

Legal Right of Fetus: A Myth or Fact

Md. Rafiqul Islam Hossaini

LLB (Hon's) UoL, UK; LLM (JnU); M. Phil (Researcher) (University of Dhaka)

Abstract: *Protection of human life has been extended to the protection of unborn child under the common law. In English law foetus has no legal right of its own until it is born alive and separated from its mother. The right to life of the unborn foetus is restricted or limited subject to the right to life of the mother. There are two types of legal liability for killing a child which subsequently dies after birth. They are: (1) Criminal liability (murder or manslaughter) and (2) Civil liability (medical negligence). Moreover, for killing an unborn child in the womb or damaging a foetus in the womb potential specific liabilities may arise both in the UK and Bangladesh. Apart from this, for considering the legal rights of foetus, the common law defence of necessity is a significant issue and a matter of academic debate.*

Keywords - legal right of fetus, criminal liability, civil liability, specific liabilities, defence of necessity

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1. INTRODUCTION

The word foetus or fetus is derived from the Latin word *fētus*, which means “offspring” or “bringing forth” or “hatching of young”. The literal meaning of foetus is “an unborn or unhatched vertebrate in the later stages of development showing the main recognizable features of the mature animal”. Foetus is regarded as the prenatal state of human development between its embryonic state and birth. At the 11th week (nine weeks after fertilization) of gestational period the foetal stage of development tends to be taken as beginning. In the American case of *Jefferson v. Griffin Spalding County Hospital*, a significant description concerning foetus has been provided, it was described as “unborn human being” by the court. Moreover, the Court of Appeal (CA) of the UK, in the case of *St George's Healthcare NHS Trust v. S.* considered that foetus is not “nothing”. This view has been supported by the Attorney General's Reference (No.3 of 1994), where foetus has been considered as separate entity to the pregnant mother.

2. PROTECTION UNDER ENGLISH COMMON LAW

Protection of human life has been extended to the protection of unborn child under the common law. It was not a crime to cause damage or harm to the foetus until the mother attain the “quickening” period which was the confirmation that the baby received a soul from God. Destroying unborn child was considered as an ecclesiastical crime until the Lord Ellenborough's Act of 1803, as the 1803 Act considered it as a criminal offence and provided it on a statutory footing for the first time. Legally foetus has been provided certain level of protection for long period of time.

It has been stated by Sir George Baker in 1979 that, in English law foetus has no legal right of its own until it is born alive and separated from its mother. This view has been supported by Heilborn J. in the case of *C v S*. However the decision of *C v S* has been confirmed in the case of *Re M.B.* As such birth is the point in which legal personality is gained and at that point legal action can be brought against another person. The right of foetus has been considered in respect of right to life under Article 2 of the European Convention on Human Rights. In *Vo v France* it was held that in certain circumstances this right may be extended to the unborn child. In the important cases of *Paton v United Kingdom* and *H v Norway*, where it was held that right to life of the unborn foetus is restricted or limited subject to the right to life of the mother. As such if the life of the mother of the foetus is not in danger the unborn child can enjoy right to life.

3. LEGAL LIBILITIES

There are two types of legal liability for killing a child which subsequently dies after birth. They are: (1) Criminal liability (murder or manslaughter) and (2) Civil liability (medical negligence).

3.1. CRIMINAL LIABILITY IN THE UK

Considering criminal liability, it not a murder to kill an unborn child as the foetus or the child in the womb is not a person in the eye of law. The definition of murder is considered as the unlawful killing of one person by another, having the intention to kill or cause grievous bodily harm. If the wrongdoer does not have the intention to kill or cause GBH (Grievous Bodily Harm) to the foetus in the womb, he or she cannot be convicted for murder. However, Sir Edward Coke defined murder in a different way, as per his definition murder means killing any "reasonable creature" by any person with malice aforethought under the Queen's peace. In this regard if the foetus or child in the womb is considered as "reasonable creature" then a successful conviction of murder may be established though a problem regarding intention to kill or cause GBH to the unborn child may arise. However, to mitigate this problem the UK Court of Appeal has chosen a significant approach to follow: until birth the foetus is to be considered as a part of mother and liability for the subsequent death of the child followed by the principle of transferred malice. In respect of the approach taken by the CA it can be said that, if the foetus is part of the mother then the mother has right to give consent to damage or injure it. On the other hand, if the foetus is considered as part of the mother then the principle of transferred malice need not be applicable here since it is not possible attain intention to injure the foetus without having intention to injure the mother. The leading case of *R v Nedrick* the House of Lords (HL) clarified the test for intention through the principle of virtual certainty. In the case of *Woollin* it was held that the jury must have taken the view that intention could be inferred from all the relevant facts. As such if the consequence of the relevant act is virtually certain from the act done then it can be regarded as the wrongdoer has the requisite intention. However, Lord Mustill, in this respect, blurred the situation through raising the point double transferred malice (from mother to the foetus and then foetus to the child) and considered that double transferred malice is not applicable to such situations. Therefore, though conviction for murder might be tough to prove but the wrongdoers liability for manslaughter might not be that tough to prove as the constructive or gross negligence manslaughter can be easily proved. It is important to note that the punishment for murder is a mandatory life imprisonment whereas the punishment for manslaughter is any period of sentence up to life imprisonment.

