1 The nature of the troubled pregnancy

Introduction

Most academics have difficulty in writing their monographs and I must certainly count myself among that majority. I can, however, go one stage further and admit to having had a comparable difficulty in finding a title. In planning their families, most people would opt for an ideal number of ideal children. Life, however, is far from ideal and my aim has been to collate and review the development of the law as it now relates to human reproduction that has gone contrary to plan – contrary in the sense that the problems have strayed beyond those that can be settled within the doctor/patient relationship and which, as a result, require some legal control of the outcome.

Inevitably this implies that there is, at source, some form of conflict between the three principals – the pregnant woman, her fetus and her medical adviser. One's consequent reaction is to see these as encompassed within the mantle of 'unwanted pregnancy' and, certainly, a very large number of pregnancies are genuinely unwanted. At the same time, by far the greater proportion of these will be resolved between the woman and her doctor within the abortion clinic and I should make it clear that, while I consider lawful termination of pregnancy at considerable length in this book, I do so with some reluctance insofar as I am not concerned with abortion per se – and certainly not with abortion on what are often described as the 'social grounds'.[1] Rather, I am concerned with abortion as a potential and lawful solution to many of the other problems of the complicated pregnancy.

Most persons who wish to avoid pregnancy will, however, surely see contraception as being preferable to abortion as a means to that end. Given that they are using contraceptive methods under expert medical guidance and that they believe that, as consumers, they are protected from the hazards of defective production, they will expect a satisfactory outcome. The vagaries of contraceptive methods are such, however, that

[1] Abortion Act 1967, s.1(1)(a).

the possibility of failure is to be anticipated and, when it occurs, the chances of that failure being attributable to an individual's negligence are, in general, very slender.[2] The situation changes, however, when a person has expressed his or her aversion to parenthood by way of the ultimate contraceptive method – that is, sterilisation. The intention is obvious, the persons responsible for the treatment are readily identifiable and the individual's right to competent treatment is clearly recognisable. A pregnancy following sterilisation is, in every way, the paradigm 'unwanted' pregnancy which fits well within the stated remit of this book.

This, however, is only half the story. What concerns many couples is not so much the fact of pregnancy but, rather, the resultant parenthood. The greater part of that concern will be based on economics – can we afford to be the good parents that the child deserves? As Peter Pain J put it in an early example of unwanted pregnancy:

> [E]very baby has a belly to be filled and a body to be clothed. The law relating to damages is concerned with reparation in money terms and this is what is needed for the maintenance of a baby.[3]

Clearly, then, if that extra expense results from someone's negligence, there is a prima facie case that compensation is payable. At the same time, however, it is important to appreciate that, in seeking such compensation, there is no *necessary* denigration of the child's status.

On the other side of the coin, however, a sizeable minority will be concerned for the type of child they will be parenting. Such concern may, again, be double-edged. On the one hand, many will want the 'perfect baby' and, such are the advances of modern medicine that, while the so-called designer baby cannot, at present, be produced to order, it is increasingly possible to ensure that imperfection is predictable – and, given the consumer/provider nature of much modern medical practice, increasing numbers of prospective parents expect those predictions to be made and to be made available for evaluation. At the same time, perhaps even more will, either for good or for unsustainable reasons, be positively worried lest the woman be carrying an imperfect child.

Thus, in many cases involving 'unwanted' pregnancy and birth, it is not *a* baby that is unwanted but, rather, that *particular* baby – or, to put it more bluntly, a child that is disabled. That is a harsh thing to say – harsh because, insofar as it is almost universally held that it is a mark of a civilised society that all its members are treated equally and are afforded

[2] *Richardson* v. *LRC Products Ltd* (2001) 59 BMLR 185, [2000] Lloyd's Rep Med 280 is an unusual case involving a defective condom which proves the point.
[3] In *Thake* v. *Maurice* [1986] QB 644 at 666. Discussed in greater detail at p. 102 below.

the same respect, it touches upon the moral conscience of society as a whole. This is not to condemn or even criticise those who, say, faced with an unexpectedly disabled neonate, will initially reject it. In practice, it is remarkable how few unexpectedly disabled children are committed to institutional care; rather, it is noticeable that many are accepted into a loving and caring family. Nonetheless, it is an inescapable fact that, while the upkeep of children costs money, the upkeep of a disabled child costs not only more money but also a great deal of hidden expenditure in the form of extra care and attention. Thus, the economic problems of pregnancy are intimately bound with the health of the resultant child.

