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978-0-521-61624-9 - The Troubled Pregnancy: Legal Wrongs and Rights in Reproduction

J. K. Mason

Frontmatter

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## The Troubled Pregnancy

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.

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Frontmatter

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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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J. K. Mason

Frontmatter

[More information](#)

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Frontmatter

[More information](#)

# The Troubled Pregnancy

*Legal Wrongs and Rights in Reproduction*

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Frontmatter

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978-0-521-61624-9 - The Troubled Pregnancy: Legal Wrongs and Rights in Reproduction

J. K. Mason

Frontmatter

[More information](#)

---

This book is dedicated to the 'gang'  
Graeme, Sharon and Geoff  
with great affection.

Cambridge University Press

978-0-521-61624-9 - The Troubled Pregnancy: Legal Wrongs and Rights in Reproduction

J. K. Mason

Frontmatter

[More information](#)

## Contents

---

<i>Preface</i>	<i>page xi</i>
<i>Table of cases</i>	xiii
<i>Table of statutes</i>	xxv
1 The nature of the troubled pregnancy	1
Introduction	1
An overview of medical negligence	9
2 Voluntary and involuntary termination of pregnancy	14
Introduction	14
The fetal persona	16
Maternal status	24
The Abortion Act 1967	25
Prevention and reversal of implantation	35
Negligence and abortion	38
Involuntary termination of pregnancy	41
Conclusion	49
3 Antenatal care and the action for wrongful birth	53
Introduction	53
Late termination of pregnancy	54
Antenatal care and fetal abnormality	59
The principles of antenatal care	66
The development of the wrongful birth action	79
Recompense for wrongful birth in the United Kingdom	84
Conclusions	97
4 Unsuccessful sterilisation	100
Introduction	100
Negligent sterilisation	100
Liability and wrongful pregnancy	105
The case of Mr and Mrs McFarlane	112
Wrongful pregnancy in Australia	125
Lessons from a legal 'test match'	138
<i>McFarlane</i> under fire	141
A connecting case	145

Cambridge University Press

978-0-521-61624-9 - The Troubled Pregnancy: Legal Wrongs and Rights in Reproduction

J. K. Mason

Frontmatter

[More information](#)

x	Contents	
5	Uncovenanted pregnancy and disability	150
	Introduction	150
	The disabled neonate	152
	The disabled mother	163
	The proximity test	183
6	Wrongful neonatal life	188
	Introduction	188
	The wrongful life action in history	189
	The perspective in the United Kingdom and the Commonwealth	204
	Wrongful life in Europe	232
	Conclusion	237
7	The management of the disabled neonate	241
	Introduction	241
	Principles of management of severe congenital disease	245
	The British cases	250
	Professional guidelines	290
	Neonatal euthanasia	293
8	Conclusion	297
	Patterns and anomalies	297
	Conflicts of values	299
	<i>Bibliography</i>	303
	<i>Index</i>	312



Cambridge University Press

978-0-521-61624-9 - The Troubled Pregnancy: Legal Wrongs and Rights in Reproduction

J. K. Mason

Frontmatter

[More information](#)

## Preface

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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

Cambridge University Press

978-0-521-61624-9 - The Troubled Pregnancy: Legal Wrongs and Rights in Reproduction

J. K. Mason

Frontmatter

[More information](#)

---

xii Preface

and European ambiances 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  
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Cambridge University Press

978-0-521-61624-9 - The Troubled Pregenancy: Legal Wrongs and Rights in Reproduction

J. K. Mason

Frontmatter

[More information](#)

## Table of cases

---

### Australia

- Cattanach v. Melchior* (2003) 199 ALR 131, 4, 108, 127, 131, 132, 137, 138, 139–41, 162, 163, 177, 182, 213, 216, 217, 297, 301, 302
- CES v. Superclinics (Australia) Pty Ltd* 38 NSWLR 47, 83, 84, 116, 123, 127, 140–1, 142
- Dahl v. Purnell* (1993) 15 QLR 33, 127
- De Sales v. Ingrilli* (2002) 193 ALR 130, 134
- Graham Barclay Oysters Pty Ltd v. Ryan* (2002) 194 ALR 337, 135
- Harriton v. Stephens* [2002] NSWSC 461, 8; *Harriton v. Stephens, Waller v. James, Waller v. Hoolahan* [2004] NSWCA 93, 213–16, 224 *Harriton v. Stephens* [2006] HCA 15, 7, 219, 224
- Jaensch v. Coffey* (1984) 155 CLR 549, 130
- McMahon v. South Eastern Sydney Area Health Service* [2004] NSWSC 442, 83
- Melchior v. Cattanach* [2000] QSC 285, [2001] QCA 246, 126, 127, 156
- National Insurance Co. of New Zealand v. Espagne* (1961) 105 CLR 569, 138
- Nominal Defendant v. Gardikiotis* (1996) 186 CLR 49, 133
- Perre v. Apand or Amand Pty Ltd* (1999) 198 CLR 180, 127, 135
- R v. King* [2003] NSWCCA 399, 44
- Rogers v. Whitaker* (1992) 175 CLR 479, (1993) 16 BMLR 148, 69, 70
- Sutherland Shire Council v. Heyman* (1985) 157 CLR 424, 129
- Veivers v. Connolly* [1995] 2 Qd R 326, 82
- Waller v. James; Waller v. Hoolahan* [2004] NSWCA 93, 213, 223, 224 [2006] HCA 16 222–4
- Watt v. Rama* [1972] VR 353, 218
- Webster v. Chapman* [1998] 4 WWR 335, 226
- X and Y v. Pal* (1991) 23 NSWLR 26, 198–9, 218, 224

