

THE DIALECTICS OF WRONGFUL LIFE AND WRONGFUL BIRTH CLAIMS IN ISRAEL: A DISABILITY CRITIQUE

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ABSTRACT

This article examines the dialectics of wrongful life and wrongful birth claims in Israel from 1986 until 2012. In May 2012 Israeli Supreme Court declared that while wrongful birth claims were still permitted, wrongful life claims were no longer accepted in a court of law. The article examines the conditions that allowed for and supported the expansion of wrongful life/birth claims until 2012. The article identifies two parallel dynamics of expansion: a broadening of the scope of negligent conduct and a view of milder forms of disabilities as damage that merits compensation. The article further suggests four explanations for such doctrinal evolution, two of which emanate from doctrinal ambiguities and the other two are rooted in social factors that have shaped the meaning of disability as a tragedy and state of inferiority. While recent developments seem promising, the article concludes with a word of caution. Such changes may reproduce past injustices mainly because the compensation mechanism

has remained an individual-torts based one, which may run counter to the broader struggle for social change for disabled people.

Keywords: Disability studies; disability legal studies; torts; wrongful life; wrongful birth; Israel; disability

INTRODUCTION

R. is a five-year-old boy born with a mild heart condition that did not affect his health and no right arm (from the elbow down) (*R.V. v. Maccabi Healthcare Services (HMO)* 2008). R.'s parents filed a malpractice lawsuit composed of two interrelated legal claims. They filed a wrongful birth claim, arguing that had they known R. was going to be born disabled, they would have aborted the pregnancy, and a wrongful life claim, arguing in R.'s name that he would have been better off not having been born at all, rather than living with the impairment he has. R.'s mother testified in court:

I love R. very much, he contributes a lot to the family, he is our happiness, he is our light ... I cannot say that he is a harm to the family but had I aborted him within a year I would have had the same R. but with an arm and then he would have equally contributed to the family but would not have suffered from all the problems that a disabled child has (*R.V. v. Maccabi Healthcare Services (HMO)* 2008, 4–5)

In this article I show that wrongful life and wrongful birth cases, involving stories like the case of R., provide fascinating examples through which to examine the potential contribution of critical approaches to disability for torts theory and practice.

The article focuses on the Israeli arena in the years 1986–2012, a period in which Israel was the world leader in wrongful life/birth litigation (submitted together in most lawsuits for reasons that will be discussed below), by critically examining the dialectical evolution of wrongful life/birth doctrine, and offering a new perspective for addressing the complexities that cases such as R.'s involve. I argue that R.'s case was neither unique nor extreme. In Israel, even failure to detect relatively mild conditions has resulted in wrongful life/birth claims in court. However, this state of affairs cannot be separated from the broader legal, social, cultural, political, and economic context within which wrongful life/birth claim are litigated.

From 1986 to May 2012 wrongful life claims were a common and expanding practice in Israel (Davis, 2007; Gilbar, 2010; Karako-Eyal, 2007;

Perry, 2003; Sperling, 2009). In 1986 the Israeli Supreme Court decided the *Zeitsov v. Katz* case (1986), allowing for the first time both wrongful birth and wrongful life claims to be litigated in Israeli courts. While most legal systems only permitted the litigation of wrongful birth claims, Israel was one of the few countries that allowed wrongful life claims to be submitted to courts (Perry, 2008). In May 2012 the Israeli Supreme Court declared that while wrongful birth claims were still permitted, wrongful life claims were no longer allowed (*Hamer et al. v. Prof. Amit et al.*, 2012). With the *Hammer* decision Israel joined the majority of legal systems. This long journey, stretching over a period of 26 years, in which Israel has shifted from allowing wrongful life claims in courts to abolishing such legal avenue for redress, reveals an insightful story of social and legal change.

The *Zeitsov* case concerned a misdiagnosis of Hunter syndrome, a genetic condition that the family's physician was specifically asked to prevent. While the district court accepted only the wrongful birth claim, the Supreme Court ruled that the case met both wrongful life and wrongful birth requirements. As this article shows, *Zeitsov's* ruling was inconclusive, but it is exactly its indeterminate nature that contributed to the dynamics of expansion that followed. Based on a close reading of wrongful life cases in the years following the *Zeitsov* case, this article identifies two parallel dynamics of expansion: a broadening of the scope of what constitutes negligent conduct, and a recognition of milder forms of disability as "damage" meriting compensation.

This article examines the forces and conditions surrounding the prevalence, evolution, and increase of wrongful life/birth claims in Israel. Four different sources of expansion are identified and discussed, two of which are related to doctrinal ambiguities that resulted from *Zeitsov's* lack of conceptual clarity while the other two are related to social factors that have shaped the meaning of disability as a tragedy and state of inferiority. The negative attitudes towards disability are situated in a local discourse of reproduction and birth that encourages and even expects prospective parents to search for congenital impairments and to terminate the pregnancy if impairment is detected. But the prevalence of wrongful life/birth claims was also impacted by the inadequate socioeconomic infrastructure which made such claims a means of survival for disabled people and their families.

The article exposes the importance of a disability critique in uncovering the motivations behind these doctrinal developments. It also reveals inner tensions and contradictions inherent in a disability critique in this context: Wrongful life and wrongful birth claims are at once a source of relief and

a site of subordination for disabled people. While the stigma associated with disability is troubling and may lead to the opposition of wrongful life/birth claims, the socioeconomic aspect is appealing and may lead to their support. Still, despite the financial security that torts damages may allow some disabled people, it does not overcome stigma and prejudice or repair structural inequality. There is a powerful and persistent negative message about disability embedded in wrongful life and wrongful birth claims, and thus the benefits of such claims to individual claimants may run counter to the broader struggle for social change.

These dilemmas were very much at the heart of recent public debate in Israel on the future of wrongful life/birth claims in Israel. In 2009, the doctrinal and ethical complexities relating to wrongful life/birth claims resulted in the Israeli Supreme Court ordering a joint hearing of five pending appeals on the subject (*Hamer et al. v. Prof. Amit et al.*, 2009). Seven Justices were designated by the Supreme Court to hear these cases.¹ Most cases involved upper limb impairments. In 2011, while the case was pending, the Ministry of Justice nominated a public committee to provide recommendations to the Attorney General to assist him in formulating his official position on the subject, which would be brought before the Supreme Court. In March 2012, the public committee published a comprehensive report which recommended that a no-fault-based administrative solution would replace wrongful life torts actions ([Report of the Public Committee on the Matter of “Wrongful Life-Giving”, 2012](#) (hereinafter the Public Committee Report, or PCR)). In May 2012 the Supreme Court decided the *Hammer* case, which reversed the former 1986 ruling in *Zeitsov*. According to the new ruling, plaintiffs are barred from claiming damages based on wrongful life but are allowed to pursue compensation for wrongful birth. The problem that the Supreme Court encountered in *Hammer* was that wrongful birth compensation tends to be lower than wrongful life compensation, since it only covers the parents' expenses until the child reaches adulthood. Therefore, under the new ruling, parents were allowed to sue for lifelong disability-related costs.

This article explores the processes that preceded these recent developments, and examines the changes they can be expected to generate in the Israeli legal and social arenas. Both the public committee's recommendations and the Supreme Court decision are largely consistent with the claims and findings provided in this article. However, I argue that these changes should be treated with caution as they carry the risk of reproducing some of the injustices that wrongful life claims involved and raise concerns

about the future implementation of the ruling. Specifically, the persisting motivation to provide individual compensation through either torts damages or sectarian benefit schemes still emphasizes individual solutions rather than structural transformation and egalitarian principles, both of which are essential for pursuing the ideal of disability liberation.

WRONGFUL LIFE AND WRONGFUL BIRTH: CHARACTERISTICS, SIMILARITIES, DISTINCTIONS

To understand wrongful life and wrongful birth legal actions, it is important to look back at the story of R.: Had R. lost his arm as a result of any sort of accident, either as a fetus or a living person, there would have been no question as to the suitability or legitimacy of torts law as an avenue of action. In such a case, R. would have brought a lawsuit, asking the court to hold the wrongdoer responsible and to compensate him for the harm he suffered from losing his right arm.

