

ABORTION MALPRACTICE: EXPLORING THE SAFETY OF LEGAL ABORTION

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"Prolife, your name's a lie,
you don't care if women die."
- Chant of Abortion Rights Activistsⁱⁱ

Implicit in the chant of abortion rights activists is the argument that the legalization of abortion has converted what was once a terrifying dangerous experience at the hands of an unscrupulous amateur into a relatively risk-free medical procedure performed by caring physicians.ⁱⁱⁱ The success of this argument is evidenced by its inclusion in a dissenting opinion in *Webster v. Reproductive Health Services*.^{iv} Other commentators have carefully examined the argument that abortions were both numerous and dangerous prior to 1973, when the Supreme Court ruled that the states must permit abortions if necessary to preserve the health of the mother.^v These commentators discovered that the numbers of pre-1973 deaths most often used by abortion rights activists are not credible, and are not relied upon in serious discussions, even by those who use them in political rhetoric.^{vi}

Part I of this article explores the second half of the abortion activists' argument; that legal abortions are relatively risk-free medical procedures performed by caring physicians. This contention is brought into question by newspaper accounts of abortion providers allegedly providing substandard medical care to women. The 1978 *Chicago Sun-Times* investigative series entitled "The Abortion Profiteers" is an example of such reports. Reported cases of abortion malpractice provide some evidence of the practices

reported in the newspaper accounts.

Abortion is the most common surgical procedure performed in the United States by providers that remain virtually unregulated.^{vii} Even in the jurisdictions that appear to have laws that would mandate meaningful regulation, regulatory agencies have been slow to intervene. This is due in part to lack of funding and personnel,^{viii} in part to lack of political will,^{ix} and in part to the procedural protections afforded anyone determined to have violated the state regulatory scheme.^x

In attempts to limit abortion providers' ability to profit from the taking of human life (both mother and child), Part II of this article suggests that medical malpractice may provide a meaningful supplement to regulation. Various legal theories that allow women to recover from the injuries received at the hands of the abortionist will be described, as well as the defenses most often employed by abortion providers. Particular litigation strategies and trial tactics of abortionists will be outlined, as well as the effects of these tactics upon women who sue.

Part III of this article will briefly suggest areas where research is needed in order to insure that women who are injured by abortions recover for those injuries. Scholars involved with University Faculty for Life can provide valuable assistance to the efforts of lawyers seeking to protect both mother and child from those who profit from abortions.^{xi}

I. INJURIES FROM LEGAL ABORTIONS

Sometimes spoken and sometimes not,^{xii} the initial premise of almost all advocates of abortion rights is that legalization of abortions results in safer medical procedures. Government statistics maintained by federal centers for disease control and prevention

seemingly support this assumption.^{xiii} Yet even some government officials question the validity of those statistics in light of the manner in which the information is gathered. The statistics reflecting deaths caused by abortion are compiled from death certificates issued by each state. Because those certificates are based upon the doctor's characterization of the cause of death, it is the individual provider who determines whether a death would be characterized as caused by abortion or some other medical procedure or complication.

The leading factors in death to due [sic] legal abortion include complications of anesthesia, hemorrhaging, infection, and amniotic embolism. Deaths from complications of anesthesia are sometimes deleted from mortality statistics, though common sense would say that the deaths were due to the abortion procedure if, but for undergoing the abortion, the woman would have lived.^{xiv}

Both public officials and private physicians have been accused of deliberately altering medical records in order to avoid evidencing a causal connection between abortion and physical injuries or death.^{xv} Challenges to the reporting system have motivated a group of women Republican state lawmakers to create a "Contract with American Women" requiring the creation of a new federal abortion surveillance agency.^{xvi}

These challenges often arise after public reports of misconduct or incompetence on the part of abortion providers. The 1978 *Chicago Sun-Times* series of newspaper articles is an example of reports motivating attempts to regulate abortion providers.^{xvii}

1978 INVESTIGATIVE FINDINGS

On November 12, 1978, the *Chicago Sun-Times* began a series of in-depth articles reporting the results of a five-month investigation into what the paper characterized as "Chicago's thriving abortion

business."^{xviii} During the investigation, reporters and investigators worked in six clinics. The clinics were selected, in part, because they provided the greatest number of abortions in the area. Collectively the six clinics performed more than half of the 60,000 abortions provided in Illinois the previous year.^{xix} "In four of those clinics women's reproductive lives — indeed, their very lives — were endangered every day."^{xx} Abuses reported after the investigation included: 1) abortive procedures performed on women who were not pregnant^{xxi}; 2) abortions performed by incompetent or unqualified individuals^{xxii}; 3) abortions performed without anesthetic, or prior to anesthetic taking effect^{xxiii}; and 4) routine postoperative pathology reports ignored or not ordered. These practices resulted in women suffering post-operative infections and complications, including death in at least two cases.^{xxiv}

In addition to injuries suffered during abortions, it was reported that at least one abortionist refused to provide post-operative care for injuries suffered during the abortion, absent additional payment. The paper reports that one clinic offered discounts for abortions performed on Wednesdays. Instead of the usual \$125.00, the clinic charged \$110.00. However, based upon the experience of one patient, if a Wednesday abortion proved to be incomplete, the patient was required to pay an additional \$25.00 in order to obtain follow-up treatment. If unable to make the additional payment, the patient would be told to leave the clinic without treatment. If she refused, the police were called to escort the "trespasser" away.^{xxv}

Races to see who could perform the most abortions on a given day were reported. Not only did victory convey "bragging rights" as to speed and surgical prowess, but rapid abortions assured increased compensation since each doctor was paid according to the number of

abortions performed.^{xxvi}

Other decisions reportedly driven by the economics of abortion practice include actions ranging from the seemingly petty, like the directive that recuperating patients not be allowed to have more than three cookies (in order to reduce clinic "cookie" expenses), to the far more ominous, such as the following statements reported from a staff meeting: "We have to sell abortions. We have to use all of the tactics we can because, just like my other business, we have competition. Now, we have to go by the rules, but rules have to be broken if we are gonna get things done."^{xxvii}

RECENT REPORTS OF ABORTION-RELATED INJURIES

In addition to the *Chicago Sun-Times* exposé, several cases of women injured by abortionists have received public attention.^{xxviii} In California, Dr. Leo Kenneally was suspended from the practice of medicine in 1995 after a five-year court battle over charges resulting from the death of three patients.^{xxix}

Also in the news were stories about Dr. Thomas Tucker, who was found guilty of 32 counts involving falsified paper work and faulty procedures in his abortion clinics in Jackson, Mississippi.^{xxx} Just the year before, local papers had published articles featuring Dr. Tucker's practice. These stories quoted Dr. Tucker's explanation of his choice to perform abortions. "It started out as a financial thing, but I got heavy into the [abortion rights] movement and realized there was a lot of need for physicians."^{xxxi}

More recently the case of Dr. David Benjamin received national attention when New York district attorneys persuaded a jury to convict Dr. Benjamin of second degree murder in the 1993 death of his patient after he attempted to perform a late-term abortion. At the time

of the patient's death, Dr. Benjamin's medical license had been revoked, but he was allowed to practice while he appealed the board's decision.^{xxxii}

As a final example, Dr. Steven Brigham agreed to provide abortions in Florida after the murder of Dr. Britton. His hero status among abortion rights advocates was tarnished, however, by reports that he was under investigation for medical misconduct in five states.^{xxxiii} Most recently Florida authorities suspended Dr. Brigham's medical license.^{xxxiv}

II. MALPRACTICE CLAIMS FOR ABORTION-RELATED INJURIES

In *Roe v. Wade* the United States Supreme Court ruled that the U.S. Constitution limited the ability of states to intervene in the private decision-making of a woman and her doctor in deciding whether to terminate a pregnancy.^{xxxv} Until *Planned Parenthood v. Casey*,^{xxxvi} the Court continually expanded this holding until it seemed that any regulation of abortion was invalid, even when an extensive record of misconduct by abortion providers existed, and the legislation was primarily designed to insure the physical safety of the mother. With *Casey*, the Court upheld Pennsylvania statutes that required abortion providers to give women specific information concerning the procedure at least 24-hours prior to the abortion.^{xxxvii} This change in the Court's position on regulations governing abortion providers foretells increased regulation of clinics and abortionists.

