

Compensating the Child for the Harm of Being Born Disabled: A Comparative Study

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The doctor's mistake in diagnosing and detecting serious deformities or illness of the foetus during pregnancy may lead to the birth of a handicapped child. If the parents were aware of a diagnosis, they would quickly conduct surgical interventions where possible to reduce this disability or end it by conducting therapeutic interventions on the foetus, as long as it is inside the womb or resorting to loss, if it is not possible to reduce this disability or end it by performing surgical interventions on the foetus. Therefore, it can be said that the doctor's mistake is the direct cause of the damage, and nothing changes the matter that the foetus' disability occurred before the commission of such mistakes. If such a mistake had not occurred, it is possible that the parents would have resorted to one of the above options, in order to avoid the birth of a handicapped child. Therefore, this gives the child the right to seek compensation.

Keywords: *Disabled child, Missed opportunity, Misdiagnosis, Compensation, Wrong life lawsuit.*

Introduction

The term, 'disabled child', refers to a child who suffers a stable or temporary total or partial deficiency or imbalance in his or her physical, sensory, mental or psychological abilities, and to the extent that limits the possibility of learning, rehabilitation or work, and so that he or she cannot meet the requirements of his or her normal life without a disability. It also generates a sense of the difficulty of social inclusion (CRPD Article 2).

It is clear from the definition that the reliable criterion for describing a child as disabled is the extent of the loss of the ability, in whole or in part, to perform the usual activities practised

naturally by those of his or her age and who are not disabled. The birth of a disabled child is due to internal and external factors. For example, a congenital disability resulting from the internal factors present in the child. That is, at its first roots ‘in the sperm or egg’. The sperm that fertilised the egg has a defect in either its shape, size, number of chromosomes or the egg carries the same defect or both. These internal factors may be attributed to the factor of heredity, which may exceed the parents to the grandparents (Al-Awari, 2010: 32).

The external factors may present another reason. For example, an obstetric disability that occurs from the environmental factors, whether chemical or natural, and results in changes in the embryo from its genetically sound structure, leading to a disabled child. Such external factors may include exposing the mother, in the first weeks of pregnancy, to an injure or sick . Consequently, microbes are able to penetrate the uterine wall, and reach the tissues of the developing foetus. This may cause a defect that eliminates it or leaves it with a birth defect. Further examples include infecting the mother with the German measles virus or the mother’s consumption of chemicals and drugs, such as Thalidomide or Cortisone, or exposure to X-rays, which may affect the foetus and make it vulnerable to disability (Ismail, 2010: 154).

The reasons which lead to the birth of a disabled child may also be due to the mistakes or errors of the physician managing the care of the expectant mother. The doctor may make errors a during pregnancy, which causes damage to the foetus. This can lead to the child’s birth with a disability, despite the possibility that the doctor was available to intervene to remove or reduce the effects of a disability.

The Study Problem

Given the suffering that a disabled child experiences throughout their life with a disability, many questions have arisen regarding compensating the child for the harm of being born with a disability. Can the mere birth of a child with a disability be considered an injury in itself that requires compensation? In other words, is it possible to suggest that a child has the right not to be born unless he or she is physically, sensually, mentally, and psychologically safe to carry out the activities of life which are practised by those of his or her age and who are not disabled? Therefore, the question remains: can that child be compensated in the violation of this right?

The Study Aims

The present study aims at identifying the position of legislation, the judiciary, and jurisprudence in Latin and Anglo-Saxon countries and comparing them with Iraqi legislation. The study seeks to highlight the extent of the need to develop a legal text regulating the right of a handicapped child to compensation, ensuring a minimum level of care and attention to

help him or her coexist with a disability. Furthermore, it is also positioned at reconsidering the Iraqi legislation, in which there is no text permitting abortion for medical reasons related to the foetus, to stipulate the possibility of resorting to abortion whenever it is medically proven and certain, in the scenario that the foetus suffers from serious deformities that cannot be treated, and provided that this disability is severe and does not allow the child to practise or engage in the easier daily activities.

The Study Significance

The present study explains the severe jurisprudential and judicial dispute regarding the extent of the right of the disabled child to be compensated independently over the right of his or her parents to compensation. There is no such discussion and disagreement on any other issue in this regard. The present study also determines who is responsible for the error that led to the birth of the disabled child.

