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Liability of a Pharmacist For Negligently Dispensing Oral Contraceptives

Edward R. Shohat

Therefore, the court was able to find an illegal element in the transactions common to all members of the class, the price, and by equating unconscionability with fraud, was able to find a basis on which the attorney general could litigate under the Consumer Fraud Act.

The *Kugler* decision offers a viable solution to the problems confronted by the low-income consumer in states which have a consumer fraud act.

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LIABILITY OF A PHARMACIST FOR NEGLIGENTLY DISPENSING ORAL CONTRACEPTIVES

Mr. and Mrs. Troppi sued their pharmacist, Mr. Scarf, alleging his negligence in supplying tranquilizers in place of prescribed oral contraceptives which resulted in an unwanted eighth child.[1] The following damages were sought: (1) Mrs. Troppi's lost wages; (2) medical and hospital expenses; (3) pain and anxiety of pregnancy and childbirth; and (4) the economic costs of rearing an eighth child. The trial court granted defendant's motion for summary judgment on the grounds that whatever damage plaintiffs suffered was more than offset by the benefit of having a healthy child.[2] On appeal, the Michigan Court of Appeals *held*, reversed and remanded: The application of the benefit rule does not, as a matter of law, prevent recovery for the expenses of rearing an unwanted child. Moreover, the parents of such a child are not required to place the child for adoption in mitigation of damages. *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W.2d 511 (1971).

Although a pharmacist's liability for negligently providing the wrong drug has long been recognized,[3] no appellate court has expressly ruled on the question of whether that liability extends to the consequences of negligently dispensing oral contraceptives.[4] The question faced by the Michigan Court of Appeals was not whether Scarf was liable for his negligence, but whether the damages sought by the Troppis were compensable under established principles of tort law.[5] A court would only be

1. After a miscarriage ended her eighth pregnancy, Mr. and Mrs. Troppi consulted their physician and decided to limit the size of their family. The physician prescribed an oral contraceptive, Norinyl.

2. The trial court applied what is commonly known as the benefit rule. *See* RESTATEMENT OF TORTS § 920 (1939).

3. *See, e.g.*, Brown v. Marshall, 47 Mich. 576, 11 N.W. 392 (1882). *See also* Hoder v. Sayet, 196 So.2d 205 (Fla. 3d Dist. 1967) (sale of blood).

4. A jury in Los Angeles has awarded a California family $42,000 to support a six-year-old son born as a result of negligence by a defendant drug company in supplying sleeping pills instead of prescribed oral contraceptives. The case is not officially reported. *See* Miami Herald, Nov. 26, 1971, § A, at 16, col. 1.

5. The Michigan court is careful to note throughout its opinion that it is relying on common law principles.

called upon to review the precise question decided in the instant case if the court could find that the defendant had breached a legal duty owed the plaintiff which proximately caused the birth of the unwanted child. There are, however, few precedent-setting cases which have been decided on this particular point, and all of them have involved elective or therapeutic sterilization operations.

The sterilization cases have proceeded on various theories. In *Christensen v. Thornby*,[6] the plaintiff's wife had been warned by her physician that it would be dangerous for her to bear a second child, so the plaintiff consented to a vasectomy which the defendant-surgeon represented as a success. Sometime thereafter, however, the plaintiff's wife became pregnant and gave birth to a normal healthy child without mishap. The plaintiff sued the defendant for deceit, alleging as damages his own anxiety as well as the considerable expense suffered both before and after the birth of the child. In affirming the trial court's sustention of the defendant's demurrer, the Minnesota Supreme Court noted that the avowed purpose of the operation was to save the wife from the dangers of pregnancy, rather than to prevent the financial burden of birth and support. Since the wife survived the birth unharmed, the damages sought were held to be merely incidental to the bearing of a child, and therefore, too remote from the avowed purpose of the operation to warrant compensation.[7]

A similar result, based on different reasoning, was reached in *Ball v. Mudge*.[8] The plaintiff-husband, in that case, had undergone a vasectomy because of the anticipated expenses incident to the birth and support of a fourth child and because of an obstetrician's warning that his wife should not risk a fourth Caesarean section delivery. After the operation the plaintiff's wife became pregnant and delivered a normal baby by Caesarean section. In a suit based on breach of warranty and negligence, a verdict was returned for the defendant-surgeon. The Supreme Court of Washington affirmed this decision and held:

> As reasonable persons, the jury may well have concluded that appellants suffered no damage in the birth of a normal, healthy child, whom they dearly love, would not consider placing for adoption and "would not sell for $50,000" and that the cost incidental to such birth was far outweighed by the blessing of a cherished child, albeit an unwanted child at the time of conception and birth.[9]

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6. 192 Minn. 123, 255 N.W. 620 (1934) [hereinafter cited as *Christensen*].

