

# Legal Implications of a Link Between Abortion and Breast Cancer

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Dozens of studies have shown that the greater the number of abortions, the higher the incidence of breast cancer.<sup>1-3</sup> Three states expressly require physicians to disclose to patients seeking abortion that the procedure may increase the risk of breast cancer. Three other states have more general disclosure requirements about abortion.

There is a legal obligation of informed consent for any medical procedure. With the majority of studies showing that abortion increases breast cancer risk, and even the minority studies reinforcing the well-established principle that childbirth is protective against breast cancer, patients seeking abortion have an obvious right to this information. The patient who had an abortion and later develops breast cancer may have a valid claim against the provider. Already there have been at least two settlements in the United States in lawsuits brought for such failure to disclose.

Unfortunately, misinformation has circulated in the media following an article published last year in the British medical journal *The Lancet*. The article did not deny that increased abortions result in greater incidence of breast cancer. Rather, the article merely claimed that abortion does not increase the risk of breast cancer, compared to the risk of someone who delayed pregnancy altogether. The *Lancet* article and data are consistent with the prevailing medical view that the more abortions in a society, the greater the number of breast cancer cases.

Failure to diagnose breast cancer has now become the most common malpractice case. While only a small percentage of physicians perform abortions, most physicians will encounter a patient who has an abortion in her medical history. The total rate in the U.S. of a patient contracting breast cancer is 1 in 7.5, and tragically continues to rise. The likelihood of a patient developing breast cancer may be higher if there is an abortion in the patient's medical history, and physicians may be held accountable for a heightened duty to screen that patient for cancer.

There is also a public policy issue about who should pay for the enormous costs of increased breast cancer cases. Tobacco companies are now held liable for medical costs imposed by increased risk of cancer from smoking. Attorneys General of various states have sued to obtain enormous settlements from the tobacco industry. Should the logic be any different for physicians who perform abortions?

## Informed Consent Laws

There is a general duty at common law for physicians to procure informed consent from a patient before an operation.<sup>4</sup> Washington State, for example, required informed consent by physicians more than 30 years ago, and shifts the burden to the defendant to justify omission of material information.<sup>5</sup> Lack of informed consent is the basis for many lawsuits, as consent is plainly not meaningful if not fully informed. Consent to an operation based on an understanding that there are no long-term adverse effects is invalid if the operation does increase a risk of a long-term condition, and the patient was

not informed of this fact. The right resides with the patient alone: if there is a body of research suggesting a risk, then the patient has a right to be informed of that risk, even though there is not a generally accepted view about it.<sup>6</sup>

Accordingly, lack of fully informed consent by a patient can impose liability on the physician. New York State courts have held that even emotional distress brought on by misinformation about abortions serves as the basis for a valid claim, and the acting physician can thereby be held liable. In 1987, the New York Court of Appeals allowed recovery by a patient because she had received incorrect information resulting in an abortion that caused emotional distress.<sup>7</sup>

In 2004, a trial court in New York upheld a claim of medical malpractice where a breach of duty by a physician and misinformation caused emotional distress. The mother had been told that her condition of fibroid tumors rendered it unlikely that she could carry her pregnancy to term. She then submitted to a chemical abortion, but it failed to be completed. The patient ultimately decided to give birth. Her child was then born with severe defects, which were caused by the attempted chemical abortion. If the patient had been correctly informed, she would have chosen to continue her pregnancy and given birth to a healthy child.<sup>8</sup>

Lawsuits may be filed against physicians who perform abortions and fail to disclose that the procedure might increase the chance of breast cancer. One such suit in Pennsylvania has already settled on confidential terms, after a lawsuit on similar grounds succeeded in Australia.<sup>9,10</sup> Pennsylvania does not have a law expressly requiring that abortion providers disclose a connection with breast cancer, but the common law imposes a duty of informed consent in nearly all states. Similarly, an Oregon judge recently approved a settlement paid on behalf of an abortion provider there to a 19-year-old girl with a family history of breast cancer, who was not told of an increased risk from the procedure at age 15.<sup>11</sup> She recovered monies, even though she has not yet developed breast cancer at her young age.

