

The protection of the embryo in German family law

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Introduction

The legal status of the embryo is a surprisingly unsettled question in German law. Traditionally, family law deals with parents and children, it regulates custodial powers of the parents and the protection of children. Since an embryo is not yet a child, it is not per se included in statutory provisions which speak of 'children' or 'minors'.

Increasing knowledge of the development of human life and modern techniques of artificial insemination *in vitro* and *in vivo* have led to a growing awareness of the human dignity to be attributed to an embryo. This awareness has caused embittered discussions on the abortion issue. While the lawfulness of abortion is primarily a question of criminal law,¹ the discussion has recently expanded into the family law field. If an embryo constitutes human life, an analogous application of the provisions on custody and child protection seems an automatic consequence. The issue is essentially one of *protection*: should the embryo in the mother's womb be afforded the same, or at least a similar protection as a child? In legal terms: can you ward a foetus,² and should we ward a foetus? This question leads to two different sets of problems. First, is the embryo protected from *abortion* not only by the criminal law, but also and independently by family law? Secondly, may the state as *parens patriae* protect the embryo from any other conduct by the pregnant woman, such as substance abuse, drinking alcoholic beverages, and comparable dangers?

Though this article will focus on the as yet rather undeveloped German legal discussion of these problems, it will also include some comparative materials with regard to English and US law. This article will not discuss dangers for the human embryo from scientific progress in the field of medically assisted procreation, in particular 'leftover' embryos and prenatal medical treatment or genetic alteration of the embryo.

In the field of private law, child protection '*post factum*' is relatively well established. Provided the child is born alive, he or she is entitled to claim damages for injuries inflicted before birth or even before conception.³ It is disputed, however, whether the parents themselves are liable for damages too, if they have caused injuries to the embryo, although it appears damages may be claimed if the parents, or one of them, suffered a venereal disease, which has been transferred to the embryo.⁴ In other claims there is a tendency to distinguish between the father and mother: the father who negligently or intentionally has injured the embryo is treated like any other third party, while the mother, according to some legal authors, should not be held liable because of her right to personal freedom and privacy.⁵ If the child has not been prenatally injured by human

acts but has been born with pre-existing defects, or has been born healthy but unwanted by his or her parents, the German courts have had to decide the same issues as courts in other countries, known as 'wrongful birth' and 'wrongful life' actions. The results of such cases have been essentially the same as those in the USA or in the UK: while parents can recover damages for the birth of the child (more precisely, for their unwanted support obligations towards the child), the child's claim for 'wrongful life' has been rejected.⁶

Child protection law and abortion

Current discussion in Germany, England and the USA

In a recent highly publicised case in Germany, a husband had learnt of the intention of his pregnant wife to abort the embryo applied for an injunction against his wife as her husband and on behalf of the unborn child. The right to act for the embryo against the mother was conferred upon him by a previous decision of the wardship court.⁷ The civil court did not issue an injunction because the doctor, on being informed by the court of the pending proceeding, felt unable to proceed with the abortion and the wife was persuaded to give birth to the child. Had she decided otherwise, the civil court apparently was willing to intervene in favour of the embryo, even though the wife had obtained the medical certificate necessary for a legal abortion.⁸

Wardship courts have claimed jurisdiction in relation to abortions in other contexts too. When asked by minor girls to dispense with the necessary parental consent for an abortion, the courts not only weigh the merits of the parents' and the daughter's conflicting views, but go a step further and second-guess the medical evaluation which certifies the legality of the intended abortion.⁹

This attitude of the civil courts and wardship courts has opened a second front in the war on abortion. The lines between lawful and illegal abortions, as drawn by criminal law, seem to be inconclusive since they may be re-evaluated according to the rules and principles designed to govern the parent-child relationship in family law.

These problems are not unknown to the Anglo-American world. In England, the High Court had to consider a husband's application for an injunction in a case which presented a very similar factual situation to the German case mentioned above.¹⁰ After having found that the provision of the Abortion Act 1967 had been correctly complied with by the doctors and the wife, Sir George Baker P in *Paton v Trustees of BPAS*¹¹ dismissed the claim for an injunction. In his view, the foetus had no right of its own before birth and a separate existence from its mother. Neither has the husband a right to stop his wife or the doctors from performing

the abortion. Unless 'there is clear bad faith and an obvious attempt to perpetrate a criminal offence', the judges should not interfere with the discretion of the doctors acting under the Abortion Act 1967.¹² Even in such a case, the matter should be left to criminal law proceedings rather than to the civil courts.¹³