### Canada

- Arndt v. Smith* (1994) 93 BCLR (2d) 220, 73–5 (1995) 126 DLR (4th) 705, 73, 74 [1997] 2 SCR 539, 75, 82, 225

Cambridge University Press

978-0-521-61624-9 - The Troubled Pregnancy: Legal Wrongs and Rights in Reproduction

J. K. Mason

Frontmatter

[More information](#)

xiv Table of cases

- Bevilacqua v. Altenkirk* (2004) 242 DLR (4th) 338, 101, 107  
*Bosard v. Davey* (2005) CarswellMan 92, QB, 225  
*Cherry v. Borsman* (1990) 75 DLR (4th) 668, 39–40, 228–31, (1992) 94 DLR (4th) 487, 39–40, 200, 225, 226, 228–31  
*Doiron v. Orr* (1978) 86 DLR (3d) 719, 102, 106, 107  
*Fredette v. Wiebe* (1986) 29 DLR (4th) 534, 229  
*Kealey v. Berezowski* (1996) 136 DLR (4th) 708, 107, 134  
*Keats v. Pearce* (1984) 48 Nfd & PEI R 102, 107  
*Lacroix v. Dominique* (2001) 202 DLR (4th) 121, 225, 226, 230  
*London Loan & Savings Co of Canada v. Brickenden* [1934] 3 DLR 465, 74  
*McDonald-Wright v. O’Herlihy* [2005] OJ No.1636, 216, 219, 225  
*Mickle v. Salvation Army Grace Hospital* (1998) 166 DLR 743, 82, 227  
*Petkovic alt Petrovik v. Olupona* [2002] O.J. no 3411, 191, 226–7  
*R v. Sullivan and Lemay* (1991) 1 SCR 489, 44, 51  
*Reible v. Hughes* [1980] 2 SCR 880, (1980) 114 DLR (3<sup>rd</sup>) 1, 69, 72, 74, 75, 82, 84  
*Roe v. Dabbs* 2004 BCSC 957, 39, 107  
*Sharma v. Mergelas, Nowaczyk v. Majewski* (1997, unreported) 191, 227  
*Suite v. Cooke* (1995) 58 ACWS (3d) 961, 107  
*Superintendent of Family and Child Services and Dawson* (1983) 145 DLR (3d) 610, 248, 259, 279  
*Webster v. Chapman* [1998] 4 WWR 335, 226  
*Winnipeg Child and Family Services (Northwest Area) v. G(DF)* (1997) 152 DLR (4th) 193, 51, 226

**European courts**

- Andersson and Kullman v. Sweden* App. No 11776/85, 46 DR 251, 145  
*Bosso v. Italy* no. 50490/99, ECHR 2002-VII, 48  
*Brüggemann and Scheuten v. Federal Republic of Germany* (Application no. 6959/75, Commission Decision of 12 July 1977); (1981) 3 EHRR 244 [1977] 3 EHRR 113, 31, 48  
*D v. UK* (1997) 24 EHRR 423, 272  
*Glass v. United Kingdom* [2004] 1 FLR 1019, (2004) 77 BMLR 120, 249, 292  
*H v. Norway* (Application no. 17004/90, Commission Decision of 19 May 1992), 48  
*Pretty v. United Kingdom* [2002] 2 FLR 45, (2002) 66 BMLR 147, 272, 289

Cambridge University Press

978-0-521-61624-9 - The Troubled Pregnancy: Legal Wrongs and Rights in Reproduction

J. K. Mason

Frontmatter

[More information](#)

## Table of cases

xv

*Vo v. France* (Application No. 53924/00) (2004) 79 BMLR 71, (2005) 40 EHRR 12., 9, 44–9, 50, 51, 55, 58, 299

*X v. Austria* (Application no. 7045/75, Commission Decision of 10 December 1976), 48

*X v. United Kingdom* (Application no. 8416/79, Commission Decision of 13 May 1980); (1981) 3 EHRR 244, 48

**France**

*X v. Mutuelle d'Assurance du Corps Sanitaire Français et al (Perruche)* (2000) JCP 2293, 131, 235, 236, 238, 239, 240

**Hong Kong**

*Ho and another v. Chan and others* (1991) (Unreported, High Court of Hong Kong, HCA003490A/1986), 125

**Israel**

*Zeitsoff v. Katz* [1986] 40(2) PD 85, 220

**Netherlands**

*X v. Y (Molenaar)* The Hague, Court of Appeals, 26 March 2003, 234–5, 236–7, 238, 240

**New Zealand**

*Auckland Area Health Board v. Attorney-General* [1993] 1 NZLR 235, [1993] 4 Med LR 239, 289

*Re an Unborn Child* [2003] 1 NZLR 115, 40

*Harrild v. Director of Proceedings* [2003] 3 NZLR 289, 41, 43

*Re Z* (1982) 3 NZAR 161, 116, 118

**South Africa**

*Castel v. De Greef* 1994 (4) SA 408, 210.

