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side knowledge could have been advantageously used.'"⁴⁷ To require control in terms of ten percent of the common stock diminishes the effectiveness of the statute. The statute itself vests the power in the Securities Exchange Commission to exempt certain securities and transactions,⁴⁸ and exceptions to the statute should not be created by narrow judicial interpretation⁴⁹ One authority is of the opinion that "the express purpose of preventing the unfair use of inside information might suggest an application of the statute to all cases which may come literally within its scope."⁵⁰ By virtue of the ten percent and six months arbitrary cut off points, the statute is already limited, and the court should not limit further what is remedial legislation⁵¹ when, as in *Chemical Fund*, there is the slightest possibility for unfair use of inside information.

SARAH E. PARKER

Torts—Dignity As a Legally Protectable Interest

A recent New Jersey decision¹ presents the question of what injury, if any, has been suffered by a mother who has been denied the opportunity to obtain an abortion. Plaintiffs, a defective infant and his parents, brought a malpractice action against the mother's obstetricians alleging that they negligently assured Mrs. Glietman that her recent illness of German measles would not affect the infant then in gestation.² The basis of plaintiffs' claim was that defendants' repeated assurances induced Mrs. Glietman

⁴⁷ Painter, *The Evolving Role of Section 16(b)*, 62 MICH. L. REV. 649, 678 (1964).

⁴⁸ Cook 387.

⁴⁹ Hamilton 1455.

⁵⁰ Meeker 958.

⁵¹ Adler v. Klavans, 267 F.2d 840 (2d Cir. 1959). As the opinion states, "One can speculate on whether the moral or ethical values are altered by the passage of 24 hours, but the statute makes an honest if not an honorable man out of the insider in that period." *Id.* at 845. A line had to be drawn somewhere by the lawmakers as in any other area governed by statute.

¹ Glietman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967).

² At present it is well established that rubella virus can cause malformations of the eye (cataract and microphthalmia); internal ear (congenital deafness due to destruction of the Organ of Corti); heart (persistence of the ductus arteriosus as well as atrial and ventricular septal defects); and occasionally of the teeth (enamel layer). The virus may also be responsible for some cases of brain abnormalities and mental retardation.

J. LANGMAN, MEDICAL EMBRYOLOGY 73 (1963). In the principle case the infant had substantial defects in sight, hearing, and speech.

to forego an abortion which, plaintiffs asserted, would have freed the infant from a life with defects, the mother from emotional harm, and the father from added expenses. Defendants denied plaintiffs' allegations and testified that they had advised Mrs. Glietman of a twenty per cent chance of some deformity. The trial court, on motion by defendants, dismissed the suit for want of proximate cause and because it felt the New Jersey statute⁸ prohibited the suggested abortion. The factual dispute, therefore, was not resolved by the jury.

On appeal the New Jersey Supreme Court took plaintiffs' evidence as true⁴ and further assumed that Mrs. Glietman could have obtained an abortion unattended by any criminal sanctions and failed to do so in reliance upon defendants' assurances. The decision of the lower court was affirmed, three justices dissenting. The reason for affirmance as to the infant was that he had suffered no damages cognizable at law.⁵ The parents were denied recovery

⁸ Any person who maliciously or without lawful justification, with intent to cause or procure the miscarriage of a pregnant woman, administers or prescribes or advises or directs her to take or swallow any poison, drug, medicine, or noxious thing, or uses any instrument or means whatever, is guilty of a high misdemeanor.

N. J. STAT. ANN. § 2A: 87-1 (1953).

⁴ This assumption will also be made throughout this note. It might be proper to suggest that the court's decision may be due, in part, to the improbability of plaintiffs' allegations. It has been stated that a large percentage of malpractice litigation is without foundation, Regan, *Medical Legal Problems—The Physician's and Lawyer's Viewpoint*, in *MEDICOLEGAL SYMPOSIUM* 17 (1955), and the likelihood that a practicing obstetrician would either not know of the possible effects of rubella during pregnancy or would lie about them does indeed seem small.

