ASSISTED REPRODUCTION AND THE DUTY OF CARE TO THE UNBORN CHILD

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Assisted Reproduction

Assisted reproduction is a term now widely used to describe a range of treatments to assist otherwise infertile couples to conceive and carry a child to term. Some of the procedures, like donor insemination (DI), have been in routine use for a considerable time, while others, like in vitro fertilisation (IVF) and variants thereof, are comparatively recent innovations. The number of children born as a result of these treatments, while insignificant in comparison to 'unassisted' births, is still considerable. In Australia, 1061 children have been born from treatment cycles completed by the end of 1991 (Lancaster 1993, pp. 1,7 & 14) and in South Australia 158 children were born following treatment in 1991 alone (SA Council on Reproductive Technology 1993, p. 17).

The development of technologies to assist couples to reproduce has occurred rapidly and there has been little time for the rational development of a moral and ethical framework to guide providers of assisted reproduction. For scientists working in the area this problem is particularly acute.

Embryologists working in human IVF programs play a key role in influencing the fate of gametes and embryos. We manipulate semen for insemination, select oocytes (eggs) for transfer in a GIFT procedure, select embryos for transfer following IVF and determine which embryos to freeze or to discard. We deal with the earliest stages of human life, the sperm, the egg and the embryos which are the product of the union of the gametes.

This work has excited the public imagination and has been the subject of numerous enquiries, reports, books and endless newspaper and magazine articles, some supporting the new technologies developed to assist infertile couples and many critical of it. However, in spite of much debate about the legal and ethical status of the embryo, considerable uncertainty remains. These are certainly issues about which many points of view have been expressed, but, perhaps because of the difficulty of the imponderable questions involved, a consensus still seems a distant hope.

Nevertheless, these are real issues which confront scientists in assisted reproduction programs every day.

Guidance, or regulation, of this work is provided by three main sources; Institutional Ethics Committees and government bodies such as the National Health and Medical Research Council, legislation and the common law.

It is important to recognise that developments in the law in this area are not just relevant to practitioners of assisted reproduction. In addition to medical specialists whose duty of care to their patients is obvious, a variety of laboratory scientists may find themselves faced with similar issues. Advances in prenatal diagnosis, for example, mean that the work performed in the laboratory may have important consequences for couples considering whether to continue or terminate a pregnancy. The Human Genome Project, involving scientists all over the globe in an endeavour
which has been compared in its magnitude and cost to the American Apollo moon
program, has important implications for human rights in general, but particularly for
'less than perfect' fetuses who may face selective termination (Post 1991, pp. 229-
233).

This paper addresses questions of liability and responsibility raised in courts faced
with issues of fetal 'rights' and looks at how legislators have attempted to deal with the
same.

**The Common Law: Wrongful Life (and Wrongful Birth)**

The moral, ethical and legal consequences of bringing an unwanted, healthy child, or a
child impaired in some way, into the world have provided philosophers, ethicists,
lawyers and commentators of all kinds much fuel for debate.

John Stuart Mill, in the 19th century, believed that...

- to bring a child into existence without a fair prospect of being able, not only to
  provide food for its body but instruction for its mind
- was a moral crime,
- against the unfortunate offspring and against society (cited by Carey 1991, p.28)

The question as to how society should deal with undesired pregnancy and unwanted
children, healthy or otherwise, has proved problematic. The issues are divisive, as can
readily be seen in the debate that rages around abortion. The relatively recent
emergence in the courts of the torts of 'wrongful birth' and 'wrongful life' has proven to
be at least as contentious as the 'right to life' issue, which is hardly surprising given the
shared ground (see Hersch 1983 for a review of 'wrongful life').

In discussing actions for wrongful life it is not the intention to suggest that providers of
assisted reproduction are negligent in their practice. These cases are worthy of
consideration because they provide a forum in which issues such as the value of
existence, the rights of the child and parents and the rights and responsibilities of health
care providers have been discussed.

The two torts have emerged from malpractice suits alleging negligence before or during
a pregnancy and they raise many of the complex issues faced by the practitioner of
assisted reproduction, the couple seeking assistance and legislators concerned with
regulating these activities.

**Pre-natal injury.**

A child that is injured *in utero* has, at birth, a cause of action to recover damages from
the tortfeasor whose negligent action *caused* the injury, provided that the components of
an action in negligence are present; that is, a duty of care owed, breach of that duty, the
breach was the proximate cause of the injury and the injury or damage is compensable
kind are distinct from the tort of wrongful life where the injury or harm is not *prima
facie caused* by the alleged negligent defendant.

