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## **A New Weapon In an Old War -- A special report.; Latest Tactic Against Abortion: Accusing Doctors of Malpractice**

By TAMAR LEWIN

Dr. Brian Finkel, whose practice consists mostly of performing abortions, sounds matter of fact when he talks about the bullet-proof window in his office, the bullet-proof vest and helmet he wears walking to his car, the guns he carries, the years of demonstrations outside his office and the threats he has received.

But he sounds thoroughly outraged -- and, in his own bluff way, hurt -- when he gets on to the subject of John Joseph Jakubczyk, general counsel to Arizona Right to Life, and the newest anti-abortion strategy: malpractice suits against the doctors who perform abortions.

"John Jakubczyk is a lawyer, an officer of the court, who has abused his professional power to harass me and intimidate my patients," Dr. Finkel said. "The suits he filed against me have dirtied my name. They have made me uninsurable for most insurance carriers. They made me pay legal fees to defend myself. I am committed to providing women with a service they need, but I have begun to wonder if it's worth it. You get hit about the head with a two-by-four long enough and you finally say, ouch, that hurts."

While abortion-malpractice lawsuits are a new phenomenon in much of the country, they are almost routine for Mr. Jakubczyk, who has filed nine of them in the last decade. Besides two against Dr. Finkel, Mr. Jakubczyk has also filed malpractice claims against the local Planned Parenthood affiliate, the A-Z Women's Center, a doctor at Abortion Services of Phoenix and a doctor at the Family Planning Institute.

So far, Mr. Jakubczyk has had little success. He lost the only case that went to trial. Most have been dismissed or withdrawn. And in one case against Dr. Finkel, the judge thought the charges so flimsy that he fined Mr. Jakubczyk for filing a frivolous suit, but the fine was later overturned by an appeals court.

"The problem is, even if they lose, they win," said Dr. Finkel, who has faced six abortion malpractice suits, some filed by other lawyers than Mr. Jakubczyk, which were all dismissed. "Whatever happens in court, they've had the press conference, and I've been damaged. I'm paying \$25,000 a year for insurance now, and I'm not allowed to practice out of state, all because of this developing art form of legal misconduct."

In response to Dr. Finkel's complaint, the Arizona bar is investigating whether Mr. Jakubczyk's lawsuits violate ethical standards.

Like any other surgery, abortion carries its risks. And there is nothing new about an occasional malpractice suit when a doctor's bad care has caused severe injury or death.

What is new is the number of abortion malpractice suits now being filed -- and who is filing them. Increasingly, lawyers associated with anti-abortion groups, rather than malpractice specialists, are seeking out claims against doctors who do abortions.

According to J. Thomas Smith, a partner in a new law firm devoted to abortion malpractice, only 86 abortion-malpractice verdicts have been issued in the last 10 years. While no one knows how many current cases will end in verdicts, Life Dynamics Inc., an anti-abortion group in Denton, Tex., that is encouraging

such suits, says it is involved in 80 cases. Legal Advice A Wide Variety Of Services

Many new cases go beyond traditional malpractice claims. Life Dynamics, which attracted 125 people to Dallas for a two-day seminar last year on abortion malpractice, has provided much of the impetus and legal research for expanding the kinds of cases brought against doctors who do abortions.

For example, it offers research and expert witnesses on post-abortion trauma who say women often suffer the same kind of long-term psychological problems after abortions as soldiers do after wars, a concept that was examined and rejected by both former Surgeon General C. Everett Koop and the American Psychological Association.

Life Dynamics advises lawyers to consider charging doctors with battery if the woman's formal consent can be challenged.

In a mass mailing to doctors, Life Dynamics advised them to tell women of studies tying abortions to a higher risk of breast cancer and asked them to refer any patients who have had an abortion and are now diagnosed with breast cancer to Life Dynamics for "inclusion in a proposed class-action lawsuit."

Mark Crutcher, the president of Life Dynamics, said his group had more than 600 lawyers in its "Abmal" network, 40 percent of whom, he said, support abortion rights. The network offers lawyers ads soliciting clients ("Don't be a victim for the rest of your life"), expert witnesses, courses to teach women how to testify effectively, dossiers on abortion doctors and even a loan of the medical instruments used in abortion for lawyers to use in showing a jury what was done.

