

CONTENTIOUS ISSUES

Beneficence on unborn patients treated in wombs vs. autonomy of pregnant women: A legal standpoint

Rathnayake AP

Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka

ABSTRACT

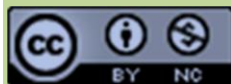
The 21st century marked increased emphasis on fetal rights which has resulted in the development of advanced medical procedures such as fetal surgery. Fetal surgery has been considered as a starting point of the maternal – fetal conflict owing to the fact that it involves two patients; the fetus and mother. Recognition of fetal patients has caused controversies in the field of law when determining issues pertaining to medical negligence and pre- birth injury. Legal scholars argue on the fact of imposing medical malpractice liability on physicians when fetal patients are injured during surgery. In addition, the “glorification” of the fetus while considering the termination of pregnancy as a secondary option is disputed by feminists. The reason is that, the termination of pregnancy signifies bodily independence of women and autonomy. The author, in this article has adapted a qualitative approach of methodology with a normative and content analysis. The author has discussed primary and secondary sources of law including foreign domestic legislations namely the Abortion Act 1967 (amended by the Human Fertilization and Embryology Act 1990) in the United Kingdom, The Offences against Persons Act 1861 and The Infant Life Preservation Act 1929. The central focus of the article is on the United Kingdom as an illustrative jurisdiction. The basic focus of this article is directed to study whether there is a conflict of rights between fetal patients and pregnant women in the face of the law of tort, medical law and ethics and to suggest the incorporation of the ‘Two-Patient Model’ to balance conflicting interests while discussing the Chervenak and McCullough’s ethical framework.

Keywords: *Fetal patients; jurisdiction; medical negligence; pregnant women; pre-birth injury*

Corresponding Author: Rathnayake AP
ayodhya.rathnayake@kdu.ac.lk
ORCID iD: <https://orcid.org/0000-0003-3674-7280>

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INTRODUCTION

The developments in modern medicine marked a significant recognition of fetal rights. The recognition of fetal rights with the disciplines of fetal medicine & antenatal imaging have supported the concept of fetal intervention or fetal surgery¹. The

invent of the procedures of fetal surgery has labelled both the mother and fetus as patients¹. The concept of the fetal patient has resulted in the maternal- fetal conflict². The evolution of fetal rights commenced from the criminalization of abortion and the institution of litigation related to the tort of medical negligence on pre-birth injury³. Identification of fetal personhood and the independence of the fetus was the foundation for the conflict in existence⁴. Accordingly, the protection of rights of one entity would cause diminishing or undermining of the rights of the other entity. This study specifically focusses on the evolution of fetal rights with the development of medical interventions, resulting in the maternal & fetal conflict. The discussion throughout the article particularly focusses on the conflict existing between fetal and maternal rights resulting in infringement on self- rule or autonomy of the pregnant woman.

The methodology adopted in the study is qualitative in nature and predominantly takes the form of a normative study. Thus, it is a literature review with analysis of primary and secondary sources of law. The primary sources of law mainly represent domestic legal instruments while the secondary sources of law are texts, publications and legal dictionaries. In addition to the use of secondary legal sources, the study addresses the topic in reference to a specific jurisdiction. The author's focus is directed to the jurisdiction of United Kingdom (UK). The focus on the position in UK clearly depicts the evolution of fetal rights and legislative developments.

DISCUSSION

As specified previously, the term 'fetus' has been subjected to a lengthy process of evolution with a simultaneous development of rights. At the commencement the fetus was glorified amidst religious views. The status of the fetus was improved and its importance was further emphasized with advancements in medicine and technology¹. Criminalization of termination of pregnancy resulted in abortion being considered as a conduct which contravenes the criminal law. However, due to increasing protests from feminists, abortion is considered as a procedure which shall be exercised as a life preserving option in the light of women's rights. In Sri Lanka, the termination of pregnancy is allowed to save the life of the pregnant woman, on medically established grounds and the law on abortion is rigid⁵. Restrictive abortion laws results in the glorification of the status of the fetus whereas in jurisdictions with non- restrictive abortion laws there is conflict with fetal interests. Fetal intervention as a step forward from the termination of pregnancy has emerged as a tremendous advancement in medical treatment. Fetal intervention is primarily governed by medical negligence frameworks¹¹.

However, taboos have been imposed by the law of tort which recognized cases related to medical negligence which was subsequently extended for the benefit of the fetus in instances of pre- birth injury³. The field of fetal interventions have clinical significance. Interventions are performed considering the fetus as an organ of the mother¹¹. Treatment of the fetus grants patienthood to the fetus thereby resulting in the award of independent rights of personhood. If interventions have a negative impact on the mother this gives rise to the maternal - fetal conflict. This simply implies the fact that, granting of patienthood to the fetus has the

very effect of placing undue burden on the mother to act in a selfless way and to live for the unborn child.

