Perruche jurisprudence: the threat reappears

By a judgment of 15th December 2011, the Court of Cassation has affirmed that the children, born before the anti-Perruche law enters into force (which prohibits the recognition of a damage because of her/his birth, and limits the compensation of the parents to their sole sentimental damage), could be compensated for their damage to be born. And this, regardless of the date their proceedings were launched.

As a reminder, the so-called “anti-Perruche” law aimed at neutralizing the Perruche Jurisprudence which allowed to welcome two proceedings: the one of a disabled child non detected during the pregnancy to be compensated for its damage to be alive, and that of her/his parents to be compensated for their damage not to be able to terminate their pregnancy due to prenatal misdiagnosis.

The Gènéthique team interviewed Mr. Jerry Sainte Rose (JSR), Advocate General at the Court of Cassation at the time of the Perruche case in 2000, and former State Councilor, as well as Mr. Nicolas Gombault (NG) CEO of Sou medical, MACSF Group, to understand the decision of the Court of Cassation, and the impact of this decision which perpetuates the Perruche jurisprudence.

NG: The decision of the Constitutional Council had validated the legislative reform introduced by the “anti-Perruche” law, and it could be expected, under these conditions, that the Court of Cassation modifies its jurisprudence and assesses the conditions of responsibility of practitioners in charge of the prenatal diagnosis, in a different way, according to the date this law will apply.

All the more that the State Council decided, by considering the decision of the Constitutional Council, that the new regimen of responsibility from the law of 4th March 2002 would be applicable to all proceedings after this law enters into force, even if they would be initiated for children born before this law. However the Court of Cassation on the 15th December 2011 decide to maintain the effects of Perruche jurisprudence for all disputes concerning children born before the law of 4th March 2002 and for whom the parents or the children would go to law after the law enters into force.

For us all this seems to be strongly subject to criticism because it means that for years to come the parents will be able to claim an integral compensation for their child with non-detected disability, as this child is born before the 4th March 2002, and even though they will go to law posteriorly. We see double standard completely different. If these children are born in public hospital, they will not be able to claim compensation for the fact to be born because, according to the jurisprudence of the State Council, the law of 4th March 2002 will apply. While the Court of Cassation allows all the children born in private clinics, before the law of 4th March 2002, to invoke “the damage to be born”, we see that the system is no longer equal because if the woman was followed in private clinic or in public hospital, the rights and the compensation will be totally different. Hence the responsibility of public hospitals will be lower than that of liberal practitioners or private clinics what creates a breach of equality before the charges. The equality before the courts is unfortunately undermined.

JSR: Following the decision of the Constitutional Council, I thought like the majority of commentators that the wrongful life action was definitely condemned. Obviously, the 1st civil chamber of the Court of Cassation wanted to speak out against what it is called a “breach of jurisprudence”. Is it a proud reaction of the judges? Probably because they did not admit that the legislator cancels in some ways what they did, whereas they have good reasons to do it:

- in legal terms, it is difficult to understand how the physician, who did not detect a disability of genetic origin or related to a disease contracted by the mother during the pregnancy, could cause this disability which preexisted before his intervention. What was the right of the child who has been wrongfully injured: right not to be born, right to be born healthily? So many rights which do not exist and that nobody can guarantee. And by being alive, the disabled child did not lose anything. The conditions to accept the civil responsibility have not been respected.

- in ethical terms, I remind the firm condemnation by the French National Consultative Ethics Committee of the wrongful life action which is only a procedural substitution to abortion which did not occur; the compensation of the child equals to the denial of his person and to his symbolic death. The considered action is also dangerous since it can
encourage physicians, so that their responsibility is not involved, to abort perfectly healthy fetuses.

- Finally, concerning the equality of treatment of disabled people, it is obvious that this action, rejected by the State Council, leads to a triple inequality: it can only concern people with disability detectable during the pregnancy, people who are born in private clinics excluding those born in public hospitals and also concerns those of whom the parents accept to say it was better they did not born.

Génétique: You say that the decision of the Court of Cassation seems to be unconstitutional?

JSR: The decision of the Constitutional Council does not have any ambiguity. It mentions that dealing with facts noted before the 7th March 2002, the action of the child is not receivable when it was introduced after this date. Disregarding the willing of the legislator which was to put an end to the wrongful life action and interpreting freely the decision of the Constitutional Council, the Court circumvents the law and reports its application for a certain numbers of years. I do not see any remedy to this situation other than a new intervention of the Parliament followed by a possible seizing of the Constitutional Council.