There has been much discussion of these cases. The correctness of the statement by Sir George Baker P that a foetus 'cannot have a right of its own' has been questioned; some ascertain 'anomalies and inconsistencies in the existing legal principles relating to the unborn child'¹⁴ or 'a complicated patchwork of "rights" of the foetus'.¹⁵ The judges did not, it is argued, fully discuss the appropriateness of wardship proceedings to protect a foetus.¹⁶ The consequences of this position, however, are unclear: Phillips argues in favour of foetus protection by the wardship court, Lowe denies such protection for policy reasons.¹⁷ Others see some interrelationship between the Abortion Act and child protection law. The unfettered application of the latter should not undermine the policies of the Abortion Act and generally be utilised as an anti-abortion procedure.¹⁸ But, on the other hand, the Abortion Act 1967 was deemed unsatisfactory with regard to the interests of the foetus – the decision to abort is left to the mother and two doctors, and no one ensures that adequate consideration is given to the developmental stage and interests of the foetus.¹⁹

The legal background in the USA is somewhat different from that in England or Germany, because the decision to terminate pregnancy within the first trimester is left to the free decision of the woman. The attempt of the Missouri legislator to require the written consent of the husband before an abortion may be performed has been held unconstitutional by the US Supreme Court.²⁰ Neither the furtherance of marriage nor the interests of the husband were held sufficient reasons to justify an intrusion into the freedom of the wife. State legislation may not even require the doctor²¹ or the wife²² to notify the husband of the planned abortion. It seems obvious that, under these circumstances, any application of the husband for an injunction against his wife or her physician must fail. Nevertheless, there have been a number of applications in recent years which have been successful in the trial courts.²³ The injunctions are lifted regularly by the Appellate Courts,²⁴ but the applicant may have gained valuable time. The idea of independent interests and rights of the unborn child was not considered in *Roe v Wade*.²⁵ It has attracted more attention recently in the context of 'regulating the pregnancy'.²⁶ There are no known cases where child protection law has been considered as an instrument for the prevention of abortion.²⁷

Apparently, the interrelationship of abortion law and family law, especially child protection law, seems to be a relatively new and unexplored issue in many countries. In the following discussion a closer look will be taken at the legal framework and principles under German law.

Embryo protection by German family law: basic questions

The first question to be answered is whether the embryo is a 'person' within the meaning of the law and, as such, endowed with human rights, or only a dependent part of the body of the pregnant woman. The answer does not follow

from natural sciences nor from logic, it depends on a value judgment. The German Civil Code attributes legal personality to a human being from birth onwards, not before,²⁸ but that does not necessarily mean that the embryo is considered as legally non-existent. The Civil Code itself, especially in the context of tort and inheritance law, takes notice of the embryo.²⁹ As to fundamental human rights, the German Constitutional Court has found that the embryo has to be considered not only as potential, but as an already existing 'human life' and as such entitled at least to basic rights under the German constitution, and to protection of such rights.³⁰ One of these rights is the 'right to life' as guaranteed by Article 2 II 1 of the German constitution.³¹

Secondly, in order to fall within the scope of family law, the protection owed to the embryo has to be defined as part of the parental custodial duties. The allocation of rights and responsibilities with regard to the care of children is laid down in Article 6 II of the German constitution: primary caretakers are the child's parents, while the state is confined to the role of watchdog (*parens patriae*). Wardship and custody proceedings in Germany are understood and defined by statute as interventions of the state as *parens patriae* whenever the protective function of the parents is considered ineffective. This distribution of competence and the line of demarcation between parents and state should apply to the unborn child as well. The legislator of the German Civil Code has already foreseen the need for prenatal care and protection of the future rights of the child and, analogously to the rules on custody, this care is allocated primarily to the parents.³² The statute speaks of 'future rights' because in 1900 the notion of foetal rights had not been developed. Since the recognition of such rights by the constitution of 1949, as interpreted by the German Constitutional Court, it is submitted that section 1912 BGB (German Civil Code) should be read so as to include 'existing rights' of the embryo as well. According to firmly established principles of interpretation, the ascertainable intent of the legislator has to be given priority over the literal meaning of the statutory language. By enacting section 1912 BGB, it was the obvious intent of the legislator to subordinate the embryo, as far as it could conceivably be a subject of law, to the same custodial system which applies to children. The consequences for the correct interpretation of section 1912 BGB are seldom addressed directly,³³ but even without reference to this statutory provision there is agreement that the protection of the newly established foetal rights and interests should rest primarily with the parents-to-be.³⁴

It would appear that the parents are also invested with primary responsibility for the well-being of the embryo. It has been argued that the right to kill a child is not included within the custodial powers of parents. Instead, the responsibilities of the parents includes the protection of the child from being injured or killed, and a parent who failed to provide this protection 'neglects' the child, giving rise to state intervention to protect the child.

How is this intervention to be realised? There are two civil proceedings³⁵ available to invoke the protective function of the state as *parens patriae*. In the first place, jurisdiction for child protection is vested in the wardship courts. Under section 1666 BGB (German Civil Code) they may intervene on behalf of an endangered child upon

application of a parent, of third parties, or *ex officio*.³⁶ They can order whichever preventive measures are deemed necessary and appropriate against the parents or third parties. Thus a husband who wants to prevent the killing of his child (or his child-to-be) by its mother can call for the help of the wardship court.³⁷ The second procedural way leads to the general civil courts. When the well-being of their child is endangered by somebody else, the parents, instead of addressing themselves to the wardship court, may choose to apply for an injunction against that third party by the civil court. They may base this application on their legal rights as parents or alternatively on the rights of their child, as representatives of their child.³⁸ The civil courts, however, have no jurisdiction to enjoin a *parent* from endangering or even killing his child. On the level of private law, such jurisdiction is vested exclusively in the wardship courts.³⁹ Thus, the application of the husband against his pregnant wife, as mentioned above, was ill-founded.

