Medicine and the Law

Judicial warning on very late abortions

In September, 1983, a boy with spina bifida was delivered full term at Cuckfield Hospital, Sussex. He was paraplegic and required a shunt, and his care imposed a very heavy burden on his parents. By the age of $6\frac{1}{2}$ years he had paid some 195 visits to hospital and his mother felt that it would have been better for her if he had never been born. His parents (both solicitors) sued, claiming that the question of possible fetal abnormality should have been investigated immediately when at an ultrasound scan on June 9, 1983, the radiographer had reported "??F spine". Unfortunately, the radiographer (who had never before scanned a spina bifida pregnancy) had not been able to capture the suspect feature on a 'Polaroid' picture. A repeat scan was booked for 32 weeks' gestation. On June 10 the radiographer discussed the case with the radiologist but he could not find out what sort of abnormality she was describing. In his view there was no urgency since the pregnancy was far too advanced for an abortion.

The plaintiffs contended that had they been given the opportunity to have the abnormal scan investigated immediately the mother would have had an abortion. The defendants (Mid Downs Health Authority and Dr Bernard Storr) argued that there had been no negligence and that a 27-week pregnancy was too far advanced for termination to be lawful under the 1967 Abortion Act since the fetus would have been a child capable of being born alive within the meaning of the Infant Life Preservation Act 1929. It is section 1 of that 1929 Act which lays down the time limits for legal abortion under the 1967 legislation. Unfortunately, the 1929 Act has often been wrongly interpreted as fixing the limit at 28 weeks when all it says is that at 28 weeks a fetus is prima facie a child capable of being born alive.

Never before has an English court had to interpret the phrase "capable of being born alive" in the context of a late abortion. (In C *v* S [1988] *QB* 135 the Court of Appeal did consider the meaning but only in relation to an 18–21 week pregnancy.[1]) Giving judgment on Feb 5, 1990, Mr Justice Henry Brooke said that he was satisfied that at 27 weeks the fetus was a baby capable of being born alive. He dismissed the plaintiffs' claim which was, essentially, that the mother had been negligently deprived of the opportunity of having an abortion which, in the judge's view, would have been unlawful. This result had to follow even though, had the woman been referred to a London teaching hospital before June 11–12, spina bifida would probably have been detected and termination would have been done immediately. In 1983 there were obstetricians willing to terminate a pregnancy with a severely handicapped fetus at 27 weeks and 2 days.

The judge went out of his way to say that he was satisfied to "a very high standard of proof" that at the material time the baby was capable of being born alive. In indicating that the evidence well exceeded the civil standard of balance of probability, and later in his judgment, the judge was suggesting that the evidence was beyond reasonable doubt, which is the standard of proof in criminal cases. This judgment can thus be read as a warning to obstetricians who are willing to do very late abortions. This does not mean that a jury would always convict—for example, the evidence might show that a fetus was too malformed to be capable of being born alive and that it would have been reasonable for a doctor to have terminated the pregnancy in the belief that this was so.

Counsel for the plaintiffs had submitted that there were surgeons willing to terminate at 27 weeks; that it would not have been an affront to public conscience if they had; and that no jury would have convicted in those circumstances. The judge rejected this argument: the court was not concerned with unlawful acts in the past but with a claim for a lost opportunity which would have involved an unlawful act.

The judge heard evidence that those concerned with the lawfulness of late abortions had interpreted "capable of being born alive" in very different ways. The variety of interpretations is illustrated in para 18(1) of the 1988 report of the House of Lords select committee on the Infant Life (Preservation) Bill: ". . . as a matter of legal interpretation, this expression probably means capable of being brought into the world alive independently of the mother, for a period however short, even a matter of minutes". The consensus in the medical profession, however, seemed to be that capable of being born alive meant "'viable' in the sense of capacity to survive for an appreciable period . . . capable of 'sustained independent existence', 'being able to breathe at the time of birth'" and so on. The select committee thought that most of those concerned with the interpretation of the phrase equated "capable of being born alive" with "capable of sustained survival".

In Mr Justice Brooke's view the meaning was clear. Even an anencephalic child lacking all or most of both cerebral hemispheres but capable of using its lungs or a child with spina bifida and one or more adverse prognostic criteria is born alive "if after birth it exists as a live child, that is to say, breathing and living by reason of its breathing through its own lungs alone, without deriving any of its breathing or power of living by or through any connection with its mother". He cited the Court of Appeal in C *v* S where Sir John Donaldson *MR* rejected the proposition that a fetus aged between 18–21 weeks was capable of being born alive on the grounds that a fetus incapable of ever breathing could not be so described within the meaning of the 1929 Act.

No minimum period of survival is therefore required to satisfy the words "born alive". The judge said that if the baby had been delivered at 27 weeks "he could have breathed unaided for at least two or three hours". With intensive neonatal care "he would, but for his spina bifida, have shared the 27-week-old baby's 30% risk of not surviving the first week of life". There would, in his judgment, have been no grounds on which the fetus could lawfully have been deprived of the chance to live whatever his parents' wishes. The case had to be distinguished from the case[2] in which the Court of Appeal sanctioned the withholding of certain types of treatment if the prognosis was hopeless and a baby was born dying.

Comment. A judicial warning on the unlawfulness of late abortions of even very handicapped fetuses has now been sounded. Extra effort will have to be made to recognise handicap as early as possible. Ultrasound scans at about 16 weeks are now routine in the UK but anencephaly is occasionally missed. The prognosis in anencephaly is hopeless, with very little chance of survival beyond a few hours. The judge's choice of anencephaly as an example may be persuasive but it does seem unfortunate and it is to be hoped that the Director of Public Prosecutions will continue to operate a commonsense approach to doctors who risk doing late abortions where the fetus is severely handicapped. Even if a criminal prosecution was brought, a jury, as Mr Justice Brooke acknowledged, might be more "merciful" than a judge applying legal logic in a civil case. Mr David Alton's private member's Bill, which was before Parliament some 18 months ago, was amended in committee to allow a fixed upper limit of 28 weeks for abortion where the fetus was thought to be handicapped. Some of Mr Alton's supporters thought that this was merely a restatement of the law under the 1929 Act, but lawyers in favour of the bill knew differently. In the event, the bill was lost. Late abortion is very rare, but in some cases it may be the most merciful option. Any future attempts to lower the time limit on abortion should allow a higher upper limit of 28 weeks for severely handicapped fetuses.

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1. Brahams D. An action by putative father and unborn fetus to prevent termination. *Lancet* 1987; i: 576–77.
2. Brahams D. Court of Appeal endorses medical decision to allow baby to die. *Lancet* 1989; i: 969–70.