*Mukheiber v. Raath and Raath* (1999) <http://www.uovs.ac.za/law/appeals/26297.htm>, 20 January 2000, 119

**United Kingdom**

*A v. A* [2003] 1 All ER 669, (2003) 71 BMLR 61, 291

*A National Health Service Trust v. D* [2000] 2 FLR 677, (2000) 55 BMLR 19, 271–2, 279

*AD v. East Kent Community NHS Trust* [2003] 3 All ER 1167, (2003) 70 BMLR 230, 186–7

*Airedale NHS Trust v. Bland* [1993] 1 All ER 821, (1992) 12 BMLR 64, 245, 260, 274, 285

*Al Hamwi v. Johnston* [2005] Lloyd's Rep Med 309, 62, 70, 77–9

Cambridge University Press

978-0-521-61624-9 - The Troubled Pregenancy: Legal Wrongs and Rights in Reproduction

J. K. Mason

Frontmatter

[More information](#)

xvi Table of cases

- Alcock v. Chief Constable of South Yorkshire Police* [1992] 1 AC 310, [1991] 4 All ER 907, 92, 121
- Allan v. Greater Glasgow Health Board* 1998 SLT 580, (1993) 17 BMLR 135, OH, 86, 101, 111, 124, 125, 136, 137
- Allen v. Bloomsbury Health Authority* [1993] 1 All ER 651, (1993) 13 BMLR 47, 93, 104, 105, 130
- Anderson v. Forth Valley Health Board* 1998 SLT 588, 605, 84, 86–8, 89, 94, 95
- An NHS Trust v. D* (2006) 87 BMLR 119, 276
- An NHS Trust v. MB (a child represented by CAFCASS as guardian ad litem)* [2006] 2 FLR 319, 228, 263, 276, 277, 278, 279, 284–9
- Attorney-General's Reference (No 3 of 1994)* [1998] AC 245, 17, 42–4, 234, 299
- B v. NHS Hospital Trust* [2002] 2 All ER 449, (2002) 65 BMLR 149, 24
- Bagley v. North Herts Health Authority* [1986] NLJ Rep 1014, 41
- Barr v. Matthews* (2000) 52 BMLR 217, 29
- Baxter v. Baxter* [1948] AC 274, 35
- Benarr v. Kettering Health Authority* [1988] NLJR 179, 111, 120, 130
- Blyth v. Bloomsbury Health Authority* [1993] 4 Med LR 151, CA, 69
- Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582, (1957) 1 BMLR 1, 9, 10–12, 13, 39, 68, 70, 71, 79, 101, 103, 104, 249
- Bolitho v. Hackney Health Authority* [1998] AC 232, (1998) 39 BMLR 1, 10, 11–12, 13, 71, 75
- Bravery v. Bravery* [1954] 3 All ER 59, [1954] 1 WLR 1169, CA, 106
- Burton v. Islington Health Authority* [1993] QB 204, 43, 189, 207, 218
- C v. Health Authority* [1999] CLY 4002, 76
- C v. S* [1988] QB 135, [1987] 1 All ER 1230, 21, 27
- Caparo Industries plc v. Dickman* [1990] 2 AC 605, [1990] 1 All ER 568, 87, 88, 95, 96, 97, 119, 120, 125, 135, 141, 150–1, 155, 160, 181, 183, 185
- Chester v. Afshar* [2005] 1 AC 134, [2004] 4 All ER 587, 67, 71, 76–7, 135, 179, 221, 239
- Chissel v. Poole Hospital NHS Trust* [1998] Lloyds Rep Med 357, 39
- Crouchman v. Burke* (1998) 40 BMLR 163, 39, 104
- County Ltd v. Girozentrale Securities* [1996] 3 All ER 834, 142
- D v. An NHS Trust (Medical treatment: consent: termination)* [2004] 1 FLR 1110, 27
- Das v. Ganju* (1998) 42 BMLR 28, 111
- De Martell v. Merton and Sutton Health Authority* [1993] QB 204, [1992] 3 All ER 833, 43, 189, 207

Cambridge University Press

978-0-521-61624-9 - The Troubled Pregenancy: Legal Wrongs and Rights in Reproduction

J. K. Mason

Frontmatter

[More information](#)

## Table of cases

xvii

- Deriche v. Ealing Hospital NHS Trust* [2003] EWHC 3104, 76
- Donnelly v. Joyce* [1974] QB 454, [1973] 3 All ER 475, 186
- Egerton v. Brownlow* (1853) 4 HL Cas 1, 129
- Emeh v. Kensington and Chelsea and Westminster AHA* [1985] QB 1012, 95, 110–11, 113, 115–16, 137, 140, 142, 148, 152, 154, 155
- Enright v. Kwan* (2003) EWHC 1000, 65, 78
- Eyre v. Measday* [1986] 1 All ER 488, 102, 104
- Fallows v. Randle* [1997] 8 Med LR 160, 72, 101
- Farraj v. Kings Healthcare NHS Trust* [2006] EWHC 1228, (2001) 90 BMLR 21, 65
- Farrell v. Merton, Sutton and Wandsworth Health Authority* (2001) 57 BMLR 158, 92
- Fish v. Wilcox and Gwent Health Authority* (1992, unreported), on appeal (1993) 13 BMLR 134, 91, 95
- Fitzleet Estates Ltd v. Cherry* [1997] 3 All ER 996, [1977] 1WLR 1345, 168
- Frost v. Chief Constable of South Yorkshire Police* [1998] QB 254, 121
- Gaynor v. Warrington Health Authority* (2000, unreported), CA, 9 March, 98
- Gillick v. West Norfolk and Wisbech Area Health Authority* [1986] AC 112, [1985] 3 All ER 402, 33–4
- Godfrey v. Gloucestershire Royal Infirmary NHS Trust* [2003] EWHC 549, 93–4, 111
- Gold v. Haringey Area Health Authority* [1986] 1 FLR 125; revsd [1988] QB 481, 68, 111
- Goodwill v. British Pregnancy Advisory Service* [1996] 2 All ER 161, [1996] 2 FLR 55, CA, 104, 197
- Greenfield v. Irwin (a firm)* [2001] 1 FLR 899, 86, 143–5, 146, 187  
*sub nom Greenfield v. Flather*, 94, 143
- Gregg v. Scott* [2005] 2 AC 176, 135
- Gregory v. Pembrokeshire Health Authority* [1989] 1 Med LR 81, 53, 62, 72–3, 84, 234
- Grieve v. Salford Heath Authority* [1991] 2 Med LR 295, 41
- Groom v. Selby* (2002) 64 BMLR 47, [2002] Lloyd's Rep Med 1, 104, 146–9, 155
- Hamilton v. Fife Board* 1993 SC 369, 1993 SLT 624, 17, 31, 207, 235
- Hardman v. Amin* [2000] 59 BMLR 58, [2000] Lloyd's Rep Med 498, 80, 91–3, 95, 97, 124, 130, 153, 154, 160, 162, 173
- Hedley Byrne & Co Ltd v. Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, 125

