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Torts—Damage Suits Against Pharmacists and Physicians Based on Negligence in Birth Control Treatments. *Troppi v. Scarf*, 187 N.W.2d 511 (Mich. 1971)

Birth control information and methods have become available as a matter of right to wide segments of the American public. Birth control has played an important role in the policies espoused by leaders of causes ranging from the trimming of welfare roles to uninhibited sexual freedom. The utility of birth control in achieving these goals, and indeed the very desirability of the goals themselves, present legislative questions which in some instances cannot be resolved by governmental fiat. But birth control is, in its essence, not a tool of social policy, but a medical function. The law recognizes that medical functions improperly performed can lead to liability on the part of the medical personnel involved. This legal principle becomes overwhelmingly complex when the medical function for which redress is sought is a birth control method improperly executed.

In a birth control suit, where the plaintiff seeks damages for the birth of an unwanted child, the abstract principles governing medical malpractice conflict with policy considerations concerning the availability of a remedy in the event of the birth of a normal child. To date it appears that public policy has largely controlled the issue of the existence of a remedy A line of recent cases, exemplified by *Troppi v. Scarf*,[1] suggests that a watershed may have been reached in this area, and that legal principles may in the future have a significant impact on the shaping of public policy

The *Troppi* plaintiffs had seven children when the plaintiff wife suffered a miscarriage which prompted her to seek birth control advice. Plaintiff's physician prescribed an oral contraceptive and telephoned the prescription to the defendant, a licensed pharmacist. Instead of correctly filling the prescription, the defendant pharmacist supplied a mild tranquilizer. Mrs. Troppi subsequently became pregnant and delivered a normal child, her eighth. Plaintiffs sued for damages including medical expenses, lost wages, pain and suffering, anxiety, and the expenses necessary to rear and educate the child.

At trial a summary judgment was entered for the defendant on the theory that whatever damage plaintiffs suffered was more than offset by the benefit of having a normal child. The trial court relied upon a "public policy" against suits based upon the birth of a normal child,

1. 187 N.W.2d 511 (Mich. 1971).

and said that damages would be impossible to determine due to the necessity of evaluating, as a setoff, the benefits of parenthood. The appellate court reversed, holding that the assessment of damages is within the competency of the trier of fact, and indicating that the element of uncertainty in the net recovery does not render the damage question unduly speculative.[2] Thus the appellate court recognized that while public policy demands a recognition of the benefits of normal childbirth, this policy cannot be advanced to negate totally recovery in the form of a summary judgment. In other words, the jury must determine damages, giving recognition to normal childbirth as a setoff. Thus evidence of normal childbirth cannot be used to justify per se a directed verdict. The jury must, after hearing the evidence, weigh this benefit against the hardships in each particular case.

In filling prescriptions a druggist is required to use that high degree of care which a very prudent and cautious person would exercise.[3] The case of a druggist erroneously filling a prescription for a contraceptive bears a close resemblance to the case of a physician failing to perform successfully a sterilization procedure.[4] Yet different results have been reached in these apparently analogous cases.

The motive of the patient in both cases is to prevent subsequent pregnancies, and the result in each is the birth of a child. In each instance the paramount issue is not the establishment of liability on the part of the physician or pharmacist,[5] but rather whether the birth

2. *Id.*

3. *See, e.g.*, Tucker v. Graves, 17 Ala. App. 602, 88 So. 40 (1920); Thomsen v. Rexall Drug & Chem. Co., 45 Cal. Rptr. 642 (1965), where the court held that if it could be shown that the druggist's erroneous filling of the prescription was the proximate cause of the injury, then the druggist could be held liable on a negligence theory. Fuchs v. Barber, 140 Kan. 373, 36 P.2d 962 (1934); Trumbatur v. Katz & Besthoff, 180 La. 915, 158 So. 16 (1934); Krueger v. Knutson, 261 Minn. 124, 111 N.W.2d 526 (1961); Boudot v. Schavallie, 178 N.E.2d 599 (Ohio 1961); Burke v. Bean, 363 S.W.2d 366 (Tex. 1962), in which the court reasoned that the general customer has no definite knowledge concerning many medicines, and must rely implicitly upon the druggist who holds himself out as one having a peculiar learning and skill to fill prescriptions. For this reason the court held that the druggist owes to his customers the highest degree of prudence, thoughtfulness, and vigilance so that human life may not constantly be exposed to the danger flowing from the substitution of a harmful drug for a beneficial drug ordered by the customer's physician.

