

BOOK REVIEW

THE TROUBLED PREGNANCY: LEGAL WRONGS AND RIGHTS IN REPRODUCTION

By J.K. Mason

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This book is published as part of a series on Law, Medicine and Ethics. As the title suggests it is concerned with a number of medico-legal issues arising out of complicated pregnancies. The focus is on those pregnancies that are unwanted, or that end with the unwanted consequence of a disabled child. The core issues are the legal suits of wrongful pregnancy, wrongful birth and wrongful life. However, Professor Mason also considers the issues of abortion and the management of the seriously disabled neonate.

The book is divided into eight chapters. Excluding the introduction and the conclusion the six substantive chapters may all be read as stand alone essays. This is perhaps unsurprising given the genesis of the book in an earlier series of articles written by Professor Mason on wrongful pregnancy, wrongful birth and wrongful life. While these chapters may be read in isolation they also fit together into a coherent whole. However, the origin of the book is perhaps also reflected in the absence of any central thesis. Rather than being a progressively argued defence of a single thesis, it is a cogent and insightful analysis of the law's approach set against the backdrop of a number of reasonable beliefs about how the law ought to be.

These guiding beliefs are: that the fetus has interests, and possibly rights, that should be protected against the actions of third parties (i.e. those other than the mother); that the negligently caused birth of an unplanned child should be compensated; that wrongful birth is legally distinguishable from wrongful pregnancy on the grounds that there is greater proximity in the case of wrongful birth; and that in providing compensation for the birth of a disabled child, whether to the parents or the child, one is not devaluing the disabled but merely recognising that the defendant's negligence has resulted in a financial detriment that should be remedied.

In the introductory chapter, Professor Mason explains what he means by the 'troubled pregnancy'. He also considers the categorisation and terminology of the different claims. Thus, he explains the distinction between the parental claims of wrongful pregnancy and wrongful birth and sensibly rejects the term 'wrongful conception', which tends to be used synonymously with wrongful pregnancy. The latter term, however, better expresses the wrong done, which is to negligently cause the woman to become pregnant as a consequence of, for example, a negligent sterilisation. Wrongful birth, on the other hand, is where the doctor negligently fails to alert the pregnant woman to the risk that the child will be disabled. In this case the pregnancy is wanted but the birth of a disabled child is not. Wrongful life claims are the parallel claims brought by the disabled child born as a consequence of the doctor's negligence. Here Professor Mason helpfully explains the problems that such a loaded label has for the

success of such claims and, in chapter six, he subsequently argues that it would be better to refer to the claims as for 'diminished' rather than 'wrongful' life.

The introductory chapter ends with a brief overview of medical negligence. If this book were aimed solely at lawyers such a discussion would be unnecessary. However, given that the book will be of interest to ethicists and to healthcare professionals the short discussion is a helpful inclusion. It may also prove useful as a refresher for law students reading the book.

In chapter two, Professor Mason discusses the issues of fetal status and abortion. His starting point is to acknowledge the strength of the Catholic position that life begins at fertilisation. However, he acknowledges that this may lead to intuitively unacceptable conclusions about the status of the *in vitro* fetus and he instead asserts that morally 'meaningful life' begins at implantation. In adopting this position he summarily rejects the moral personhood argument because it provides an 'invitation to infanticide'. Having set out his beliefs regarding fetal status, Professor Mason goes on to consider the relevance of viability, which he notes is a key stage in the acceptability of abortion, albeit one reliant on policy rather than morality. The remainder of the chapter examines the legal regulation of abortion, including a discussion of where the termination of pregnancy is involuntary. It is this latter part of the chapter that is the most useful and Professor Mason considers some very important issues regarding the protection provided to the fetus. The initial consideration of fetal status, while it clarifies Professor Mason's beliefs, is unsatisfying as a discussion of the moral status of the fetus. It is better seen as the author setting out his store rather than as an engagement with the philosophical issue.