Yet the mere existence of regulations is not enough. Several actions reported in the *Chicago Sun-Times* violated state and local regulations that were in effect at the time.^{xxxviii} Yet subsequent events have revealed the inability of regulators to respond swiftly to the deceptive practices and threats to women's health reported in the exposé. In order for regulation to be effective, there

have to be both the political will and the necessary government resources to enforce the law. Regulators argue that they rarely receive the support necessary to police this politically volatile industry.^{xxxix}

Medical malpractice claims by women who are injured during an abortion provide a mechanism supplementary to regulation. By recognizing and compensating women injured by abortion, courts require those who profit from the argument that abortion is simply another elective surgery to meet the standards that other providers of surgical procedures must meet. Abortion malpractice suits also reveal the economic motivation of many abortion providers, and the duplicity of those who seek to characterize all abortion providers as defenders of women's rights.^{xi}

CLAIMS THAT MAY ARISE FROM ABORTION MALPRACTICE

Women injured by abortion providers may seek compensation for those injuries through filing malpractice suits. The particular claims that may be asserted in such cases include negligence, failure to obtain informed consent to the abortion, battery, infliction of emotional distress, fraud or negligent misrepresentation, breach of contract, deceptive trade practices, and any statutory claims that may be created by state statutes. Each of these claims (or "causes of action") require the woman to establish specific acts of misconduct by the abortion providers, and that those acts were the legal cause ("proximate cause") of the injuries she seeks compensation for.

Negligence. In order to prevail on a claim of negligence the woman must establish four things: 1) the abortion provider owed her a duty to conform to a certain standard of conduct; 2) the provider failed to conform to

the standard of conduct; 3) the failure was both the factual and legal cause of the woman's injuries; and 4) the injuries were of the type and extent that the law requires compensation for.^{xii} Failure to establish any one of these elements is fatal to the woman's claim.

In seeking to establish the first element, the woman rarely has to worry about whether the doctor owed her a duty. The law has long recognized that doctors owe patients a general duty to treat them in accordance with the standards observed by other doctors in good standing in the medical community.^{xiii} However, when the woman sues the clinic or hospital in addition to the doctor, the existence of a duty can be a hotly disputed point. The clinic or hospital may claim that the doctor is an "independent contractor"^{xiii} and that the clinic or hospital has no responsibility (and thus liability) for any actions of the doctor.

Separate from the question of whether a duty exists is the question of what the scope of that duty is. For example, while the agreement to provide an abortion creates a general duty to use all reasonable means to achieve that end, does it include a requirement that the abortionist forward all fetal tissue to a pathologist or laboratory to determine if the abortion has been successful? Does failure to do so create liability for injuries the woman suffers from the incomplete abortion?^{xiv} This is an example of questions that arise in the context of satisfying the requirement that the woman show that the provider failed to meet the standard of care.

Expert testimony is usually required in order to establish what a reasonable doctor would do in the same or similar circumstances.^{xiv} The expert must be able to discuss what is required in order to perform an abortion which is safe for the woman. While any physician probably could testify as to the textbook

requirements of the abortion procedure, book knowledge is rarely sufficient to qualify. Instead most courts require a showing that the expert witness either has done extensive studies concerning the procedures as part of a scholarly endeavor, or that the doctor has actually performed abortions.^{xlvi} Absent such qualifications, the court will refuse to allow the doctor to testify on the grounds that he or she is not an expert. Since many prolife physicians have never performed an abortion, these doctors can not act as effective witnesses in abortion malpractice cases.

After the plaintiff has established that the defendants owed her a duty of care of a particular nature and scope, the woman must show that the provider failed to perform the duty. Often this is established through notations in the medical records, or the testimony of the provider or other witnesses to the abortion.

Next the woman must prove that the failure to perform the duty was the legal and factual cause of her injuries.^{xlvii} Proof of factual cause requires a showing that "but for" the action or inaction of the abortion providers, the woman would not have suffered the injuries. Proof of legal cause (also called "proximate cause") requires that the injuries be a foreseeable result of the provider's duty.^{xlviii}

Finally, the woman must prove that legally recognizable injuries resulted from the provider's negligence.^{xlix} Thus some courts have refused to recognize claims where the injuries complained of are the birth of a healthy child.^l

Lack of Informed Consent/Battery. Claims for lack of informed consent are based upon the right of patients to have sufficient information prior to agreeing to medical treatment.^{li}

[I]t is generally held that a physician who performs a diagnostic, therapeutic, or surgical procedure has a duty to disclose to a patient of sound mind, in the absence of an emergency that warrants immediate medical treatment, (1) the diagnosis, (2) the general nature of the contemplated procedure, (3) the material risks involved in the procedure, (4) the probability of success associated with the procedure, (5) the prognosis if the procedure is not carried out, and (6) the existence of any alternatives to the procedure.ⁱⁱⁱ

In cases involving minors or women determined to be legally incapable of consenting, it may be sufficient for the doctor to obtain the consent of the minor's parent or the guardian of the incapacitated woman.ⁱⁱⁱⁱ

The primary dispute in abortion malpractice cases alleging lack of informed consent is what constitutes "material risks" that the abortion provider must warn of. For example, in *Humes v. Clinton* the court rejected a claim asserting liability for failure to warn about the psychological risks abortion poses to some women.^{liv} In *Reynier v. Delta Women's Clinic, Inc.* the court suggested that a perforated uterus was a normal risk of an abortion that need not be discussed with the patient prior to performing the abortion.^{lv}

Establishing that the abortion provider failed to warn of a material risk is not sufficient, in and of itself, to create liability for failure to obtain informed consent. The woman also must establish that she would have foregone the abortion if she had known of the risk that in fact occurred.^{lvi}

If the woman succeeds in establishing that the abortion provider failed to obtain her informed consent, liability may be imposed under either a theory of battery or negligence.^{lvii} Battery is an intentional and unconsented to touching which is harmful or offensive.^{lviii} The older medical malpractice cases involving lack of informed consent treat the failure to inform as negating the consent given by the woman

who was ignorant of the risk.^{lix} More recent cases treat the failure to obtain informed consent as a failure to conform to the standard of care, essentially fulfilling the first two elements of a claim of negligence.^{lx}

