Mason looks at the legal response to those aspects of the troubled pregnancy which require or involve medico-legal intervention. The unwished-for pregnancy is considered particularly in the light of the Abortion Act 1967, s.1(1)(d) and the related action for so-called wrongful birth due to faulty antenatal care. The unexpected or uncovenanted birth of a healthy child resulting from failed sterilisation is approached through an analysis of the seminal case of McFarlane and associated cases involving disability in either the neonate or the mother. The disabled neonate’s right to sue for its diminished life is discussed and the legal approach to the management of severe congenital disease is analysed - thus following Baroness Hale in believing that care of the newborn is an integral part of pregnancy. Aspects are considered from historical and comparative perspectives, including coverage of experience in the USA, the Commonwealth and Europe.
This series of books was founded by Cambridge University Press with Alexander McCall Smith as its first editor in 2003. It focuses on the law’s complex and troubled relationship with medicine across both the developed and the developing world. In the past twenty years, we have seen in many countries increasing resort to the courts by dissatisfied patients and a growing use of the courts to attempt to resolve intractable ethical dilemmas. At the same time, legislatures across the world have struggled to address the questions posed by both the successes and the failures of modern medicine, while international organisations such as the WHO and UNESCO now regularly address issues of medical law.

It follows that we would expect ethical and policy questions to be integral to the analysis of the legal issues discussed in this series. The series responds to the high profile of medical law in universities, in legal and medical practice, as well as in public and political affairs. We seek to reflect the evidence that many major health-related policy debates in the UK, Europe and the international community over the past two decades have involved a strong medical law dimension. Organ retention, embryonic stem cell research, physician assisted suicide and the allocation of resources to fund health care are but a few examples among many. The emphasis of this series is thus on matters of public concern and/or practical significance. We look for books that could make a difference to the development of medical law and enhance the role of medico-legal debate in policy circles. That is not to say that we lack interest in the important theoretical dimensions of the subject, but we aim to ensure that theoretical debate is grounded in the realities of how the law does and should interact with medicine and health care.

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The Troubled Pregnancy

Legal Wrongs and Rights in Reproduction

J. K. Mason
MD (Camb.), LLD (Edin.), FRC Path, FRSE
Professor (Emeritus) of Forensic Medicine and Honorary Fellow,
School of Law in the University of Edinburgh
This book is dedicated to the ‘gang’
Graeme, Sharon and Geoff
with great affection.
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Preface

The origin of this book lies in a series of articles I wrote, mainly for the *Edinburgh Law Review*, following upon the ground-breaking House of Lords ruling in *McFarlane v. Tayside Health Board* in 2000. I admit to being amongst those who found that unanimous decision hard to accept and I followed its fallout with increasing interest. Cambridge University Press were kind enough to agree to a proposal that we consolidate the results into a coherent monograph and this has resulted in *The Troubled Pregnancy*. It will, however, be apparent that what started as a relatively simple fancy rapidly became a major academic exercise. The more I looked at the individual index cases, the more I became involved with the subject both on a historical and an international basis. The result was a major expansion of the anticipated text.

Inevitably, then, the book has taken some time to write – and this has not been helped by the acquisition of the occasional metal joint and of a serious bout of two-fingered repetitive strain injury. It has, therefore, been particularly prone to the well-known hazard that medical law is a moving target. At the same time, it has provided a welcome opportunity to reflect on what has gone before or, so to speak, to ‘learn on the job’ – to put it in perspective, I still think *McFarlane* was wrong but I doubt if it was as wrong as I thought it was five years ago! I must, therefore, ask the reader’s forgiveness if, at times, it looks as though I have changed my mind between Chapters 1 and 8 – indeed, I may well have done so. In the end, however, I hope I have painted a fair picture of an area of jurisprudence in which decisions must be made that cannot, by their very nature, please everyone.

I have had the enormous privilege of spending some twenty years in the Edinburgh School of Law where I have received unfailing kindness and help from my legal colleagues; I owe them, collectively, a debt of gratitude for giving me what turned out to be a third career. As to this particular project, I would like to thank Mrs Elspeth Reid, lately editor of the *Edinburgh Law Review*, for her encouragement of my research; Dr Parker Hood and Ms Joelle Godard for their help in the Australian
and European ambiences respectively; Dr Alexis Tattis for early assistance and Dr Sharon Cowan for valuable guidance in the feminist field. My truly profound thanks, however, go, firstly, to Mr Geoff Pradella, one of my recent postgraduate students, who undertook some prodigious research for me and also read and commented on several chapters; and, secondly – and as always – to Professor Graeme Laurie who encouraged me throughout, read and constructively criticised some chapters and, on more than one occasion, saved the manuscript from the flames! Finally, I must thank Cambridge University Press for their forbearance over the months and for giving me the long-sought opportunity to publish under the auspices of my alma mater. I hope the book does them justice.

Edinburgh
JKM
August 2006
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