

World Association for Medical Law
2016 Annual Congress
Japanese Law of Abortion, Prenatal
Diagnosis and Wrongful Birth

Kobe University School of Law
Eiji Maruyama
<http://www2.kobe-u.ac.jp/~emaruyam/>

Types of Prenatal Diagnosis

- (1) Diagnosis carried out for the purpose of fetal therapy
- (2) Diagnosis carried out to determine method of childbirth and prepare for postnatal care
- (3) Diagnosis carried out to obtain information for determining whether pregnancy should be continued to term or terminated
(Sato K., *Prenatal Diagnosis*, pp. 2–3 [Yuhikaku, 1999])

The present talk will focus on prenatal diagnosis of type (3) that is conducted with selective abortion in mind.

When Impairments are Detected in the Fetus

◆ Are abortions permitted?

[Penal Code Article 214]

When a physician, at the request of a woman or with her consent, terminates the pregnancy, imprisonment with labor for not less than 3 months but not more than 5 years shall be imposed.

[Maternal Protection Act Article 14 Paragraph 1]

A doctor designated by a medical association that is a public interest incorporated association established for the area of a prefectures (hereafter referred to as the “designated doctor”) may perform an induced abortion on a person who falls under any of the following two categories after obtaining consent from the expectant mother and her spouse.

- (i) Where the continuation of pregnancy or a delivery may significantly damage the health of the expectant mother’s body due to physical or economic reasons, or
- (ii) Where a woman become pregnant as a result of being raped violently or coercively, or at a time when she could neither resist nor refuse.

Definition of “induced abortion”

[Maternal Protection Act Article 2]

- (2) In this Act, “induced abortion” shall mean artificially discharging the fetus and its appendages from the mother’s body during the period when the fetus cannot maintain its life outside the mother’s body.

Period when the fetus cannot maintain its life outside the mother's body

[Notice of Vice Minister of Health No. 122, Ministry of Health and Welfare, September 25, 1996]

Article 2 Induced abortion

(1) General matters

The standard for “period when the fetus cannot maintain its life outside the mother's body” mentioned in Article 2 Paragraph 2 of the Maternal Protection Act shall ordinarily be less than 22 weeks of gestation.

The number of weeks of gestation shall be determined objectively based on medical judgment by the designated doctor.

(3) Eligibility for induced abortion

The provision “the continuation of pregnancy or a delivery may significantly damage the health of the expectant mother's body due to physical or economic reasons” in Article 14 Paragraph 1 Subparagraph 1 of the Maternal Protection Act refers to cases in which there is concern that the continuation of pregnancy or a delivery would inflict serious economic constraints upon the mother's household such that the mother's body would be significantly damaged.

Maternal Protection Act

- ◆ Absence of clause for fetal abnormality: There is no provision allowing induced abortion on the grounds of fetal abnormality.
- ◆ The Law for Amendment of the Eugenic Protection Act, June 1996.
 - Eugenic Protection Act ⇒ Maternal Protection Act
 - The amendment repealed the provisions that permitted induced abortion when it is for the purpose of preventing genetic diseases.
 - Former Act, Article 1: This Act aims to prevent the birth of inferior descendants from a eugenic point of view, and to protect the life and health of the mother.
 - Former Act, Article 14 Paragraph 1 (conditions under which abortion is permitted)
 - (i) Where the mother or her spouse has a psychiatric disease, mental retardation, psychopathy, or a hereditary physical disease or abnormality.
 - (ii) Where a blood relative within the fourth degree of kinship of the mother and her spouse has a hereditary psychiatric disease, hereditary mental retardation, hereditary psychopathy, or a hereditary physical disease or malformation.

Wrongful Birth Litigation

- ◆ When an infant is born suffering from severe congenital impairment due to an error on the part of a medical personnel (professional negligence / breach of duty of care), the parents sometimes bring a lawsuit/an action to claim damages from the medical personnel and institution (in the United States, and recently globally, this type of suit is called “wrongful birth” lawsuit/action).