Related to, but distinct from the duty to obtain informed consent, is a claim of negligent counseling. Often this claim is asserted when pre-abortion counseling is provided by someone other than a healthcare professional.^{lxi} Negligent counseling seeks to protect similar interests to those protected by the requirement of informed consent.^{lxii}

Infliction of Emotional Distress. Claims of emotional distress related to the women's experiences in pregnancy and childbirth have received mixed treatment by the courts.^{lxiii} This is particularly true where a woman seeks compensation for emotional distress suffered from an incomplete abortion.^{lxiv}

To be entitled to recovery for the negligent infliction of emotional distress, a plaintiff must prove three elements: (1) the plaintiff must have been in the zone of danger; (2) the plaintiff must have felt contemporaneous fear for his safety; and (3) the plaintiff must show some sign of physical injury or illness as a result of his emotional distress. The physical illness or injury requirement indicates a desire to permit compensation only in cases involving severe or serious emotional distress.^{lxv}

These requirements exist to protect against bogus claims, and limit liability for conduct that is not intended to, yet results in distress suffered by others. In order to establish the first and second elements, a woman must show that she felt distress from a threat to her physical

well-being. The third element of physical injury is required where the conduct causing the distress is merely negligent.^{lxvi} If the conduct causing the distress is outrageous, a growing number of jurisdictions do not require that the plaintiff show physical illness or injury resulting from the distress.^{lxvii}

Fraud, Deceit, or Negligent Misrepresentation. Actions for fraud or deceit require that the plaintiff show that: 1) the defendant made a false representation; 2) the defendant knew it was false at the time the representation was made; 3) the representation was made with the intention that the plaintiff would rely upon it; 4) the plaintiff justifiably relied upon it; and 5) the plaintiff was injured as a result of her reliance.^{lxviii} Fraud claims have enjoyed some success when asserted against abortion providers when the providers have made false statements that the woman was pregnant.^{lxix}

Liability for misrepresentation may also exist in cases where abortion providers conceal information necessary for women to maintain claims against them.^{lxx}

Breach of Contract. "A breach of contract claim arising out of the rendering of medical services will be held legally sufficient only when it is based on 'an express special promise to effect a cure or to accomplish some definite result.'"^{lxxi} Most consent forms used by abortion providers expressly disclaim any promise "to cure."^{lxxii} However, where evidence exists that the abortion provider expressly promised that the abortion was or would be successful, women may sue claiming that the abortionist has breached his or her contract.^{lxxiii}

Deceptive Trade Practices. Many states have enacted statutes that provide extensive protection against business practices designed to deceive consumers.

Whether these statutes apply to abortion providers has yet to be determined. At least one commentator has expressed reservations about the propriety of applying deceptive trade practices acts to medical professionals for anything other than intentional misconduct.^{lxxiv} This limitation would not preclude many claims that could be asserted by women injured by abortions. Clearly the reported practices of misrepresenting the results of pregnancy tests^{lxxv} or paying "commissions" to "counselors" for each abortion sold^{lxxvi} could be maintained under a deceptive trade practice act which limits liability for healthcare providers to intentional acts.

Alternatively, there is some ground for arguing that abortion clinics are not medical facilities for purposes of requiring that all claims be submitted to medical compensation funds or protection under special statutes of limitations.^{lxxvii} The existence of these cases suggests that abortion clinics may not be protected by any exemption limited to medical providers.

The advantage of pursuing a claim under such statutes is the availability of treble damages and attorneys' fees. In cases where the harmful conduct is properly characterized as a "business practice," this type of claim should be seriously considered.^{lxxviii}

Violations of State Statutes. In addition to the claims re-cognized at common law, states often have statutes that provide for enforcement by private parties. In the alternative criminal statutes may require restitution be made to victims.^{lxxix} Any statutory claims should not be overlooked.

DEFENSES AND TACTICS OF ABORTION PROVIDERS

Abortion providers rarely recognize liability for the injuries women suffer. Typically they contest every

element of the woman's claim. Additionally providers often assert defenses based upon the statute of limitations, waivers or releases contained within a consent form, and the "bad woman" defense.

Statute of Limitations. Statutes of limitations require plaintiffs to bring suit within a specified period of time. Failure to do so will allow the defendant to have the case dismissed.^{lxxx} Statutes of limitations protect potential defendants against false claims, as well as insure that evidence supporting any defense will still be available.^{lxxxi}

However, depending upon the nature of the injuries suffered due to the abortion, the woman may not even know that she has been injured until several years after the abortion. This is particularly true where the injury is sterility. Courts have recognized this problem in medical malpractice actions and have crafted three rules that allows the statutes of limitations to be suspended ("tolled"). In some jurisdictions, statutes of limitations do not begin to run during the existence of the physician and patient relationship. Others state place an affirmative duty on doctors to reveal any injuries to the patient. The third, and most common way courts avoid overly harsh application of a statute of limitation is to allow women to bring suit anytime within the statutory period after they reasonably should have discovered their injuries.^{lxxxii}

Waiver and Release. Even when women sue abortion providers within the statute of limitations, the abortionists often assert that the woman signed a document that waives any liability.^{lxxxiii} Blanket waivers and releases are frowned upon by the courts, and therefore a defense based upon too general a document stands little chance of success. However,

abortion providers often include detailed descriptions of potential complications in the consent to treatment. These are much more likely to preclude a woman succeeding in her claim.

Bad Woman Defense. While not constituting legal defenses (and often contrary to the rules of procedure and legal ethics), tactics such as wide-ranging inquiry into the woman's personal life and attacks upon her integrity, dissuade women from filing suit, or if a suit is filed, persuade them to settle for small amounts. This makes abortion malpractice cases less attractive to lawyers who often rely upon a contingent fee arrangement to insure payment for their services to clients who otherwise would be unable to afford the expenses of filing and prosecuting a medical malpractice claim.^{lxxxiv}

Separate from illicit attempts to coerce the plaintiff to dismiss or settle her claim through improper discovery are the attempts to introduce into the trial irrelevant information about the plaintiff's sexual habits or past abortions. Although experienced in cases involving issues other than abortion malpractice,^{lxxxv} commentators suggest that such tactics are common where the claim arises from a failed or unsafe abortion.

And, unfortunately, the tactics are all too effective.^{lxxxvi} There is a certain grim irony in "defenders of women's rights" using such tactics, yet until courts or legislatures effectively forbid such conduct, it will probably continue.

III. AREAS NEEDING ADDITIONAL RESEARCH

Several areas of research could be helpful as women and their lawyers seeking to hold abortion providers accountable for the injuries they inflict. Listed below are just a few:

- Recent reports of research establishing a causal connection between abortion and breast cancer is an example of the sort of information that can be very useful to a woman seeking compensation for abortion-related injuries. Any additional adverse physical effects that can be established must be warned of if abortion providers are to avoid liability for lack of informed consent.
- Trial lawyers need to know the extent and nature of insurance coverage carried by abortion providers, as well as the incidents of claims on the policies that exist, in order to maximize the settlements women receive.
- Identification and documentation of common business practices of abortion providers would assist women if they seek to assert claims under their state's deceptive trade practices act.
- A compilation of state agencies' policies in regulating abortion clinic would provide attorneys a starting point for determining whether the clinic or abortionist have violated any laws in the treatment of the woman injured by abortion.
- Research defining what counseling techniques should be used if a woman's consent to abortion is to be fully voluntary would assist in establishing negligent counseling claims.