However, R.'s story is different; his right arm is missing as a result of biology or fate, but not as a result of an accident or human intervention. There is therefore no wrongdoer, no harm, and no causation. In terms of torts law – there is no negligence, and therefore no cause of action can be established (Bopp, Bostrom, & McKinney, 1989; Perry, 2008; Tedeschi, 1966).

In order to overcome the above conceptual difficulties, wrongful life and wrongful birth claims have been conceptualized differently from other negligence-based claims. The harm in those claims is either life with a disability or having a child with a disability, the wrongdoer is a health care provider (e.g., genetic consultant, physician, ultrasound technician, or prenatal screening lab), and the causal link to be established is between the health care provider's neglect to detect an impairment and the lost opportunity to terminate the pregnancy (Perry, 2008). The core of both wrongful life and wrongful birth actions is the claim that the life of a disabled child should have been prevented and that compensation should be granted to cover the neglect (Bopp et al., 1989; Hensel, 2005).

Although wrongful life and wrongful birth claims share common roots and elements, there are substantial differences between the two (Hensel, 2005; Ossorio, 2000; Sheth, 2005–2006). A wrongful birth claim is the parents' assertion that rather than raise a disabled child, they would have

preferred to terminate the pregnancy, however the choice and opportunity to do so was denied to them. A wrongful life claim is brought by the child herself who asserts that because of her disability she would have been better off not being born at all.

There is a slightly different message embedded in each of the above claims: Wrongful birth carries the message that it is legitimate to decide to abort a fetus because of a potential disability, and that parents have a right to have all relevant information to make such decisions for themselves (Gold, 1996–1997; Ryan, 1993–1994; Steinbock, 2000). The message inherent in wrongful life claims, however, is that from the perspective of the disabled person, it would be preferable not to have been born at all (Hensel, 2005; Sheth, 2005–2006). In reality, wrongful life claims are not brought to courts by disabled persons, but by parents on behalf of their minor child who is often still too young to sue for herself. Despite these differences, the fundamental element of both claims is the child's disability, which is why some scholars argue that both wrongful birth and wrongful life are equally morally problematic (Bopp et al., 1989; Hensel, 2005; Jones, 2011; Pritchard, 2005).

Wrongful life claims raise persisting philosophical and doctrinal difficulties relating to the elements of *harm*, *damages*, *causation*, and the notion of *fault* (Heyd, 2002; Jones, 2011; Perry, 2008; Ossorio, 2000; Stolker, 1994; Tedeschi, 1966). The *harm* in wrongful life claims is life itself, a morally controversial argument that contradicts law's basic assumptions of and commitment to the value and protection of life and prevention of death (Bopp et al., 1988–1989; Hensel, 2005). Also problematic is the *calculation of damages*, which is based on an impossible comparison between life and nonexistence, a comparison that requires unavailable knowledge about the condition of nonexistence (Heyd, 2002; Perry, 2008; Stolker, 1994). The persisting difficulty with *causation* is that it is not the provider's intervention that resulted in the child's impairment (Perry, 2008; Ossorio, 2000). Consequently, it is highly problematic to attribute *fault* to the sued provider for neglecting to prevent a life with a disability.

Wrongful birth claims raise less doctrinal difficulties, particularly in jurisdictions where abortion is legal. The harm in such claims is the infringement of the parents' autonomy and the resulting birth of a disabled child (Hensel, 2005; Gold, 1996–1997; Ossorio, 2000). In addition, damages are easier to calculate in wrongful birth claims since not having this particular child was a viable option. Finally, causation can be more easily established as it is rooted in the lost opportunity to terminate the pregnancy, and fault is consequently readily attributed to the wrongdoer.

At the same time, wrongful life claims are very attractive from a practical-instrumental perspective. Unlike a wrongful birth claim which only covers the parents' expenses until the child reaches adulthood, a wrongful life lawsuit covers medical and other expenses for lifetime care (Perry, 2008; Ossorio, 2000). Because they potentially compensate for the assumed pain and suffering that a life with a disability entails, wrongful life claims may also involve higher non-pecuniary compensation (Perry, 2008). In addition, wrongful life claims allow for a longer limitation period, which starts not upon birth, but rather when the injured person reaches the formal age of acquiring full legal capacity, usually 18 years of age (Perry, 2008; Ossorio, 2000).

Over time, both wrongful birth and wrongful life claims have taken different paths. In most countries, wrongful birth claims have become widespread and uncontroversial, while wrongful life claims have remained highly contentious (Bopp et al., 1989; Hensel, 2005). Until the *Hammer* decision in 2012, Israel was among the few jurisdictions in which wrongful life claims have been allowed. Others include Holland and several states in the United States (Hensel, 2005; Perry, 2008; Stein, 2010). Israel has not only permitted such claims but has stood out as a leader, exhibiting a prevalent and expanding practice (Davis, 2007; Perry, 2003).

After the *Hammer* decision, Israel joined the majority of jurisdictions that permit only wrongful birth claims to be filed. However, in light of the lower compensation that wrongful birth claims provide (compared to wrongful life claims), the Supreme Court found a creative solution by declaring that damages for wrongful birth would cover lifelong disability-related costs. With this decision the Supreme Court attempted to avoid the ethical complexities that wrongful life claims involve all the while overcoming the financial shortcomings that characterize wrongful birth. Still, since wrongful birth claims are based on negative assumptions about disability, they send a problematic message about the value of life with disability, and convey a social expectation to terminate a pregnancy where congenital impairment is detected.

WRONGFUL LIFE/BIRTH CLAIMS FROM A DISABILITY PERSPECTIVE

The disability critique of wrongful life/birth claims draws on the disability studies' critique of bioethics and the disability critique of law, also known

as disability legal studies. A disability studies critique argues that courts, policymakers, scholars, and individuals tend to ignore the significant role of social disablement and social suffering in disabled peoples' lives, and see only impairment as the source of difficulty for them (Hensel, 2005; Jones, 2011; Ossorio, 2000; Sheth, 2005–2006). A disability legal studies perspective demands an analysis of the role that legal institutions and arrangements play in the social construction of disability (Kanter, 2011; Mor, 2006). It stresses the need to examine the impact of law on disabled people on an individual and a communal level and addresses the ways in which the law produces and reinforces sociocultural understandings of disability as inferiority and a burden on family and society.

The disability studies critique of bioethics, particularly the critique of prenatal screenings and abortions due to congenital impairments, perceives both wrongful life and wrongful birth claims as morally problematic since both convey the message not only that a life with a disability is not worth living, but also that families and society are better off with no disabled members (Hensel, 2005; Parens & Asch, 1999). From a familial perspective such claims may endorse a view of parental love as conditional love, a love which is dependent on the child's health and abilities (Feder-Kittay & Kittay, 2000; Parens & Asch, 1999). Sometimes they express an explicit expectation from parents to terminate a pregnancy following a diagnosis of impairment (Hensel, 2005). From a societal perspective, prenatal testing and related practices can indeed be seen as a new form of eugenics that benefits from an additional layer of state support through official court rulings (Hensel, 2005; Hubbard, 2006; Pritchard, 2005). However, opponents to the eugenics argument stress that there are various reasons for parents to end a pregnancy following a diagnosis of impairment (Steinbock, 2000), and that the rhetoric of eugenics is often unsuitable since such practices are largely driven by market forces and consumerist ideologies (Shakespeare, 2009).

Wrongful life and wrongful birth claims are problematic from a disability rights perspective as well. First, they manifest disability discrimination, since disability is the only trait that it is possible to sue for the lost opportunity to abort the pregnancy because of neglect to detect it (Hensel, 2005; Saxton, 2006; Hubbard, 2006; Sheth, 2005–2006). Second, such claims contradict the struggle for disability rights and undermine its goals (Asch, 2000; Hubbard, 2006; Sheth, 2005–2006). Others contend that while there is a tension between disability rights and wrongful life/birth claims they are not fully inconsistent (Shakespeare, 2009; Steinbock, 2000).