"There are more women than we ever dreamed of getting killed, raped, assaulted and severely injured," Mr. Crutcher said. "We've got over 2,500 examples."

Life Dynamics is not the only group encouraging these suits. In Pensacola, Fla., Mike Conroy says his organization, Legal Action for Women, gets about 10 calls a day on its toll-free line, 1-800-U-CAN-SUE, from women who say they have been injured by an abortion.

Mr. Conroy's group, like Life Dynamics, refers women to lawyers who will handle such cases, and both groups provide materials to hand out to women leaving abortion clinics.

Last year, several lawyers from different states established a firm, Swendsen, Amshoff, Donovan & Smith, to handle abortion malpractice work. Ted Amshoff, of Louisville, Ky., said the firm had 20 open cases, including 4 in which women died as a result of abortions. Motives Legal Harassment Or Honest Claims

Many abortion doctors, clinics and women's advocacy groups see the new malpractice suits as a form of harassment motivated by anti-abortion ideology.

"These are bogus lawsuits," said Pamela Maraldo, president of Planned Parenthood Federation of America. "Where there is malpractice, where a bad doctor is injuring women -- of course we want that stopped. But in the current war-zone climate of bombings and shootings at abortion clinics, with the active campaigns to threaten doctors who perform abortions, I can't believe these lawsuits are aimed at protecting women. I believe they are part of an overall strategy to take away women's right to choose."

In a 1992 anti-abortion manual, Mr. Crutcher urged support for abortion malpractice suits "to protect women, but also to force abortionists out of business by driving up their insurance rates."

But the lawyers who handle abortion-malpractice cases -- Mr. Crutcher is not a lawyer -- say filing lawsuits to harass doctors would be an abuse of the courts. They say they are filing the cases not as anti-abortion advocates, but simply as advocates for injured women.

And, they say, they have a strong incentive to avoid frivolous claims, or harassment suits, since the cases are handled on a contingency basis, with the lawyers getting paid only if they win money for their clients.

"I bring cases only where there was a failure to meet the standard of care, and a woman was injured as a result," said Mr. Jakubczyk, who spoke at the Life Dynamics seminar. "For every woman for whom I file a claim, there are many more I tell that no matter how bad their abortion left them feeling, they don't have a case. People see me as John Jakubczyk, pro-life advocate. But in these cases, I'm just John Jakubczyk, representing a woman."

Ted Amshoff, a Louisville, Ky., a partner in Swendsen, Amshoff, who would not discuss his his personal views on abortion, calling them irrelevant to his legal work, said some of the women he represents had found other lawyers unwilling to handle their cases for fear that they would be seen as opposing abortion.

"I would think it would be a meeting ground for both sides to try to identify doctors who are not providing good care to women," said Mr. Amshoff, who has served as counsel to Kentucky Right to Life. "If this office alone has four death cases, and others where a hysterectomy and colostomy were needed, there's something wrong." No Man's Land Personal Dilemmas Over Abortion

In the bitterly divisive landscape of abortion, there is a no man's land, occupied by women who oppose abortion on moral or religious grounds, but nonetheless choose it when they find themselves pregnant. Anti-abortion groups, doctors and abortion-rights groups alike say those women are most likely to sue.

The whole malpractice issue turns abortion politics on its head, sending women who have chosen abortions to lawyers who oppose them.

And malpractice litigation has created some strange alliances. Dr. Warren Hern of Boulder, Colo., has for years been a prime target of the anti-abortion movement, both because he is an outspoken advocate of abortion rights and because he performs late abortions.

But Dr. Hern, who wrote the most widely used textbook on abortion, supports many malpractice claims.

"There's a lot of bad medicine being practiced out there in the name of choice," said Dr. Hern, who estimates that lawyers interested in filing abortion-malpractice suits now account for about 5 percent of the sales of his textbook. "I testified in an Oregon case against a doctor who really did not do well by a patient. As a society, I think we've been in denial about the risks of abortion, both because of ideology, and because of economics. There are a lot of respectable doctors doing a lousy job. It's not a sin to have a complication, but it is a sin if you have not tried to prevent it. And it's a very serious sin if you abandon it."

