

# Terminating the pregnancy of a brain-dead mother: Does a fetus have a right to life? The law in South Africa

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In the recent Texas case of *Munoz v. John Peter Smith Hospital*, the court granted a husband an order for the removal of life support from his brain-dead pregnant wife whose body was decaying, after a hospital had tried to keep her on 'life support' until the fetus was born. In South Africa the court would have issued a similar order but for different reasons, viz. because in this country: (i) a fetus has no legal rights until it is born; and (ii) unlawfully subjecting a dead pregnant women 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, could result in a criminal charge of violating a corpse.

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Recently, in the Texas case of *Munoz v. John Peter Smith Hospital*,<sup>[1]</sup> a husband obtained a court order for the removal of 'life support' from his brain-dead pregnant wife. The question the court had to consider

was whether a pregnant woman who is carrying a viable fetus, and is clinically and legally dead, should be kept on 'life support' until the fetus is born. The court ordered that 'life support' should be withdrawn and Mrs Munoz's body released to her husband and family. It found that Mrs Munoz 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'<sup>[2]</sup> did not apply.<sup>[3]</sup> The question arises whether a South African (SA) court would have issued a similar order but for different reasons, because there is no such code here.

## The facts in the Munoz case

Mrs Marlise Munoz, a 33-year-old paramedic who was 14 weeks pregnant, suffered a suspected pulmonary embolism which left her brain dead. Nine weeks later, when the fetus was 23 weeks old, her husband sued the John Peter Smith Hospital after the doctors told him that a Texas law forbade the hospital from withdrawing 'life support' from his dead wife until the fetus's birth or a miscarriage occurred.<sup>[4]</sup>

Mr Munoz approached the court to order the hospital to remove his wife from 'any respirators, ventilators or other "life support"', and to release the body to her family for proper preservation and burial.<sup>[5]</sup> He argued that:

- The Texas Health and Safety Code<sup>[2]</sup> that disallows the withdrawal of life-sustaining treatment from pregnant patients does not apply to dead people or their fetuses.
- The hospital was treating the body in a criminal manner.
- The deceased's constitutional rights to privacy and equal protection were being violated because she had made advance directives to her husband and parents stating that she did not want to be kept on 'any type of artificial "life sustaining treatment", ventilators or the like.'<sup>[5]</sup>

The application did not mention that the fetus was badly deformed.<sup>[4]</sup>

When ordering the withdrawal of treatment and release of the body, the court only considered the first argument and held that the Texas Health and Safety Code<sup>[2]</sup> did not apply to Mrs Munoz because she was dead. It did not rule on any of the other grounds in the application.<sup>[3]</sup>

Such a ruling could not have been given in SA had Mrs Munoz died in this country, because there is no statute similar to the Texas Code<sup>[2]</sup> here. However, in the unlikely event that such a case arises in SA, a similar result could have been achieved on other grounds. In order to determine the grounds on which an SA court will have issued a similar order, but for different reasons, it is necessary to consider:

- The provisions of the Choice on Termination of Pregnancy Act<sup>[6]</sup>
- The legal rights of deceased persons
- The criminal law protection afforded to deceased persons
- The legal status of a fetus in SA.

## Choice on Termination of Pregnancy Act (Choice Act)

In SA it appears that the Choice Act<sup>[4]</sup> does not apply to similar situations to that of Mrs Munoz because there was no expulsion of the fetus as required by the definition of 'termination of pregnancy'. The Choice Act defines a termination of pregnancy as 'the separation and expulsion, by medical or surgical means, of the contents of the uterus of a pregnant woman.'<sup>[7]</sup>

In the Munoz case there was no question of separating or expelling 'the contents or the uterus' of Mrs Munoz. The request was to discontinue 'life support' which would have meant that the fetus would have died while in her uterus. Therefore the Choice Act would not have applied.