The Study Methodology

The above questions will be answered according to the comparative analytical method. The Anglo-Saxon and Latin laws will be analysed to identify the judgments and opinions of jurists in this field. The present study is divided into two sections: The first section is the judicial position on compensating the child for the harm of being born with a disability and the second section is the position of jurisprudence regarding compensating the child for the harm of being born with disabilities.

The Judicial Position on Compensating the Child for the Harm of Being Born with a Disability

To identify the judgments of the judiciary regarding the compensation for the birth of a disabled child, the position of the judiciary in the Latin and Anglo-Saxon countries should be analysed to determine the extent to which the mere birth of a disabled child is considered a disadvantage in itself.

The Position of the Judiciary in Latin Countries Regarding Compensation for a Child Born with a Disability

To identify the judgments of the judiciary in Latin countries regarding the compensation for the birth of a disabled child, the position of the judiciary in the Arab countries and France should be analysed to determine the extent to which the mere birth of a disabled child is considered a harm in itself.

The Position of the Judiciary in the Arab Countries Regarding Compensation for a Child Born with a Disability

The Iraqi and Egyptian legislators did not regulate the child's right to be compensated for the harm of being born with a disability, with a special law. This issue was not presented to the Iraqi and Egyptian courts to provide a definitive opinion upon it. In light of this legislative deficiency, it is necessary to refer to the general rules for compensation, specifically to the article 204 of the Iraqi Civil Law No. 40 for the year 1951, and the Egyptian Civil Law, 1948: Article 163, which stipulate that compensation is required for any harm that affects others, which in turn does not give the right to a disabled child to be compensated unless the reason for being born with a disability is as a result of the doctor's mistake. For example, a doctor wounding the newborn during the delivery process, which leads to the disability or giving the mother a prohibited drug that leads to the disability of the child.

However, if the reason for the birth of a disabled child is the result of a genetic disease during pregnancy or changes in genetic makeup due to chemical or natural factors, this child does not have the right to be compensated. It is not possible to count the incident of his or her birth as a damage to be compensated for because the Iraqi legislator (Iraqi Penal Code, No. 111 of 1969: Article 417-419), and the Egyptian Penal Code (Articles from 262–264) permit parents to resort to abortion in the event that the foetus is found to have a severe incurable or treatable disease.

The Position of the French Judiciary Regarding Compensation for a Child Born with a Disability

At the French Court of Cassation, on 17 November 2000 (French Civil Code, Dalouz edition: 2009, p. 1428), the PERRUCHE judiciary judged that Nicolas had the right to be compensated for the disability that arose from the fixed errors committed by the doctor and the laboratory of analysis, represented by the doctor's default and the inaccuracy of his information and the inaccuracy of the results of the analyses provided by the laboratory, which led to Nicolas' disability. If the mother knew of the danger, she would have terminated her pregnancy, and therefore, there is a causal relationship between the error and the harm represented by the child's disability. The causal link has been interpreted or viewed in a broad way; those who did not prevent the disability, caused it.

The French judiciary has been affected by the above court judgment. The Bordeaux Court of Appeal gave a disabled child the right to be compensated for being born with a disability, due to the doctor's mistake that lead to the mother being deprived from the right of resorting to abortion, if she knew of the child's condition and of a lack of fluid surrounding the foetus, which exposes the foetus to disability (CA Bordeaux, 18 Sept 2001).

On 13 July 2001, the French Court of Cassation had a second opportunity to confirm its previous case regarding the child's right to be compensated for being born with a disability. Three other judgments were issued to confirm that the child shall have the right to be compensated for the harm of being born with a disability: the errors committed by the doctor in the inaccuracy of the diagnosis; the discovery of the truth of the disease at the time of early diagnosis; and the mother's delusion that she is free from any genetic disease that can be transmitted to the foetus, which collectively made the parents believe that the development of their child was normal. These errors led to the birth of the disabled child, whereas, it was possible to avoid it by resorting to medical abortion during the first three months of pregnancy, if the doctor had provided them with correct and sufficient information about the position of the foetus. (CA Bordeaux, 18 Sept 2001).