Another layer of critique concerns the lack of adequate and accurate information in the doctrinal and ethical debates that surround prenatal screenings, disability-related abortions, and wrongful birth and wrongful life claims (Parens & Asch, 1999): The tragedy, the suffering, and the misery associated with disability are problematic not only because of the social and political aspects of disability, but also because they do not match the lived experience of disability. Research and personal accounts of disabled people show that they can and do lead meaningful and joyous lives even under prevailing discrimination and exclusion (Asch, 1999, 2003; Bagenstos & Schlanger, 2007). These studies support the disability perspective and its purporting that disabled life is worth living, that families do thrive with disabled family members, and that society is better off when it allows disabled people and their families to flourish.

Finally, an additional set of critiques interrogate negligence and malpractice law as the framework within which wrongful life and wrongful birth claims take place. The context of malpractice magnifies the individual nature of those claims and the resulting emphasis on impairment as a negative trait and a source of suffering (Bloom & Miller, 2011). The individual nature of torts law assumes that damages should be awarded only to those whose disability results from an identifiable injury that was caused by someone's fault. Wrongful life/birth claims demonstrate the problematic nature of such a search for someone to blame: Individual blame is perceived as a solution while the social structure is accepted as a given and remains unchallenged. Such assumptions run counter to the basic tenets of a disability critique which emphasizes the ongoing disablement that disabled people experience and the social responsibility for disability.

The language that claimants use in courts is shaped not only by their experience but also by the rules that the legal discourse of torts law dictates. Parents who wish to receive the highest damages possible are forced to espouse a language of burden and tragedy and to focus on impairment itself as a dominant component in their child's life and in their family life (Bloom & Miller, 2011; Hensel, 2005). The context of torts does not allow parents to take the risk of presenting a complex picture of hardship and joy. Moreover, the setting of an open courtroom may turn the trial into a spectacle of personal tragedy, medical failure, and social inferiority (Hensel, 2005). Ultimately, an elaborate legal text is produced and published in which judges are forced to publicly justify their decision. These texts become cultural testimonies to the ways in which disability is

understood in a given era and to the manner by which law becomes an active participant in the construction of disability.

PRENATAL TESTING AND ABORTION POLICY IN ISRAEL

To understand the prevalence of wrongful life lawsuits in Israel up until 2012, and the expected continued prevalence of wrongful birth lawsuits, background on the public discourse within which they are situated is necessary. This public discourse overwhelmingly supports and even mandates extensive genetic testing and prenatal screenings as well as the termination of a pregnancy which may have even a slight chance for congenital impairment (Hashiloni-Dolev, 2006; Ivry, 2009; Remennick, 2006; Weiss, 2002). Various studies show that Israel holds a world record in prenatal testing and screenings (Hashiloni-Dolev, 2006; Ivry, 2009; Remennick, 2006; Weiss, 2002).

The enthusiasm for prenatal screening is situated within a medico-legal climate, whereby pregnant women are eligible for and expected to perform extensive prenatal screenings and testing (Davis, 2007; Hashiloni-Dolev, 2007; Ivry, 2009; Remennick, 2006). The Israeli public health care system provides a broad range of prenatal tests including free genetic counseling, as part of its routine pregnancy follow-up. Alongside this public health care system there is a vibrant industry of private providers and agencies that have developed expertise and prestige in the field. The pressure to comply with such testing is particularly heavy for Ashkenazi Jews, who are known to be at a higher risk for carrying various genetic conditions (Ivry, 2009; Remennick, 2006). Research shows that health care providers who communicate information about available tests to parents are not just passive transmitters of information but rather openly endorse genetic testing and prenatal screenings as a means to prevent the birth of a disabled child (Remennick, 2006). This pressure is significantly greater in Israel than in the United States and Germany (Hashiloni-Dolev, 2007).

The legal regulation of abortions in Israel also contributes to the climate of prenatal testing for impairments, setting the context for wrongful birth and wrongful life claims. While elective abortion is officially prohibited under Israeli criminal law (Criminal Law, 1977, §313), the law holds a very tolerant view of abortions due to congenital impairments. Israeli

abortion law delineates four exceptions to the general ban on abortion, including the woman's age (below legal age of marriage or above 40), a danger to the woman's health, problematic circumstances that led to the pregnancy (i.e., rape, incest, outside of wedlock), and the fetus's potential impairment (Criminal Law, 1977, §§314–316). In cases that meet one of the exceptions a permit from a Pregnancy Termination Committee is required. All exceptions apply at any stage of the pregnancy with no formal restriction.² The language of the impairment exception allows for the termination of a pregnancy if “the fetus might have a physical or mental defect” (Criminal Law, 1977, §316.A.3). The scope of the exception is broad and it permits abortions based on any type of impairment or any likelihood for impairment and at any stage of the pregnancy. To limit the scope of the law the Ministry of Health (MOH) issued guidelines concerning late-term pregnancy terminations,³ requiring an approval from an upper-level pregnancy termination committee (MOH Guidelines, 2007).⁴ Despite the guideline that sought to limit late-term abortions, statistics show that an average of 98–99% of all requests for abortion permits was approved.⁵

This relatively permissive practice of abortion may result in the illusion of a de facto right to abortion and family planning. The judicial affirmation of wrongful birth and wrongful life claims may further strengthen that illusion by adding legal safeguards to the parents' autonomy. To challenge this perception, I wish to highlight the sharp contrast between the lack of legal safeguards on the general right to end an unwanted pregnancy (Amir & Shoshi, 2007) and the firm protection that is granted to terminate a pregnancy based on impairment concerns. The overall picture suggests that the right to end a pregnancy is very limited in its scope, highly regulated by a mandatory administrative procedure, and is not driven by a commitment to protect parents' autonomy and self-determination. Instead, this right exhibits a narrow but strong commitment which allows and encourages parents to prevent the birth of a disabled child.

What is supposed to be an intimate decision about whether or not to terminate a pregnancy becomes part of what seems to be a general social interest in preventing the birth of disabled children. The emergence and expansion of wrongful life/birth claims should be viewed against this very complex and dominant background which leaves many prospective parents feeling that they have the legal right, the medical means, and the social expectation not to have a disabled child. When this very system fails them, they sue.

DYNAMICS OF EXPANSION IN ISRAELI CASE LAW

Up until recently, wrongful life/birth claims exhibited a clear direction of almost uninterrupted growth and expansion in Israeli case law. This trend was interrupted in 2009, when the Supreme Court decided on a joint hearing of five wrongful life/birth cases (*Hamer et al. v. Prof. Amit et al.*, 2009). The *Hammer* decision was preceded by calls from Israeli scholars to curb the expansion of wrongful birth/life doctrine due to ethical and doctrinal difficulties (Davis, 2007; Gilbar, 2010; Karako-Eyal, 2007; Perry, 2003; Sperling, 2009). However, the logic of this expansion and the elements that contributed to the process were insufficiently researched thus far.

The following analyzes the dynamics of expansion that characterized wrongful life case law in Israel from 1986 until May 2012. A close survey of Israeli wrongful life/birth case law reveals two parallel processes of expansion: an expansion of the categories of disability that fall under wrongful life/birth claims and an expansion of the acts (or omissions) performed by health care providers that constitute negligence.

To demonstrate these dynamics I will describe two cases: *Zeitsov v. Katz* (1986) and *Ploni v. The State of Israel* (2007). The first Israeli case that accepted wrongful life and wrongful birth claims was CA 512/81 *Zeitsov v. Katz* (1986). The *Zeitsov* family had a history of Hunter syndrome and was determined not to have a child who carried the gene that indicated the possibility of developing that disease and substantial physical and developmental impairments. During the pregnancy the parents performed the necessary exams and were assured by their physician that their child was not a carrier for the Hunter disease gene. Despite the tests and assurances the child ended up being a carrier for and later developed Hunter disease – the specific genetic syndrome that they sought to avoid. This case involved a severe disability and gross negligence on the part of the physician who failed to detect what she was specifically asked to.

C.C. 259/02 *Ploni v. The State of Israel* was decided in 2007, twenty years after *Zeitsov*.⁶ During pregnancy the ultrasound showed that Ploni's limbs were shorter than expected for that stage of development (24 weeks); however, the tests were inconclusive and no specific diagnosis was made. Ploni's parents decided to terminate the pregnancy but their request for an abortion permit was denied by an upper-level abortion committee. It was later revealed that the committee's decision was based on gross due-process violations as is defined by the MOH guidelines. Ploni was eventually diagnosed with hypochondroplasia, which meant that he would be substantially shorter than average (potentially reaching an average of 150 cm/4.9 ft) but

not as short as persons diagnosed with achondroplasia (dwarfism). Apart from height differences Ploni had no medical or other difficulties, although he might experience some in the future. Ploni's case was won in court; while the court found that the decision to deny an abortion was reasonable, the due process violations established negligence and allowed for a wrongful life claim.