4. In Boudot v. Schavallie, 178 N.E.2d 599 (Ohio 1961), a physician prescribed a certain shampoo, but the pharmacist negligently supplied a different one, causing injury to the plaintiff. The court held that a pharmacist stands in the same position as any other medical specialist.

5. The establishment of liability on the part of the physician or pharmacist has not been seriously challenged in these cases. The failure of the physician to sterilize

of a normal child is such a benefit as to outweigh, as a matter of law, any coincident damages. Family planning, including the use of contraceptives[6] and sterilization,[7] is not violative of any extant public policy, and should not be allowed to preclude the recovery of damages.[8]

The damages suffered by the parents can be clearly identified. They include the cost of the prescription or sterilization procedure, pain and suffering, anxiety, lost wages, the cost of medical care, and the cost of rearing the child.[9] The primary question remains whether these damages are recoverable.

Where defendant's tortious conduct extends a "benefit" to the plaintiff, as well as causes him injury, the value of the benefit will customarily be weighed against the injury in order to compute damages.[10] This principle was recognized in an early case involving improper birth control technique, yet it was held that the birth of a normal child con-

successfully his patient, or of the pharmacist to fill correctly a prescription for a contraceptive is clearly the proximate cause of the birth of the child. An argument has been made that the sexual relations between the plaintiffs in these cases constitute an independent intervening cause thereby relieving the defendant of liability. 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. Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967). If the act is foreseeable, then it does not break the chain of causation. Gill v. Epstein, 62 Cal. 2d 611, 44 Cal. Rptr. 45, 401 P.2d 397 (1965). At least in the case of married couples, it is foreseeable that the couple will have sexual relations and the intervening cause argument has been rejected. Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

6. The Department of Health, Education and Welfare has promulgated several informative pamphlets dealing with this subject. Family Planning: One Aspect of Freedom to Choose, *reprinted from* H.E.W Indicators (June 1966); One Local Welfare Agency's Approach (1966); Report on Family Planning (Sept. 1966); White-Non-White Differences in Family Planning in the U. S., *reprinted from* H.E.W Indicators (Feb. 1966).

7. *See, e.g.*, Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); Jackson v. Anderson, 230 So. 2d 503 (Fla. 1967); Christensen v. Thornby, 192 Minn. 123, 255 N.W 620 (1934).

8. *Id.*

9. Bishop v. Byrne, 265 F Supp. 460 (S.D. W Va. 1967); Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); Coleman v. Garrison, 281 A.2d 616 (Del. Super. 1971); Jackson v. Anderson, 230 So. 2d 503 (Fla. 1967); Troppi v. Scarf, 187 N.W.2d 511 (Mich. 1971); Ball v Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964).

10. RESTATEMENT OF TORTS § 920 (1939)·

> Where the defendant's tortious conduct has caused harm to the plaintiff or to his property and in doing so 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 the damages, where this is equitable.

See, e.g., Northwest Oil Co. v. Haslett Warehouse Co., 168 Or. 570, 123 P.2d 985 (1942); Meier v. Portland Cable Ry., 16 Or. 500, 19 P 610 (1888).

fers such a benefit on the parents as to outweigh, *as a matter of law*, any damages that may have been suffered.[11]

That ruling was nothing more than a judicial expression of what the court perceived to be the prevailing public sentiment. The homage paid to public perception of the issue was expressly acknowledged in *Shaheen v. Knight*,[12] where a medical function, sterilization, was improperly performed, but no damages were awarded. This case dramatically illustrates the subservience of a rule of law to prevailing social ethic. It was a classic case of a wrong without a remedy, since the "wrong" was actually a "right" according to admittedly extrajudicial, but nevertheless prevailing standards.[13]