Civil Liability for Medical Negligence

(Tort liability)

[Civil Code; Article 709]

A person who has intentionally or negligently infringed any right or legally protected interest of another person shall be liable to compensate any damage resulting therefrom.

- (1) An intentional or negligent act
- (2) The act infringed upon another person's right or legally protected interest
- (3) The existence of a causal relationship between the infringement and the damage (in the case of Japan, however, consolation money is often granted even if a causal relationship is not proven)

Negligence

- ◆ Failure to exercise duty of care
- ◆ Standard for duty of care = a level of care normally (reasonably) expected of a person in the same position or social status.
- ◆ What does this mean specifically?
 - Medical practice that conforms to accepted medical standards

Medical Personnel's Duty of Care in Genetic Counseling/Prenatal Diagnosis (1)

Medical personnel have a duty to recognize accurately the risk of the baby being born disabled based on such information as follows and to adequately explain the risk to the mother or client.

- Advanced age of expectant mother
- History of delivery of disabled baby
- Infection with a viral disease such as rubella, taking medicine such as thalidomide, or radiation exposure
- Presence of hereditary disease or genetic mutation in the family
- Results of ultrasound scan

*("accurately," "adequately" —— "without negligence")

[The above is predicated on the feasibility to recognize risks and the existence of a duty to explain them]

Medical Personnel's Duty of Care in Genetic Counseling/Prenatal Diagnosis (2)

★ With regard to the available tests/examinations for recognizing the risk of birth defects (such as amniocentesis (examination of amniotic fluid), chorionic villus sampling (CVS), NIPT (maternal blood fetal fragmented DNA), maternal serum markers (triple marker test/ quattro test), maternal blood fetal cells, ultrasound scan, embryo biopsy (PGD), and examination of the bodies of the expectant mother and existing children).

- Duty to
 - Adequately explain to expectant mother or client.
 - Accurately administer test/examination if desired by the expectant mother or client.
 - Make accurate diagnosis based on the results of the test/examination.
 - Adequately explain accurate diagnosis to expectant mother or client.
- [predicated on the medical, institutional, and social practicability of test/examination]

Medical Personnel's Duty of Care in Genetic Counselling/Prenatal Diagnosis (3)

★ If the risk of birth defects is high...

- Duty to adequately explain the possible measures for preventing birth of children with impairment, including:
 - Contraception
 - Induced abortion
 - Duty to administer such a measure (or refer to a facility where such measure is available) if the expectant mother or client desire it.
- [predicated on the medical, institutional, and social practicability of the measure for preventing birth of children with impairment]

Issues in Wrongful Birth Litigation

- ◆ Is choosing to abort a fetus with congenital impairment a right/legally protected interest ?
- ◆ Can one claim causal relationship (causation) between negligence and damage given that the Maternal Protection Act does not contain a fetus clause (a clause allowing selective abortion of a fetus with disabilities) ?
- ◆ Does the birth of a child with congenital impairment constitute damage ?

Legal Precedents in Japan concerning Congenital Rubella Syndrome

- (1) Tokyo District Court Judgment dated September 18, 1979 (plaintiffs = child's parents; defendant = gynecologist)
 - Despite blood test result revealing the HI antibody titer of the mother to be 512-fold, the defendant judged that there was no risk of giving birth to a congenitally abnormal child and failed to explain the risk (both plaintiffs were granted 3 million yen in consolation money).
- (2) Tokyo District Court Judgment dated July 22, 1983 (plaintiffs = child's parents; defendant = Japanese government)
 - A gynecologist employed by a national hospital was informed by the plaintiff (the mother) that her child had recently contracted rubella. However, the gynecologist did not carry out an antibody titer test and did not explain the risk of congenital rubella syndrome (both plaintiffs were granted 1.5 million yen in consolation money).