CONCLUSION

Members of University Faculty for Life can play a significant role in the development of the law that will reduce abortions through holding abortion providers liable for the injuries they inflict upon women. Women and their lawyers must rely upon scholars and researchers to develop the empirical evidence that abortion hurts women, that the abortion industry should be highly regulated while abortion remains legal, and

ultimately, that there are solid pragmatic reasons legally to limit abortions to cases where the woman's life is at stake.

NOTES

i. This article benefits from the excellent research assistance I received from my student assistants, Christa Kerney and Kathryn Elias.

ii. Kim Cobb, "Abortion Demonstrators Swap Insults Outside Buffalo Clinics" in *Houston Chronicle*, Apr. 21, 1992 at 1, 1992 WL 8061039 HOUSTON CHRONICLE A NEWS. See also David Germain (Assoc. Press), "Clinics Open as Groups Begin Siege in Buffalo" in *Orange County (Cal.) Register*, Apr. 21, 1992 at A05, 1992 WL 6347823, and John F. Harris, "Both Sides of Abortion Debate Take Case to Fairfax Hospital" in *Wash. Post (Metro)*, May 14, 1989 at B03, 1989 WL 2055552.

iii. See Diane Curtis, "Doctored Rights: Menstrual Extraction, Self-Help Gynecological Care and the Law" in 20 *N.Y.U. Rev. L. & Soc. Change* 427, 428 (1993-1994): "The campaign for legal abortion has always been premised on the still largely unquestioned assumption that only legal abortions are safe abortions because they are performed by physicians, who are licensed (and therefore presumably skilled), rather than by the notorious 'back-alley abortionists' (who are presumably untrained and unskilled). For many people, to imagine abortions performed by nonphysicians is to conjure nightmares of bloody coat hangers, turpentine or lye ingestion, and other 'home remedies' leading to injury and even death." Susan R. Estrich and Kathleen M. Sullivan, "Abortion Politics: Writing for an Audience of One" in 138 *U. Pa. L. Rev.* 119, 154 (1989): "In the years before *Roe*, '[p]oor and minority women were virtually precluded from obtaining safe, legal procedures, the overwhelming majority of which were obtained by white women in the private hospital services on psychiatric indications.' Women without access to safe and legal abortions often had dangerous and illegal ones. According to one study, mishandled criminal abortions

were the leading cause of maternal deaths in the 1960s, and mortality rates for African-American women were as much as nine times the rate for white women." Rachael N. Pine and Sylvia A. Law, "Envisioning a Future for Reproductive Liberty: Strategies for Making the Rights Real" in 27 *Harv. C.R.-C.L. Rev.* 407, 463 (Symposium, 1992): "The fact-finding role of the trial court, Fed.R.Civ.P. 52(a), permits litigants to introduce evidence about, inter alia, the medical and psychological realities of pregnancy and childbirth, the psychological and socio-economic consequences of denial of legal abortion, the medical consequences of "back alley" abortions, and the disproportionately harsh impact of laws regulating abortion on low-income, young and rural women."

iv. "The result, as we know from experience, see Cates & Rochat, "Illegal Abortions in The United States: 1972-1974" in *Family Planning Perspectives* 86, 92 (1976), would be that every year hundred of thousands of women, in desperation, would defy the law, and place their health and safety in the unclean and unsympathetic hands of back-alley abortionists, or they would attempt to perform abortions upon themselves, with disastrous results." *Webster v. Reproductive Health Services*, 492 U.S. 490, 558 (1989), J. Blackmun, dissenting.

v. Brian W. Clowes, "The Role of Maternal Deaths in the Abortion Debate" in 13 *St. Louis U. Pub. L. Rev.* 327 (1993) and Clarke D. Forsythe, "The Effective Enforcement of Abortion Law Before *Roe v. Wade*" in *The Silent Subject: Reflections on the Unborn in American Culture*, ed. Brad Stetson (1996).

vi. *Ibid.*

vii. Informal regulation may occur through professional associations. "There is a split among NAF's [National Abortion Federation Legal Clearinghouse] members over what the group has done to ensure the quality of abortion services. CO [Colorado] abortion-provider Dr. Warren Hern, who helped write NAF's abortion-care standards, said that the group has become 'ornamental.' He added that NAF 'has never pursued a serious program of standards, implementation and program evaluation.' Hern explained that the bottom line is money: 'Following good standards costs money and people don't want to do that.' But WA [Washington] abortion-provider Dr. Suzanne Poppema, who heads

NAF's clinical guideline committee, said that Hern's charges are 'unfair': 'NAF is an educational membership organization that strives to maintain excellence in care through education.' He added that overall, abortion is 'one of the safest' surgeries in the U.S.: 'We just don't want to be singled out for regulations while other surgeries are not.' (AMN, 2/6)." "National Briefing Abortion Malpractice: Attempts to Put Providers Out of Work?" in 6 *Am. Pol. Network Abortion Rep.*, Feb. 7, 1995.

viii. See Pamela Zekman and Karen Koshner, "State to Act on Abortion Clinics" in *Chicago Sun-Times*, Nov. 13, 1978 at 3 and 11.

ix. See G. Robert Hillman, "License All Abortion-Clinic Counselors, Daley Asks" in *Chicago Sun-Times*, Nov. 15, 1978 at 60.

x. See *Rucker v. Wilson*, 475 F. Supp. 1164 (E.D. Mich., 1979) (doctor argues that delay in processing complaint requires dismissal of complaint under due process); *Tampa Bay & State, St. Petersburg Times* (FL.), Feb. 7, 1995, at 4B (abortionist vows to fight Florida suspension of license based upon suspension of license in other states due to medical negligence); and *Shkolnik v. Nyquist*, 59 A.D.2d 954, 399 N.Y.S.2d 482 (N.Y. App. Div. 1977) (physician appeals revocation of medical license despite showing that he fraudulently represented the association of an abortion clinic, which he ran, with Bellevue Hospital; maintained incomplete records; failed to submit accurate records of abortions; aborted patients who were more than 12 weeks pregnant; failed to examine a patient before performing an abortion; diagnosed pregnancy based upon a male's urine specimen, and practiced in inadequate facilities).

xi. *Okereke v. State*, 129 A.D.2d 373, 518 N.Y.S.2d 210 (N.Y. App. Div., 1987) (reviewing suspension of doctor based upon finding that he had engaged in (1) the fraudulent practice of medicine for having established the Erie Women's Center so that it might refer abortion patients to him in return for money; (2) unprofessional conduct for, inter alia, failing to timely file fetal death certificates; (3) for splitting fees illegally; and (4) for advertising the Erie Women's Center in a manner not in the public interest); and *Holtzman v. Samuel*, 130 Misc.2d. 976, 495 N.Y.S.2d. 583 (N.Y. Sup. Ct. 1985) (reviewing order permitting forfeiture of bank account containing proceeds from clinic that routinely advised women they were pregnant

regardless of the results of urine test for the purpose of inducing the women to agree to abortions). Cf. *Ragsdale v. Turnock*, 841 F.2d 1358 at 1391 (7th Cir. 1988) (Coffey, Circuit Judge, dissenting) (criticizing majority for disregarding the possibility that Dr. Ragsdale's motivation for challenging regulation of abortion clinics might be protection of his \$875,000 income from performing abortions). See also text accompanying nn. 56-57.

