Torts -- Negligence -- The Substitute Birth Control Pill

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the effect of *O'Callahan* was to decide that the military never had the power to try a soldier's non-military crimes and that such convictions are invalid.47

When the dust of the battle of semantics settles, the ultimate decision to be made is whether the tremendous administrative burdens that would be caused by retroactive application will outweigh the traditional requirement that before the defendant can be legally convicted the court must be one of competent jurisdiction.48 The retroactivity question arose because of the ambiguities of the *O'Callahan* opinion. The question was left unanswered by the Supreme Court in *Relford*. The lower courts are already in conflict on the question, and it will not be definitively answered until the Supreme Court decides the retroactivity of *O'Callahan*.49 It is vital that the Court do so and restore the certainty of jurisdiction that is essential to all criminal justice.

LEE AUSTIN PATTERSON II

**Torts—Negligence—The Substitute Birth Control Pill**

By the turn of the 19th century Thomas Malthus and his disciples were predicting dire consequences for a world rapidly proving too small for its fertile population.1 These fears are ardently espoused in the 20th century as well by zero population societies urgently crying, “make love not babies—ban the population bomb.”2 With the advent of sophisticated and successful birth control techniques the ills of overpopulation might someday be realistically avoided. Meanwhile, social mores are undergoing change and the law is being challenged to keep pace by re-examining traditional concepts in light of these changes. One such concept is the benefits-of-the-healthy-child rule, which proclaims that the event of childbirth and the happiness of rearing a child always outweigh the financial liability.3 Recently a Michigan Court of Appeals took issue with this concept.

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4WRIGHT § 53, at 211.
4See 401 U.S. at 370.

In Troppi v. Scarf, the defendant pharmacist negligently supplied a tranquilizer, Nardil, instead of the oral contraceptive, Norinyl, called for by prescription. As a result, Mrs. Troppi gave birth to her eighth child. A negligence action to recover the mother's lost wages, medical expenses, pain and suffering, and the cost of rearing another child was dismissed at the trial level for failure to state a cause of action for which relief could be granted. In short, the benefits of an unplanned, healthy child precluded any recovery whatsoever as a matter of law. On appeal, recognizing the highly controversial nature of contraception and childbirth, the court concentrated on the extent to which the defendant might be civilly liable for the consequences of his negligence. The court decided to adopt a flexible benefits rule, one operating on a case-by-case basis that would allow the trier of fact to balance the benefits of a healthy child against all elements of damage, with special consideration for the plaintiff's particular circumstances.

Since chemical birth control is relatively new, it is not surprising that Troppi is the first reported decision by a court of review that involves consideration of the ticklish issues in this area. However, similar situations have arisen in the field of sterilization. The first sterilization case, Christensen v. Thornby, was brought on grounds of deceit. The court ignored the obvious sterilization purpose of the vasectomy and focused on the plaintiff's stated intention of protecting his wife's health. Since a normal delivery occurred, the court reasoned that without impairment of the wife's health there would be no recovery. Similarly, a Pennsylvania decision, Shaheen v. Knight, was an action for breach of contract based on a written guarantee of sterility by vasectomy which failed. The plaintiff sued for the additional expenses of rearing his fifth child, who was conceived after the operation. The court decreed a classic statement of the rigid benefits rule that "to allow damages for the normal birth of a normal child is foreign to the universal public sentiment of the people."
Significantly, in 1967 a California court reviewed the history of sterilization cases in a landmark decision, *Custodio v. Bauer,* and concluded that even if a normal baby were born, the plaintiffs were entitled to more than nominal damages if the physician negligently performed the sterilization. In yet another negligent sterilization case, *Coleman v. Garrison,* a Delaware court extended this reasoning to allow the jury to weigh the benefits against the economic burden, including the expenses of rearing and educating the unwanted child.

These latter two cases concentrated on the legalistic concept of a negligent tortfeasor who has, at least monetarily, injured the plaintiffs. This element of negligence is also the basis for the *Troppi* decision. Unlike the earlier sterilization cases, *Troppi* was not founded upon breach of warranty or deceit. There was no allegation that the birth control pills were defective, the products liability situation; nor was this the case of the pharmacist who plays "God," doling out or withholding contraceptives at his capricious whim. Nor was the concept of wrongful life—the illegitimate or retarded child asserting as a cause of action that he should not have been born—applicable here. The plaintiffs in the guaranteed-sterilization cases consider the mere birth of a child a breach of contract. Mr. and Mrs. Troppi were seeking compensation not for the birth of a healthy baby but for the tangible monetary expenses incurred as a result of the birth. The child was not merely unwanted or unplanned in the sense that it was, as millions of children were, conceived without due deliberation by the prospective parents; here the parents deliberately planned *not* to have any more children.

