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Case:
Bundesgerichtshof (Sixth Civil Senate) BGHZ 86, 240, JZ 1983, 447
Date:
18 January 1983
Note:
with note by Deutsch at 651; JuS 1984, 434, note by Fischer
Translated by:
Professor Kurt Lipstein

The first plaintiff, born on 24 February 1977, is the legitimate daughter of the second and third plaintiffs (henceforth called the plaintiffs). The first plaintiff suffered severe damage to her health because the second plaintiff, her mother, had caught German measles (rubella) during the first weeks of her pregnancy. The plaintiffs charge the defendant gynaecologist with having failed to diagnose the mother's illness with the result that the pregnancy—which had been desired in principle—had not been terminated.

The child and her parents ask for a declaration that—subject to a statutory assignment—the defendant is liable 'to pay compensation in respect of all the damage which they have suffered or will suffer in the future as a result of the second plaintiff's infection with German measles during her pregnancy'.

The District Court dismissed the first plaintiff's claim but granted the parents the declaration which they had sought. The Court of Appeal of Munich rejected the first plaintiff's appeal and, upon the defendant's appeal, rejected the parents' claim as well [reference].

Upon a second appeal by the three plaintiffs the decision of the Court of Appeal was quashed in so far as the claims of the parents were concerned for the following

Reasons:

A
The Court of Appeal has held that the claims of all the plaintiffs are unsubstantiated. In particular it has held:

I. Even if an error had occurred in the treatment of the patient, the defendant had not injured a protected interest or a right of the first plaintiff. It was true that according to a constant practice an act could result in damages if the party whose health had been adversely affected had not been born or not been conceived at the relevant time. In the present case, however, the defendant had not caused the injury to the first plaintiff; instead he was responsible for the fact that the first plaintiff was alive and enjoyed legal capacity. The foetus had no right to its abortion if only for the reason that, in so far as the abortion was legally admissible, the decision was that of the mother alone. Furthermore, the alternative between existence and no existence could not be expressed in legal terms of damage. Finally, by impeding an abortion the defendant had not violated a law for the protection of the plaintiff.

Admittedly the contract for treatment concluded between the defendant and the second plaintiff also exercised a protective effect in favour of the first plaintiff. However, the defendant's duty to explain to the second plaintiff the risks in the pregnancy itself and the possible injury to the foetus was only incumbent upon him in the interest of the second plaintiff.

II. In the opinion of the Court of Appeal the claims of the parents amount to a claim for a declaration by the second plaintiff in respect of non-pecuniary damages (owing to the difficult birth

requiring a Caesarian delivery) while the claim of the first plaintiff was for pecuniary damages. It rejected both claims.

(a) Claims of the second plaintiff

(aa) The Court of Appeal held that it was not called upon to decide whether the burden of economic maintenance (increased in the present case) could be regarded as damage. In any event, the principles developed by this Division in the two decisions of 18 March 1980 [references] did not apply in the present case. An error in treatment on the part of the defendant … would of course have adequately caused the second plaintiff's burden of maintenance. However, abortion, as distinct from sterilization was an act of killing [references] and according to some was only not punishable, but remained unjustified. Apart from this, unlike in the case of a request for sterilization, the defendant was not obliged in the present case also to take into account the financial interests of the second plaintiff. The defendant was only obliged to explain the medical and eugenic aspects of a pregnancy in so far as the life and health of the second plaintiff was endangered. In the present case the only concern had been to spare the first plaintiff a life under the severest conditions. In addition, financial considerations may have played a role, but these alone would not have justified a termination of the pregnancy. An excessive financial burden, which was also considered by some as a justification had not been proved. Consequently, the contractual duties of the defendant did not include the protection of those financial interests which had been pleaded. To this intent, too, the claim for damages was not justified.

(bb) Claims of the third plaintiff

Any contractual claims, alone in issue in the case of this plaintiff, were ruled out for the reasons set out when dealing with those of the second plaintiff, although the third plaintiff was included in the sphere of protection created by the contract between the second plaintiff and the defendant [reference].

B

These conclusions are valid in so far as the first plaintiff's (the child's) appeal is directed against them, but do not as a whole stand up against the appeal by the parents:

I. 1. In the light of the undisputed facts it cannot be doubted that the defendant, in his capacity as a medical practitioner, received and accepted the mandate of investigating the danger of serious injury to the first plaintiff (the child) as a result of the infection of the mother (the second plaintiff) with German measles during the first weeks of her pregnancy. The District Court has found that he carried out this mandate negligently.