7. No allegation was made by the plaintiff in *Christensen* that either the child or the economic consequences of his birth were unwanted.

8. 64 Wash. 2d 247, 391 P.2d 201 (1964) [hereinafter cited as *Ball*].

9. *Id.* at 250, 391 P.2d at 204. The statement reflects a more direct approach to the problem than that taken by the court in *Christensen*, *supra* note 6. In the latter case, the court appeared to ignore the claim of anxiety which the plaintiff alleged that he had suffered notwithstanding his wife's successful delivery. Clearly the plaintiff could not have forseen

The benefit rule, insofar as it has been applied to sterilization cases, is rooted in the long-standing public policy which opposes contraception.[10] The most frequently cited opinion involving the rule is *Shaheen v. Knight*,[11] where the plaintiff sued his physician for breach of a contract to perform an elective sterilization operation.[12] After finding that the defendant did breach the contract, the court stated:

> Defendant argues . . . and pleads, that plaintiff has suffered no damage. We agree with defendant. The only damages asked are the expenses of rearing and educating the unwanted child. We are of the opinion that to allow damages for the normal birth of a normal child is foreign to the universal public sentiment of the people.[13]

At the same time, other courts have categorically endorsed the compensability of damages in sterilization cases. In *West v. Underwood*,[14] a husband and wife sued for personal injuries to the wife and consequential damages to the husband which were occasioned by a physician's failure to perform an agreed-upon sterilization operation at the same time as the wife's second Caesarean section delivery. During a subsequent operation undertaken to secure sterilization, complications arose for which a third operation was needed. In reversing a nonsuit, the court stated that should the plaintiffs prevail on the issue of liability, they "were entitled to recover for all pain and suffering, mental and physical, together with loss of services and any other loss or damage proximately resulting from such negligence."[15]

The language in *West* appears broad enough to encompass any injuries sustained as a result of a defective sterilization operation. Nevertheless, the luckless couple in *West* did not proceed on the theory of seeking support for an unwanted child. The court limited its opinion accordingly, and consequently, the decision does not tarnish the precedent value of cases denying support for unwanted children.[16]

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that his wife would survive the birth unharmed. In *Ball*, *supra* note 8, however, this claim was made and rejected via the benefit rule enunciated in the cited statement.

10. Individual perceptions of this adverse public sentiment may have retarded the development of more effective and reliable sterilization techniques. This may be especially true in the medical profession which is responsible for pioneering developments in this area. Note, *Elective Sterilization*, 113 U. PA. L. REV. 415, 422 (1965).

11. 11 Pa. D. & C.2d 41 (Lycoming County Ct. 1957) [hereinafter cited as *Shaheen*].

12. As distinguished from therapeutic, an elective sterilization operation is one which is sought for reasons, usually economic, other than the protection of the wife's health. *See generally* Note, *The Birth of a Child Following an Ineffective Sterilization Operation as Legal Damage*, 9 UTAH L. REV. 808 n.2 (1965).

13. Shaheen v. Knight, 11 Pa. D. & C.2d 41, 45 (Lycoming County Ct. 1957). The court also rejected the plaintiff's claim for damages on the ground that he had refused to place the child for adoption and held that the plaintiff could not keep the child and have the doctor support it.

14. 132 N.J.L. 325, 40 A.2d 610 (Ct. Err. & App. 1945) [hereinafter cited as *West*].

15. *Id.* at 326, 40 A.2d at 611.

16. *See, e.g.*, Christensen v. Thornby, 192 Minn. 123, 255 N.W. 260 (1934); Shaheen v.