xii. E.g., "Keep Abortion Out of the Back Alley" (Editorial) in *St. Louis Post Dispatch*, Aug. 17, 1992 at 2B.

xiii. Joyce Price, "Statistics May be Misleading on Deaths Caused by Abortion" in *Washington Times* (D.C.), June 4, 1994 at A5.

xiv. Forsythe (see note 5 above).

xv. "Maryland's D.H.M.H. Secretary Sabitini's Credibility Questioned by Human Life International" in *P.R. Newswire*, Oct. 30, 1992 (challenging report indicating no deaths related to abortion in 1989; challengers pointed to the deaths of three women recorded in the press during the period covered by the government report) and *Hachamovitch v. State Bd. for Professional Medical Conduct*, 206 A.D.2d 637, 614 N.Y.S.2d 608 (N.Y. App. Div., 1994) (doctor disciplined for practicing medicine fraudulently by making entry in patient's office record that patient did not have bleeding following abortion procedure performed by physician).

xvi. "'Contract' Unveiled" in *Tulsa World*, Jan. 23, 1996 at D6 (Oklahoma State Representative Joan Greenwood identified the need for such contracts as "The Centers for Disease Control, which is presently charged with that task [abortion surveillance], makes biased reports that minimize the health risks of abortion").

xvii. *Thornburg v. Am. College of Obstetrics & Gynecologists*, 476 U.S. 747 (1986) and *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983). After the *Chicago Sun-Times* series, the Illinois legislature passed several statutes aimed at eliminating the abuses identified in the articles. Even with these reports, the legislation was overturned by the federal courts. *Charles v. Daley*, 749 F.2d 452 at 462-63 (7th Cir., 1984).

xviii. Pamela Zekman and Pamela Warrick, "The Abortion

Profiteers: Making a Killing in Michigan Ave. Clinics" in *Chicago Sun-Times*, Nov. 12, 1978 at 1.

xix. Ibid.

xx. Ibid.

xxi. "Men Who Profit from Women's Pain" in *Chicago Sun-Times*, Nov. 13, 1978. Subsequent reports of similar conduct include Beth Holland, "Abortion Doc Nailed: Unlicensed MD Arrested in Police Sting" in *Newsday*, Jan. 14, 1992 at 7. Use of undercover agents to determine abortion as compliance with state requirements is not unprecedented. See *Penn Cas. Co. v. Simopoulos, M.D., Ltd.*, 235 Va. 460, 369 S.E.2d 166 (1988). (Physician arrested while preparing to perform an abortion on policewoman who was not pregnant.)

xxii. "Men Who Profit from Women's Pain" in *Chicago Sun-Times*, Nov. 13, 1978 and "Women Take Chances with 'Tryout' Doctors" in *Chicago Sun-Times*, Nov. 14, 1978.

xxiii. Pamela Zekman and Pamela Warrick, "Dr. Ming Kow Hah: Physician of Pain" in *Chicago Sun-Times*, Nov. 15, 1978 at 1.

xxiv. Ibid. See also "Infamous Doctor is Detroit Connection" in *Chicago Sun-Times*, Nov. 21, 1978; Pamela Zekman and Karen Koshner, "Probe Michigan Ave. Abortion Clinic Death" in *Chicago Sun-Times*, Nov. 17, 1978 at 1 (reporting that the family of Sherry Emry had filed a \$5 million medical malpractice suit against Water Tower Reproductive Center); UPI Feb. 17, 1987 (reporting that Illinois state officials had charged one abortionist with gross malpractice as a result of Sylvia Moore's death from complications related to an abortion performed December 31, 1986); and Pamela Zekman and Pamela Warrick, "12 Dead After Abortions in State's Walk-In Clinics" in *Chicago Sun-Times*, Nov. 17, 1978 at 19 (reporting 11 deaths of patients other than Sherry Emry and Sylvia Moore). Subsequent claims against doctors included in the article include *Fowler v. Bickham*, 550 F.Supp. 71 (N.D. Ill., 1982) (case settled for \$15,000) and *Chicago Tribune*, Sept. 14, 1989 at 5 (sued for \$10 million by patient alleging a botched abortion).

xxv. Pamela Zekman and Pamela Warrick, "The Abortion

Profiteers: Making a Killing in Michigan Ave. Clinics" in *Chicago Sun-Times*, Nov. 12, 1978 at 6. There are other reports of the practice of demanding additional payment prior to performing a second abortion when the original operation was incomplete. See *Showery v. State*, 678 S.W.2d 103, 105 (Tex. Ct. App., 1984): ("The [still pregnant] complainant returned to Dr. Showery to complain of the results of his surgery. After indicating that he was not 'Sears' and didn't guarantee his work, he offered several explanations for her condition. He agreed to perform a second abortion and accepted \$300.00 in cash. The operation was performed on April 20.").

xxvi. Pamela Zekman and Pamela Warrick, "The Abortion Profiteers: Making a Killing in Michigan Ave. Clinics" in *Chicago Sun-Times*, Nov. 12, 1978 at 5, and Pamela Zekman and Pamela Warrick, "Dr. Ming Kow Hah: Physician of Pain" in *Chicago Sun-Times*, Nov. 15, 1978 at 1. It has been reported that Dr. Hah is no longer practicing medicine. Beth Holland, "Abortion Doc Nailed: Unlicensed MD Arrested in Police Sting" in *Newsday*, Jan. 14, 1992 at 7.

xxvii. Pamela Zekman and Pamela Warrick, "The Abortion Profiteers: Making a Killing in Michigan Ave. Clinics" in *Chicago Sun-Times*, Nov. 12, 1978 at 5.

xxviii. *Hachamovitch v. State Bd. Prof. Med. Conduct*, 206 A.D.2d 637, 614 N.Y.S.2d 608 (N.Y. App. Div., 1994) *leave to appeal denied*, 84 N.Y.2d 809, 645 N.E.2d 1218, 621 N.Y.S.2d 518 (1994) (doctor's license suspended for fraudulent entry upon medical chart relating to post-abortion bleeding); *Holtzman v. Samuel*, 130 Misc.2d 976, 495 N.Y.S.2d 583 (N.Y. Sup. Ct., 1985) (reviewing order permitting forfeiture of bank account containing proceeds from clinic that routinely advised women they were pregnant regardless of the results of urine test for the purpose of inducing women to agree to abortions); *Showrey v. State*, 678 S.W.2d 103 (Tex. Ct. App., 1984) ("[d]uring her testimony, the complainant testified that following the second abortion procedure she began to eject fetal parts, causing nightmares and extreme emotional distress. She testified that she reported this incident to her physician Dr. Turner Sharp, who eventually hospitalized her for one week for suicidal depression. Dr. Sharp testified that he referred

the complainant for psychiatric counseling due to suicidal depression but she never reported any discharge of fetal parts.")

