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Damages for Wrongful Birth

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WHILE RECOVERY OF DAMAGES for wrongful death was sanctioned in England as early as 1846[1] and is now available by statute in every state,[2] the law has been loathe to afford a remedy for wrongful birth. Plaintiffs who have attempted to cope with the problem of people-pollution by various birth control methods, only to have their ecological efforts stymied by the negligence of a physician performing a sterilization operation or a pharmacist dispensing birth control pills, have been denied a remedy for what, in this writer's view, is the "wrongful birth" of the resulting child. This paper will examine the long, hard road of non-recovery for plaintiffs who have sought vainly, through no fault of their own, to limit their family size through sterilization and birth control pills. It has culminated in two courageous decisions,[3] which portend the demise of *damnum absque injuria* for wrongful birth.

Pill Pregnancies Not Compensable

While the Supreme Court of the United States has said that birth control is within a constitutionally protected "zone of privacy" that surrounds the marital union, and that the state may not infringe on the right of a husband and wife to use contraceptives so as to limit the size of their family,[4] and while the great social value of "the pill" has been hailed in this era of the population explosion,[5] still pill pregnancies have not been compensable.

In *Maley v. Armstrong*,[6] a negligence suit brought against two physicians, the plaintiff contended that she became pregnant although she took the birth control pills defendants had prescribed for her. She gave birth to a normal, healthy child. The court held that the plaintiff had not sustained compensable damages as a result of the defendants' negligence, noting that:

> Birth control is clearly not against public policy. However, it would appear that if a cause of action of this particular nature (wherein the health of the mother has not been impaired and the child is normal and loved by the parents) should be sanctioned, it should be by the duly elected legislature after complete public debate. A decision of this nature involving conflicting mores and far flung social ramifications should not depend upon the personal, religious and social views of a particular judge or jury.

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1 Fatal Accidents Act of 1846 (Lord Campbell's Act) 9 & 10 Vict. c. 93.

2 W. PROSSER, LAW OF TORTS 924 (3rd ed. 1964).

3 Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); Troppi v. Scarf, 31 Mich. App. 240, 187 N.W. 2d 511 (1971).

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

5 B. SEAMAN, THE DOCTORS' CASE AGAINST THE PILL 239 (1969).

6 No. 83195 (Iowa, Dist. Ct. Linn County, Jan. 11, 1967).

When a pharmacist fills a prescription, he is held to impliedly warrant that he will deliver the drug prescribed.[7] In *Szczerbiak v. Fair Drugs, Inc.*,[8] the defendant pharmacist was charged with negligence in filling the plaintiff wife's birth control pill prescription. Instead of the prescribed pills, she was given common cold tablets, and, as in the *Maley* case, she conceived and gave birth to a normal, healthy child. The plaintiffs already had several other children, and the wife was at an age at which she desired no more. As a result of the birth, the plaintiffs were forced to sell their mobile home and move into larger quarters. The plaintiff wife had to give up her employment to stay home and care for the child. The defendant pharmacist asked for judgment on the pleadings. As to the question of whether the public policy of Wisconsin permits the award of damages for the birth of a well-born child and the costs incident to and following the birth, the Circuit Court of Milwaukee County answered with a resounding "No", notwithstanding that the pharmacist was negligent in giving the plaintiff wife pills other than the prescribed oral contraceptives. The court rationalized:

> It goes without saying that the human race will not survive unless children are born, and for and with the birth of children go the problems for which plaintiffs claim damages for in this action . . . .
>
> The natural birth of a healthy child, with no injury to the mother, is universally considered as a joyous event. This child may rise to great heights some day. . . .
>
> Allowance of damages claimed in this case would "contravene good morals" and the "established interest of society," and so would be against public policy.

Similarly, in *Coloff v. Hi Ho Shopping Center, Inc.*,[9] the defendant pharmacist incorrectly filled the plaintiff wife's oral contraceptive prescription with dehydrating pills. The plaintiffs asked damages for the medical expenses incurred as a result of the birth of the child, the wife's pain and suffering attendant with childbirth, the aggravation of the wife's pre-existing varicose vein condition, and the expense of rearing the unwanted child.[9a] The court did at least allow the case to go to a jury; however, the jury was only permitted to consider damages for the medical expense attending the child's birth and the aggravation of the wife's pre-existing varicose vein condition. The court upheld the defendant pharmacist's contention that there could be no damages for the rearing of the child or for the wife's pain and suffering. The jury found the defendant pharmacist negligent and returned an $8,000.00 verdict on the two submitted issues.