We can see from *Zeitsov* to *Ploni* two parallel dynamics that took place. The first dynamic shows that not only severe forms of disabilities, but also milder impairments were recognized as a basis for damages in wrongful life/birth cases. If *Zeitsov* concerned a severe and complex disability that involved physical and developmental elements, *Ploni* concerned a relatively simple disability with no major complications, that even the courts didn't consider to be extremely abnormal (Gilbar, 2010).

The second dynamic indicates a change in the character of the negligent act; while earlier cases primarily concerned misdiagnoses of impairments, recent cases involved more complex and nuanced procedural questions relating to consent, autonomy, and full disclosure of information. Specifically, if *Zeitsov* was based on a clear failure of the physician to detect what she was specifically asked to detect, *Ploni* was based on a procedural flaw, even though the ultimate decision was found reasonable by the court (Sperling, 2009). In another famous case that illustrates this trend, the court granted compensation due to a physician's neglect to inform the parents about comprehensive prenatal screenings that are available in the private market (see C.A. 4960/04 *Siddi v. Clalit Health Services (HMO)*; Karako-Eyal, 2007).

Further examination of these two dynamics reveals that they are closely related; cases involving milder forms of disabilities tended to involve procedural questions regarding proper legal safeguards to better protect parents' autonomy. To explain this development I trace its roots to the doctrinal anomalies of wrongful life/birth claims in Israel and to the disability and social critiques of its underlying forces.

THE FORCES OF EXPANSION

After describing the processes of expansion that characterize wrongful life/birth claims in Israel, I turn to explore their sources and motivations. My argument is normative, but it is based on an in-depth study of Israeli wrongful life/birth doctrine. I suggest four underlying factors that

combined to drive the wrongful life/birth's process of expansion: the indeterminate logic of wrongful life/birth doctrine, the convergence of causes, negative attitudes toward disability, and the inadequate socioeconomic infrastructure.

The Indeterminate Logic of the Zeitsov Case

The indeterminate logic of the *Zeitsov* case (*Zeitsov v. Katz*, 1986) is the single most studied and addressed element explaining the process of expansion that characterized wrongful life/birth case law in Israel. Scholars, judges, practitioners and policymakers, as well as supporters and opponents have all acknowledged that a doctrinal anomaly shaped the field of wrongful life/birth claims in Israel and made the legal framework for those claims unstable and uncertain (Davis, 2007; Gilbar, 2010; Perry, 2003; Sperling, 2009). The root of that anomaly is found in the *Zeitsov* case, which opened the gate for wrongful life and wrongful birth claims but provided no clear reasoning or definite logic to follow.

Five justices sat on the bench in the Supreme Court's hearing of the *Zeitsov* case; one denied the claim and four accepted it but were divided in their reasoning. The dissenting opinion ruled that the question of whether a person has a right to not be born is philosophical and theological and cannot be resolved by law; therefore, the law cannot support a plaintiff's claim that she/he would have been better off not having been born at all (Justice Goldberg in *Zeitsov*, 1986).

The majority opinion included two approaches: The restrictive approach and the permissive approach. Both enjoyed equal support. The restrictive approach, supported by two justices, held that in extreme and rare cases it is possible to say that a person would have been better off not having been born than living with a severe disability. Justice Ben-Porat, the Justice who wrote the leading opinion, instructed that such a decision should be based on "accepted societal conventions" and on the objective standard of the "reasonable person" (Justice Ben-Porat in *Zeitsov*, 1986, p. 97). The restrictive approach faces numerous ethical, doctrinal, logical, and disability-related difficulties. Specifically, by its simple embrace of the essence of a wrongful life claim it states that some lives are not worth living. A major difficulty in the restrictive approach is that it inevitably faces the challenge of line drawing. Eventually, the restrictive approach was broadly interpreted by courts in a way that found most

impairments sufficiently severe enough to establish a wrongful life claim (see Part E.iii.a).

The permissive approach, which was formulated by Justice Barak, sought to bypass the ethical and doctrinal difficulties inherent in a “better off not being born” argument. This approach offered a unique reasoning purporting that wrongful life claims do not weigh life against nonexistence, but rather compare life with a disability to life with no disability. In this approach the protected interest is the interest of life without impairment and not the interest of non-existence. The stated goal was not to restore the claimant to his/her original state, but rather to provide adequate compensation that would allow the claimant to *live with* the impairment she/he was born with. Following this logic, a usual torts analysis is performed and damages are regularly calculated (Justice Barak in *Zeitsov*, 1986, pp. 116–119).

There are several compelling elements in the permissive approach. Importantly, this approach avoided the complexities of comparing life to nonexistence, rejected “better off dead” language, and normalized wrongful life claims making them look almost like regular malpractice cases. This approach also avoided line drawing and allowed a broader class of plaintiffs to be compensated. Nevertheless, some core issues relating to causation and fault remained unresolved in the permissive approach. Specifically having a life with no disability was never a viable option for the plaintiff and what could be prevented in those cases was not disability but rather life itself. There was also a persistent difficulty with the underlying message of such a claim – although there is no explicit “better off dead” message, the claim held the implicit assumption that the pregnancy should have been terminated.

During the 26 years that passed from *Zeitsov* to *Hammer*, none of the justices’ approaches became binding precedent (Davis, 2007). The dominant view among commentators was that in practice, the decisions of the lower courts revealed a stronger tendency toward *Zeitsov*’s permissive reasoning (Davis, 2007). However, I argue that while the lower courts may have tended to support the permissive approach as a better normative solution, in most instances their ruling relied on the restrictive approach as the suitable legal framework for the situation.

A close reading of all available lower courts’ rulings reveal that the majority of cases were decided based on the restrictive approach. Many such cases involved impairments that were perceived by the courts as “severe enough” to establish the claim that the plaintiff would have been

better off not having been born at all. Such impairments included Down syndrome (see, e.g., *A.L. v. Dr. Yaniv*, 2005; *Ben-David v. Dr. Antebi*, 2007; *Ploni vs. Dr. Kassif*, 2007) and fragile X syndrome (see, e.g., *Segal v. Clalit Health Services (HMO)*, 2008). In a small number of cases the courts relied on the restrictive approach to deny a claim because it involved “too mild” an impairment. All of these cases involved upper limb impairments (see, e.g., T.A. (Haifa) 745/02 *Hamer v. Prof. Amit*, 2006). In the largest group of cases which involved a variety of impairments, from mild to severe, the courts ruled that while both approaches supported the compensation of the claimant the particular impairment being discussed was “objectively” severe enough and fit within the guidelines and logic of the restrictive approach (see, e.g., *Amor v. The State of Israel*, 2002; *Palombah v. Clalit Health Services (HMO)*, 2005). Eventually, very few cases were decided based on the permissive approach; those that involved mild disabilities, primarily upper limb impairments (see, e.g., *v. Clalit Health Services (HMO)*, 2005). The overall inclination of the courts has been to grant compensations in all wrongful life/birth lawsuits.

The result was that, in a large group of the cases in which the courts seemed to prefer the permissive approach, they ended up ruling according to the restrictive approach. In addition, since in most cases the restrictive approach served to anchor the court’s decision, a negative message about life with a disability was inevitably communicated. Although the attractiveness of the permissive approach could have led to the abandonment of the “better off dead” discourse, the presence and relevance of the restrictive approach kept that perspective active and dominant.

It seems that from a doctrinal and institutional perspective a ruling based on the restrictive approach was safer, since only “severe” cases benefited from the support of all four justices who comprised the majority in *Zeitsov*, and faced a smaller chance of being appealed or reversed. Ultimately, the indeterminate logic of *Zeitsov* resulted in sending a clear message that life with most forms of disabilities is not worth living and that all forms of disabilities equally warranted an abortion.

