

Wrongful life and wrongful birth cases: a comparative approach

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Biomedical science and technology often make it possible to know in advance whether a child will be born with certain defects or hereditary diseases. On the one hand, prenatal tests enable detection of congenital diseases, on the other, sometimes, the parents undergo genetic testing prior to conception, in order to determine if they are carriers of diseases or other deleterious genetic conditions that may show up in their children .

These techniques bring with them the possibility of their wrong or incompetent application: doctors may fail to perform the indicated tests which could lead to the discovery of malformations; sometimes the tests are made but the outcome is misdiagnosed.

The consequence is often the birth of an impaired child, which has become the object of two different kinds of lawsuits. On the one hand the wrongful birth action: the parents sue the laboratory or the physician for his negligence; on the other hand the wrongful life action which is brought by or on behalf of the disabled child himself, sometimes even against his own parents.

The point is the child would have been aborted or perhaps not even conceived if knowledge of his condition had been available. From the legal point of view the question is consequently to ascertain whether it is possible under present condition to talk about a right to be born healthy, a right which seems to be outlined in the words of those courts which recognise the so called wrongful life actions .

The notion of wrongful life derives from a decision of the Appellate Court of Illinois, *Zepeda v. Zepeda*, where a wealthy child sued his father for allowing him to be born illegitimate : 'the plaintiff seeks damages for the deprivation of his right to be a legitimate child, to have a normal home, to have a legal father, to inherit from his father, to inherit from his paternal ancestors and for being stigmatized as a bastard'.

Although the judges considered the behaviour of the plaintiff not only a moral wrong but as a tortious act against the individual, and although they maintained that the injury is as real as a physical defect, the action is not allowed. The recognition of the plaintiff's claim would mean to create a new

tort, as a consequence, 'encouragement would extend to all others born into the world under conditions they might regard as adverse. One might seek damages for being born of a certain colour, another because of race; one for being born with a hereditary disease, another for inheriting unfortunate family characteristics; one for being born into a large and destitute family, another because a parent has an unsavoury reputation'.

The following evolution testifies that such a danger was not so far away: in 1980 the Court of Appeals of Michigan had to decide a case, *Grodin v. Grodin*, where the child sued his own mother because she continued to take drugs during pregnancy, not having realised that she was already seven or eight months pregnant. As a result of his mother's taking the drug, the child had developed teeth that were brown and discoloured.

According to the court there is no preclusion to exclude the liability of the mother: on the contrary, 'a child may maintain a lawsuit against his parent for injury suffered as a result of the alleged ordinary negligence of the parent except where the alleged negligent act involves an exercise of reasonable parental authority over the child'.

So it seems that the tort area is growing bigger: it is starting to cover pathologies which have not been the object of actions for damages until now. The question is whether these lawsuits are the sign of an evolution and change of the concept of state of illness and state of health.

In most cases, however, the claimed negligence of laboratories, physicians or parents resulted in the birth of impaired children.

In a first group of cases, the physician erred in evaluating the genetic test, undergone by the parents prior to conception.

The German Bundegerichtshof decided an emblematic case in 1983 : the parents of a disabled child, prior to the conception of a second one, undergo some genetic tests in order to determine if the same disease might show up in the unborn. The physician reassures the parents but the child is affected by the same disease as the elder sister. The court condemns the physician to pay 10.000 DM as *moral damage* as well as to provide for the child's rearing. According to the court, a complete and correct information would have prevented the couple from the conception of the child. Their aim was not only not to give birth to an impaired child, but also not to be exposed to the economic consequences deriving from that birth. As the physician had knowledge of it, he had taken full responsibility of avoiding such consequences; therefore he has to be considered liable.

Holding the physician liable for the birth of the impaired child, the Bundegerichtshof also discussed whether considering the costs of rearing a child as a damage means establishing the equivalence of 'existence of

the child and damage': their response was negative in contrast with the opinion of the BundesVerfassungsGericht, who, in a decision of 1993 referring to a termination of pregnancy, asserted that 'from a legal point of view neither the existence, nor the cost of maintenance of a child may be considered as a damage. Otherwise the human dignity as protected by Art. 1 of the Grundgesetz would have been violated' .

