NOTES

TORTS—ILLEGAL ABORTION—CONSENT NOT A BAR TO RECOVERY

In a case of first impression in Georgia, an action was brought by plaintiff to recover damages for personal injuries she suffered due to the alleged negligence of defendant during the course of an illegal abortion. The Georgia Court of Appeals held that the complaint stated a cause of action in tort regardless of plaintiff's assent.[1] The court based its decision on several grounds: (1) that the woman was not *in pari delicto* with the chiropractor;[2] (2) that anti-abortion statutes were intended for the protection of the woman;[3] (3) that fraud would be sufficient to vitiate the woman's consent;[4] and (4) that the specification of negligence alleging abandonment after the operation and later failure to come to her assistance after complications had developed, states a claim for which recovery might be had.[5] And, of particular interest in

1. Gaines v. Wolcott, 119 Ga. App. 313, 167 S.E.2d 366 (1969), *cert. granted*, 225 Ga. 373, 169 S.E.2d 165 (1969) *affirmed*. The Georgia Supreme Court, on *certiorari*, 225 Ga. 373, 169 S.E.2d 165 (1969), specifically considered only two grounds in affirming the decision of the Court of Appeals; first, that the woman was not *in pari delicto* with the chiropractor; second, that the chiropractor is liable in damages for the abandonment of the plaintiff after the abortion, and refusing to aid her in complications resulting from the operation. However, the court also stated that further elaboration on the other issues raised in the case was not necessary since these issues were covered exhaustively in the well written opinion of the Court of Appeals.

2. The law in Georgia is that, "where one is engaged with another in the simultaneous and wilful violation of the same penal statute, he cannot recover damages for injuries inflicted upon him through the negligence of his joint wrongdoer *unless* the violation of the statute was not a contributing cause of the injuries; this is based upon the principle that the parties are *in pari delicto*, that what each does is the act of the other and that to permit recovery under such circumstances would be in violation of public policy." Gaines v. Wolcott, 119 Ga. App. 313, 314, 167 S.E.2d 366, 368, citing Allen v. Gornto, 100 Ga. App. 744, 750, 751, 112 S.E.2d 368 (1959); GA. CODE ANN. § 37-112 (Rev. 1962), GA. CODE ANN. § 105-603 (Rev. 1956) (emphasis added). The court held that the parties were not *in pari delicto* since the woman is neither a principal nor an accomplice in the violation of the abortion statute, GA. CODE ANN. §§ 26-1101 and 26-1102 (Supp. 1968), and since her participation in the illegal abortion was not the contributing cause of her injuries. *See also* Hughes v. Atlanta Steel Co., 136 Ga. 511, 71 S.E. 728 (1911).

3. Gaines v. Wolcott, 119 Ga. App. 313, 167 S.E.2d 366, 369 (1969).

4. The court in the principal case held that the present complaint contains two allegations of negligence which might be found to be the basis of fraud in that the defendant represented himself as being capable of performing the operation and failed to advise the plaintiff of the possible consequences of the operation. In such a case, whether plaintiff has been guilty of such negligence in not informing herself of the facts as to defeat her recovery is a question for the jury. Gaines v. Wolcott, 119 Ga. App. 313, 318, 167 S.E.2d 366, 371 (1969). *See also* Herman v. Turner, 117 Kan. 733, 232 P. 864 (1925); Gunder v. Tibbits, 153 Ind. 591, 55 N.E. 762 (1899); Miller v. Bayer, 94 Wis. 123, 68 N.W. 869 (1896).

5. Gaines v. Wolcott, 119 Ga. App. 313, 319, 167 S.E.2d 366, 371 (1969). *See also* True v. Older, 227 Minn. 154, 34 N.W.2d 700 (1948); Androws v. Coulter, 163 Wash. 429, 1 P.2d 320 (1931).

this case, was the court's apparent reliance on the deterrent effect of allowing civil recovery,[6] i.e., that to allow recovery by the woman would discourage abortionists from performing this illegal operation and thereby act as a deterrent to the commission of this crime. As discussed *infra*, this rationale is the basis behind the " 'breach of the peace" rule, which provides that consent of the person injured by an act which is an unlawful breach of the peace, such as a mutual combat, will not preclude recovery in a civil action.[7] This casenote will be primarily concerned with the court's *sub silento* adoption of this rule in the principal case, and its implications.