Three states do expressly require that abortion providers inform their patients that the operation may increase the risk of breast cancer: Texas, Mississippi, and Minnesota. Minnesota mandates this disclosure, but its health department adds a disclaimer to its publications as described below. A fourth state, Kansas, provides the information through state publications including its website. Two other states, Alabama and Louisiana, have backed away from disclosing the possibility of an increased risk. Neither Alabama nor Louisiana, however, has altered the common law duty to provide all relevant information to a patient in procuring consent.

Texas, the second most populous state, has a statutory mandate that informed consent be given 24 hours prior to an abortion. Texas law expressly establishes that consent is informed only if "the physician who is to perform the abortion...informs the woman... [of] the possibility of increased risk of breast cancer following an induced abortion and the natural protective effect of a completed pregnancy in avoiding breast cancer..." Additionally, the woman having an abortion must certify in writing that she has been informed of this increased risk.<sup>12</sup> This law was enacted in 2003, and its effect on abortions in that state is not yet known.

Mississippi law requires that women preparing to have an abortion sign a form indicating they have been specifically told about an increased risk of breast cancer from abortion when medically accurate.<sup>13</sup> Effective in 1996, this requirement and others have had a dramatic effect on the numbers of women obtaining abortions in that state. In response to the requirements, abortions have fallen in Mississippi. In 1991 the number of abortions performed was 8,814; in 2002, the latest year for which data is available, this number had dropped to 3,605, a decline of 59 percent.<sup>14</sup>

Minnesota law requires informed consent and disclosure of the abortion/breast cancer link at least 24 hours prior to an abortion. According to Minnesota law, “[n]o abortion shall be performed” unless the woman is told of “the particular medical risks associated with the particular abortion procedure to be employed including, when medically accurate, the risks of ... breast cancer.”<sup>15</sup> Additionally, the Minnesota Department of Health’s “Report of Informed Consent for Induced Abortion” lists the risk of breast cancer associated with abortion. Although the state mandates this disclosure and the department does claim the risk exists, they also add a disclaimer: two recent studies claim there is no link, adding that “[w]omen who have a strong family history of cancer, or who have clinical findings of breast disease, should seek medical advice from a physician regardless of their decision to become pregnant or have an abortion.”<sup>16</sup>

Kansas law expressly requires that women be informed of “a description of risks related to the proposed abortion method,”<sup>17</sup> and the state-mandated pamphlet handed out to potential patients warns, “[s]everal studies have found no overall increase in risk of developing breast cancer after an induced abortion, while several studies do show an increase[d] risk ...”<sup>18</sup> However, Kansas does not specifically require informing patients of abortion and its related increased risk of breast cancer.

In Louisiana, a state-mandated brochure and its Department of Health and Hospitals had been informing women of the potential risks of the abortion procedure, voluntarily including information on the increased risk of breast cancer.<sup>19</sup> Under pressure from media representations of the *Lancet* article, Louisiana hastily removed the abortion/breast cancer link information.<sup>20</sup>

In June 2004, a U.S. District Court judge approved a settlement involving a challenge to the 2002 Alabama “Women’s Right to Know Act.” The constitutionality of the law, which required disclosure of the effects of abortion on the body, the risks involved, and the alternatives available, was well established. But the court-approved settlement specifically stated that the warning of the increased risk of breast cancer due to an abortion was to be removed from the state-mandated brochures. Apparently abortion providers oppose informing patients about the increased risk of breast cancer more than they oppose other disclosure requirements.<sup>21</sup>

### The Flawed *Lancet* Article

In March 2004, *The Lancet* published an article<sup>22</sup> that was widely—and inaccurately—portrayed as disproving the link between abortion and breast cancer.<sup>23-28</sup> The article did not deny that more abortions increase breast cancer incidence, a fact observed by the vast majority of studies and by changes in breast cancer rates worldwide in response to changes in abortion rates. Delaying or avoiding childbirth elevates the risk of breast cancer, and abortion has that adverse effect. According to most studies, abortion also causes additional risk.