The Convergence of Causes

The *Zeitsov* case generated another doctrinal anomaly that received much less attention in Israeli legal scholarship; no clear distinction between wrongful life and wrongful birth as separate but interrelated claims was developed in Israeli case law. In all but one case in which the plaintiffs won

their claim, the courts granted compensations based on wrongful life but mixed together elements of the parents' claim, practically treating the two causes of action as one.

The root of this development is also grounded in the *Zeitsov* decision in *Zeitsov v. Katz* 1986. While the justices' opinions in *Zeitsov* addressed at length the difficulties that wrongful life claims involved, they did not attend to the elements of wrongful birth claims and offered no guidance regarding the distinction between the two causes of action. The reason for the neglect is that all Supreme Court justices affirmed the District Court's ruling which held that wrongful birth is an acceptable cause of action in Israeli law. None of the justices found any ethical difficulty with the parents' claim for compensation, primarily because Israeli law allows abortions based on a suspected congenital impairment. Justice Barak noted that the infringement on the parents' right to family planning is the basis for a wrongful birth claim, and stressed that a usual torts analysis is fitting for such circumstance (Justice Barak in *Zeitsov*, p. 113). Indeed, abortions based on impairment-related grounds are permitted in Israeli law. But it is an overstatement to claim that a legal right to family planning actually exists in Israeli law. As argued earlier, the legal protection of the opportunity to terminate a pregnancy due to congenital impairment is a highly regulated exception to the rule that prohibits elective abortions.

As explained above, the distinctions between the two causes of action are important for doctrinal and conceptual clarity: Were the parents the ones who wished not to have had a disabled child or was it the disabled child herself who regretted having been born? Were compensations granted for living a life with impairment or for the infringement on the parents' autonomy and freedom of choice? Following *Zeitsov*, courts were inconclusive in their use of wrongful life and wrongful birth as separate claims, using wrongful life as the broad framework, but expanding its application to a line of reasoning rooted in wrongful birth logic. In *Ploni*, for instance, the court's ruling was grounded in due process, which is closely tied to the parental autonomy that characterizes wrongful birth claims (*Ploni*, 2007). In *Siddi*, the court found the plaintiff's HMO liable for neglecting to inform the parents that even though the quality of prenatal exams provided by the HMO was reasonable, more exhaustive prenatal screenings was available privately (*Siddi v. Clalit Health Services (HMO)*, 2005).

In both *Ploni* and *Siddi* the protected interest was the parents' interest to have all relevant information in order to make a fully informed decision about continuing the pregnancy. Both cases involved relatively mild

impairments (short stature in *Ploni* and lack of the right palm and breathing problems in *Siddi*). And yet, both *Ploni* and *Siddi* were litigated as wrongful life cases. In both cases the court did not differentiate their rationales for each cause of action, but rather mixed them together, assuming that the parents' interests and the disabled person's interests and perspectives were identical. This resulted in the expansion of wrongful life claims and the practical dissolution of wrongful birth claims.

The case of *R.* was the only case in which an Israeli court denied the claim for wrongful life and accepted the claim for wrongful birth (*R.V. v. Maccabi Healthcare Services (HMO)*, 2008). *R.* had no right arm and lived with a mild heart condition that did not affect his health. His parents already had an older disabled child and testified that they were determined not to have another child with any impairment, either mild or severe. The court ruled that *R.*'s condition did not establish a wrongful life claim based on the restrictive approach, but accepted the parents wrongful birth claim based on the following dual test: (1) in such a case an abortion committee would have given a permit for abortion, and (2) had the parents had the option they would have actually performed an abortion. The clear distinction between the two causes was not employed by courts in subsequent cases until the *Hammer* decision.

The analysis provided above reveals that the convergence of causes is a major contributor to the dynamics of expansion described earlier. The cases that involved "mild" impairments and gross violations of the parents' autonomy were the ones that typically belonged in the doctrinal realm of wrongful birth. But in a doctrinal reality that does not separate wrongful life from wrongful birth, every case is almost automatically conceptualized as a wrongful life case. The combination of the convergence of causes and the indeterminate logic of *Zeitsov* resulted in a doctrinal atmosphere that granted compensation for almost all impairments and sent the message that one is better off not being born with any type of disability, mild or severe.

Thus far I have analyzed the ways in which doctrinal anomalies have allowed the expansion of wrongful life claims in Israel. I now turn to examine the sociocultural atmosphere and the socioeconomic infrastructure that have supported these anomalies and participated in their formation. I argue that the sociocultural and economic features of Israeli society, in the form of negative views and structural barriers, have shaped the local evolution of wrongful life/birth and have impacted all actors, including prospective parents, health care providers, lawyers, and judges.

Negative Attitudes Toward Disability

Disability in Israeli Wrongful Life/Birth Court Decisions

Wrongful life and wrongful birth claims inherently contain negative views of life with a disability. A close survey of Israeli wrongful life/birth case law reveals that many judges felt agony when they were required to make a statement about the value or quality of life of a disabled child. Despite their qualms, most ended up making such statements. This is true particularly for lower courts that were compelled to participate in the practice of line drawing while examining whether a particular syndrome or impairment fit *Zeitsov's* restrictive approach. Below is a discussion on the way in which the courts treated three different impairments: Down syndrome, blindness, and upper limb impairments.

Fear of having a child with Down syndrome epitomizes the concern of congenital impairments, and as such it is the most tested for impairment in prenatal testing (Dixon, 2008). It is not surprising then that courts treated Down syndrome as the most taken for granted case of wrongful life; Down syndrome was repeatedly mentioned as accepted case of “better off not having been born.” The first case that discussed Down syndrome was a District Court decision in the matter of *The State of Israel v. Azulay*, Ham. (Haifa) 4993/90 (1991). According to the court, “For a child who was born with ‘Down syndrome,’ who would live his entire life in an institution, not only unable to contribute to society, but also being only a burden on society, social convention determines that he would have been better off not having been born” (*The State of Israel v. Azulay* 1991, §10). In a later case (*Amor v. The State of Israel*, 2002), the court ruled that despite testimonies stating that the plaintiff seemed to “enjoy what she does, just like other kids” the doctrinal standard was objective and did not rely on the person’s own evaluation of her own life (*Amor v. The State of Israel*, 2002, p. 11). The court concluded that the happiness in the lives of people with Down syndrome was minimal (*Id.*), stating that “raising a damaged child involves such an immense pain that even the joy of raising the child cannot ease” (*Id.*, p. 3).

In subsequent cases courts plainly ruled that indication of the claimant’s Down syndrome was sufficient to prove an “extreme case” in which it would have been better for the child not to have been born (*A.L. v. Dr. Yaniv*, 2005; *Ben-David v. Dr. Antebi*, 2007; *Ploni vs. Dr. Kassif*, 2007). Down syndrome is not the only impairment that has been perceived this way. Following *Zeitsov*, courts declared spina bifida, fragile X, and all instances

of developmental disabilities to be among those extreme instances that meet the restrictive approach's standards of "better off not having been born."

The courts' perspective of blindness is another revealing example. The courts have expressed conflicted responses in their approach to blindness but eventually concluded that it met the restrictive standard. For example, in *The State of Israel v. Azulay* (1991), the judge found that while blindness was not as severe as Down syndrome it still substantially limited the child's ability to enjoy life. In order to illustrate that blindness falls within the logic of the restrictive approach, the court cited the *Halakha* (Jewish law) that states that "a blind person is considered a dead person" (*The State of Israel v. Azulay* 1991, §11) In a 2005 case that involved a blind child, the judge described the plaintiff as talented, active, and friendly, but still determined that "objectively" blindness fell among the extreme cases in which it would have been better for the child not to have been born (*Palombah v. Clalit Health Services (HMO)*, 2005).

