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Wrongful Birth and Wrongful Life.
Floodgate argument and the balancing of contrasting rights in courts law making.

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The Italian Corte di Cassazione, Sezioni Unite, n. 25767/2015 (SS.UU.), in a recent case has decided on the wideness (strictness) of the legal capacity of the conceived but not yet born child in a hypothesis of missed diagnosis of a genetic disease.

The case: In particular, the decision, here analyzed, affects the configurability of damages for the born child because of the impossibility for the mother to exercise the right to abortion, as the diagnosis was missing and she was not aware of the hard risk for her physical and psychological health coming from the birth of a child affected by "down syndrome". The parents sued the hospital, the doctor and all the staff for damages, because they didn't prescribe any blood and chemical exams to the pregnant woman, something that should normally be done at the 16th week of pregnancy, in order to exclude some genetic diseases. The pleading was centered on the damages affected by parents for the **wrongful birth** and by the daughter for the **wrongful life** of the born brother.

Wrongful birth: the personal damages suffered by pregnant women, who have not had the possibility of self-determining in the prosecution of the pregnancy in case of pathological processes suffered by the fetus; in particular, in those cases when a disease exposes herself and her health to a severe risk (a pre-condition for abortion, according to the Italian L. 194/1978), caused by the doctor's breach of contract and, in particular, because of the latter not informing the patient of the illness suffered by the fetus.

Wrongful life: the damages suffered directly by the conceived but not yet born fetus, because of the missed abortion; this category of damages has been invoked often by parents in case of fetus malformations o genetic diseases, when it is not possible to ascertain the doctor's responsibility for the child's health damages, since the disease preexisted to medical treatment and intervention. The wrongdoing concerns only the lack of diagnosis and of subsequent information, as the woman consequently could not exert her right to choose abortion and the child was born, while she/he shouldn't have.
After years of contrasting decisions SS.UU., has stated that there is no place for a "right to birth only if healthy" in the Italian legal system.

In analyzing such decision, I will focus especially on:

I. burden of proof;

II. potential plaintiffs of such kind of action (parents, brother and sisters of the child and the child her/himself);

III. comparative insights on how legislation, judges and scholars in other legal systems (Great Britain and France) have managed with the floodgate argument, the rights of both the woman and the "unborn" child.

I. BURDEN OF PROOF

On this point, before this new decision, there were 2 contrasting judicial solutions (* and **). They diverge in how the plaintiff (woman) should prove the:

a) CAUSAL LINK between the doctor's breach of contract (more accurate assessment and duty of information) and the woman's choice in order to interrupt or continue the pregnancy;

b) EXISTENCE OF LEGAL CONDITION TO INTERRUPT THE PREGNANCY after the period of 90 days from conception.

** HARDER PROOF FOR PLAINTIFF: such solution refuses the general presumption mechanism and the idea of deducting an uncertain fact (the choice to interrupt the pregnancy) from a certain one (the request for biogenetic exams) and asks for a more specific proof of the indisputable evidence of the intention to abort in case of fetus malformation, for example the explicit and previous declaration of such intention (witnesses). The mere request for biogenetic exams and pre-birth diagnosis is a single and simple presumptio hominis (presumption of fact), which alone is insufficient to prove an interior and hypothetic will. It's the woman's duty to add further elements of fact in order to satisfy her burden of proof, as *"what has concretely happened after can be evaluated as simple clue, to confirm other elements, but not as a plain proof and unique one"*.

* EASY PROOF FOR PLAINTIFF: *"it is reasonable, as well as entirely likely, that the woman would have stopped the pregnancy if adequately informed of the fetus disease"* (Cass. N. 6735/2002-Cass. N. 1444889/2004; Cass. N. 13/2010; Cass. N.15386/2011). This position is based on a general presumption under which it is sufficient that the woman demonstrates that she had asked for genetic exams in the pre-birth phase in order to deduct that she would have interrupted the pregnancy if adequately informed of the genetic disease suffered by the child, as it is implicit that these circumstances imply *"the hard risk for the woman's psychological health"*, prescribed under L. 194/1978 (Cass. N. 22837/2010).

