LXHO HOGG, C. G. G. Unsuccessful contraception

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UNSUCCESSFUL CONTRACEPTION

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INTRODUCTION

The purpose of this paper is to examine the legal consequences of the birth of a child whose parents have taken contraceptive precautions. Contraception will be regarded as including not only short-term measures such as the contraceptive pill or physical protectives, but will also extend to the long term permanent measures of male and female sterilisation .

Where the parents have used contraception it is clear that the birth of a child is the very event they wished to prevent. They will now be unwillingly confronted with the economic and social pressures attendant upon the birth and upbringing of a child. Pressures which may be aggravated by their circumstances and which may well affect other members of their existing family. This paper will therefore centre around the question whether the birth of an unwanted child can cause a loss or damage entitling the parents and their family to compensation.

If there were entitlement to compensation for the birth of an unwanted child it will obviously have to be considered who should be liable for payment. In the New Zealand context there would appear to be two possible alternatives. The first is spreading the loss over society under the Accident Compensation Act 1972. The second is to make the producer of the contraceptive or surgeon who performed the sterilisation operation liable under common law.

Since coverage under the Accident Compensation Act is an absolute defence to a common law action[1] the nature of the question as to liability is somewhat vexed and is not a matter of choice so much as one of definition. Moreover, as it will later appear, resolution of this question will have considerable repercussions on assessment of compensation.

THE UNWANTED CHILD - CAN HIS BIRTH CAUSE A COMPENSATABLE LOSS?

The Courts have developed an irrebuttable presumption that the birth of a child, in the context of marriage at least, confers a benefit upon both the parents and society as a whole.[2] The fact that the parents hoped to avoid the birth has been regarded as irrelevant. Moreover, so great has been the moment ascribed to the birth of a child by the Courts that the avoidance of the benefit of birth by means of contraception has been regarded as contrary to public policy.

Thus in a comparatively recent unanimous decision of the English Court of Appeal it was held that a marriage may be annulled for non-consumation where, by the use of a contraceptive, a spouse-

> "deliberately discontinues the act of intercourse before it has reached its natural termination or when he artificially prevents that natural termination which is the passage of the male seed into the body of the woman. To hold otherwise would be to affirm that a marriage is consumated by an act so performed that one of the principal aims if not the principal end of marriage is intentionally frustrated." [3]

In a subsequent decision of the same Court[4] the above rule was applied in an action for annulment where the husband had been sterilised. Thus it was not so much the "passage of the male seed" as the unnaturally induced sterility which was advanced as

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(1) Accident Compensation Act 1972; preamble; binding as per s.5(e) of the Acts Interpretation Act 1924.
(2) cf Ball v. Mudge (1964) 64 Wash 2d 247, 391, p.2d 201,204 Shaheen v. Knight (1957) 11 pa D& C 2d 4,43 Lycoming County
(3) Cowen v. Cowen (1946) P.36,40, (1945) 2 All E.R.197,199
(4) J. v. J. (1947) P 158 (1947) 2 All E.R. 43,44

the key factor to annulment. The birth control policy question arose again, most recently, in another decision of the same Court.(5) In that case a husband had a vascectomy operation to spite his wife who sought a divorce on grounds of cruelty. The Court refused to grant the divorce and the majority saw no need to refer to J.& J. (supra). It was, however, cited with resounding approval in the minority judgment of Lord Denning M.R. from which the other members of the Court expressly dissociated themselves.

Whilst the majorities' distinction of J.v.J. in Bravery may indicate a significant change in judicial attitudes the two cases can easily be distguished in that Bravery was an action for divorce while J.v.J. was an action for annulment. Moreover the minority judgment of Lord Denning M.R.would appear to indicate that there remains a formidable judicial opinion that contraception is contrary to public policy.

It can only be concluded that the law remains uncertain and it would appear that at most the decision in Bravery has done little more than cast doubt upon the principle that contraception is contrary to public policy. The policy reasons for this principle are implied rather than judically expressed, but it is suggested that they are:-

(1) That to endorse the use of contraception would be to open the flood gates to immorality both within and outside marriage.

(2) That it is in the interests of the public not to discourage procreation by endorsing contraception, so as to maintain the population.

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(5) Bravery v. Bravery (1954) 3 All E R 59, 67.68

It is submitted that due to changes in society neither of the above policy limbs can be supported, and social and governmental attitudes are now quite different from those reflected in the judgments which have given rise to the rule against contraception.

The New Zealand Government Department of Health estimates that:-

> "***almost half the women of reproductive age in New Zealand use the pill."(6)

In the Department's estimation tens of thousands of other contraceptives are used yearly in New Zealand, and the consumption is growing.(7) The Department also has figures which indicate that the number of male and female sterilisation operations is rapidly increasing.(8) It should be noted that these figures do not include the physical methods of contraception such as withdrawal or the rhythm method.

