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Ralph C. McCullough II
University of South Carolina School of Law

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SYMPOSIUM

TORTS AND THE UNBORN—THE RIGHTS OF PARENT AND CHILD

AN INTRODUCTION

RALPH C. McCULLOUGH, II*

“Acts of gross negligence in medical practice are perhaps more shocking to the public conscience than equally culpable acts in other professions, businesses, industries and walks of life.”¹ This observation is perhaps even more true in the areas covered in this issue: wrongful birth, wrongful life, wrongful pregnancy, and DES litigation. The lifetime of heartbreak, anguish, and expense for the victims and parents of these types of medical malpractice raises substantial emotional and economic issues that must be faced by today’s courts.

The rising incidence of litigation and subsequent confusion in this interface of medicine and the law can be traced to several sources. Advances in the areas of genetic counseling and testing, sterilization, prenatal diagnosis and treatment of fetal defects, and neonatal care are being made at breakneck speed. As more information becomes available, the failure of the physician to remain apprised of and utilize these advances increases the possibility of liability. New methods and discoveries have made it easier to meet the burden of proof of causation—the most difficult hurdle to clear in any type of medical malpractice claim. This technology, however, has also created some problems. As noted in this symposium, “the issue of when a fetus is to be considered viable is quite unresolved and new discoveries only seem to muddy the waters more.”²

* Professor of Law, University of South Carolina School of Law. B.A. 1962, Erskine College; J.D. 1965, Tulane University.

1. D. LOUISELL & H. WILLIAMS, *MEDICAL MALPRACTICE* 3 (2d ed. 1981).

2. Note, *Recovery for the Tortious Death of the Unborn*, 33 S.C.L. REV. 797, 807 (1982).

Another major consideration contributing to the state of the law in this area is the controversy raised by the constitutional issues addressed in *Roe v. Wade*. Viability, the privacy rights of the mother vis-a-vis the unborn child, and equal protection problems raised in *Roe* must be squared with the issues presented in wrongful birth and wrongful pregnancy claims. Whether it is better not to be born than to be born burdened with physical or mental defects is a difficult question for the courts to decide. A deeply held belief in the inherent good in simply being alive must be measured against the embarrassment, expense, and emotional trauma for the congenitally defective child and its parents.

Spiraling health care and maintenance costs present a practical reason for bringing claims of this nature. A young woman facing extensive surgical and postoperative care for DES-induced cancer, the parents of a mentally retarded or physically handicapped child who needs a lifetime of institutional or private home maintenance, education, and medical attention, or the couple whose income potential or personal lifestyle led them to seek sterilization yet subsequently became parents will surely face a staggering and unplanned economic burden. Suing the physician or drug company responsible for their changed circumstances may offer the only hope for meeting monumental costs. Many are willing to take the gamble on litigating their claim out of sheer financial desperation.

Finally, changing social attitudes toward family life, the choice to remain childless, and the culpability of physicians for their malpractice have had a great impact on this area. Families with a congenitally defective child are no longer willing to suppress their anger and anguish and accept their circumstances as fate upon learning that their grief may have been avoidable. The right to remain childless has also become widely accepted and having this desire thwarted, despite the high value placed on having children, may come to be seen as compensable.

The courts need to be guided in deciding the questions presented by these types of claims. It is incumbent upon the legal profession to guide the course of litigation in this area through carefully chosen and prepared claims in order to define clearly the interests of both child and parent that need to be protected. The articles in this volume present a solid framework for the practitioner to use in evaluating a possible claim. Force-

ful and thoughtful advocacy is needed to bring the rights of both parent and child in these regrettable situations clearly into focus and favor with the courts.

