

THEORETICAL LEGAL ISSUES OF ASSISTED REPRODUCTION AND THE DUTY TO CARE FOR THE UNBORN CHILD

Garanina Inna^{1*}, Izbienova Tatiana², Mustakimov Nail³, Mustakimov Nail³, Soldatov Yakov⁴ & Soldatova Alena⁵

¹As. Prof., PhD, Mari State University, Russia, ilneza@mail.ru

² As.Prof., Mari State University, Russia, nfnf1978@yandex.ru

³As.Prof., Mari State University, Russia, mustakim@bk.ru

⁴As.Prof., University of Management «TISBI», Russia, yacovsoldatov@yandex.ru

⁵As.Prof., University of Management «TISBI», Russia, soldatovaalena@yandex.ru

*Corresponding author

Abstract

This article deals with the issues of the responsibility of parents, health workers, including and to address issues arising in the courts relating to the rights of the unborn baby. The authors analyze the general theoretical issues and international experience of regulating these issues and foreign judgments in cases arising from the non-pecuniary damage to parents and child, whose rights were violated when she/he was in the womb.

Keywords: reproductive rights, assisted reproduction, unborn baby, fetus, non-pecuniary damage, the rights of children.

1. INTRODUCTION

Since the formalization of reproductive rights in the international law and Russian legislation discusses the problem of children's rights, in particular the right to life, the right to be born, the legal status of the embryo.

Currently, assisted reproduction is a concept that is used to describe a wide range of procedures aimed at helping infertile couples conceive and endure a child before the term. Some procedures, for example, donor fertilization, have been routinely used for a long time, while others, such as in vitro fertilization and their variants are relatively recent innovations. The number of children born because of these procedures remains significant compared to children who have not been born (Raywat, 2015).

Development of technologies to help couples to reproduce children is developing dynamically, but there was less time for rational development of the moral and ethical basis for the activities of "suppliers" of assisted reproduction. This problem is particularly important for lawyers who working in the field of reproductive rights.

2. OPINION AND DISCUSSION

Embryologists working in human programs with IVF play a great role in influencing the fate of gametes and embryos. From the point of view of law and medicine, it is possible to manipulate sperm for fertilization, select oocytes (eggs) for transmission, select embryos for transmission to the next IVF, and subsequently determine which embryos can be frozen or discarded.

This activity aroused public opinion and became the subject of numerous legal discussions, some of which support new technologies designed to help infertile couples to have children, but most of them are very controversial. However, despite the long debate about the legal and ethical status of the embryo, there is still uncertainty in deciding on the legal status of the unborn child. This, above all, concerns questions about the right of the unborn child to health and proper care, to which account was expressed quite few points of view, perhaps because of the complexity of the interpretation of this right. And as a result, it becomes almost impossible to find a consensus between law and morality.

Nevertheless, these are real questions that are faced by lawyers. Legal regulation of the activity of assisted reproduction is provided by three main sources, for example, from special state authorities, at the international level, and, for example, health authorities, etc.

With the right of an unborn child, such a concept as "legal status of the embryo" is also associated with life. We note that there is no single point of view on the definition of the legal status of an embryo in the theory of legal science. This issue remains the subject of theoretical discussions. In the scientific community, two points of view on this question can be singled out, one of which ignores the right of the embryo to be called a human being, the other - defends the denied right. Both doctrines give sufficiently strong arguments in their defense, which are based on different philosophical positions. Nevertheless, both doctrines argue that the embryo is a form of highly developed, complex organized being that embodies the insecurity of life (Rinaldi, 2009).

It is important to recognize that the legal norms in the field of protection of human reproductive rights are relevant not only to the implementation of assisted reproductions. Advances in prenatal diagnosis can have important consequences for married couples, given that it is necessary to decide whether to continue or terminate a pregnancy that has appeared because of an assisted reproduction. Genetics of one of the goals has the purpose to recreate a person, which has important consequences for international human rights law and legal theory in general, but it becomes especially important for a less protected person - a embryo inside the mother's womb that may face a selective cessation of life, interruption of life in the womb for medical and other reasons.

In the legislation of some states such concept as "illegal life" (that is, birth because of actions that are either illegal or resulted from negligence, etc.) is singled out (Wendy, 2005). John Stuart Mill, in the 19th century, believed that "... to bring a child into the world, not being sure not only to provide food for his child, but to give him proper upbringing - should be considered a moral crime against the offspring and against society ..." (Romanovskiyi, 2015).