As pointed out earlier, however, the public perception of birth control has changed. With that changing perception has come a judicial recognition of a right not to bear children, the invasion of which is not offset by the assumed benefits of parenthood. The first case to allow recovery, *Custodio v. Bauer*,[14] adopted a purely economic approach and rejected an inquiry into the benefit attributable to the birth of a child. The court based its determination that a compensable loss existed on the fact that the mother would have to spread her society, comfort, care, protection, and support over a larger group.[15] The compensation was awarded in order to replenish the family exchequer so that the new arrival would not deprive the other members of the family of what had been previously planned as their just share of the family income, and evaluation of the social benefit to the family of an additional member was precluded.[16]

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

12. 11 Pa. D. & C.2d 41 (1957). The *Shaheen* court dismissed a suit seeking damages for the cost of rearing a child. Expressing a belief that the allowance of damages for the normal birth of a normal child is foreign to the universal public sentiment, the court determined that any imposition of damages would be an anomolous result: The physician would pay for the pleasure derived by plaintiffs in rearing and educating the child.

13. The *Shaheen* court concluded that many people would have been willing to support the child if given custody Therefore, the court reasoned that since plaintiffs wished to keep the child, they should be required to provide support. Shaheen v. Knight, 11 Pa. D. & C.2d 41, 44 (1957). The rationale appears ludicrous. Of course the child was unwanted before conception, a fact ignored by the court. Presumably, the only avenue for recovery by the parents is a threat to abandon the child or a simple refusal to care for it. In this case the damages recovered are really a form of blackmail, where for an appropriate price the parents agree to keep and raise the child, thereby relieving the state from the potential burden of an additional ward.

14. 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

15. 59 Cal. Rptr. at 476.

16. 59 Cal. Rptr. at 476-77

By basing damage computation on an economic evaluation and by viewing recovery as a replenishment of family funds, The *Custodio* court apparently rejects the benefit theory of the *Restatement*.[17] The *Custodio* court reasons that the pocketbook is to be made whole, not the parents, and therefore the benefit theory has no application since the pocketbook receives no benefit from the child.

The *Custodio* approach is a commendable departure from the stone age jurisprudence of *Shaheen* in that it goes beyond the *Restatement*. It assures compensation to the parents of an unwanted child by prohibiting the fact finder from considering any benefit from the child's presence as a factor in diminution of damages. Yet it is this last element that is *Custodio*'s fatal flaw for it fails to take cognizance of reality

An unwanted infant is not like a damaged fender, which can be fixed for a certain sum of money That an individual has the right to be childless is not widely questioned; but the value of that right is not capable of objective measurement. The damage suffered when an unwanted child is born depends in large measure on the human relationship formed between the reluctant parents and the infant. The nature of that relationship depends in large measure on who the parents are. *Custodio*, in its effort to overcome the traditional, public-sentiment-based rule against compensation for the birth of a normal though unwanted child, has cast the rule of compensation so rigidly as to discount these critical elements of the damage inquiry

Troppi v. Scarf, and the Delaware decision in *Coleman v. Garrison*,[18] appear not to go so far toward compensation as *Custodio* These two cases retain the *Restatement*-based benefit theory of damages. They stand only for the proposition that it is error to conclude as a matter of law that the benefit from the birth of a normal child outweighs the damage. This view is superior to *Custodio* in recognizing the necessity of evaluating the benefit of a child.

Troppi and *Coleman* thus stand for flexibility in the imposition of damages, and insist that the jury be allowed to ponder the intangible benefits arising in a given case. The question presented to a jury in its effort to balance benefits against damages in an unwanted childbirth may ultimately resolve into an analysis of motive. If the parents decided to limit the size of their family for financial reasons, or because a child would alter their life-style—as in the case of middle-aged parents whose other children had grown to maturity—then there has in fact

17. Note 10 *supra*.
18. 281 A.2d 616 (Del. Super. 1971).

been substantial injury notwithstanding the fact that the parents love and cherish the newborn infant. Thus, in the above instance, application of the *Troppi* rule is superior to the economic analysis of *Custodio* in that economic damages may be reduced by the showing of a family benefit from the birth of a child. Similarly, *Troppi* is superior to the total benefit theory of *Shaheen* in that it does allow recovery if damages are shown to outweigh benefits.

