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The Obligation of the Health Care Provider to Compensate for Damages in Case of Wrongful Conception: a Model to Suit Estonian Law

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Abstract

Family planning is today generally considered self-evident. For a majority of us, becoming parents is one of the most joyful events in our lives, but not if the pregnancy and the birth is unwanted. The birth of an unwanted child causes both pecuniary and non-pecuniary damage, inter alia the costs of medical expenses, loss of income and child maintenance costs. If the unwanted pregnancy and birth are the result of a negligently performed medical procedure or diagnosis or erroneous advice regarding contraceptive method, the question of the health care provider's liability and compensable damage arises. While there is an absence of case law for wrongful conception in Estonia, this article is aimed at providing a suitable model for Estonian case law through an analysis of Estonian, German and U.S. legal literature. The article mainly focuses on the question of recoverable damage and the extent of compensating for damage under the Estonian Law of Obligations Act (2002).

Introduction

For most, the birth of a child is one of the happiest moments in one's life; for others becoming pregnant and giving birth are undesirable life events. At times it is so undesirable that parents feel they have suffered damage because of the birth of the child. In this article the obligation of health care providers to compensate for the damages in cases of unwanted pregnancy (also known as *wrongful conception*) is considered. In such cases the parent(s) issue(s)

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a claim against the health care provider for damages consequent to the conception and birth of the child.[1]

There is an absence of case law in Estonia for cases of wrongful conception (as well as wrongful birth or wrongful life); it is thus interesting to analyse whether and to what extent Estonian courts would satisfy the claim for damages under Estonian law if such a claim were to be put before the court.

The article is based on a comparative analysis: the Estonian law is compared to German and U.S. law. In light of the comparison, the authors come to a conclusion about whether and to what extent it is expedient and rational to satisfy the parents' claim under the rubric of wrongful conception. The aim of the article is to propose a suitable model for Estonian case law. German law has been chosen for comparative material because the German legal system, including German law (and also the standpoints established in case law and theoretical sources), has set an important example for the creation of Estonian civil law.[2] U.S law was selected in expectation of finding discussions of universal character, i.e. applicable *inter alia* in Estonian case law.

The article contains four parts: in the first the concept of wrongful conception and the legal basis for the liability of health care providers are explained.[3] In the second part the authors analyse what kind(s) of damage and to what extent such damage is compensated in Germany and in the U.S. in cases of unwanted pregnancy, and also what the legal framework for resolving such cases in Estonian court is at present. The third part deals separately with the principal issues related to unwanted pregnancy regarding compensation for child maintenance costs and non-pecuniary damage, analysing pro- and contra-compensation arguments. In the fourth part the authors propose guidelines to follow in cases of wrongful conception. These suggestions should ideally be of universal character, but the authors have primarily aimed to offer a reasoned solution for Estonian law.

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1 A *health care provider* is generally a legal person, who runs a hospital, or a doctor. Under Estonian law, a qualified doctor, dentist, nurse or midwife providing healthcare services independently, who participates in the provision of health care services and operates on the basis of an employment contract or other similar contract entered into with a provider of health care services, shall also be personally liable (Estonian Law of Obligations Act (LOA, entered into force 1 July 2002) Section 758(2)) (The Law of Obligations Act and other more important Estonian legal acts are available also in English: www.riigiteataja.ee). It should be noted that the article does not delve into the problematics of the obliged subject's liability. *Health care provider* is the overall term used here to refer to the subject liable for the damage.

2 See P. Varul; I. Kull; V. Kõve; M. Käerdi; K. Saare, *Tsiviilõiguse üldosa* (General Part of Civil Law), (Juura, 2012), 25 (in Estonian).

3 However, this article does not deal in depth with the legal basis for liability. Namely the question of qualifying the liability could be interesting from the aspect of domestic law, but the central issues in the cases of unwanted pregnancy relate to recoverable damage(s).

1. The concept of wrongful conception and the legal basis for the liability of health care providers

1.1. The concept of *wrongful conception*

Cases of wrongful conception involve the parent's or parents' claim against the health care provider to compensate for damages arising from the birth of an unwanted but healthy child due to the health care provider's negligence. Cases of wrongful conception are thus characterised by the fact that the parents have wanted to avoid pregnancy, but due to an error on the part of the health care provider the parents have not been able to prevent the birth of a child.[4] S.D. Pattinson has found that in wrongful conception cases (and also in wrongful birth cases), the major ethical tension is over the value to be attached to the autonomous decision of those whose opportunity to avoid having a child or a child with particular traits has been lost.[5] Thus a couple may find themselves in a situation where the woman is carrying a healthy, though unwanted, baby and the termination of pregnancy is no longer possible or recommendable.[6]

