

Medico-Legal Obligations of Hospitals: A Study in Relation to Abortion Cases in India

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ABSTRACT

The cause of abortion usually being accident and/or natural and may be because of choice and desire of the couple or women as owner of the womb. It is this aspect of exclusive right of women, to abort, which is debatable in law and society, besides, there are obligations on Hospitals while permitting women to abort. It is also seen that in some case hospitals have been negligent while in others some have adopted un-fair practices. A child is by-product of sexual act either as consequences of marriage, living relation or so on and so forth. Mother is considered to be the owner of the womb, accordingly, has a say in continuance of the pregnancy and/or its termination. This right of mother(s) ownership is regulated by social norms and law. The Indian Penal Code covers the offences against the fetus under Section 312-318 and labels such act(s) as punishable with maximum punishment of 7 years. The Law not being sufficient and keeping in view the social change and need, the legislature framed the Law namely, The Medical Termination of Pregnancy Act in year 1971 with exceptions, limitations and prohibitions. It is this aspect of exclusive right of women, to abort, which is debatable in law and society. Though the law at present permits abortion of fetus before 20 weeks of pregnancy subject to limitations and procedures thereto. The topic involves not only the Law, society but also the obligations on Hospitals. Accordingly, the research topic has its essence to determine the right of mother, in presence of other conflicting claims, besides, obligations on Hospitals. The topic is dealt on doctrinal methodology on the strength of primary and secondary source of data, whereby one set of data has been corroborated with the other for arriving at conclusion to understand whether mother's right is absolute and exclusive and/or it is covered and cloaked by limitations, besides, the duties of Hospitals and remedy for deviation and Negligence on their part.

Keywords

Abortion, Living relations, owner of womb, Absolute rights, Hospital Negligence, Limitations.

Article Received: 10 August 2020, Revised: 25 October 2020, Accepted: 18 November 2020

Introduction

From the times, when the society has established, it has also established the relations between the men and the women. In its developmental phase, such relations are termed as marriage. With the passage of time, the writers and/or priests have classified their relationship of marriage into monogamy, polygamy, polyandry and in rare of the rarest cases a commune system of sexual relation emerged on the scene. It is also perceived that theologies emerged to control the social relations by prescribing certain norms and keeping the society within the bounds of the same. The Christianity is against Abortion. In the medieval times, the religion has enormous influence on governance and in the process the theological concepts of prohibition in relation to abortion got the sanction of Law. The most of the Christian countries and especially Europe and Australasia continent are the examples of the influence as referred with exceptions. Not only this, the Indian

Executive's Wife in Netherland has to die without going for abortion as per the law of the land thereat. The Western theology including Jew, Parsi and Islam are opposed to termination of pregnancy considering it as temporal wrong and sin. In Eastern civilization especially in sanathan Dharma, it is said:

"Impregnation, gestation, birth, infancy, childhood, youth, middle age, old age and death are the nine ages of the body"

In this way the pregnancy itself is life rather starts with impregnation as an initial stage followed by gestation in the mother's womb. Any violence to the fetus is considered as violence against life, not withstanding consent of the owner of the womb even if there is compliance to legislations. The temporal laws and commands differ from country made laws on the subject. In the theMahanirvana Tantra it is stated:

"The woman who causes miscarriage before the completion of the fifth month, as well as the person who helps her thereto, should be heavily

punished. The women who after the fifth month, destroy the child in her womb, and the person who helps her thereto, are guilty of killing human being”.

The Tantra clarifies and asserts by making a demarcation of miscarriage/abortion before the 5th month of gestation and after the said period. In the former the heavy punishment is desired while in the later termination of fetus is considered as man slaughter in killing a human being. The other theologies referred and especially Islam and Christianity have also shown resistance to the abortion in addition to fundamentals of Sanathan Dharma of East.