It is clear that the upsurge in use of contraception has done nothing to reduce the population of New Zealand, which continues to grow. Moreover in light of world over-population it would seem to be to our advantage to artifically limit population growth. Thus there remains only the question of immorality. Were the Courts to enforce this policy limb of the rule against contraception they would be in the position of condemning a considerable proportion of the population of New Zealand. While quantity alone does not dispose of the qualitative moral argument it is submitted that this factor together with present Government policy does extinguish the morality objection.

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(6) Department of Health submissions on contraception and sterilisation to the Royal Commission on Contraception Sterilisation and Abortion para. 5.3 page 10.

(7) Ibid. para. 5.3 page 9

(8) Ibid. para. 8.7 page 17

In its submissions to the Royal Commission on Contraception Sterilisation and Abortion the Health Department noted that:-

> "There is ample evidence that family planning is conducive to the health of not only the mother of the family but of all the members of her family and that, therefore, family planning is an aspect of public health in which the Department is legitimately interested."(9)

Later in the same submissions it was also noted that:-

> "In the past decade family planning has become accepted as a public health measure and an integral part of a modern health service. It is supported by the New Zealand Government which annually spends a considerable sum both in New Zealand and overseas upon it." (10)

Government involvement does not however extend as far as providing contraception in the same way as prescription drugs. All contraceptive devices, including the pill which is only available by prescription, are unsubsidised and must be paid for by the user. Application may however be made on the basis of economic hardship for the provision of contraception without any cost to the user.(11) Although since this policy was introduced in 1971 only 362 such applications have been made.(12)

Under the present system sterilisation operations may be performed without cost to the patient in public hospitals.(13) However the actual situation is effectively the same as that for short-term contraception. Since due to the low priority given to sterilisation operations in public hospitals the majority are performed in private hospitals and are paid for by the patient.

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(9) Ibid note 6 para. 2.2 page 1
(10) Ibid para 2.6 page 2
(11) Health Department Clinical Services News Letter No.139 dated 19th July 1974
(12) Ibid note 6 para. 7.5 page 13.
(13) Ibid para 8.6 page 16

Effectively, then, at the present time all that is really provided free is advice, either by Department clinics and publications or through the New Zealand Family Planning Association. The Family Planning Association at present plays the major role. It is however beset by financial problems which Department subsidies are inadequate to cover.

Notwithstanding the present situation the Maternity Services Committee of the Board of Health has recommended that:

> "The most suitable method of birth control including surgical methods should be readily available free to all who need it."(14)

It is to be hoped that the above recommendation will be adopted by Government. What can be concluded from the status quo and future policy recommendations is that there is no longer any factual basis on which to justify preserving the rule against contraception. Despite the fact that it now appears that avoidance of the benefit of the birth of a child is no longer contrary to public policy such a conclusion does not absolutely extinguish the benefit rule. Any such assertion could not be factually justified since the birth of a child is still actively sought by many persons in New Zealand. Moreover to adopt a fundamentally hostile attitude to the birth of a human being is necessarily repugnant.(15) The benefit rule must remain with us. It is submitted however that the redundance of the rule against contraception may now raise the possibility of displacing the absolute effect of the presumption of benefit by the use of contraception.(16)

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(14). Ibid para 2.7 page 3

(15). Gleitman v. Cosgrove (1967) 49N.J.22,29,227A 2d 689,693, 22 A.L.R. 3d 1411

(16). This approach was adopted in Troppi v.Scarf (1971) 187 NW 2d 511, 317:
Jackson v.Anderson (1970) 230 S02d 503
Custodio v. Bauer(1967) 251 Cal.App 2d 303,325,59 Cal. Rptr. 463, 27ALR 3d 884
Bishop v. Byrne (1967) 265 F. Supp. 460

It is not suggested that the mere fact of contrary intention is sufficient to displace the benefit rule, other factors must be taken into account. It could not be disputed that the birth of a child inevitably involves the parents in economic and sometimes social loss.[17] On the other hand it is equally indisputable that the birth of a child inevitably confers a benefit upon the parents in terms of: -

> "the joy and affection which they will have in rearing and educating ***"

their children.[18] In order to enable the parents to enjoy the benefit it is necessary to equalise the loss, thus the positive factors of the birth must be weighed against the negative factors of the economic loss. It has been suggested that this will involve placing a dollar value on the positive elements of the birth which is totally repugnant.[19] It is submitted that this is not the case, although even if it were such an exercise should be no more repugnant than assessing loss of enjoyment of life under S.120 of the Accident Compensation Act 1972. It is suggested that it is not necessary to quantify the benefit in the same way as the economic loss since the purpose of the assessment must be to compare the effects of each factor, not simply to measure them on the same yardstick.