Legal Precedents in Japan concerning Rubella Syndrome

- (3) Tokyo District Court Judgment dated July 8, 1992 (plaintiffs = child's parents; defendant = gynecologist and operator of the gynecology clinic)
 - Signs of imminent miscarriage were observed, so the mother consulted the defendant's hospital and was admitted on the following day for an eight-day period. During that time, the defendant focused his attention on measures to prevent a miscarriage and he forgot to administer the fourth HI test to confirm infection status (both plaintiffs were granted 4.5 million yen in consolation money).
- (4) Maebashi District Court Judgment dated December 15, 1992 (plaintiff = child's parents; defendants = municipal partnership that ran the hospital and a dermatologist employed by it)
 - Despite test results indicating an antibody titer of 64-fold, the defendants did not order another test and denied the possibility of being infected with rubella virus (both plaintiffs were granted 1.5 million yen in consolation money).

Tokyo District Court Judgment dated September 18, 1979

“The defendant had a duty to provide detailed explanation and guidance so that the plaintiffs, who lacked medical knowledge themselves, could make the choice of whether or not to deliver the child. Specifically, the defendant should have explained that there was a possibility, and indeed a very high probability, of the baby being disabled because the expectant mother contracted rubella during a very early stage of her pregnancy; and if the baby were born with congenital rubella syndrome, it would likely suffer seriously from symptoms that cause severe damage to important parts of the body such as the eyes and heart.”

Tokyo District Court Judgment dated July 22, 1983

“The Court found that, in 1976 rubella outbreak nationwide, many cases of induced abortions were carried out on women who had contracted rubella in their early stage of pregnancy. The Court also found that among gynecologists were those who held the view that induced abortion could be permitted under the Eugenic Protection Act. Their reasoning was as follows: ‘If it is found out that the expectant mother has contracted rubella during pregnancy and she becomes so much concerned about the defective birth that her health is endangered, then Article 14 Paragraph 1 Subparagraph 4 of the said act will apply (the continuation of pregnancy or a delivery may significantly damage the health of the expectant mother’s body due to physical or economic reasons [currently Article 14 Paragraph 1 Subparagraph 1 of the Maternal Protection Act]).’ The Court concludes that, under these situations, there would be room for recognizing induced abortion as lawful and it is difficult to deny the possibility that the above situation applied to the plaintiff mother.”

Tokyo District Court Judgment dated July 22, 1983

“Such being the case, the plaintiffs, being the parents of the child due to be born, had an acute concern and interest in whether that child would develop an disorder, and they therefore had an interest to receive an adequate explanation from a physician and to be given the opportunity to consider whether to continue the pregnancy to term. Moreover, considering the severity of the blow that would have come from such an interest being denied, it is entirely reasonable to regard the said infringement of interest to constitute in itself an independent damage.”

Tokyo District Court Judgment dated July 8, 1992

“As parents of the child due to be born, the plaintiffs had an acute concern and interest in the child. They hoped to hear that their fears were groundless and have their minds put at rest, but they also knew that in the worst case, they would have to prepare themselves for a life as parents of a disabled child and make the difficult decision of whether to continue the pregnancy to term; either way, it is simply human nature that they would want to know as soon as possible where they stand. The plaintiffs sought information from the defendant that would allow them to make such a self-determination. Where these conditions were not fulfilled *** and the interest of self-determination was injured, the plaintiffs are reasonably entitled to consolation money on the basis that their legally protected interest was infringed.”

Tokyo District Court Judgment dated July 8, 1992

- ◆ However, the Court did not grant compensation for medical costs necessitated by the disorder. The reason for this was stated as follows:
“Even under the Eugenic Protection Act, the possibility of the child being born with congenital rubella syndrome does not automatically make induced abortion permissible. The decision as to whether to request an induced abortion or to live as a parent of a disabled child ultimately depends on the higher moral and ethical views of the parents. The propriety of a gynecological diagnosis, being but one element in this decision-making process, is on an entirely different level, and it cannot be claimed that there is a legally sufficient causal relationship between the two [the parents’ decision and the propriety of a gynecological diagnosis]. Also, it is beyond the competence of the law to deliberate on the damage by comparing the financial or psychological suffering that would arise in the case of aborting a congenitally disabled child with that in the case of raising said child.”