The influence of abortion law on child protection law

All court interventions based on private law, be it civil courts or wardship courts, which purport to prevent the abortion of an embryo, have to take into account the line which the legislator has drawn in criminal law between lawful and illegal abortions. Present abortion law in Germany does not freely admit abortions within certain time limits, but states specific justifications and requirements which have to be positively met in order to make an abortion lawful.⁴⁰ Do these rules of criminal law preclude any intervention by courts of another branch of law which are inconsistent with penal abortion law? For the purposes of our subject, we should distinguish three alternatives.

First, where the abortion would not be justified under criminal law, there is no reason to curtail the jurisdiction of wardship courts to protect the life of the embryo by preventive measures. Section 1666 of the German Civil Code confers upon the court not only the right, but also the duty to intervene, whenever the court learns of a planned illegal abortion.⁴¹

Secondly, even if the requirements of criminal law are met in an actual case, some authors argue that this should not hinder the courts in acting for the protection of the embryo on the basis of family law provisions regarding parental neglect. An abortion, it is argued, can never be 'justified' in law. The statutory provisions of criminal law simply waive the state's claim to punish illegal acts under certain conditions.⁴² According to the prevailing view, however, abortions justified under criminal law are 'lawful acts',⁴³ and what is lawful in one branch of law cannot be considered unlawful or 'parental neglect' in another legal context.⁴⁴

This position seems to be correct. The balancing between the conflicting rights and interests of the pregnant woman and the embryo established by the German legislator and the Constitutional Court must be conclusive for all branches of law, the result has to be accepted and cannot be altered by the application of family law. The legal relation between parents and children is not dominated by parental rights, but by the parental duty to promote the welfare of the child. The law on children is governed by the 'best interest' principle and leaves no room for the weighing of equiva-

lent, but conflicting interests of individuals. In the extreme case where only the life of the foetus *or* the life of the mother could be saved, wardship courts would be bound to decide in favour of the foetus without looking at the interests of the mother.⁴⁵ For this reason, too, family law is ill-equipped to procure justice for both embryo and mother.

Thirdly, the legal situation in a given case remains doubtful, even though the woman has obtained a doctor's certificate attesting that the statutory requirements for a legal abortion are met. May the wardship court take up the issue independently, investigate the correctness of the doctor's statement and, if it believes that an abortion would not be justified, order preventive measures for the protection of the embryo?

Again there is disagreement in the legal discussion. Some argue that the medical judgment in relation to abortion is meant to be decisive and the requirements cannot be re-examined by the civil courts.⁴⁶ The possibility of challenging the doctor's medical judgment might lead to unnecessary harassment of women seeking an abortion. At least two courts, however, have claimed the authority to re-examine the doctor's decision. In the first case,⁴⁷ a pregnant girl of 16 years wanted to abort the embryo while her parents were opposed to the operation. Since the minor could not get the abortion without the consent of her parents, she applied to the wardship court for parental consent to be dispensed with. She argued that her parents, in withholding their consent, abused their custodial rights. The court not only refused to interfere with the parental decision, but, despite the fact that the girl had presented two medical certificates stating the existence of legal grounds for an abortion, issued an injunction restraining the girl from obtaining an abortion. The second case presented a reverse situation.⁴⁸ The parents urged their 16 year-old daughter to have an abortion, but she wanted to carry the child to term. The parents procured a doctor's certificate which stated legal grounds for the abortion. The court, informed by the welfare department, made the girl a ward of court and deprived the parents of their custodial rights with regard to the abortion issue. It not only found that the attitude of the parents constituted child abuse, but questioned the correctness of the doctors certificate and consequently the legality of the planned abortion. According to this view, the foetal right to life does not cease just because a doctor has issued a certificate, but only if in fact a situation of distress, as defined by the statute, exists and as such is properly stated by a doctor. If the certificate is wrong, the rights of the embryo prevail and the wardship courts are justified in protecting its life.⁴⁹ The investigation by the courts is said to include considering whether the pregnant woman's existing distress could be averted by means other than an abortion, possibly by adoption of the child⁵⁰ or by the father's announced willingness to assume the care of the future child.⁵¹

A third proposal tries to find a compromise between these two extremes. Accordingly, as a matter of principle, a wardship court's competence to re-evaluate the prerequisites for a lawful abortion should not be denied, but the court should allow substantial margin to the doctor's discretion and should intervene only in cases involving obvious abuse.⁵² The Federal Supreme Court of Germany has already applied limited judicial review of medical abortion certifi-

cates in other contexts,⁵³ a similar attitude seems appropriate with regard to child (or embryo, respectively) protection proceedings.⁵⁴ This would discourage inconsiderate and frivolous attacks on medical certificates, but, on the other hand, allow protection of the embryo in cases where the foetal right to life obviously has been disregarded by the woman and her doctor.