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[7] 25 AM. JUR. 2d *Drugs, Narcotics, & Poisons* § 53 (1966).

[8] No. 356-463 (Wis., Cir. Ct. Milwaukee County, Oct. 17, 1969).

[9] No. 168070 (Wash., Super. Ct. Pierce County 1966).

[9a] It costs $30,000 to raise a child to age 18, Cleveland Plain Dealer, Oct. 8, 1970, at 1, col. 3.

Sterilization Slip-Ups—A Blessing?

The question of whether a physician should be liable to his patient for damages when, following the performance of a sterilization operation for family-planning purposes, a child is born, has been consistently answered in the negative. Recovery has been sought against the physician on the bases of negligence,[10] breach of contract or warranty,[11], and fraud, deceit, and misrepresentation.[12]

So, in *Ball v. Mudge*,[13] the husband underwent a vasectomy operation both for family-planning and health purposes. The physician failed to perform post-operative testing. Recanalization (regeneration of the severed tubes) occurred, and the plaintiff's wife became pregnant, giving birth to a normal child. The husband and wife brought suit against the physician, asking damages for the expense of delivering the child and for its care, maintenance, and support. The jury found for the defendant physician. On appeal, the court held that the costs incident to the birth and rearing of a normal child were far outweighed by the "blessing of the event itself". Moreover, the court said that the plaintiffs had failed to establish that post-operative testing in the case of a vasectomy was normal medical practice in the community.

In *Shaheen v. Knight*,[14] the plaintiff, already the father of four children, sought a sterilization operation for the sole reason that he wanted no more children. As in the *Ball* case, the wife became pregnant after the operation and the couple was "blessed" with their fifth child. The plaintiff sought recovery on a breach of contract theory, in that he and the defendant physician had entered into a contract in which the defendant had agreed to make him immediately and permanently sterile and guaranteed the results thereof. The Pennsylvania court held that a doctor and his patient are free to contract for a particular result. If the result is not achieved, the patient has a cause of action for breach of contract. This action is separate and apart from a malpractice action in which negligence must be proved, even though they may both arise out of the same transaction. However, the court said that even though the plaintiff had a valid breach of contract action, there could be no recovery because the plaintiff had suffered no damage. Again applying the "blessing" concept, the court said:

> To allow damages in a suit such as this would mean that the physician would have to pay for the fun, joy and affection which the plaintiff Shaheen will have in the rearing and educating of this plaintiff's fifth child. Many people would be willing to support this child were they given the right of custody and adoption,

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[10] Ball v. Mudge, 64 Wash.2d 247, 391 P.2d 201 (1964).

[11] Shaheen v. Knight, 11 Pa. D. & C. 2d 41 (C.P. Lycoming County 1957).

[12] Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934).

[13] Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964).

[14] Shaheen v. Knight, 11 Pa. D. & C. 2d 41 (C.P. Lycoming County 1957).

> but according to plaintiff's statement, plaintiff does not want such. He wants to have the child and wants the doctor to support it. In our opinion to allow such damages would be against public policy.[15]

In *Christensen v. Thornby,*[16] the plaintiff underwent a vasectomy because the defendant physician advised him that it would be dangerous for his wife to bear another child. Relying on the physician's representation that the operation had been successful, the plaintiff resumed sexual relations with his wife. She again became pregnant, and a normal, healthy child was born. The plaintiff based his suit on the misrepresentation by the defendant doctor that he and his wife could engage in sex without fear of pregnancy. The Supreme Court of Minnesota, however, said that since the primary purpose of the operation was to preserve the wife's health, not to save the expenses incident to pregnancy and delivery, and since the wife had survived the pregnancy and delivery, the plaintiff had suffered no damages. Quite to the contrary, the court said, the plaintiff had been "blessed" with the fatherhood of another child and expressed incredulity at the plaintiff's seeking to charge the defendant with the cost of nurturing and educating the child during its minority.