The question of how the society and the state should react to the problems of unwanted pregnancy and those born of "undesirable" children, the birth of a sick child proved to be a legal problem. This issue raises various discussions about the legitimacy of abortion and compliance with moral principles. The courts' reviews in some states of cases of violation of rights in "unlawful birth" turned out to be quite controversial, since it concerns the review of issues of violation of the right to life (Wendy, 2005).

A child who is injured in the womb or in the process of birth is entitled to compensation for damage by a medical worker who caused such harm, whose negligence caused such an illness. However, such reimbursement is possible provided that the negligence is proved, that is, the responsibility for caring for the unborn child, entrusted to health care workers, is not fulfilled, which should be considered as a non-performance, which was the direct cause of the injury (for example, Lynch vs. Lynch & Anor (1991)) (Romanovskiyi, 2015). Actions of this kind should be distinguished from offenses directed against life.

What should be understood as an "unlawful birth"? In the case of Procanik vs. Cillo was considered a lawsuit from parents and their child about the damage, due to the fact that the child was born with numerous diseases, since the mother during her pregnancy contracted rubella (Rinaldi, 2009). According to the court, "unlawfulness of birth" is defined as the birth of a sick child as a result of negligent medical consultations or careless treatment of a doctor, when such consultations or treatment deprived parents of the choice to leave or interrupt pregnancy, which would help to avoid the birth of a sick child. Negligent actions can also include

such actions carried out during childbirth, which led to the birth of a healthy embryo, but a child with multiple injuries.

In the field of regulation of reproductive rights as well as medical law, one of the main duties of medical workers is the duty of care. It's obvious that this duty lies both to married couples who, for example, are being treated for infertility, and for a doctor. But how does the implementation of this responsibility affect the unborn child. At what point does the duty of care for the fetus arise? And is it worth considering abortion as a violation of this duty?

We believe that such issues should be considered resolved, since a child conceived in the process of infertility treatment is implied as the result of treatment. The interpretation of the obligation to care was reflected in the decisions of the courts of some states (for example, the US Supreme Court), which found that "... to establish the existence of a duty of care for the plaintiff (the fetus, the child) who was injured by negligence of defendant (medical worker), it is necessary to prove the exact order of acts in which bodily injuries were inflicted and whether it was possible to foresee them reasonably. If it turns out that the injury was inflicted on the person and could be foreseen, the harm is unequivocally proven". A child born with syphilis, because of the doctor's refusal to screen the mother for the presence of the disease, should be regarded as carelessness of the doctor, resulting in "unlawful birth".

Possible negligence should be compared with the standard of care in general and the evaluation of independent experts. However, this is not always easy. In the field of medicine such as assisted reproduction, which is rapidly changing due to technological progress, it is difficult to determine what is the standard of medical care. (Wendy, 2005)

Analyzing the rights of the unborn child, there are also issues about how to determine the amount of harm caused to the unborn child. In the case of "unlawful birth", the legal consequences of the birth of a sick child will not only be the health of the child, but also the financial burden of parents to bring up such a child. Thus, in one of cases where the plaintiff's husband was sterilized after they had already had five children. After three years after sterilization, the plaintiff gave birth to a healthy sixth child who had not planned, because she was sure that she could not have children from her husband. She appealed to the court, where it was decided that the defendant (husband) did not warn the plaintiff about the insignificant risk of pregnancy, thereby putting her at risk of becoming pregnant without using contraception during sexual intercourse. The woman, having five children, did not plan the expenses for the upbringing of the sixth child, as well as expenses arising during pregnancy. The court awarded her compensation about the birth of the sixth child and the duty to her husband to compensate for the cost of raising a child. (Garanina, 2016)

In the Supreme Court of Georgia, the losses incurred in the birth of a child with Down syndrome were not recognized as damage, because "society recognizes the importance of human life which makes it difficult to support the idea that parents can suffer from the birth of any child". (Garanina, 2016)

Claimants may argue that negligence has deprived them of the opportunity to abort. Thus, before the Supreme Court of New Jersey, before the decision was taken in the case, the Court dismissed the claim for recognition of the "unlawful birth" because it was contrary to the public order that provides compensation for the loss of the opportunity to terminate the pregnancy, as a result of the fetus Suffered during the period of intrauterine development.

It becomes increasingly complicated to determine the harm. Birth, even in a weakened state, is legally recognized as beginning of life. And the question arises how to prove that the harm is caused to the child in the womb before birth. In other words, if the damage caused by carelessness by a medical worker occurred before the birth of the child, is this a trauma to life? Most foreign courts have already said their unambiguous "no", but this, we believe, contradicts the position that the parents of such a child can be awarded damages.