⁵ Although our prime concern is the mother, the issue raised by the infant's claim warrants mention. Since there was no evidence that measures could have been taken to improve the infant's chances of a normal life, see, e.g., *Sylvia v. Gobeille*, 220 A.2d 222 (R.I. 1966); *First Nat'l Bank v. Rankin*, 59 Wash.2d 288, 367 P.2d 835 (1962), the decision seems correct because to recover he must maintain that he should not have been born, and it does seem impossible to "[W]eigh the value of life with impairments against the nonexistence of life itself." *Glietman v. Cosgrove*, 49 N.J. 22—, 227 A.2d 689, 692 (1967). Two cases were cited in support. In *Zepeda v. Zepeda*, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), an illegitimate child sought recovery against his father for damages caused by his birth out of wedlock. Although the court found the existence of a tort, recovery was denied on the grounds that recognition of such a claim should come from the legislature. In *Williams v. State*, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966), plaintiff's mother was raped while a patient at a state hospital for the mentally ill, and plaintiff sued for damages caused by the state's negligence in failing properly to protect its patient. The court found no wrong was done to plaintiff. For more on the "wrongful life" action see notes, 43 N.D.L. REV. 99 (1966); 11 S.D.L. REV. 180 (1966); 18 STAN. L. REV. 859 (1966).

because 1) they also suffered no damages cognizable at law and 2) even if there were legal damages, policy considerations "prevent this Court from allowing tort damages for the denial of the opportunity to take an embryonic life."⁶ It is submitted that the court should have determined whether the abortion was legal in New Jersey before affirming the dismissal and that, in any event, Mrs. Glietman suffered an injury to her dignity for which she should be compensated.

The court's assumption was only that plaintiff could have obtained a non-criminal abortion, the place being undetermined, and policy reasons were still found to prevent recovery. This is a logical conclusion if the abortion were illegal in New Jersey. If, however, such abortions were legal in that state,⁷ then it does not follow that public policy is a bar to plaintiff's recovery as the law would have weighed the relative rights of the mother and the embryo, and concluded that the mother's was the superior one. Otherwise, the abortion should be illegal. Thus, the fact that the infant "would almost surely choose life with defects as against no life at all"⁸ would be of no moment as the choice would not be his at that time. The choice would be the mother's and compensation for the denial of that right should not be withheld because an exercise thereof might result in the termination of an embryonic life. The right to end that life would be the very right impliedly given if the abortion were legal. It seems, therefore, that a determination of the legality of such an abortion in New Jersey was necessary to decide the case correctly. Given the other elements of liability, the decision would depend on whether plaintiff could have obtained the abortion had she been correctly advised by the defendants.

As to the issue of damages, the plaintiff may encounter some difficulty. In a majority of the cases where the question has been considered, recovery to the parents for harm resulting from the birth of a child was denied on the grounds that it was either too remote⁹ or was against public policy.¹⁰ Although plaintiff is seeking damages for emotional harm, the event which gave rise to that

⁶ Glietman v. Cosgrove, 49 N.J. 22,—, 227 A.2d 689, 693 (1967).

⁷ The assumption must be that the abortion is legal in New Jersey for even if plaintiff could have easily been aborted in a nearby state, the court would be reluctant to lend its aid to the circumvention of its own law. *But see*, dissenting opinion, *id.* at—, 227 A.2d at 703.

⁸ *Id.* at —, 227 A.2d at 693.

⁹ Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934).

¹⁰ Shaheen v. Knight, 11 Pa. D. & C.2d 41 (1957).

harm was the birth of her child. Several factors, however, are in her favor. In the first place, it seems without reason to establish a right in the parents to decide that they do not wish to risk a deformed child and then deny recovery when that right is wrongfully taken from them. Secondly, a recent California decision, *Custodio v. Bauer*,¹¹ may well be indicative of a new trend. In that case plaintiff-wife, after bearing nine children and being advised that another might threaten her health, underwent a sterilization operation. The operation was apparently unsuccessful, as a year and a half later Mrs. Custodio gave birth to her tenth child. The decision of the lower court which had sustained defendants' demurrer was reversed. The court stated, "It is clear that if successful on the issue of liability, they [the plaintiffs] have established a right to more than nominal damages."¹² *Doerr v. Villate*,¹³ wherein plaintiff sued for breach of an oral contract to sterilize her husband, was discussed in the opinion. Although the sole issue there was whether the two-year statute of limitations for personal injuries or the five-year statute for oral contracts applied, the *Custodio* court observed that *Doerr* does demonstrate, "that the birth of a child may be something less than the 'blessed event' referred to in those cases [those denying recovery]."¹⁴ Of course this reasoning is of no avail unless the abortion were found to be legal in New Jersey.

