Giving Birth to a New Political Issue

This regular Insight *feature focuses on how the judicial system affects public policy. This column examines a recent N.C. Supreme Court decision.*

By Katherine White

Does North Carolina's judicial system allow medical malpractice claims? Unquestionably—unless, that is, the case involves "wrongful birth" and "wrongful life." In those cases alone, says a bare majority of the N.C. Supreme Court, the answer is a flat no. The state's present laws and judicial rules, they say, do not address new medical technology that can predict, for instance, whether a child would be born retarded, and whether a mother should have that information so she can make an informed decision whether to bear the child or have an abortion.

The Court—in a narrowly split, 4-3 decision—says it is up to the General Assembly to decide what the legal position, and the public policy, of the state will be. But because of the Court's own divergent views on the matter, and because the Court has shunted the issue to the General Assembly, the prospect is that a complex medical issue may be decided in the crucible of the political arena.

In effect, the justices, in their December 10, 1985 decision in *Azzolino v. Dingfelder*,[1] are protecting doctors and other health care providers from medical malpractice claims stemming from the failure to provide accurate genetic counseling to pregnant women. The decision runs counter to the court opinions in other states where the subject has come up.[2] (The decision could be appealed to the U.S. Supreme Court before the issue reaches the legislature. A petition for judicial review was filed in the N.C. Supreme Court's office on January 19, 1986, but was turned down by the justices on February 18.) And the decision has been criticized both by the justices' legal colleagues and by legal-medical experts. They believe the Court's inaction established social policy that carries with it untenable results—namely, that doctors will be free from malpractice claims when they fail to give genetic counseling and a child with a condition such as Down's Syndrome is later born.

The Court's decision focused on whether such a child or his parents can seek money for the cost of the child's care from a doctor who could have used a relatively common medical test called amniocentesis to determine the child's health before birth. Jane Azzolino, a Chatham County mother, sought amniocentesis during early pregnancy. She was 36 years old at the time and expressed concern that her age placed her at high risk for delivering a child with Down's Syndrome, which bears an abnormal chromosome that gives the child distinct physical characteristics and causes slight-to-severe mental retardation. Older mothers have statistically higher chances of delivering Down's Syndrome babies.

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According to Mrs. Azzolino's lawsuit, her doctor and a nurse practitioner told her that amniocentesis was not necessary because she fell one year short of the age when the mother's age heightens the risk for having a handicapped child. Michael, now 7, was born in 1979 with Down's Syndrome. Mrs. Azzolino sued, but her case was thrown out of Chatham County Superior Court in 1983. In November 1984, the N.C. Court of Appeals reversed that decision, stating that Mrs. Azzolino did have the right to sue for damages for "wrongful birth" *and* that Michael had the right to sue for damages for "wrongful life." More than a year later, however, the N.C. Supreme Court reversed the Court of Appeals and sided with the Superior Court.

In the majority opinion, four justices assumed for the purposes of their analysis that the doctor was guilty of negligence when he did not perform the test. But negligence alone is not enough to sustain a cause of action. In such lawsuits, the courts require an *injury* to be caused by the negligence. "Life, even life with severe defects, cannot be an injury in the legal sense," wrote Associate Justice Burley B. Mitchell Jr. for a majority that included Chief Justice Joseph Branch and Associate Justices Rhoda Billings and Louis Meyer. Relying on language from a New York Court of Appeals dissent, the Court said, "A cause of action brought on behalf of an infant seeking recovery for wrongful life demands a calculation of damages dependent upon a comparison between the Hobson's choice of life in an impaired state and non-existence. This comparison the law is not equipped to make."[3]

Mitchell wrote that only the General Assembly "can provide an appropriate forum for a full and open debate of all the issues arising from the related theories of 'wrongful' birth [the parents' cause of action] and 'wrongful' life [the child's action]. Unlike courts of law, the General Assembly can address all of the issues at one time and do so without being required to attempt to squeeze its results into the mold of conventional tort concepts which clearly do not fit."

Yet the majority opinion also encroaches into social policy by declaring its fear that doctors might ultimately "take the 'safe' course by recommending abortion . . . We do not wish to create a claim for relief which will encourage such results." The majority opinion illustrated its point with this story:

> A clinical instructor asks his students to advise an expectant mother on the fate of a fetus whose father has chronic syphillis. Early siblings were born with a collection of defects such as deafness, blindness, and retardation. The usual response of the students is, "Abort!" The teacher then calmly replies: "Congratulations, you have just aborted Beethoven."

Not only that, Mitchell wrote, but the possibility also existed that if the Court recognized such claims, the state's judicial system would be liable to a flood of fraudulent claims: "The wrongful birth claim will almost always hinge upon testimony given by the parents after the birth concerning their desire prior to the birth to terminate the fetus should it be defective. The temptation will be great for parents, if not to invent such a prior desire to abort, to at least deny the possibility that they might have changed their minds and allowed the child to be born even if they had known of the defects it would suffer."