Such an approach would enable the assessment of compensation on all the merits of any given case rather than on an arbitrary fixed basis. Thus, where for example, the purpose of contraception was simply to postpone an intended family the

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(17) This is clearly evidenced by Family Benefit payments under the Social Security Act and the Court's power to award maintenance of children under the Matrimonial Proceedings Act.

(18) Shaheen v. Knight ibid note 2, at 521

(19) Ibid note 18 and Ibid note 16 Troppi v. Scarf at 518 where such objection was rejected.

loss would be minimal and the compensation should be proportional.[20] However this approach does not mean that there would be no entitlement to compensation if the parents could afford to bring up the child since the birth would result in money which was to have been directed to other purposes being expended on the new arrival; the loss would simply take a different form. It is submitted that compensation must be primarily aimed at replenishing:-

> "*** the family exchequer so that the new arrival will not deprive the other members of the family of what was planned as their just share of the family income."[21]

It must also be pointed out as an additional facet to compensation that it should not be confined to economic loss. The mother should be able to recover for the pain involved in giving birth to a child.[22] She should also be able to recover for lost educational and social opportunities. Where the spouses are married there should also be recovery for loss of conjugal rights.[23]

It should not be supposed that the ramifications of the benefit rule are confined to compensation, in fact the retention of the benefit rule is something of a two-edged sword. Since the birth of a child is always a benefit it is not open to remedy the attendant economic loss by depriving the parents the benefit of their child by abortion or adoption.[24] To do so would not only be morally unjustifiable but also contrary to public policy.

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(20) Ibid Troppi v.Scarf at 818
(21) Custodio v.Bauer 59 Cal Rptr 463, 467
(22) Ibid note 16; Troppi v.Scarf at 818 Bishop v.Byrne at 464
(23) West v. Underwood (1945) 132 N.J.L.325 40 A. 2d 610
(24) Ibid note 16 Troppi v.Scarf at 521

On the other hand the benefit rule must deprive the child himself from recovering compensation for "wrongful life."[25] If there is recovery it is clear that it must be initially by the parents or the parents and their family who suffer the immediate economic loss. However if the child were born unhealthy the situation would be quite different. If the child were injured in utero by a defective contraceptive he should recover compensation.[26] There should also be recovery, it is submitted, where the child is born with a hereditary defect which the parents endeavoured to prevent by their use of contraception.

It is submitted that changing Governmental and social attitudes to the legitimacy of contraception also have ramifications beyond the immediate effect of the benefit rule. The parents' intercourse could not be regarded as an intervening event on a "but for" analysis since the use of, and hence reliance on, contraception is now not only regarded as socially legitimate but is also encouraged by Government so that the unsuccessful contraceptive is not only the last but also the sole wrong doer.

By the same token it is submitted that the parents' marital status should not be relevant[27] since all persons over sixteen years who have sexual intercourse are encouraged to use contraception. It is suggested that this will not involve any real change in judicial attitudes to extra-marital sex, which can be reconciled with existing Government policy. The decision to use contraception of necessity occurs subsequent to the decision to have sexual intercourse. Thus the use by purchase of contra-

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(25) Ibid note 15 Gleitman v. Cosgrove
(26) Watt v. Rama (1972) V.R. 353
(27) Ibid note 16 Troppi v. Scarf 518 where in dicta marital status was regarded as irrelevant.

ception is not void as an immoral contract since its purpose is to prevent pregnancy not to encourage sex.

At this point it is relevant to point out that before any loss could be assessed it would have to be shown that the pregnancy was in fact unwanted, and that bona fide steps were taken to avoid it. In many cases this would be difficult, not to say impossible, since most contraceptives are destroyed during or immediately after use. Moreover there are unlikely to be any witnesses to confirm that such measures were taken. This limitation must, of necessity, curtail many possible recoveries.

It is submitted, however, that such a limitation must be imposed by practicality since the only logical alternative would be to award compensation whenever it could be shown that the birth of a child has caused an economic loss. Such an approach is clearly undesirable since it would thwart the Government's policy to encourage contraception by providing a positive dis-incentive to use it.

WHO SHOULD BE LIABLE FOR THE LOSS?

(1). The Accident Compensation Act 1972

Since it is Government policy to encourage family planning it does not seem unreasonable that the Government, by the Accident Compensation Act 1972, should provide the immediate source of recovery where contraception has failed. Consistent with the above indication that some limitation on recovery is necessary it would appear that the requirement of 'personal injury by accident' to qualify for coverage under the Accident Compensation Act should perform this function.

