and against: can arguments drawn from comparative law decide cases?

5.1. Comparative law does not decide cases

As can be imagined, I have my own view on some of the arguments raised in the worldwide discussion on the issue of wrongful life. Others, however, will value those arguments differently. If someone, for example, attaches a fairly great amount of weight to the right to self-determination, a sanctioning mechanism provided by tort law in the form of an award in damages is needed.¹²⁰ If someone does not, this would be much less necessary. The question thus raised is of course how we then get to a final say on what is 'right'

113 Of course Table 1 is flawed for not incorporating the time when the decisions were handed down (the German court could not use or cite French law) or the occurring change in the solutions (e.g. in France).

114 See Menyhard 2009, *supra* note 46, no. 14.

115 One wonders, though, according to what yardstick this effort to harmonise was conceived.

116 K. Oliphant, 'Comparative Report', in H. Koziol & B.S. Steiniger, *European Tort Law 2008*, 2009, no. 19.

117 Size matters, in the sense that small jurisdictions have less courts, less cases, and thus less materials of their own, which could stimulate looking at others, cf. U. Drobnič, 'General Report', in U. Drobnič & S. van Erp, *The Use of Comparative Law by Courts*, 1999, p. 21.

118 One cannot say that solutions reached are influenced by legal traditions instead of a specific comparison, as far as I am concerned. The Dutch approach, for instance, does not square with such an explanation since the Dutch legal system is rooted in the French and later also the German tradition, systems that do not accept wrongful life claims.

119 In fact, accepting a claim does have a global impact in the sense of the case at hand being cited and mentioned frequently across the world, as is evidenced by the Dutch experience since the *Kelly* case.

120 See my article: Giesen 2009, *supra* note 14, pp. 257-273, and Um 2000, *supra* note 52. On self-determination in this regard also Ruda 2010, *supra* note 5, pp. 215-217, and R. Schwitters, 'Het kind van de rekening', in N. Doornbos et al. (eds.), *Rechtspraak van buiten*, 2010, pp. 223 et seq.

or ‘wrong’ here. If the arguments used around the globe are basically the same and if most, if not all legal systems use, in some way or another, comparative law materials and then still the final outcomes chosen are not the same, what does that tell us on a more general level about the use of comparative law?

This outcome would suggest that comparative law is – and this would indeed be my view, at least in relation to wrongful life claims – in most cases (or better: legal systems) not able to provide *the* answer to the question of which arguments are valid and (most) convincing, and thus comparative law is neither able to answer, once and for all and for people everywhere, the question whether wrongful life claims should be allowed or not.¹²¹ That, of course, is not a surprising conclusion. It has to do with the fact that although the arguments for and against all possible solutions are as such the same everywhere, it is *the legal culture* in a certain place and at a certain time that determines in the end how a legal system interprets, weighs, rates and values those arguments and thus decides the debate on the topic at hand (see Section 4.3 below).¹²² Comparative law can at most provide arguments which are as yet unknown (which is of course of great value in itself), but not by and in itself decide a case. In our case, for example, if the decision maker in a certain legal system, be it a court or legislator, values the right to self-determination less highly than a decision maker elsewhere, there is room for another solution than the one reached elsewhere. And in general, depending on the solution finally reached, comparative law can provide the decision maker with legal solutions and arguments used elsewhere, either for or against, to subsequently reason and legitimize the decision as reached on other grounds.¹²³

My basic and simple point is thus that legal culture – or more neutral maybe – the *legal politics within a (tort) law system* decides how the answer to the moral questions involved will sound. Comparative law can provide the basic arguments for and against certain solutions (and thus the basis for justifying the solution reached) and it is extremely useful at that,¹²⁴ but it can do no more. The final decision is always one of a ‘political’ nature.¹²⁵ Or, in other words, the use of comparative law in reaching decisions is in most systems something of a monologue (stating what is out there) and not a genuine dialogue (discussing solutions reached elsewhere). In essence, all this is of course a lesson that has been taught before,¹²⁶ but I think it is still an important lesson to (re)learn. A legal system cannot simply copy comparative notions and rules even if the arguments seem sound; if it does, mistakes will be made.¹²⁷ This is in accordance with the conventional wisdom that comparative law is not a method for interpreting national legal texts (but a source of inspiration when explaining the law as it is or ought to be).¹²⁸

121 See the stark observations in this respect by Stapleton 2007, *supra* note 70, pp. 44-45.

122 See for instance Fleming 1998, *supra* note 73, p. 185; Stapleton 2007, *supra* note 70, pp. 12-13 and pp. 15-17, and Van Gerven et al. 2000, *supra* note 36, p. 136, stating that the wrongful birth issue is approached within Europe from the same legal, *cultural and ethical* background (emphasis added, *IG*), while still reaching opposite results. This same background being used, there would still be a ‘common law of Europe’ in this respect. I disagree, but that is another point for another day.