A further aspect of the 'unwanted' pregnancy that deeply troubles the public conscience is that, so often, the logical disposal of the unwanted is by way of death. Again, then, we are restrained by an innate adherence to the principle of the 'sanctity' of human life – a principle that recurs again and again in the pages that follow. The result may well be a conflict of conscience – an unwanted pregnancy may turn into an unwanted abortion. Equally dramatically, an originally rejected disabled neonate has become deeply loved and a new conflict arises – that between, on the one hand, the parents' desire to support their child and, on the other, that child's best interests in abandoning his or her struggle for existence. And we will see that the judiciary, when asked to decide between these parental options, have their own problems to overcome – an added dimension being that an individual case decision will, as likely as not, be taken to represent public policy. Thus, the outcome of a case may well depend upon whether the individual or the majority on the bench are motivated primarily by moral or by legal principles.

There are, indeed, so many aspects – and so many nuances within those aspects – to the subject matter of this book that I decided it was best described by the neutral overall term 'the troubled pregnancy'. Having said which, I should say that it is implicit – though, perhaps, not obvious[4] – that I am confining discussion to those troubles which have both an ethical and a legal dimension. The obstetric management of birth may, for example, be negligent and, as a result, be a potent source of neonatal disability; but it is a purely technical matter and contains no ethical element. Similarly, the purist might well say that an adulterous pregnancy is likely to be troubled; but, again, this is not a book on family law.

It is not difficult to appreciate that, as a result of this selection, one of the main difficulties in writing on it – and one of the major dilemmas influencing the courts once they become involved – has lain in the

[4] A pregnancy can, of course, be 'troubled' by the various patho-physiological problems associated with the state and there is no intention to include such purely medical matters.

intensely emotional nature of the subject. Indeed, insofar as the law in this field has been established over the years on something of an ad hoc basis, it could be said that its ethical component has proved to be more basic and significant to its evolution than has strict legal principle. That being so, it is hard to keep one's personal interpretation of the ethical conditions out of one's analysis of the many variations on the theme of troubled reproduction that arise – and it will become evident that this goes as much for judges as it does for authors. Rather surprisingly, the dilemmas facing the former have been demonstrated most recently – and most vividly – in the Australian courts[5] and this is one reason why I have devoted considerable space to the Australian cases. As to the latter, it cannot be said that an author's personal views are in the same league of significance as those of the judiciary and, while I have some strong views on many of the topics addressed in the body of the text, I hope I have succeeded in being reasonably objective. At heart, then, this book concerns the growth of the common law in these difficult areas rather than an analysis of the community's moral response to that lead – although, from what has been said, it is clear that the two are, mutatis mutandis, inseparable.

This book can be regarded as a triptych. At one side, and beginning the saga, we have the troubled conception and its intensely ethical association with abortion. On the other, and completing the picture, we have the extension of the troubled pregnancy into the realm of troubled parenthood as exemplified by the management of the disabled neonate – and I justify this inclusion because, whether intended or unintended, parenthood is the *natural* concomitant of pregnancy. The core of the book, however, is concerned, as in the title, with the origins and management of the troubled pregnancy and 'troubled', here, has been defined in the terms which have come into widespread usage over recent years:

- 'wrongful pregnancy' – generally taken as meaning an 'uncovenanted' pregnancy[6] resulting from defective contraceptive advice or surgical intervention;
- 'wrongful birth' – which implies the birth of a disabled child as a result of inadequate antenatal management; and

[5] I regard the case of *Cattanach* v. *Melchior* (2003) 188 ALR 131 as the most significant example of the moral/legal debate to be found in the contemporary era.

[6] This expression was first used in this context by Kennedy J in *Richardson* v. *LRC Products Ltd*, n. 2 above. It is used in Scots law to describe an event that was not so much unexpected as one which was not contemplated by the parties concerned and is, therefore, aptly applied to a pregnancy following, say, a sterilisation operation. I am anxious to perpetuate it as it avoids applying the pejorative, and often inaccurate, adjective 'unwanted' to a child.

- 'wrongful life' – essentially, a claim *by the neonate* that he or she is suffering because his or her mother was wrongly advised as to continuation or termination of the pregnancy.

Since these terms are central to the text – and because they are not universally agreed – it will, I believe, be helpful to discuss their implications in some detail in this introduction.