One may conclude that in Germany the child protection provisions of family law have a supporting and complementary function in abortion cases. The wardship courts in applying family law, however, do not have the power to override the balance of interests struck by the penal code, and they should not second-guess the doctor's certificate on the lawfulness of the abortion, unless the certificate is clearly false.

Managing the pregnancy: the protection of the embryo from being injured by maternal conduct

Abortion means the intentional destruction of the embryo. A different set of problems arises where the woman is willing to carry the foetus to term, but by her personal conduct endangers the health or even the life of the embryo. Three types of behaviour may become relevant here.

First, a woman's conduct may be dangerous or detrimental for herself, and these self-inflicted dangers extend to the embryo in the mother's womb (possibly in an aggravated form): such conduct as drug, alcohol or nicotine abuse, and also careless sexual or other social contacts with the imminent danger of infections (e.g. AIDS, venereal diseases).

Second, the woman may engage in activities quite normal and acceptable for an adult but involving some risks for the foetus (e.g. motorbike riding, climbing on ladders, air travel, taking holidays in countries with undeveloped health-care systems or with an unhealthy climate). In fact, there is virtually no behaviour which has no conceivable impact on the well-being of the embryo.

In a third group, are those women who refuse what is seen as necessary medical treatment either for themselves or their embryo.

The consequences of maternal conduct and decisions during pregnancy for the embryo and the child after birth can be severe or even disastrous. Scientific evidence shows that the abuse of alcohol during pregnancy, for example, may cause alcoholembryopathy to the child, who at the time of birth is already damaged for life.⁵⁵ The refusal of a blood transfusion or a caesarean section may lead to the still-birth of the child. While these issues call for protection of the embryo and the regulation of maternal conduct, it would not reflect sound legal policy to subject women, from conception onwards, to strict state supervision and, thereby, reduce them to procreation machines or, as has been said in the USA to 'fetal containers' stripped of any personal rights.⁵⁶

Current discussion and positions in Germany, the USA and England

In Germany, the problem has not yet attracted full judicial and scholarly attention. While third persons are held civilly and criminally liable for damages to the child before its

birth,⁵⁷ the liability of the mother herself is strongly disputed. The arguments in tort law and criminal law are essentially the same. While some authors hold the position that the state should not interfere even indirectly with the personal freedom of the pregnant woman, and that no legal duties of care exist towards the unborn life,⁵⁸ others see no reason to exempt the mother from liability – her privacy interests deserve less protection than those of the child in being born without serious health defects. The preventive protection of the embryo by the wardship courts, has not yet been a subject of discussion. This may change in the future, because very often legal developments in the USA tend to spill over to Europe. In the USA, the protection of the embryo by means of civil law has become a major issue of legal controversy. Several courts have intervened on behalf of the foetus and have ordered medical or surgical treatment against the will of the pregnant woman,⁵⁹ or have seized custody of the foetus (in fact of the woman) in order to prevent harmful conduct,⁶⁰ or have allowed the child to sue his mother for prenatal injuries inflicted on him.⁶¹ Others, especially the Illinois Supreme Court in a well-reasoned decision, have rejected such practices:

'Judicial scrutiny into the day-to-day lives of pregnant women would involve an unprecedented intrusion into the privacy and autonomy of the citizens of this state . . . the decision must come from the legislature only after thorough investigation, study and debate.'⁶²

The English courts have been much more cautious on this issue. The antenatal behaviour of a mother was considered in care proceedings in the *Berkshire* case,⁶³ but in that case protection of the foetus was not at stake, the child was already born. In *Re F*, however, the local authority tried to initiate wardship proceedings in relation to an unborn child, as the mother, a drug addict and suffering from a severe mental disturbance, had moved to an unknown place.⁶⁴ The application was unsuccessful. The judges of the Court of Appeal did not question the foetus' need for protection but they felt unable to extend the wardship jurisdiction to unborn children. The foetus was said to have no legal right of its own,⁶⁵ and the effect of wardship would be an intolerable and unenforceable control of the mother's life.⁶⁶ The judges agreed that such powers should be conferred upon the courts only by an Act of Parliament, which would also have to provide the necessary limits and safeguards.⁶⁷

Thus, the English courts refuse to protect the foetus *qua* foetus from being injured by the unreasonable conduct of its mother. The line of reasoning in the legal literature is similar to the American discussion: some focus on the human rights of the unborn child and would extend protection to the embryo,⁶⁸ others look at the personal freedom of the mother and insist that wardship jurisdiction does not empower the courts to control the life of persons other than the ward.⁶⁹ In the final analysis there are but few chances to reconcile the interests of foetus and mother. The imposition of civil or criminal liabilities on the mother are deemed unsuitable. In the case of an irreconcilable conflict, the interests of the foetus have to give way, because its legal personality is not yet fully developed and it is still part of the mother. But, according to Fortin,⁷⁰ the wardship jurisdiction should be exercised more flexibly than in

Re F, and extended to the foetus, especially in cases where this would further both the interests of the foetus and the mother.