The only group of impairments that was treated inconsistently in the court decision is upper limb impairments. Interestingly, such cases arrived quite quickly to courts. The first court that faced such a claim dismissed it, arguing that "any other decision would ... 'contradict both public policy doctrine (*Takanat Hatzibur*) and the principle of sanctity of life'" (*The State of Israel v. Azulay*, 1991, §12). That case was appealed to the Supreme Court who accepted it, ruling that dismissing such a claim infringes on the claimant's right to prove her case before the court, and that only after hearing the case should courts decide which approach they follow (*Azulay v. The State of Israel*, 1993). In the years that followed lower courts were occupied with a substantial number of cases that concerned upper limb impairments; my survey of wrongful life/birth court decisions shows that these cases comprise almost 30% of all published wrongful life/birth cases. Among them, some claims have been denied based on the restrictive approach, some have been accepted based on the permissive approach, but in most cases the claim was rejected on factual grounds. No court has been willing to accept the claim that upper limb impairments fall within the logic of the restrictive approach. These findings suggest that even though wrongful life and wrongful birth claims relating to upper limb impairments were not always successful in court, they were still considered socially and legally legitimate claims.

The controversy surrounding upper limb impairments marks the contours of the entire debate on wrongful life and wrongful birth claims. Specifically, it demonstrates that all court decisions found all non-limb-related impairments to be covered by the restrictive approach. Moreover,

the large body of case law on the matter indicates the large numbers of parents who view upper limb impairments as severe enough to justify the termination of a pregnancy and the filing of a wrongful life/birth claim. Particularly telling in this context is the *Berman* case, a joint case which involved two instances in which the right arm was missing at birth (*Berman v. Mor – Institute for Medical Data*, 1997). One of the mothers testified that when she was 37 weeks pregnant she specifically requested a sonogram to make sure the fetus had all of its limbs. The sonogram failed to detect any impairment. The mother argued in court that had the impairment been found she would have terminated the pregnancy. The claim in *Berman* was denied, but in her decision, Justice Beinisch stated: “My heart goes out to the plaintiffs for their bad fate ... for being destined to face such a severe impairment for their entire lives” (*Berman v. Mor – Institute for Medical Data*, 1997, p. 217). Both the mother’s testimony and Justice Beinisch’s words are revealing. Through such claims, a disturbing picture of intolerance for any impairment in the mainstream Israeli discourse of reproduction and birth appears.

The legal controversy surrounding upper limb impairments has captured the essence of the doctrinal indeterminacy that characterized wrongful life/birth case law. Eventually, several appeals on upper limb impairment cases were joined with the *Hammer* case and led to the reversal of *Zeitsov* and the rejection of wrongful life claims. The prevalence of these claims was significant in bringing that dramatic doctrinal shift, but it was also a product of a certain environment that allowed such claims to flourish.

One factor that contributed to that environment was the setting of torts litigation in general and wrongful life in particular. It is clear that the litigation of wrongful life cases is likely to generate extreme statements regarding the inferior status of disabled people in society and the negative ways in which disability is perceived. This is a setting in which parents want money and courts wish to provide financial assistance to parents. Still, I argue that the statements mentioned above with regard to disability cannot be dismissed as merely instrumental. In the following section I show that they were situated in a local discourse that nourishes “the quest for the perfect baby” and expects the medical profession to carry out that aim.

Disability in Israeli Discourse of Reproduction and Birth

The prevalence of wrongful life/birth lawsuits (until the *Hammer* decision), pervasive use of prenatal testing, and perceived right to terminate a pregnancy due to congenital impairment creates a culture that encourages the reproduction of healthy and non-disabled babies. Israeli society is usually

marked by pronatalist tendencies which play a fundamental role in shaping its reproductive policies (Portugese, 1998; Sered, 2000). However, the context of disability shows clearly that the expectation to reproduce is contingent on the fetus's health. Earlier I described the socio-medico-legal climate which shapes the experience of a contingent pregnancy in Israel. The cultural roots of this atmosphere are elaborated on below.

In recent years, a growing body of literature has attempted to explain Israeli society's preoccupation with bodily (im)perfection. Many draw on aspects of local history such as the Zionist project of renewal and the recent Jewish persecution. Others address the rise of consumerism, the commercial interests of private market prenatal services, and the fascination with technology and scientific progress.

According to Meira Weiss, the Zionist politics of the body manifests an ideology of *The Chosen Body* (Weiss, 2002). In seeking to transform the Jewish body from a sick and pale figure to a strong, healthy, and masculine ideal, Zionism ironically adopted anti-Semitic stereotypes instead of challenging their underlying ableist assumptions (Mor, 2007; Sufian, 2007; Weiss, 2002). Zionism aimed to reform the Jew by turning him into a soldier and worker capable of bearing the collective mission of national revival, a project that bears deep anti-disability sentiments (Mor, 2007). Meira Weiss's words aptly summarize this critique: "Handicap is a reminder of the Jew's 'crippled' condition in pre-Israel times" (Weiss, 2002, p. 91).

The recent history of the persecution and revival of the Jewish people together with the continuing demographic challenges that Israel faces fosters a culture of pronatalism and existential fear of extinction (Ivry, 2009). According to Ivry, in this "politics of threatened life," the fetus's potential impairment becomes a threat to the pregnant woman's life.

Although Israeli society places great emphasis on familism, natalism, and the centrality of parenthood (Remennick, 2006), prenatal testing, which may seem to contradict this ethos, is seen rather as an indication of good parenting (Ivry, 2009; Remennick, 2006) and expression of "genetic responsibility" toward one's own future, the future of one's family, and that of society at large (Remennick, 2006).

Another set of important factors pertains to more recent global and local developments in the realms of technology and economics. One such development is the rising role of consumerism in the pursuit of "perfect life" and of "custom designed" babies (Remennick, 2006). In addition, the vibrant private market of prenatal services in Israel has its own commercial interests in encouraging increasing testing (Hashiloni-Dolev, 2006; Remennick, 2006). Finally, Israeli society is known for its easy adoption of

new technologies, particularly in the field of reproduction and health (Hashiloni-Dolev, 2006; Ivry, 2009; Weiss, 2002). It is hard to tell which of the above elements provides a better explanation, but the overall picture presents a deeper understanding of this national preoccupation with bodily (im)perfection that shapes personal attitudes toward disability.

The negative view of disability which is reflected in and reinforced by the Israeli dominant discourse of reproduction and birth has also impacted the approach of disabled people and disability activists to the issue of prenatal testing. Unlike many other countries, there is no active disability movement in Israel objecting to or even questioning prenatal testing, abortions due to congenital impairment, or wrongful life/birth claims. There is minimal research examining disabled peoples' views on this subject, but existing studies show that most Israeli activists do not find any contradiction or tension between the above practices and the struggle for disability rights (Hashiloni-Dolev, 2007; Raz, 2004).

The reading of wrongful life/birth cases shows that these same attitudes were also shared by judges; these judges were part of the same atmosphere that views disability as a tragedy and misfortune and therefore supports the prevention of life with a disability. The analysis of wrongful life/birth cases shows that judges share parents' disappointment and empathize with the disabled child whose life could have been avoided. It is hard to know what made wrongful life/birth cases different from other torts claims that may be rejected because of failure to meet the criteria of negligence; it may be the context of reproduction, childbirth, and the creation of new life together with the sense that the tragedy and the suffering could have been avoided. Regardless, what judges repeatedly neglected to notice in these cases was that the tragedy and the suffering of the plaintiffs were not a product of a natural misfortune, but were rather socially constructed, a product of human intervention in the form of stigma, inaccessibility, and lack of adequate social services. Interestingly, none the cases discussed or even mentioned the Equal Rights for People with Disability Law which was enacted in 1998 (Equal Rights for People with Disability Law, 1998).

The *Hammer* case, the case that overruled *Zeitsov*, was the first wrongful life/birth case to mention the principles of the Equal Rights for People with Disabilities Law, which was enacted already in 1998. Justice Rivlin, the justice who wrote the leading opinion for the majority, expressed the following view about life with a disability:

A person is born in the Image of God. Once he is born – his dignity and the sanctity of his life should be protected. There is no way to evaluate his life, be his life as difficult as

they may be. There is no way to evaluate his life, be his disability as it may be. Life is a supreme value – for all. (*Hamer et al. v. Prof. Amit et al.*, 2012, §26)

Justice Rivlin further declared that “according to our social view, within the framework of our moral belief and by the power of our legal principles – defining the life of a person with a disability as ‘harm’ is inappropriate, immoral, and intolerable” (*Hamer et al. v. Prof. Amit et al.*, 2012, §27). The *Hammer* decision indeed marks a new direction in Israeli law, but we have yet to see what language the courts will employ in future wrongful birth cases.