Apart from the wrongful conception cases, there are also cases of wrongful birth and wrongful life. In the cases of wrongful birth the child is born disabled and the parent(s) claim for compensation for the damages arising from the birth of a disabled child due to the health care provider's negligence. Wrongful birth cases differ from wrongful conception cases primarily by the fact that in the latter the parents had not intended on having a child at all, at least at the point in time in question.[7] It should be noted that the combination of wrongful conception and wrongful birth claims is also possible if a woman becomes pregnant e.g. due to negligent sterilisation or abortion (which leads to wrongful conception claim) and gives birth to a disabled child (which stems from the negligent diagnosis and leads to a wrongful birth claim). Wrongful life cases are distinguished from wrongful conception cases by the fact that the child born disabled is the one who issues a claim against the health care provider for the inflicted damage.[8]

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4 E.g. the health care provider negligently performs a sterilisation procedure and, as a proximate result of that negligence, the patient conceives a child. *Nunnally v. Artis*, 254 Va. 247; 492 S.E.2d 126 (1997).

5 S.D. Pattinson *Medical Law and Ethics* (2nd edn, Thomson Reuters (Legal) Limited, 2009), 333.

6 For example, in Estonia, the Termination of Pregnancy and Sterilisation Act Section 6 (1) allows the abortion of pregnancy that has not lasted longer than 11 weeks. In certain circumstances, abortion is allowed until the 21st week (e.g. if there exists the risk that the child will be born with severe physical or mental abnormality).

7 B.A. Koch, 'Comparative Report', in B. Winiger, H. Koziol; B.A. Koch, R. Zimmermann (eds.), *Digest of European Tort Law. Volume 2: Essential Cases on Damages* (Berlin/Boston: Walter de Gruyter GmbH & Co. KG, 2011), 901.

8 On differentiating the prenatal delicts, see also B.A. Koch 'Medical Liability in Europe: Comparative Analysis' in B.A. Koch (ed.), *Medical Liability in Europe. A Comparison of Selected Jurisdictions,* (Berlin, Boston: De Gruyter, 2011), 611-691, at 672, K.A. Mahoney 'Note: Malpractice Claims Resulting from Negligent Preconception Genetic Testing: Do These Claims Present a

It should be noted that various authors apply different meanings to the terms *wrongful conception*, *wrongful birth* and *wrongful life*. For example, taking into consideration the claimant involved, *wrongful life* is contrasted with *wrongful birth*, with *wrongful conception* cases being seen as a subtype of *wrongful birth* cases.[9]

1.2. Contractual liability

As the unwanted pregnancy is generally the consequence of a breach of contract for provision of health care services, the legal basis for the liability of health care providers could primarily be contractual.[10] The central prerequisite to contractual liability is the breach of obligation.

In case of unwanted pregnancy, the breach of obligation could lie in negligence in sterilisation, abortion procedures[11] or pregnancy diagnoses.[12] Also, the health care provider may err in advice or recommendation given on contraception method or give an incorrect diagnosis of fertility.[13] It is also possible to envision cases where the parents wanted to conceive but not *that* child.[14] The breach of obligation could also lie in pre-operative counselling, the operation itself, post-operative testing or post-operative counselling (e.g. if there is, for instance, a failure to warn of the need to use contraceptives until sperm tests after vasectomy have proved negative).[15]

Under Estonian law, the performance of the named obligations must be evaluated considering the first sentence of Law of Obligations Act (LOA) Section 762, which states that health care services shall at the very least conform to the

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Strain of Wrongful Birth or Wrongful Conception, and Does the Categorization Even Matter?' *Suffolk University Law Review* 39 (2006), 773-792, at 773.

9 See I. Giesen, 'Of wrongful birth, wrongful life, comparative law and the politics of tort law systems', *Utrecht Law Review* 72 (2009), 259. According to this discussion, the birth of a healthy or disabled child can be distinguished, and additionally whether the health care provider was negligent before conception (e.g. failing to properly perform the sterilisation procedure) or after gestation (e.g. failing to properly perform the termination of pregnancy). See B.C. Steininger, 'Wrongful Birth and Wrongful Life: Basic Questions', *Journal of European Tort Law* 2 (2010), 125-126.

10 E.g. according to Estonian law it can be alleged that at all times, if the health care provider has provided health care services, they have also concluded a contract for the provision of health care services (LOA Section 759).