To gain entitlement under the Act, it will therefore

be necessary to show that either, or both, the unwilling mother or the unwanted child has suffered personal injury by accident. 'Personal injury by accident' is defined to include:

(i) The physical and mental consequences of any such injury or of the accident;

(ii) "Medical *** misadventure."[28]

Where a child is born healthy it is clear that his birth could not be regarded as a personal injury or even an accident. However, where the child is born unhealthy it is worth exploring the possibility of his recovery since the Accident Compensation Commission has recognised the entitlement of the unborn child.[29]

It would appear that there is coverage where the child is injured by a defective contraceptive method. For example a dislodged inter-uterine device becoming embedded in the foetus or a chemical contraceptive causing deformation.[30] It is submitted that the resultant physical defects are injuries in the same sense as a non-ideopathic illness in that they are caused by factors external to the subject.[31] Similarly it is submitted that proof of the external cause raises an inference that the injury was the result of an accident despite the fact that the actual moment of injury is not identifiable.

Where, however,a child is born with some hereditary defect or illness which the parents endeavoured to prevent by taking contraceptive precautions it may be that the situation vis a vis the act is different. It is difficult to see how an ideopathic illness could be regarded as an injury since it is not caused by an event external to the subject. It could however be argued that the

(28) s.2 (1)(a) Accident Compensation Act 1972 as amended by the Accident Compensation Amendment Act 1974.
(29) ACC Report May 1976 page 17 containing an express approval of Watt v. Rama ibid note 26.
(30) c.f. the Thalidomide cases; S v.Distillers Co.Ltd. (1969)3 All ER 1412 Allen v. Distillers Co. Ltd.(1974) Q.B. 384
(31) Storey v. Wellington Hospital Board (1932) NZLR 1553 (CA)

failure of the contraceptive method which caused the pregnancy is in fact an accident.

Proceeding on the assumption that contraceptive failure could be regarded as an accident it is arguable that the use of the word "or" in s.2(1)a(i)[32] is disjunctive and allows cover for the physical consequences of an accident without proof of attendant "personal injury." It is however difficult to reconcile this argument with the use of the word "the" prefacing "accident" which would appear to be referential to "injury." Such an interpretation would also render the qualifying phrase of 'personal injury by accident' at least partially redundant. It is unlikely that the Commission would be willing to extend entitlement to the extent that above interpretation would warrant. Therefore it appears that a child born with an hereditary defect is unlikely to have cover under the Act where his birth is due to unsuccessful contraception.

Thus where the child is born uninjured we must turn to the mother. Where she is injured by the physical and mental circumstances of giving birth it is by no means clear that there is recovery. Since while the actual pregnancy may well be regarded as an accident the personal injury caused by the resultant birth occurs some nine months later. It is submitted that the time delay need not prevent recovery since there is no express requirement in the Act that the accident andinjury should be simultaneous, only that they should be causally connected. The situation is different where the mother is injured by the medical treatment given to her on birth of the child since it is clear there is recovery under s.2 (1) a (ii) of the Act[33]

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(32) c.f. note 28
(33) ibid.

but this has nothing to do with the unwanted nature of the birth.

Generally apart from the immediate physical pain and suffering attendant upon the birth the mother is left without any lasting mental or physical injury. As was submitted above where pregnancy can be shown to have been caused by contraceptive failure the 'accident' requirement is satisfied. The question is therefore whether pregnancy may be regarded as personal injury. S.105 B includes pregnancy in its definition of 'actual bodily harm' for the purposes of s.2, but such pregnancy must be caused either by rape or sex with a child under 12 years. Therefore the Act provides no immediate entitlement.

It may be that this anomally could be avoided under the head of 'medical misadventure.' For example where in the case of female sterilisation the fallopian tubes are not entirely severed or the wrong tube is severed. The problem with this approach is that it is the medical omission of not properly cutting the relevant tubes that has caused the pregnancy not any positive Act. Thus pregnancy is not a consequence of the treatment given, but the treatment not given. In a recent Accident Compensation Commission review decision[34] (which is subject to appeal) it was said in dicta -

> "*** that in some circumstances a 'medical omission,' where in diagnosis or treatment may lead to a situation properly described as 'medical misadventure' for the purposes of the Act, ***"

These circumstances were said probably to comprise -

> "*** an omission in either diagnosis or treatment (which) may so 'taint' the treatment actually given as to render such treatment inadequate***"

(34) ACC Report January 1976 19,20

It is clear that an unsuccessful sterilisation operation is just such a circumstance. The relevant test was formulated as -

> "*** the death, the injury, on the aggravation of the injury on which the claim is founded, must be attributed to, caused by, and be a direct result of the medical conduct complained of, on the mishap that occurred."