In the next section I further complicate the above picture and show that the judges’ understanding of disability was not only rooted in negative attitudes toward disability, but also grounded in a deep concern for the new lives that would be born into a reality of poor socioeconomic infrastructure.

The Inadequate Socioeconomic Infrastructure

This section discusses another important driving force behind Israel’s endorsement of wrongful life/birth claims: the inadequate socioeconomic infrastructure which significantly contributes to the difficulties that a life with a disability entails, and the instrumental role of torts law in providing financial relief.

The Role of Socioeconomic Factors in Wrongful Life Court Decisions

From a socioeconomic perspective, one can perceive Justice Barak’s permissive approach in *Zeitsov* as primarily aiming to provide plaintiffs with the means to live a decent life. Indeed, although the compensated group included only those whose life could have been prevented, Barak’s legal construction attempted to avoid the rhetoric of suffering and bypass the difficulty of line drawing. His reasoning suggests that sufficient financial resources can mitigate impairment. Barak maintained that his approach was advantageous as it “grants [the plaintiff] decent compensation that will allow him to live with the impairment he has” (*Zeitsov v. Katz*, 1986, p. 118). He also contended that the right of the claimant was that “once he is born, his life will be without impairment ...” (*Id.*). While the physical impairments clearly could not vanish, Barak’s words implied that the economic aspects of the impairment could be eased. He stressed that the goal of compensation in this context would not be to restore an initial state of

affairs, but rather to “provid[e] the injured with a remedy” (*Id.*, p. 118). He concluded by stating that “from the perspective of the injured ... he should be guaranteed the means for existence” (*Id.*, p. 122).

Similarly, Justice Ben-Porat maintained that compensation was aimed at “improving the quality of life of [the claimant] in his inferior condition, to the extent that money can actually fulfill that goal” (*Id.*, p. 102). Ben-Porat’s approach represented a view of disability as inherent inferiority, a term that she repeatedly employs, combined with a deep commitment to improve the life conditions of claimants. She stressed that “it is not enough to bring that claimant to a condition in which he is indifferent to life” (*Id.*, p. 100), rather he should be granted a sum that would minimize the implications of his inferiority as much as possible. The aim of such compensations was to allow the claimant “to maximize his potential so that he will be able to function better and to suffer less, in his inferior condition” (*Id.*). Moreover, “once he was born (even if it not for his own good) ... the child before us deserves to live a meaningful life, even though it is in the context of his handicap” (*Id.*). Both Justice Barak and Justice Ben-Porat sought to remedy the economic aspects of disability. Although such an emphasis on economic aspects may reinforce the view of disabled people as a burden, it also shows that financial means can mitigate one’s disability, thereby implying that disability is socially constructed, at least to some extent.

Many court decisions, particularly those that concern substantial impairments, expressed this duality; disability is perceived as an objective and inherent inferiority, but an inferiority that could be partially mitigated by financial means. In *Amor v. The State of Israel*, a claim involving a plaintiff with Down syndrome, the court stated that the very principle of the “‘sanctity of life’ justifies not only ‘giving’ life but also bringing the person who was forced to live a life of suffering to a reasonable quality of life” (*Amor v. The State of Israel*, 2002, §11). Such court decisions acknowledged that living a dignified life with a disability would entail significant extra personal costs. Clearly, those who were able to afford better services, better treatment, and better training would have better opportunities in life. Wrongful life/birth cases presented an opportunity to provide substantial financial assistance to a disabled person and her family which would allow for greater quality of life and prevent them from financial crisis.

In *Palombah v. Clalit Health Services (HMO)* (2005), the court determined that blindness is “objectively” severe enough condition that meets the standard of the restrictive approach and at the same time found the plaintiff to be a charming, beautiful, intelligent, and talented girl who is loved by her friends and family. The court stressed that “the process of

growing up blind is an extremely difficult process,” and that the plaintiff is “about to face numerous difficulties and challenges throughout her life” (*Palombah v. Clalit Health Services (HMO)*, 2005, p. 26). The court stated that in light of the claimant’s talents, she would surely “learn how to live with her impairment, would become independent, and would be able to participate in the labor market” (*Id.*, p. 24), but still ruled that the plaintiff’s expected level of “functional disability” was 65% (*Id.*, p. 25).

Ploni v. The State of Israel (2007) is the only case thus far in which the court portrayed the plaintiff’s disability as a “socioeconomic” disability. The court referred to the attorney’s claim that “the world is built for people of average height” (*Ploni v. The State of Israel*, 2007, p. 41). The court described Ploni as a popular, confident, and active child, but expressed sincere concern for the plaintiff’s future in a society that is inhospitable to short statured people, stating: “As long as [the plaintiff] is a child, he encounters no difficulties As he grows up he might face substantial difficulties in choosing a profession, finding a job, or forming an intimate relationship.” The court supported its last statement with an ironic reference to the testimony of the physician who rejected the parent’s request for an abortion permit, in which he stated in court that he would not take such a short statured doctor to his department. This ironic reference exposes the complex reality underlying wrongful life claims: Although immoral in theory, the harsh reality is that disabled people face tremendous difficulties stemming from economic hardships, negative societal attitudes, and structural barriers and wrongful life claims are a way of addressing these difficulties.

The extra costs of disability become particularly apparent to judges when they are required to calculate the level of damages to be awarded to claimants. Decisions concerning damages may include a long list of services and material needs that disabled people may need, including personal assistance, wage loss, loss of earning capacity, housing modifications, mobility costs, extra laundry and drying costs, diapers, wipes, extra towels, sheets and clothing, hydrotherapy, therapeutic horseback riding, communications therapy, occupational therapy, and more (see, e.g., *Plonit v. Prof. Chamkah*, 2008). This recognition corresponds with Justice Barak’s emphasis on the remedial aspect of wrongful life claims and the need to guarantee the claimant with sufficient means for existence. Nevertheless, while such decisions expose the actual costs of disability and provide some extent of an individual remedy, they do not address their structural causes by ameliorating the social conditions that have given rise to the reality that disabled people face.

The Multiple Aspects of Socioeconomic Infrastructure

The fourth element that contributed to the expansion of wrongful life/birth claims is therefore related to the economic aspects of disability. This element indicates the courts' concern with the cost of living with a disability, namely daily needs, social services, treatments, employment chances, and the ability to financially support oneself. Underlying these economic concerns is a socioeconomic reality in which disabled people experience significant barriers and fewer possibilities due to their disability. While most courts did not actively connect the two, the decisions they made were influenced by that linkage; these decisions expressed a sincere attempt to assist disabled people and their families so that they would not only survive but flourish as well. This socioeconomic analysis may also explain the courts' tendency to anchor their ruling in the restrictive approach, namely for the purpose of ensuring compensation for plaintiffs. They resorted to the permissive approach only when the restrictive approach seemed inapplicable. The goal was the same: to secure a remedy for the plaintiff.

According to this practical-instrumental argument, the motivation behind the submission and approval of wrongful life/birth claims is the inadequate socioeconomic infrastructure. Such lawsuits present a major opportunity for economic survival and for the provision of necessary treatments and needs (Jones, 2011). However, the support of wrongful life/birth claims for financial reasons has pitfalls that reach beyond the negative messages they convey (Hensel, 2005; Sheth, 2005–2006). In order to afford better life conditions for the plaintiff and her family, these claims require judges, lawyers, and parents to participate in a public display of suffering (Hensel, 2005; Sheth, 2005–2006). In addition, these claims do not benefit all disabled people and not even all disabled children, but rather only those who are willing and able to take part in this display. Ironically, those who knowingly carry a pregnancy with a disabled child to a full term are not entitled to such funds, even though they all bear the same disability-related costs (Hensel, 2005; Jones, 2011; Sheth, 2005–2006).

What is missing from most court decisions and dominant legal scholarship is recognition of the role that structural barriers and societal attitudes play in this reality of economic inferiority. The very willingness to award high damages in wrongful life/birth cases demonstrates a belief in the right of a disabled person to maximize his/her potential and to lead a satisfying life. By acknowledging the role of economic factors in the experience of disability, a preliminary understanding of disability as a social construct is demonstrated. Yet this economic understanding of disability is still too

narrow as it still defines the problem and solution in individual terms. When court decisions take social structures for granted and see them as merely part of a neutral reality, disabled people seem to be “objectively” better off not having been born. Such a limited view of socioeconomic factors may strengthen the negative view of disability as a burden; if disability is so expensive, it might be better to save all these costs by preventing the reproduction of disabled people.