Cambridge University Press

978-0-521-61624-9 - The Troubled Pregnancy: Legal Wrongs and Rights in Reproduction

J. K. Mason

Frontmatter

[More information](#)

xviii Table of cases

- Hunt v. Severs* [1994] 2 AC 350, [1994] 2 WLR 602, 99, 186  
*Hunter v. Hanley* 1955 SC 200, 1955 SLT 213, 9, 10, 39  
*Jepson v. Chief Constable of West Mercia* [2003] EWHC 3318, 2003 WL 23145287, 58  
*Jones v. Berkshire Health Authority* (1986, unreported), 111  
*Kapfunde v. Abbey National plc and Daniel* (1998) 46 BMLR 176, 185  
*Kay's Tutor v. Ayrshire and Arran Health Board* [1987] 2 All ER 417, 1987 SLT 577, HL, 13  
*Kelly v. Kelly* 1997 SC 285, 1997 SCLR 749, 27, 40  
*Kuwait Airways v. Iraq Airways Co* [2002] 2 AC 883, 238  
*Lee v. Taunton and Somerset NHS Trust* [2001] 1 FLR 419, 86, 91, 96–7, 98, 115, 124, 125, 154, 160  
*Lindsay v. Glasgow Health Board* (1990) *The Scotsman*, 14 March, 111  
*Lord v. Pacific Steam Navigation, The Oropesa* [1943] P 32, [1943] 1 All ER, 149  
*Lybert v. Warrington Health Authority* [1996] 7 Med LR 71, CA, 70  
*Marriott v. West Midlands Regional Health Authority* [1999] Lloyd's Rep Med 23, 11  
*Maynard v. West Midlands Regional Health Authority* [1985] 1 All ER 635, [1984] 1 WLR 634, 10, 39, 101  
*McFarlane v. Tayside Board* 1997 SLT 211, OH, 112, 113 1998 SLT 307, (1998) 44 BMLR 140, IH, 86, 112, 157, 181 [2000] 2 AC 59, 2000 SC 1, HL vii, vii, 84, 90–7 passim, 110, 111, 112–25, 132, 135, 136, 137, 140, 141–5, 149 passim, 151, 156, 157, 158, 161–4, 165, 167–84, 185, 186–7, 216, 298, 301, 302  
*McKay v. Essex Area Health Authority* [1982] QB 1166, [1982] 2 All ER 771, 99, 109, 121, 188, 205–11, 212, 218–19, 222, 225, 231, 236, 237, 238, 268  
*McLelland v. Greater Glasgow Health Board* 1999 SC 305, on appeal 2001 SLT 446, 84, 88–90, 95  
*Miliangos v. George Frank* [1976] AC 443, 169  
*Millar (P's Curator Bonis) v. Criminal Injuries Compensation Board* 1997 SLT 1180, (1996) 44 BMLR 70, 87  
*NHS Trust A v. Mrs M, NHS Trust B v. Mrs H* [2001] 2 WLR 942, (2001) 58 BMLR 87, 272  
*Nunnerley v. Warrington Health Authority* [2000] Lloyd's Rep. Med. 170, 95, 98–9  
*Palmer v. Tees Health Authority* [1999] Lloyd's Rep Med 351, 197  
*Parkinson v. St James and Seacroft University Hospital NHS Trust* [2002] QB 266, [2001] 3 All ER 97, CA, 130, 136–7, 139, 141, 147, 149, 151, 153–62, 164, 165–6, 169–73, 174–5, 176, 182–3, 241



Cambridge University Press

978-0-521-61624-9 - The Troubled Pregenancy: Legal Wrongs and Rights in Reproduction

J. K. Mason

Frontmatter

[More information](#)