As indicated above, pregnancy is not an injury in terms of the Act but the wording of s.2 equates "medical misadventure" with 'personal injury by accident,' so that it is enough that pregnancy is a 'consequence' of it. However, as indicated in the above quotation, it would appear that the Commission interprets s.2 as 'personal injury caused by medical misadventure' so that the term 'medical misadventure' goes to the requirement of an 'accident' alone. It therefore appears that the medical misadventure is not in itself a 'personal injury.' Whilst it could be argued that cutting the wrong tube or incompletely cutting the right one, is in fact an injury as well as an accident, the point remains that pregnancy is not a 'physical consequence of the positive acts that lead to these personal injuries by accident, but of the omission in incompletely or not, severing the fallopian tubes. Thus while it appears that medical omission in this case may well constitute an accident there is no relevant attendant injury, the consequence of which is pregnancy. As indicated above in the case of a child born with a hereditary defect it is unlikely that there will be recovery regarding pregnancy as a consequence of an accident alone, in the absence of attendant personal injury.

Where the child is born as a result of an unsuccessful vascectomy operation, quite apart from the above, recovery is even more fundamentally prevented since while the vascectomy may

be regarded as a medical misadventure by omission where it is unsuccessful, the physical consequences of the accident affect someone other than the male subject.

Similarly where a child is born because of wrongfully prescribed contraceptives, or contraceptives which are defective in either supply or manufacture (35) there is unlikely to be recovery where both mother and child remain healthy. This is especially the case where contraceptives are bought from a vending machine or across the counter which are unlikely to be regarded as a medical treatment since they are produced for consumption without any particular person in mind. Moreover in both these cases there is clearly no personal injury even remotely attendant to their accidental failure.

It is therefore concluded that entitlement under the Act will be confined to those cases where externally caused injury can be proved and where the unwanted nature of the pregnancy is irrelevant. Even supposing there were entitlement, for example, under the head of 'medical misadventure' it would appear to be very limited. It would appear that the mother could recover her medical expenses under s.111, she could also, perhaps, recover for pain and suffering caused by her pregnancy under s.120. Where the mother is married it may be that her family could recover for 'quantifiable loss of service' under s.121 (2)(a).

However the best part of what may be recoverable would be dependent upon proved 'incapacity' caused by the birth on the part of the mother. S.2 of the Act defines incapacity as -

"Total or partial incapacity."

The three sections of the Act directly concerning incapacity ss. 113, 114 and 118 are all framed in terms of physical incapacity

(35) c.f. Troppi (supra) where tranquilisers were supplied instead of the pill.

and it is unlikely that their ambit could be extended to include economic incapacity.

As indicated in the introduction coverage under the Act is an absolute defence to a common law action.(36) Because of the paucity of compensation available to an uninjured mother or child the question of definition assumes major proportions. It is clear that the Accident Compensation Act would yield less by way of compensation than a common law action, but this is strictly irrelevant. It is submitted however that in policy terms the disparity of each potential recovery should militate against a wide interpretation of the Act.

(2). Recovery under Common Law

Where both mother and child are left uninjured from the circumstances of pregnancy and birth it would seem there is no recovery under the Accident Compensation Act. The alternative solution lies in the common law. It is submitted that generally the relevant facts would enable actions to be brought in both contract and tort. However it would appear that the substantive differences in each plea, quite apart from the merits of any given case, would play a large part in the outcome of an action. It is worth considering and evaluating these differences.

The basic requirement of an action in contract is consideration moving from the promisee. As indicated above, it has been recommended that Government extend its role in family planning towards providing gratuitous contraception, and to some

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(36) Ibid. note 1

extent this is already the case. Thus in the absence of consideration the role of contract law will be of diminishing importance.

Moreover an action in contract is also subject to the limitation of privity. Thus the only relevant damage or injury is confined to that of the contracting party who paid for the contraceptive service who, in many cases, is not the mother who suffers the initial damage. It may be that this limitation could be avoided by regarding the purchaser as the agent of the user or patient. Although such an approach would probably be confined to the marital situation where it would be reinforced by the fact that the purchaser would at least share in the economic loss caused by the unwanted birth. It is submitted that such an extension of the agency rule in the marital context at least, is quite reasonable having regard to the single legal identity spouses can, on many occasions, assume. It does not, however, do much to assist the unmarried mother.

The assessment of damages in each branch of the law proceeds on the basic concept of "restituo in integrum." With the difference that the purpose of an award of damages in tort is to return the plaintiff as close as possible to the position he would have occupied had the tort never been committed.(37) While in contract their purpose is to return the plaintiff to the position he would have occupied had the contract been performed properly.(38)

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(37) Fleming on Torts 4th Edition 202, 207.

(38) Hall v. Pim (1927) All E.R. Rep. 226

It could thus be argued that the benefit rule could be circumvented in contract since the relevant consideration is defining the breach rather than defining the injury. Such an approach would, however, ignore the problem of assessment of damages since even were a contract breached damages could hardly be awarded where the breach conferred a benefit upon the aggrieved party. It is clear that the benefit rule will have universal application.

