MEDICINE AND THE LAW

Overturning refusal of a hospital to terminate life support for a brain-dead mother until the fetus was born: What is the law in South Africa?

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In a Texas case the court granted a husband an order for the removal of life support from his brain-dead pregnant wife after a hospital tried to keep her on it until the fetus was born. In South Africa the court would have issued a similar order, but for different reasons. Here, unlawfully and intentionally subjecting a pregnant corpse to life-support measures to keep a fetus alive against the wishes of the family would amount to the crime of violating a corpse.

The Munoz case

Mrs Munoz was 14 weeks pregnant when a suspected pulmonary embolism left her brain dead. When the fetus was at 23 weeks’ gestational age, Mr Munoz sued the hospital after the doctors told him that a Texas law forbade them to withdraw life support from his dead wife until the fetus was born. In South Africa the court would have issued a similar order, but for different reasons. Here, if the alleged perpetrators genuinely believed that they had obtained the necessary consent to interfere with the body and to release the body to her family for proper preservation and burial, it would be a good defence.

The rights of the dead under the common law

According to the common law, a person’s legal personality ends with death, and a dead person has neither rights nor obligations. However, it protects corpses and regulates their disposal. Dead persons may also preserve their wishes in a valid will in terms of the Wills Act, or ask their next of kin to do certain things for them – even if the latter are not legally enforceable. If there is no will, the deceased person’s next of kin (e.g. a spouse) could therefore request a hospital to maintain the corpse with life support until the child is born. However, this only applies if such treatment will not be medically futile, as in the Munoz case where the fetus was “distinctly abnormal.”

In a recent American case, the court ordered a hospital to remove life support from a person’s brain-dead pregnant wife, finding that the woman could not be regarded as a ‘patient’ because she was dead. Therefore, the Texas Health and Safety Code stating that ‘life support’ must be given to ‘pregnant patients’ did not apply to her. A South African court faced with the same situation would have issued a similar order for the removal of life support, but for different reasons, because there is no such Code here.

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to preserve the fetus by a statute like the Texas Code,[2] because there is no such law here. They would be guilty of the common-law crime of violating a corpse by subjecting her dead body to life support.[11] The fetuses and the law

South African law does not regard the fetus as a person, and it is not protected by the Constitution or the common law unless it is born alive.[12] It is not murder to destroy a viable fetus – it is abortion – because a fetus is not regarded as a human being.[13] If the facts of Munoz case are applied to South Africa, no action could have been brought on behalf of the fetus. The death of a fetus is a natural consequence of its mother’s death and the courts would not have interfered. The court would have ordered the hospital to withdraw the life-support treatment and to release Mrs Munoz’s body to her husband.

Conclusions

Unlawfully and intentionally subjecting a dead pregnant woman to life-support measures to keep a fetus alive, where the deceased has not made a will to that effect and against the wishes of the family, may result in a criminal charge of a violating a corpse.

A pregnant deceased woman’s body may be subjected to life support until the baby is born at the request of the next of kin (e.g. a spouse or partner) – provided that it is medically justifiable.

Doctors accused of violating a corpse by subjecting a pregnant deceased woman’s body to life support may raise the defence that they genuinely believed that they had the necessary consent for their conduct.

8. Section 21(1) of the Wills Act No. 7 of 1953.
13. Clarke v Hare No 1992 (4) 406 (D).

Accepted 19 March 2014.

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