The proper approach under German law

Constitutional law

Most of the views expressed proceed from the same premise: the acceptance of the embryo as a human being separate from its mother and the recognition of independent foetal rights require the automatic legal protection of these rights, as if the embryo were a person separate from the mother. The conclusion depends on a personal value judgment. The opposite view, which tries to avoid this conclusion for policy reasons, feels compelled to deny foetal rights against the mother altogether.

The premise of both sides is erroneous, as it inevitably leads to an all-or-nothing approach with regard to foetal protection, which fails to procure justice for the mother or the embryo. The recognition of the legal rights of the embryo is the necessary precondition for its protection,⁷¹ but as such does no more than open the door to a balancing process of the legal rights and interests of the embryo and those of the mother, respectively.

This two-step approach has been followed by the German Constitutional Court in the abortion context, but is appropriate in other contexts too. After having established the independent constitutional rights of the embryo and having confirmed the individual rights of pregnant women, the court continues:

'This right (of the woman) is not granted unconditionally, however – it is limited by the personal rights of others and the principles of law and morals. The intrusion into constitutionally protected rights of others can never be justified without legal approval nor can such rights be destroyed together with the life of the other, especially where nature itself has attributed a special responsibility for such life (to the mother).'⁷²

Article 2 I 1 of the German constitution which, according to the court, applies to embryos as well, guarantees not only the right to life, but also to bodily integrity. Thus, it is submitted, the personal rights of the woman have to be weighed not only against the foetal right to life in the abortion context, but also against the foetal right to be free from bodily harm. This task has still to be fulfilled by German courts.

The outcome of the balancing process cannot be found on a general and abstract level; it depends on the (potential) injuries to the embryo and the degree of intrusion into the rights and integrity of the mother. But, according to the principles of interpretation developed by the German Constitutional Court, no constitutionally protected right may override another conflicting right. In other words, the question is not 'foetal rights or womens rights', it is rather 'how can both constitutional positions be harmonised in a way which leaves each of them as untouched as possible?'. No easy answer can be expected to this question because the problems presented are far more complex and varied than the abortion issue.

The family law approach

What are the consequences for a reasonable application of the child protection provisions of family law? As we have seen in the context of abortion, the balance of interests found by the legislator in criminal law has proved to be conclusive for family law too. With regard to the negligent or otherwise dangerous conduct of pregnant women, there is no such body of statutory guidance. Thus, one could conclude that the civil courts have free rein to protect the embryo to the same extent as they protect born children. But this conclusion would be premature for two reasons.

First, the law on parents and children is, as already indicated, ill-equipped to contribute to the balancing of interests between mother and embryo, as required by the constitution. This branch of law is dominated by the child's interest and does not acknowledge any parental right to the detriment of the child.⁷³ Unrestricted application of child protection provisions is, however, likely to violate constitutional rights of the pregnant woman.

Secondly, all state intrusions into private rights have to conform to a fundamental principle of German law: the 'principle of proportionality',⁷⁴ which means that any state intervention is lawful only if it can be shown to be necessary, as well as effective, and if the damage caused by the intervention is not disproportionate in relation to the expected advantages. This principle has been stressed by the German legislator, especially with regard to child protection proceedings.⁷⁵ Though preventive measures ordered by civil courts may be necessary for the protection of the embryo, it seems doubtful if they would be effective and proportionate. In the case of a drug-addicted or alcohol-abusing woman, what could a court do to control and enforce its order that the woman should, in future, refrain from this abuse? Effective prevention would require permanent public supervision of the woman, day and night, which obviously is impossible, and if it were possible, it probably would be disproportionate, as would be the confinement of the woman until the day of birth.⁷⁶ The situation would be different, for example, where the woman refuses a caesarean section though the doctors strongly recommend it, because of an imminent danger to the embryo. The court order could dispense with the requirement of consent and thus make the caesarean section possible. But the jurisdiction of the court to decide this issue merely on the basis of the child protection provision has to be questioned. The woman has made her decision with regard to her own body, and her constitutional rights to do so have to be taken into account properly.

