Medical ethics and law

Medical negligence and wrongful birth actions: Australian developments

Kerry Petersen *La Trobe University, Victoria, Australia*

Abstract

Wrongful birth actions aim to compensate litigants who are negligently deprived by health professionals of their right to reproductive choice. Access to safe and legal abortion is integral to the action and wrongful birth claims in the United Kingdom have been facilitated by the Abortion Act 1967 (as amended). The recent Australian case CES v Superclinics (1995) 38 NSWLR 47¹ shows how judicial confusion about the legality of abortion can result in judges condoning medical negligence. The Superclinics case also suggests that doctors are not required to provide pregnant women with the same standard of care as other patients. These developments show that law can become incoherent and health professionals can act negligently with impunity when reproductive choice does not have a secure legal foundation.

Modern reproductive medicine is particularly affected by rapid technological change and high consumer expectation. The medicalisation of human reproduction has given doctors control over contraception and abortion and more recently over artificial procreation through reproductive technology. In addition, advances in preconception and prenatal testing, together with the relentless march of genetic knowledge, continue to pose more and increasingly complex ethical dilemmas. These developments place a greater ethical and legal onus on doctors to avoid causing harm through human and mechanical error. Furthermore, while the availability of preconception and prenatal screening provides women with more reproductive choice, the resulting information adds a further dimension to the meaning of reproductive choice. Access to safe and legal abortion is an implicit part of the testing/screening procedures and, therefore, the right of parents to proceed with a pregnancy must be respected and protected where there are indications of fetal abnormality or potential disorders in later life.

Key words

Wrongful birth; medical negligence, abortion; reproductive choice; Australian laws; health professionals.

The combination of ethical duties and legal responsibility form the foundation of professional and legal accountability. The health professional has an ethical obligation *not* to impose intentional or non-intentional harm on a patient. Moreover, if the patient suffers harm, the health professional may be liable in tort law if the plaintiff can establish that the breach of the duty of care led to the reasonably foreseeable damage. Courtesy of the *Bolam*² test, the courts in Australia and the United Kingdom have shielded doctors from the fate of their United States counterparts by endorsing medical practice as a yardstick of legal liability in negligence cases. The Bolam test is still followed in Australia but has to some extent been mitigated by the ruling in *Rogers v Whitaker*³ where the Australian High Court decided that although evidence of medical practice is a useful guide for the courts in negligence cases it is not determinative.

Medical advances, particularly in reproductive medicine, have contributed to the expansion of a relatively new area of negligence in wrongful birth cases.⁴ The following discussion shows that the relationship between the Australian and English courts continues to play an important role in the evolution of the wrongful birth actions, but case law can become incoherent and the ethical and legal responsibilities of medical practitioners can be avoided, when principles governing reproductive choice are not carefully distilled and do not have a secure philosophical foundation in law. In the first English wrongful birth case, *Scuriaga v Powell*,⁵ the plaintiff mother was awarded damages when her “unwanted” child was born after a negligently performed abortion. Since then, a number of cases have provided parents with compensation for the birth of an “unwanted” child on the grounds that the child would never have been born unless the defendant had acted negligently or in breach of contract.

The essence of the action is the negligent deprivation of reproductive choice. In part, this action is a response to sophisticated medical advances and societal and legal acceptance of reproductive choice. It imposes legal responsibility and accountability on health professionals and compensates

victims of medical negligence in cases where there has been an unsuccessful sterilisation; misdiagnosis of pregnancy; failed abortion; misdiagnosis of fetal abnormality after screening, and misdiagnosis of maternal illness which can cause fetal abnormality. There is now an established body of English law.⁶ If the child's mother alleges that she was deprived of the opportunity to have an abortion because of the doctor's negligence it will be necessary for her to be able to prove that she could have secured a legal abortion at the relevant time. Clearly, the action for wrongful birth is facilitated if the abortion laws are liberal and clearly set out. The Abortion Act 1967 (UK) as amended by the Human Fertilisation and Embryology Act 1990 (UK) makes specific provision for lawful medical abortion. The "social" clause permits abortions to be performed for therapeutic and social reasons up to 24 weeks and the remaining grounds which deal with more serious indications are now free of gestational limitations. In *Rance v Mid-Downs Health Authority*,⁶ which was decided before the Abortion Act was amended in 1990, hospital staff failed to detect fetal abnormality when conducting prenatal tests and the child was born with spina bifida. The wrongful birth claim failed mainly because of problems with causation but also because the fetus would have been "capable of being born alive" under the Infant Life (Preservation) Act 1929 (UK) when the hypothetical abortion would have taken place. The possibility of an English court treating a hypothetical abortion as unlawful still exists because abortion is *prima facie* a criminal offence. The legislation merely provides defences to a criminal act if the statutory conditions are satisfied. Nevertheless, the legislation tends to be interpreted liberally.

