

# **Portugal**

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## Constitutional Court, 2 February 2016 – Wrongful Birth and Wrongful Life

- In the scenario of a pregnancy, A underwent three ultrasound exams at the Radiology Centre D.
- However, C was born with *severe malformations in upper and lower limbs*, which resulted in an inability of 93%.
- A and B, parents of C, brought, on their behalf and of their son (Wrongful Birth and Wrongful Life) a tort action against D and E, radiologist and partner of D, as well as against the remaining partners and other radiologist who provided medical services to D.
- The parents claimed that the non-diagnosis of the foetus abnormalities (mainly in the second ultrasound) violated the *leges artis*. Therefore, in virtue of the lack of diagnosis and information to them, *the woman (couple) could not terminate pregnancy, under the law*.

- The Court of first instance partially upheld the action, and found liable D and E to pay to each of the parents the amount of €35,000 and an amount to be settled later, with respect to the expenditure of replacement of the minor's prosthesis until he reaches 18 years old.
- The doctor who provided services to D was acquitted.
- The Court:
  - a) Based its decision on the existence of contractual liability for the failure to comply with the obligation regarding a correct diagnosis in ultrasound exams. Such circumstance determined the deprivation of the necessary information for the exercise of pregnancy termination.
  - b) Rejected the Wrongful Life action.

- The Court of Appeal:

- a) Partially revoked the decision, ordered a new first instance judgement concerning the enlargement of the case facts;

- b) Acquitted the defendants and held that the damage resulting from the parent's ignorance of the foetus abnormalities was not caused by the lack of information but by the specific existence of the abnormalities themselves;

- c) Concluded by the absence of a causal link between the parents suffering and the defendant's performance.

- The Supreme Court:

- a) Reversed the judgment of the Court of Appeal and restored the judgement of the Court of first instance.

- The defendants brought an action to the Constitutional Court in order to evaluate the unconstitutionality of articles 483 (general rule on tort liability), 798 (debtor's liability) and 799 (presumption of fault) of the Portuguese Civil Code.
- The question the Court had to answer was whether it was constitutional or unconstitutional the compensation for Wrongful Birth.
- The Constitutional Court:
  - a) Denied the appeal on the grounds of a reproductive self-determination right concerning the non-disclosure of proper information (contractually mandatory) by defendants.
  - b) The obligation to compensate damage results from the medical error as regards a prenatal diagnosis when this behaviour has *prevented parents from taking into consideration the foetus abnormalities*.

c) Following the gradual doctrinal and jurisprudential position as to the viability of Wrongful Birth actions, the Constitutional Court rejected the traditional (against) arguments, in particular, the inviolability of human life and the paradox of non-existence.

d) Compensation is due to *mala praxis*, concerning an incorrect diagnosis, and so it is absolutely separated from any theoretical and eventually paradoxal position.

- *Report Conclusions on this Judgement:*
- As regards the Portuguese Legal System, the majority of the *doctrine* accepts the legal feasibility of Wrongful Birth actions and denies Wrongful Life actions. With respect to *jurisprudence*, the dominant understanding also welcomes the Wrongful Birth actions and refuses Wrongful Life actions.
- The position of the Constitutional Court is correct.

- Furthermore, the civil liability requirements listed in art 483 of the Portuguese Civil Code are fulfilled. Indeed, the doctor's failure of the duty to inform parents of the congenital abnormalities represents a breach in the doctor's contract to provide appropriate medical services.
- That circumstance deprived the woman (couple) to authorise pregnancy termination under her (their) (negative) self-determination reproductive right, leading to the birth of a child with disabilities and, hence, it is a proper cause of the associated damage claimed by the parents, which not contend, nor even is related to the right to life.