Editorial

Reproduction, Arbitrary Statutes, and Tort Law

by Barry R. Furrow, J.D.

Abortion continues to be a highly charged subject. Those who oppose legal abortions have suggested a variety of means to limit women's access to such procedures. One approach, promoted by the Board of Trustees of the Catholic Health Association (CHA), is a model statute that would abolish the tort suits based on claims of wrongful birth and wrongful death. This proposal, which CHA hopes individual states will adopt, provides that:

> No person shall be liable in civil damages for any act or omission that results in a person being born alive instead of being aborted.

If adopted, such a statute would prevent either parents or impaired children from suing for damages for any failure of a third party to provide services (such as medical diagnosis of fetal defects) that might have resulted either in the mother deciding to abort the fetus or in a negligently performed abortion.[1] The CHA is promoting this statute as part of its efforts against abortion.

One can understand the Catholic Health Association's reason for opposing abortion.[2] One can also understand attempts by such opponents, working within current constitutional limits, to legislatively restrict the availability of abortions. However, the CHA proposal is objectionable on two grounds. First, it thwarts the purposes of tort litigation. Second, it is an arbitrary rule, distinguishing between classes of people without rational justification.

A tort suit serves at least two purposes: it compensates an individual injured by the negligence of another and it deters future negligent behavior. Litigation creates incentives for the providers of health care services to minimize injury-creating activity. Such incentives are especially important in the area of reproductive medicine, where technologies such as amniocentesis are now in common use. Moreover, our realization of the importance of the genetic component of birth defects is expanding rapidly. Potential parents have come to expect from their gynecologists, obstetricians, and family physicians the latest information as to their genetic heritage and the possibility of genetic defects in children they may choose to have. CHA's proposal seeks in effect to immunize this cluster of medical specialists dealing with reproduction—not because such a move is justified by sound policy arguments but because the CHA opposes abortion, or any action that might lead a couple to choose an abortion. If a couple doesn't learn their fetus is defective, they won't abort it. Thus, an obstetrician could fail to inform a couple about the risks of their child being born with a birth defect, whether because he opposes abortion or because he lacks training. He could also perform an abortion negligently. In neither case, under the CHA proposal, would the parents be able to sue him for his failures.

The CHA proposal would compound the inequalities of the tort system by creating another anomaly, in which the beliefs of a vocal minority are injected into the common law system.

The CHA proposal is a highly selective restriction on common law rights and damage remedies, promulgated for reasons unrelated to the tort system's limitations in deterring or compensating medical accidents. The ability of tort suits to improve the quality of medical practice over time by reinforcing standards of good practice would be thwarted if a negligently performed amniocentesis or an improperly taken genetic history produce no negative consequences for the negligent practitioner.

The second major indictment of the proposed statute is that it is arbitrary, imposing an unequal burden upon similarly situated classes of parents, without adequate justification for such treatment. Consider the following cases:

Case 1. Couple one has a child with a genetic impairment. They decide not to have another child, for fear of a recurrence of this defect. The wife has a doctor perform a tubal ligation that, because it is negligently performed, fails to sterilize her. A second child is born with the same genetic disease. In most states at present, the parents could sue the doctor for damages in a wrongful birth action, alleging that his or her negligent deviation from accepted medical practice caused injury. The parents could seek recovery for the added costs of raising the impaired child and for the mental distress they might suffer. The CHA proposal would have no impact on this patient's right to sue, since the physician's negligent acts did not result in "a person being born alive instead of being aborted." The parents' claim is that the birth should not have occurred. Because the failure was due to negligent sterilization, not abortion, there would be recovery under the proposal.

Case 2. Assume the same couple. The wife gets pregnant and seeks an

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abortion, which is negligently carried out. The child is born with a genetic disease. The child is denied standing to sue in a wrongful life suit, and the parents cannot sue for wrongful birth.[3]

The couple in Case 2 cannot seek compensation while the couple in Case 1 can, although both couples were (1) subjected to subprofessional conduct, perhaps even gross negligence, by physicians, (2) which caused them, (3) the expense of a child with substantial impairments. So long as abortion is a legally obtainable reproductive choice, the couple in Case 2 is being unfairly and arbitrarily denied resource to litigation to compensate them for the negligent acts of a third party on whose competence they relied. This unequal treatment of parties in roughly the same position gives rise to a constitutional problem—denial of equal protection—where a tort rule operates unequally and unfairly. The CHA proposal, if enacted by a state, is likely to be struck down as unconstitutional.[4]

The tort system has its critics; and it does indeed have uneven effects in a variety of situations, due to lack of consumer information about the right to sue, to economics, or to other factors. Nonetheless, there is no justification for compounding the existing inequalities of the system by creating another anomaly, in which the moral beliefs of a vocal minority are injected into the common law system.