11 Estonian Supreme Court has held that since this is a medical intervention into a woman's bodily integrity, the termination of the pregnancy can be considered as a provision of health care. Decision in Case No. 3-2-1-31-11 of the Civil Chamber of the Supreme Court of 11 May 2011. The decisions of the Supreme Court of Estonia are available in Estonian: www.riigikohus.ee.

12 See J.K. Mason, G.T. Laurie, M. Aziz, *Law and Medical Ethics* (8th edn, Oxford University Press 2011), 340-341.

13 S.D. Pattinson (note 5), 311.

14 *Ibid.*, 310-311.

15 A. Grubb, J. Laing, J. McHale, *Principles of Medical Law* (3rd edn, Oxford University Press, 2010), 295-296.

general level of medical science at the time the services are provided and the services shall be provided with a level of care which can normally be expected of providers of health care services. In the opinion of the Estonian Supreme Court, if the quality of the doctor's actions is less than that of an educated and experienced specialist in the specific field, this could be considered a medical error.[16]

In addition to the breach of obligation, the damage and the causal link between the damage and the breach of obligation should precede liability for the damages. Under Estonian law, fault is another prerequisite for the liability of health care providers; LOA Section 770(1) states that the health care provider is liable for faulty violation of his obligations, particularly for errors in diagnosis and treatment and for violation of the obligation to inform patients and obtain their consent. Though, as a rule, a health care provider shall not promise a patient that an operation will be successful (LOA Section 766(2)); if the object of the contract for provision of health care services is the termination of pregnancy or a pregnancy prevention-oriented procedure, then, as a rule, an unsuccessful procedure constitutes a medical error on the part of the health care provider.

Accordingly, establishing the grounds for the health care provider's contractual liability should not be problematic in the cases of unwanted pregnancy. A separate circle of issues relates to the question of who the contract protects, i.e. whether the partner, who is not party to the contract for provision of health care services, could also issue a claim for compensation against the health care provider.[17]

1.3. Delictual liability

Besides the prerequisite of the contractual liability in cases of wrongful conception the presumptions of delictual liability could simultaneously also be fulfilled, e.g. in the case of unsuccessful sterilisation procedure the Federal Court of Justice of Germany (*Bundesgerichtshof*, or BGH) has stated that

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16 Decision in Case No. 3-2-1-78-06 of the Civil Chamber of the Supreme Court of 3 October 2006.

17 E.g. the German Supreme Court has found that the contractual obligation to perform the sterilisation procedure protects both parties, even if only one of the parents was a party to the contract. BGH, NJW 1995, 2407 ff. The Court of Appeals of Maryland has found that the common law duty of care owed by a health care provider to diagnose, evaluate, and treat its patient ordinarily flows only to the patient, not to third parties. *Dehn v. Edgecombe*, 865 A.2d 603 (Md. 2005). Under Estonian law, the question of whether the parent who is not a party to the contract is entitled to the compensation for the damages depends foremost on whether the health care provider had to recognise that the contract was also directed at the protection of the third party's (the second parent's) interests and rights (LOA Section 81 – contract with protective effect for third party). E.g. if the patient informs the doctor that they and their partner do not wish to have any more children, and conclude the contract, it can seemingly be alleged that the health care provider should also have recognised the interests of the patient's partner and the aim of said patient to protect their partner's interests.

the legal basis of the tortfeasor's liability could be both contractual and non-contractual.[18] Causing an unwanted pregnancy violates the right to family planning (as a general personality right) and inflicts bodily injury on the pregnant woman. Nevertheless, the bodily injury is not reflected in the existence of a foetus as such, but rather as intervention in the right to bodily self-determination.[19]

In Estonian law, the problems of concurrence of contractual and delictual liability are regulated in LOA Section 1044, the third subsection of which states that if the death, bodily injury or damage to the health of a person is caused as a result of the violation of a contractual obligation, the tortfeasor shall be liable for such damage on the basis of tort law. The Estonian Supreme Court has noted that in cases of misdiagnosis the patient might have a claim against the health care provider on the basis of the law of delict.[20]

In case of unwanted pregnancy the health care provider could be liable under Estonian law of delicts foremost under LOA Section 1045(1) p 2, if the unwanted pregnancy could be regarded as damage to the patient's health.