Although there is a sharp conflict of authority as to whether the consent of a woman to an illegal abortion precludes a recovery either in tort or in contract, apparently a scant majority of these courts hold that her consent bars recovery.[8] The reasoning of these courts seems to be that anti-abortion statutes are intended for the protection of the unborn child and the public interest, and not for the protection of the woman.[9] Also, since the woman has voluntarily participated in an immoral or illegal transaction, public policy demands that she be denied recovery.[10]

The courts which allow recovery seem to adopt at least one of two views, one being that anti-abortion statutes are intended for the protection of the woman.[11] Thus, the general rule is applied that where the purpose of a statute is primarily to protect a definite class of persons from their own immaturity of judgment and not solely to protect the public, the assent of a plaintiff within this class to such a proscribed act is not a bar to a civil action.[12] Many of the courts which follow this minority view give additional strength to their holdings by

6. Gaines v. Wolcott, 119 Ga. App. 313, 316, 167 S.E.2d 366, 369 (1969).

7. T. COOLEY ON TORTS, § 97 (4th ed. 1932); W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 18 at 108 (3rd ed. 1964).

8. Cases collected in Annot., 21 A.L.R.2d 369 (1952). *See also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 18 at 109 (3rd ed. 1964).

9. Miller v. Bennett, 190 Va. 162, 56 S.E.2d 217 (1949).

10. Hunter v. Wheate, 289 F. 604 (D.D.C., 1923); Miller v. Bennett, 190 Va. 162, 56 S.E.2d 217 (1949); Bowland v. Lunsford, 176 Okla. 115, 54 P.2d 666 (1936); Nash v. Neyer, 54 Idaho 283, 31 P.2d 273 (1934); Androws v. Coulter, 163 Wash. 429, 1 P.2d 320 (1931); Martin v. Morris, 163 Tenn. 186, 42 S.W.2d 207 (1931); Szadivica v. Cantor, 257 Mass. 518, 154 N.E. 251 (1926); Larocque v. Conheim, 42 Misc. 613, 87 N.Y.S. 625 (1904); Goldnamer v. O'Brien, 98 Ky. 569, 33 S.W. 831 (1896).

11. Joy v. Brown, 173 Kan. 833, 252 P.2d 889 (1953); Androws v. Coulter, 163 Wash. 429, 1 P.2d 320 (1931); Martin v. Hardesty, 91 Ind. App. 239, 163 N.E. 610 (1928); Milliken v. Heddesheimer, 110 Ohio St. 381, 144 N.E. 264 (1924). *See* 45 ILL. L. REV. 395 (1951); 26 S. CAL. L. REV. 472 (1953).

12. Cases collected in Annot., 21 A.L.R.2d 369 (1952).

arguing that the public interest demands that the plaintiff be allowed a civil action as an incentive to disclose a crime peculiarly likely to remain secret.[13] Likewise, to allow a civil action would discourage the commission of the crime in the first instance since the abortionist would have a greater fear of being discovered and also a fear of civil liability. This rationale is commonly referred to as the "breach of the peace" rule and has been primarily applied in cases of mutual combat[14] and similar consentual batteries[15] although it has also been extended, by analogy, to allow recovery in abortion cases.[16] The reasoning is essentially that if consent to a mutual combat, usually only a misdemeanor, *is void*, then consent to an abortion, a felony,[17] should most certainly be void and should not bar a civil action.[18] Since the crime is more harmful to the public interest, there is an even more cogent reason for deterring it. For this reason, a number of such courts have held that consent by the woman is void even though the woman is also guilty of a crime by her participation in the abortion.[19]

In that the court appeared to rely strongly on cases from other jurisdictions which had adopted the "breach of the peace" rule in allowing civil recovery for injuries sustained in illegal abortions and since the court also justified their holding by use of the deterrent effect

13. Joy v. Brown, 173 Kan. 833, 252 P.2d 889 (1953); Milliken v. Heddesheimer, 110 Ohio St. 381, 144 N.E. 264 (1924).

14. Schwaller v. McFarland, 228 Iowa 405, 291 N.W. 852 (1940); Morris v. Miller, 83 Neb. 218, 119 N.W. 458 (1909); McNeil v. Mullen, 70 Kan. 634, 79 P. 168 (1905). *See*, 17 VA. L. REV. 374 (1931).