123 Cf. the paper by John Bell in this volume (J. Bell, ‘The Argumentative Status of Foreign Legal Arguments’, 2012 *Utrecht Law Review* 8, no. 2, pp. 8-19).

124 See Stapleton 2007, *supra* note 70, p. 2 (and p. 44), who is very cautious about using comparative law, for instance because of the *cultural context*, but who does see value in comparing systems (within the common law) in order to find *arguments*. Critically on that paper: B.S. Markesinis, ‘Weltliteratur und ‘Weltrecht’’, in P. Apathy et al. (eds.), *Festschrift für Helmut Koziol zum 70. Geburtstag, Jan Sramek*, 2010, pp. 1433 et seq. On the use of comparative law (to achieve harmonisation in European tort law systems), see also (less cautiously) H. Koziol, ‘Comparative Law – A Must in the European Union: Demonstration by Tort Law as an Example’, 2007 *Journal of Tort Law* 1, no. 3, Art. 5, and more in general (and optimistic) E. Hondius, ‘Naar een Europese Asser-serie: Over de noodzaak van rechtsvergelijking bij nationale toepassing van geharmoniseerd en eenvormig recht’, 2011 *Ars Aequi* 60, no. 10, p. 738 et seq.

125 Cf. (for South Africa specifically) J.C. van der Walt & J.R. Midgley, *Principles of Delict*, 2005, p. 69 (with further references); Shapira 1998, *supra* note 42, p. 374, and Huls 2006, *supra* note 58, pp. 88-89 (for the Netherlands). See also Steiniger 2010, *supra* note 5, p. 155, who speaks about a person’s ‘Weltanschauung’, and Ruda 2010, *supra* note 5, p. 214 (value preferences). Cf. Bell, *supra* note 123.

126 Most notably of course A. Watson, *Legal Transplants: An Approach to Comparative Law*, 1993. Cf. also, more recently, Stapleton 2007, *supra* note 70.

127 Cf. e.g. the great Dutch legal scholar W.L.P.A. Molengraaff, *Het verkeersrecht in wetgeving en wetenschap*, 1885, pp. 8-9. This also means that the (mere) citation of a foreign law, rule, case or solution by a court does not in itself constitute that the foreign law or solution is used as a *justification* for the decision reached, as M. Gelter & M. Siems, ‘Networks, Dialogue or One-Way Traffic? An Empirical Analysis of Cross-Citations between Ten European Supreme Courts’, available at: <<http://ssrn.com/abstract=1722721>> (last visited: 13 November 2011), seem to suggest (see also their paper in this volume: M. Gelter & M. Siems, ‘Networks, Dialogue or One-Way Traffic? An Empirical Analysis of Cross-Citations Between Ten of Europe’s Highest Courts’, 2012 *Utrecht Law Review* 8, no. 2, pp. 88-99).

128 For the Netherlands: Asser-Vranken 1995, *supra* note 77, no. 198 et seq., most notably no. 202 (never as a separate argument, always as a supportive argument), no. 203 (argumentative force is not great since foreign law is not binding), no. 205 (persuasive authority) and no. 216 (mentioning wrongful life cases as a legal issue which can benefit from comparative law in finding arguments).

5.2. Why all the fuss then?

Of course, having taken note of the above one may ask why all those judges across the world have taken the trouble to find foreign cases, read them and sometimes to some extent use them. Why all the fuss? Why not ignore the vast amount of comparative information altogether if it is not decisive? And why would there be so much interest in comparative information if it is not useful?

The answer is actually plain and simple, and has partly been mentioned already in the foregoing.¹²⁹ First, it supplies the decision maker with (all the) arguments in point (and a discussion as to their validity) without having to go to the trouble of finding them himself. Second, these arguments can influence the final result even if not decide the issue. Third, it is useful as a factor legitimizing a decision,¹³⁰ because it shows that the judge has seen everything there is to be seen on the issue at hand. Fourth, the judge who can show that he has seen all there is to see strengthens his own position (reaffirms or heightens his status).¹³¹ Fifth, there is actually not all that much 'fuss' that could be circumvented; the task of engaging in comparative law is in practice not that big because the information is out there anyway (supplied by academics, usually).