Neither Estonian case law nor legal literature have taken a position as to whether unwanted pregnancy could be regarded as damage to a woman's health. It has simply been found that the abnormality occurring in the human body could be regarded as health damage.[21] The authors find that with the aim of giving the victim a freedom of choice (whether to qualify the claim as contractual or delictual), it is not excluded that unwanted pregnancy could be regarded as bodily injury. Analogously to the German discussion, it is not reasoned under Estonian law to consider the unwanted foetus as damage to the health of the pregnant mother,[22] but rather the fact that a person was deprived of possibility to decide over their own body. Though the commentary to LOA states that a person's bodily self-determination is one's personal right,[23] causing the un-

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

19 See G. Wagner, 'Unerlaubte Handlungen', in F.J. Säcker, R. Rixecker (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 5. Schuldrecht. Besonderer Teil III. 5. Auflage* (München: Verlag C. H. Beck, 2009), 1688-2126, at 1777.

20 Decision in Case No. 3-2-1-171-10 of the Civil Chamber of the Supreme Court of 8 April 2011.

21 P. Varul; I. Kull; V. Kõve; M. Käerdi, *Võlaõigusseadus III. Kommenteeritud väljaanne* (Law of Obligations Act III. Commented Edition) (Juura, 2009), 645.

22 As to whether the unwanted pregnancy can be regarded as bodily injury, see also A. Grubb, J. Laing, J. McHale (note 15), 298-301, 5.102; 5.107-5.109. It has been found that pregnancy could be considered as health damage, if the pregnancy is unwanted. See D. Nolan 'New forms of damage in negligence' *The Modern Law Review* 70:1 (2007), 73-75, also *Nunnally v. Artis* 254 Va. 247; 492 S.E.2d 126; 1997.

23 See P. Varul et al., (note 21), 646.

wanted pregnancy could be regarded as both a violation of personal right and health damage.

Relying on intervention in family planning as violation of personal right (LOA Section 1045(1) p 4) should not bring about delictual liability according to Estonian law. In such case the existence of contract supersedes the delictual liability.

2. Recoverable damage in cases of wrongful conception

2.1. Defining the damage

It has been found that there are four possibilities for the solution of actions for wrongful conception: 1) damages should never be awarded; 2) damages should always be awarded; 3) the blessing of parenthood should be offset against the concurrent economic loss and the damages adjusted accordingly; 4) a distinction should be made between healthy and disabled children, and damages should be awarded only for the extra costs involved in the upkeep of the latter.[24]

In order to map out the possible damage emerging from the unwanted pregnancy it is pertinent to rely on B.A. Koch's analysis of case law. If B.A. Koch's analysis is generalised, the mother could suffer loss of income, the costs of medical expenses and non-pecuniary damage. The damage to both parents could lie in child-rearing costs, additional expenses due to certain circumstances (e.g. child's condition); they could also suffer non-pecuniary damage relating to unwanted parenting and intervention in family planning.[25] Basing on European case law, B.A. Koch has concluded that in Europe the damage arising from carrying an unwanted baby and childbirth would be compensated with high probability, but there is lower probability that the child's maintenance costs and other costs concerning fulfilling parental obligations would be compensated.[26]

It could be alleged that the main object of discussion in unwanted pregnancy cases has been the question of whether the child's maintenance costs are recoverable damages.

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24 J.K. Mason, G.T. Laurie, M. Aziz (note 12), 343. The complexity of this type of cases can be seen in the fact that e.g. in the delictual provisions of Draft Common Frame of Reference these questions have deliberately been left unregulated. C. von Bar, *Principles of European Law: Non-Contractual Liability Arising out of Damage Caused to Another* (Bern, Munich: Sellier European Law Publishers, Bruylant, Stämpfli Publishers Ltd., 2009), 359.

25 B.A. Koch, (note 7), 901.

26 B.A. Koch, (note 7), 902. On the recoverability of the child's maintenance costs in European countries see also U. Magnus. *Unification of Tort Law: Damages* (The Hague, London, Boston: Kluwer Law International, 2001).

2.2. Recoverable damage in Germany and the U.S.

In German case law, the question of recoverable damage in the cases of unwanted pregnancy has been variously addressed. *Bundesgerichtshof* has stated that the birth of a child and their maintenance should be kept separate. The latter is a recoverable damage.[27] This standpoint has been criticised by the second *Senat* of the Federal Constitutional Court of Germany (*Bundesverfassungsgericht*, or BVerfG) which considered compensation for costs of maintenance to be contrary to the dignity of the child and thus a violation of Article 1 Section 1 *Grundgesetz* (Basic Law).[28] Human dignity as a fundamental right does not allow for a child to be regarded as damage, because human existence cannot be calculated in terms of money.[29] However, the standpoint of the *Bundesgerichtshof* was supported by BVerfG's first *Senat*, given that the contract for provision of health care services is lawful. The contract would not be lawful if, for example, the termination of pregnancy was against the law.[30] Summarising the corresponding German case law, C. van Dam has noted that although the *Bundesgerichtshof* principally acknowledged the right to compensation for costs of maintenance, the position of the second *Senat* indicates that it requires serious and thorough discussion.[31]