Both positions agreed that

once the abortive will is proved, in presence of adequate information on fetus malformation, the legal requisite for the pregnancy interruption occurs, as the knowledge and consciousness of the malformation would have created for sure the risk of a severe damage to the psychological health of the woman (critics by E. PALMERINI, *Nascite indesiderate e responsabilità civile: il ripensamento della Cassazione*, in *NGCC*, 2013, I, 200).

SS.UU. the pregnant plaintiff must prove:

i. The existence of legal pre-requisites for the abortion.

ii. The will to abort.

In these directions further and specific themes of proof are: a) the relevant disease/malformation of the child; b) the omission of due information by the doctor; c) the severe risk for her physical-psychological health; d) the abortive choice.

iii. The damages arisen from the impossibility to exert the right to abortion, as the idea of damage in re ipsa isn't admissible *"because it is necessary that the situation of severe risk for the physical or psychological health of the woman, as art. 6 lett. B) L. 194/1978 has changed from a potential risk into a concrete damage or loss, eventually verifiable through a court appointed expert"*.

i. On the existence of legal pre-requisites for abortion and ii. the will to abort.

The disagreement in previous decisions - about means of proofs on the real and actual will to interrupt the pregnancy, whereas adequately informed about the malformation and whereas the fetus disease is suitable to determine a severe risk for woman health – is solved by SS.UU. stating that the simple proof of the fetus anomaly is a presumptive evidence and it is consequently insufficient to demonstrate the abortive will.

SOME SCOLARS

agree with SS.UU., because this solution avoids the mistake *"to identify the severe danger for woman psychological and physical health with the mere will to abort"* (for all see, C. Castronovo, *Eclissi del diritto civile*, Milano, 2015, 93). The logic inference here criticized would be too generic and abstract and could be qualified as a presumptio juris tantum (inconclusive o rebuttable presumption). This is why the SS.UU. asks for a more rigorous proof of the concrete and specific will to abort, without giving up to the instrument of presumptio hominis (presumption of fact) and, at the same time, taking into consideration that the intention to interrupt the pregnancy has the nature of an intellective fact, of an internal will, which is not suitable to be object of direct experience, so that its proof can be only indirect. In this field, in the absence of a presumptio iuris et de iure (irrebuttable or conclusive presumption), the help of presumptions of fact is unavoidable, so that from a known and definite fact we can infer an uncertain and possible event.

The SS.UU.

suggests some presumptive evidence of the abortive will, such as: "*the request for a medical consultancy to ascertain the health condition of the fetus, the precarious psychophysical conditions of the woman, which could be verified by a court appointed expert, previous manifestation of such will and intention, which could be proved though witnesses…*".

iii. On the damages:

SS.UU.'s decision puts limits on damages coming from the preclusion at the possibility to exert the abortive choice. The containment of damages for the violation of the health of the woman maybe is too much restrictive, as art. 6 of L. 194/1978 allows the interruption of the pregnancy in presence of a severe risk and not of a concrete and already actual damage. So, if the choice to interrupt the pregnancy after the first 90 days is allowed in case of a concrete risk, it is possible that it should be taken in presence of a severe danger for the psychophysical integrity or the life of the woman, even if the latter is not necessarily destined to become an effective ad actual prejudice.
Actually, the woman's position results injured by the loss of the choice *"in presence of a severe danger for her life or health"*. So the *"endangerment"* is sufficient, the statute doesn't ask for an actual, concrete, certain prejudice.
The woman doesn't have a right to abort, but to choose and in the case she had been deprived of such choice by the diagnostic and informative breach of contract, which occur not as a pure material and economic loss, but as a personal injury, which coincides with the deprivation of the utility that would have come out from the choice (in presence of the legal requisites).