As a result, my proposition is that the preventive powers of a wardship court under the authority of child protection provisions should be confined to mandatory instruction, admonition and directive orders, but should not include instruments of enforcement.⁷⁷ If the woman decides not to follow the directive of the court, she will open herself to the sanctions of criminal law as well as possible tort actions if the child is later born damaged as a result of her conduct.⁷⁸

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NOTES

1. For England see the Abortion Act 1967. The somewhat half-hearted approach of German criminal law (ss 218219d StGB, German Penal Code) has proved unsatisfactory for both sides, opponents and supporters of abortion, and has provoked some very unpleasant and highly disputed criminal proceedings against doctors and their female clients. Because the Contract on the Unification of Germany (Einigungsvertrag) has left untouched for a limited period of time the more liberal statute of the former German Democratic Republic for the Eastern part of Germany, there has to be law reform in the next few years on the abortion issue. The German legislator enacted a new Abortion Law on 27 July 1992, but the Constitutional Court (Bundesverfassungsgericht BVerfG) by an injunction of 4 August 1992 has stopped the statute from coming into force immediately (*Neue Juristische Wochenschrift* NJW 1992, 2343). The Court will decide on the constitutionality of the new statute within the next few months.
2. This question has been posed for English law by Jane Fortin (1988) 51 MLR 768.
3. German Federal Court (BGH)BGHZ 58, 48, *Neue Juristische Wochenschrift* 1972, 1126; Staudinger/Schäfer, BGB (12th ed 1985), s 823, N 3040. This seems to be the position of English law too: see Law Commission, Working Paper 47 (1973); Report 60 (Cmd 5709).
4. See s 6 of the Statute on Venereal Diseases (*Geschlechtskrankheitsgesetz*) of 1953. Cf the English Congenital Disabilities (Civil Liability) Act 1976; Bainham (1987) 50 MLR 361 at p 366.
5. For more details see *infra* n 72.
6. Wrongful birth: German Federal Court, BGHZ 76, 249; BGHZ 76, 259; BGH, *Neue Juristische Wochenschrift* 1981, 630; *Neue Juristische Wochenschrift* 1981, 2002; BGHZ 86, 240, *Neue Juristische Wochenschrift* 1983, 1371; BGH *Familienrechtszeitschrift* (*FamRZ*) 1984, 983; BGHZ 95, 199. Wrongful life: BGHZ 86, 240, *Neue Juristische Wochenschrift* 1983, 1371; nearly the same facts were presented in the English case *McKay v Essex Area Health Authority* [1982] QB 1166; for a comparative discussion of the law in England and the USA see Teff, *ICLQ* 34 (1985) 423.
7. *Amtsgericht Köln*, decision of 15 March 1984, *Neue Juristische Wochenschrift* 1985, 2201, *FamRZ* 1985, 519.
8. German Penal Code (StGB) ss 218 II 3, 218c I. For a further discussion of this case see *infra* n 60. To date this has been the only published case of this type in Germany.
9. *Amtsgericht Celle*, *FamRz* 1987, 738, 741; see also *Amtsgericht Dorsten*, *Der Amtsvormund* 1978, 131, 134 forbidding an abortion wanted by the parents against the will of their daughter. Cf *infra* n 61.
10. *Supra* n 7.
11. *Paton v Trustees of BPAS* (1979) 1 QB 276, 279, 2 All ER 987 (Appeal to the European Human Rights Court dismissed in *Paton v UK* (1981) 3 EHRR 408). Such right had been discussed at the committee stage of the Abortion Act 1967, but was not incorporated in the Act; see Parliament Debates HC: Official Report Standing Committees 1966/1967, Vol X. For a detailed discussion of this problem see Bradley (1978) 41 MLR 365382.
12. *Ibid* at p 282. This view has been adopted by Heilbron J in *C v S* [1987] 1 All ER 1230, at pp 1240/1241, where an unmarried father had applied for an injunction on his own behalf and as next friend of the (unborn) child; on appeal, Sir Donaldson MR agreed with the statements of Heilbron J and Baker P [1987] 1 All ER at p 1243.
13. *Ibid* at p 281, 282; for a different view in this respect see Heilbron J, in *C v S* at p 1241.
14. Fortin (1988) 51 MLR 54.
15. Lyon and Bennett (1979) 9 Fam L 35, 38.
16. For alternative procedural devices see Bradley (1978) 41 MLR 365 at pp 377379.
17. See also Radevsky (1980) 130 NLJ 813; Lowe (1980) 96 LQR 29; Lowe (1981) 131 NLJ 561.
18. Fortin (1988) 51 MLR 768, 771.
19. Fortin (1988) 51 MLR 54, 71.
20. *Planned Parenthood of Central Missouri v Danforth*, 428 US 52 (1976); *Planned Parenthood of Southern Pennsylvania v Casey*, 112 S Ct 2791 (1992).
21. *Planned Parenthood of RI v Board of Medical Rev*, 598 F Supp 625 (DRI 1984).
22. *Ewbanks v Brown*, 604 F Supp 141 (WDKy 1984).
23. Krause, *Family Law Cases*, Comments and Questions (3rd ed 1990) p 255.
24. See e.g. *Conn v Conn*, 525 NE 2d 612 (Ind App 1988); 526 NE 2d 958 (Ind Sup Ct 1988); review denied 109 S Ct 391 (1988).
25. *Roe v Wade*, 410 US 113, 93 S Ct 705. This is still the state of the law today.
26. See *infra* III and Johnsen, The Creation of Fetal Rights, 95 Yale LJ 599 (1986).
27. See Johnsen, *ibid*, at p 611612.
28. German Civil Code (BGB) s 1.