In dissent, Associate Justice James Exum said the majority went too far and, in effect, made the case center on the emotional pro-life and abortion issues.[4] The injury to Mr. and Mrs. Azzolino was not Michael's life but, rather, Mrs. Azzolino's inability to make an informed decision on whether to abort the afflicted fetus. By not providing her with adequate information, health professionals prevented her from choosing the kind of family she would have, a choice that is legally protected and a choice that, when interfered with, gives rise to a legal remedy, such as support and maintenance for the child.

If the Court had limited its decision to whether Mrs. Azzolino was given the information necessary to make an informed decision, Exum said, the case would become one of simple, traditional medical malpractice for which the state has laws to redress.

Associate Justice Harry Martin, in a separate dissent, also cast the issue as simple medical malpractice, saying "the doctor's negligent genetic counseling and treatment . . . deprive[d] them [the Azzolinos] of the ability to make an informed decision on whether to abort the fetus."

By putting the issue before the General Assembly as one of public policy and not of traditional legal principles, the Court may well get the "full and open debate" for which Justice Mitchell hoped. It also will open the debate to considerations that do not directly address whether doctors and other health care professionals owe prospective parents genetic counseling when circumstances warrant. Pro-life and pro-choice advocates will again debate abortion. The medical profession, now complaining of higher insurance costs and rising medical malpractice claims, and those who would hold doctors accountable for each action they take, may inject economic arguments into the debate.

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Drawing Ethical Lines Is A Demanding Art Form

This regular Insight *feature examines the legislative process as it affects public policy. This column reviews the age-old question of conflicts of interests.*

by Chuck Alston

"When a legislator must act on a legislative matter as to which he has an economic interest, personal, family or client, he shall consider whether his judgment will be substantially influenced by the interest, and consider the need for his particular contribution, such as special knowledge of the subject matter, to the effective functioning of the legislature. If after considering these factors the legislator concludes that an actual economic interest does exist which would impair his independence of judgment, then he shall not take any action to further the economic interest, and shall ask that he be excused, if necessary, by the presiding officer in accordance with the rules of the respective body. If the legislator has a material doubt as to whether he should act, he may submit the matter to the Legislative Ethics Committee for an advisory opinion . . . " —NCGS 120-88.

This passage, adopted in 1975, contains a lot of words which, when read closely, offer little guidance to a legislator facing a potential conflict of interests. Yet, in a citizen-legislature, such conflicts arise regularly. How, then, can a legislator know what to do when his own interest may conflict with the public interest?

Bankers, doctors, real estate agents, funeral directors, insurance salesmen, merchants, contractors, educators, manufacturers, restaurant owners and pharmacists comprise the legislature. Normal legislative sessions usually consider bills affecting most, if not all, of these vocations.

This inevitable clash of selfish interests and the public good gives rise to uncomfortable questions. Should the teacher vote on the state budget? The budget usually raises teachers' salaries. Should the banker vote on interest rates? Those rates determine how much profit he will make. Should lawyers in the legislature be allowed to draft changes in the criminal code? They have the legal knowledge and expertise that other legislators lack, but won't such changes affect their livelihoods? And how about insurance agents who sponsor bills on insurance regulation or rates? The list is endless.

The ethics issue is by no means new.[1] But it gained visibility in the 1985 session in the case of former state Sen. John Jordan (D-Alamance), who resigned his office after pleading guilty to charges of bribery and extortion. Jordan stood accused of using his office to further his own interests in a business dispute over a hydroelectric power project. The Legislative Ethics Committee, after a month-long investigation, referred the matter to the Attorney General's Office for possible prosecution. A local prosecutor took the case to the grand jury, which issued the indictment that led to Jordan's guilty plea and resignation from office.

If there was a beneficial aspect to Jordan's case, it lay in renewing interest in legislative ethics. Before the 1985 session ended, there was enough interest to warrant an interim committee—the Legislative Ethics and Lobbying Committee—to study ethical issues confronting lawmakers and report to the 1986 short session of the General Assembly, which will convene in June.

The committee went to work tackling such issues as:

- Should business partners of legislators be permitted to lobby?
- Should limits be placed on the gifts, meals,

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and other gratuities that legislators receive from lobbyists?

- Should legislators sell tickets for fundraising events to lobbyists?
- Are additional rules needed to guide the proceedings of the Legislative Ethics Committee when it is forced to investigate a member?

The odds are good that when the committee concludes its work, the vagaries of G.S. 120-88 will remain as the sole statutory guidelines for legislators struggling to draw the line between their own interests and legislation. And that's business as usual.

"I don't know of any states that draw those kind of rules," says Terry Sullivan, director of the legislature's General Research staff and the ethics committee's counsel. "Every ethics committee meeting I've ever attended, the question comes up: How do you draw the line? And within 90 seconds, the example of the school teacher or the banker is given and the committee moves on to something else," Sullivan says.

The school teacher is the obvious example. But the entanglements also can pass with little notice, as happened in 1985. Consider these two examples: Several legislators who are retired federal employees voted on a bill allowing more of their retirement income to be exempt from state taxes. A legislator who is an executive of an oil wholesaler pushed legislation to change the relationship between oil companies, oil jobbers and gas stations—a result that would have accrued to his employer's own interests.