The most modern and practical approach to negligent sterilization was demonstrated in *Custodio v. Bauer*.[17] In that case, Mrs. Custodio had undergone a therapeutic sterilization operation, but later became pregnant and gave birth to a normal healthy child. Suit was instituted against the surgeon to recover damages, including the support of the unwanted child, for negligence and breach of warranty. Expressly rejecting *Christensen* and *Shaheen*, the California District Court of Appeal held that the compensation was not for the unwanted child, "but to replenish the family exchequer . . ." so that no member of the family is deprived by the new arrival of his just share of the family income.[18] In so holding, the California court rejected the notion that the benefit of having a healthy child outweighs, in every case, the detriment of negligent sterilization.[19]

In the instant case, the Michigan court could easily have followed the lead of California in *Custodio* and gone no further. Contraception, however, is frought with moral and religious overtones which could not be lightly cast aside. In reaching its decision that application of the benefit rule does not preclude recovery for the expenses of rearing an unwanted child, the Michigan court rejected the public policy argument which forbids such damages. The court first noted that contraception has been elevated to a constitutionally-protected "zone of privacy" within the marital relationship.[20] In a treatment which was more extensive than that of the *Custodio* court, the Michigan court held that the complete denial of a defendant's liability would be inconsistent with a tort scheme designed to deter the negligent dispensing of drugs.[21] Furthermore, the court recognized that in a society in which tens of millions of women use oral contraceptives on a daily basis, it could not be accurately said that public policy forbade the relief sought by the Troppis.[22]

Knight, 11 Pa. D. & C.2d 41 (Lycoming County Ct. 1957); Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964).

An Illinois court has recognized, at least implicitly, that the birth of a child may be something less than the blessed event referred to in *Christensen* and *Shaheen*. However, the court, as did the New Jersey court in *West*, failed to touch upon the important policy questions which have served to bar plaintiffs from compensation. Doerr v. Villite, 74 Ill. App. 2d 332, 220 N.E.2d 767 (1966).

17. 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967) [hereinafter cited as *Custodio*].

18. *Id.* at 324, 59 Cal. Rptr. at 477.

19. The court concluded:

> Where the mother survives without casualty there is still some loss. She must spread her society, comfort, care, protection and support over a larger group. If this change in the family status can be measured economically it should be compensable as the former losses.

Id. at 323, 59 Cal. Rptr. at 476.

On facts similar to those in *Custodio*, one Florida court has chosen to follow the California lead in rejecting the contention that public policy precludes recovery for the normal birth of a healthy child, but that court expressly avoided the question of damages. *See* Jackson v. Anderson, 230 So.2d 503 (Fla. 2d Dist. 1970).

20. Troppi v. Scarf, 31 Mich. App. 240, 253, 187 N.W.2d 511, 517 (1971), *citing* Griswold v. Connecticut, 381 U.S. 479 (1965).

21. Troppi v. Scarf, 31 Mich. App. 240, 254, 187 N.W.2d 511, 517 (1971).

22. "Those tens of millions of persons, by their conduct, express the sense of the community." *Id.* at 253, 187 N.W.2d at 517.

The overriding benefit concept adopted by the trial court, as well as by Washington and Pennsylvania courts in *Ball* and *Shaheen*, was likewise rejected. However, the court stopped short of rejecting the benefit rule in all cases.[23] The rule, though, is flexible enough for courts to award damages which correspond to the differing injuries that are sure to arise in future cases involving the negligent dispensing of oral contraceptives.[24] What is cast aside by the court in the instant case is the notion that, as a matter of law, a child's services and companionship have a dollar value equal to or greater than the economic cost of his support, the pain and anxiety of pregnancy and birth, medical expenses, and the various other elements of damage—real and potential.[25]

Recognized in *Troppi* are the realities of modern life. No longer is a child expected to make a marked contribution to the family income.[26] No longer can it be said that the birth of a child reaps so substantial a benefit upon his parents that no damages can be sustained in any circumstances as a result thereof. There may be instances where the benefit does, in fact, mitigate the harm,[27] but this will not always be the case.