The facts as found leave no doubt, moreover, that the second plaintiff, who had some medical knowledge, was particularly concerned, in consulting the defendant, to prevent any likely serious danger of permanent damage to the infant which had just been conceived, by terminating the pregnancy. It is also to be presumed in this second appeal that if the defendant had acted in accordance with his mandate he would have confirmed this fear and would thus have made a timely termination of the pregnancy possible as the sole remedy. Consequently, in these circumstances the defendant has caused by his negligent breach of the contract to treat the plaintiff the damage complained of by the latter.

2. It could be doubted whether the defendant had broken his contract, if it were assumed that a termination of a pregnancy, which is only regulated in criminal law (§ 218 ff. of the Criminal Code), is merely exempt from penalties, but remains illegal as a crime of killing. This view is supported generally by Sax [references]. However, as Sax himself observes expressly [references], it seems contrary not only to the view of the legislature but also to generally accepted opinion, as the Court of Appeal realized also. This Division sees no reason for going into this dogmatic dispute. It holds, in accordance with the generally accepted view, that an abortion which is exempt from penalties according to § 218 ff. of the Criminal Code is certainly not illegal. This view is borne out not only by the Preparatory Materials accompanying the present statutory provisions but also by the

position taken by the Federal Constitutional Court [reference] which [reference] supports a clear distinction between lawfulness and illegality.

Consequently an abortion which is exempt from penalties according to § 218 of the Criminal Code can form the object of a valid contract with a medical practitioner …

The Court of Appeal does not question that an infection with German measles during the particularly vulnerable period of early pregnancy may justify the mother in deciding to terminate it. Such an infection involves the risk, which is not overwhelming but at least highly likely, that the child will be born with severe or even extremely severe injuries [references]; the evidence in the present case is to the same effect. In these circumstances the future mother must have the right and the possibility, having regard to the present law, to call for an abortion. It is irrelevant in the present circumstances that the medical adviser is not under a direct duty to collaborate. The defendant has not alleged that he would have refused the plaintiff mother's request, had the danger been diagnosed.

No different conclusions can be derived from the fact that the statute does not concentrate on the prognosis for the welfare of the child but on whether the mother can be required to bear the burden. This does not mean that the test is only restricted to considerations of the danger facing the mother of a severe financial and work-load, as well as of the mental anguish through sharing the fate of a severely handicapped child. In addition, the ethical interest of the mother who is the sole person, according to what seems to be the general opinion, entitled to take this decision, must be taken into account. It is not to be held against her and she must not reproach herself for having failed, by a decision placed in her hands, to have spared the child a life which may be often painful and makes integration into society difficult.

Consequently it is generally believed, and held on the facts in practice, that an infection with German measles at a period when it may have dangerous repercussions is a ground which entitles the mother to demand an abortion.

II. In the opinion of this Division the negligent breach of contract by the defendant which constitutes at the same time an injury to the second plaintiff (the mother) may certainly lead to claims by the plaintiff parents, though not to a separate claim by the child.

1. Claims of the parents

In recent literature the predominant view appears to be that, in principle, claims of the parents may arise in the circumstances [references]. However, the decision forming the present appeal is mentioned several times with approval. The possibility of such claims is denied, in particular, by those who hold, for various reasons, that abortion is merely not visited with penalties, but illegal [reference]. This Division, as stated before, shares the former opinion.

(a) Claims of the mother

(aa) One starts from the fact that with the birth of the child the danger has materialized which the mother had decided to prevent by having an abortion. The total damage suffered by the child . . . is so grave that a mother who was prepared to undergo an abortion, if necessary, would have decided not to give birth to the child, had she been cognizant of the damage in advance. The damage suffered by the mother as a result was caused by the defendant's breach of contract and, generally speaking, he is therefore liable to repair it. The damage, being pecuniary damage due according to the law of contract, can consist in the additional expenses, financial and material (labour) which the mother will have to assume in toto or in part, possibly for her whole life. Plaintiff's counsel has stated expressly that their claim is limited to the additional expenses and is not concerned with the amount of maintenance which a healthy child would have required; therefore this Division can limit the decision to that claim in the case before it. The fact that this additional expense, too, arises from a duty of support imposed by family law, does not prevent its characterization as pecuniary damage, in so far as a third-party liability is concerned [reference].