Conscientious health care professionals have sought for years to ensure the availability of safe and effective abortions.[5] Many experts contend that only by providing the best medical and genetic information possible to potential parents can we actually save the babies who might have been aborted because of unfounded fears of defects.[6] Information can save as well as destroy. Abortions are currently legal and are, therefore, part of a woman's reproductive choices, no matter how undesirable we may individually find such a state of affairs. The tort system should not immunize a whole category of medical practitioners—and their negligence—in order to take a stand against abortion. Parents need accurate information on potential genetic defects; abortions and other procedures should be safely performed. Physicians must, in fairness, be judged against the standards of their specialities, rather than exempted in this narrow category of cases.

References

1. The CHA has also drafted a second statutory proposal aimed at abolishing actions by a child against doctors, medical facilities, or parents for allowing that child to be conceived: "There shall be no award of damages based on a claim of a person that he or she should not have been conceived." This is considered a secondary proposal by CHA, and I will not discuss it here. See CATHOLIC HEALTH ASSOCIATION, THE 'WRONGFUL LIFE/WRONGFUL BIRTH' CONUNDRUM: TWO STATUTORY PROPOSALS OF THE CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES (April 1984).

2. The Catholic community is not united on legislative attempts to restrict the availability of abortions. See Statement, *A Diversity of Opinions Regarding Abortion Exists among Committed Catholics*, N.Y. Times, Oct. 7, 1984, at E7.

3. This is not an impossible situation. For a case where a similar failure occurred, see *Speck v. Finegold*, 408 A.2d 496 (Pa. 1979) (defective infant has no course of action, but parents may sue in their own right for pecuniary expenses of caring for and treating diseased child). Proposal B of the CHA would, if enacted, prevent a child from suing on its own behalf but would not prevent the parents from suing for their own damages.

4. See Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules*, UNIVERSITY OF FLORIDA LAW REVIEW 34:477 (1982). For a constitutional attack sustained on such grounds, see *Brown v. Merlo*, 506 P.2d 212 (Cal. 1973).

5. W. HERN, ABORTION PRACTICE (Lippincott, Philadelphia, 1984) (describing data and procedures to make abortions safe and effective).

6. See Milunsky and Reilly, *The 'New' Genetics: Emerging Medicolegal Issues in the Prenatal Diagnosis of Hereditary Disorders*, AMERICAN JOURNAL OF LAW & MEDICINE 1:71 (1975) (proper genetic information may offer assurance to parents, enabling them selectively to have unaffected offspring). The medical emphasis is "not on removal of defective fetuses, but on provision of life for those who otherwise may never have been born" (*id*).

Correspondence

Caselaw on Fetal Monitoring

Dear Editors:

The recent article by Barry Schifrin, Henry Weissman, and Jerry Wiley—"Electronic Fetal Monitoring and Obstetrical Malpractice," in the June 1985 issue—may give readers the impression, since no cases are cited on the points that they make, that none exist.

Williams v. Lallie Kemp Hospital, 428 S.2d 1000 (La. App. 1983), *cert. den.* 434 S.2d 1093, in fact, holds precisely against the major point the authors argue. In that case it was held that proof of failure to comply with ACOG standards would be sufficient, as a matter of law, to permit a finding of negligence. There is a clear inference in the opinion that compliance would, equally, be sufficient to preclude it. Other directly relevant fetal monitoring cases are: (1) *Walker v. United States*, 600 F. Supp. 195 (D.C. DC 1985); (2) *Haught v. Maceluch*, 681 F.2d 291 (CCA 5, 1982); (3) *First National Bank of Chicago v. Porter*, 448 N.E.2d 256 (Ill. App. 1983); and (4) *Jones v. Karraker*, 440 N.E.2d 420 (Ill. App. 1982).

In *Williams* it was held that proof of failure to comply with ACOG standards would be sufficient, as a matter of law, to permit a finding of negligence.

Relevant material is also discussed in the supplement to 40 *ALR* 3d 1222, "Liability for prenatal injuries," Section 9.

Feinberg, Peters, Willson, and Kroll also discuss this issue in their *Obstetrics, Gynecology and the Law*, at pages 374–78.

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