



THE UNWANTED BABY: A COMMENT ON *HARYANA V. SANTRA*

AT A time when the concern for the country's volcanic demographic situation is on the top of the national agenda and all resources are being mobilised to arrest population growth, the Supreme Court judgement in *Haryana v. Santra*¹ assumes special significance. A mother of seven, a labourer under considerable financial burden underwent a sterilisation operation under the sterilisation scheme launched by the Haryana government as one of the programmes for family planning. Despite the operation, a female child was born. The mother filed a suit for recovery of Rs. 2 lakhs as damages for medical negligence. The court came to a finding that it was a clear case of medical negligence by a doctor of a government hospital where the woman had gone for sterilisation. The doctor, after having operated only on one fallopian tube gave her a certificate of complete and successful sterilisation with no chance of pregnancy thereafter.

According to the trial court, "the medical officer who conducted the operation threw the care and caution to the winds and focussed attention to perform as many operations as possible to build record and earn publicity."² The appeal to the high court was summarily dismissed, hence the case came up to the Supreme Court. The court went into details on the issue of tortious liability for medical negligence leading to wrongful birth. All through the judgement, the court's great concern for the alarming population growth "where the population is increasing by the tick of every second on the clock," is evident. The government has formulated various family planning programmes and policies and adopted schemes to arrest population growth. It is pursuant to these goals that various states have launched schemes motivating people to adopt family planning measures. According to the court, the medical officers entrusted with the implementation of the family planning programme cannot, by their negligent acts in performing complete sterilisation operation, sabotage the scheme of national importance. The court remarked³ :

The people of the country who co-operate by offering themselves voluntarily for sterilisation reasonably expect that after undergoing

1. 2000 (3) SCALE 417.

2. *Id.* at 421.

3. *Id.* at 424.



the operation they would be able to avoid further pregnancy and consequent birth of additional child.

After going into the aspect of moral and statutory obligations of the parents to maintain their minor children, contained in the provision under section 125 of the Code of Criminal Procedure, 1973, and section 20 of the Hindu Adoptions and Maintenance Act 1956, the court assessed the amount of damages for the unwanted child at Rs. 54,000 payable by the state government on account of negligence by the doctor. This covered the expenses at the rate of Rs. 3,000 per annum, which the claimant would have to incur in bringing up the child till she attains puberty. (Though the statutory liability extends till the age of majority which is 18).

This judgement being the first one delivered by the highest court needs to be viewed from various perspectives, specially public policy and demographic needs of the country. Should the birth of a normal healthy child, albeit unwanted - be a subject matter of court litigation for grant of damages? If so, under what heads should the damages be awarded. Several cases have been known in the West where the courts seemed to be "lost in the quagmire of ideological and moral issues". Some courts refused to allow such claims on ground of public policy, while in many others the claim was offset against the benefits derived from having a child and the pleasure in rearing up that child. In many others, where sterilisation was undergone on account of social and economic reasons, particularly in a situation where the claimant already had several children, the court allowed the claim for rearing up the child. To take some examples in *Shaheen v. Knight*,⁴ where a wife gave birth to a fifth child despite husband's vasectomy, a claim "for the additional expenses of supporting, education and maintaining the said child until maturity" was denied on grounds of public policy. However in *Benarr v. Kettering Health Authority*,⁵ the court went to the extent of awarding damages even to cover the private education of the child. In *Allen v. Bloomsbury Health Authority*,⁶ damages were awarded in a case involving negligence in termination of pregnancy. This covered general damages for pain and discomfort associated with the pregnancy and birth as also damages for economic loss being the financial expenses for the unwanted child in order to feed, clothe, care and educate the child till the age of majority. In *Allan v. Greater Glasgow Health Board*,⁷ a case from Scotland, public

4. 6 Lycomin Rptr, 19, 22, 11 pa.d & C.2d 41, 45 (1957) as referred to in Bryan Murphy & Leo C. Downing in "Ligation Litigation" 25 *Jfam L* 729-42 1986-87 at f.n. 27.

5. (1988) 138 NLJ 179.

6. (1993) 1 All E R 651.

7. 1998 SLT 580.



policy considerations were rejected and cost of rearing the child was also awarded.

The effect of such claims on a child's psychology was considered in a case from Canada in *Doiron v. Orr*.⁸ The Judge stated that he would have been prepared to award damages for mental anguish caused to the plaintiff but refused to accept that in such a case there could be liability for the cost of bringing up an unwanted child. The court remarked⁹:

I find this approach to a matter of this kind which deals with human life, the happiness of the child, the effect upon its thinking, upon its mind when it realised that there has been a case of this kind, that it is an unwanted mistake and that it's rearing is being paid for by someone other than its parents, is just grotesque.

In a recent case from South Africa,¹⁰ damages were awarded for the cost of maintaining the child where the woman had undergone sterilisation operation because of financial conditions. The courts in New Zealand and Australia in *L v. M*¹¹ and *CES v. Superclinics Australia Pty. Ltd.*¹² respectively, refused to award expenses involved in rearing the child.

Thus we see that there is no unanimity amongst the courts in the matter, and naturally so, for the social, cultural and economic conditions of each country vary. The Supreme Court very aptly pointed this out in the *Santra* case¹³:

Ours is a developing country where majority of the people live below the poverty line. On account of the ever increasing population, the country is almost at the saturation point so far as resources are concerned.... Damages for the birth of an unwanted child may not be of any value for those who are already living in affluent conditions but those who live below the poverty line or who belong to the labour class who earn their livelihood on daily basis...cannot be denied the claim for damages on account of medical negligence.

In India, prior to this case there have been sporadic instances where claims have been filed. For instance, in 1983, a woman who despite an abortion operation at a local municipal corporation hospital in Ahmedabad delivered a child, filed a suit for damages and was awarded Rs. 22,100.

8. 86 DLR 719.

9. *Id.* at 722-23.

10. *Administrator, Natal v. Edward* (1990) 3 SA 581.

11. (1979) 2 NZLR 519.

12. (1995) 38 NSWLR 47.

13. *Supra* note 1 at 427.



A few years later, in Baroda, a woman delivered a child despite tubectomy and filed a compensation suit against the Gujarat Health Minister and the doctor. In 1995, a woman who already had 3 sons gave birth to another male child in a village in Patiala (Punjab) despite a tubectomy performed in a government hospital. Her case was taken up with the health department. The outcome, however, is not known. More recently, in 1997, in *State of M.P. v. Asharam*,¹⁴ the high court allowed damages for medical negligence in the performance of a family planning operation on account of which a daughter was born after 15 months of the operation.

It cannot be denied that the issues arising out of such cases are complex and the ramification of an unwanted pregnancy/child birth vary depending on the health of the child and financial position and burden on the parents. Unsuccessful vasectomy operations can have disastrous effect on the marital relations as well, for obvious reasons — it can create suspicion in the mind of the husband about the wife's fidelity. Gender of the child is significant too. In our society where there is a bias against a girl child, the birth of an unwanted female child could be an added inducement for such claims. (The unwanted child in this case was a female and this fact has been indicated, though, may be inadvertently over half a dozen times in the judgement. One wonders whether it would have made any difference if it had been a male child). Policy and ethical considerations in paying damages for birth of a child cannot be overlooked either. The emotional effect on the parent child relationship could be grave. Equally grave is the national need to address the catastrophic population issue. Each case, however, has to be viewed against its peculiar facts, and the balance needs to be maintained between practical difficulties of the parents, the impact on the child's psychology and the national needs.

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14. 1997 *Accident Claim Journal* 1224.

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