It follows that—as in the case of a child born owing to a failure of preventive measures—also in the case of a child which the mother did not wish to be born in a condition as the present, i.e. handicapped, at least the additional expenses caused by the handicap can be claimed as damage to be made good (a point still left open [reference]). Of course, this is true only if and to the extent that the danger to be avoided has in fact occurred, so as to show that the severity of the actual damage—if it could have been foreseen—would have made it unreasonable to let the child be born. This must be assumed in the present appeal.

This is the only means of providing reparation for the defendant's negligence which imposed upon the mother a burden not required by law to be borne by her and which she was entitled to evade.

(bb) In addition this Division holds that, having regard to need for a Caesarian operation, the question must be considered whether the mother is entitled to damages for pain and suffering.

As distinct from the other cases referred to above decided by the Federal Supreme Court (Civil Division), the pregnancy, as such, was not due to the medical adviser's negligence, but was freely chosen or at least accepted by the mother (the second plaintiff). Thus, the defendant did not interfere directly with the personal health of the second plaintiff by involving her in an unwanted birth (as distinct from [reference]).

Therefore this Division holds that only that infliction of pain and suffering can justify a claim according to § 847 BGB which, as an aspect of damage, exceeds the inflictions which accompany a birth without complications. This may happen if—once again the evidence is not available—the Caesarian operation only became necessary because the child was injured, as the plaintiffs maintain. In assessing damages, it would have to be considered, on the other hand, that thereby the mother was spared an abortion which—as the defendant contends—would not have been without complications, and which she would have suffered if the defendant had fulfilled his obligation.

No additional claims of the mother arise by applying § 847 literally or by way of analogy. Nor did the Court of Appeal discern such a claim in the plaintiff's pleadings, a conclusion which remains unchallenged in the present appeal. For this reason it may be observed in passing only that such a claim based on the mental burden, not amounting exceptionally to an illness, resulting from being burdened with a severely handicapped child would be alien to German law (contrary to several foreign legal systems, as evidenced, e.g., by Howard v. Lecher, decided by the Court of Appeals of New York, 366 NE (2d) 64 (1977)—'mental and emotional suffering'). The practice of the Federal Supreme Court, which grants damages similar to those for pain and suffering within a strictly defined area in respect of the right to one's personality [reference], cannot be extended to the present issue. In particular, no pecuniary damages can be awarded, contrary to principle underlying the statutory provisions, in respect of a violation of the 'right to plan a family' as an emanation of the general right to one's personality [references] if a decision involving the personality of the party affected was only frustrated in fact—as was the case here.

(b) Claims of the plaintiff husband

The husband is entitled to expenses in money and kind to the same extent as the wife. To this extent he was included in the sphere of protection resulting from the contract for medical treatment; as far as the liability to pay damages of the responsible medical practitioner is concerned it is irrelevant to what extent the burden created by him is distributed between the spouses. The principle laid down by this Division [reference] apply here as well. The present case shows clearly that normally no other conclusion can be reached for at least according to the allegations of the plaintiff parents—the father, acting as a 'houseman', has now assumed the time-consuming care of the handicapped child, in order to enable the mother to continue her professional career and thus to provide the financial means for maintaining the family.

No claims of the third plaintiff for damages other than financial are in issue.

2. Claims of the child

In the present case the highest German Court is confronted for the first time with the problem which has been described in Anglo-Saxon parlance as ‘wrongful life’. As stated above, the defendant did not cause the child’s deplorable condition; nor is it contended that by taking special measures he could have prevented it. However, in breach of his obligation towards the mother to treat her, he failed to prevent by means of an abortion the birth of a child, the health of which was severely endangered and in whose person this danger materialized in a severe form. To this extent this Division agrees with the Court of Appeal that the child cannot raise any claims based on these facts.

As stated above, little German practice has come to light. Apart from the decision under appeal here, an appeal against a judgment of the Court of Appeal of Hamm of 25 January 1982 [reference] is pending before this Division in which, however, claims by the child itself were not considered for procedural reasons. Foreign judgments, which for the reason alone that they are based on different laws are only of limited relevance for German law, appear to have been rendered in England and the United States. In England a claim by the child has recently been rejected (Court of Appeal, 19 February 1982, McKay v. Essex Health Authority and Another [1982] 2 WLR 890). In the meantime, legislation has excluded a claim by the child altogether. In the United States, too, this opinion has been generally accepted for some time (Court of Appeal, California, Curlender v. Bio-Science (1980) 165 Cal. 477).