15. Teeters v. Frost, 145 Okla. 273, 292 P. 356 (1930); Gilmore v. Fuller, 198 Ill. 130, 65 N.E. 84 (1902).

16. *Supra* note 13. This rule has been severely criticized by various authorities. It has been traced to dictum from the early English case of Matthew v. Ollerton, 90 Eng. Rep. 438 (K.B. 1963), at a time when the action of trespass, such as an action to recover damages resulting from a mutual combat, had a quasi-criminal character. At this time the Crown and the plaintiff had a mutual interest in the action since both could receive payment from the defendant. For this reason, the Crown vitiated the consent so that it would not bar the action. Since the action of trespass is no longer quasi-criminal in character, 5 and 6 William and Mary, c12 (1694), it is contended by these authorities that Matthew v. Ollerton is no longer good precedent, that the state has no interest in the civil action, and therefore consent should be a bar, even though the offense amounts to a breach of the peace. However, the rule has become transplanted into the American system and has been accepted by a considerable majority of the courts, W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 18 at 108 (3rd ed. 1964), although it is still a minority view as applied to abortion cases.

17. It should be noted that under Georgia law, the performance of an abortion upon a woman is a misdemeanor. GA. CODE ANN., § 26-1102 (Supp. 1968).

18. Joy v. Brown, *supra* note 13.

19. True v. Older, 227 Minn. 154, 34 N.W.2d 700 (1948); Androws v. Coulter, 163 Wash. 429, 1 P.2d 320 (1931); Martin v. Hardesty, 91 Ind. App. 239, 163 N.E. 610 (1928). In the first two cases, recovery was based on abandonment of the woman.

of allowing civil recovery in such situations, which is the principal factor behind the "breach of the peace" rule, it appears that the Georgia court has *sub silento* adopted this rule. By adoption of this rule, and by the allowance of recovery in cases of abandonment after the performance of the abortion which resulted in injury to the woman,[20] it would seem that the court has placed Georgia among that group of courts which hold that the woman's consent is void even though she is also guilty of a crime by her participation in the abortion.[21] Therefore, it is probable that the woman's consent will be no bar to an action even if the Georgia Legislature should enact a statute making the woman criminally liable and therefore *in pari delicto* with the abortionist[22] as the court seemed to infer in the principal case.[23]

The courts which have refused to apply the "breach of the peace" rule where there is consent to a criminal act such as abortion and thereby deny recovery, argue that the application of the rule is actually not effective as a deterrent to the crime of abortion since the abortionist is criminally liable in any event.[24] The majority of these courts also reason that to allow a recovery would actually encourage the woman to participate in the abortion. The argument is that she will be more tempted to have the abortion performed if she knows that she can recover for resulting injuries in case the abortion is unsuccessful.[25] However, the court, in the principal case, correctly evades the former argument by reasoning that to hold the abortionist liable in tort will surely increase the deterrent effect since there is a much greater chance that the crime will be brought to the attention of the public and the proper authorities by means of a civil action. This argument carries a great deal of weight in that usually the abortion is kept secret by the woman because of her fear of social disapproval. If no civil action is allowed to counteract this fear the abortion is more likely to be kept secret which would result in fewer prosecutions of abortionists. Therefore, the deterrent effect is greatly increased by the threat of a civil action rather than merely the threat of criminal prosecution. As to the latter argument of the courts which have rejected this rule, it is true that the allowance of a civil recovery may encourage the woman to have the abortion performed. However, most women in this position

20. *Id.*
21. *Id.*
22. *Supra* note 2.
23. Gaines v. Wolcott, 119 Ga. App. 313, 319, 167 S.E.2d 366, 371 (1969).
24. Saydoff v. Wardo, Cal. App., (1954), 271 P.2d 140, 143 (1954).
25. *Id.*

would not be aware of any legal rights they may have. Also, a woman is desparate under these circumstances and her primary concern is to have the abortion performed regardless of whether she could or could not recover in a civil action. Therefore, the encouragement will only be slight while the deterrent effect on the abortionist will be substantial. It appears that the Georgia court has adopted the better view since the most effective means of eliminating an evil is to attack it at its source, which would be the abortionist in the principal case. Even Professor Bohlen, a critic of the "breach of the peace" rule generally recognizes the more cogent reasons of public policy in applying the rule to abortion cases.[26]

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26. Bohlen, *Consent as Affecting Civil Liability for Breaches of the Peace*, 24 COLUM. L. REV. 819, 832 and 833 (1924).