Material risks

There have only been a few wrongful birth cases in Australia⁷ and the action is relatively novel. As well as deciding that medical practice does not constitute a legal standard, the ruling in *Rogers v Whitaker*,³ referred to at the beginning of this article, also found that a doctor has a duty of care to warn a patient of material risks, particularly the risks that a reasonable doctor would disclose, or risks which the doctor could reasonably be expected to know would be significant for the patient. This case places considerable emphasis on the context of the professional relation between doctor and patient and could provide a green light for more wrongful birth litigation in Australia. Weybury and Witting argue:

"[i]t should be easier for Australian plaintiffs in wrongful conception actions to prove a breach of duty where a doctor has failed to warn of the failure rate of a sterilisation procedure."

They add:

"[i]t is clearly arguable that a doctor who is confronted with a woman in difficult financial circumstances, who has had a large number of children and expresses a strong desire to avoid further pregnancy, should reasonably be aware that she would be likely to attach significance to the risk of failure of a proposed sterilisation procedure."

This ruling in *Rogers v Whitaker* should make it easier to prove a breach of the duty of care when people seek genetic testing, genetic counselling, prenatal testing or prenatal counselling for specific reasons such as a family history, where there is already an afflicted child in their family or where they have other concerns which could cause fetal disorders and the health professional knows and understands the reasons for their concern.

Further obstacles

The most recent Australian wrongful birth case *CES v Superclinics*,⁹ shows that even where defendants are found to have acted negligently, further obstacles have to be overcome by the plaintiff in this area of law. This case is important because it illustrates how ethical and legal obligations can be overridden when abortion laws are unclear and judges disagree about legal principles underpinning state abortion laws. The case also illustrates the dangers of blurring the distinction between civil responsibility and criminal liability in a medical negligence claim. Moreover, even though Australian judges draw on the authority of English precedents in these cases, Australian law is evolving within a different legal culture because changes to abortion laws in the majority of Australian states have occurred in the courts rather than in the legislatures. Before considering *CES v Superclinics* in further detail, however, I shall discuss the legal framework governing abortion in Australia.

The Australian constitution gives each state and territory power over criminal laws which include abortion. Moreover, because Australia does not have a Bill of Rights, change to the draconian criminal statutes based on the English Offences Against the Person Act of 1861 can only be made by state or territory parliaments or by courts. For obvious reasons, Australian politicians prefer to avoid the issue. Moreover, it is worth noting that abortion statutes based on the Abortion Act 1967 (UK) were passed more than thirty years ago in the Northern Territory and South Australia when anti-choice lobby groups were not as powerful as they are today.¹⁰ As in England, these statutes provide defences for doctors performing lawful therapeutic abortion. Elsewhere, a different path has been followed. The states of Queensland, New South Wales and Victoria rely on the defence of necessity and an onerous evidentiary burden laid down by

Justice Menhennitt in *R v Davidson*¹¹ and subsequently followed in *R v Wald*¹² and *R v Bayliss*.¹³ It is presumed that this ruling would be followed throughout the rest of the Australian jurisdictions but the issue has not been tested in their criminal courts. Under the Menhennitt ruling, the Crown has to prove beyond reasonable doubt that the accused honestly believed on reasonable grounds that the abortion was necessary to preserve the woman from serious danger to her physical or mental health. As well, under Wald an abortion will be lawful where economic and social factors present a serious threat to a woman's mental health. There are strong grounds for arguing that under these precedents abortion is not regarded as *prima facie* unlawful in these jurisdictions. This differs from the position in South Australia and in the Northern Territory, where amending acts provide defences for therapeutic abortions.