3.2. CRIMINAL LIABILITY IN BANGLADESH

Offence relating to act done with intent to prevent child being born alive or to cause it to die after birth has been considered under Section 315 of the Penal Code 1860. Section 315 says that, if a person, not in good faith for the purpose of protecting the mother's life, does any act with intention to prevent the child from being born alive or cause it to die after its birth and the act prevents the child from being born alive or cause it to die after its birth, shall be punished with imprisonment for up to 10 years or fine or both.

Section 316 of the Penal Code 1860 deals with the offence of causing death of quick unborn child by act amounting to culpable homicide. It provides that, a person shall be punished with imprisonment for up to 10 years and with fine if he/she does any act that cause the death of a quick unborn child and the act is such that if it in the normal circumstances cause death would be guilty of culpable homicide.

3.3. CIVIL LIABILITY IN THE UK

For bringing civil action of medical negligence for the subsequent death of a born child, three elements are needed to be proved. They are: (1) Duty of care, (2) Breach of duty of care and (3) Damage is caused by that breach. This sort of civil action can be easily brought against the medical practitioners if they are found negligent in respect of their duty. However, for a successful claim it is essential to prove that subsequent death of the born child was caused due to the breach of the duty of care which the medical practitioner ought to perform.

3.4. CIVIL LIABILITY IN BANGLADESH

Civil suits for compensation are not barred for medical negligence litigations in Bangladesh. As section 9 of the Code of Civil Procedure provides, "The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred".

The Code of Civil Procedure, section 19 further provides: "Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the said Courts".

As the standard of proof in civil cases is "balance of probabilities" and in medical negligence litigations victim will get compensation if he or she can show that there was a possible medical negligent situation that occurred against the victim. In civil cases for compensation there is no need to show that the defendant (medical practitioner) was negligent beyond reasonable doubt. For medical negligence litigations as there is no express or implied restriction in civil suits for compensation; it is a suitable remedy for medical negligence cases.

4. SPECIFIC LIABILITIES IN THE UK

For killing an unborn child in the womb or damaging a foetus in the womb three potential specific liabilities may arise. They are: (1) Child destruction under the Infant Life (Preservation) Act 1929; (2) Abortion under the Abortion Act 1967; (3) Procuring or attempting to procure miscarriage under the Offences Against the Person Act 1861.

According to S.1 (1) of the Infant Life (Preservation) Act 1929 a person shall be guilty of felony, to wit, of child destruction and shall be convicted for life imprisonment if a person having the intention to destroy the life of the child “capable of being born alive” by any willful act causes that child to die before having an independent existence of its mother. Nothing in this Act shall constitute a crime if the act was done in good faith for the preservation of the life of the mother. The prima facie proof of capable of being born alive is the 28 or more that 28 weeks of pregnancy of the mother. However, this period is later reduced to 24 weeks of pregnancy of the mother.

The phrase ‘child capable of being born alive’ was first considered by the UK court in the case of *C v S* where the court held that, 18-21 weeks of gestation period cannot be considered as the child capable of being born alive. As such no offence can be established unless the foetus is a child capable of being born alive. Lady Justice Heilborn considered that the term ‘child capable of being born alive’ is ambiguous, subject to different interpretation and should be interpreted in connection with the common law “born alive” rule. However, in *Rance* the 26 weeks of gestation period was considered as the foetus is capable of born alive and the abortion performed on the foetus was considered as unlawful. The common law rule of “born alive” provided by Barry J in *R v Hutty* has two significant components: firstly, the child has to be fully extruded from the womb of the mother; and secondly, the child must have separate and independent existence from its mother. However, in the case of *Handley* the Court held that born alive means the independent child is capable of breathing through its own lungs. Barry J concludes that issue by stating leaving by virtue of functioning its own organs. In *Iby* the New South Wales Court of Criminal Appeal considered that “any sign of life” is necessary for considering a foetus to be a child capable of being born alive. In this regard viable foetus would undoubtedly satisfy the definition of child capable of being born alive. Though viability is an ambiguous term but medical consensus is that it is usually reached between 23 and 24 weeks of pregnancy of the mother. However, World Health Organization holds that 22 weeks of gestation is the age when the foetus is capable of showing sign of life and sign of life is evident in foetus of 20 weeks of gestation period. The Mental, Prenatal and Infant Mortality Committee of the South Australian Government provided that foetus of 20 weeks of gestation is capable of born alive. However, in connection with foetal development the heart begins to beat at the age of 22 days though not fully formed till 10 weeks of gestation. And at the age of 12 weeks of gestation vasculature or circulatory system is mostly completed. At the age of 16 weeks of gestation recognizable human brain exists. It is not surprising consequently that, foetus of 16 weeks of gestation survived birth though briefly.