**What is meant by 'Wrongful Birth' and 'Wrongful Life'?**

In *Procanik v Cillo* (478 A.2d 755 N.J. 1984), the New Jersey Supreme Court
considered an appeal for damages by the parents and their child who was born
suffering from impairments resulting from his mother contracting German measles
during her pregnancy.
In his judgment Proctor J. defined wrongful life as referring ...

"to a cause of action brought by or on behalf of a defective child who claims that but for the defendant doctor's negligent advice or treatment, the child would not have been born...

and wrongful birth ...

applies to a cause of action of parents who claim that the negligent advice or treatment deprived them of the choice of avoiding conception... or... of terminating the pregnancy (Procanik 1984).

Wrongful birth actions may be further characterised as 'wrongful conception' where the child was normal but unplanned and 'wrongful birth' where the child was born impaired.

In order to appreciate the questions raised in these cases the components of an action for negligence and how they are applied in these suits, need to be considered.

Duty of Care

It is fairly obvious that a duty of care is owed by the practitioner to a couple seeking treatment.

What may not be immediately apparent is whether any duty is owed to the unborn child who may not even be in existence at the time of the alleged negligent acts or, where pregnancy termination is available, has no guarantee of continued existence.

This problem is presumably overcome if it can be considered that the child is 'foreseeable'. The 'test' for whether a duty of care exists is expressed in general terms by the High Court which held that...

in order to establish the prior existence of a duty of care with respect to a plaintiff subsequently injured as the result of a sequence of events following a defendant's carelessness it is not necessary for the plaintiff to show that the precise manner in which his injuries were sustained was reasonably foreseeable; it is sufficient if it appears that injury to a class of persons of which he was one might reasonably have been foreseen as a consequence (Chapman v Hearse (1961) 106 CLR 112, pp 120-121).

A child born with syphilis is, therefore, a foreseeable victim of a doctor's failure to screen a mother for the disease though the child was not born, or even conceived, at the time of the negligent act (X & Anor v Pal & Ors (1991) Aust Torts Reports 81-098, 68,868).

In Renslow v Mennonite Hospital (367 N.E.2d 1250 IL. 1977) the issue was whether "physicians could be held liable for a fetal blood disorder suffered by a child due to the negligent transfusion of the mother 9 years prior to conception.." It was held that the plaintiff child was a foreseeable victim of negligence.

Breach of Duty

Whether or not a breach of duty occurred will be determined by the examination of the facts of the case. The allegedly negligent act will be compared with the standard of care exercised by the profession as a whole and will usually involve an appraisal by expert witnesses.

This may not, however, always be straightforward. In areas of medicine like assisted reproduction, in which practices change rapidly as advances in technology are made, there may arise special difficulties in determining what the standard of care is, or should be.
Harm resulting from the breach of duty

What is the harm that has been suffered?

In the case of 'wrongful birth' the legal damage is not the child itself but the parent's financial burden of raising a child that they had not planned to have. In Thake and another v Maurice [1984] All ER 513 the plaintiff's husband was sterilised in 1975 after they had had 5 children. In 1978 the plaintiff gave birth to a healthy child and it was held that the defendant had negligently failed to warn the plaintiff of the slight risk of pregnancy. She was granted compensation for the birth, pain and suffering and the cost of rearing the child.

In contrast, in the Georgia Supreme Court, damages were not allowed for raising a child born with Down's syndrome because "society places a value on human life in general, and on the lives of children in particular, making it most difficult to support any notion that parents may suffer compensable injury resulting from the birth of a child" (Atlanta Obstetrics and Gynecology Group v Abelson, Daily Report, vol. 101, no. 244, p. 98).

Where the child is impaired the situation becomes more complex and is certainly affected by public policy considerations (Dickens 1989 p. 398). The plaintiffs may allege that the negligence deprived them of the opportunity to terminate the pregnancy. In Gleitman v Cosgrove (49 N.J. 22, 227 A.2d 689,1967) heard in the New Jersey Supreme Court prior to the Roe v Wade decision the court rejected an action for wrongful birth on the grounds that it was against public policy to award damages for the loss of the opportunity to abort a fetus injured in utero.

In wrongful life cases it becomes more difficult to determine the harm. Is birth, even in an impaired condition, a legally recognisable injury? In other words, if the only injury caused by the defendant's negligence was the plaintiff's birth, is life an injury? Most courts have said no but it seems to be an inconsistent position if the parents of the impaired child may be awarded damages.