## Table of cases

xix

- Paton v. British Pregnancy Advisory Service Trustees* [1979] QB 276, 18, 40
- Pearce v. United Bristol Healthcare NHS Trust* (1999) 48 BMLR 118, 70, 71, 85
- Penney v. East Kent Health Authority* (2000) 55 BMLR 63, [2000] Lloyd's Rep Med 41, 11
- Pfizer Corporation v. Ministry of Health* [1965] AC 512, 103, 234
- Pollock v. Lanarkshire Health Board* (1987) Times, 6 January, 111
- Portsmouth Hospitals NHS Trust v. Wyatt and ors* [2005] EWHC 117, 274
- Poynter v. Hillingdon Health Authority* (1997) 37 BMLR 192, 197
- Practice Note (Official Solicitor: Declaratory Proceedings: Medical and Welfare Provisions for Adults who Lack Capacity)* [2001] 2 FLR 158, 100
- R (on the application of Axon) v. Secretary of State for Health* (2006) 88 BMLR 96, 33–4
- R (on the application of Burke) v. General Medical Council* (2005) QB 424, (2004) 79 BMLR 126, QBD, 259, 262, 264, 277 (2005) 85 BMLR 1, CA, 228, 263, 277, 290
- R (on the application of N) v. Doctor M and others*, [2003] 1 FLR 667, (2002) 72 BMLR 81, 12, 249
- R (on the application of Quintavalle) v. Secretary of State for Health* [2003] 2 AC 687, [2003] 2 All ER 113, 61
- R (on the application of Rogers) v. Swindon NHS Primary Care Trust* [2006] EWCA Civ 392, 264
- R (on the application of Smeaton) v. Secretary of State for Health* [2002] 2 FLR 146, (2002) 66 BMLR 59, 17, 18, 36, 37, 38
- R v. Arthur* (1981) 12 BMLR 1, 57, 253–7, 258
- R v. Bourne* [1939] 1 KB 687, [1938] 3 All ER 615, 28, 117
- R v. Cambridge Health Authority, ex p B* [1995] 2 All ER 129, CA, 250
- R v. Collins, ex p S* [1998] 3 All ER 673, (1998) 44 BMLR 160, 24
- R v. Cox* (1992) 12 BMLR 38, 295
- R v. Croydon Health Authority* (1998) 40 BMLR 40, [1998] Lloyd's Rep Med 4, 183–5, 184
- R v. Dixon*, Nottingham Crown Court, 21 December 1995, 29
- R v. Dhingra* (1991, unreported) Daily Telegraph, 25 January, 37, 38
- R v. Hamilton* (1983, unreported) The Times, 16 September, 55
- R v. Instan* [1893] 1 QB 450, 215
- R v. Knuller (Printing and Promotions) Ltd* [1973] AC 435, 168
- R v. Portsmouth Hospitals NHS Trust, ex p Glass* [1999] 2 FLR 905, (1999) 50 BMLR 269, 271, 272, 274
- R v. Price (Herbert)* [1969] 1 QB 541, [1968] 2 All ER 282, 38

Cambridge University Press

978-0-521-61624-9 - The Troubled Pregenancy: Legal Wrongs and Rights in Reproduction

J. K. Mason

Frontmatter

[More information](#)

xx Table of cases

- R v. Secretary of State for Social Services and ors, ex p Hincks* (1980) 1 BMLR 93, CA, 118
- R v. Shivpuri* [1986] 2 WLR 988, 168
- R v. Smith (John)* [1974] 1 All ER 376, 58 Cr App Rep 106, 29
- R v. Tait* [1990] 1 QB 290, 50
- Rance v. Mid-Downs Health Authority* [1991] 1 QB 587, (1991) 5 BMLR 75, 20, 21, 54, 84
- Rand v. East Dorset Health Authority* (2000) 56 BMLR 39, [2000] Lloyd's Rep Med 181, 80, 90–1, 95, 97, 115, 120, 124, 130, 154, 160, 173
- Re A (medical treatment: male sterilisation)* [2000] 1 FLR 549, 246, 249, 279, 287
- Re A* [1992] 3 Med LR 303, 291
- Re B (wardship: abortion)* [1991] 2 FLR 426, 34
- Re B (a minor) (wardship: medical treatment)* [1981] 1 WLR 1421, [1990] 3 All ER 930 at 931, 188, 209, 228, 247, 252–4, 256, 257–9, 266, 268, 269, 276, 300
- Re C (a baby)* [1996] 2 FLR 432, (1996) 32 BMLR 44, 270–1, 281, 284
- Re C (a minor) (wardship: medical treatment)*, [1990] Fam 26, [1989] 2 All ER 782 266, 267–8
- Re C (medical treatment)* [1998] 1 FLR 384, sub nom *Re C (a minor)* (1997) 40 BMLR 31, 243, 263, 284, 291
- Re F (in utero)* [1988] Fam 122, [1988] 2 All ER 193, 19, 40, 50, 226, 248
- Re F (mental patient: sterilisation)* [1990] 2 AC 1, 248
- Re J (a minor) (wardship: medical treatment)* [1991] Fam 33, (1990) 6 BMLR 25, 209, 243, 245, 247, 250, 259, 260, 262, 267–70, 274, 276, 277, 282, 283
- Re J (a minor) (wardship: medical treatment)* [1993] Fam 15, (1992) 9 BMLR 10, 262–4, 274
- Re K (a child) (Medical treatment: Declaration)* [2006] EWHC 1007, [2006] 2 FLR 883, 296
- Re L (medical treatment: benefit)* [2005] 1 FLR 491, 250, 278, 281, 281–3 sub nom *Re Winston-Jones (a child) (medical treatment: parent's consent)* [2004] All ER (D) 313, 281
- Re M (a minor) (wardship: sterilization)* [1988] 2 FLR 497, [1988] Fam Law 434, 101
- Re MB (an adult: medical treatment)* [1997] 2 FLR 426, (1997) 38 BMLR 175, CA, 24, 26, 27, 79, 226
- Re P (a minor)* (1982) 80 LGR 301, [1986] 1 FLR 272, 35, 101
- Re R (adult: medical treatment)* (1996) 31 BMLR 127, 277
- Re S (adult: refusal of medical treatment)* [1992] 4 All ER 671, (1992) 9 BMLR 69, 79

Cambridge University Press

978-0-521-61624-9 - The Troubled Pregnancy: Legal Wrongs and Rights in Reproduction

J. K. Mason

Frontmatter

[More information](#)