II. POTENTIAL PLAINTIFFS

SS.UU.: - the mother has the right to sue for damages, because she has been deprived of the right to self-determination in the abortive choice and also her health has been injured, as she is part of the agreement stipulated with the hospital and the doctor;
- the father, brothers and sisters of the child born with malformation, even if they are not part of that agreement, are indirectly damaged by the breach of contract, as they are going to suffer for the disruptions of family dynamics and financial hardship associated with caring for the crippled child.
- the crippled child has been the center of a deep interpretative disagreement:

1) STRICT: The right for compensation of the fetus is limited to injuries of psycho-physical integrity caused by diagnostic or therapeutic mistakes of the hospital and of the doctors.
The legal system doesn't provide for *"a right to no-birth if not healthy"* in the case of genetic malformation not discovered in the diagnostic steps and not communicated to the pregnant mother (but not caused by the doctor), in order to allow her the choice to continue or interrupt the pregnancy. Such right would become a right that the born child could exert also against the mother who had decided to continue the pregnancy (Cass. N. 14488/2004; Cass. N. 16123/2006; Cass. N. 10741/2009) and a right with no holder in any case (birth or no-birth).

2) WIDER: postponing the onset of the damage on the malformed child after birth, this guideline does not see the damage on the born child as the injury to *"the right not to be born if not healthy"* (or to born only if healthy), but as the harm coming from being born unhealthy, as it is *"undeniable that the exercise of the right to compensation by the minor child is not in any way attributable to an impersonal "not to be born"*.
The compensation, instead, is attributable to the single, unique human history linked to that specific individual who, by suing for damages, is asking the court for the plain respect of the constitutional protection, in order to be enabled to live less uncomfortably, aspiring to a less incomplete realization of his rights, both as an individual and as a social part (art. 2 Cost) (Cass. N. 16754/2012). For the same position in scholarly writings, see P. G. Monateri, *"La marque de Cain" la vita indesiderata, e le reazioni del comparatista al distillate dell'alambicco, in Un bambino non voluto è un danno risarcibile?*, in A. D'angelo (ed.), Milan, 1999, 295, who talks about a new hypothesis of *"danno esistenziale"*.

SS.UU.

On this point the legal reasoning starts from the issue "natural capacity to have rights and exert them" of the conceived and not already born child, which art. 1 cod. civ. expressly connects to the birth. A direct and original relationship between the hurting and the injured party is not necessary, as the hurting event can occur before the damage materializes. But the damage and the right to compensation become, respectively, relevant before the law (the first) and exercisable (the right) only after the birth.
From that moment (birth) when the conceived becomes a person, any deviation from the archetype *"healthy human being"*, which can be consequence of a fact attributable to any other agent, represents an injury to the person and, because of this, object of compensation. (C. Castronovo, *Eclissi del diritto civile*, cit., 90).
Generally speaking, the responsibility does not exclude that the harm can precede the event, but there must be a valid causal nexus between the event (lamented as damage) and the first.

"It does not pose any problem relating to the natural (personal) capacity of the conceived but not already birth child, as it is not necessary in order to recognize the right to sue for compensation".
"It is possible to be addressee of legal protection, without being entitled with natural/personal capacity".
Not subject but object of legal protection!

So, coming out from the cul-de-sac of the legal (natural) capacity of the conceived but not already born child (not a crucial issue according to P.G. Monateri, *Il danno al nascituro e la lesione della maternità cosciente e responsabile,* in *Corr. Giur.*, 2013, 60), SS.UU.:

- clarifies that damage means loss of utility;
- refuses the idea of presumptive damage or damage *in re ipsa*;
- concludes that in the specific case the genetic disease cannot be considered a damage, even in the case of a missed diagnosis, which has excluded the possibility for the woman to choose for the interruption of the pregnancy. In such situation there is not a deterioration of the condition of the born due to the doctor's conduct (even if negligent).

The correct diagnosis wouldn't have led to the elimination or attenuation of disease, but to the inexistence of the conceived. The damage would coincide with life and the absence of damage with death. The Italian legal system cannot admit to equalize the two situations: life, even if crippled, and death. So the damage, even if it exists, cannot be considered *contra ius*.