Some legislators seem unaware that their actions constitute a potential or real conflict of interests. Syndicated columnists Richard Cohen and Jules Witcover tell the story of a Maryland legislator, a tavern keeper who also sold liquor for off-premises consumption.[2] He sponsored legislation prohibiting the discount sale of liquor—a bill that would have hurt his competitors who ran package stores. When asked about the conflict of interests posed by sponsoring a bill that would harm his competitors and line his own pockets, the lawmaker-tavern keeper replied, "How does that conflict with *my* interests?"

When a legislator's independence of judgment is threatened, North Carolina law advises the member to refrain from voting. But members of the N.C. General Assembly don't often excuse themselves from voting. In the 1985 session, which ran from February 5 to July 17—or nearly six months—the 120 House members sought only 28 such excuses. Nearly half the excuses came from three members: Reps. George Miller (D-Durham), Tim McDowell (D-Alamance), now a state Senator appointed to fill the remainder of Jordan's unexpired term, and Frank (Trip) Sizemore (R-Guilford). The 50-member Senate had but 14 such requests. In one case, Sen. Ollie Harris (D-Cleveland), a Kings Mountain funeral home operator, asked the Senate to void his vote for an amendment that permitted only funeral licensees to reopen graves. The Senate acceded to Harris' request.

Sizemore, a freshman House member who is a Greensboro lawyer, requested five such excuses. He read the ethics law carefully and found it wanting. "I wasn't sure how the standards applied," he says. "Where I could, I exercised caution."

McDowell works for Elon College, a private college that receives state aid for North Carolina students. Twice he excused himself from voting on bills that affected all private colleges "just so there wouldn't be any question," he says. Still, it would have been difficult to prove that McDowell would have benefited personally from either of the bills. "It's hard to determine, really," says McDowell. "When you have a citizen-legislature, I don't know how you can have guidelines. If we had specific guidelines, you'd have a zero-zero vote on the budget, and especially on taxes."

For every McDowell or Sizemore exercising an abundance of caution, there is a situation in which one legislator-insurance agent excuses himself while nine others don't. While one response to such situations would be to bar lawmakers from participating in issues where they have a direct economic interest, it's clear that such a response would not be workable—or even desirable.

Voters, after all, send their representatives to Raleigh to vote, not to watch from the sidelines. Legislators have the dual responsibility to represent their constituents as best they can, in addition to comporting themselves in an honorable fashion while debating and making the laws that govern all the state's citizens.

Most other states, like North Carolina, have some sort of "generalized moral code of ethics for legislators to live up to," says Ed Feigenbaum, who coordinates a biennial survey of state ethics laws for the Council of State Governments. Other states have more extensive ethics laws governing the conduct of public officials generally, but North Carolina's disclosure requirements "stack up pretty well" with those of other states.

The law, for all its murkiness, does speak to all legislators who have a potential conflict and who must weigh the benefit of their special knowledge against the detriment of their special interests. And it does apply across the board, no matter what a legislator's occupation is. Critics who question the banker's role in interest rate legislation often overlook a teacher's involvement in drawing up a merit pay scale, but they

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both constitute the same sort of conflict of interests. Few would expect lawyers or businessmen to exempt themselves from the coming debate over liability insurance or personal injury and malpractice lawsuits. Moreover, should the legislative debate proceed without the benefit of their expertise and knowledge in such matters? Hardly.

The law, by requiring legislators to *disclose* their business interests in annual reports, provides a means for voters to decide when special knowledge becomes special interest. Perhaps a vigilant press and an informed electorate remains the best check on unethical conduct. Voters can always turn out miscreants who abuse their legislative power. And in cases of criminal misconduct, the grand jury awaits.

FOOTNOTES

[1]See "Campaign Financing, Ethics Act & Open Meetings—Conflicting Interests for Citizen Legislators," *North Carolina Insight,* Vol. 3, No. 4, Fall 1980, pp. 30 to 34.

[2]"A Heartbeat Away," by Richard M. Cohen and Jules Witcover, Bantam Books, 1974, p. 40.

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No one would argue that such collateral issues should not be a part of the legislative process. They obviously are appropriate questions for legislative debate. But they also have the potential—unlike most court decision-making—to bypass the legal questions involved and proceed directly to questions of social policy. Unless the U.S. Supreme Court intercedes first, the General Assembly may have its hands full in keeping this complicated and controversial debate on the legislative track.

FOOTNOTES

[1]*Azzolino v. Dingfelder,* ___ N.C. ___ (1985), filed Dec. 10, 1985.

[2]See generally, Annotation, 83 A.L.R. 3d 15 (1978 & Supp. 1985).

[3]*Becker v. Schwartz,* 46 N.Y. 2d 401, 412, 386 N.E. 2d 807, 812 (1978).

[4]Although the majority emphasized the result had no bearing on a woman's right to abortion, the legal arguments presented by the American Civil Liberties Union, the N.C. Academy of Trial Lawyers, the N.C. Right to Life Education and Legal Defense Fund, and the Azzolinos raised the abortion issue.