But if the abortion were illegal in New Jersey, has Mrs. Glietman then suffered no injury? It is suggested that she has, that the real injury is an affront to her dignity as a human being, and that this is true regardless of whether she could have obtained an abortion. Mrs. Glietman, by virtue of the fact that she is a human being, had a right to know that she might become the mother of a defective child. To the extent that she was uninformed of that possibility, she was that much less an individual.

In examining plaintiff's injury it is helpful initially to inquire into the nature of defendants' corresponding duty under these facts. In general, a fiduciary relationship exists between a physician and his patient.¹⁵ A necessary extension of this is the duty

¹¹ 59 Cal. Rptr. 463 (Dist. Ct. App. 1967).

¹² *Id.* at 477.

¹³ 74 Ill. App. 2d 332, 220 N.E.2d 767 (1966).

¹⁴ 59 Cal. Rptr. at 475.

¹⁵ *See, e.g.*, *Batty v. Dental Bd.*, 57 Ariz. 239, 112 P.2d 870 (1941); *Woods v. Brumlop*, 71 N.M. 221, 377 P.2d 520 (1962).

of the physician to give accurate, truthful information in the absence of any justification not to do so.¹⁶ Alleged breaches of this duty are most frequently encountered in the so-called "informed consent" cases. *Natanson v. Kline*¹⁷ is an example. There plaintiff was injured by radiation therapy following a mastectomy. The claim was that since Mrs. Natanson had not been advised of the risks inherent in the treatment, her consent to it was not informed. In reversing a judgement for the defendants, the court observed,

Anglo-American law starts with the premise of thorough-going self-determination. It follows that each man is considered to be the master of his own body, and he may, if he be of sound mind, expressly prohibit the performance of life-saving surgery, or other medical treatment. A doctor might well believe that an operation or form of treatment is desirable or necessary but the law does not permit him to substitute his own judgement for that of the patient by any form of artifice or deception.¹⁸

Here, as opposed to *Glietman*, it is easy to see why the defendant had the duty to inform plaintiff because with this information the latter could make an intelligent decision. But does the law require such disclosure merely to avoid a technical battery? The better analysis, and the one which the quoted material tends to support, is that as a matter of human dignity an individual should be accorded the right to have such information. The right goes beyond the right to determine one's own course in that it embraces our very identity as individuals.¹⁹ Performing an operation without valid consent is only one way to offend the dignity. On the basis of this analysis plaintiff's legal inability to obtain an abortion should neither preclude her from this same right to know, nor should it excuse defendants from the performance of their duty.

¹⁶ Note, 20 OKLA. L. REV. 214 (1967), lists nine factors which have affected the duty: likelihood of injury, seriousness of injury, feasibility of alternative methods, certainty of particular method, interest of patient, knowledge of patient, emotional stability of patient, necessity of treatment, and existence of emergency.

¹⁷ 186 Kan. 393, 350 P.2d 1093, *aff'd on rehearing*, 187 Kan. 186, 354 P.2d 670 (1960).

¹⁸ 186 Kan. at 406-07, 350 P.2d at 1104.

¹⁹ Perhaps the poet made this distinction between merely determining one's own course and the broader concept of dignity when he wrote,

"It matters not how straight the gate,
How charged with punishment the scroll
I am the master of my fate:
I am the captain of my soul."

Henly, "Invictus," A TREASURY OF GREAT POEMS ENGLISH AND AMERICAN 985 (1942).