PERSONAL INSIGHTS

The issue is at the centre of a huge and controversial debate, influenced by ethical, religious or lay insights. But it's important to remember that the genetic malformation is a fatality rather than a damage. It cannot be considered neither as a damage to health (as some scholars think, for all see G. Cricenti, *Meglio non essere mai nati? Il diritto a non nascere rivisitato*, in *RCDP*, 2013, 333) nor as a limitation of life conditions (danno esistenziale) due to any other human agent (suggested by Cass. N. 16754/2012).

This reconstruction hides the attempt to recognize forms of legal protection (of economic nature) from a tragedy, but destiny is part of human life and it escapes human control. Scholars and judges don't have to lose the dimension and the limits of their role.

The answer that contemporary State has given to such kind of difficulties is the provision of social services, social assistances and welfare policies in general. The solution cannot consist in reverting the economic weight of the malformation and of the consequent limited life on the doctor, who is not responsible of the illness only because his intervention would have contributed to a different course of events, which, in any case, would never be a less limited life for the born child.

Moreover, by accepting the position which considers the birth with genetic malformation a damage, we incur in another contentious issue: can the parents, who sue as legal representatives of the child when they ask for compensation for a wrongful (not desired) life, replace their child in assessing if the birth (and life) can be considered as a loss suffered? (R. Caterina, *Le persone fisiche*, Torino, 2012, 11).

III. COMPARATIVE INSIGHTS ON THE FLOODGATE ARGUMENT

Allowing a claimant to recover in some peculiar situations might open the metaphorical "floodgates" to large numbers of claims and lawsuits or to abnormal and distortive results. The principle is most frequently cited in common law jurisdictions, and in English tort law in particular.
A floodgate effect is a situation in which a small action can result in a far greater effect with no easily discernible limits: a floodgate, which once opened, no matter how minutely, will allow water to flow from either side through the gate until both sides are balanced up. It may also be used to refer to the effect where, once a floodgate has been opened, water will gush out in a torrent through the gate, making it easier to continue to open the gate, but harder to close it.

UK

In common law legal systems, the term is used to illustrate a situation where a precedent will set the stage for repeated performances, the number of which is hard to control. It is expressed to be a constraint upon which a defendant will owe a duty of care; or a limitation upon the remoteness of damage for which a defendant should be held responsible for.
In English law the first recorded reference to the floodgates principle was in 1888 in *Victorian Railway Commissioners v Coultas*. That case involved a pregnant woman (the claimant) whose husband had driven onto train tracks at a level crossing, and due to the negligence of the gate keeper, the couple was nearly struck by a high speed train. The plaintiff, Mrs Coultas, suffered from a severe shock, leading to impaired memory and eyesight, and the loss of her unborn child. Nonetheless, the Privy Council held that she had no sustainable claim for damages, holding that:

> *" Damages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot under such circumstances, their Lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper. (…) Damages must be the natural and reasonable result of the defendant's act; such a consequence as in the ordinary course of things would flow from that act".*

In *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd [1973] 1 QB 27* Lord Denning MR recognised this explicitly:

> *"At bottom I think the question of recovering economic loss is one of policy. Whenever the courts draw a line to mark out the bounds of duty, they do it as matter of policy so as to limit the responsibility of the defendant. Whenever the courts set bounds to the damages recoverable - saying that they are, or are not, too remote - they do it as matter of policy so as to limit the liability of the defendant. In many of the cases where economic loss has been held not to be recoverable, it has been put on the ground that the defendant was under no duty to the plaintiff. ... In other cases, however, the defendant seems clearly to have been under a duty to the plaintiff, but the economic loss has not been recovered because it is too remote."*

Concerning the issues of proof, damages and potential plaintiffs (not the fetus after birth), the SS.UU. have followed the rationale of the floodgate argument to restrict or limit the right to make claims for damages. The Italian legal system seems oriented to safeguard life and doesn't protect both the parents and child's will to refuse a "minor generis" life in comparison with the one not afflicted by the disease.