Génétique: What will be the impact of the judgment of the Court of Cassation of 15th December 2011?

JSR: On a legal point of view, this decision is important. The impact of this decision is hardly measurable but it allows all children with incurable congenital disability and born before the anti-Perruche law enters into force, or the 7th March 2002, to claim compensation after this date. If the parents of children born before the 7th March 2002, in principle, will not be able to go to law on their own behalf in less than two months (their proceeding will be prescribed), proceedings could be brought in the name of the children or by them when they will be 18. When they are 18, these children will have still ten years to take legal action. Thus this leads us that a birth damage may be recognized until 2030, even beyond.

NG: Today I cannot tell you exactly how this will result on a financial level and if we will be obliged to increase significantly the premiums we request particularly to practitioners who intervene in the antenatal diagnosis. We have some ongoing cases concerning a litigation introduced after the 4th March 2002 for a birth occurred previously. But our real question is the number of new challenges from today. How many parents, informed about this jurisprudence will be encouraged to go to the courts to find the responsibility of health professionals specialized in antenatal diagnosis and particularly in fetal ultrasound, emphasizing that they gave birth before the law of 4th March 2002 of a child born with disability, because of the fact that they can still invoke the Perruche jurisprudence? We do not know it but we are particularly attentive to the evolutions we will see, and the numbers of cases we will have in the months and years to come. This worries us and this is why we are particularly vigilant regarding the developments of these cases.

Génétique: More generally, what is today your feeling on the prejudice to be born which was recognized ten years ago in France and that the Court intends today to perpetuate or even on the evolution of the medical responsibility since then?

NG: What we note since 2002 is that the Court of Cassation intended by all means to limit to the maximum the application of this anti-Perruche law, and to make the effects of the Perruche jurisprudence survive. The judgment of the 15th December 2011 represents again the manifestation. This passes through a greater responsibility of health professionals who can be condemned to extremely high amounts to compensate experienced damage. This does not prohibit us to still insure a high number of practitioners who has an activity of antenatal diagnosis. Particularly sonographers. On the other hand, we have significantly reduced, since the years 2000, the number of obstetrician members, for childbirth practice, taking into account the magnitude of the involved risks.

JSR: My position in this respect, which has a certain echo in the opinion, was also that of the Parliament, all trends included: the compensation of the disability by the national solidarity ensures the equality of all disabled people. Despite the so-called generosity it expresses, the Perruche jurisprudence seemed commendable to the extent that it seems dedicate all children with disability to abortion. Life is a donation and a child cannot claim to be born as she/he is. We have the feeling that the advances of medicine and the statements sometimes too optimistic of some physicians lead the parents to imagine that they could give birth to the perfect child. But it only deals with a fantasy and the law cannot promote biotechnological fantasies. We can note that the current trend is the information overload. This reinforces the general trend to “precaution abortion”. However it is notable that in Europe, at least as far as I know, the French Court of Cassation was the only one to welcome the wrongful life action. The German Constitutional Court rejected it as well as the Italian Court of Cassation. In the United Kingdom, it is prohibited by the law from 1970.

A summary in date:

- 14th February 1997: The State Council refuses to recognize the damage to be born
- 17th November 2000: Perruche Jurisprudence: The Court of Cassation compensates a child for her/his damage to be born with a disability undetected during the pregnancy
- 4th March 2002: anti-Perruche law (enters into force on 7th March 2002): 1. Action of the child prohibited: Prohibition for any person to rely on a damage of the sole fact of her/his birth. 2. Action of parents limited: compensation for sentimental damage of parents, their material damage supported by the national solidarity. 3. Retroactivity of the law: The law will be applicable to the pending lawsuits (lawsuits initiated before it comes into force and not definitely judged).
- 11th June 2010: Priority preliminary ruling on constitutionality (QPC) relative to anti-Perruche law: The anti-Perruche law is constitutional excluding the provision foreseeing its application to pending lawsuits.
- 13th May 2011: the State Council, based on the motives of the Constitutional Council decision, applies the anti-Perruche law to all the cases initiated after the 7th March 2002.
- 15th December 2011: the Court of Cassation by interpreting freely the QPC excludes the application of the anti-Perruche law to all the children born before the 7th March 2002 and recognizes them the damage to be born.