29. ss 331 II; 844 II; 1923 II; 2043 I; 2108 I; 2178 BGB (German Civil Code).
30. German Constitutional Court (*Bundesverfassungsgericht*) BVerfGE 39, 1 35, *Neue Juristische Wochenschrift* 1975, 573, 574. Some excerpts from this decision in English language can be found in Krause, *Family Law* (*supra* n 32) at pp 371373. The Court has reaffirmed its position in the decision of 4 August 1992 (*supra* n 1). As to the controversy in German legal literature about the legal capacity of the embryo see Coester-Waltjen, *Gutachten zum 56 DJT* 1986, B 103; Lanz-Zumstein, *Die Rechtsstellung des unbefruchteten und befruchteten menschlichen Keimguts* (1990) p 255 with further references.
31. The Constitutional Court had to deal with the abortion issue, there was no need to consider other fundamental rights of the embryo; for this problem see *infra* III 3.
32. German Civil Code (BGB) s 1912 II.
33. But see Staudinger/Coester, *BGB* (12th ed 1991) s 1666 N 30; Geiger, *FamRZ* 1987, 1177; Stürmer, *Juristenzeitung* 1990, 709, 720721. For a literal interpretation of the statute (future rights), however, see Harter, *Zentralblatt für Jugendrecht* 1989, 235, 24; Vennemann, *Familienrechtszeitschrift* (*FamRZ*) 1987, 1069; Mittenzwei, *Archiv für die civilistische Praxis* (*AcP*) 187 (1978) 247, 275276.
34. *Autsgericht Celle*; *Butweister*, *Juristische Rundschau* (JR) 1989, 52, 53-54.
35. To be distinguished from proceedings under criminal or public law.
36. In England, see Children Act 1989, s 31.
37. For a detailed discussion see Staudinger/Coester (*supra* n 33) s 1666 n 8, 9.
38. The need for an individual legal right as a foundation of an injunction is acknowledged in English law, too; see *Paton v Trustees of BPAS* (*supra* n 11) at p 279.
39. For a detailed discussion of this point see Staudinger/Coester (*supra* n 41) s 1666 n 68.
40. ss 218219d German Penal Code (StGB). As to the forthcoming law reform in Germany see *supra* n 1.
41. Stürmer, *Juristenzeitung* 1990, 709, 721; Staudinger/Coester (*supra* n 33) s 1666 n 32; *Amtsgericht Celle*, *FamRZ* 1987, 738; *Amtsgericht Dorsten*, *Der Amtsvormund* 1987, 131, 135; Mittenzwei (*supra* n 11) at p 271; Coester-Waltjen, *Neue Juristische Wochenschrift* 1985, 2175, 2177. For English law, see Baker P in *Paton* (*supra* n 11) at p 280.
42. Geiger, *FamRZ* 1986, 1; Tröndle, *Zeitschrift für Rechtspolitik* 1989, 54, 58.
43. This is the position of the German Federal Court, BGHZ 86, 240, 245; BGHZ 89, 95, 102; *Neue Juristische Wochenschrift* 1985, 671.
44. Bienwald, *FamRZ* 1985, 1096, 1101; Coester-Waltjen, *Neue Juristische Wochenschrift* 1985, 2175, 2176; Harrer, *Zeitschrift für Jugendrecht* 1989, 238, 240241; Jagert, *FamRZ* 1985, 1173, 11741175; Stürmer, *Jura* 1987, 75, 81; Stürmer, *Juristenzeitung* 1990, 709, 715, 721; cf *Amtsgericht Celle* *FamRZ* 1987, 738, 740.
45. This has been aptly pointed out in the English discussion; see Lowe (1980) 96 LQR 29, at p 30; Bradley (1978) 41 MLR 365, at p 382.
46. Finger, *Kritische Justiz* 1986, 326, 336338; Jagert, *FamRZ* 1985, 1173, 1174; von Hippel, *Der Schwangerschaftsabbruch in rechtsvergleichender Sicht*, in: Voss, *Chancen für das ungeborene Leben* (1988) 69, 89 n 61.
47. *Amtsgericht Celle*, *ibid*.
48. *Amtsgericht Dorsten*, *ibid*.
49. *Amtsgericht Celle*, *ibid*, in pointing to the widespread and notorious misuse by doctors in issuing abortion certificates: The court is bound to law and justice and therefore cannot base its judgment on such usages (*FamRZ* 1987, 738, 741; translation by the author).
50. Cf s 218 (2) sent 3 lit b StGB. It is doubted whether the pregnant woman may be referred to adoption instead of abortion; but see *Amtsgericht Celle*, *FamRZ* 1987, 738, 741; von Hippel (*supra* n 46) at p 93 n 137 with further references.
51. See *Landgericht Köln*, *FamRZ* 1987, 207; Mittenzwei (*supra* n 33) at p 278279; Roth-Stielow, *Neue Juristische Wochenschrift* 1985, 2746; for the opposite view see Coester-Waltjen, *Neue Juristische Wochenschrift* 1985, 2176 (fathers announcement not binding in law, therefore not to be taken into account). For the UK see Bradley (1978) 41 MLR 365, 370.
52. Staudinger/Coester (*supra* n 33) at n 35. This seems to be the position of Baker P too, in *Paton* (*supra* n 11) at p 282.
53. BGH, *Neue Juristische Wochenschrift* 1985, 671; *Neue Juristische Wochenschrift* 1985, 2752.
54. For a different view see Stürmer, *Jura* 1987, 80; Kluth, *Neue Juristische Wochenschrift* 1986, 2548; Eser, *Arztrecht* 1981, 260, 295.
55. Majewski, *Alkoholembryopathie* (1989) p 109110; Marthaler/Trapp, *Niedersächsisches Ärzteblatt* 12/89, 21; Löser, *Münchener Medizinische Wochenschrift* 1989, 24; Löser/Gravinghoff/Rustemeyer, *Kinderheilkunde* (1989) 764. Similar defects are caused by drugs or nicotine; see Bingol, *Journal of Pediatrics* 1987, 93; Dalby, *Journal of Pediatric Psychology* 1987, 105.
56. See note, *Harv L Rev* 994, 1010 (1988).
57. *Supra* n 3; as to criminal sanctions see *Landgericht Aachen*, *Juristenzeitung*, 1971, 507 and the controversial discussion of A