CAUSATION OF ABORTION:

Once the position with respect to the Abortion Laws in India become known, it is imperative to find out the causation of abortion. Towards this, the research paper suggests on the basis of the data that the abortion may be an accidental act or it may be natural because of Rh factor or otherwise due to different Medico-scientific reasons. The abortion can also be a matter of choice of the couple, besides it may be under compelling circumstances like in the case of rape, forced sex coupled with the women age, etc. The law as referred in a country like India, it is the gestation period of the fetus in the womb which becomes relevant in most of the cases. The period for abortion is permissible as referred herein within the period of 20 weeks. Though under judicial activism and other compelling circumstances women has been permitted to abort beyond the said period subject to the Medical opinion and health/survival of the women as mother. Except for the causes referred, it becomes difficult to justify abortion in presence of Law and morality in India. However even under the circumstances where abortion is permitted and medical experts have given the clearance, still there are techniques for aborting the fetus.

TECHNIQUES OF ABORTION:

There are two types of abortion techniques namely abortion pill, and surgical operation at present. As said the abortion are prevented and discouraged but still in its history need to prevent and regulate started. The codification of law was felt in England and in 1803 its place was provided in the legislation under section 1 and 2 of Malicious Shooting or Stabbing Act, 1803. It is also seen that the Poland in 1932 was first country to legalize abortion only in cases of rape and threat

to maternal health. Iceland in 1935 permitted therapeutic abortions followed by Turkey, Denmark, Sweden. Other countries followed one after other but with limitations of time in relation to gestation. Mexico allowed abortion in special cases of rape pregnancy, threat to mother's health, and fatal malformation. Japan legalized it in 1948 followed by Yugoslavia on limited basis in 1952. United States permitted it during first and second tri-semester of pregnancy. The Abortions have become reality and India as a state cannot remain aloof- compelling for regulation and regulatory mechanism. A medical abortion is performed through taking two medications in pill-form; mifepristone (Mifeprex) and misoprostol. The surgical abortions are permitted and are performed by experts in the field of medical profession. Techniques of abortion differ keeping in view the period of fetus. For fetus of 100 days to be precise less than 15 weeks, Suction –aspiration or Vacuum aspiration are common methods adopted for induced abortion. It consists of removing fetus /embryo, Placenta and membranes by succession in which case a manual syringe is used but in case of electric vacuum aspiration an electric pump is used.

The other technique being the water bag abortion, where chemical solution comprising of saline, urea or prostoglandin is injected through abdomen and into amniotic sac. In the process cervix is dilated prior to the injection. The chemical solution induces uterine contractions which expel the fetus causing abortion.

HOSPITALS AS MEANS FOR ABORTION:

While admitting patients as a case of abortion, the Laws impose obligations on doctors as well as on hospitals. Such obligations are contained in Statutes, Sub-ordinate legislations as well as under operative guidelines. In short, the negligence whether medical negligence or otherwise has few components which party alleging has to satisfy before proceeding against the doctor of the hospital. The components being:

Duty of Care;

Breach of Duty;

Breach of Duty resulting in loss.

The duty of care of the doctor or hospital is to be gathered from the rules and laws applying them including the conduct rules. The hospitals are also liable for the negligence of their doctors and/or their staff. The negligence of the hospital is vicarious as the master is liable for the servant's

tortuous act. The hospitals are also liable for their independent act in case of abortions permitted on their premises without compliance to regulations and other operative guidelines for the purpose. Hospitals sub-serves the means for abortion and it is their duty to take absolute due care not with respect to rules and regulations only but also to adopt proper medical procedures and expertise of the doctors with an object to save the sanctity of the mother as a mother and owner of the womb. The case study thereto will be dealt under sub-heading, judicial approach.

LEGISLATIVE FRAMEWORK IN INDIA:

In India, two children is a norm though not backed by any legal sanction. The policy has been justified that prevention by vasectomy and tubectomy is not against the theologies whether of East or West. But still there is controversy with some in preventing even the natural course of events. The fact remains that the referred acts are merely in the form of prevention, without the fetus coming into existence as a zygote by virtue of sexual act. Beyond preventive measures, laws in India permits abortion under some circumstances as referred to in The Medical Termination of Pregnancy Act, 1971 when continuation of pregnancy is a risk to the life of a pregnant woman or could cause grave injury to her physical and mental health; when there is substantial risk that the child, if born would be severely handicapped due to physical and abnormalities. Under the Act, to be precise it says:

When pregnancies may be terminated by registered medical practitioners:-

(1) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.