The *Lancet* article did claim, “[p]regnancies that end as a spontaneous or induced abortion do not increase woman’s risk of developing breast cancer.”<sup>22</sup> This was the strongest assertion in the

article, but it does not deny that abortion increases the risk of breast cancer. Instead, this assertion compares the risk of breast cancer from an abortion to a hypothetical case in which no pregnancy occurred in the first place. Once a pregnancy occurs, aborting that pregnancy does increase the risk of breast cancer for that individual. For society as a whole, more abortions do cause greater incidence of breast cancer in the future. Not even the *Lancet* article doubts this.

Reports in the news media ignore the fact that the *Lancet* article relies entirely on a hypothetical comparison, first between pregnancy followed by an abortion, and second, no pregnancy at all. But neither the patient, nor the abortionist physician, nor the government, has the option of turning back the clock and undoing a pregnancy after it occurs, and childbirth is beneficial to health.

The only possible alternatives are childbirth and abortion, and the *Lancet* article tacitly concedes that the latter increases the risk of breast cancer compared to the former. Nearly all studies have concluded likewise. The medical consensus is that carrying a pregnancy to term is healthier than terminating it by abortion. Women consenting to an abortion need this information in order for their consent to be informed.

Countries that have banned or restricted abortion illustrate this effect. During two decades of rule by the dictator Nicolae Ceausescu, Romania prohibited abortion and enjoyed one of the lowest breast cancer rates in the entire world during that time, far lower than comparable Western countries. Romania’s breast cancer rate was an astounding one-sixth the rate of the United States.<sup>29</sup> But after the execution of Ceausescu on Christmas Day, 1989, Romania has taken the entirely opposite approach, embracing abortion to the point that Romania now has one of the highest abortion rates in the world.<sup>30</sup> Science predicts that breast cancer rates will rise as the women having abortions reach ages susceptible to the disease. Indeed, that is exactly what is happening, with the worst still ahead as women who had abortions in the 1990s as teenagers or in their 20s reach ages more susceptible to breast cancer.

Similar observations of cause and effect are evident in Poland and Ireland: Poland limits abortion and now enjoys one of the lowest breast cancer rates in Europe, despite a high rate of cancer in men, while Ireland prohibits abortion and benefits from a breast cancer rate of only 1 in 13, about half the U.S. rate.<sup>31</sup>

Even in the Far East, where breast cancer rates have historically been much lower than in the West, increased abortions have apparently caused alarming increases in breast cancer incidence. In Taiwan, for example, abortion was traditionally rare, but Taiwan has imitated its pervasive practice in the West. A sharp increase in abortions in Taiwan would predictably lead to relatively higher breast cancer incidence among the younger age group affected by the change. This has indeed occurred, as “breast cancer patients younger than 40 years of age account for only 6 percent of total breast cancer victims in West European countries, but the ratio reaches a high of 29 percent in Taiwan.”<sup>32</sup> No plausible explanation for this phenomenon, other than abortion, has been advanced.

The data republished in the *Lancet* article do show an increased risk among breast cancer victims asked if they had obtained an abortion. Specifically, the article reveals that about 33 out of 39 large studies of breast cancer patients had an increased risk of breast cancer from abortion beyond the effect of avoiding a pregnancy.<sup>22</sup> The *Lancet* article disingenuously excludes the studies showing the highest correlation and includes dubious studies, but even then its data still illustrate a clear correlation. Its tables show studies in France, Greece, Australia, and Germany displaying relative risks of breast cancer of 1.35 or above for abortion compared to no pregnancy at all. The risk of breast cancer from abortion compared

to childbirth, which is the real alternative, is of course far higher, given the protective benefits of childbirth.

The *Lancet* article errs, however, in emphasizing small “prospective” studies that rely on self-reporting of abortion by patients who do not have cancer and may not even be sick. In contrast to the cancer patients, who have every incentive to disclose a medical history of abortion, women who are not ill have an incentive to keep that personal information private. The only healthy women who have reason to disclose a prior abortion are those preparing for childbirth, which has beneficial effects that mask the health impact of the abortion.