An analogous situation is presented in *United States v. Kalish*.²⁰ There petitioner, as a tactical move advised by counsel, refused to take the required step forward at his induction and was arrested. As a result of the arrest, he was photographed and fingerprinted, and after his acquittal and subsequent induction into the service, he sought to have these fingerprint and photograph records destroyed. The government resisted, contending that since the Army had these same records on petitioner, the destruction of only one of the files could be of no benefit to him. The court held that as a matter of privacy and personal dignity petitioner had the right to have the records destroyed. Here petitioner stood to lose only a dignitary sense if the requested relief were denied, just as Mrs. Glietman lost when the requested information was denied her. The destruction of the records did not free petitioner from having records kept on him, just as the requested information would not have freed Mrs. Glietman from having a defective child. This, however, is unimportant because both have been injured in their dignity; and for this there should be some legal redress.

Dignity is protected in other contexts, although few courts have expressly acknowledged that dignity is, in fact, the interest being safeguarded. In assault a cause of action arises for the mere insult of being threatened,²¹ while in battery an offensive touching with no physical harm is sufficient. The true injury in being spit on²² is the indignity of it—the dignity is more battered than the person. The recent recognition of mental distress as a cause of action rather than as an element of damages resulting from some other tort²³ represents an increasing concern for the dignity of man. Privacy is perhaps the best example with which to demonstrate that dignity is an interest worthy of the law's protection. This expanding tort is a judicial recognition of the citizen's need to be secure in his thoughts, and unfettered in his customs and beliefs. It is the law's response to the stimulus of an ever-encroaching society. If state intrusion into marital affairs²⁴ does not offend the dignity of the citizen, then in what manner is he offended? If peeping tom laws are not designed to protect the integrity of the individual in his home, then what is the protected interest?

²⁰ 271 F. Supp. 968 (D.P.R. 1967).

²¹ W. PROSSER, TORTS § 10 (3rd ed. 1964).

²² *Draper v. Baker*, 61 Wis. 450, 21 N.W. 527 (1884).

²³ W. PROSSER, TORTS § 11 (3rd ed. 1964).

²⁴ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Perhaps it is because dignity and individuality are so intangible that damages are rarely given on these express grounds. Yet it is clear that this has not impeded courts from granting relief in the assault, battery, mental distress, and privacy contexts. In the assault situation the plaintiff need not actually be afraid, for the protection is against a purely mental disturbance of his personal integrity.²⁵ In the medical setting, an operation which exceeds that for which consent is given may subject the physician to liability even though the operation was beneficial.²⁶ Surely dignity is being protected here, albeit in the form of personal security. And once dignity is recognized to be the real injury to Mrs. Glietman, damages no longer present a problem. Professor Bloustein expresses the concept best by concluding that in privacy actions,

Unlike many other torts, the harm caused is not one which may be repaired and the loss suffered is not one which may be made good by an award of damages. The injury is to our individuality, to our dignity as individuals, and the legal remedy represents a social vindication of the human spirit thus threatened rather than a recompense for the loss suffered.²⁷

It is submitted that Mrs. Glietman, simply because she is a human being, had a right to know facts which so vitally concerned her. The defendants, having accepted her as their patient, had the duty to respond truthfully to her inquiries. That duty was breached and, for this, there should be some legal remedy.²⁸ Recovery should not be made to depend upon what use, if any,²⁹ the mother may have made of this information, since this is pure conjecture. She

²⁵ See note 20 *supra*.

²⁶ See, e.g., *Mohr v. Williams*, 95 Minn. 261, 104 N.W. 12 (1905).

²⁷ Bloustein, *Privacy As an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962, 1002-03 (1964). See also Westin, *Science, Privacy, and Freedom; Issues and Proposals for the 1970's*, 66 COLUM. L. REV. 1003, 1205 (1966). Compare, Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326 (1966).

²⁸ It could be argued that by granting Mrs. Glietman a recovery, the court would be indirectly punishing defendants for not aiding in the circumvention of state law. To whatever extent this reasoning is valid, the policy of protecting the individual in his dignity should outweigh such a consideration.

²⁹ One use may have been to prepare, emotionally and financially for the possible tragedy. See, Smith, *Therapeutic Privilege to Withhold Specific Diagnosis From Patient Sick with Serious or Fatal Disease*, 19 TENN. L. REV. 349 (1946).

should have been informed regardless of whether it would be of any benefit to her. That a decision favorable to plaintiff may deter other such abuses by a powerful profession is additional grounds for recovery.

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