There is also an additional facet to the assessment of damage in each cause of action and that is remoteness of damage. It is submitted that an argument that the economic loss consequential upon an unwanted birth is too remote in tort could not be reconciled with the large awards that the Courts have made to the supporting relatives of an injured party for nursing expenses.(39) It is submitted that there is no real ground for distinction since an award in each situation rests on the responsibility of the relatives for an expense immediately and irretrievably consequent upon the event in point. It would appear that it is the element of responsibility which distinguishes the situation of the unwanted child from other economic loss cases.(40)

The situation may however be quite different in contract where for the purposes of assessing damages for breach the degree of foreseeability required is higher than in tort.(41) It could not reasonably be argued that the possibility of pregnancy from contraceptive failure is not within the strictest test of foreseeability but the attendant economic loss may well be regarded

(39) Ibid note 30; the Thalidomide cases, of also:
Taylor v. Bristol Omnibus Co. Ltd. (1975) 2 All E.R. 1107
Hagar v. De Placideo 116 S.J. 396

(40) e.g. Kirkham v. Boughey (1958) 2 QB 338
Spartan Steel v. Martin & Co. (1973) QB 27

(41) The Heron II (1969) 1 AC 350

as a far more serious damage than would have been contemplated. It has been held that where the kind of loss is within the reasonable contemplation of the parties the fact that its extent is far more serious than contemplated is irrelevant.(42) Such an approach is however somewhat difficult to reconcile with the leading authority in the area of damages in contract,(43) where no such distinction was drawn. Either approach could be argued so that it is by no means clear that the measure of damages in contract will be as fruitful as that in tort.

As indicated the assessment of damages in contract is dependent upon proof of breach, the definition of which must depend upon identification of the terms of the contract. It is clear that every contraceptive method is subject to some unavoidable failure rate(44). Thus the supplier or surgeon could not practically be regarded as warranting absolute protection. Therefore the advantage of strict liability in contract is considerably eroded and the supplier or surgeon can only be regarded as providing a reasonably safe contraceptive method. The merging of the contractual plea into tort will also be seen as imposed by the natures of the contraceptive methods. An analysis of which will also underline the difficulties of proof, in that it will not only be necessary to show that contraceptive precautions were taken as it would have been for the Accident Compensation Act, but also that the method used was itself defective.

Recovery for failure of Supplied Contraceptives

Where the defective contraceptive is bought across the counter or from a vending machine, or where it is correctly

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(42) Vacwell Engineering v.B.D.H.Chemicals Ltd.(1971) 1 Q.B. 111 Wroth v. Tyler (1973) 1 AllE.R. 847; and to a certain extent per the English Court of Appeal in Harbutt's Plasticine v. Wayne Tank & Pump Co. Ltd.(1970) 1 Q.B.447, 466

(43) The Heron II (1969) 1 AC 350 H.L. see also Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.(1949) 2 K.B. 528 CA

(44) Ibid note 6 para 5.2 page 7 c.f.also Obstetrical and Gynaecological Survey Vol. 39 Nov. 1974 980

prescribed but defective in supply,[45] the situation can be described as a sale of goods. Typifying this kind of transaction is the absence of any written contract of sale. It is submitted that an action in contract may be brought under the Sale of Goods Act 1908 and under the head of "producer liability" in tort.

Section 16 of the Sale of Goods Act provides for "implied conditions as to quality or fitness" where the goods are bought either by description or the purpose for which they are required is made known to the vendor. It is suggested that either or both these requirements would be met in the present situation either expressly or by implication.

Moreover by virtue of Section 55 special damages may be recovered so that:

> "*** if a buyer suffers personal injury through use of defective goods he can claim damages from the seller under the implied terms of the Sale of Goods Act despite the fact that the seller has not been guilty of any negligence."[46]

It is submitted that the phrase 'personal injury' can and should be extended to the economic and other losses attendant upon the birth of an unwanted child. Thus it would appear that in the sale of goods situation an action in contract might have the advantage of strict contractual liability without any express limitation of the range of damages. Nevertheless as indicated above a warranty of absolute protection cannot by statistical necessity be reasonably implied. The standard must be that of a reasonably safe contraceptive. A plea in contract

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(45) Ibid note 16 of Troppi v.Scarf where the chemist negligently supplied tranquiliser instead of the pill.
(46) Atiyah; Sale of Goods 1973 Edn. 107

might still however allow of an advantage in that all that need be shown is that the contraceptive used was not reasonably safe whilst negligence must still be proved in tort.(47) It is submitted that this distinction no longer has any real importance and it should be remembered that it is in the purchase of physical protectives and the like, across the counter that the doctrine of privity is likely to make its largest inroads.