(2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner,-

(a) Where the length of the pregnancy does not exceed twelve weeks, if such medical practitioner is, or

(b) where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are, of opinion, formed in good faith, that-

(i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or
(ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

Explanation 1.-Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation 2.-Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

(3) In determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken to the pregnant woman's actual or reasonable foreseeable environment.

(4) (a) No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a 4 [mentally ill person], shall be terminated except with the consent in writing of her guardian.

(b) Save as otherwise provided in clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman.

The act itself provides permissible limits of pregnancy in a way that the termination of pregnancy is regulated under Indian conditions. Not only this, the Act also identifies the place where the termination can take place. In its section 5, it says:

4. Place where pregnancy may be terminated.-No termination of pregnancy shall be made in accordance with this Act at any place other than-

(a) a hospital established or maintained by Government, or

(b) a place for the time being approved for the purpose of this Act by Government or a District Level Committee constituted by that Government with the Chief Medical Officer or District Health Officer as the Chairperson of the said Committee.

Provided that the District Level Committee shall consist of not less than three and not more than five members including the Chairperson, as the Government may specify from time to time.

The Act provides protection to doctor in performing abortion provided his act is in good faith in terms of section 8 of the Act .Before the specific legislation on abortion, the Law on miscarriage inter-alia attracted provisions of the Indian Penal Code, 1860 .

ABORTION AND HOSPITAL NEGLIGENCE:

As a country, India is governed by constitutional proprietary and rule of law. The hospitals, their establishment and performance of the duties ought to have been in accordance with the statutes, regulations and operative guidelines. The doctors engaged in hospitals whether as regular or on contract assignment being professional are governed by medical profession rules covering conduct and ethics . In this way, the twin system of regulations, operate with respect to duties of hospital and side by side the conduct of the doctors. The legal regime with respect to hospitals provides number of compliances in multi-dimensional ways including those running for hospital, patient care, so on and so forth. In this way, the hospitals have twin responsibilities, one as a direct responsibility because of being a legal entity, in a multi regulatory mechanism and other as a vicarious responsibility, for the performance of works and duties by its staff and the doctors thereto. Prima facie for admitting a patient for abortion there are various compliances including those provided by the Law. There are also the technical duties in the form of expertise of a doctor. Thus, it is a doctor who is the central figure in carrying and clearing abortion related matters and providing full medical assistance in compliance to procedures and practices. While adopting the abortion the importance of events is tridimensional like assessing pre-abortion situation, inducing/performing abortion besides the post abortion care. It is the duty of the hospital and their doctors to gather complete details from the patient and arrive at a finding as to whether the abortion is justified in due compliance to the laws and precautions to be adopted by the patient for which he shall be clearly acquainted. The duties imposed upon the doctor as a professional ought to be adhered. Any misadventure and/or non-compliance to said procedures and practices will provide cause of action to the patient against the doctor as well as hospital.