The successive judicial rulings issued by the French Court of Cassation gave the child the right to be compensated for the harm of being born with a disability, as a result of the doctor's mistake in the inaccuracy of the diagnosis, which led to the mother being deprived from the right of resorting to an abortion if she knew of the child's condition during pregnancy. This issue led to instability and anxiety between doctors, insurance companies, and all medical personnel until the French law No. 303–2002 was issued on 4 March 2002, on the patients' rights and the quality of the health system. The first article of the law stipulates that a person with a disability due to medical mistake can ask for compensation, but provided that the mistake is the direct cause that led to the occurrence of the disability or its exacerbation. This includes in the instances a doctor injures a newborn during the delivery process, leading to disability or giving the mother a medication that led to the disability of the child. If the matter is limited to the mere failure of the doctor to disclose the disability, the disabled child does not have the right to be compensated.

The above article also granted the parents the right to claim compensation for the moral damage they suffered as a result of the birth of their disabled child. As for the maintenance and upbringing or rehabilitation costs of their disabled child, this was referred to social security.

In response to the consequence of applying the provisions of the first article of the Law of 4 March 2002, many instances of anxiety, panic, and denouncing the negative aspects of this law raised discussion about the waste of children's rights, people with disabilities, and many parents. Some citizens in France resorted to the European Court of Human Rights on the basis that the application of the provisions of the above article may conflict with some articles of the European Convention on Human Rights.

Indeed, the Draon and Maurice family raised their objection for not being compensated based on the fact that the provisions of Article 1 of the French law issued on 4 March 2002, came as a remedy to the European Convention on Human Rights. However, the French judiciary rejected the requests of the two affected families for compensation for the private expenses that are spent on their disabled children throughout their lives, as they are excluded from the scope of compensation according to the text of the above article. This ultimately led to the affected families resorting to the European Court of Human Rights. The two families raised before this court that the application of the provisions of the first article of the law of 4 March 2002, leads to deprivation insatiable from fair compensation, which is a right they are entitled to under the provisions of Article 13 of the European Convention on Human Rights.

On 6 July 2004, the European Court of Human Rights announced the acceptance of requests submitted by the two families for consideration. These two cases were examined by the Grand Chamber of the European Court, which consists of 17 judges.

On 6 October 2005, the European Court of Human Rights ruled that the first article of the French law issued on 4 March 2002 deprives the petitioners of the two families above the possibility of compensation for the private expenses spent on their disabled children throughout their lives, Furthermore, to refer this to the social security that provides for small amounts not corresponding to the harm caused to the parents, as a result of the birth of a disabled child. It is, in fact, a deprivation from the right to just compensation, which is a right they are entitled to under the provisions of Article 13 of the European Convention on Human Rights (CourEuropeenne des Droits de l'Homme [CEDH], 2005, Requete n 1513/03).

It should be noted that the European Court, although it was subjected to the issue of the parents' right to private expenses, did not address the issue of whether or not the incident of the birth of a child is considered a disability that represents a harm in itself.

However, the French Court of Cassation, through three judgments it issued on 24 January 2006 (Arete n 136 du 24 janv.2006), has gone beyond the dimension that the European Court of Human Rights followed. Its judgments confirm that the incident of the birth of a disabled child is a harm that requires compensation, in addition to the parents' right to be compensated for the private expenses they incur throughout the life of their disabled child. There is no doubt that the French Court of Cassation wanted to provide the maximum possible protection in the event of the birth of a disabled child, especially since French law permits abortion with the intention of avoiding the birth of a disabled child, and work to avoid the scourges and groans of disability (French Public Health, No. 75 of 1975: Article [2213/1]).

As a result, parents have the right to resort to abortion during the first three months of the pregnancy if they find that continuing the pregnancy endangers their child, such as being

born with a disability. Therefore, in cases of certain diseases, which may lead to disability, the doctor must draw the parents' attention to it. Subsequently, they must decide to continue the pregnancy or resort to abortion. In the event that the doctor informs the parents of the risks of a specific disease, which may lead to a significant chance or degree of disability, it may result in the parents taking a decision to resort to abortion, in order to avoid the birth of a child with a disability. Thus, the birth of the disabled child is itself harmful, and compensation is required.