It should be added that according to BGH case law, only the average costs of the child's maintenance could be awarded, but not the expenses of the specific child, or full expenses. BGH has stated that the family's social or economic position should not be taken into account when deciding compensation.[32] In addition to pecuniary damage, non-pecuniary damage is compensated to the mother: German law provides compensation for such a loss on the ground that she suffered physical injury (*Körperverletzung*), which relates to the pregnancy and delivery of the child.[33]

In the U.S., the case law regarding the recoverable damage differs from state to state. The courts of some states have found that the blessing of having a child

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27 BGH decision of 18 March 1980, BGHZ 76, 249.
28 BVerfG decision of 28 May 1993, NJW 1993, 1751; BVerfG (Zweiter Senat) decision of 22 October 1997, NJW 1998, 523; JZ 1998, 356.
29 H. Oetker, (note 18), 299.
30 BVerfG decision of 12 November 1997, BVerfGE 96, 375; NJW 1998, 519; JZ 1998, 352.
31 C. van Dam, *European Tort Law* (Oxford University Press Inc., New York 2006), 157.
32 BGH decision of 4 March 1997, NJW 1997, 1638 and BGH decision of 25 February 1997, NJW 1997, 1640.
33 BGH decision of 27 June 1995, NJW 1995, 2407; BGH decision of 25 June 1985, NJW 1985, 2749. See also C. van Dam, (note 31), 159.

cannot be regarded as damaging the parents.[34] In two states the child-rearing expenses are also compensated.[35]

As an example of the recoverable damage, in *Boone v. Mullendore*, a case in which the woman became pregnant after the procedure of removal of her ovaries, the Supreme Court of Alabama stated that the medical expenses incurred by the parents as a result of the pregnancy are compensated as pecuniary damage. Any additional damages would tend to be extremely speculative in nature, and awarding such damages could have a significant impact on the stability of the family unit and the child in question. The court regarded as recoverable non-pecuniary damage the physical pain and suffering, and mental anguish of the mother arising from her pregnancy; and the loss to the husband of the comfort, companionship, services, and consortium of the wife during her pregnancy and immediately after the birth.[36]

Similar types of damages were compensated in *Fulton-DeKalb Hospital Authority v. Graves*, where the Supreme Court of Georgia stated that the cost of raising a child could not be recovered.[37] In *Girdley v. Coats*, the Supreme Court of Missouri explained that wrongful conception gives rise to compensatory damages that are measurable.[38]

As a contrasting example, in *Burke v. Rivo* the Supreme Judicial Court of Massachusetts court stated that the costs of raising an unwanted child should be compensated, if the reason for seeking sterilisation was based on economic or financial considerations. However, any benefits conferred on the parents as a result of the birth of the child should be offset from the compensation.[39]

J.K. Mason et al. summarised that the majority of states have allowed recovery for all losses excluding those attributable to bringing up a healthy child. Interestingly, Mason and McCall Smith have noted that the proportion of the cases in which compensation for the birth of a healthy child is allowed seems to increase the more recent the case.[40]

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34 *Public Health Trust v. Brown* 388 So 2d 1084 (1980); *Sutkin v. Beck* 629 SW 2d 131 (1982).

35 *Lovelace Medical Center v. Mendez* 805 P 2d 603 (1991); *Sherlock v. Stillwater Clinic* 260 NW 2d 169 (1977).

36 *Boone v. Mullendore*, No. 80-423, 416 So. 2d 718 (1982).

37 *Fulton-DeKalb Hospital Authority v. Graves*, No. 40588, 314 S. E. 2d 653 (1984), see also *Jackson v. Bumgardner*, No. 670A84, 318 N.C. 172; 347 S. E. 2d 743 (1986).

38 *Girdley v. Coats*, No. 74029, 825 S. W. 2d 295 (1992).

39 *Burke v. Rivo*, 551 N.E.2d I (Mass. 1990).

40 J.K. Mason, G.T. Laurie, M. Aziz, (note 12), 343-344. See also K. Wevers, 'Prenatal torts and pre-implantation genetic diagnosis', *Harvard Journal of Law & Technology* 24:1 (2010), 263.