- Kaufmann, *Juristenzeitung* 1971, 569; Roxin, *Juristische Arbeitsblätter* 1981, 542, 548; Gössel, *Strafrecht Besonderer Teil* (Vol 1, 1987), 149152; Arzt/Weber, *Strafrecht Besonderer Teil (Lehrheft 1, 1988)* 159161.
58. For tort law see Stoll, *Festschrift für Nipperdey* (1965) 739, 751, 758759; *Münchener Kommentar* (Mertens) s 823 n 61.
 59. *Raleigh Fitkin-Paul Morgan Memorial Hospital v Anderson*, 201 A 2d 537 (NJ Sup Ct 1964), cert denied 377 US 985 (1964); *Re Jamaica Hospital*, 491 NYS 2d 898 (Sup Ct 1985).
 60. See the cases reported by Johnson, 95 Yale LJ 599, 604605 (1986); Note, 103 Harv L Rev 1325, 1328 (1990).
 61. *Grodin v Grodin*, 301 NW 2d 869 (Mich 1980); *Stallman v Youngquist*, 504 NE 2d 920 (Ill App 1987).
 62. *Stallman v Youngquist*, 531 NE 2d 355 (Ill 1988), at p 361 (a case involving prenatal injuries resulting from a car accident negligently caused by the mother); for a comment on this decision see Note, 103 Harv L Rev 823 (1990).
 63. *D v Berkshire County Council* [1987] 1 All ER 20 (Div Ct), 27 (Ct App), 33 (HL).
 64. *Re F* (in utero) [1988] 2 All ER 193.
 65. As to this point, May LJ referred with approval to the statements of Baker

- P in *Paton* (*supra* n 11) and Heilbron J in *C v S* (*supra* n 12); Balcombe LJ added that there was no right either under Art 2(1) of the European Convention for the Protection of Human Rights (see *Paton v UK* [1980] 3 EHRR 408, 415).
66. May LJ, at pp 194, 196; Balcombe LJ, at p 200; Staughton LJ, at p 201.
 67. Balcombe LJ and Staughton LJ, *ibid*, referring to the example of the Mental Health Act 1983.
 68. See, e.g., Phillips (1979) 95 LQR 332, at p 335; Lyon/Bennett (1979) 9 Fam L 35, at pp 37, 39.
 69. Lowe (1980) 96 LQR 29 at p 30.
 70. Fortin (1988) 51 MLR 54; 51 MLR 768.
 71. For a different view see Heldrich, *Juristenzeitung* 1965, 593, 597; Phillips (1979) 95 LQR 332 at p 333.
 72. Bundesverfassungsgericht, *Neue Juristische Wochenschrift* 1975, 573, 575.
 73. *Supra* at n 45.
 74. Grundsatz der Verhältnismässigkeit.
 75. s 1666a BGB.
 76. But see *supra* n 60.
 77. Cf Stürmer, *Juristenzeitung* 1990, 709, 720721.
 78. For a different view see Bainham (1987) 50 MLR 361 at pp 366367.

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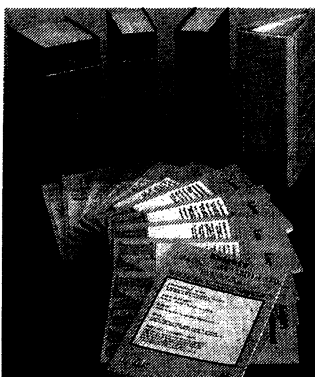
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