If Mrs Munoz had been alive and living in SA at the time, and 24 weeks pregnant, the termination could have been performed in terms of the Choice Act because the fetus was 'distinctly abnormal.'<sup>[4]</sup> Under the Act, after 20 weeks of gestation, the pregnancy may be terminated if its continuation 'would result in a severe malformation of the fetus.'<sup>[8]</sup>

## Do deceased persons have legal rights under the constitution and common law?

### Civil-law rights of the dead to bring civil actions under the Constitution

Although deceased persons lose their constitutional and common law rights to bring civil actions, there may be some protection for their bodily integrity under criminal law and certain statutes.

The Constitution<sup>[9]</sup> only applies to people who are alive, and as in common law, a person's legal personality terminates on their death.<sup>[10]</sup> Therefore, a deceased person no longer has a constitutional right to equality, human dignity, freedom, security and privacy.<sup>[11]</sup> On this basis the constitutional arguments raised in the Munoz case regarding the deceased's right to privacy and equality being violated by subjecting her body to 'life sustaining treatment' against her will<sup>[4]</sup> would not have succeeded had the case been brought in SA. However, the values in the Constitution enshrined in the rights listed in the Bill of Rights,<sup>[12]</sup> particularly the rights to dignity and privacy, give a good indication of how common law should be developed when the court considers whether an act of omission is *contra bonos mores* (contrary to good morals) and unlawful.<sup>[13]</sup>

### The rights of the dead to bring civil actions under common law

According to common law, the 'legal personality of a person is terminated by death: a dead person can have neither rights nor obligations'.<sup>[10]</sup> Therefore, when a person dies before the matter has gone to court and the pleadings joined (*litis contestatio*), the person loses all their legally enforceable rights in respect of their personality, including their bodily integrity.<sup>[10]</sup> However, the law protects their body and regulates its disposal: 'not in the interests of the deceased but partly in the interests of public health and partly because of respect for the dead'.<sup>[10]</sup>

Although a person loses their common law rights to bring a civil action on death, they may preserve their wishes in a valid will in terms of the Wills Act,<sup>[14]</sup> or ask their next of kin to do certain things for them – even if the latter requests are not legally enforceable. For instance, a person could record in a will her wishes regarding what should happen if she dies while pregnant – even though this would be a most unlikely occurrence. Such a will would have to comply with the Act,<sup>[4]</sup> and not be a so-called 'living will' or advance directive, because such documents only subsist while a person is alive.<sup>[5]</sup>

If there is no will recording the wishes of the deceased pregnant person, her next of kin (e.g. spouse, partner, parents, etc.) could request a hospital to maintain the body with 'life support' until the child is born – even though there may be no legal obligation on the hospital to do so. However, this will only apply if such treatment will not be medically futile, as was the situation in the Munoz case – otherwise it would be unethical and probably illegal for the hospital to do so. The World Medical Association defines 'futile medical treatment' as treatment that 'offers no reasonable hope of recovery or improvement' or from which 'the patient is permanently unable to experience any benefit'.<sup>[15]</sup>

Recently, in Canada, a Mrs Robyn Benson who had been declared brain-dead when she was 22 weeks pregnant was treated with 'life support' for 6 weeks to enable the child to be born – at the request

of her husband. Although the doctors had hoped to maintain the 'life support' until 34 weeks of gestation, a healthy premature baby boy was delivered after 28 weeks.<sup>[16]</sup> This case differs from the Munoz case in three respects:

- Mrs Benson died when the fetus was 22 weeks old, unlike Mrs Munoz who died when the fetus was only 14 weeks old – although the application for withdrawal of treatment was made at 24 weeks.
- Mr Benson had requested that his dead wife be subjected to 'life-support' treatment.
- The fetus in the Benson case was healthy – unlike in the Munoz case, where it was 'distinctly abnormal'.<sup>[4]</sup>