In the case "Terpin v. Sortini", the defendant, a specialist in the field of hearing treatment, assured the parents that the first child has a normal hearing and further hearing loss is not an inherent defect. Based on these recommendations, the couple conceived a second child who was born with an inborn hearing disorder. Parents intended to compensate for the general losses for "depriving the child of the basic right to be born healthy without total deafness" and additional damage compensating for the cost of training and education of such a child in a specialized institution for hearing impaired and deaf children. (Garanina, 2016)

The first recognized fact of the so-called "unlawful birth" was recognized in the case of Sepeda against Sepeda, where a physically normal but illegitimate child filed a lawsuit against his father, claiming that his mother, having been under the influence of fraudulent acts, entered into sexual relations with the defendant,

and became pregnant. I gave birth to him, not wishing that. After giving birth, she transferred him to a new family. (Lancaster, 1993)

In the case of *Glaytman v. Cosgrove*, a lawsuit was filed on behalf of a child who suffered from visual, speech and hearing impairment, because of the mother's having rubella during pregnancy and not being warned about the possible consequences of the disease. The mother of the child was sure that the fetus would not suffer in any way, as the doctor assured her. The court ruled that the child did not suffer any injuries recognized by law at the time of birth, since life with defects is more valuable than non-existence. (Raywat, 2015)

A child born to a mother who has had rubella during pregnancy has no reason to file a lawsuit against doctors who, through carelessness, did not warn the mother about the risk to her child during pregnancy. Many courts concluded that “the only duty of the defendant (doctor) was to terminate the pregnancy and kill the plaintiff (the child)” and decided that this duty cannot be recognized by the court as lawful, since it violates the rights of the unborn child to life.

The child has no reason to go to court for compensation for damage caused by his birth, even with severe physical disabilities. Critics of the traditional law school in the field of tortious responsibility suggested that such harm should be equated with devaluation of a child's life, and courts need to focus their attention on analyzing the child's health status and that a trial can be the only way when such children can obtain the finances necessary for paying for their care.

Care for the well-being of children conceived and born with the help of reproductive technologies is reflected in the legislation of different countries. The norms on reproductive technologies state that the welfare of any child born because of artificial insemination should be considered as a fundamental human right.

A woman should think, and doctors should be sure that a child who can be born because of infertility treatment will be provided with due care (including that which is born at the father's / husband's desire), and it is also necessary to consider the interests of the other child, if such couple already has.

Particular attention is always paid to the principle that human life must be preserved and protected. Couples planning to use assisted reproductive technologies should be fully and properly advised of the possible risk to the woman and child when carrying out the appropriate procedures.

WHO recommends that legislation include a provision such as a “guiding principle” that would establish that the interests of any child are above all.

At present, the topic of children's rights is expanded by including questions about the child “in the womb” and the child who is supposed to be conceived. This is important, therefore, that those who participate in the technology of human reproduction should pay due attention to the consequences of the birth of children who were born out of the use of assisted reproductive technologies. Undoubtedly, it is necessary to recognize that the interests of the child should be above all from the moment of fertilization to childbirth. (Romanovskiy, 2015)

Nevertheless, at the birth of children who appeared after the assisted reproductive procedures, the risk for those without whose help the children “would not have been born” should be taken into account. The position of foreign courts in cases of compensation for damage caused to the health of children born with the help of ART is not unambiguous. The issue of the existence of a cause-effect relationship is most problematic, since the existence of the child is the result of manipulation in the laboratory.

So, whether the child has the right to an impeccable healthy existence, is it possible to consider an unhealthy (defective, invalid) existence preferable to unbirth. The situation of a child born with the help of an assisted reproduction, but with a congenital disability, is the basis for the claim, where the respondent will be a medical institution that placed the embryo in the woman, as a result of which the disabled child was born. (Dickens, 1989)

3. CONCLUSION

Analysis of international legal documents allows us to conclude that there is a need to consolidate in the current legislation norms that would regulate the protection of life of the embryo from the moment of conception.

A separate issue in determining the rights of the embryo is the legal regulation of various manipulations with it. The term “manipulation with the human embryo” implies the cultivation of them for therapeutic (infertility

treatment) and research purposes. The legality of performing such manipulations and the degree of permissible impact on human embryos are widely discussed in law theory.

In the light of theoretical discussions about the rights of the embryo, the question arises that it is more humane: to subject the embryo to destruction (as an unclaimed product) or to conduct research with them regarding human development.

First, the duty to care for the unborn child must be realized in the highest degree. Secondly, the duty to care for the unborn child is the responsibility of a married couple, who is treated for infertility. This duty includes the obligation to ask medical professionals about all the consequences, and health workers should fully disclose any risk to the couple and the child who will be born as a result of the treatment.

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