Usually it is seen that the doctor's liability falls especially under the second stage referred with respect to actually inducing the abortion and to some extend pre abortion stage. The hospital cannot escape the liability. In short the liability of the hospital for the negligence of his doctor will assume the status of vicarious liability but of doctor, it will be direct. Similarly, in a situation of negligence on the part of nurses and other supporting staff, the negligence of the hospital is also going to be vicarious. For other negligence of non-compliances of the regulatory mechanism resulting in wrong to the abortee, the hospitals liability may assume direct responsibility. It is also of a prime importance that areas of negligence with respect to operation may fasten the liability of hospital both criminally and under the civil laws for compensation. As per the doctor is concerned his liability may also be under criminal laws, if gross negligence is established beyond shadow of doubt. Otherwise, doctor can also escape from the liability if he can establish that he has taken care as a man of profession would do in similar situations provided he has acted in accordance with the procedures and practices relevant on the subject. The doctor's liability can also fall under consumer protection act for negligence and causing wrong with a loss in terms of Section 15(2) of the Act. Besides, there can be civil liability also under the general laws. However it is usually seen from the cases dealt and analyzed that the aggrieved person prefer remedy under the consumer laws rather proceeding before civil courts. The liability of the hospital sometimes is joint and several with professional doctors. Hospital cannot escape from the negligence of the doctor by applying the vicarious liability test. To be brief, the liability of the hospital is not only the vicarious but may also be direct in some circumstances narrated herein before especially in the context of abortions and the wrong caused thereto to the abortee /patient. The aforesaid deliberations are based on number of cases analyzed and referred herein before and hereafter. The aforesaid position is arrived at by analyzing the statutory position in India, socio religious aspect as referred in different diversified regions, besides the judicial decisions. In order to co relate and/or corroborate the outcome deduced, it is prudent to find out the position of abortion and hospital negligence in other jurisdiction like England and Germany as dealt, analyzed and

deliberated herein after under the sub heading comparative study.

COMPARATIVE STUDY:

From the ancient times, the man and his progeny had sustained the world. With the emergence of religions as an authoritative socio-theological Agency, various do's and do not's surfaced in the social system. The marriage in the beginning with its limitations of monogamy, bigamy, polygamy and polyandry so on and so forth. The significance to the child birth as referred in religious treaties in the past has prevented abortion in specific terms. Some consider the act of fertilization of sperm with the ovum as beginning of the life, while others give some period of development of the embryo for considering the position of child in the womb. The Christian missionaries are against abortion, so is the case in Islam. Hindus also fall in the same line with some exceptions. In short, the religions of East and the religions of West are against termination of womb. On the other hand, with the advent of Democracy and legislative practices for making the Law, their interaction emerged between the Law and the Society. At one time, theology and /or Ecclesiastic courts played a dominant role in Law making and administration of Justice whether in England or elsewhere. In England followed by Poland the laws regarding abortion were merely an exception strictly under some conditions referred like in case of rape victim, besides, with other limitations.

It is also seen some of the other European countries have been conservative to such an extent that termination of fetus was refused, in the result, ensued the death of Indian Diplomat in Netherland. No doubt, the said country has changed its Law but at the cost of precious. In India also the penal code dealt with miscarriage and as such induced abortions where having no legal framework. Doctors for their acts were provided defenses under Section 80 and 88 of Indian Penal Code. The latest law on medical termination of pregnancy also provides non-obstinate class in Section 3(1) and also under section 8 of the Act giving immunity against criminal action and in later section referred against civil action for damages also in *Dr Suresh Gupta v. Government of NCT Delhi*.

JUDICIAL APPROACH:

Judicial approach with respect to abortion is of divergent nature but with two aspects of

significance. There is a duty of care both on doctor as well as on hospital for compliance to permissible limits under the statutes. There sacred and fountain duty on doctor for adherence to professional conduct. In England Bolam Test has attained the respectability for ascertaining the doctor's liability. The rule so deduced proposes that in arriving at doctors negligent, it should be kept in mind, besides professional knowledge & skill, as to what another doctor would have done in similar circumstances and existing facilities. Usually in common parlance for medical negligence and liability thereto four D's principle also emerged like Duty of Care, Dereliction of Duty, Damages as consequence, Damage as direct cause of negligence. The approach of fixing of medical negligence both the Bolam test and also test as 'reasonable man of professional skill' were made applicable. Judicial approach in India is such that error of judgment is kept outside the purview of negligence provided the professional duties are carried in terms rules and procedures. The remedial measures for aggrieved party, in proceeding against doctor and/or hospital, lies both under civil law as well as under criminal law. Liability for crime in case of gross negligence falls within provisions of section 304-A provided the ingredients of section are satisfied.