In America, manufacturer's liability is generally strict in the field of food and drugs and products dangerous to the consumer.(48) In our jurisdiction the maxim of "Res ipsa loquitur" which has applied in this area of the law since 1936(49) has now been developed far enough to allow the Australian High Court to say that:

> "*** the care necessary approximates and almost becomes strict liability."(50)

It is suggested that because of the high degree of reliance placed on the safety of contraceptives and the catastrophic results of their failure they could be regarded as being equivalent to "inherently dangerous chattels" and if this is the case the standard required of the manufacturer would be such as to:

> " require practically a guarantee of safety."(51)

It is submitted that there is no real advantage to be gained in suing in contract alone especially in terms of privity and the range of damages. There may however still be room for a stricter contractual standard and it would appear to be wise to bring a joint action.(52)

(47) Daniels v.White & Sons (1938) 4 All E.R. 288
(48) The Food Drug and Cosmetic Act 21 U.S.C.A. s.301 et seq.and s.402A Rest.2nd.
(49) Grant v.Australian Knitting Mills (1936) A.C.85 101 see also Mason v.Williams & Williams Ltd.(1955)1 All E.R.808,910
(50) Shandloff v.City Dairy (1936) 4 D.L.R. 712,719
(51) Holinaty v.Hawkins (1965) 52 D.L.R. 2d. 289
(52) e.g. Parker v. Oloxo Ltd. (1937) 2 All E.R. 524

The real problem with unsuccessful physical contraceptives is proof. Because there is unavoidable failure rate the plaintiff will need to rebutt the obvious preseumption that the pregnancy was within the failure tolerance of the contraceptive used. The plaintiff will therefore be required to adduce affirmative proof or to proceed on an admission. Such proof will of course be very difficult since not only will it be necessary to show that the contraceptive was in fact used and used properly but also that the particular contraceptive used was defective.

Thus, because of the problem of proof it seems very unlikely that there could be recovery where condams or diaphagrams or spermicidal foams are used. The same problem would also seem to extend to the contraceptive pill although if it could be shown that the wrong drug was supplied (53) it is submitted that the presumption of tolerable failure is extinguished by a counter presumption that the medication supplied is totally inadequate for the use for which it was required. Similarly where an inter-uterive device is used which is defective in manufacture it is suggested that the defective manufacture also raises a counter-presumption extinguishing the presumption of tolerable failure. Since an I.U.D. must be inserted by an expert third party the initial difficulty of proof may be avoided. Although it should be noted that both the contraceptive pill and the I.U.D. form something of a grey area where producer's liability and professional negligence might intersect since it would clearly be a defence for the manufacturer to show that the fault was that of the doctor involved.

(53) As it was in Troppi v.Scarf c.f. note 45

Recovery for failure of surgical contraceptive precautions

Where the contraceptive method is obtained by securing professional services which are defective a contractual analysis would appear to be of little assistance. Apart from the very unlikely possibility that the surgeon might expressly warrant his services at very most the standard required could be that in the recent English Court of Appeal decision in Greaves v. Baynham Meikle.(54) In that case it was held that the contractual standard for the professional service provided that it

> "*** should be reasonably fit for the purpose for which it was required."(55)

The case concerned the negligence of an engineering firm which contracted to design a warehouse. The entire Court was at pains to emphasise that the standard required of a professional man is the same in contract as it is in tort so that

> "The law does not usually imply a warranty that he will achieve the desired result but only a term that he will use reasonable care and skill. The surgeon does not warrant that he will cure the patient." (56)

Thus the universally relevant standard is that of tort. It is submitted, however, that by using the maxim of "Res ipsa Loquitur' the plaintiff is entitled to say by analogy;

> "I want into hospital to be cured of two stiff fingers. I have come out with four stiff fingers and my hand is useless. That should not have happened if due care had been used. Explain it if you can." (57)

This does not mean that the mere fact of an unwanted pregnancy could raise the maxim since statistical evidence points to an unavoidable failure rate. It is however suggested that

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(54) (1975) 3 All ER 99
(55) Ibid at 102
(56) Ibid at 103 per Denning M.R.
(57) Per the then Denning L.J. in Cassidy v.M.O.H. (1951) 2 KB 343, 365

an obvious irregularity in treatment such as an incompletely or unsevered fallopian tube should raise a presumption of negligence.

The physician could rebutt the presumption by showing:

(1) That the supposed irregularity is in fact the result of causes beyond the physician's control such as natural regrowth of the severed tubes.