2.3. The legal frames of compensation for damages in Estonia

In Estonia, the recoverable damage in the cases of wrongful conception should be established on the basis of the relevant provisions of Law of Obligations Act. LOA Section 130(1) enacts the compensation for damage in case of health damage or bodily injury.

Hence, if regarding unwanted pregnancy as health damage, LOA Section 130(1) enables the mother to easily claim both medical expenses and damage consequent to decrease of income. Additionally, according to LOA Section 127(2), it should be evaluated whether the aim of the breached obligation or provision was to prevent damage like the one that occurred in the specific case. In case of the claim arising from the breach of contract, foreseeability of damage should be taken into consideration (LOA Section 127(3)). Actually, the provisions mentioned leave the court a broad discretion to decide which kind of damage is recoverable in case of an unwanted pregnancy, i.e. which kind of damage compensation is equitable.

In Estonian case law, the costs of an unsuccessful procedure have been compensated as pecuniary damage.[41] However, it is questionable to regard the costs of the initial procedure as the patient's damage because these costs did not arise from failure of the procedure. Rather, the costs of a new procedure (which is aimed at accomplishing the purpose of the failed procedure) could be considered as recoverable damage. It is not surprising that Estonian law also does not enact *expressis verbis* whether the child's maintenance costs are recoverable damage.

In addition to pecuniary damage, the compensation for non-pecuniary damage could also be possible under the Estonian Law of Obligations Act in cases of wrongful conception. If the unwanted pregnancy is regarded as health damage, LOA Section 134(2) should be applied, which states that in the case of causing bodily injuries or damage to the health of a person or violation of other personal rights, the aggrieved person shall be paid a reasonable amount of money as compensation for non-pecuniary damage. This means that non-pecuniary damage accompanies health damage automatically.

As has been repeatedly noted, the Estonian courts have not stated which kind of legal right is violated in case of unwanted pregnancy. If the court finds that intervention into family planning or unwanted pregnancy is a breach of personal right, non-pecuniary damage could be claimed under LOA Section 134(2).[42]

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41 Decision in Case No. 2-09-15036 of 15 February 2010 of Harju County Court.

42 In several European countries the damages associated with intervention in family planning is compensated. See more at B.A. Koch, (note 7), 903.

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

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

3. Compensation of child maintenance costs and non-pecuniary damage: *pro* and *contra*

3.1. Causation and the ethical background of the compensation for child maintenance costs

If we start to evaluate the grounds for the compensation for child maintenance costs with causation, the *conditio sine qua non* rule should be taken as a starting point: without the health care provider's negligence the child's upbringing expenses would not have arisen. Therefore the health care provider's mistake is by all means the natural cause of the child's maintenance costs.

Nevertheless, there are several counterarguments opposing the application of merely the *conditio sine qua non* rule. M. Hogg has noted that despite the existence of a causal link, the creation of the parent's maintenance obligation as a result of the third party's negligence is not sufficient for transition of maintenance obligation as a fundamental value to the third party.[43]

In several cases the opponents to the compensation for the maintenance costs have relied on the argument that if the child's maintenance costs are compensated, this means asserting that the child (or their birth) is the harmful event, which is not ethical. This brings about a negative value judgment attached to the child and inflicts psychological damage on the child if he learns about the parents' claim against the health care provider.[44] At the same time it should be taken into account that satisfying the child's maintenance costs claim could be in the interests of the child himself and the whole family.[45]

The authors of this article agree with H. Koziol's opinion that the main question of the corresponding dispute is not whether the child can be regarded

43 M. Hogg, 'Damages for Pecuniary Loss in Cases of Wrongful Birth', *Journal of European Tort Law* 1 (2010), 156-170, at 161.

44 On this see more at B.C. Steininger (note 9), 129-130.

45 *Ibid.*, 129-130.

as damage, but whether the child's maintenance costs should be compensated.[46] B.C. Steininger too finds that the damage does not lie in having a child as such, but in the obligation to bear his upbringing expenses.[47]

3.2. Taking into account the benefits within compensating for pecuniary and non-pecuniary damage

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

The benefit offset principle is also applied in the U.S.[48] U.S case law has found that the application of the benefit rule depends on the reasons for which the parents decided to avoid the pregnancy. If they wanted to avoid having any more children (and by this, the benefit of another child), it would be unjust to apply the benefit rule.[49] According to K. C. Vikingstad, in the U.S, the courts have misused the benefit rule in wrongful parentage cases either by using a severely modified form of the rule or improperly allowing benefits to be used to reduce or eliminate actual damages, rather than considering, as the rule intends, benefits in assessing the extent of actual damages to an interest.[50] M. Ramsay argues that the alleged benefits of unplanned healthy children are irrelevant to the tortfeasor/victim relationship and these benefits should not block or reduce victims' claims to child-rearing damages.[51]

C. van Dam has summarised that the main objection to benefit offset in cases of wrongful conception is that the costs are material whereas the joy is immaterial. This is an argument to only setting off the non-pecuniary loss with the benefits.[52]

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46 H. Koziol, *Basic Questions of Tort Law from Germanic Perspective* (Jan Sramek Verlag, 2012), 125-126.