In every negligence action certain elements must be proven, and the *Troppi* fact situation provided no exception. First, the plaintiff must establish a certain duty, or standard of care, owed him by the defendant. Because of the responsible role of the pharmacist in society and the great potential for harm inherent in drugs, a high standard of care has been legally established:

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1251 Cal. App. 2d at ——, 59 Cal. Rptr. at 477.
17 Id. at 618.
13 Mich. App. at ——, 187 N.W.2d at 513 n.1.
15 W. PROSSER, LAW OF TORTS § 30, at 143 (4th ed. 1971) [hereinafter cited as PROSSER].
In a business so hazardous, having to do so directly and frequently with the health and lives of so great a number of people, the highest degree of care and prudence for the safety of those dealing with such dealer is required. 18

Next, the plaintiff has to show a specific act of negligence by the defendant or his agent. 19 In Troppi the pharmacist, when receiving the doctor’s instructions by telephone, wrote the wrong drug name into the prescription and gave Mrs. Troppi tranquilizers instead of birth control pills. 20 When complex chemical compounds are identified by brand names or shortened root words, the competent pharmacist should repeat the prescription to the physician to avoid unprofessional errors. 21

Third, the plaintiff must show cause-in-fact, that but for the pharmacist’s mistake the injury would not have occurred. 22 The court in Troppi assumed that the defendant’s negligence was a cause in fact in order to consider the trial court’s dismissal of the complaint. 23 To complete the proof of negligence proximate cause must also be shown, 24 but the probability of pregnancy following the substitution of tranquilizers for birth control pills easily satisfied the foreseeability requirement. 25

In order to recover damages in a negligence action, the plaintiff must show some injury to person or property. 26 The award of damages for a healthy baby born by normal delivery is clearly the significant issue in Troppi. Laying aside temporarily the intangible benefits of parent-

21See also, for example, in Troppi the birth control pill “Norinyl” is norethindrone mestranol, and the similar sounding tranquilizer “Nardil” is phenelzine. MEdICAL ECONOMICS, INC., PHYSICIANS’ DESK REFERENCE 1138, 1202 (1968).
22PROSSER § 41, at 236.
24PROSSER § 42, at 244.
25The cause-in-fact and proximate cause issues are much more complex if the woman has been taking birth control pills for some time and only one substitute pill or pills for one menstrual cycle were negligently supplied. The evidence must show at what exact point in the woman’s menstrual period the pills were taken. Also, if the woman knows or should know how her pills look and the substituted drug is radically different in appearance, the issue of contributory negligence may be raised. A brief illuminating discussion of how birth control pills work and of the difficult issues of proof can be found in Sheppard, Negligent Interference With Birth Control Practices, 11 S. Tex. L.J. 229, 252-54 (1969).
26PROSSER § 30, at 143.
hood, one can assess the plaintiff's precise measurable damages—the medical and hospital bills and mother's loss of wages. Pain and suffering, although not as easy to evaluate accurately, are a commonplace element of damages for the trier of fact. The economic costs of rearing an eighth child are measurable much the same as child support in a divorce action.

Replying to this assessment of damages, the defendant cited Restatement of Torts section 920:

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.

The defendant contends that under section 920 and the benefits rule, whenever a healthy child is born the joys, blessings, companionship, and love of rearing the child always outweigh any possible recovery as a matter of law. The basic flaw in this argument was pointed out by a Florida court which held in Jackson v. Anderson that normal birth mitigates damages and does not vitiate liability. Therefore, the negligent defendant may still be liable for damages if in the particular case the benefits of the unwanted child are not greater than the expenses of rearing him. Under the more flexible benefits rule adopted in the Troppi decision, the trier of fact must have the power to decide each case in light of such factors as family size, fixed income, marital status, parental age and health, and so on. Of course, the task of balancing the intangible

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2731 Mich. App. at ____, 187 N.W.2d at 513. Since childbirth is such a frequent occurrence, the pain and suffering of pregnancy and giving birth are reasonably within the common experience of many women. In the United States, 24.5 women per 1,000 die during childbirth, a further indication of the expectant mother's anxiety during pregnancy. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1971, at 55 (92d ed.).


29Restatement of Torts § 920 (1939). One legal writer, citing the equitable nature of this section and the differences between the injury and the nature of the benefit (e.g., balancing the loss of the wife's services against the benefits of parenthood), describes section 920 as particularly inappropriate. Sheppard, supra note 25, at 238-42.