Section 1 (1) of the Abortion Act 1967 states about the offence of abortion and provided that, a person shall not be liable for abortion if the termination of pregnancy is done by a registered medical practitioner and two registered medical practitioner formed a good faith opinion that- (a) pregnancy has not exceeded 24 weeks and if the pregnancy is not terminated it would involve greater risk to the physical or mental health to the pregnant woman or any existing children of her family; (b) to prevent grave permanent injury to the

physical or mental health of the pregnant woman the termination of pregnancy is necessary; (c) if the pregnancy is not terminated it would involve risk to the life of the pregnant woman; (d) if the termination of pregnancy is not done there is substantial risk that the child would suffer such physical or mental abnormalities as to be seriously handicapped. Moreover, section 1 (4) provides that the good faith opinion required by two registered medical practitioner is not necessary if a registered medical practitioner formed a good faith opinion that the termination of pregnancy is immediately necessary to save the life of the mother or to prevent grave permanent injury to the physical or mental health of the pregnant woman.

However, as per the above legal provisions stated in Abortion Act 1976, section 1 (1) (a) only provides a limitation period of 24 weeks for abortion and lawful abortion can be done in one of the situations provided in S. 1(1) (b), S. 1(1) (c), S. 1(1) (d) after 24 weeks of gestation period. As such if the foetus in the womb does not affect the life of the mother and there is no possibility that physical or mental health of the mother would be injured and no substantial risk of being physically or mentally handicapped then the foetus in the womb cannot be aborted.

There will be no offence of child destruction and abortion if the registered medical practitioner does everything in good faith. The ground of “good faith” has been considered in the case of *R v Smith* where the Court of Appeal ruled that the good faith ground of doctors is an essential requirement for the Jury to determine the totality of the evidence. As per *BOLAMS CASE*, good medical practice will itself meet the requirement of good faith of doctors. Mason and Laurie argued that for the termination of pregnancy bad faith of doctors can only be found if the termination is done without consent of the mother.

Section 58 of the Offence Against the Person Act 1861 makes it an offence convicted with life imprisonment if a woman with child with intention to procure her own miscarriage unlawfully administer any poison or noxious thing or unlawfully use any instrument or other means. This offence is not limited to the mother with child only. The rest part of section provides whosoever with intention to procure miscarriage of any woman whether with child or not unlawfully administer the woman with poison or noxious things or causes to use any unlawful instrument or other means shall also be guilty of felony and shall be convicted for life imprisonment.

5. SPECIFIC LIABILITIES IN BANGLADESH

Causing miscarriage is a specific offence under Section 312 of the Penal Code which provides, if a person voluntarily cause a women with child to miscarry shall be punished with imprisonment for up to 3years of fine or both, if the act was not done in good faith for the purpose of saving the mother’s life. A person shall be punished with imprisonment for up to 7 years and fine, if the act was done to the mother be quick with child. Moreover, Section 313 provides that, if the miscarriage was done without the mothers consent irrespective of quick with child or not shall be punished with life imprisonment or imprisonment up to 10 years and fine.

6. COMMON LAW DEFENCE OF NECESSITY

For considering the legal rights of foetus, the common law defence of necessity is a significant issue and a matter for academic debate. Stephen fist provided the first

authoritative definition of necessity and stated that to justify a criminal conduct 4 requirements need to be established: (1) there must not be any other choice without doing the criminal act; (2) the criminal act must be done to avoid irreparable or inevitable evil; (3) only reasonably necessary act was done by the wrongdoer; (4) the act was proportionate to the avoided evil. Michael Bohlander argued that the defence of necessity could not be used for murder which has been confirmed by the cases of *R v. Dudley and Stephens* and *R v Howe*. Bohlander also argued that if the common law defence of necessity can be used for killing unborn child then why not it be used for a handicapped burden person.

7. CONCLUSION

Attainment of legal personality in the eye of law is a prima facie requirement for having legal right. But this requirement is to some extent relaxed in connection with the legal rights of fetus. Though the foetus is an unborn child and has not attained legal personality the rights of foetus has been protected by the common law and through the development of law by some specific statute. Rights of foetus have not been ignored by both common law and statutory laws of the UK and Bangladesh but have been given significant importance through legal provisions. As per legal provisions, it is an offence to deprive the rights of the foetus.

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