Categorisation of the troubled pregnancy

It is, in fact, difficult to establish their precise origins. One thing is, however, certain – they were born in the United States[7] where the three-pronged concept of antenatal tort has been around for at least thirty years.[8] It is equally true that the terms have been plagued by uncertainty as to their meaning since their inception while, at the same time, they have been subject to conceptual criticism at both academic and judicial level. In a relatively recent review, Strasser[9] goes to some lengths to describe the difficulties of placing a particular event in a *particular* cause of action – a matter which is, perhaps, of special significance in the United States with its many different jurisdictions and, consequently, varied interpretations. Should, for example, a failed sterilisation operation resulting in the birth of a disabled child be categorised as a wrongful pregnancy or a wrongful birth? Or, should the extent of the doctor's knowledge of the facts make any difference to the nature of the action? Categorisation, as Strasser points out, allows for different states to allow or deny different actions while the mere categorisation of an action may result in the award of different damages in circumstances that are, essentially, similar. In short, 'jurisdictions do themselves and each other a disservice when focusing attention on factors other than the negligent action and the resulting harm'.[10] And it cannot be denied that the courts of the United Kingdom, the Commonwealth and of the European Union are faced with similar difficulties.

[7] There is, of course, a mass of literature on the subject of 'birth-related torts'. The most recent, and very helpful, review of the subject that I have found is content to accept their relevance: Mark Strasser, 'Yes, Virginia, There Can Be Wrongful Life: On Consistency, Public Policy, and the Birth-Related Torts' (2004) 4 *Georgetown Journal of Gender and Law* 821–61.

[8] For an exhaustive survey of the predominantly 1970s cases, see Marten A. Trotzig, 'The Defective Child and the Actions for Wrongful Life and Wrongful Birth' (1980) 14 *Family Law Quarterly* 15–40.

[9] n. 7 above.

[10] ibid., at 823. It will be seen later, for example, that California recognises only two relevant torts – actions for wrongful life brought by the resultant child and actions for wrongful birth brought by the parents (*Turpin* v. *Sortini* (1982) 31 Cal 3d 220).

As to uncertainty within these terms, first, both 'wrongful conception' and 'wrongful pregnancy' are used fairly indiscriminately to describe the situation in which a child is born to a couple who did not want any or any more children and had received expert advice or treatment designed and expected to prevent that happening. Although it is clear that the two represent a continuum, I would prefer, in the context of 'a wrong done', to speak only of wrongful pregnancy. Conception, per se, does a woman no harm – countless pre-implantation embryos are lost without their existence being noted.[11] Only the resulting pregnancy can cause the woman harm or wrong and, to that extent, 'wrongful pregnancy' can hardly be said to be a misnomer – although we will see that it may not be accepted as a term of art.

The same cannot be held in respect of an action for 'wrongful birth' which is raised *by and/or on behalf of the parents* and is, here, taken to mean the birth of a disabled, but otherwise wanted, child which could have been prevented had the defect been detected *in utero* and had the woman, as a consequence, elected for a legal termination of her pregnancy.[12] Clearly, there is nothing wrongful about the birth of a disabled child – indeed, it could be held that, from the implications alone, the retention of the phrase does a disservice to medical jurisprudence as a whole. What are wrongful – and, as we will see later, something may be wrong but still not actionable – are the defective antenatal care and the resulting denial of choice to the pregnant woman. Thus, 'wrongful birth' is not only a misnomer but the action itself fully represents the dangers of particularising a general principle – that of medical negligence. This is certainly not a new criticism. As long ago as 1979, we have the influential American academic, Professor Capron, writing:

> [I]t would be easier to recognize a case arising from the birth of a child with a preventable genetic defect as one for appropriate general and special damages to parents and child along the customary lines of tort law if our vision were not impaired by the distorting lenses of 'wrongful life'.[13]

[11] Some commentators positively distinguish a 'wrongful conception' from a 'wrongful pregnancy' when the former has been negatived by lawful termination – and this seems a reasonable distinction as the argument as to the allocation of damages may be very different. Even so, any *dolor* derives from the pregnancy. See Bernard Dickens, 'Wrongful Birth and Life, Wrongful Death before Birth and Wrongful Law' in Sheila A. M. McLean (ed.), *Legal Issues in Human Reproduction* (Aldershot: Dartmouth, 1989), chapter 4.

[12] It has to be remembered that, while the majority of jurisdictions world-wide now allow for termination of pregnancy on the grounds of maternal health, not all accept fetal disability of itself as a justification.