The liability of the physician or of the laboratories and the consequent acknowledgment of the right to get compensation for damage is recognised in the United States as well. For example the physician who fails to inform the parents that their blood tests revealed that they both were sickle cell carriers and that there was a risk of them bearing a child with sickle cell disease is condemned to the payment of all expenses "associated with the pregnancy" which include medical expenses, pain and suffering, and lost wages for a reasonable period, as well as damages for any "emotional distress causally resulting from" the wrongful conception.

In 1993, in England the Court of Appeals , condemned the physician to the payment of a great amount of money, because the parents had not been informed that a previously aborted child had been impaired. They conceived another child who was born suffering from bifid spine.

In France the Cour de Cassation , in 1996, decided the case of a physician who had excluded the possibility of genetic transmission of the neurological diseases which affected the husband. The child suffered from the same disease as the father: the physician was condemned 'pour réparer les conséquences dommageables définitives des troubles de l'enfant'^a with respect both of the parents and of the child.

Analogous is the view of the judges with regard to the second group of cases, when the physician, after the child has already been conceived, fails to ascertain a disease which may be transmitted to the foetus or does not carry out the opportune tests in order to find out genetic disease or impairments.

In these cases it is even more obvious that the only alternative to avoid giving birth to an impaired child and consequently, from a legal point of view, not being exposed to claims for damages, is the voluntary termination of the pregnancy.

Two decisions may be discussed here: a French and a German one. The former was made by Conseil d'Etat in 1997 , the mother, aged 42, undergoes an amniocentesis which is negative: nevertheless she gives birth to an impaired child. The defect derives from the genetic diseases of the child so that, there is no causal connection between the behaviour of the laboratories, which made the genetic tests and the disease.

Nevertheless the negligent conduct of the laboratory caused the parents to believe that the child would be healthy and that they could carry the pregnancy to term without any danger. The misinformation has prevented them from interrupting pregnancy and this has to be considered the proximate cause of the prejudice suffered by the parents because of the impairment of the child.

In 1987, the German High Court stated, in order to admit the recovery of the damage in favour of the mother of an impaired child, to whom the physician had not suggested to undergo some tests during the pregnancy, that she should prove that a correct medical information would have induced her to undergo an amniocentesis, that from the results of this tests it would have been possible to discover the impairment and that as a consequence she would have interrupted the pregnancy. As if the right to compensation were bound to the proof that the woman would have interrupted the pregnancy if severe defects of the unborn had been diagnosed.

The right of the child to sue for prenatal torts and to recover damages for being born impaired is even more troublesome : in 1994 for example, the Tribunale di Roma, Italy, denied every recovery for damages, on the premise that the timely knowledge of the impairments would have had relevance only for an interruption of the pregnancy. But a right not to be born contrasts completely with the present Italian law system which considers life as a supreme and unavailable good. The principle of the sacredness of life excludes the case of the child bearing a 'right not to be born' . There is no legal right, not to be born.

The French Courts have decided in a similar way, although on the basis of the lack of causation between the disease and the conduct of the physician . Last year the Cour de Cassation completely changed this trend and recognised to a child who had been born with sever defects, the right to recover damages, since the physician had not discovered that the mother had contracted German measles .

In the United States the discussion 'if it is better not be born at all or if it is better to be born although with severe defects' is left to philosophy and theology.

Eventually the problem under the legal point of view, is that of the individuation of the damage. It consists necessarily in the comparison between a defective life and a non life: a healthy life could in no case have descended from the conduct of the physician. The impaired child claims to be compensated for the damages deriving from a life that he would have preferred not to live. Nevertheless, if we are trying, through the recovery, to put the injured party in the situation he would have been in, if he had not

been damaged, we would need to give a value to non-life, to death.

This may be the reason why in several US States wrongful life actions are barred by statutes and in England the Congenital Disabilities Act of 1976 does not allow that claim any longer .

In spite of this and in order to overcome the necessary contradictions in the solutions offered by the law a careful examination is required which takes account of what the different disciplines have contributed so far to such a delicate and complicated problem.