Conversely, if the motive for seeking birth control is fear for the mother's health or fear of the possibility of serious complications of pregnancy resulting in possible congenital abnormality, then the normal birth of a healthy child causes no long-standing economic injury In this case the benefits of parenthood may well outweigh the anxieties of pregnancy, yielding a net damage recovery of zero. Again, application of the *Troppi* rule is superior to the totally economic analysis of *Custodio*. Under the *Custodio* view, plaintiffs in such a situation would be entitled to recover for all future expenditures even though their sole motive in seeking birth control was the physical well-being of the mother, and the birth has caused her no harm. Moreover, the benefit oriented view in *Shaheen* would fail to appreciate the psychological discomfort caused by the nine months of anxiety concerning the outcome of the pregnancy

The flexibility inherent in the *Troppi-Coleman* approach to this damage question is of particular value when the identity of the parents becomes an element of the damage suffered. The unmarried woman who finds herself pregnant may realize no benefit from the birth of a child. But the approach of *Custodio*, compensation in economic terms, does not seem to satisfy the psychological injury the experience may well cause. Such a case would seem to require that the jury consider, not the benefits from the parenthood which go in diminution of damages, but the additional intangible elements of injury which actually increase the recoverable damage.[19]

The recognition that unwanted pregnancy may result in intangible burdens is merely the converse of the acknowledgement that it may

19. Particularly in the context of a suit by an unwed mother, the question of mitigation of damages, *i.e.* placing the child for adoption, may arise. While there is no authority on the mitigation issue in this particular area, it seems unlikely that courts can impose a duty to give up unwanted children, even where the plaintiff is unmarried. The decision seems to be within the exclusive province of the parents, and no general rule could possibly cover the myriad of situations under which the decision to place a child for adoption might be made.

result in intangible benefits. Thus it is the *Troppi-Coleman* approach which seems best suited to weigh these various factors as they arise.

If the submission of the damage issue to the jury illustrates a judicial conformance with a previous or coincident shift in social perception of the ethics of family planning, the question of how well the plaintiff-parents fare with the jury remains unsettled. The only reported case illustrating a jury verdict in an unwanted child situation is *Ball v. Mudge*,[20] decided in 1964. There a jury determined, and an appellate court affirmed that the plaintiff-parents suffered no damage from the birth of a normal child.

Under the *Troppi* analysis of benefits, it may well be that the *Ball* jury would award damages where the controlling facts are sufficiently compelling, as in the case of the unwed mother. It is conceivable that a jury finding that benefits outweigh injury is now capable of being reversed as clearly erroneous. If this is so, then the *Troppi* court has indeed reversed the roles of court and public perception. For now the courts will have power to insist that standard rules of law regarding malpractice, and legal concepts of benefit and burden resulting from wrongful conduct, be applied in birth control cases. That power will prohibit the imposition of social perceptions which do not coincide with legal principles, and should lead to frequent success for plaintiffs seeking compensation for unwanted births.

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Trial Procedure—BOMBSHELL INSTRUCTION FOR DEADLOCKED JURIES: ABA STANDARD REPLACES *Allen* CHARGE IN DISTRICT OF COLUMBIA. *United States v. Thomas*, 449 F.2d 1177 (D.C. Cir. 1971)

In the past, trial judges employed various devices in order to prod a deadlocked jury into reaching a verdict.[1] However, the feasibility of

20. 64 Wash. 2d 247, 391 P.2d 201 (1964).

1. By the ancient common law, jurors were kept together as prisoners of the court until they had agreed upon their verdict. [This required that they be] [K]ept without meat, drink, fire, or candle, unless by permission of the judge, till they are all unanimously agreed.

People v. Sheldon, 156 N.Y. 268, 275, 50 N.E. 840, 842 (1898)

The reasons commonly given for such action are that a hung jury results in considerable loss of time and money, and represents a failure of the jury system. Comment, *Defusing the Dynamite Charge: A Critique of Allen and its Progeny*, 36 TENN. L. REV. 749 (1969). *See* Andrews v. United States, 309 F.2d 127, 130 (5th Cir. 1962) (dissenting opinion), *cert. denied*, 372 U.S. 946 (1963); AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO TRIAL BY JURY 154 (1968) [hereinafter cited as ABA STANDARDS].