WRONGFUL LIFE ⇐⇒ FLOODGATE ARGUMENT ⇐⇒ ABNORMAL RESULT

ABNORMAL RESULT: deciding for the liability of the doctor in cases of missed diagnosis of a genetic disease would imply the logic consequence that the child, once born, could sue for damages the mother, who, in presence of the requisites prescribed by art. 6 L. 194/1978, had decided to carry the pregnancy to term.

FRANCE

According to the majority of courts and scholars, procreation is conceived not only as a biological fact, but as a human event affected by the choices of those involved. This way, such event can be a source of responsibility, as the causal link is qualified as legal (legal) and can be found between the negligent missed diagnosis integrity imposed by the malformation. The malformed born baby and the limited physical is, at the same time, an individual and legal entity, as the *Cour de Cassation, Assemblée pléniére*, 17 November 2000, has stated in the famous *Perruche case*. The first (individual) is condemned to handicap by nature, but the second (legal entity) is victim of the wrongful birth, causally linked also to the missed diagnosis by the doctor.

SS.UU.

Differently from the French model, the floodgate effect in the Italian SSUU legal reasoning is represented through the argument that if, in the presence of health risks, the birth depends on a free choice of the pregnant woman, this act of freedom takes an absorbent value from the causal nexus point of view, as long as it involves a choice taken without coercion. In fact, the outcome of a free choice can never be considered obvious and sure. Consequently, also this event (the choice) should be considered a causal antecedent, which, even if not sufficient to determine the damage, could have triggered through a different sequence of events leading to a dissimilar final outcome. The correct diagnosis is not in itself capable of preventing the malformation, because this outcome should be the result of the pregnant woman's choice (no malformation in sense of no birth).
The doctor's duty consists in preventing or reducing the development of fetus anomalies, protecting the pregnant woman's life and health, offering her the information and care needed so that she can give birth without physical and psychological damages and in full self-determination on such choice, with consciousness and free will.
The obligation to avoid the onset of genetic diseases is alien to the doctor's duty. Not by chance, SSUU underlines that the L. 194/1978 aims at putting the woman in conditions for a free choice on maternity in the first 90 days of pregnancy; while in the following period it allows only to preserve the life and/or health of the pregnant, in case she is exposed to severe and hard risks, even due to fetus malformation, giving up the new life in fieri in order to preserve the already formed life. This balance of contrasting interests is coherent with the constitutional principle of non-equivalence of protection of the mother, who is an already existing person, and the fetus, which is not already as such (Corte Cost., 18 February 1975, n. 27, in *Foro it.*, 1975, I, 515).

Conclusions

The floodgate argument seems here to enforce also a principle which inspires L.194/1978 and the Constitutional framework in such field, according to which the interruption of pregnancy does not pursue purposes of programming the family ménage, neither birth control objectives or species' breeding goals.
Such legal reasoning is criticised by some scholars (P.G. Monateri, "La Marque de cain", quoted, 295-302; A. Guarneri, *Wrongful life, bébé èréjudice e il discusso diritto a nascere sano…o a non nascere*, in *Resp. civ. Prev.*, 2001, 499 et seq.), who underlined the necessity to give space to damages for wrongful life as a reaction to the doctor's wrongful doing (missed diagnosis).
But, in my opinion, such hermeneutic option goes beyond what the law provides and towards some paradoxes and abnormal outcomes, which I mentioned above.
"It is a question of policy", to use Lord Denning's words, and scholars and judges have a great function in policy making, that has to be exerted with the consciousness of their role's limits and responsibility, avoiding paradoxical outcomes and finding solutions that do not go beyond the law. We have a political responsibility on the direction the legal system can take when we offer a certain interpretative option, instead of another, as our words – published in a review – or the judge ones (contained in a Court decision) will reach and be read by some one else (student, scholars, judges, general public…).

References

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