

Civil liability for error of prenatal genetic testing

-- New challenges of Taiwan's civil liability law

Chung-Wu Chen

Abstract

After experiencing the first ecstatic joys brought by news of pregnancy, the future parents are immediately struck by hundreds, if not millions of concerns. The list is endless, but the baby's mental and physical well-being is no doubt one on top of the list. Taking prenatal genetic tests in order to ensure the chances of having a health child is common knowledge and practice in modern times.

But, what if the results of the medical tests were misjudged by doctors and medical engineers, and instead of the expected healthy baby, a child with hereditary disease or physical disability is born? Can the mother, father or the child himself (herself) sue the hospital and the persons concerned for this mistake? Is there a 'right' that was violated by this act? What are the damages? After all, isn't 'life' itself the most miraculous and precious gift from God? In Taiwan, <the case of Shin-Kong Hospital's false negative result on prenatal testing for Down's syndrome> is a leading case in this new domain of medical liability.

The issues concerning the valuation of 'life', determination of 'worthy life' along with the debate of the legitimacy of women's 'right' of terminating pregnancy is of major importance in social policy, philosophy, and religion. The purpose of this article is to examine this scenario by point of view of civil liability law.

Firstly, we point out that the problems in this case rise from 'medical error' instead of 'medical accident', therefore, the regulations in The Consumer Protection Act of Taiwan is not involved.

Secondly, we propose the idea that in this case, the pregnant women has a legitimate 'right to terminate pregnancy' on the basis of The Genetic Health Act of Taiwan. The right belongs to the pregnant women alone and is not shared by the spouse.

Finally, we agree that by making an error in the judging of prenatal genetic testing, the hospital and people concerned had violated the pregnant mother's 'right to terminate pregnancy'. Consequently, according to tort and contractual liability regulations, they are responsible for the burden of extra expenses the parents have to bear in the situation of taking care of an unhealthy child (for example: medical payment, special-education expenses etc.). The expenses of child rearing and compensation of emotional distress should also be included.

Keywords: medical liability, compensation of damages, prenatal genetic testing, The Consumer Protection Act of Taiwan, right to terminate pregnancy, legitimacy of right or interest, concept of damage, expenses of child rearing, emotional harm