By effect if not design, the *Lancet* article relied on samples consisting of the least likely breast cancer victims among women who had abortions. For the small prospective studies used by the *Lancet* article, “[o]n average, the age of the women with breast cancer was 50.4 years and they had 2.4 births.”<sup>2</sup> But about 80 percent of breast cancer victims are over 50, and the typical breast cancer patient has had fewer than 2.4 births.<sup>3</sup> The obvious disincentives for healthy women to report their own abortions, and the masking effect of the large average number of childbirths, negate any effect of abortion in this sample. It is no surprise that the effects of abortion are offset by other factors in this unrepresentative group. The *Lancet* article has many additional flaws, already explained elsewhere.<sup>4, 5</sup> It contains political language favoring abortion, such as the phrase that certain women “have been at risk of illegal abortion for part of their reproductive lives.”<sup>2</sup> The authors apparently picked studies advancing their agenda, and admitted to excluding studies showing higher correlations between abortion and breast cancer.<sup>2, 7</sup> They also excluded older women, who are most likely to contract breast cancer, by an irrational elimination of studies pre-dating legalization of abortion in many countries. The article did not accomplish its purported goal of surveying other studies when it selectively excluded studies that did not serve its conclusion. Moreover, the article failed to include details about how the prospective studies were really performed.

Regional variations in breast cancer rates among similar ethnic groups confirm the link between abortion and breast cancer. In Great Britain, for example, the rate of breast cancer decreases steadily as one travels from England, where abortion has been common, to Northern Ireland, where abortion has been uncommon, to Ireland, where it has been prohibited.<sup>3, 6, 3, 7</sup>

In the United States, similar relationships between abortion and breast cancer can be observed. The San Francisco Bay Area, including Berkeley, known for its long-standing acceptance of abortion, has a breast cancer rate 9 percent higher than the rest of the state, according to information from the state Department of Finance and the state Office of Vital Records. In another example, Long Island has suffered from a high rate of breast cancer that politicians have blamed on the environment.<sup>3</sup> But Long Island has long had a thriving abortion industry, dating back to 1970 when the state legalized the procedure even before *Roe v. Wade* (1973), and many of the earliest and busiest abortion clinics in the United States have been on Long Island. In contrast, Wyoming has one of the lowest abortion rates among states, and has one of the lowest breast cancer rates among women nationwide.<sup>3, 9</sup>

### Malpractice and Failure to Diagnose

The alarming increase in breast cancer in the wake of abortion has been well documented. But the question of who is paying the costs has not been addressed.

Physicians are. Not the small percentage who perform abortions, but the large percentage who do not. The physicians bearing the costs here are those sued for failure to diagnose breast cancer, and the other physicians who have endured rising liability insurance premiums.

The most common type of malpractice case is now failure to diagnose breast cancer. This kind of lawsuit now surpasses all others against physicians.<sup>4</sup> The average payout for these failure to diagnose cases is substantial: about \$200,000 apiece. Added to that are substantial costs of defense, lost time and income for the defendant physician, and significant administrative costs.

These legal and administrative costs are borne by all physicians in the form of rising liability insurance premiums. The more than 50 percent increase in breast cancer in America since *Roe v. Wade* has likely caused a greater than 50 percent increase in lawsuits for failure to diagnose it, as lawyers develop practices specializing in this type of action. (Abortions and breast cancer both increased before *Roe v. Wade* also.) And even when breast cancer is detected, a failure-to-diagnose lawsuit can be filed for not detecting it sooner.

About 5 percent of breast cancer is inherited, and thus delineated in a routine medical history that documents parental illness. But a physician faces a difficult task of defending against a failure-to-diagnose claim in everyone else. About 80 percent of women with breast cancer are the first in their families to be stricken by the disease.<sup>4</sup> Even a proper diagnosis can lead to a malpractice lawsuit, if the attorney wants to argue that the breast cancer should have been detected sooner.

With abortion recognized as a risk factor for breast cancer by consensus in the medical literature and by several state laws, physicians should be aware of the likelihood of being sued for failure to diagnose breast cancer in a patient who had an abortion. A physician can save lives and protect himself against lawsuits by being vigilant for the possibility of breast cancer in patients with a medical history of abortion.

The Alan Guttmacher Institute estimates that about 1 in 3 American women will have had an abortion by the time she reaches age 45.<sup>2</sup> Accordingly, physicians can expect that roughly a third of their patients around that age will have had an abortion, though this can vary widely by location and demographics.