Even with the best care, Dr. Hern and others said, 5 to 10 percent of first-trimester abortions are incomplete, leaving behind a few grams of tissue, or even the whole fetal sac. More rarely, abortion causes perforation of the uterus, hemorrhage or infection. Without proper follow-up care, such complications can cause serious injury.

Some anti-abortion lawyers are now filing claims based more on emotional than physical injuries. In one Phoenix case, for example, Mr. Jakubczyk charges that Dr. Joel Bettigole performed an abortion on a patient who did not want one.

"From her point of view, she went in, mixed up and confused, and didn't get any real counseling," Mr. Jakubczyk said. "From her point of view, she changed her mind, and withdrew her consent. She began to cry and scream, and they told her to shut up or she'd scare the other girls."

Dr. Bettigole would not discuss the case because it is in litigation.

"All I can say is that it never happened," he said. "I don't remember this particular patient, but I know it never happened because I have never treated any patient like that."

While that case and others like a pending Tennessee case against Planned Parenthood raise the question of valid consent, they are largely based on claims for emotional injuries and post-abortion trauma.

The Tennessee case involves a 15-year-old who became pregnant by the son of a Planned Parenthood official.

"The girl's mother had been shot and killed by her stepfather, and her grandmother got custody of her," said Mr. Smith, the Swendsen, Amshoff lawyer handling the case. "Her dad said come live with him or he would kill himself. She said she couldn't and he did kill himself. Four months later, she got pregnant, and the boy said, 'Have an abortion or I'll kill myself.' She wanted the baby, had already chosen a name. But she got pulled into having an abortion. Within a week she was admitted to the emergency room, crying uncontrollably. She's been in psychiatric care for more than a year now."

Planned Parenthood said it could not discuss the case while it was pending, but disputes the the lawsuit's account. And mental health experts say any girl who lost both parents so brutally might have emotional problems, abortion or no.

Mr. Smith said that, for him, abortion malpractice is both a legal specialty and a ministry.

"A great many women are injured by abortion, but in the past, very few have filed suit," Mr. Smith said. "So as a lawyer I see it as potentially a very lucrative specialty. And as a byproduct, it's a form of ministry. I've been working with this little 15-year old for a year, and it's a way of ministering to the second victims of abortion, the women who've been damaged."

The religious overlap was plain in a prayer request Mr. Smith made to Operation Prayer Storm, a group he describes as "a loose coalition of 25 ministries seeking revival and an end to abortion."

Last April, Operation Prayer Storm sent out to those on its mailing list requests to pray for students who want prayer at school graduations, to stop the Federal Government from mandating "religion free" workplaces and for Swendsen, Amshoff to "get revelation of ALL information they need in each abortion malpractice case."

Swendsen, Amshoff lawyers have appeared on the evangelist Pat Robertson's television show, the 700 Club, in a segment that also featured a Life Dynamics ad.

Just who provides the money for the abortion-malpractice campaign of Life Dynamics remains a mystery. Mr. Crutcher, 47, said his organization depended on donations. He would not identify any donors, but said some had gave more than \$100,000. He said the group spent more than \$1 million last year to support a staff of seven and a steady barrage of mass mailings.

Mr. Crutcher said Life Dynamics would not take a share of the court awards in any cases it helps with.

If the Phoenix experience is any guide, the new abortion-malpractice suits will take a toll, even on doctors who are not found to have committed malpractice and on their insurers.

"In the mid-80's, when John Jakubczyk was head of Right to Life here, we were one of the abortion clinics targeted to be closed down," said Constance Bennett, the former executive director of the Family Practice Institute. "It was like being under siege. Demonstrators hatcheted the roof, they Super Glue'd the doors shut, they broke in and chained themselves to the tables. We were burglarized. I got death threats, and my dog was drowned in the pool.

"In the middle of all that, John Jakubczyk filed his first abortion-malpractice case, against one of our doctors,

for a perforated uterus. The doctor was investigated and exonerated, but the insurance company paid about \$5,000 to settle."

By all accounts, that is the only money Mr. Jakubczyk has ever recovered in these cases.