

CONTENTIOUS ISSUES

FOETAL PATIENTS, SURGEONS, AND MEDICAL NEGLIGENCE: AN INSIGHT FOR A NEW LEGISLATION

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ABSTRACT

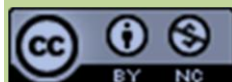
Foetal interventions are the direct result of developments in the field of medicine. The scientific advancements opened the way for pregnant women to select the treatment of the foetus '*in utero*'. This is an option available when the pregnant woman is reluctant to terminate the pregnancy on the grounds of congenital abnormalities of the foetus. Further, treatment of the foetus is considered a psychological relief to pregnant women who otherwise had to wait until the birth of the child to remedy the defects. The predominant method of treatment of the foetus is 'foetal surgery' which facilitates the treatment of the foetus in the womb. This demarcates the treatment of the fatal conditions of the foetus through invasive procedures or open surgery. The problem that arises in this context is whether the foetal surgeons exercise a medical duty of care towards the foetus. The problem is aggravated when the viable foetuses become patients as such patients have the potential to survive outside the womb (ex-utero) irrespective of the destruction of the life of the mother. Medical negligence and a course of action for medical malpractice litigation are established only upon the proof of the existence of a medical duty of care and the breach of it. This paper aims to provide insight into legislation on the medical negligence of surgeons performing surgeries on foetuses. The methodology adopted in the paper is qualitative in nature and a comparative legal analysis with the jurisdiction of the United States of America (USA). The paper's conclusion holds that foetal surgeons legally undertake to act for the benefit of foetal patients and have an obligation to avoid negligence.

Keywords: *Foetal patients; Medical negligence; Open surgery; Surgeons; Viability*

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INTRODUCTION

Giving birth to an unhealthy child with birth defects is a physical and psychological trauma to the parents¹. Such parents were given two options : terminate the pregnancy or wait until the child is

born and resort to treatments. The third option which has been offered by medical science is the treatment of the foetus within the womb itself (*in utero*). In 1981, the first intrauterine surgery on a foetus was performed by surgeons at the University of California, United States of America (USA). A series of cases identified the imposition of liability on medical practice which inflicted injuries on a foetus encased in a womb². This led to the development of Wrongful Death Actions on behalf of unborn or viable foetal patients. Sri Lanka faces a drastic advancement in the field of medicine and surgery. Among the developments concerning the field of medicine, foetal medicine is of imperative concern. The objective of the paper is to provide insight into legislation on the matter of medical negligence of foetal surgeons. The paper focuses on legal aspects pertaining to the medical practice of surgeons who deal with viable foetal patients. The author has reviewed literature relevant to medical law, medical malpractice litigation, and landmark

cases decided by the US courts in sequence about the imposition of liability on medical professionals relating to the wrongful death of fetuses.

DISCUSSION

Modern medicine has clearly shown that foetal surgery or foetal intervention is an emerging field³. The mission statement of the International Foetal Medicine and Surgery Society has elaborated that, it has two main functions namely to advance the field of foetal diagnosis, therapy, and related medical and scientific pursuits⁴. 'Foetal Medicine' has earned the epithet as a super speciality enterprise and a technology-driven field where fatal-foetal conditions are being treated⁵. The recent developments pertaining to foetal diagnosis have opened ways to the detection of foetal defects and conditions. The foetal treatments have been developed through the courage to experiment with emerging techniques. With the current developments in foetal surgery, medical interventions have become supportive in the benefit of foetal diseases. The surgeries performed on fetuses show the promotion of long-term health interests of children⁶.

Medical negligence arises when the duty of care does not comply. Medical Negligence is the result of the breach of duty of care and emerged from the law of delict⁷. Determining negligence is based on a test comprised of three stages namely the person owed a duty of care, the duty of care was breached, and the breach has caused in the direct result of a legally recognized harm⁷. In this process, the doctor's fault/ negligence must be established by the claimant on the balance of probabilities. The compensation is paid to return the claimant to a position if the harm had not occurred.

In view of the Common Law, compensation cannot be granted to an injured foetus in a womb, even if the foetus was capable of surviving and being born alive². The reason was basically the fact that there was uncertainty as to the legal personhood of the fetus⁸. This context was changed with the development of perceptions of 'foetal viability'⁹. A viable foetal patient must be understood in terms of both biological and technological factors⁹. The reason is that a viable foetus is capable of surviving *ex-utero* (outside the womb)⁹. This stands to an instance where the foetus is of sufficient maturity and has the capacity to survive up to the neonatal period provided the requisite technological support. In *Verkennes v. Corniea*, it has been clearly defined that, an unborn child reaches the stage of viability means an instance where its existence is unfettered by the destruction of the life of the mother¹⁰. In

Bonbrest v. Kotz, an injured foetus in a womb due to medical malpractice was born alive. The court's view was that the pregnant woman and the viable foetus are separate entities. The significance of the viable foetus is that it can survive outside the womb, even after the death of the mother¹¹. The landmark case *Bonbrest* opened the way for the claims by children who suffered injuries at the stage of the foetus in the womb upon the proof of the continued effects of the injury even after the birth.