A broader understanding of the socioeconomic infrastructure would emphasize that the high cost of living associated with disability is not just related to expensive individual needs, but are often connected to and stem from structural barriers that create a society that is unaccommodating, inaccessible, inhospitable, discriminatory, and exclusionary toward disabled people (Asch & Fine, 1988). The financial support that torts damages provides to some disabled people, those who choose to file a claim and meet torts law requirements, may allow them to lead a financially secure life. However, this financial support cannot replace the ethic of social responsibility (Jones, 2011), nor can it overcome prejudice or fix structural inequality (Hensel, 2005). Moreover, allowing torts law to become a supplement for that which society originally denies and diverts the burden from society as a whole to random individual wrongdoers. This system benefits only a select few. Clearly, the patchwork of torts law cannot replace the struggle for social change.

BEFORE CONCLUDING: *HAMMER*, THE PUBLIC COMMITTEE REPORT, AND THE FUTURE

The doctrinal confusion, conceptual ambiguity, and ethical-moral problematic nature of wrongful life claims pressured the Supreme Court to reconsider its rulings. Another critical background factor that pressured the Supreme Court was the rise of disability rights discourse and the spread of disability rights activism in Israel. During the last two decades Israel has witnessed many protests and campaigns concerning the rights and benefits of disabled people in Israeli society (Mor, 2009). These campaigns led to the amendment of existing laws and the enactment of new laws aimed at improving the life of disabled people and providing them with legal protection. An important milestone was the enactment of the Equal Rights for People with Disabilities Law in 1998 (hereinafter ERPDL). The Public Committee Report (PCR) and the *Hammer* decision, both issued in 2012,

refer to the ERPDL in their texts to uphold the dignity and the value of life of disabled people and support the claim that a life with a disability cannot be considered a harm (*Hamer et al. v. Prof. Amit et al.*, 2012, §§26–27; Public Committee Report, 2012, pp. 42–46). Both texts accept that wrongful life claims send a negative message about a life with a disability and that they affect disabled people's place in society. Both also acknowledge and seek to transform prevalent stigma and stereotypes relating to disabled people in society.

The PCR and the *Hammer* decision present two possible alternative directions for the compensation of children who were born with congenital impairments: the PCR resorts to an administrative mechanism based on principles of no-fault and social security. The *Hammer* decision continues with fault-based torts but allows only the parents to sue. The PCR locates and attempts to address the predicament of wrongful life/birth lawsuits in their larger social context and to alter the medico-legal atmosphere in which they operate. It recommends a relatively egalitarian mechanism that provides benefits to any child who was born disabled whether or not her impairment was caused by medical malpractice and whether or not the impairment could have been diagnosed in vitro. In addition, the PCR seeks to decrease the rate of disability-related abortions by challenging the stigma associated with disability, as well as by minimizing the impact of economic considerations on the decision whether or not to give birth to a disabled child (Public Committee Report, 2012, p. 58).

The breadth of the PCR recommendations is impressive, yet they are still far from implementation. The realization of their transformative potential is dependent on a long and complex legislative process and will be determined by the level of support and benefits that will be achieved. However, even if fully implemented, a central difficulty with this scheme is its resulting unequal treatment of those who are born disabled and as such entitled to its benefits, and those who acquire their disability later in life and are not covered by the proposed program.

Unlike the PCR, the *Hammer* decision became effective immediately.⁷ But from a disability perspective, the impact of this change is much narrower. While the claim “better off not being born” lost its legal legitimacy in the *Hammer* decision, the validity of common statements such as “having a disabled child is a harm to one's family” or “parents should be compensated for the disappointment of having a disabled child” was reinforced. In a way, many problems that characterized wrongful life claims may still persist, albeit in different formats. Issues relating to line drawing and the determination of what conduct would constitute negligence are

expected to occupy future court decisions. It will be interesting to follow the development of wrongful birth claims in Israel and to notice the new dilemmas and challenges their litigation may bring.

Most importantly, the perspective developed in this article shows that wrongful birth claims remain a torts-based solution with a very limited ability to provide financial security to disabled people; they benefit very few and do not address structural inequalities. While somewhat less problematic from an ethical perspective, and possibly less stigmatizing, they cannot generate broad social change.

In sum, both the PCR and the *Hammer* decision are consistent to some extent with the claims raised in this article. However, both developments raise concerns about implementation and carry the risk of reproducing past injustices. First, individual compensations and allowances based on the circumstances or the cause of the disablement bring individual relief but not comprehensive group-based solutions. Second, addressing stigma is insufficient, a greater commitment to disability rights and to the restructuring the social environment is needed.

CONCLUSION

The analysis provided in this article interrogates the practice of wrongful life/birth lawsuits that was pervasive in Israel until recently abolished. The article situates that practice in its supporting context, particularly the context of social disablement through negative assumptions and inadequate socioeconomic infrastructure. The concluding discussion shows that recent developments, namely the *Hammer* decision and the recommendations of the PCR, are timely but imperfect: both respond to actual concerns but provide partial solutions that can potentially reproduce past injustices. This is because fault-based and no-fault schemes are eventually individual-based solutions that do not sufficiently address the root causes of the problem: they benefit only a few and do not treat disability as a matter of structural inequality.

This analysis raises the concern that beyond sending a negative message about disability, the search for individual relief may substitute the struggle for meaningful social change. It will clearly take time until the struggle for disability rights and adequate social services is completed. The question remaining is whether litigating wrongful life or wrongful birth claims in the interim period is beneficial to the disability community. It is yet to be seen

how wrongful birth claims will evolve in courts and whether or not the government will follow the PCR recommendations.

This article demonstrates the need for a thick account of disability in legal analysis. Its reading of wrongful life/birth cases manifests an approach to legal texts that combines attention to the intricacies of legal doctrine, a commitment to critical analysis and sensitivity to socioeconomic motivations and consequences, all the while placing disability at the center. The dialectical dynamics of wrongful life/birth claims in Israel illustrate the constitutive role of law in the sociocultural production of disability. The understanding of disability as a contingent and unstable category calls for the incorporation of disability legal studies into critical legal theory and for the expansion of the study of intersectionality, and social justice so that they include the disability critique.

NOTES

1. The Supreme Court of Israel usually sits in panels of three Justices, unless the case involves a particularly important legal issue. The designation of seven Justices to hear the case indicates the case's significance.

2. Whereas most countries allow unrestricted early pregnancy termination but forbid it at later stages, Israel formally prohibits elective abortions but allows the termination of a pregnancy at any stage if the case fits one of the named criteria. For a global review of state policies regarding late termination of pregnancy, including limits relating to age of pregnancy, see <http://www.gutmacher.org/pubs/journals/2405698.pdf>

3. The guidelines define 23 weeks as the legal line for late term termination of pregnancy. At 23 weeks most fetuses reach viability, which means that they can survive outside the womb. In bioethics it is considered the stage where more weight is ascribed to the fetus' interests.

4. The guidelines set specific criteria relating to abortions due to congenital impairments, based on the severity of the expected impairment, and the level of certainty that such impairment will indeed occur. The severity is measured by the level of expected dependence on others in daily activities and the ability to integrate in society (MOH Guidelines, 2007), available at http://www.health.gov.il/hozer/mk23_2007.pdf

5. Applications to Committees for Termination of Pregnancy – Selected Data, Central Bureau of Statistics, 2009, available at http://www.cbs.gov.il/www/publications/lidot/lidot_all_2.pdf. More data is available on the Central Bureau of Statistics website http://www.cbs.gov.il/reader/cw_usr_view_SHTML?ID=752

6. *Ploni* is the Hebrew term for anonymous party.

7. Except for some ambiguity in the interim period. See, for example, *H.A. (minor) v. The State of Israel – Ministry of Health* (July 1, 2012), in which the court accepted a wrongful life claim because the parents lost their opportunity claim since

limitation period for wrongful birth claim passed and the court did not want the claimant to lose her opportunity for economic support.

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