It is helpful to know what percentage of those patients will ultimately develop breast cancer, in order to screen for it early and save lives. The total rate is 1 in 7.5 in the U.S. But more abortions mean more breast cancers under the prevailing medical view, thereby implying a higher rate of breast cancer among women who have had an abortion.<sup>3, 7, 4, 3, 4, 4</sup>

How much higher?

About 80 percent of breast cancer victims are over age 50, but that population was already past the teenage years when abortion rates increased sharply after the national legalization of abortion. Half of all abortions are in women aged 24 or younger, and the numbers of abortions in the United States did not reach its highest levels until many years after *Roe v. Wade*. The vast majority of abortions performed in the United States, and the world, occurred after 1980, and a woman aged 24 or less then is still younger than age 50 today. Any increase in breast cancer by abortion already witnessed would be merely the beginning of much greater increases in breast cancer in the future. The largest expense to physicians and society from the effect of abortion on breast cancer lies ahead.

While ultimately a third of American women will have abortions by age 45, far fewer women had abortions in the 1960s and 1970s than in the 1980s and 1990s. Among women who have reached age 50 today (and thus were already aged 25 years or older by 1980), perhaps only about a fifth of that group has had abortions.

If the 50 percent rise in breast cancer rates since abortion became legal nationwide is primarily attributable to this fifth, that implies a 3.5-fold increase in relative risk for it. Given that the total lifetime risk of breast cancer has risen to 1 in 7.5, a relative lifetime risk of 3.5 for breast cancer by the fifth who have reached 50 years and have had an abortion translates into an absolute lifetime risk for them of about 1 in 3. The risk would be even higher if all types of cancer are included.

The United States has not yet felt the full impact of the abortions performed on more than 20 million young women since 1980. The vast majority are well under 50 years old; many millions of them have not yet reached age 30. If 1 in 3 of these younger women develops breast cancer, or even half that rate at 1 in 6, the costs in terms of lives lost, medical expenses, failure-to-diagnose lawsuits, and forgone opportunities would be staggering.

The tobacco companies were finally held liable for the costs they impose on individuals and society. Will the same occur for the abortion industry, or will those costs continue to be borne by other physicians in the form of liability premiums, and by society? Are we currently in a period of denial similar to what happened for decades about tobacco?

The states of Mississippi and Texas, and the countries of Ireland and Poland, have adopted abortion policies that will minimize the occurrence of breast cancer in the future. Meanwhile, Romania is changing from having among the lowest incidence of breast cancer to having the highest. "The liberalization of abortions in Romania in 1990, the significant increase of the number of abortions at relatively short intervals, determined a rise in the incidence of breast and uterine cervix cancer in my country."<sup>4</sup> Its population faces increasing breast cancer for the next few decades, cutting short many women's lives and devastating its health system.

Fewer than 20 years after *Roe v. Wade*, the rate of breast cancer in the U.S. had risen to 1 in 10, and *Time* magazine sounded a national alarm with a cover story describing it as the "puzzling plague."<sup>4</sup> Yet the article did not mention abortion. Now the breast cancer rate has risen further to 1 in 7.5, but articles about causation have vanished from the established media.

## Conclusions

Consent to any operation is meaningless unless fully informed. The consensus in the medical literature is that abortion does increase the incidence of breast cancer. This information is of obvious significance to women who may consider having an abortion, and their consent without it is legally deficient.

Failure to diagnose breast cancer has become the most popular type of malpractice lawsuit. To save lives and guard against possible lawsuits, physicians should warn of the link prior to the operation and be vigilant looking for breast cancer in patients who have a medical history of abortion.

The costs to individuals and society from withholding or ignoring this information about abortion and breast cancer are enormous. Diagnosis and treatment of breast cancer involves far more misery for women than a diagnosis of appendicitis, for example. Yet in sharp contrast to the tobacco industry, the abortion industry pays nothing to offset the substantial costs to society of increased cancer. States and countries, already strained to their breaking point in their health budgets, face a rising tide of costly breast cancer cases. Disseminating information is the best way to save lives and conserve scarce resources.

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