Abortion practice throughout jurisdictions following the Davidson and Wald rulings has flourished and the clinical autonomy of medical practitioners has contributed to the liberalisation of abortion practices. Women have been able to obtain safe, subsidised medical abortions from hospitals and private abortion clinics throughout Australian cities and there are no reports of "backyarder" abortions. Although neither the pro-choice nor the anti-choice advocates have regarded this situation as particularly satisfactory a stasis has been maintained for nearly three decades. The first real challenge to the status quo appeared in a civil rather than a criminal case, causing pro-choice advocates to reflect on the wisdom of leaving matters to the courts.

Medical neglect

The vulnerability of the law underpinning the abortion delivery system was graphically exposed because of medical neglect. The woman plaintiff in *CES v Superclinics* was a young student who went to the medical clinic, Superclinics, after missing her menstrual period. She was extremely concerned about the possibility of being pregnant as she was in an unstable relationship and had very limited means of support. After an unbelievable number of misdiagnoses, this young woman was eventually diagnosed as being pregnant at 19.5 weeks gestation and was advised it was too late to have an abortion. She gave birth to a healthy child and sued Superclinics and the medical practitioners for wrongful birth, alleging they had deprived her of the opportunity to discover her pregnancy in time to have an abortion. The child was born because of the defendant's negligence and the courts accepted that if the health professionals employed by Superclinics had acted competently the woman would have had a safe abortion early in the pregnancy. She would not have lost the

opportunity to choose whether or not to continue with the pregnancy.

The trial judge in *CES v Superclinics*¹⁴ accepted that there was a breach of the duty of care and the defendants had acted negligently. He also accepted that the plaintiff would have succeeded in securing an abortion if she had sought one early in the pregnancy. Nevertheless, he denied her claim for damages on the ground that she had lost the opportunity to perform an illegal act under the Crimes Act 1900 (NSW), finding that her health was excellent at all times and that the pregnancy did not present a serious danger to her mental health. Ignoring the culpable behaviour of the defendants plus the social context, whereby state-subsidised abortions are freely and openly available in Sydney, he drew an analogy between a woman seeking an abortion in these circumstances and an unsuccessful bank robber claiming damages against a third party who unintentionally thwarted the robbers from executing their deed. Effectively Newman J sanctioned the defendants' medical misconduct.

The New South Wales Court of Appeal in *CES v Superclinics*, (Kirby A C-J and Priestley JA; and Meagher JA dissenting) overruled the Supreme Court decision. Kirby A C-J found that a hypothetical abortion would not necessarily have been unlawful. Priestley JA agreed that a termination would not be deemed unlawful unless and until a court ruled it to be so. However, Meagher JA (in dissent) decided that a medical practitioner could not have honestly believed on reasonable grounds that a hypothetical abortion in these circumstances would have been lawful. The appeal court ordered a retrial to consider the question of damages. Furthermore, special leave to appeal to the high court of Australia was granted to the defendant doctors and medical clinic; leave was also granted to the Roman Catholic Church to join the proceedings. However, the matter was settled out of court on 10th October 1996.

In his judgment Kirby A C-J observed that abortion practice is a social reality which cannot be ignored and that doctors acting negligently must be accountable for their behaviour. He said:

"[t]o interpret the law without reference to such reality in a claim for civil damages where serious breaches of duty have been accepted to have occurred is, in my view, quite unrealistic. Effectively it shifts the burden of the respondents' proved breaches of duty of care in this case from them to a patient who came to their 'Superclinics' and received careless treatment. It sanctions without civil redress serious acts and defaults which have resulted in very substantial losses to the appellants. This cannot be, and is not, the law".¹⁵

Kirby A C-J took the view that the trial judge had incorrectly applied the tests in Davidson and Wald

by not recognising the true nature of the evidentiary burden and he also found that the test was not one of strict liability. He ruled that the correct question should have been: would a jury be entitled to conclude beyond reasonable doubt that a hypothetical medical practitioner could not have held an honest and reasonable belief that a woman's physical and mental health would be sufficiently affected by the pregnancy to justify termination? In a strongly worded and intellectually analytical judgment Kirby A C-J takes the view that abortion in the common law states is not a *prima facie* offence and the loss of opportunity to perform an illegal act was not a relevant consideration in this wrongful conception action. Kirby A C-J rejected the analogy of the bank robber and preferred the approach adopted by de Jersey J in the Queensland case *Veivers v Connolley*.¹⁶ In this case, damages were awarded to the plaintiff whose child was born severely disabled after the mother contracted rubella early in the pregnancy. The court found that the medical practitioner was negligent in failing to diagnose the condition and that a correct diagnosis would have led to a recommendation for an abortion in view of the risks to the fetus. Mrs Veivers made it very clear that she would have had an abortion if she had been given the opportunity. Nevertheless, because of the remote possibility that the abortion would have been illegal de Jersey J reduced the damages by five per cent. Although this approach is flawed from the point of view of reproductive choice, *CES v Superclinics* suggests it is probably better than leaving individual judges to interpret the law.