[13] Alexander Morgan Capron, 'Tort Liability in Genetic Counselling' (1979) 79 *Columbia Law Review* 618–84 at 634, n. 62. This quotation, of itself, proves the potential confusion

An outstanding recent criticism of the phrase has been voiced by the Supreme Court of Indiana:

> It is unnecessary to characterize the cause of an action here as 'wrongful birth' because the facts alleged in the Johnsons' complaint either state a claim for medical malpractice or they do not. Labeling the Johnsons' cause of action as 'wrongful birth' adds nothing to the analysis, inspires confusion, and implies the court has adopted a new tort.[14]

And I would go further – it seems to me that the phrase 'wrongful birth' is frankly confusing as it is applied in the present context.

Yet, of these three basic concepts, it 'wrongful life' that has attracted the greatest controversy and criticism – and it is not only inevitable but it is, surely, right that this should be so. An action for 'wrongful life' is brought by a disabled child who is claiming, basically, that he or she would not have achieved a separate existence were it not for the negligence of the doctor[15] managing the pregnancy.[16] The clear implication of the phrase is that there must be a corrective 'rightful death'. It, therefore, takes us immediately into the moral and emotional minefields of fetal and, by extension, neonatal euthanasia where, for many, the values underlying the importance of human life and the protection of the vulnerable are challenged.[17] It is small wonder that judicial opinions have been influenced by non-legal considerations when dealing with such claims and that the relevant jurisprudence has become distorted. The backlash has, accordingly, been considerable – we have, for example, the Australian High Court Judge Kirby[18] quoting the label of 'wrongful life' as 'unfortunate',[19]

as, interestingly, the nomenclature at the time was different. 'Wrongful birth' was said to be associated with the unplanned birth of a *healthy* child; 'wrongful life' concerned the child who was socially or, later, physically disabled and stemmed from the claim of being disabled by virtue of being born illegitimate: *Zepeda* v. *Zepeda* 190 NE 2d 849 (Ill., 1963).

[14] *Bader* v. *Johnson* 732 NE 2d 1212 (Ind., 2000) at 1216, referring back to similar criticism in *Greco* v. *United States* 893 P 2d 345 (Nev. 1995) at 348. The additional point in *Bader* v. *Johnson* is that it was argued from the other side that actions for wrongful birth were barred in Indiana. I admit to having chosen to quote *Bader* for the additional reason that it is the only case I know that refers to 'the troubled pregnancy' (at 1219).

[15] The largely theoretical possibility of an action against the parents is discussed at p. 195 below.

[16] It will be seen that there is very little conceptual difference between actions for wrongful birth and those for wrongful life. The important practical difference is that the former is bought by the parents and the latter by the disabled child. The theory and practice of each, thus, overlap and the two actions are commonly taken in parallel.

[17] As Harvey Teff put it many years ago: 'One is not instinctively attracted to the cause of someone who appears to be impugning life itself', in 'The Action for "Wrongful Life" in England and the United States' (1985) 34 *International and Comparative Law Quarterly* 423–4, at 425.

[18] In *Harriton* v. *Stephens* [2006] HCA 15 at [8]. [19] Quoting Teff, n. 17 above, at 425.

'ill-chosen',[20] 'uninstructive'[21] and 'misleading and decidedly unhelpful'.[22] In his view, its use, even as a shorthand phrase should be avoided – the underlying reason being that, while a neonatal action in negligence might sound, an action under the title of wrongful life is more or less doomed to failure (see Chapter 7).

In short – and we will expand on the theme throughout this book – the three adopted pre-natal torts have been widely criticised almost since their inception. Why should this be so? I doubt if one can answer this better than by quoting from the Supreme Judicial Court of Massachusetts:

> These labels are not instructive. Any 'wrongfulness' lies not in the life, the birth, the conception, or the pregnancy, but in the negligence of the physician. The harm, if any, is not the birth itself but the effect of the defendant's negligence on the parents' physical, emotional, and financial well-being resulting from the denial to the parents of their right, as the case may be, to decide whether to bear a child or whether to bear a child with a genetic or other defect.[23]

Thus, even if it is only to state the obvious, the factor common to all three expressions is negligence on the part of health carers. If, then, we are to derive coherence from what is, essentially, a trans-Atlantic formulation – and if, perhaps, we could prevent its permeating the United Kingdom jurisprudence in its present state[24] – the logical approach is to regard all three as mere facets of medical negligence and apply the general rules of tort law rather than to presume we are dealing with unique entities which must be disentangled from one another. This study has convinced me that this is the correct approach despite the fact that, almost in order to make the point, and in deference to popular usage, I am still using the three categories as a framework for discussion throughout the text.

That being the case, it is inevitable that, despite the fact that much of it is common knowledge, we must, by way of a preface, take a brief look at the current state of the general law related to medical negligence. Those aspects which are of particular significance in pregnancy will be addressed in the relevant chapters.