Writers on the law of the Federal German Republic relating to this topic are divided, but the majority denies a claim to the child. Such a claim is, however, advocated by Deutsch [reference] and probably also by Plum [references]. On the other hand, claims by the child itself are denied not only by all those who do not accept failure to facilitate an abortion as a ground for liability, but also by those writers who would allow claims by the parents in these circumstances [references]. In rejecting a claim by the child based on ‘wrongful life’ or ‘wrongful birth’ this division is guided by the following considerations:

(a) A direct duty, enforceable by an action in tort, to prevent the birth of a child on the ground that in all probability it will be affected by an infirmity which makes its life appear ‘valueless’ in the eyes of society or in its own presumed opinion (for which naturally no evidence can be produced) would be alien to the duties sanctioned by the law of tort which are normally centred on the protection of personal integrity. No such duty exists. This applies even in cases—different from the present—where there exists not only a danger of damage, but, e.g. where a fairly reliable prognosis of a serious genetic defect is possible, e.g. by means of amniocentesis—as in the case of mongolism. This principle holds good, although according to what is probably the dominant opinion as well as the actual legal practice the birth of such children should be prevented. Human life, which at the conclusion of implantation includes also the foetus, is a legally protected interest of the highest order deserving absolute protection. No third party may determine its value. For this reason it is recognized that the duty to save the life of a sick person or one who is seriously injured must not be made to depend upon a judgment as to the value of the life to be saved. Only when the question is whether isolated single human functions are to be sustained by artificial means without any hope of improvement, this principle may have to yield [references].

Such is not the case here. Quite generally, having regard to the experience under the national socialist regime of lawlessness, the practice of the courts in the Federal Republic does not permit, with good reason, any legally relevant judgment about the value of the lives of others [reference].

(b) Therefore any breach of duty which might render the defendant liable in damages could only be derived from the contract to treat the mother.

(aa) On the one hand, it is possible that contractual duties, including those towards third parties, may constitute duties to be accounted for in tort [reference]. In this respect reference may be made to what has been stated before. Neither the fact of bringing life into being nor of failing to prevent it (as distinct from affecting the quality of life by an act of omission) violates the legal interest protected by § 823 BGB. This is not merely a dogmatic consideration. It is also supported by the fact that the ethical evaluation by public opinion of permissible abortions is not uniform (it is true

that the defendant has never relied on ethical scruples; if so, he would have had to refuse to advise and to treat the mother).

Above all, seeing that no interest of personal integrity is involved, it is impossible to determine with binding effect whether a life affected by serious handicaps as an alternative to absence of existence can be regarded at all in law as damage, or whether it is a better condition that the latter [Stephenson LJ [1982] 2 WLR 890: 'Man, who knows nothing of death or nothingness, cannot possibly know whether that is so'].

(bb) Thus it remains only to examine whether the defendant is bound by a direct contractual obligation which obliged the latter to protect the child as a result of the protective effect of an agreement (possibly implied only) in favour of the unborn child. Once again this Division is unable to give an affirmative answer, although such a contract for medical treatment may well have protective effects in favour of the child in other respects, as the Court of Appeal has also recognized.

It would not be an obstacle that at the time when the defendant committed the act resulting in his liability the plaintiff child did not yet enjoy legal personality (§ 1 BGB). In the law of tort, too (see above) it is recognized that an act causing liability may be committed before the injured party was born [reference] and even before he was conceived [reference]. The same applies to a claim for damages which is based on a contractual duty in favour of the unborn child.

This Division is, however, unable to find that such a protective effect was stipulated since the law in force at present expressly authorizes the mother in her own interest alone to demand an abortion. This attitude of the law may not be convincing in its reasons; also, as far as can be ascertained, it does not exist in other countries, where the law does not reject abortion in principle. Nevertheless, the attitude taken by German law must be respected within the confines of the Federal Republic, if only for reasons of constitutional law [reference]. Consequently it precludes not only a broad interpretation of the contract to treat the mother so as to benefit the child, the birth of which was to be prevented, but also as already stated, any direct guarantee actionable in tort of the medical adviser towards the child arising from the assumption of the mandate to treat the mother.

(cc) Leaving aside the special features of the German rules on abortion, this Division regards the denial of claims by the child itself as imperative in such cases. Such claims are only admissible if the child's interest in personal integrity has been violated culpably by human activity which, as stated before, may have occurred even before the child was conceived. For the rest, the question is not so much one of arguments based on formal logic, also relied upon by the Court of Appeal, as for instance to the effect that those having legal personality cannot conceivably derive claims from acts which gave rise to the claimant's existence and legal personality [reference]. Instead, this Division believes that in cases such as the present the limits within which claims can be adjudicated according to law have been reached altogether and even exceeded. As a matter of principle a human being has to accept his life as nature has endowed him and has no claim against others to be born or to be eliminated. If a mother—and she alone—is nevertheless accorded such a choice by the law, this does not mean either that the child is granted a right as against her not to exist. It is irrelevant that the mother's decision may legitimately have been influenced by compassion for the severely injured life [reference].