Wrongful Life Allowed

There have only been a handful of cases which have recognised wrongful life claims (see Morrissey 1991, pp. 157-175 for a review of American cases). The court in Curlender v Bio-Science Laboratories (106 Cal. App. 3d 811, 1980) awarded both general and special damages to a child born afflicted with Tay-Sachs disease. In rejecting the position of earlier courts that such a child had suffered no legally cognisable injury the court held that...

[t]he reality of the 'wrongful life' concept is that such a plaintiff exists and suffers, due to the negligence of others. It is neither necessary nor just to retreat into meditation on the mysteries of life. We need not be concerned with the fact that had defendants not been negligent, the plaintiff might not have come into existence at all (Curlender, supra p. 896)

In Turpin v Sortini ( Cal., 643 P.2d 954, 1982) the defendant was a hearing specialist who had assured the plaintiff's parents that an earlier child had normal hearing. On the strength of this advice the couple conceived a second child who was born suffering from a congenital hearing impairment. The plaintiff child sought general damages for being "deprived of the fundamental right of a child to be born as a whole, functional human being without total deafness" and special damages for the cost of "specialised teaching, training and hearing equipment" (Turpin, supra p. 956). Unlike Curlender the court held that general damages could not be awarded because...

(1) it is simply impossible to determine in any rational fashion whether the plaintiff has in fact suffered an injury in being born impaired rather than not
being born, and (2) ... it would be impossible to assess general damages in any fair, non-speculative manner (Turpin supra p.963).

Nevertheless the court did award special damages to the plaintiff. In recognising the wrongful life claim the court did not accept that such a decision would in any way "disavow the value of life" and further, considered that public policy does not establish "as a matter of law- that under all circumstances 'impaired life' is 'preferable' to 'non-life'" (Turpin supra p.962).

Wrongful life action not allowed

The first recorded 'wrongful life' case was that of Zepeda v Zepeda (190 N.E.2d 849 1963) which involved a suit by a physically normal but illegitimate child against his father, in which the child alleged that his mother had been fraudulently induced into having sex with the defendant! Perhaps it is not surprising that this case was unsuccessful.

Gleitman v Cosgrove (supra, 1967) was an action on behalf of a child who suffered impairments of sight, speech and hearing as a result of his mother contracting German measles during pregnancy. The plaintiff's mother had been assured by her doctor that there would be no effect on the fetus. The court held that the child had no cause since the child had suffered no injury recognised by law since being born is not an injury and public policy demanded rejection of the claim since even life with defects was more valuable than non-existence.

In 1990, the Massachusetts Supreme Court (Viccaro v Milunsky 551 NE.2d 8) recognised the parent's claim for wrongful birth but stated that there would be a fundamental problem of logic in allowing a plaintiff child to recover against a defendant when the plaintiff would never have been born but for the defendant's negligence.

English and Australian courts have similarly rejected the notion of a wrongful life claim. A child born impaired as a result of her mother's infection with rubella during pregnancy had no cause of action against doctors who negligently failed to warn the mother of the risk to her pregnancy (McKay & Anor v Essex Health Authority & Anor 1982 1 QB 1166). Stephenson L.J. concluded that the "only duty which either defendant can owe to the unborn child infected with disabling rubella is a duty to abort or kill her.." and held that this duty was not one that could be recognised by the court. The court further held that the impossibility of assessing damages on the basis of "a loss of expectation of death" made the claim untenable. This reasoning was followed in Bannerman v Mills & Anor (1991, Australian Torts Reports 81-079) where the court held that "the tort of wrongful life is not known to the common law and even if it were it would not be possible to assess any damage in monetary terms".

In both these cases the courts considered that the parents of the child plaintiff did have a right to bring an action for negligent advice.

The common law: conclusion

The common law position would therefore seem to be that a plaintiff child has no cause of action in a suit for wrongful life because the alleged tortfeasors have not caused the injury and being born, even with severe impairments, is not an injury. (For an analysis of whether such a child has been 'harmed' by being born see Steinbock 1992, pp. 114-125.) Critics of the traditional tort analysis relied on by the courts in rejecting wrongful life suits have suggested that a comparison of harms leading to compensation may be possible in these cases (Perry 1990 p. 82). The injured or impaired child may be better served by focusing on the resulting condition of the child and that litigation may be the only way such children can obtain the resources they need to maintain their care (Steinbock supra p.125; Dickens supra p. 400).
Legislation

Concern for the welfare of children conceived and born with the assistance of reproductive technology is reflected to varying extents in legislation.

