When Wrong Test Is Ordered, "Wrongful Birth" Results

At a New Jersey hospital, a pregnant woman underwent an ultrasound examination with results suggesting a possible fetal abnormality. In response, DNA testing of the patient and her husband was ordered to investigate for a suspected hormonal disorder. But the wrong test was ordered, and the results of that test were negative.

A baby girl was born with congenital adrenal hyperplasia, a condition causing ambiguous genitalia due to exposure to high concentrations of androgens in utero. She underwent genital reconstructive surgery at age 4 months and is expected to require additional surgery, lifelong hormone replacement therapy, and lifelong monitoring.

The parents claimed that they would have elected to terminate the pregnancy if they had been properly informed of the child's condition.

OUTCOME

A jury returned a ruling of 75% liability to the hospital and 25% liability to a hospital lab technician. The verdict was for $1 million, comprising $625,000 for the child and $375,000 for her parents.

COMMENT

The controversial legal theory of recovery in this case is known as "wrongful life" or "wrongful birth." To prevail on these tort actions, one must prove that the defendant's negligence led to the birth of an infant following a pregnancy that would have been terminated, had the parents been given all the prenatal screening information required by the standard of care.

> *"Without doubt, this is a sensitive issue, and respect for our fellow clinicians' opinions is warranted."*

The goal of any prenatal screening program should be to provide parents with information that is adequate, accurate, and timely. In this case, after the suspicious sonographic findings were encountered, the wrong test was ordered and the diagnosis was missed. Each practice providing prenatal screening should have a checklist to confirm that the correct test was ordered, completed, and documented—not to mention discussed with the patient in a timely manner.

In this case, the clinician ordered the wrong test, which left the patient with inadequate information. From the facts given, it is unclear if the ordering clinician became aware of this fact and what information, if any, the patient was given regarding the error. Importantly, information must also be given in a timely manner, leaving the patient adequate time to make an informed decision regarding termination—before fetal viability. But how is *viability* defined?

Although a detailed discussion of the constitutional principles of fetal viability is beyond the scope of this commentary, three US Supreme Court cases paved the way for successful wrongful life/wrongful birth actions. In *Griswold v Connecticut* (1965), the court held that decisions regarding birth control were protected by the right to privacy. In *Roe v Wade* (1973), the court held that a constitutionally protected right to privacy exists with regard to pregnancy terminations until the point of "viability," originally defined as between 24 and 28 gestational weeks. *Planned Parenthood v Casey* (1991) held that advances in neonatal care required a revised definition of viability to a point "somewhat earlier," without establishing a specific bright-line rule for viability.

To complicate matters, in recent years, at least 14 states (Alabama, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Louisiana, Mississippi, Nebraska, North Carolina, North Dakota, Oklahoma, and Texas) have redefined viability and passed laws banning therapeutic abortion beyond week 20 (although some of these bans have been judicially blocked). In states with this type

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of legislation, whether a clinician could be held legally responsible for failing to provide information necessary to permit an informed decision prior to the 20-week mark is unclear.

Questions as to whether these state laws were in conflict with *Roe v Wade* led to a constitutional challenge. In 2013, the US Court of Appeals for the Ninth Circuit (the highest level before the Supreme Court) ruled that a 20-week cutoff was unconstitutional because it violated the "viability rule" established by *Roe* and *Casey*. The Supreme Court declined to review that decision.[1]

Damage awards in wrongful life/wrongful birth cases are often substantial. The verdict in this case was relatively restrained.

Without doubt, this is a sensitive issue, and respect for our fellow clinicians' opinions is warranted. However, from a liability standpoint, the safest course of action is to provide patients with all the necessary information—including prenatal testing results—as soon as possible, allowing them to make an informed decision before viability (however that is defined in your state). **—DML** **CR**

REFERENCE

1. *Isaacson v. Horne*, 716 F.3d 1213, 1225 (9th Cir. 2013), *cert denied*, 134 S. Ct. 905 (2014).

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