47 B.C. Steininger, (note 9), 133.

48 Restatement (Second) of Torts Section 920 (1979) provides: when the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.

49 The court stated that it was not equitable to apply the benefit rule because it was precisely to avoid the benefit of another child that the plaintiffs sought out the defendant in the first place. *Marciniak v. Lundborg*, 153 Wis. 2d 59, 450 N. W. 2d 243, 247-249.

50 K.C. Vikingstad, 'The use and abuse of the tort benefit rule in wrongful parentage cases', *Chicago-Kent Law Review* (2007) 1063, at 1097.

51 See more at M. Ramsay, 'Wrongful pregnancy and the offset/benefits approach', *Canadian Journal of Law & Jurisprudence* 28 (2015), 129-154.

52 C. van Dam, (note 31), 158.

The authors are of the opinion that the benefit offset argument is sufficiently convincing to justify not compensating the non-pecuniary damage which relates to unwilling parenthood or intervention in family planning. It could be alleged that the damage inflicted by intervention in family planning conflates into joy and non-material value, which is offered by the upbringing of the child. Another question is whether this joy is able to 'neutralise' the physical pain and discomfort associated with pregnancy and childbirth. We find that the joy cannot 'neutralise' the physical effect to the full extent. Therefore, the child's mother could be entitled to a reasonable (if not to say symbolic) amount of compensation for her physical suffering.

According to the general approach, only damage of the same type can be taken into account, i.e. material benefit cannot be deducted from non-pecuniary damage; likewise, non-material damage cannot be deducted from pecuniary damage.[53] For example, in Germany it has been found that in establishing the amount of pecuniary damages it is not possible to take into account the accompanying non-material benefit.[54]

What kind of material benefit could accompany the birth of an unwanted child? First and foremost, the potential material benefit accompanying the birth of an unwanted child is the child's possible obligation to support his parents in future (Family Law Act [2010] Sections 96–97). However, at the time of compensation it is not known in advance whether the child will have such an obligation. Therefore, it is very questionable whether the child's theoretical obligation to support his parents in future could be taken into account in establishing the amount of damages.

In summary, it is not so easy to find the arguments against compensating the child's maintenance costs on the basis of gained benefit. At the same time, the gained benefit allows the 'reduction' of a considerable amount of non-pecuniary damage.

3.3. Reduction of amount of compensation due to aggrieved person's part in causing damage

Analysis of the compensability of the child's maintenance costs also gives rise to the question of whether the parents have caused these expenses themselves (at least in part). It could be alleged that the parents have failed to prevent the damage by not deciding in favour of termination of pregnancy at the time of discovering the unwanted pregnancy. Another allegation

53 H. Koziol, (note 46), 129.

54 B.C. Steininger, (note 9), 137. On the child-birth as non-material benefit deduction see also N. Priaulx, 'Health, Disability & Parental Interests: Adopting a Contextual Approach in Reproductive Torts', *European Journal of Health Law*, 12, (2005), 213-244, at 218.

is that the parents had the possibility to avoid the arising the maintenance obligation by giving the child away for adoption.

The aggrieved person's part in causing damage can be taken into account according to LOA Section 139, the first subsection of which states that if damage is caused in part by circumstances dependent on the injured party or due to a risk borne by the injured party, the amount of compensation for the damage shall be reduced to the extent that such circumstances or risk contributed to the damage.

Also in the U.S. the aggrieved person cannot recover damages if they had a possibility to avoid inflicting of damage by acting reasonably (Restatement (Second) of Torts Section 918).

A. Jackson has noted that the claim that the parents should have aborted or adopted is particularly controversial. In situations in which parents are pleased to keep their children, it is suggested that it is straining the concept of an 'injury' to state that parents have suffered from their children.[55] For example, in *Boone v. Mullendore* the Supreme Court of Alabama has denied the argument that the parents should have decided in favour of abortion or adoption.[56]

According to A. Keirse and M. Schaub the above allegations do not relieve the health care provider from the claim to compensate the maintenance costs of an unwanted child. If refusing to terminate the pregnancy had been considered unreasonable and the aggrieved person could have reduced the damage, then the liability should be divided between the health care provider and the patient, but definitely the unreasonable refusal to terminate the pregnancy does not release the health care provider from liability completely.[57] The possibility of giving the child away for adoption does not provide a basis for the reduction of compensation under German law either.[58]

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

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55 A. Jackson, 'Wrongful Life and Wrongful birth', *Journal of Legal Medicine* 17:3 (1996), 349-381, at 377.