xxix. Such charges are described in Virginia Ellis, "State Panel Accuses MD of Negligence in 3 Deaths" in *L.A. Times*, May 5, 1990 at 1. On May 25, 1995, the *L.A. Times* reported that Dr. Kenneally's license was revoked. (Douglas P. Shuit, "Doctor Tied to 2 Deaths Loses License" in *L.A. Times*, May 25, 1995 at 3).

xxx. "Mississippi Loses Abortion Clinics; Just One Left in State as Doctors Suspended" in *Cincinnati Post*, May 9, 1994 at 2A, 1994 WL 6837478.

xxxi. Jim Yardley, "Abortion Doctor Says It's the Cause, and the Cash, That Keeps Him Driving" in *Atlantic J. & Const.*, May 16, 1993 at A1. See also Steve Pokin, "At the Eye of the Abortion Storm Dr. Edward Allred Has Made a Fortune in Abortions" in *Press-Enterprise*, Nov. 8, 1992 at A01. ("In Allred's own eyes, he is simply a shrewd businessman who happened 25 years ago to start a medical practice just as abortion was made legal in California and as a better way of doing abortions became available.")

xxxii. Abraham Abramovsky, "Depraved Indifference in the Incompetent Doctor" in *N.Y.L.J.*, Nov. 8, 1995 at 3 (Col.1).

xxxiii. Ronald Smothers, "Abortion Doctor is Linked to Complaints in 5 States" in *N.Y. Times*, Sept. 30, 1994 at A-19 (reporting suspension of Dr. Brigham's license in New York and Georgia, as well as investigations in other states) and *Tampa Bay & State, St. Petersburg Times* (FL.), Feb. 7, 1995 at 4B (abortionist vows to fight Florida suspension of license based upon suspension of license in other states due to medical negligence).

xxxiv. Regional Reports, "Florida Abort Doc's License Lifted" in *The National L.J.*, Feb. 20, 1995 at A8 (col. 1).

xxxv. 410 U.S. 113 (1973).

xxxvi. 112 S. Ct. 2791 (1992).

xxxvii. 112 S. Ct. 2791 (1992).

xxxviii. G. Robert Hillman, "License All Counselors, Daley Asks" in *Chicago Sun-Times*, Nov. 15, 1978 at 5.

xxxix. Pamela Zekman and Karen Koshner, "State to Act on Abortion Clinics" in *Chicago Sun-Times*, Nov. 13, 1978.

xl. See n. 21. It is interesting to note that almost every Supreme Court case after *Roe* has been brought by abortion providers rather than women seeking abortions.

xli. W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, & David G. Owen, *Prosser & Keeton on the Law of Torts*, Sec. 30 (5th Ed., 1984).

xlii. *Ibid.* at Sec. 32: "But by undertaking to render medical services, even though gratuitously, a doctor will ordinarily be understood to hold himself out as having a standard professional skill and knowledge."

xliii. Cf. *Cole v. Delaware League for Planned Parenthood, Inc.*, 530 A.2d 1119 (Del. Super. Ct. 1987) (found that local Planned Parenthood affiliate was not entitled to shortened statute of limitations available to "health care providers").

xliv. See *Williams v. Robinson*, 512 So.2d 58 (Ala. 1987) and *Stills v. Gratton*, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (Cal. Ct. App., 1976). Compare *Dunmore v. Babaoff*, 149 Mich. App. 140, 386 N.W.2d 154 (1985).

xlv. *S.A. v. Thomasville Hosp.*, 636 So.2d 1 (Ala. 1993) (claiming that physician breached the standard of care in a second-trimester abortion not supported by testimony of plaintiff's expert); *Koehler v. Schwartz*, 67 A.D.2d 963, 413 N.Y.S.2d 462 (N.Y. App. Div. 1979), order affirmed by *Koehler v. Schwartz*, 48 N.Y.2d 807, 399 N.E.2d 1140, 424 N.Y.S.2d 119 (1979) and *Senesac v. Assoc. in Obstetrics & Gynecology*, 449 A.2d 900 (Vt., 1982) (statements by defendant physician that she had "made a mistake," were not sufficient evidence of negligence in the absence of expert testimony that the care failed to meet the standard of care observed by abortions).

xlvi. Cases discussing the various requirements for expert testimony in medical malpractice cases were collected and analyzed in Jay M. Zitter, J.D., Annotation, "Standard of Care Owed to Patients by Medical Specialist as Determined by Local, 'Like Community,' State, National, or Other Standards" in 18 A.L.R.4th 603; James O. Pearson, J.D., Annotation, "Modern Status of 'Locality Rule' in Malpractice Action Against Physician Who is not a Specialist" in 99 A.L.R.3d 1133; A.S Klein, Annotation, "Competency of General Practitioner to Testify as Expert Witness in Action Against Specialist for Medical Malpractice" in 31 A.L.R.3d 1163; and H.H. Henry, Annotation, "Necessity of Expert Evidence to Support an Action for Malpractice Against a Physician or Surgeon" in 81 A.L.R.2d 597.

xlvii. *Edison v. Reproductive Health Services*, 863 S.W.2d 621 (Mo. Ct. App., 1993) (parents of minor who committed suicide after abortion failed to establish that the abortion provider's negligence was the proximate cause of the suicide) and *Holmquest v. Hanson*, 1992 WL 196213 (Minn. App., 1992) (plaintiff failed to establish that doctor's failure to advise her of abnormal PAP smear results caused emotional distress).

xlviii. See *Coleman v. Atlantic Obstetrics & Gynecology Group, P.A.*, 390 S.E.2d 856, *superseded* 398 S.E.2d 16 (Ga. App. Ct., 1990).

xlix. *Speck v. Feingold*, 497 Pa. 77, 439 A.2d 110 (1981) (holding that the parents of a genetically defective child, born due to the negligence of physicians performing in performing vasectomy and abortion procedures, had a cause of action in tort against the physician for the recovery of expenses attributable to the birth and raising of the child, and for the mental stress and physical inconvenience attributable to the birth of the child).

l. *Zapata v. Rosenfield*, 811 S.W.2d 182 (Tex. Ct. App., 1991), *error denied* (1991); *Nanke v. Napier*, 346 N.W.2d 520 (Iowa, 1984); and *Delaney v. Krafte*, 98 A.D.2d 128, 470 N.Y.S.2d 936 (N.Y. App. Div., 1984). *Contra Stills v. Gratton*, 55 Cal. App.3d 698, 707-709, 127 Cal. Rptr. 652 (1976) (mother of child born after negligently performed abortion entitled to full compensation under established

tort principles); *Miller v. Johnson*, 231 Va. 177, 343 S.E.2d 301 (1986) (permitting recovery for damages, if proven, for medical expenses, pain and suffering, and lost wages for a reasonable period, directly resulting from the negligently performed abortion, the continuing pregnancy, and the ensuing childbirth, as well as damages, if proven, for emotional distress causally resulting from the tortiously caused physical injury). Some courts have distinguished the cases involving the birth of a handicapped child, see *Speck v. Finegold*, 268 Pa. Super. 342, 408 A.2d 496 (Pa. Super. Ct., 1979), modified 439 A.2d 110 (Pa., 1981). See generally "Note: Wrongful Birth in the Abortion Context" in 53 *Denver L. J.* 501 (1976).