Blessing Becomes Bane

The underlying concept common to all of the foregoing cases is that while there may have been an injury to plaintiffs resulting from the tortious conduct of the defendants, this injury is not compensable, because the birth of a healthy child confers so substantial a benefit on the parents as to outweigh the expenses of its birth and support. This so-called "benefit rule", which has been enunciated in the foregoing case law as the "blessing concept", is expressed in the *Restatement of Torts* as follows:

> Where the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred upon the plaintiff a special benefit to the interest which was harmed, the value of the benefit conferred is considered in mitigation of damages, where this is equitable.[17]

It is difficult to conceive of an unwanted birth as a blessing or benefit when one is confronted with the statistics on overpopulation. For example, whereas from 6000 B. C. to 1650 A.D. the population doubled itself only about every thousand years,[18] the present doubling time is a mere *thirty-five years.*[19]

That the supposed "blessing" of childbirth could well be a bane was finally recognized in *Custodio v. Bauer.*[20] Here, a married couple,

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[15] *Id.* at 45-46.

[16] Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934).

[17] RESTATEMENT OF TORTS § 920 (1939).

[18] P. EHRLICH, THE POPULATION BOMB 18 (1968).

[19] *Id.* at 214.

[20] Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

already the parents of nine children, instituted an action against the defendant physicians who had performed a sterilization operation upon the plaintiff wife. Subsequently she became pregnant with her tenth child. The trial court sustained the defendants' demurrer to the complaint and dismissed the action. On appeal, the trial court's judgment was reversed. In an opinion by Associate Justice Sims, it was held that the complaint stated causes of action in negligence, breach of contract, and fraud or misrepresentation. Moreover, the court recognized that if the plaintiffs successfully established liability at the trial, they would be entitled to "more than nominal damages."[21]

The defendants had represented to the plaintiff wife that additional children would aggravate an existing bladder and kidney condition and that removal of a portion of the Fallopian tubes would accomplish sterilization. However, the defendants failed to sufficiently cut and relocate the Fallopian tubes so as to avoid their regeneration. Thus, the court said that the plaintiffs had stated a cause of action in negligence for the failure of the defendants to use that degree of care or skill ordinarily possesed by others of their profession in the same locality. The court further found that a cause of action was stated in that the defendants had failed to inform the plaintiff wife that the surgical procedure was not absolute in nature and that a possibility existed that she could thereafter become pregnant; also that the defendants had failed to inform the wife that several surgical procedures were possible to accomplish complete sterilization, thus depriving her of an opportunity to choose the procedure that would render her absolutely sterile.

Regarding the breach of contract allegation, the court said that, while a doctor is not a "warrantor of cures" or required to guarantee the results of an operation, where there is proof of an express contract the doctor can be held liable for failure to perform a promise to effect a cure or obtain a certain result. Thus, the plaintiffs' allegation that the wife and the defendant physicians had entered into an agreement whereby the defendants had agreed in writing to sterilize the plaintiff wife by an operative procedure was not demurrable.

Likewise, the fraud theory was held not demurrable in that the defendants represented to the plaintiff wife that she could engage in sexual intercourse with safety and that contraceptive devices were no longer necessary, as she could not become pregnant; that said representations were false and known to the defendants to be false; and that plaintiff relied on them to her injury.

The defendants contended that the pregnancy, the ensuing birth of a normal child, and the costs and expenses of the delivery and rearing of a child were not legally cognizable injuries. They further asserted that any alleged breach of duty by them was not the proximate

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[21] *Id.* at 325, 59 Cal. Rptr. at 477.

cause of the pregnancy because of the intervening sexual relations between the plaintiffs!

Dealing first with proximate cause, the court said:

> The general test of whether an independent intervening act, which actively operates to produce an injury, breaks the chain of causation is the foreseeability of that act. (citations omitted) It is difficult to conceive how the very act, the consequences of which the operation was designed to forestall, can be considered unforeseeable.[22]

Finally, asserting that the birth of a normal, healthy child was a legally cognizable injury, the court said that there is a loss in that the mother "must spread her society, comfort, care, protection and support over a larger group."[23] Thus, the court said, "If this change in the family status can be measured economically it should be . . . compensable. . . ."[24]

In remanding the action, the court set the following guidelines for the assessment of damages should liability be found:

> For the breach of an obligation not arising from contract, the mesure of damages . . . is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.[25]
>
> For the breach of an obligation arising from contract, the measure of damages, . . . is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom.[26]

Another Blow To Damnum Absque Injuria

In *Troppi v. Scarf*,[27] the defendant pharmacist incorrectly filled a prescription for oral contraceptives and gave the plaintiff wife a mild tranquilizer instead. As might be anticipated, the wife gave birth to a normal, healthy child. The husband and wife sought damages for medical and hospital bills, cost of confinement, loss of earnings of the plaintiff wife, support for the child until he reached the age of twenty-one, and the emotional stress and strain to the plaintiff wife incidental to the pregnancy. The trial court dismissed the action, "reasoning" that to allow damages for the birth of a normal child would impose upon the negligent druggist the burden of paying for what was the result of the conjugal pleasure of the plaintiffs and for their joy in the future in rearing and educating their eighth child.