6. To conclude

What can be concluded from all this? Arguments and insights drawn from comparative law are being used in a wide variety of legal systems, in one way or another, but since the arguments are basically the same everywhere while the solutions are not, it is obvious that these insights are of influence but not decisive in the end. Thus, choosing solutions to 'hard cases' as the one dealt with in this paper is in the end a political issue and not one of comparative arguments.¹³² The choices to be made are no longer completely legal, but are at least partly also *sociological* and *political* in nature in the sense that each society and legal system gets the legal – I should say: political – decision it 'deserves', i.e. the one it attracts by being the way it is at a certain point in time even if the *legal arguments* from a comparative law angle indicate (at least to some extent) something different.¹³³

129 Of course, here we touch upon the much larger and often raised question as to the (practical and theoretical) use of comparative law, especially for and by the courts, a question that easily merits a separate article. I will resist the temptation of further elaborating on that more general theme, instead sticking to the few lines in the text hereafter, and will refer only to some of the vast amount of literature on that topic (all with further references), such as: the paper by John Bell in this volume, *supra* note 123; K. Oliphant, 'Fairchild v Glenhaven Funeral Services Ltd. (2002)', in C. Mitchell & P. Mitchell (eds.), *Landmark Cases in the Law of Torts*, 2010, pp. 335 et seq.; Hondius 2009, *supra* note 77; A.M. Hol, 'Internationalisation and Legitimacy of Decisions by the Highest Courts', in A.S. Muller & M.A. Loth, *Highest Courts and the Internationalisation of Law*, 2009; R.A. Posner, *How Judges Think*, 2008, pp. 347 et seq.; A. Lollini, 'Legal argumentation based on foreign law', 2007 *Utrecht Law Review* 3, no. 1, pp. 60 et seq. (see also his paper in this volume: A. Lollini, 'The South African Constitutional Court Experience: Reasoning Patterns Based on Foreign Law', 2012 *Utrecht Law Review* 8, no. 2, pp. 55-87). G. Cavinet, 'The Practice of Comparative Law by the Supreme Courts: Brief Reflections on the Dialogue Between the Judges in French and European Experience', 2006 *Tulane Law Review* 80, no. 4; G. Cavinet et al., *Comparative Law before the Courts*, 2004; B.S. Markesinis, *Comparative Law in the Courtroom and Classroom*, 2003; U. Drobnig & S. van Erp, *The Use of Comparative Law by Courts*, 1999; B.S. Markesinis et al., *The Tortious Liability of Statutory Bodies. A Comparative and Economic Analysis of Five English Cases*, 1999; L. Strikwerda & I.R. de Jong, 'Rechtsvergelijking en rechtsvinding in burgerlijke zaken', 1994 *Ars Aequi* 43, no. 5, pp. 284 et seq.; J.H.M. van Erp, 'The use of the comparative law method by the judiciary', in E.H. Hondius & J.H.M. van Erp, *Netherlands Reports to the Fourteenth International Congress of Comparative Law*, 2004, pp. 23 et seq. See also Flanagan & Ahern 2011, *supra* note 46 (but from a more empirical angle, trying to explain the judicial use of foreign law by identifying judicial attitudes through a questionnaire, and especially p. 3 for references to the vigorous debate in the US on the use of foreign (constitutional) law).

130 Cf. Hol 2009, *supra* note 129, and John Bell's paper in this volume, *supra* note 123.

131 See Flanagan & Ahern 2011, *supra* note 46, who found 'citational opportunism' and social reward to be important in the use of foreign law.

132 To be sure, even within a certain legal system the specific weight which a specific argument receives can vary widely between and among legal authors, judges, legislators and the general population, cf. Vranken in his note under the *Kelly* case (*supra* note 2), no. 8: not one argument is strong enough to place the others in its shadow. According to Perry 2008, *supra* note 16, we are dealing with equally legitimate subjective beliefs rather than objective truths.

133 I am referring here, of course, to my personal subjective opinion only, taking due note, I hope, of the warning issued by Stapleton 2007, *supra* note 70, pp. 44-45 (that there cannot be one correct conclusion about what policy to adopt in tort law, based on comparative arguments, something which, as she states, continental comparative lawyers seem to do rather often).