The Position of the Judiciary in the Anglo-Saxon Countries Regarding Compensation for a Child Born with a Disability

To identify the judgments of the judiciary in the Anglo-Saxon countries regarding the compensation for the birth of a disabled child, the position of the judiciary in Britain, and in the United States of America must be analysed to identify the extent to which the mere birth of a child is considered a harm in itself.

The Position of the British Judiciary in Compensating the Child for the Harm of Being Born with Disabilities

The principle stipulated by the British legislation in the Code of Moral Disabilities of 1967, explicitly prohibits what is known as a "wrong life lawsuit". It is the lawsuit filed in the name of the child, and for his or her account through his or her legal representative to demand the right to be compensated for the disability in which he or she was born. The lawsuit is filed against the person causing disability, whether the doctor, hospital, medical analysis laboratory, radiology centre, or even the child's parents. This principle was established as a result of the report issued by the law committee, which was formed regarding foetal injury. The purpose behind the formation of this committee was to prevent this type of lawsuit. The committee is considered to be responsible for the right of the disabled child, in the same compensation, separate from the right of the parents to compensate for obstructing the difficult issues that caused them significant anxiety. It was concluded that there is no reason for such a lawsuit.

According to the Moral Disabilities Act of 1967, the 1982 London Court of Appeals ruled in the McKay case to refuse to accept the lawsuit filed in the name of the disabled child to claim compensation for the disability he or she was born with as a result of the doctor's mistake and negligence in the failure to disclose to a pregnant woman the risk of a rubella infection. The court decided that the doctors have no legal obligation to the foetus, to end his or her life if their disability is proven. However, the foetus does not have the right not to live (McKay v. EuexAren Health Authority, 1982Q B 1166, [1982] 2 W L R 890).

Hence, it is possible to conclude that the lawsuit filed in the name of the child to claim compensation for the harm of being born as a disabled person is totally rejected in the British judiciary, according to the Physical Disabilities Law issued in 1967, which prohibits this lawsuit based on the report of the Law Committee that issued it.

The American Judiciary Position of Compensating the Child for the Harm of Being Born with Disabilities

The lawsuit filed in the name of the disabled child claiming compensation for being born with disabilities in the American courts is termed, “the wrong life”. The American courts differed on the issue of compensation for the disabled child and they were divided into two directions:

A. The child has no right to be compensated for the harm of being born with a disability

The lawsuit filed in the name of the disabled child claiming compensation for being born disabled faced a strong rejection in the United States (US). Judicial judgments issued by the American courts rejected this suit. More than 31 US states rejected this suit. The Supreme Court of New Jersey, in 1967, in the suit of *Gleitman Vandaik* the case comprised that a pregnant woman was infected with rubella, and doctors assured her that there was no risk to her pregnancy. However, she was surprised that the child was born suffering from congenital defects, mental retardation, deafness, and partial blindness. Therefore, she filed a lawsuit in the name of her disabled child, claiming the right to be compensated by the physician. The New Jersey State Supreme Court affirmed the necessity of rejecting a child’s case because it is logically impossible to make a comparison between life with a disability and never existing (*Gleitman v. Cosgrove*, 49 NJ 22 [1967], 227 A.2d 689).

B. The child's right to be compensated for the harm of being born with a disability

The lawsuit filed in the name of the disabled child could claim compensation for the birth of a disabled child but only in two states: California, and Washington. The California Court of Appeals agreed to accept the child's case for being born disabled in 1980, in the *Curlender.v.Bio-Science Laboratories* case. The proceedings began with a pregnant woman and her husband going to the medical analysis laboratory to check whether they carry the genetic genes of the rare genetic disease Tay-Sachs, a disease that leads to death at the age of five years old, and of which there is a lack of treatment for. However, as a consequence of a laboratory error and the lack of accuracy in examining the sample, the couple were informed that they do not carry the gene for this disease and that there were no fears for the foetus. It was therefore

surprising when the child was born and doctors noticed, after a period from birth, the symptoms of convulsions, muscular dystrophy, blindness, mental retardation, and among others, which were diagnosed as carrying the serious genetic disease Tay-Sachs (Curlender.v.Bio-Science Laboratories [1980], 103 Cal. App. 3 rd 811).