The New South Wales Court of Appeal has upheld Davidson and Wald but the divergent judicial approaches means that the common law is still uncertain and according to Priestley JA unpredictable. Furthermore, Kirby A C-J's judgment is extremely important not only because it is the most analytical of the three but also because it stands for the proposition that in spite of the criminal statutes abortion is not intrinsically an unlawful act.¹⁷

The *CES v Superclinics* case clearly demonstrates how negligent defendant health professionals can raise the defence of illegality in a wrongful birth case when abortion laws are unclear and how plaintiffs are at risk of being denied compensation even when a court finds that the case for medical negligence has been established. The present situation forces litigants to take the possibility of the court declaring a hypothetical abortion illegal into account when weighing up the pros and cons of seeking redress for

medical misconduct. Finally, another disturbing aspect of the supreme court trial decision in *CES v Superclinics* is that it suggests that the law does not require doctors to provide pregnant women with the same standard of care as other patients. This is clearly untenable from both an ethical and legal perspective.

Kerry Petersen is Senior Lecturer in the School of Law and Legal Studies, La Trobe University, Bundoora, Victoria, Australia.

References and notes

- 1 *CES v Superclinics* (1995) 38 NSWLR 47.
- 2 In the case of *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 McNair J ruled that a medical practitioner is not negligent "if he acted in accordance with a practice accepted by a body of medical men skilled in that particular art" (at 587).
- 3 (1992) 175 CLR 479.
- 4 If the pregnancy is terminated the action is for wrongful conception or wrongful pregnancy.
- 5 (1979) 123 *Solicitors' Journal* 406.
- 6 See: *Udale v Bloomsbury Area Authority* [1983] 2 All ER 522; *Emeh v Kensington and Chelsea and Westminster Health Authority* [1984] 3 All ER 1044; *Thake v Maurice* [1984] 2 All ER 513 (No 1); *Thake v Maurice* [1986] 1 All ER 497 (No 2); *Gold v Haringey* [1987] 2 All ER 888; *Rance v Mid-Downs Health Authority* [1991] 2 WLR 159; *Salih v Enfield Health Authority* [1991] 3 All ER 400; *Allen v Bloomsbury Health Authority* [1993] 1 All ER 651; *Goodwill v British Pregnancy Advisory Service* [1996] 7 Med LR 129.
- 7 *F v R* (1983) 33 SASR 189; *Petrunic v Barnes* (1988) *Aust Torts Reports* 80-147; *Dahl v Purnell* (1992) 15 *Qld Lawyers Reports* 33; *Veivers v Connolley* [1995] 2 Qd R 326.
- 8 Weybury D, Witting C. Wrongful conception actions in Australia. *Torts Law Journal* 1995; 1: 53-73, 63.
- 9 (1995) 38 NSWLR 47.
- 10 *Criminal Law Consolidation Act* 1935 (SA) s 82A; *Criminal Code* 1983 (NT) ss 172, 173.
- 11 [1969] VR 667.
- 12 (1971) 3 DCR (NSW) 25.
- 13 (1986) 9 *Qld Lawyer Reports* 8.
- 14 Unreported, Newman J, Supreme Court of NSW, 18 April 1994.
- 15 (1995) 38 NSWLR 47, 70.
- 16 *Veivers v Connolley* [1995] 2 Qd R 326.
- 17 For commentary on the case see: Greycar R, Morgan J. Unnatural rejection of womanhood and motherhood: pregnancy, damages and the law: a note on *CES v Superclinics*, *Sydney Law Review* 1996; 18, 3: 323-41; Petersen K. Wrongful conception and birth: the loss of reproductive choice and medical irresponsibility. *Sydney Law Review* 1996; 18, 4: 503-22.