The Michigan court also rejected the doctrine of mitigation and provided an analysis of the doctrine and its utility in unwanted child cases that is missing from the Washington[28] and Pennsylvania[29] cases. The court's conclusion that no mother, wed or unwed, can reasonably be required to place her child for adoption in mitigation of damages[30] is based on its recognition of the distinction between avoidance of conception and disposition of the human organism after conception.[31] The law recognizes that it is best for the child to be reared by its natural parents.[32] Moreover, even if unplanned and unwanted, a newborn child spawns "emotional and spiritual bonds which few parents can bring themselves to break."[33] *A fortiori*, the tortfeasor must take the plaintiff

23. Under the benefit rule, if the defendant's tortious conduct confers a benefit to the "same interest" harmed by his conduct, the dollar value of the benefit is subtracted from the dollar value of the injury in determining the damages to be awarded. *Id.* at 255-56, 187 N.W.2d at 518; Burtraw v. Clark, 103 Mich. 383, 61 N.W. 552 (1894). *See* 22 AM. JUR. 2d *Damages* § 204 (1965); C. MCCORMICK, DAMAGES § 40 (1935).

24. The court observed in part:

> What must be appreciated is the diversity of purposes and circumstances of the women who use oral contraceptives. . . . [I]t is clear that in each case the consequences arising from the negligent interference with their use will vary widely. A rational legal system must award damages that correspond with these differing injuries. The benefits rule will serve to accomplish this objective.

Troppi v. Scarf, 31 Mich. App. 240, 256, 187 N.W.2d 511, 518 (1971).

25. *Id.* at 255-56, 187 N.W.2d at 518.

26. *Id.* at 255-56, 187 N.W.2d at 518.

27. The possibility is strongly implied by the court in the instant case.

28. Ball v. Mudge, 64 Wash. 2d 247, 250, 391 P.2d 201, 204 (1964).

29. Shaheen v. Knight, 11 Pa. D. & C.2d 41, 46 (Lycoming County Ct. 1957).

30. Troppi v. Scarf, 31 Mich. App. 240, 260, 187 N.W.2d 511, 520 (1971).

31. The right to use contraceptives is constitutionally protected. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485 (1965). However, the performance of an abortion remains a felony in most jurisdictions.

32. Troppi v. Scarf, 31 Mich. App. 240, 259, 187 N.W.2d 511, 520 (1971).

33. *Id.* at 257, 187 N.W.2d at 519.

as he finds her and cannot insist that the victim of his negligence be willing to sever the natural bonds of parenthood and place the child for adoption.[34]

The Michigan court found: that public policy favors compensation such as that sought by the Troppis; that an unwanted child may result in a net financial detriment rather than benefit; and that adoption is not a reasonable mitigation requirement. Also, the court rejected the contention that the three items of damages together were so uncertain as to render them unduly speculative. The court then struggled with the question of approximating the costs of rearing the unwanted child[35] and found that while there existed some uncertainty in applying the benefit rule,[36] difficulty in determining the amount to be subtracted from gross damages would not justify a complete denial of recovery.[37]

Had the Troppi's problem been litigated a decade ago, recovery unquestionably would have been denied. However, neither people nor the law by which they live remain static. As in virtually every aspect of life, attitudes toward sex and sexual problems have undergone a social metamorphosis. Hopefully, as in the instant case, courts will follow changed social attitudes. Clearly, a pharmacist has traditionally been liable for negligence in filling a prescription for cold tablets or diet pills. The time has now come for the pharmacist to be held to the same standard of care in filling prescriptions for oral contraceptives. Any other view would place a higher premium on the human sinus and wasteline than on the human himself.

EDWARD R. SHOHAT

LIABILITY OF CREDIT CARD ISSUER FOR FAILURE TO DISCLOSE CREDIT TERMS AS REQUIRED BY THE TRUTH-IN-LENDING ACT

The plaintiff, a credit card holder, received a monthly statement from the defendant-bank, a credit card issuer,[1] showing a new balance and indicating that no finance charge had been incurred during the period

34. *Id.*

35. The court found that Mrs. Troppi's medical expenses, hospital bills, lost wages, and the actual cost of rearing the child were computable with reasonable accuracy. Likewise, pain and anxiety are elements of damages traditionally entrusted to the trier of fact. *Id.* at 260-62, 187 N.W.2d at 520-22.

36. *See* note 23 *supra* and accompanying text.

37. Under applicable Michigan case law, difficulty in reaching a precise determination of damages is no bar to recovery. *See, e.g.*, Purcell v. Keegan, 359 Mich. 571, 103 N.W.2d 494 (1960), where recovery was permitted for unpaid compensation for overtime work. The precise amount of work was not ascertainable in that case.

1. The parties were contractually related under a credit card plan, the Master Charge Card Agreement.