The Reproductive Technology Act (SA) 1988 expressly declares that...

[t]he welfare of any child to be born in consequence of an artificial procedure must be treated as of fundamental paramount importance, and accepted as a fundamental principle, in the formulation of the code of ethical practice (s. 10(2)).

Legislation in the United Kingdom (UK), Victoria and Western Australia does not express this principle with the same vigour. Section 13(5) of the Human Fertilisation and Embryology Act 1990 (UK) directs that as a condition of licensing...

[a] woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father), and of any other child who may be affected by the birth.

Section 29(7)(b) of the Infertility (Medical Procedures) Act, 1984 (Vic) instructs the Standing Review and Advisory Committee to "...ensure that the highest regard is given to the principle that human life shall be preserved and protected at all times." In the regulations accompanying the Victorian Act, Schedule 3 (Infertility (Medical Procedures) Regulations (1988)) requires that couples contemplating assisted reproduction be counselled as to the "... possible risks to the woman and any child resulting from participation in a relevant procedure" (s.1.8).

The Victorian committee, in a submission to the Minister of Health, has recommended that the legislation be amended to include, as a 'Guiding Principle' that the "welfare and interests of any prospective child should be considered" (Review of Post-Syngamy Embryo Experimentation. Part III Recommendations for Amendment of the Infertility (Medical Procedures) Act 1984 Oct. 1991; s.2). The Human Reproductive Technology Act 1991 (WA) contains a similar provision (s.4.(d)(iv)).

Although the South Australian 'code of ethical practice' is yet to be gazetted there is little doubt that s.10(2) of the SA Act will have considerable influence. In it's 1991 report to the Minister of Health the SA Council on Reproductive Technology reflected on the significance of this section saying that...

[t]his protectionist theme of children's rights has now expanded to include debates about the child "in utero" and the child not yet conceived. It is important, therefore that those involved in assisted reproduction technology pay due regard to the impact of their practices on the children who are born as a result (p.1).

While there will undoubtedly be considerable discussion about the interpretation of these sections the intention of the legislature would seem to be clear in recognising that the interests of the child must be paramount (in SA at least) from fertilisation to delivery.

Conclusion

Nevertheless, it is as unfortunate as it is inevitable that children will be, and are, born following assisted reproduction procedures into a 'less than perfect life.' In the absence of a negligent act causing a physical impairment does such a child have a cause of
action against the practitioners who treated the child's parents and without whose assistance the child 'would not have been born'?

The conclusion from the 'wrongful life' cases reviewed above would seem to be 'no'. But the position of the courts in these cases may not be readily applied to a child who is the result of an assisted reproduction procedure. The issue of causation is more problematic when the very existence of the child is the result of manipulations in the laboratory and operating theatre. We return inevitably, it seems, to the unanswered, and perhaps unanswerable questions of whether a child has a right to an unimpaired existence, and whether any kind of existence is preferable to non-existence.

The authors of the UK Act (supra) considered the position of a child born disabled following assisted reproduction. Section 44 of the Act amends s.1 of the *Congenital Disabilities (Civil Liability) Act 1976* such that the child has a cause of action where...

s.1A.(1) (a) a child carried by a woman as a result of the placing in her of an embryo or of sperm and eggs or her artificial insemination is born disabled,  
(b) the disability results from an act or omission in the course of the selection, or the keeping or use outside the body, of the embryo carried by her or of the gametes used to bring about the creation of the embryo, and  
(c) a person is under this section answerable to the child in respect of the act or omission.

s.1A.(3) provides that ...

The defendant is not under this section answerable to the child if at the time the embryo, or the sperm and eggs, are placed in the woman or the time of her insemination (as the case may be) either or both of the parents knew of the risk of their child being born disabled (that is to say, the particular risk created by the act or omission).

None of the relevant Australian Acts have addressed this issue.

In terms of advice to providers of assisted reproduction it may be safe to draw the following, rather obvious, conclusions.

1) A duty of care is owed to the unborn child to ensure as far as is possible that the child is born unimpaired.

2) A duty of care is owed to the couple receiving treatment for infertility which includes an obligation to fully disclose any risk to them, or to any child born as a result of the treatment.

References


Carey, J.S. 1991, 'I am not yet born - but that won't stop me suing you', *New Statesman*, 15 November, p. 28.