31Mich. App. at ____, 187 N.W.2d at 518-19. The court distinguishes the situation of the unmarried coed, to whom the unwanted child would be a burden and a financial millstone, from that of the couple who only wanted to delay conception for an extended honeymoon. A pharmacist's negligence may cost the struggling coed an education and a career. The argument that every plaintiff
blessings of a child against the expenses of rearing him seems difficult and uncertain, but in wrongful death cases juries are normally called upon to do just that.\textsuperscript{32}

Perhaps the most appealing argument in the defendant-pharmacist's favor is that, no matter how negligent he was, to force the defendant to pay damages while the parents enjoy the happiness and blessings of rearing a healthy child is against public policy. One legal writer has concluded that to allow recovery for a normal birth would be ethically repugnant to the family unit system and would later prove emotionally traumatic to the unwanted child.\textsuperscript{33}

A classic statement by the Pennsylvania Supreme Court clearly set out the limitations of the judicial power to formulate public policy:

> The right of a court to declare what is or is not in accord with public policy does not extend to specific economic or social problems which are controversial in nature and capable of solution only as the result of a study of various factors and conditions. It is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community in so declaring.\textsuperscript{31}

Contraception, sterilization, and the population explosion are volatile issues with religious and moralistic arguments on both sides. Such controversial issues do not lend themselves to sweeping pronouncements of public policy or "unanimity of opinion."

On the other hand, couples seeking to limit the size of their family have laudable aims; for instance, the husband's income may only be adequate to reasonably support, clothe, feed, and house a certain num-


should put up the unwanted child for adoption ignores the bonds of affection and obligation formed by childbirth and asks the court to foster a rule which would separate the child from its natural parents.


ber of children. The couple may have allotted funds for their children's higher education. The new unwanted addition requires a reallocation of family resources to the detriment of the other children. Also, a great disparity in ages between the new arrival and his closest sibling can disrupt the family's life style. The California court in *Custodio v. Bauer* noted that the mother must now "spread her society, comfort, care, protection and support over a larger group" and that recovery is not so much for the unwanted child but "to replenish the family exchequer." Any recovery will inure to the benefit of the family and thus offset the burdens of the unwanted child.

Moreover, the Michigan court in *Troppi* cited state statutes promoting the use of family planning services and concluded that "[w]here 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." Also, the Department of Health, Education, and Welfare has vigorously advocated family planning in several publications. The United States Supreme Court has held that the practice of contraception falls within the constitutionally protected "zone of privacy" inherent in the marital relationship. Today when 8.5 million women use birth control pills specifically to avoid conception, the overriding benefits of parenthood claimed by defendant seem exaggerated. Also, defendant's position overlooks the punitive nature of torts. Theoretically at least, allowing the suit would encourage pharmacists to exercise a greater degree of care.

Therefore, the *Troppi* decision contributes laudably to the merger of judicial and social standards. The defendant by his own act of negligence created a situation, wholly within the foreseeable realm of conse-

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31 In North Carolina the father has a legal obligation to give his child the advantages as well as the necessities of life commensurate with his financial circumstances and position. Williams v. Williams, 261 N.C. 48, 57, 134 S.E.2d 227, 234 (1964).
33 Id. at 307, 59 Cal. Rptr. at 476.
34 Id. at 309, 59 Cal. Rptr. at 477.
36 See, e.g., HEW, FAMILY PLANNING: ONE LOCAL PUBLIC WELFARE AGENCY'S APPROACH (1966); HEW, REPORT ON FAMILY PLANNING (1966).
quences, whereby the plaintiff's financial resources were decreased and his costs of living were increased. Other lesser courts have moved in the same direction. For instance, on very similar facts when dehydrating pills were negligently substituted for birth control pills, a Washington superior court allowed the jury to consider the mother's medical expenses and the aggravation of a pre-existing varicose veins condition. However, the court refused to consider the pain and suffering of a normal pregnancy as compensable. Also, a recent decision in Los Angeles County Superior Court concerning the substitution of sleeping pills for birth control pills by the negligent pharmacist resulted in a 42,000 dollar recovery for the parents.

As the number of women who use chemical contraceptives increases, more courts will be faced with reconsidering the strict benefits rule. The flexible rule of *Troppi*—allowing the jury to weigh all of the claimed benefits against the economic burdens of an unwanted child in each case—is the better reasoned approach in reconciling traditional concepts of tort liability and the changing ethos of the American family. Decisions like *Troppi* provide the courts with an opportunity to narrow the gap between dated judicial standards and modern sociological trends.

THOMAS JOSEPH FARRIS

Torts—Product Liability—Circumstantial Evidence and Proof of Defect

Since the landmark decision of *Henningsen v. Bloomfield Motors, Inc.*, the doctrine of strict liability in tort as a protection for consumers injured by a defective product has met with wide acceptance. The courts have re-examined their traditional rationale for product liability and have decided that the consumer is entitled to maximum protection at the expense of those who market the products. Relying on this premise,

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RESTATEMENT (SECOND) OF TORTS § 402A, comment c at 350 (1964).