56 *Boone v. Mullendore,* No. 80-423, 416 So. 2d 718; (1982).

57 A. Keirse, M. Schaub, 'Self-Determination with a Price Tag; The Legal and Financial Consequences of Wrongful Conception and Wrongful Birth and the Decision of the Parents to Keep the Child', *Journal of European Tort Law* 3 (2010), 252-253.

58 See H. Oetker, (note 18), 302.

4. Grounded scope of compensation for the damages

On the basis of the antecedent analysis, in cases of wrongful conception it could be concluded it is reasonable to compensate the expenses related to pregnancy and childbirth as pecuniary damage: both medical treatment expenses and loss of income due to incapacity to work. In certain cases, the costs of the procedure performed to correct the mistakes of the preceding procedure can be regarded as pecuniary damage.

As noted before, the mother should be entitled to a reasonable sum of non-pecuniary damages due to physical inconvenience and pain. Other non-pecuniary damage is recovered by the joy of raising a child.

With regard to expenses relating to the upbringing of the child, then, as noted above, it is not easy to justify (at least among the provisions governing compensation) why the child's maintenance costs should be left uncompensated by the health care provider. However, the authors feel that compensation for the child's maintenance costs is contrary to the principle of reasonableness and *ratio legis* of the right to compensation.

According to H. Koziol, the answer to the question of whether the child's maintenance costs should be compensated depends on whether the approach is taken from the perspective of family law or the law of compensation for damages. The first is based on the logic that all the consequences associated with the birth of the child are in whole governed by family law,[59] in which the law of compensation for damages cannot interfere. H. Koziol and B.C. Steininger are both of the opinion that the tortfeasor in unwanted pregnancy not only causes the maintenance obligation, but also a comprehensive family law relationship whereby the material and non-material elements are inextricably intertwined.[60]

Basically the answer to the question requires a value judgment on the part of the court. However, even if the court finds that the right to damages in this case falls back from family law, it is not a convincing argument against compensating maintenance costs. It could be said that although the tortfeasor has caused a comprehensive family law relationship, the obligation to provide maintenance for the child does not disappear. Moreover, the court needs more specific arguments to reason the decision.

The authors believe that the solution to the problem could be sought in the argument of benefit set-off. While according to the general approach only the same type of benefit can be taken into account, it has been placed in doubt by H. Koziol in the context of these cases, because it does not enable the evaluation

59 H. Koziol, (note 46), 125-126.
60 H. Koziol, (note 46), 130; B.C. Steininger (note 9), 133.

of the event as whole: 'It is by no means clear that all non-pecuniary advantages should be left disregarded when making an overall assessment...'.[61]

It might therefore be concluded that in denying recovery of child maintenance costs the court is required to make a value judgment, which is based on the fact that as a special case the non-material benefit obtained from child rearing negates the child's upbringing expenses. Moreover, LOA Section 127 (5) does not stipulate that only the same type of benefits should necessarily be taken into account.

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

Conclusion

The question of compensation for damages in cases of wrongful conception has been discussed by lawyers in different countries for a long time.

Although the questions of qualification of the claim in the cases of unwanted pregnancy could be interesting from the aspect of domestic law, the central question of this discussion is whether it is correct to regard child maintenance costs as recoverable damage. Generalising the practice in the countries compared in this article it could be alleged that in Germany child maintenance costs are more likely to be compensated; it is less likely in the U.S.

Estonian courts will have relatively broad discretion in defining the recoverable damage. This discretion is expressed in the definition of the aim of the breached obligation or provision and taking into account the gained benefit.

In summary, we take the position that under Estonian law (as well as the universal principle), pregnancy and childbirth-related medical costs and loss of income due to temporary incapacity could be compensated foremost. If the health care provider's mistake can be righted by a subsequent procedure, the cost of the procedure should also be considered recoverable damage.

We find that child maintenance costs should not be compensated as damage: as a special case a standpoint should be taken that the non-material benefit re-

61 H. Koziol, (note 46), 129, 130.

lated to the upbringing of a child offsets the child's upbringing expenses as pecuniary damage.

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