In reversing the lower court, the Court of Appeals of Michigan held that application of the benefit rule did not prevent recovery for

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[22] *Id.* at 316, 59 Cal. Rptr. 472.
[23] *Id.* at 323, 59 Cal. Rptr. 476.
[24] *Id.*
[25] *Id.* at 325, 59 Cal. Rptr. at 477.
[26] *Id.*
[27] Troppi v. Scarf, 31 Mich. App. 240, 189 N.W. 2d 511 (1971).

the expenses of rearing the unwanted child. Where the plaintiffs had alleged the mother's lost wages, medical and hospital expenses, pain and anxiety of pregnancy and childbirth, and economic cost of rearing a child as items of damage, assessment of damages was properly within the competence of the trier of fact. The element of uncertainty in net recovery did not render the damages unduly speculative.[28]

To the trial court's finding that to assess damages in this cause would be in contravention of public policy, the Appellate Court stated:

> Not only does contraception not violate the public policy of the State of Michigan, the legislature has recently enacted two separate statutes designed to foster the use of contraceptives.[29]

Taking more wind out of the sails of the public policy argument, the court went on to say:

> Where the State's advocacy of family planning is so vigorous as to include payments for contraceptives as part of the welfare program, public policy cannot be said to disfavor contraception. . . .
>
> Contraceptives are used to prevent the birth of healthy children. To say that for reasons of public policy contraceptive failure can result in no damage as a matter of law ignores the fact that tens of millions of persons use contraceptives daily to avoid the very result which the defendant would have us say is always a benefit, never a detriment. Those tens of millions of persons, by their conduct, express the sense of the community.[30]

The defendant argued that the plaintiffs should have mitigated their damages by aborting the child or placing it for adoption. The court said that the plaintiffs were under no duty to take either of the suggested actions, because, though an unplanned child may be unwanted, that does not necessarily mean that he is unloved. As the court put it:

> Many, perhaps most, persons living today are conceptional accidents in the sense that their parents did not desire that a child result from the particular intercourse in which the person was conceived. Nevertheless, when the child is born, most parents accept him with love. That the plaintiffs accepted their eighth child does not change the fact that the birth of another child, seven years younger than the youngest of their previously born children, unbalanced their life style and was not desired by them.[31]

Finally, the court recognized that the allowance of damages would act as a deterrent to other potential tortfeasors by saying:

> In theory at least, the imposition of civil liability encourages potential tortfeasors to exercise more care in the performance of their duties, and, hence, to avoid liability-producing negligent acts. Applying this theory to the case before us, public policy

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[28] *Id.* at 261, 187 N.W. 2d at 521.
[29] *Id.* at 252, 187 N.W. 2d at 516.
[30] *Id.* at 253, 187 N.W. 2d at 517.
[31] *Id.* at 258, 187 N.W. 2d at 519.

favors a tort scheme which encourages pharmacists to exercise great care in filling prescriptions. To absolve defendant of all liability here would be to remove one deterrent against the negligent dispensing of drugs. Given the great numbers of women who currently use oral contraceptives, such absolution cannot be defended on public policy grounds.[32]

Conclusion

With the advent of the *Custodio* and *Troppi* decisions, it is hoped that the "silly season" of denying damages for the birth of an actively unwanted child has ended. Indeed, a case involving the tort of wrongful birth might well be brought as a class action on behalf of all the members of society, for the unwanted child merely adds another fuse to the "population bomb." Overpopulation infringes upon mankind's inalienable rights, some of which are: the right to eat, the right to drink pure water, the right to live uncrowded, the right to avoid regimentation, the right to breathe clean air, and the right to silence.[33] Thus, instead of rewarding the tortfeasor in a wrongful birth case by letting him go scot-free in return for the "blessing" which some anachronistic courts feel he has conferred upon the wronged parents and upon society as a whole, he should be saddled with the expenses of bringing the child into this already overcrowded world and supporting him to maturity. As a result, the next time a pharmacist fills a birth control prescription or a physician performs a sterilization operation he may be just a little more careful, so as to spare society from another "blessing" which it does not need or want.

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[32] *Id.* at 254, 187 N.W. 2d at 517.

[33] P. EHRLICH, *supra* note 18, at 187.