Thus, the parents filed two cases. The first was against the medical laboratory and in the name of the parents to demand compensation for the mistake made in conducting the medical tests, which resulted in the birth of a child carrying a rare genetic disease. The second case was filed in the name of their disabled child, as they are legal representatives, demanding compensation for the disabled child, himself, for his birth with an disability, which was undertaken independently from the compensation awarded to his parents. Had it not been for the error issued by the laboratory, the mother would have made a decision to undergo an abortion, and the child would not have been born disabled. It was surprising that the California Court of Appeals ruled to accept the child's claim and award him compensation.

The Washington State Supreme Court also ruled in a child's case of a disabled childbirth in 1983, in Harbeson v. Parke-Davis, Inc. The case is summarised in the fact that a woman was suffering from epileptic seizures for which doctors prescribed a specific drug for her, and that drug caused severe birth defects of the foetus. The woman explained to the doctor her desire to become pregnant, and asked the doctor to inform her about the risks of the drug upon a foetus and pregnancy. Subsequently, the doctor assured her that there was no risk to a foetus. Accordingly, she decided to become pregnant. She gave birth to two children over two consecutive years. However, they were suffering from severe birth defects of developmental failure, drooping eyelids, and mental retardation, among other birth defects. The parents filed a lawsuit against the doctor to claim their right to compensation as a result of the negligence issued, which resulted in having deformed children. This was in addition to the right of the two children, themselves, to be compensated for being born with disabilities. The Washington State Supreme Court issued a ruling accepting the two children's suit and with compensation justified by its ruling, that the two children who suffer from severe birth defects often require very expensive medical care, education, training, and special rehabilitation. Thus, it would be fair to recognise that these two children have the right to be compensated for their births with disabilities, and independently from the compensation awarded to their parents (Harbeson v. Parke-Davis, Inc, 98 Wn.2d 460 [1983] 656 P.2d 483).

Hence, a majority of the rulings issued by the American judiciary reject the wrong life lawsuit and the right of the disabled child to be compensated for his or her birth with a disability, with the exception of the few provisions that agreed to accept the child's suit.

The Position of Jurisprudence Regarding Compensating the Child for the Harm of Being Born with Disabilities

The jurisprudence differed between an opponent and a supporter of the child's right to be compensated for the harm of being born with a disability. Accordingly, the views of those opposing the child's compensation for the harm of being born with a disability, and those who support it, will be clarified.

The Child Does Not have the Right to be Compensated for the Harm of Being Born with A Disability

Some of the jurists consider that a child born with a disability which is caused by doctor or laboratory error while diagnosing his or her illness and while he or she is a foetus, cannot claim compensation for the harm of their birth with a disability. They support their view with the following evidences:

- A. The doctor's mistake in the diagnosis process was not the direct cause of the disability, wherein the child was born because of a disability which originated from the effects of a genetic disease from one or both parents who transferred it to the foetus via the mother, and where medical intervention could not have prevented it, even if the disability was discovered (Abdulsadiq, 2004: p. 154). Saying that, the doctor's misdiagnosis is the direct cause of the birth of a child with a disability because the mother has missed the opportunity to resort to abortion, which requires knowing whether the mother can resort to abortion.
- B. The recognition of a child's right to be compensated for the harm of being born with a disability means acknowledging the existence of a new right of personality, which is the right of no birth. This right does not exist in practice because the recognition of this right means that the abortion of a deformed foetus or death is motivated by compassion, as a right of the personality (Hassan, 2014: p. 107). Does death become a value in facing life with a disability? Life is better than death in all cases. Conceding the existence of this right leads to the question: who will be the owner of this right? Saying that, the holder of the right is the child, and how is this right acquired when he or she is not yet born? By saying that the holder of this right is the child, it means that there is a freedom to choose whether or not to be born, which is impossible. Furthermore, saying that the holders of this right are the parents, indicates that they do not claim compensation in the name of the child for violating his or her right of no birth, he or she does not have a legal personality, and is not eligible to gain any personal right (El Desouky, 2007: p. 91).