li. This cause of action is explored extensively in Thomas R. Eller, "Informed Consent Civil Actions for Post Abortion Psychological Trauma" in 71 *Notre Dame L. Rev.* (forthcoming May, 1996) and Joseph W. Stuart, "Abortion and Informed Consent: A Cause of Action" in 14 *Ohio N. U. L. Rev.* 1 (1987).

lii. *Tisdale v. Pruitt*, 302 S.C. 238, 241, 394 S.E.2d 857, 859 (1990) (doctor examines and performs an abortion on patient only seeking second opinion concerning the medical necessity of terminating a pregnancy she wished to continue) and *Collins v. Thakkar*, 552 N.E.2d 507 (Ind. Ct. App., 1990) (doctor sued for performing abortion on lover who only agreed to submit to a pelvic exam).

liii. *Powers v. Floyd*, 904 S.W.2d 713 (Tex. Ct. App., 1995), rehearing overruled (1995), error denied (1995), pet. cert. filed (1995) (rejecting claim that consent of mother was ineffective for abortion performed upon 16 year old girl in 1974). Cf. *Northern Ins. Co. of New York v. Superior Court in and for City and County of San Francisco*, 91 Cal. App.3d 541, 154 Cal. Rptr 198 (1979) (insurer refused to defend physician from claim arising from "administrative" error in that tortious conduct was that of a clerical employee who mistook patient for another and directed patient to a treatment room where an abortion was mistakenly performed).

liv. 246 Kan. 590, 790 P.2d 1032 (1990).

lv. 359 So.2d 733 (La. Ct. App, 1978) (the court opined that, based upon the plaintiff's testimony, she would not have been dissuaded from having the abortion if the risk had been disclosed, and

therefore her claim failed).

Ivi. *Ibid.* See also *Prosser & Keeton on Torts*, Sec. 32.

Ivii. *Prosser & Keeton on Torts*, Sec. 32.

Iviii. *Ibid.* at Sec. 9.

Ilix. *Ibid.* at Sec. 32.

Ix. "If treatment is completely unauthorized and performed without any consent at all, there has been a battery. However, if a physician obtains a patient's consent but has breached his duty to inform, the patient has a cause of action sounding in negligence." *Scott v. Bradford*, 606 P.2d 554, 557 (Okla., 1979).

Ixi. *Cole v. Delaware League for Planned Parenthood, Inc.*, 530 A.2d 1119, 1122 (Del. Super. Ct., 1987) (court finds that negligent counseling claim is defined by Section 323 of the Restatement (Second) of Torts which provides: "Negligent Performance of Undertaking to Render Services: One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking."

Ixii. See *Eidson v. Reproductive Health Services*, 863 S.W.2d 621 (Mo. Ct. App., 1993) (unsuccessful claim by parents of daughter who committed suicide after abortion).

Ixiii. Carolyn A. Goodzeit, Note, "Rethinking Emotional Distress Law: Prenatal Malpractice and Feminist Theory" in 63 *Fordham L. Rev.* 175, 178-9 (1994).

Ixiv. *Sabot v. Fargo Women's Health Organization*, 500 N.W.2d 889 (N.D., 1993). See also *Ferrara v. Bernstein*, 81 N.Y.2d 895, 613 N.E.2d 542, 597 N.Y.S.2d 636 (1993) (affirming judgment against

abortion providers for damages where "[a]s a result of the experience [miscarriage following failed abortion], plaintiff claimed she required psychiatric care; suffered posttraumatic depression, nightmares and sleeplessness; became withdrawn; and was reluctant for a substantial period of time to resume intimate relations with men"); *Humes v. Clinton*, 246 Kan. 590, 792 P.2d 1032 (1990) (denying recovery for emotional distress caused by physician's failure to warn about possible physical and psychological consequences of obtaining abortion where no physical injury occurs); *Abbey v. Jackson*, 483 A.2d 330 (D.C., 1984) (plaintiff underwent an abortion at a clinic and was later treated for complications at a hospital. She sued the owners/operators of the clinic alleging negligence in two counts: 1) negligent nondisclosure of information pertinent to appellant's consent to the procedure, and 2) negligent infliction of emotional distress). Cf. *Maguire v. State*, 254 Mont. 178, 835 P.2d 755 (1992) (rejecting mother's claim for emotional distress suffered in deciding whether to direct continuation of retarded daughter's pregnancy that was the result of rape) and *Przbyla v. Przbyla*, 87 Wis.2d 441, 275 N.W.2d 112 (1978) (rejecting claim against ex-wife for emotional distress suffered by husband due to wife's obtaining abortion).

lxv. *Shirk v. Kelsey*, 246 Ill. App. 3d 1054, 1068, 617 N.E.2d 152, 161, 186 Ill. Dec. 913, 922 (1993), *appeal denied Shirk v. Kelsey*, 152 Ill.2d 580, 622 N.E.2d 1228, 190 Ill.Dec. 911 (1993): "Around September, plaintiff noticed a knot in her stomach, and that she was gaining weight. Plaintiff and her mother both thought that she might still be pregnant because of her appearance. On September 27, plaintiff began experiencing severe stomach cramps and passed a lot of blood clotting. Plaintiff's mother thought she might be having a baby, so she instructed plaintiff's brother to take her to St. Francis Hospital in Peoria. Plaintiff received a pelvic examination upon arriving at the hospital and was told that there was a foot protruding into her vaginal area, and that she was going to have a baby. After two to three hours of labor, plaintiff delivered a baby boy who lived for approximately 90 minutes. She remained in the hospital for a few days, and was discharged with some restrictions as to work and leisure activities.

"Plaintiff stated that as a result of this incident, she has experienced emotional problems. As explained by the plaintiff: 'I've had a lot of nightmares. I wake up nights reliving the baby's birth, the baby's death. I relive having the abortion. I go through a

terrible morning [sic] periods a month before the baby's death. I'm detached from my husband and my kids for at least a month before and weeks afterward. It puts a lot of strain on my marriage because I'm not really fit to be around.' According to the plaintiff, she still mourns her son's death every year. What happened to her was her 'worst nightmare' and she felt as though she was 'being repaid' for the two abortions she had undergone." 246 Ill.App.3d 1054, 1058, 617 N.E.2d 152, 155, 186 Ill. Dec. 913, 916 (Ill. App. Ct., 1993).

Ixvi. *Prosser & Keeton on Torts*, Sec. 54.

Ixvii. *Ibid.* at Sec. 12. Compare *Martinez v. Long Island Jewish Hillside Medical Center*, 70 N.Y.2d 697, 699, 512 N.E.2d 538, 539, 518 N.Y.S.2d 955, 956 (1978) (plaintiff allowed to recover on claim of negligent infliction of emotional distress absent showing of physical injury where the medical care providers knew that plaintiff's religious beliefs forbade abortion except under exceptional circumstances, and the providers negligently gave plaintiff-mother incorrect information concerning her unborn child, as a result of which she decided on an abortion). *Cf. Boykin v. Magnolia Bay, Inc.*, 570 So.2d 639 (Ala., 1990) (rejecting parents' claim for emotional distress based upon outrageous conduct, where conduct complained of is providing abortion to minor who misrepresented her age in order to avoid parental requirement).

Ixviii. *Prosser & Keeton on Torts*, Sec. 105.