In chapter three, Professor Mason engages with the issue of wrongful birth, which is part of the core focus of the book. The chapter begins with a helpful analysis of late termination of pregnancy for reasons of fetal handicap. He then goes on to provide a brief overview of the causes of fetal abnormality and the principles of antenatal care. This is a useful diversion for the non-medical readers and helps to provide a context for the subsequent discussion of wrongful birth. This section of the chapter ends with an analysis of the negligent failure to disclose the requisite information. Again, this will be useful to the non-lawyer and student readers and it helpfully connects the role of antenatal counselling to the wrongful birth action. The final section of the chapter provides a cogent analysis of the wrongful birth cases. The focus is mostly on the UK, but Professor Mason also provides a short summary of the US and Commonwealth jurisprudence.

Chapters four and five examine the wrongful pregnancy cases. Chapter four focuses on the classic scenario of the healthy child while chapter five explores the relevance of disability. Professor Mason provides a brief summary of the US and Canadian cases before looking at the UK jurisprudence with the analysis appropriately focused on the leading House of Lords case of *McFarlane v Tayside Health Board* [2000] 2 AC 59. While Professor Mason underplays the relevance of distributive justice, his analysis is insightful and, coupled with the subsequent comparison of the High Court of Australian case of *Cattanach v Melchior* (2003) 199 ALR 131, provides a cogent criticism of their Lordships' rejection of the McFarlanes' claim.

In chapter five Professor Mason examines the cases that followed *McFarlane* but sought to distinguish that decision on the basis that either the child or the mother was disabled. He provides a valuable analysis of the Court of Appeal case of *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266, which

concerned the case of wrongful pregnancy where the child was born with a disability. Professor Mason then discusses both the Court of Appeal and House of Lords hearings of *Rees v Darlington Memorial NHS Trust*, which concerned the birth of healthy child to a disabled mother. These analyses, which reflect Professor Mason's view that the parents in these cases should be able to recover damages, are insightful and well argued. The discussion is comprehensive enough for the non-expert but sufficiently thought provoking to be valuable to those already familiar with the cases.

In chapter six, Professor Mason tackles the controversial area of wrongful life claims. Again his approach is from a position that is sympathetic to allowing the child to recover damages to meet the financial costs consequential to the child's disability. In this regard he is forceful in his rejection of the idea that wrongful life claims devalue the disabled. As noted earlier, he makes the reasonable suggestion that the claim is really for diminished, rather than wrongful, life. In other words, the child is seeking compensation for the effects of the disability rather than for the fact of his or her existence. Again, the analysis is insightful and provides an invaluable discussion of the approach of the courts in Europe, as well as those in Australia, Canada and the US.

In chapter seven, the final substantive chapter, Professor Mason considers the emotional area of the management of the disabled neonate (and infant). One may reasonably ask why this topic is included in a book on the 'troubled pregnancy' but Professor Mason justifies its presence on the basis of Hale LJ's approach in *Parkinson*, when she noted that the end of pregnancy does not signal the end of the effect on the mother's autonomy. Professor Mason strengthens the relevance of the chapter by restricting its focus to the disabled neonate whose disability was 'sown during fetal life'. However, its bearing on the core focus of the book (wrongful life, wrongful birth and wrongful pregnancy) is a little tenuous and its relevance to the rest of the book is not entirely clear. This impression is cemented by the fact that the conclusion to the book refers to all the other matters discussed but makes no reference to the management of the disabled infant. This is unfortunate because the discussion might have been made more relevant by considering whether the approach in these cases is consistent with the UK courts' attitude to wrongful life claims. Nevertheless, while the chapter does not fit well with the rest of the book it provides an interesting and valuable analysis of the case law that will be a useful resource for those interested in the management of the disabled neonate.

Overall, this book is a cogent and insightful analysis of the 'troubled pregnancy'. As one would expect, it is well written and is a pleasure to read. It should appeal to a variety of readers including lawyers, ethicists and healthcare professionals. It should also appeal to both students and qualified academics. My only criticisms of the book are that the discussion of fetal status was frustratingly unsatisfying and that the final chapter on the management of the disabled neonate seems like an unnecessary distraction from the central issues. Nevertheless, I would strongly recommend this book to anyone interested in the legal regulation of the management of the 'troubled pregnancy'.

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