[20] Quoting Joseph S. Kashi, 'The Case of the Unwanted Blessing: Wrongful Life' (1977) 31 *University of Miami Law Review* 1409–32 at 1432, although it is clear that this author interpreted 'wrongful life' in a wider sense.
[21] *Harriton* v. *Stephens* [2002] NSWSC 461 at [8].
[22] Quoting *Lininger* v. *Eisenbaum* 764 P 2d 1202 (Colo., 1988) at 1214.
[23] *Viccaro* v. *Milunsky* 551 NE 2d 8 (Mass., 1990) at 9, n. 3.
[24] We will see that, although the formula has gained some acceptance, it is certainly not consistently implemented – see, for example, the 'post-*McFarlane*' cases discussed at p. 90 below.

An overview of medical negligence

In order to prove medical negligence, it is, as is well known, necessary to demonstrate the three essential elements:

- that the health care professional owed the complainant a duty of care – and this is a *legal* duty which is a matter for the courts to decide;
- that there was a breach of that duty to the extent that the standard of care provided fell below the standard required by the law – thus, although, by definition, this is a legal concern, the courts must, and do, defer to *professional* standards; and
- that, because of that breach, the patient suffered a legally recognisable harm – the problem of *causation*.

This book makes no pretence of covering the subject of medical negligence fully. At this point, little more will be attempted other than to isolate some aspects which have particular relevance to the troubled pregnancy. Their more detailed application will, hopefully, become clear in the following chapters.

The duty of care

Normally, there would be little to say under this heading in the context of medical practice. A woman (or a man) requires medical help; she seeks this from a registered medical practitioner;[25] the practitioner, by agreeing to see her in that capacity, assumes a duty of care. On the face of things, that settles the matter.

However, the situation is surprisingly unclear in the case of the pregnant woman where the question arises as to whether the practitioner owes a coincident duty of care to the fetus. The unborn child, one feels, must have rights of some sort and certainly has interests[26] – but can a person owe a duty of care to a fetus which has no legal persona? The topic arises in several chapters including, paradoxically, that concerned with a fetal interest in *non*-survival.

The standard of care

The basics of the modern standard of care required by the law originate in England and Wales in *Bolam*[27] and in Scotland in *Hunter*

[25] It is to be remembered that it is the fact of registration from which the doctor derives both privileges and responsibilities.
[26] The question is crystallised in the European Court of Human Rights case of *Vo* v. *France* (2004) 79 BMLR 71, for which see p. 44 below.
[27] *Bolam* v. *Friern Hospital Management Committee* [1957] 1 WLR 582, (1957) 1 BMLR 1.

v. *Hanley*.[28] Both arrive at much the same conclusion and it will be convenient for present purposes to consider only the former and to refer to the '*Bolam* test'.

The Bolam *test*

The *Bolam* test, which, rather surprisingly for a principle that has had such an impact on medical jurisprudence, originated in a judicial instruction to a jury at first instance,[29] is in two parts. The first deals with standards of care in general:

> The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well-established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.[30]

This, then, defines the professional standard of care which, perhaps surprisingly, is of relatively minor concern to us here. The second part, however, runs:

> A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art.[31]

This delineates the *legal standard of care* owed by the health care worker to his or her patient and it is a test that, almost perversely, has been accepted unreservedly by the courts of the United Kingdom for almost half a century – and has even been extended from the realm of duty to that of causation.[32] It is a useful test in that it provides a simple benchmark for the courts, whose officers seldom have medical training. Clearly, however, it exposes the possibility that the medical profession is dictating the law to the courts and this cannot be a good thing when medical practitioners are parties to the relevant actions. Moreover, it is open-ended insofar as it does not, for example, limit the 'responsible body of medical

[28] 1955 SC 200, 1955 SLT 213.
[29] However, both *Bolam* and *Hunter* were fully supported in the House of Lords in *Maynard* v. *West Midlands Regional Health Authority* [1985] 1 All ER 635.
[30] n. 27 above, per McNair J at WLR 586, BMLR 4.
[31] ibid., at WLR 587, BMLR 5. In respect of the Scottish decision in *Hunter*, McNair J opined that there would be no quarrel as to that expression of opinion not according with English law – 'it is just a question of expression'. Hence, there is no doubt that, despite some minor academic quibbling, the foundation of the law is similar on both sides of the Border.
[32] See *Bolitho* v. *Hackney Health Authority* [1998] AC 232, (1998) 39 BMLR 1, HL.