### Criminal law protection of the dead under common law

Although a deceased person is unable to take civil action against interference with their personality rights such as their body, it is a crime to violate a corpse.<sup>[17]</sup> Violating a dead body consists of the unlawful and intentional violation of a dead human body.<sup>[17]</sup> However, it will be a good defence if the alleged perpetrators genuinely believed that they had obtained the necessary consent to interfere with the body.<sup>[17]</sup>

It may be legally justifiable to subject a dead person to short-term 'life support' to preserve certain tissue and organs for lawful transplantation under the National Health Act,<sup>[18]</sup> but – apart from any statutory offence committed in terms of the Act – unlawfully subjecting a corpse to intrusions by 'life support' mechanisms could well be interpreted as violating a corpse and a crime under SA law.<sup>[17]</sup>

According to the attorney in the Munoz case, the fetus was 'gestating within a dead and deteriorating body, as a horrified family looks on in absolute anguish, distress and sadness'.<sup>[4]</sup> The lawyer argued that by not withdrawing treatment from Mrs Munoz's body, the hospital was 'disturbing and damaging the body, treating it in an offensive manner, and [committing] an act that is both a tortious wrong and a criminal violation'.<sup>[5]</sup>

There is little doubt that had the Munoz case arisen in SA, such conduct by the doctors would be regarded as *contra bonos mores* (contrary to good morals) and unlawful. The legal convictions of society would be outraged<sup>[19]</sup> by the fact that a pregnant dead woman carrying a grossly defective fetus was being subjected to 'life support' mechanisms, while her body was decaying and traumatising the deceased's family. It is clear that the doctors acted intentionally – and in SA there would be no basis for a claim that they mistakenly believed that they were bound to preserve the fetus by a statute like the Texas Code.<sup>[2]</sup> Therefore, they could be found guilty of the common law crime of unlawfully violating a corpse by subjecting her body to 'life support'.<sup>[17]</sup>

### Legal status of the fetus

The fetus is not regarded as a person in SA law and is not protected by the Constitution or common law unless it is born alive.<sup>[20]</sup> This is similar to the approach in England.<sup>[21]</sup>

In SA the courts have held that there are no legal grounds for the appointment of a curator to represent a fetus in cases where its mother wishes to terminate a pregnancy.<sup>[22]</sup> Similarly, in England the court has refused to make a fetus a ward of the court to protect it from a mentally disturbed mother.<sup>[23]</sup> The courts in the USA

have held that 'the State may not override a pregnant woman's competent treatment decision, including refusal of recommended invasive medical procedures, to potentially save the life of the viable fetus.'<sup>[24]</sup> In SA, if a viable fetus is destroyed it is not murder but abortion, because the fetus is not regarded as a human being.<sup>[25]</sup>

If the Munoz case had occurred in SA, nothing could have been done on behalf of the fetus – leaving aside the fact that it would not have been medically justifiable to try to preserve the life of a 'distinctly abnormal' fetus. The courts are likely to have ordered the hospital to withdraw the 'life support' treatment and to release Mrs Munoz's body to her husband. The basis of the decision could be that to apply 'life support' to a deceased 'decaying' pregnant corpse, against the wishes of her husband and family, was unlawfully interfering with her body and constituted the crime of violation of a corpse. The death of the fetus is a natural consequence of its mother's death and should not be interfered with unless there are good medical and legal grounds for doing so.

## Conclusion

In light of the above, the situation in SA regarding the termination of pregnancy of dead pregnant mothers is as follows:

- The Choice Act and the Constitution do not apply to dead pregnant women.
- If the pregnant woman has made an advance directive or appointed a surrogate decision-maker in terms of the National Health Act, such directives and appointments fall away on her death.
- 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) and if it is medically justifiable.
- A person who intentionally and unlawfully subjects a pregnant deceased woman's body to 'life support' may be guilty of the common-law crime of violation of a corpse.
- Persons accused of violating the corpse of a pregnant mother by subjecting it to 'life support' to keep a fetus alive, can raise the defence that they genuinely believed that they had the necessary consent for their conduct – provided this can be established.

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