- C. Recognising the child's right to be compensated for the harm of being born with a disability means putting the foetus in the position of the product, wherein the doctor must take the necessary care to get it out in the best appropriate manner and failing to do so, makes the doctor bear the responsibility. This matter entails removing the foetus from the circle of people (Taha, 2006: p. 31).
- D. The legislations of several Arab countries, such as Iraq and Egypt, did not allow abortion, except for medical reasons related to the conditions of the mother only without the foetus, and a state of necessity with which abortion is permitted to save the life of the mother from a certain risk or certain death if the pregnancy continues. Otherwise, allocating the legislation of a case with which abortion of the foetus is permissible, is not required. Subsequently, it is the same if the doctor informs the parents about the state of the foetus or as long as the above legislations did not give the parents the opportunity to perform an abortion, if it was proven that the foetus were deformed or that he or she had a serious disease that cannot be cured. Thus, the information here will be useless (Ashour, 2019: p. 285–299).
In relation to the legislation of countries that permitted abortion in order to save the life of the mother, abortion to remove a deformed foetus or a seriously ill foetus which cannot be cured, the French public health law No. 75, issued on 17 January 1975, states it is not a principle report in the interest of the child by not giving birth, but the goal was in the mother's interest, as she is addressed by this law, not the child. This was not for nothing, but an effort to relieve the psychological suffering and the financial burdens that result from supporting and raising a disabled child (Mohaisena, 2019: p. 17–27).
- E. The recognition of the child's right to be compensated for the harm of being born with a disability means indirectly acknowledging the responsibility of the parents towards the child because they did not make sure that they were free of hereditary diseases before giving birth to the child or did not resort to the abortion process after proving the disease during pregnancy. Consequently, if the doctor is going to defend their responsibility by resorting to abortion, the mother finds herself motivated by that desire to fade the blame of society or she bares the responsibility. This is inconsistent with the abortion licence that the legislators permit resorting to when terms are available (Shadid, 2006: p. 126).

The Child Has the Right to be Compensated for the Harm of Being Born with a Disability

Another aspect of jurisprudence considers that a child should be compensated for the harm he or she sustained as a result of their birth with a disability.

- A. The statement that the doctor's mistake was not a direct cause of the disability in which the child was born is incorrect. According to Article 2213/1 of the French Public Health Law, "The mother can perform an abortion during the first three months of the beginning of pregnancy if two doctors testify after examination and diagnosis that the continuation of the pregnancy will put the mother's health in danger or result in the birth of a child with an incurable disease. The birth of the disabled child is only a natural result of the doctor's failure to implement his/her obligations to give the pregnant mother the correct information about the real illness. So, she can decide whether or not to continue to become pregnant. If the mother knew that it was dangerous, she would quickly drop her pregnancy" Ashmawi, 2000: p. 16).
- B. It is unacceptable to say that the child is not entitled to claim compensation for the harm of being born with a disability. The legislations of some Arab countries, such as Iraq and Egypt, did not give the parents the right to resort to abortion to terminate a deformed or a seriously ill foetus which cannot be cured. Thus, it is the doctor's mistake, in that he or she violated his or her commitment to inform the parents about the condition of the foetus, which should be taken into consideration. If informing them does not achieve any benefit because the parents are not able to resort to abortion, it is also useful on the other hand, by informing the parents about the position of the foetus and distortions that may occur to reduce the abnormalities or the possibility of ending them, especially in light of the continuous medical and therapeutic progress. Therefore, the doctor's failure to commit to providing sufficient information to the parents is considered a mistake that requires their responsibility and obligation to compensation (Khalifa, 1996: p. 34).
- C. Not being sure that the mother would inevitably resort to abortion if she knew the outcome of the diagnosis because the issue of uncertainty does not prevent the mere possibility that the mother wanted to abort. This possibility can be considered as one of the reasons through which compensation can be assessed. Therefore, the doctor's fault, and if it is not the main cause of the disability or is one of the reasons without which the damage occurred, means that the doctor's mistake caused the mother to miss the opportunity to resort to abortion. Therefore, the doctor's fault is a direct cause of the occurrence of the disability with which the child was born (Ali, 1996: p. 104).
- D. Disabled children often require highly expensive medical care, special education, and training. Therefore, it is fair to recognise this child with the right to be compensated for being born with a disability.

Conclusions

At the end of the present study, a number of results were reached, in addition to several recommendations.