Fetal intervention sometimes take the form of in utero treatment. In case of fetal surgery, the lower abdomen of the pregnant mother is incised in order to gain access to the fetus⁶. The procedure resembles the caesarean operation but the at the end of fetal surgery, the woman will be still pregnant. This poses the question of physical integrity of the pregnant woman while considering the fetus as a being interconnected to the body of the mother. In Texas, USA a fetus was subjected to a surgery to cure a tumor in as early as 2016³. This was done at the Texas Children's Fetal Center to treat spina bifida¹⁶.

As in most jurisdictions world-wide, the status of the fetus is not optimistic. It was axiomatic in the context of English Law that, no legal personhood can be attributed to the fetus until birth⁷. The Offences against Persons Act 1861 specified that, abortion & termination of pregnancy is a crime which was subject to prosecution⁸. Subsequent to this, the Infant Life Preservation Act 1929 identified that, it is a crime to kill or destroy a child who is capable of being born alive⁹. The 'child' as denoted in this Act does not indicate a child who is capable of surviving independently of the mother. The Abortion Act 1967 (amended by the Human Fertilization and Embryology Act 1990) was enacted with the purpose of formalizing lawful abortions in UK¹⁰. In the context of United Kingdom, the fetal intervention is governed by the frameworks of medical negligence. Awarding the fetus patienthood has clearly evaded the concern on psychological matters pertain to the pregnant woman. The opponents to prenatal therapy insist, higher emphasis on fetal intervention has a compulsive effect on the pregnant woman to consider the fetus as a born baby¹¹. This is marked as a point where the maternal autonomy is considered diminutive. Such a stance clearly depicts the foundation of the maternal – fetal conflict. The diminution of maternal autonomy does amount to the contravention of women's rights. The British Medical Association (BMA) has further recognized fetal pain, where it specifically held that, the fetus can feel pain after 24 weeks of gestation¹². This was proven by medical evidence where it was revealed that, in certain stages of gestation, the fetuses respond to stimuli. The perception of fetal pain before viability results in creating tension in the context of medical practice and medical ethics namely beneficence and non- maleficence¹³.

The current developments show that, fetal surgery has become a valuable mode of treatment where the imposition of taboos would deprive the fetus from the benefits and positive fetal outcomes. Thus, it is seen as indirectly affecting the familial & psychosocial aspects of the pregnant woman. However, it can otherwise be argued that, bearing child has a societal & psychological burden on the pregnant woman.

In the context of fetal surgery related conceptualizations, two models have been identified namely the one-patient model and two-patient model¹⁴. In the one-patient model, it considers the mother as the sole patient. The fetus is considered fully dependent on the mother for survival and development. In this context, the pregnant woman's decision and consent are prioritized. In the two-patient model, the fetus is recognized as a separate entity entitled to clinical interests different from those of the mother¹⁴. The autonomous choices of the pregnant woman are disregarded in the context of the two-patient model and the model is criticized for jeopardizing the interests of the pregnant woman.

There is a doubt as to what extent fetal surgery affects the laws governing the maternal and fetal relationship. The imputation of patienthood to a fetus resembles the conferring of personhood to the fetus¹⁵. This demarcates an instance where two individual right holders occupy the same human body. The fetal personhood brings forth an idea of turning women into 'ambulatory wombs'¹⁵. However, the performance of a surgery to a fetus necessitates the consent of the pregnant woman.

Two-patient model involves in balancing interests. This model identifies the pregnant woman and fetus as two separate patients whose interests may conflict. This necessitates the doctors to balance the obligations towards each. In Chervenak & McCullough's ethical framework, it is explained that a human being becomes a patient, when it is presented to the physician for medical care and when there exist clinical benefits over clinical harms¹⁴. In this context, the recognition of fetus as a patient is dependent on the very competence of the physician to provide treatment and the choice of the pregnant woman to present it for medical care¹⁴. The particular model provides the autonomy for women to decide the patienthood of the fetus. Simultaneously, it confers dependent moral status to the fetus¹⁴.

CONCLUSION

Advent of the 21st century marked a significant rise in fetal rights. The advancements of medical technology introduced fetal interventions for the benefit of the fetus. Among the improvements in the disciplines of fetal medicine, fetal physiology & ultra sound technology, the fetus has been identified as an entity with different sensory perceptions who has the capacity to respond stimuli. Fetal surgery is one of such interventions, which facilitates the treatment of the fetus within the womb. Treating the fetus awards the patienthood, which signifies traits of legal personhood. This marks the beginning of the maternal- fetal conflict. Scholars argue that, treating the fetal patient within the womb itself contravenes the physical integrity of the mother and development of assisted reproductive technologies manifestly negates the rights of women. Medical treatment is developed and extended beyond the established standards. The innovations in the context of fetal medicine and surgery should be encouraged and they necessitate the development of institutional ethical guidelines before practice. Two-patient model which considers both pregnant woman and fetus as patients balances the interests of both. There, the pregnant woman confers dependent moral status to the fetus by taking over the autonomous decision making power to present the latter for medical care. This process establishes the fact that, doctors owe an obligation of beneficence to the fetus and an obligation of autonomy and beneficence to the pregnant woman.

CONFLICTS OF INTEREST

There are no conflicts of interest.

ETHICAL ISSUES

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