## Table of cases

xxi

- Re S (adult patient: sterilisation)* [2001] Fam 15, sub nom *Re SL (adult patient) (medical treatment)* (2000) 55 BMLR 105, 249
- Re SG (adult mental patient: abortion)* [1991] 2 FLR 329, sub nom *Re SG (a patient)* (1992) 6 BMLR 95, 27
- Re SS (an adult: medical treatment)* [2002] 1 FLR 445, 27
- Re T (adult) (refusal of treatment)* [1992] 4 All ER 649 at 652–3, (1992) 9 BMLR 46, 24
- Re T (a minor) (wardship: medical treatment)* [1997] 1 All ER 906, (1996) 35 BMLR 63, 264–6, 283
- Re Wyatt* [2006] EWHC 319, [2006] 2 FLR 111, 281
- Re Wyatt (a child) (medical treatment: parents' consent)* (2004) 84 BMLR 206, 245, 247, 252, 259, 273–81, 282
- Re Wyatt (a child) (medical treatment: continuation of order)* (2005) 86 BMLR 173, CA, 247, 251, 263, 275, 277, 278, 279
- Rees v. Darlington Memorial NHS Trust* [2003] QB 20, (2002) 65 BMLR 115, CA, 137, 158, 161, 162, 163, 175, 180, 185, 186
- Rees v. Darlington Memorial NHS Trust* [2004] AC 309, [2003] 4 All ER 987, 77, 118, 121, 124, 135, 140, 155, 158, 166–82, 186, 298, 302
- Richardson v. LRC Products Ltd* (2001) 59 BMLR 185, [2000] Lloyd's Rep Med 280, 2, 4, 84, 105, 142–3
- Robinson v. Salford Health Authority* [1992] 3 Med LR 270, 153
- S v. Distillers Co. (Biochemicals) Ltd* [1969] 3 All ER 1142, [1970] 1 WLR 114, 210
- Salith v. Enfield Health Authority* [1990] 1 Med LR 333, [1991] 3 All ER 400, (1991) 7 BMLR 1, 83, 90, 95, 111
- Scuriaga v. Powell* [1979] 123 SJ 406, 39, 105
- Sidaway v. Board of Governors Bethlem Royal Hospital and the Maudsley Hospital* [1984] QB 493, [1984] 1 All ER 1018, CA, 67; affd [1985] AC 871, [1985] 1 All ER 643, HL, 68, 69, 70, 148
- Simms v. Simms, A v. A*, [2003] 1 All ER 669, (2003) 71 BMLR 61, 291
- St George's Healthcare NHS Trust v. S.* [1998] 3 All ER 673, (1998) 44 BMLR 160, CA, 24, 26, 27, 79
- Stobie v. Central Birmingham Health Authority* (1994) 22 BMLR 135, 100
- Surtees v. Kingston-upon-Thames Royal BC* [1991] 2 FLR 559, 159
- Tameside and Glossop Acute Services Trust v. CH (a patient)* [1996] 1 FLR 762, (1996) 31 BMLR 93, 79
- Taylor v. Shropshire Health Authority* [2000] Lloyd's Rep. Med. 96, 95, 152–3
- Thake v. Maurice* [1986] 1 QB 644, [1986] 1 All ER 497, 2, 94, 102, 103, 104, 105, 109, 110, 115

Cambridge University Press

978-0-521-61624-9 - The Troubled Pregnancy: Legal Wrongs and Rights in Reproduction

J. K. Mason

Frontmatter

[More information](#)

xxii Table of cases

- Thomson v. James* (1997) 41 BMLR 144, CA, 197  
*Udale v. Bloomsbury Area Health Authority* [1983] 2 All ER 522, 89, 103, 108–10, 113, 117, 136  
*Venner v. North East Essex Area Health Authority* (1987) Times, 21 February, 104  
*W Healthcare NHS Trust v. KH* [2005] 1 WLR 834, CA, 228, 248, 251, 276, 277  
*Walkin v. South Manchester Health Authority* [1995] 4 All ER 132, (1995) 25 BMLR 108, 87, 93–4, 111  
*Whitehouse v. Jordan* [1981] 1 All ER 267, [1981] 1 WLR 246, HL, 160  
*Wilsher v. Essex Area Health Authority* [1988] AC 1074, [1988] 1 All ER 871, HL, 13  
*Wisniewski v. Central Manchester Health Authority* [1998] Lloyd's Rep Med 223, 11  
*Worster v. City and Hackney Health Authority* (1987) Times, 2 June, 103  
*Wyatt v. Curtis* [2003] EWCA Civ 1779, 72, 247  
*Wyatt v. Portsmouth NHS Trust and Wyatt (by her guardian)* [2005] EWHC 693, [2005] 2 FLR 480, 275

**United States**

- Akron (City of) v. Akron Center for Reproductive Health* 462 US 416 (1983), 20  
*Albala v. City of New York* 420 NE 2d 786 (1981, N.Y.), 197  
*Amadio v. Levin* 501 A 2d 1085 (Pa., 1985), 42, 230  
*Ashe v. Radiation Oncology Assocs.* 9 SW 3d 119 (Tenn., 1999), 74  
*Atlanta Obstetrics and Gynecology Group v. Abelson* 398 S.E. 2d 557 (Ga., 1990), 82  
*Azzolino v. Dingfelder* 337 SE 2d 528 (NC, 1985), 82, 193  
*Baby K, Re* 832 F Supp 1022 (FD Va., 1993), aff'd 16 F 3d 590 (4th Circuit, 1994), 2660  
*Bader v. Johnson* 732 NE 2d 1212 (Ind., 2000), 7  
*Becker v. Schwartz* 386 NE 2d 807 (NY, 1978), 80, 82, 192, 193, 217  
*Burke v. Rivo* 551 NE 2d 1 (Mass., 1990), 107  
*Berman v. Allan* 404 A 2d 8 (NJ, 1979), 193, 194, 202, 203  
*Blake v. Cruz* 698 P 2d 315 (Idaho, 1984), 193  
*Bruggeman v. Schimke* 718 P 2d 635 (Kan. 1986), 193  
*BS, In re* 74 P 3d 285 (Ariz., 2003), 33  
*Canterbury v. Spence* 464 F 2d 772 (D.C., 1972), 69  
*Christensen v. Thornby* 255 NW 620 (Minn., 1934), 106  
*Cowe v. Forum Group, Inc* 575 NE 2d 630 (Ind., 1991), 193