Supreme Court in *Poonam Verma v. Ashwin Patel* held that for criminal negligence standard of proof against doctor especially under 304A need to be so high that it can be described as 'gross negligence' or 'recklessness', not merely lack of necessary care. The Court further observed about different aspects of negligence. The medical negligence also came for debate in *Bal Chandra Babu and another v. State of Maharashtra* where it has been observed that negligence is an omission to do something which a reasonable man guided upon the considerations which ordinarily conduct of human affairs, would do, or doing something which a prudent and a reasonable man would not do; criminal negligence in the gross and culpable neglect or failure to exercise that reasonable and proper care and precautions to guard against injury either to public generally or to an individual in particular, which having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted.

In *Dr Jacob Mathew's*, it was observed that to held doctor criminally responsible for the patient's

death, it must be established that there was negligence or incompetence on the doctor's part which went beyond a mere question of compensation on the basis of civil liability. The negligence ought to be gross falling within the ambit of 304-A. In C. P. Sree Kumar (Dr) MS (ortho) v. S Ramanujan, court laid the principles to be taken into considerations while deciding the case of medical negligence. On the strength of adjudications it is established under Indian situations that doctor's negligence is also deficiency in service under consumer protection laws which in themselves provide the standards of deficiency in service besides negligence.

CONCLUSION AND SUGGESTIONS:

From the preceding paragraphs and analysis of the data thereto it is now assumed with certainty that abortion is permissible under Indian conditions in accordance with The Termination of Pregnancy Act, 1971, but yet there are grey areas which need to be addressed because of concealment of pregnancy by the women at initial stage due to ignorance and/or social stigma, it casts and as such. The statutory period of 20 weeks need to be considered and examined on standard medical practices for its extension or otherwise. It is also seen that in some cases there has been negligence at hospital levels which need to be put to an end by heavy hand with exemplary cost and damages. At the same, the fact remains that the mother is the owner of the womb but her ownership is not absolute. Therefore in case of consensual sex and pregnancy thereto requires appropriate study and attention. As the topic involves the inter-se the rights of pregnant women, child society in general; besides father or the putative father as the case may be. On all these counts, the hospitals and the doctors presume pivotal role whose function must be clogged with obligations under respective statutes or operative guidelines with periodical surveillance to prevent misuse and/or unfair practices. For this, there ought to be credible, honest and competent establishment within the statute or under its delegated legislation thereto.

REFERENCES

- [1] Savita Halappanavar, an Indian woman was living in Ireland whose death led to the passing of the Protection of Life During Pregnancy Act 2013. Medical staff at University Hospital Galway denied her request for an abortion following an incomplete miscarriage. The denial was on the grounds that granting her request would be illegal under Irish law, ultimately resulting in her death from septic miscarriage.
- [2] The Bhagvatam (11.22.47) referred to in 'The Secret Teachings of the Vedas by Stephen Knapp'
- [3] The Mahanirvana Tantra, Chapter 11, verses 69-70 referred to in 'The Secret Teachings of the Vedas by Stephen Knapp'
- [4] Clinical Establishment Act, 2010, Code of Medical Ethics and Regulation, besides other statutes and guidelines
- [5] Section 8: Protection of action taken in good faith.- No suit or other legal proceedings shall lie against any registered medical practitioner for any damage caused or likely to be caused by anything which is in good faith done or intended to be done under this Act.
- [6] Section 312-318 of the Indian Penal Code, 1860 deal with miscarriage.
- [7] (2004) SCC (cr)1785
- [8] Lynda Jo Blom V. Douglas County Hospital 304A. Causing death by negligence:
- [9] Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.
- [10] This section in case of Doctor may be read with general exceptions especially section 88 as follows:
- [11] Act not intended to cause death, done by consent in good faith for person's benefit

[12] Nothing which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm.

[13] (1996) 4 SCC 332

[14] AIR 1968 SC 1319

[15] (2005) 6 SCC 1

[16] (2009) 7 SCC 130