The Results

The judiciary and jurisprudence differed between an opponent and a supporter of the child's right to be compensated for the harm of being born with a disability. Several of the judiciary and the jurisprudence consider that a child born with a disability cannot claim compensation for the harm of being born with a disability. In their opinion, the doctor's fault in the diagnosis process is not the direct cause of the disability that a child is born with. Instead, it arises from the effects of a genetic disease of one or both of the parents, which is transferred to the foetus by the mother before any medical intervention can occur, and which could not be prevented from occurring. Even if the disability were discovered, there is no way to treat this disease.

The other group of jurisprudence considers that the child should be compensated for the harm he or she has sustained as a result of being born with a disability. The doctor's mistake was not a direct cause of the disability in which the child was born, is an incorrect statement. According to Article 2213/1 from the French Public Health Act, "The mother can perform an abortion during the first three months of the start of pregnancy if two doctors testify after examination and diagnosis that continuing pregnancy will put the mother's health at risk or result in the birth of a child with an incurable disease. The birth of the disabled child is only a natural result of the doctor not fulfilling his/her obligations to give the pregnant mother The correct information about the truth of the disease so that she can make her decision to continue with the pregnancy or not. The doctor's shortening and inaccuracy of his/her information led to the disability of the child. If the mother knew the seriousness of the matter, she would quickly drop her pregnancy".

Recommendations

The Iraqi legislators are recommended to acknowledge the child's right to receive compensation for the harm of being born with a disability whenever the doctor's mistake during pregnancy or childbirth was the direct cause of such disability. This includes in the instances of a physician injuring the newborn during the delivery process, which led to his or her disability or giving the mother a prohibited drug that led to the occurrence of the child's disability. However, if the birth of the disabled child is as a result of a genetic disease transmitted to him or her from one or both parents when he or she was a foetus or was caused by chemical or natural factors, two cases must be distinguished:

- A. If it is possible to reduce the size of this disability or end it by conducting some surgical interventions upon the foetus while he or she is in the womb, the child has the right to be compensated by the doctor for being born with a disability. The reasoning is that the doctor's mistake in the diagnosis and detection of a genetic disease or changes in the foetus' genetic composition due to chemical or natural factors causes the parents to miss the opportunity to make a decision to perform surgical intervention upon the foetus while it was inside the womb, and in time to avoid the birth of a disabled child.
- B. If it is not possible to reduce the disability or end it by conducting surgical interventions upon the foetus while it is in the womb, the child has the right to be compensated by the doctor for being born with a disability. The doctor's mistake in the diagnosis and detection of genetic disease or changes in the composition of the foetus' genetics due to chemical or natural factors causes the parents to miss the opportunity to make a decision to undergo a voluntary abortion to avoid having a disabled child. In this regard, the Iraqi legislators are recommended to reorganise the abortion and provide for the possibility of resorting to it in the event that the foetus is found to have deformities or a serious disease that is not subject to treatment. This is provided on the grounds that it will not be one hundred and twenty days after the pregnancy. It should also be upon the written consent of the parents. Furthermore, it should be stipulated that the child has the right to be compensated by the doctor for being born with a disability if it is proven that the doctor's mistake in diagnosing and detecting deformities or serious illness caused the parents to miss the opportunity to make an abortion decision to avoid having a disabled child.

In addition to the above, when estimating compensation, the health condition of the child born with a disability, the amount of harm he or she has sustained — which could be exacerbated in the future — and the special health care, treatment, and educational expenses required from his or her parents, must be taken into consideration.

In order to ensure that the disabled child receives compensation, the researchers understand that it is necessary to determine the principle of compulsory insurance from the civil responsibility of doctors for their professional mistakes, in order for the disabled child to obtain the amount of compensation through the insurance company jurisdiction and in solidarity with the doctor.

Moreover, the researchers view that it is necessary to find alternative ways forward in the event that the traditional rules are not sufficient to compensate a disabled child. This includes establishing a fund called the 'Special Needs Care Fund' that interferes to compensate the



disabled child in the event that the official is not identified or when one of them is an available case of exemption from liability. This fund is financed from multiple sources represented by a percentage of the federal budget of the State, and the fees that are collected from owners of hospitals, pharmacies, and private medical laboratories when the Ministry of Health issues a licence to approve its opening, subsidies, and donations from local and international organisations.

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