Cambridge University Press

978-0-521-61624-9 - The Troubled Pregnancy: Legal Wrongs and Rights in Reproduction

J. K. Mason

Frontmatter

[More information](#)

## Table of cases

xxiii

- Curlender v. Bio-Science Laboratories* (1980) 165 Cal Rptr 477, 194–5, 196, 200
- Custodio v. Bauer* 251 Cal App 2d 303 (1962), 107
- Dehn v. Edgcombe* 865 A 2d 603 (Md., 2003), 104
- Dumer v. St Michael's Hospital* 233 NW 2d 372 (Wis., 1975), 193
- Ellis v. Sherman* 515 A 2d 1327 (Pa., 1986), 193
- Emerson v. Magendantz* 689 A 2d 409 (RI, 1997), 156
- Enright v. Eli Lilly & Co* 570 NE 2d 198 (N.Y., 1991), 199
- Estate of Amos v. Vanderbilt University* 62 SW 3rd 133 (Tenn., 2001), 198
- Fassoulas v. Ramey* 450 So 2d 822 (Fla., 1984), 156
- Flanagan v. Williams* 623 NE 2D (Ohio, 1993), 193
- Garrison v. Medical Center of Delaware, Inc.* 581 A 2d 288 (Del., 1990), 193
- Girdley v. Coats* (1991) Mo. App. Lexis 1065, 107
- Gleitman v. Cosgrove*, 296 NYS 2d 687 (1967), 191–2, 194, 202–3
- Greco v. US* 893 P 2d 345 (Nev., 1995), 7, 193
- Griswold v. Connecticut* (1965) 381 US 479, (1965) 85 S Ct 1678, 35
- Grubbs v. Barbourville Family Health Center* 120 SW 3d 682 (Ky., 2003), 81, 193
- Harbeson v. Parke-Davis, Inc.* 656 P 2d 483 (Wash. 1983), 201–2, 203, 239
- Hegyves v. Unjian Enterprises, Inc.* (1991) 234 Cal App 3d 1103, 197–8, 200
- Hester v. Dwivedi* 733 NE 2d 1161 (Ohio, 2000), 193
- Hickman v. Group Health Plan Inc.* 369 NW 2d 10 (Minn., 1986), 81
- Janes G v. Casserta* 332 SE 2d 872 (W. Va., 1985), 193
- Johnson v. University Hospitals of Cleveland* 540 NE 2d 1370 (Ohio, 1989), 107
- Kassama v. Magat* 792 A 2d 1102 (Md., 2002), 189, 192, 193
- Kush v. Lloyd* 616 So 2d 415 (Fla., 1992), 193
- Lazevnick v. General Hospital of Munro County, Inc.* 499 F Supp 146 (Md., 1980), 199
- Lininger v. Eisenbaum* 764 P 2d 1202 (Colo., 1988), 8, 193
- McKenney ex rel McKenny* 771 A 2d 1153 (NJ., 2001), 81
- Michelman v. Ehrlich* 709 A 2d 281 (NJ, 1998), 202, 203
- Molly v. Meier* 679 NW 2d 711 (Minn., 2004), 81
- Moscatello v. University of Medicine and Dentistry of New Jersey* 776 A 2d 847 (NJ, 2001), 203
- Nelson v. Krusen* 678 SW 2d 918 (Tex., 1984), 193

Cambridge University Press

978-0-521-61624-9 - The Troubled Pregnancy: Legal Wrongs and Rights in Reproduction

J. K. Mason

Frontmatter

[More information](#)

xxiv Table of cases

- Noccash v. Burger* 290 2d 825 (Va., 1982), 82  
*Ochs v. Borelli* 445 A 2d 883 (Conn., 1982), 107, 109  
*Planned Parenthood of Southeastern Pennsylvania v. Casey* 112 S Ct 2791 (1992), 33  
*Procanik v. Cillo* 543 A 2d 985 (NJ, 1988), 202–4, 226  
*Renslow v. Mennonite Hospital* 367 NE 2d 1250 (Ill., 1977), 197, 198, 199  
*Roe v. Wade* 410 US 113 (1973), 98 S Ct 705 (1973), 19, 21, 23, 192, 194, 203  
*Santana v. Zilog, Inc.* (1996) 95 F 3d 780, 42  
*Scheidler v. National Organization for Women, Inc.* 537 US 393 (2003), 14  
*Schirmer v. Mt. Auburn Obstetrics and Gynecologic Associates, Inc.* 802 NE 2d 723 (Ohio, 2003), 65, 81  
*Schloss v. The Miriam Hospital* 1999 RI Super LEXIS 116, 202  
*Schroeder v. Perkel* 87 NJ 53 (1981), 203  
*Sherlock v. Stillwater Clinic* 260 NW 3d 169 (Min., 1977), 94, 107, 111  
*Siemieniec v. Lutheran General Hospital* 512 NE 2d 691 (Ill., 1987), 81, 193  
*Smith v. Cote* 513A2d 341 (NH, 1986), 193  
*Speck v. Finegold* 408 A 2d 496 (Pa., 1979), 201  
*Stenberg v. Carhart* 530 US 914 (2000), 23  
*Strohmaier v. Associates in Obstetrics and Gynecology* 332 NW 2d 432 (Mich., 1982), 193  
*Superintendent of Belchertown State School v. Saikewicz* 370 NE 2d 417 (Mass., 1978), 248  
*Terrel v. Garcia* 496 SW 2d 124 (Tx., 1973), 107  
*Turpin v. Sortini* (1982) 31 Cal 3d 220, 5, 194, 195–6, 199–201, 202  
*Vicarro v. Milunsky* 551 NE 2d 8 (Mass., 1990), 8  
*Walker by Pizano v. Mart* 790 P 2d 735 (Ariz., 1990), 189, 193  
*Willis: Elliott v. Brown* 361 So 2d 546 (Ala., 1978), 193  
*Willis v. Wu* 607 SE 2d 63 (S.C., 2004), 193  
*Wilson v. Kuenzi* 751 SW 2d 741 (Mo., 1988), 81, 193  
*Wood v. University of Utah Med Ctr* 67 P 3d 436 (Utah, 2002), 81  
*Yeager v. Bloomington Obstetrics and Gynecology Inc* 585 NE 2d 696 (Ind., 1992), 199  
*Zepeda v. Zepeda* 190 NE 2d 849 (Ill., 1963), 7, 190, 217  
*Zehr v. Haugen* 871 P 2d 1006 (Ore., 1994), 107