If a decision to the contrary were to be reached against the medical adviser, it would follow that liability would also have to be admitted in other cases; for example that of parents who, although suffering from severe genetic defects, gave life to a child, and whose liability consists at present, as the case may be, in an increased duty of maintenance; or that of persons who are responsible for those genetic defects, even if these defects were known to the parents, who are primarily liable, when they produced the child (as distinct from the case [reference] where the issue was the infection of the mother with lues as a result of a blood transfusion . . .). Thus liability to pay damages could arise for several generations, a possibility which has already led to suggestions to restrict liability to the first generation [references].

These considerations show in the opinion of this Division, as stated before, that an area has been touched on in which the legal regulation of liability for far-reaching fateful and natural developments is neither reasonable nor acceptable.

(dd) This Division is not oblivious of the fact that as a result seriously handicapped children remain without financial protection, once the duty of the parents to maintain them comes to an end—as for instance when they die. This must be accepted, just as when the mother could not make up her mind to call for an abortion or if the period set by law for having an abortion has been allowed to pass, for no matter what reason.

In all these cases a fateful development takes place the interruption of which cannot be demanded by the child and the effects of which must be made good by the community within the bounds of the possible.

Note:

"*The issue of substance raised by the German decision has proved controversial in that country as it has in the USA. The decision of the Second Division of the Constitutional Court (BVerfGE 88, 203 = NJW 1993, 1751 "second abortion" case) – known for its conservative tendencies – thus echoes the doubts expressed in the USA by those who sympathise with the pro-life position. Some (lower) courts immediately heeded the advice of the Constitutional Court to reconsider the question of civil damages and took a similar, conservative stance on the issue. (Thus, LG Düsseldorf 2 December 1993, NJW 1994, 805, refusing to follow the BGH decision of 16 November 1993, NJW 1994, 788, decided only a fortnight earlier. Likewise, OLG Zweibrücken, 18 February 1997, NJW – RR 1997, 666). In some instances, they were able to do this on the technical argument that the case before them involved a maintenance claims for a healthy child (whereas the BGH decision of 16 November had been concerned with the claims of the parents of an impaired child). But other courts refused to accept this as a valid distinction and abided by the more liberal position that awarded full maintenance costs to the parents. (OLG Düsseldorf, 15 December 1994, NJW 1995, 788.) In this steadfastness, these courts found an ally in the BGH. For this court not only had by-passed skilfully the Constitutional Court by drawing a distinction between the "existence of the child" and ""the obligation to maintain it" (BGH 16 November 1993, NJW 1994, 788); it had also been quick to reaffirm its views in a quick succession of judgments. (For instance, BGH 23 March 1995, NJW 1995, 1609.) The subsequent and most recent decision of the First Division of the Constitutional Court (BVerfG, 12 November 1997, BVerfGE 96, 375 = NJW 1998, 519) – which, unlike the Second Division, is known for its liberal tendencies - has broadly followed the line of the BGH. And the decision not to refer to the Plenum of the Court the dispute between its two rivalling Divisions (BVerfG, 22 November 1997, NJW 1998, 523) suggests that the status quo is unlikely to be disturbed in the near future. The position in private law thus seems to have settled in the following way. (i) Both parents have a contractual claim for wrongful birth and pregnancy cases; (ii) this entitles them to full maintenance costs (whether the child is healthy or not; if it is not the measure of damages may be greater to cover the extraordinary medical expenses); (iii) the mother may additionally claim pain and suffering in cases of wrongful birth that result from a complicated birth. In all these actions, the child, itself, had no claims."*

The quotation is taken from Basil Markesinis, The German Law of Obligations, vol II, The Law of Torts, 4th ed. by Basil Markesinis and Hannes Unberath, Hart Publishing (forthcoming 2002) with further annotations and extensive references to English, American and German Law. Wrongful birth and wrongful life actions were recently the subject of an important decision of the Assemblée Plénière of the French Cour de cassation of 17 November 2000 which is discussed from a comparative perspective by Professor B Markesinis, in RTD civ. (1) janv.-mars 2001, pp. 77-102.