Ixix. *Clair v. Reproductive Health Services*, 720 S.W.2d 793 (Mo. Ct. App., 1986) (abortion procedures performed on non-pregnant women). *Cf. Perry v. Atkinson*, 195 Cal.App.3d 14, 19-20, 240 Cal. Rptr. 402, 405-406 (1987) (affirming dismissal of women's fraud and deceit cause of action for pain caused by abortion done in reliance on defendant's promise he would impregnate plaintiff later).

Ixx. *Cf. Henry v. Deen*, 310 S.E.2d 326 (N.C., 1984) (doctor could be held liable for altering medical records).

Ixxi. *Delaney v. Krafte*, 98 A.D.2d 128, 130, 470 N.Y.S.2d 936, 938 (N.Y. App. Div., 1984) (quoting *Mitchell v. Spataro*, 89 A.D.2d 599, 452 N.Y.S.2d 646 (N.Y. App. Div., 1982)). Other abortion malpractice cases alleging breach of contract include *Walsh v.*

Women's Health Center, Inc., 376 So.2d 250 (Fla. Dist. Ct. App., 1979); *Wilczynski v. Goodman*, 73 Ill.App.3d 51, 391 N.E.2d 479, 29 Ill.Dec. 216 (1979); and *Ladies Center of Clearwater, Inc. v. Reno*, 341 So.2d 543 (Fla. Dist. Ct. App., 1977).

lxxii. *Zapata v. Rosenfeld*, 811 S.W.2d 182 (Tex. Ct. App., 1991) (disclaimer in abortion consent form effective to preclude finding of breach of contract).

lxxiii. "There are some justifications for excluding medical professionals from 'the good and workmanlike manner implied warranty [under the Texas Deceptive Trade Practices Act].' Application of this warranty to medical professionals may be unnecessary. Medical professionals can be sued on tort theories, including negligence, misrepresentation, infliction of mental anguish, assault, battery, and under the DTPA for non-negligence causes of action. Thus, one may question why another cause of action against medical professionals is necessary. Generally, in medical malpractice cases, damages are sufficient to warrant bringing a suit. Generally, a plaintiff injured by a negligent health care provider can recover sufficient damages, so that the DTPA's incentives of attorney's fees and treble damages are not necessary to encourage attorneys to take the case.

"In contrast, in the application of 'the good and workmanlike manner implied warranty' as originally created in *Melody Home*, the repair costs may be negligible, and the DTPA's additional recovery is necessary to discourage shoddy workmanship and encourage plaintiffs to file suit although damages may be minimal. Other considerations indicate that another cause of action against medical professionals is unnecessary. Although a medical professional may be sued under a negligence theory, it may be extremely difficult to prove causation. Also, even though a plaintiff may recover punitive damages in a tort cause of action, under a DTPA cause of action a successful plaintiff may recover attorney's fees, court costs, and punitive damages in the form of treble damages. Because it is unlikely that a plaintiff will fit under the laundry list of deceptive practices, only the breach of a *Melody Home* type warranty will allow a plaintiff to recover under the DTPA against a medical professional. Just because consumers of medical services have other causes of action does not automatically preclude application of 'the good and workmanlike manner implied warranty.'" Lisa L. Havens-Corte, Comment, "Melody Home, DTPA, and the Medical

Profession" in 45 *Baylor L. Rev.* 985, 1002 (1993).

Ixxiv. See cases cited in note 11 above.

Ixxv. *Holtzman v. Samuel*, 130 Misc.2d 976, 495 N.Y.S.2d 583 (N.Y. Sup. Ct., 1985).

Ixxvi. *Cole v. Delaware League for Planned Parenthood, Inc.*, 530 A.2d 1119 (Del. Super. Ct., 1987).

Ixxvii. For an excellent discussion of the general applicability of deceptive trade practices acts to health care providers, see Lee Ann Bundren, Commentary, "State Consumer Fraud Legislation Applied to the Health Care Industry" in 16 *J. Legal Med.* 133 (1995).

Ixxviii. Cf. *Holtzman v. Samuel*, supra; *Showery v. State*, 678 S.W.2d 103 (Tex. Ct. App., 1984) (criminal conviction of abortionist for misapplication of fiduciary property over \$200 in value [proceeds from health insurance policy] resulting in four years imprisonment) and *People v. Franklin*, 683 P.2d 775 (Colo., 1984) (upholding manslaughter and criminal abortion conviction of osteopath who caused the death of a patient through performing an illegal abortion).

Ixxix. *Bryan v. Conn. Dept. of Public Health & Addictive Services*, 1995 WL 780932 (Conn. Super. Ct., 1995) (rejecting plaintiff's claim that fraudulent concealment tolled statute of limitations for period equal to time necessary to obtain evidence of every element of claim); *Bryant v. Crider*, 209 Ga. App. 623, 434 S.E.2d 161 (Ga. Ct. App., 1993) (2 year statute of limitations began to run when plaintiff became aware of significant physical symptoms immediately after abortion and not when plaintiff received diagnosis of "probable Ashermann's Syn-drome"); *Vitner v. Miller*, 208 Ga. App. 306, 430 S.E.2d 671 (Ga. Ct. App., 1993), cert. dismissed (1993); *Kirby v. Jarrett*, 190 Ill.App.3d 8, 545 N.E.2d 965, 137 Ill.Dec. 204 (1989) (statute of limitations begins to run from date that plaintiff knew or should have known of her injuries); *Schafer v. Lehrer*, 476 So.2d (Fla. Dist. Ct. App., 1985) (statute of limitations tolled by physician's concealment of injury); and *Cole v. Delaware League for Planned Parenthood, Inc.*, 530 A.2d 1119 (Del. Super. Ct., 1987).

Ixxx. *Prosser & Keeton on Torts*, Sec. 30.

lxxxii. *Ibid.*

lxxxii. *Abbey v. Jackson*, 483 A.2d 330 (D.C., 1984).

lxxxiii. Lawsuits seeking compensation for injuries suffered as a result of abortion malpractice have been listed as the second most undesirable type of case to file. Lewis L. Laska, "Medical Malpractice Cases Not to File" in 20 *Mem. St. L. U. Rev.* 27 (1989).

However, injured women (or their surviving family members) who persevere may reap significant rewards. See *Estate of Ruckman v. Barrett*, 1991 WL 444085 (Green Cty., Mo. Cir. Ct., 1991) (\$25,000,000 verdict for abortion death) and *Redding v. Bramwell*, 1990 WL 468158 (Cobb Cty., Ga. Sup. Ct., 1991) (\$500,000 verdict for abortion death).

lxxxiv. *Green v. Aberle*, 150 Misc.2d 306, 568 N.Y.S.2d 300 (N.Y. Sup. Ct., 1991) (striking interrogatories requesting past history of abortions in male college student's action for defamation, negligence and intentional infliction of emotional distress against female college student who accused him of rape) and *Garcia v. Providence Medical Center*, 60 Wash.App.635, 806 P.2d 766 (1991) (improper to introduce evidence of past abortions in case where plaintiff's claim is for emotional damages caused by infant son's death which allegedly resulted from negligent care before and during labor and delivery).

lxxxv. Lewis L. Laska, "Medical Malpractice Cases Not to File" in 20 *Mem. St. L. U. Rev.* 27 (1989).

lxxxvi. *Ibid.*