Cambridge University Press

978-0-521-61624-9 - The Troubled Pregnancy: Legal Wrongs and Rights in Reproduction

J. K. Mason

Frontmatter

[More information](#)

## Table of statutes

---

### Australia

Child Support (Assessment) Act (Cth.)

ss.3, 4, 24, 131

Civil Liabilities Act 1936 (SA)

s.67, 141

Civil Liability Act 2002 (NSW)

s.71(1), 141

s.71(2), 141

Civil Liability Act 2003 (Qd)

s.49A, 141

### New Zealand

Accident Compensation Act 1972, 118

Health and Disability Commissioner Act 1994, 41

Injury Prevention, Rehabilitation, and Compensation Act 2001, 41

### United Kingdom

Abortion Act 1967, 15, 21, 24–32, 53, 85, 208, 209

s.1(1)(a), 25, 26, 27–30, 53, 54, 80, 85, 87, 95, 97, 190, 299, 300

ss.1(1)(b) and (c), 25, 26, 54, 207, 209

s.1(1)(d), 54, 56, 57–8, 122, 154, 161, 258, 299, 300

s. 4, 29

s. 5(1), 20, 55

s.5(2), 29

Age of Legal Capacity (Scotland) Act 1991

s. 2(4), 33

Children Act 1989, text 199, 98, 106, 157

s. 1, 34

ss.2 and 3, 245

s.17(11), 159

s.31, 256



Cambridge University Press

978-0-521-61624-9 - The Troubled Pregnancy: Legal Wrongs and Rights in Reproduction

J. K. Mason

Frontmatter

[More information](#)

xxvi Table of statutes

- s.100, 246, 262
- s.100(3), 246, 264, 265
- Children (Scotland) Act
  - s.1, 115
- Children and Young Persons Act 1933
  - s.1, 256
- Children and Young Persons (Scotland) Act 1937
  - S.12, 256
- Concealment of Birth (Scotland) Act 1809, 242
- Congenital Disabilities (Civil Liability) Act 1976, 205, 210–13
  - s.1(1), 198, 200, 212
  - s.1(2)(b), 212
  - s.1A, 213, 224
  - s.4(4), 40
  - s.4(5), 212
- Consumer Protection Act 1987
  - s.3, 84, 142
- Criminal Law (Consolidation) (Scotland) Act 1995
  - s. 5, 32
- Family Law Reform Act 1969
  - s. 8, 32
- Family Law (Scotland) Act 1985
  - s.1(1)(c), 115
- Fatal Accidents Act 1976, 41
- Human Fertilisation and Embryology Act 1990, 103
  - s.5, 290
  - s.37, 24
  - s. 37(1), 25, 53
  - s. 37(4), 20, 53, 55
  - s.44, 213
- Human Rights Act 1998, 264, 271
  - Sch. 1, 47, 143, 249, 264, 272
- Infanticide Act 1938, 242
- Infant Life (Preservation) Act 1929, 20, 22, 28, 40
  - s.1, 53
  - s.1.1, 72
- Limitation Act 1980, 93
  - s.2. 93
  - s.11, 111
  - s.33, 94, 111



Cambridge University Press

978-0-521-61624-9 - The Troubled Pregnancy: Legal Wrongs and Rights in Reproduction

J. K. Mason

Frontmatter

[More information](#)

## Table of statutes

xxvii

Medical Act 1983, 290

Medical Termination of Pregnancy Bill, 15

Mental Capacity Act 2005

s.26, 248

Mental Health Act 1983, 186

Offences Against the Person Act 1837, 50

Offences Against the Person Act 1861, 29, 37, 50

s. 58, 29, 36

ss. 58 &amp; 59, 15

Sexual Offences Act 2003

s. 9, 32

Termination of Pregnancy (Jersey) Law, 29

**United States**

Partial-birth Abortion Ban Act 2003, 23

Unborn Victims of Violence Act 2004, 42

Women's Health and Human Life Protection Act 2006 (South Dakota),

30, 37

**Human Rights Conventions**

Convention on Human Rights and Biomedicine, 47

article 2, 48

European Convention of Human Rights, 34, 47–8, 51, 271

Article 2, 46, 143, 272

Article 8, 143,

United Nations Convention on the Rights of the Child, 46