When it comes to the death of the foetus, the courts confront the difficulty in ascertaining the causation between the negligent act of the surgeon and the death². With the invention of new techniques of foetal surgery, the constant monitoring which takes place before or after the surgery easily facilitates the identification of the causal nexus between the negligent act of the surgeon and the death of the fetus². This context becomes problematic when the death of the foetus is a result of a completely unrelated result of the surgery. The proof of injury in the context of foetal surgery is not considered as difficult as in the context of a conventional case pertaining to the wrongful death of a foetus. A conventional case denotes an instance where the foetus is injured due to acts that do not fall under the category of medical negligence. In such a case, the court is doubtful of the fact whether the mother who claims compensation is opportunistic in nature and where her own behaviour resulted in an injury to the foetus. A woman's own behaviour causes injury to the foetus when she does not exercise proper care, does not have an understanding of her pregnancy, and has the intention to terminate the pregnancy. The confidence that the court derives in the process of foetal surgery is grounded on the fact that it is an elective choice on the part of the mother. The pregnant woman's decision to operate on the foetus and avoid termination of pregnancy itself is a manifestation of the bond she has with the fetus².

The surgeon's duty of care is affirmative in nature which means that they have to use their skill to support the patients that they have undertaken to treat. When surgeons meet both the pregnant woman and the foetus, there are certain instances to sacrifice the foetus to protect the life of the pregnant woman. The situation in foetal surgery is different as the surgeon has lawfully undertaken the duty to act for the sole benefit of the unborn child². A foetal surgeon has a clear understanding and knowledge about the existence of a foetus, the fact that his/her negligence would cause harm to the foetus and there is a duty on his/her part to guard against the negligence. As the new developments in

the field of foetal medicine signify, there is a direct medical duty of care owed to the foetus by the surgeon, and in the process of legislating; the interests of the foetus, pregnant woman, and the surgeon should be balanced.

CONCLUSION

Foetal surgery is a process that facilitates pregnant women to continue the pregnancy without selecting the option of termination due to birth defects of the child. In the USA, wrongful death liability has been recognized in the context of unborn children as well. An injury caused to a foetus as a result of a negligent act of a surgeon was considered compensable. A claim was predominantly based on two grounds namely the 'born alive' standard and the 'viability' standard. A viable foetus is entitled to be compensated for the injuries caused. Thus, when a viable foetus is injured in a womb and born alive, the child is capable of claiming compensation upon the proof of the continued effects of the injury so inflicted. When it comes, to the continued effects of the injury on a foetus, the establishment of the causal nexus is significant, and it becomes convenient due to the process of monitoring before and after the surgery. The proof of injury is way more convenient in comparison to the conventional cases of wrongful death of a foetus when the behaviour of the mother and outsiders caused the dilemma. The foetal surgery is done at a request of a pregnant woman for the best interest of the foetus, and it cannot be argued that she was an opportunistic claimant of compensation who had no knowledge of pregnancy and the wellbeing of the foetus. In addition, a foetal surgeon is fully aware and legally undertakes the duty of acting for the sole benefit of the foetus and has a crystal-clear obligation to avoid negligence.

CONFLICTS OF INTEREST

None

ETHICAL ISSUES

None

SOURCES OF SUPPORT

None

AUTHOR CONTRIBUTIONS

APR: Whole work including interpretation and analysis.

REFERENCES

1. Dickens BM, Cook RJ. Legal and ethical issues in fetal surgery. *International Journal of Gynecology & Obstetrics*. 2011 Oct;115(1):80–83. <http://dx.doi.org/10.1016/j.ijgo.2011.07.007>.
2. Stanley JD. Fetal surgery and wrongful death actions on behalf of the unborn: An argument for a social standard. *Vanderbilt Law Review*. 2003 Dec 1;56(5):1524–55. Available from: <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1769&context=vlr>
3. Cao KX, Booth A, Ourselin S, David AL, Ashcroft R. The legal frameworks that govern fetal surgery in the United Kingdom, European Union, and the United States. *Prenatal Diagnosis*. 2018 Jun;38(7):475–481. <https://doi.org/10.1002/pd.5267>.
4. The International Fetal Medicine And Surgery Society (IFMSS). Available from: <https://ifmss.org> [Accessed 22 January 2023].
5. Sampat, K, Losty, PD. Fetal surgery. *British Journal of Surgery*. 2021 Jun 22;108(6):632–637. <http://dx.doi.org/10.1093/bjs/znaa153>.
6. Winyard A. *Critical care decisions in fetal and neonatal medicine: Ethical issues*. London: Nuffield Council on Bioethics; 2006. Available from: <https://www.nuffieldbioethics.org/assets/pdfs/Critical-care-decisions.pdf> [Accessed 21 January 2023].
7. Momodu D, Oseni TIA. Medical Duty of Care: A Medico-Legal Analysis of Medical Negligence in Nigeria. *American International Journal of Contemporary Research*. 2019 March;9(1):56–63. <http://dx.doi.org/10.30845/aijcr.v9n1p7>.
8. Knopoff KA. Can a Pregnant Woman Morally Refuse Fetal Surgery? *California Law Review*. 1991 March;79(2):499–540. <https://doi.org/10.2307/3480692>.
9. Kurjak A, Carrera JM, McCullough LB, Chervenak FA. The ethical concept of the fetus as a patient and the beginning of human life. *Periodicum Biologorum*. 2009;111(3):341–348. Available from: <https://hrcak.srce.hr/file/67669> [Accessed 22 January 2023].
10. *Verkennes v. Corniea* 38 N.W.2d 838 (Minn. 1949).
11. *Bonbrest v. Kotz* 65 F. Supp. 138 (D.D.C. 1946).