(2) That he conformed to existing medical standards in that proof of subsequent developments showing the practice adopted to be below the required standard of care is irrelevant.(58)

(3) That the error on the part of the physician was "an acceptable error of judgment" and not sufficiently gross to be classified as negligent.(59)

(4) That he conformed to the standard that would have been adopted by the majority of his profession.(60)

Whilst the first two defences are acceptable limitations to the plaintiff's right of action real difficulties can arise with the latter two. Where acceptable error is pleaded it could be argued that as defence it has wide application since confusion can easily occur especially in female sterilisation operations where the fallopian tubes are surrounded by a number of similar structures. It is however difficult to see how any error on the part of the physician can be regarded as reasonable where the implications of failure are obvious and the damages so catastrophic. It can only be hoped that the Courts will regard a surical error as somewhat more serious than the error of a lawyer.(61)

(58) Roe v.M.O.H.(1954) 2 Q.B. 66
(59) Rondel v.Worsley (1969) 1 A.C. 191 (H.L.)
(60) Smith v.Auckland Hospital Board (1965) N.Z.L.R.191,211 (C.A.)
(61) c.f. note 56

It may be that the above difficulty can be avoided by regarding the doctor's mistake as a battery. It has been held in New Zealand that a battery may be committed either by intention or negligence.(62) However more recently the English Court of Appeal has held that a negligent battery must be judged in the same way as any other negligent act.(63) Such a limitation need not affect the plaintiff where, for example, the wrong fallopian tube is cut since although under a misapprehension as to which tube he was cutting the surgeon did in fact intend to cut the severed tube, and the plaintiff's consent only went to the correct tube.

However the same problem arises as it did for "medical misadventure" under the Accident Compensation Act in that it is not the positive act of intentional severance that caused the pregnancy but the omission of not cutting the correct tube. Moreover damages in battery are limited to immediate injury and may not apply to consequential economic loss. Thus it seems unlikely that an analysis along the lines of battery is likely to be of any assistance.

The fourth defence forms the conceptual background to "acceptable error" and is in fact the cornerstone of the physician's possible defence, whereby it must be shown:-

> "*** that the course of action the doctor adopted is one which no professional man of ordinary skill would have taken if he had been acting with ordinary care.(64)

Negligence cannot be established by the expert testimony of one of the defendant's colleagues who might have personally adopted a higher standard.(65) The test is conceptual

(62) Beals v. Hayward (1960) NZ.L.R. 131 (S.C)
(63) Letang v. Cooper (1965) 1 Q.B. 232
(64) Ibid note 57 at 211
(65) McLaren Maycroft & Co. v. Fletcher Development (1973) N.Z.L.R.100 (C.A.)

rather than pragmatic and just what is "reasonable practice" would appear to be determined by the Courts by inference. Thus the physician is insulated by the Courts in that he is to a certain extent judged on his own terms.

Whilst there is some justification for attacking the "reasonable practice" rule at its conceptual base it may be that it will not be necessary to go that far for our purposes cince the most potent threat to recovery is the dependant defence of "reasonable error." It is submitted that "reasonable error" must be given a very limited application in this area of the law to where a surgeon is labouring under some hardship preventing him from exercising the standard of judgment that would normally be expected of him. It is further submitted that there is no room for such a wide defence in a kind of medical treatment where a very high standard of care can and should be expected. To allow such a defence would not encourage such a standard of care.

Even were the defence to apply since it derives from the "reasonable practice" rule it would appear that in order to displace the presumption of negligence the surgeon must affirmatively prove that he did everything that could have been expected of him. Thus the difficulties of proof in this type of action would appear to be as much of a two-edged sword as the benefit rule.

CONCLUSION.

Any recovery for the economic loss caused by the birth of an unwanted child is clearly beset by major difficulties, foremost among which is the benefit rule. It is submitted, however, that because avoidance of the benefit of birth can no longer be regarded as contrary to public policy and because of

the Court's implied recognition that childbirth does involve economic outlay, recovery is no longer fundamentally prevented.

There is also the complication of the Accident Compensation Act whose machinery is inadequate to cope with the kind of loss for which recovery is sought but whose all-embracing effect threatens to extinguish any real hope of substantial damages. Policy must surely militate against its application.

The major hope for recovery must rest in the common law, but even the machinery of the Courts is somewhat stretched by the kind of recovery sought. It is clear that if there is recovery it must be primarily against the flexible background of the neighbour principle in tort.

Finally there is the difficulty of proof which as a potent practical complication may well forestall any consideration of the legal issu3s at stake in otherwise deserving cases.

The real justification for allowing recovery must rest in public policy from which the benefit rule is itself derived. To ignore the loss complained of would give rise to something of a paradox with the use of contraception on the one hand being encouraged while on the other hand a refusal to recognise, and provide compensation for, the very eventualities which the use of contraception served to prevent. In a world threatened by over-population it is more than ever necessary to recognise the importance of a uniform population policy. We cannot close our eyes to the ills contraception is used to cure.

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