Maebashi District Court Judgment dated Dec. 15, 1992

[Regarding the dismissal of the claim for expenses for special education]

The district court noted that the disability of the child was not caused by the defendant physician's misdiagnosis, but the result of rubella being contracted during pregnancy, and that there were but two possible outcomes for the child: either it would be born with disability or it would not be born at all. The court denied compensation for expenses for special education, stating as follows:

"The propriety of the plaintiffs' claim ultimately turns on the judgment whether the plaintiffs suffered damage by comparing the two eventualities: the child being born with disabilities versus the child being artificially aborted never to be born. A court of law is simply unable to undertake such a comparison, and it cannot adopt a reasoning that the damage would have been less had the child been aborted compared to if it had been born with disability. Moreover, it is understood that induced abortion would not have been permitted in a case such as this under the current Eugenic Protection Act."

Maebashi District Court Judgment dated Dec. 15, 1992

[Regarding the award of the damages for mental suffering]

The court found the defendants liable for damages for mental suffering, stating the reason as follows :

If the defendant physician had diagnosed correctly and communicated the result to the plaintiff mother, then, even if abortion was not an option, the plaintiffs would have been able to use the remaining time before the birth to prepare themselves psychologically for becoming parents of a child with disability. As it happened, however, the plaintiffs learned their child had a disability from congenital rubella syndrome contrary to the defendant physician's diagnosis, on which they had fully relied. The psychological shock and confusion from such a realization was immeasurable.

(5) Kyoto District Court (Down syndrome), Jan. 24, 1997

[Plaintiffs = child's parents; defendants = Y1(Japanese Red Cross Society operating the hospital) and Y2 (gynecologist working at the hospital)]

【Summary】

After the 20th week of her pregnancy, X1 (39) requested amniocentesis (amniotic fluid test), but Y2 turned this request down based on the determination that the results would not be returned before the legal abortion time limit (less than 22 weeks of gestation). Y2 did not inform her of other facilities where she could have the test. Child A was born with Down syndrome. The court dismissed the claim, citing that even if the amniocentesis had been carried out as requested and had revealed the presence of Down syndrome, this knowledge would have come after the legal abortion time limit. The court also pointed out that the gynecologists would have no legal duty to explain about amniocentesis if there was no request from the expectant mother.

Brief Discussion

- ◆ In four of five cases, the court recognized negligence on the part of medical practitioners and granted compensation to the plaintiffs; the exception being the fifth case involving Down syndrome. Of these four cases, in cases 1 and 2, only damages for mental suffering were claimed. In cases 3 and 4, the plaintiffs also claimed damages for pecuniary expenses for medical care and special education.
- ◆ Damages for mental suffering (consolation money) were granted because the plaintiffs had been denied, respectively, (case 1) information that would allow them to decide whether to carry the pregnancy to term; (case 2) the opportunity to consider whether to continue the pregnancy to term; (case 3) information that would allow them to make their self-determination; and (case 4) the opportunity to prepare themselves psychologically for becoming parents of a child with disability. As for the fifth case, consolation money was denied because the court judged that psychological preparation is not established as a legally protected interest.
- ◆ Judging from the conclusions of the five cases, it seems likely that a court will grant consolation money to the mother and her spouse when negligence on the part of medical practitioners is found.

Brief Discussion

- ◆ In this kind of cases, financial damage means the expenses necessitated by the birth of a child with disabilities. Therefore, the presence or absence of a causal relationship turns on whether such expenses would not have arisen had there not been the negligence on the part of medical practitioners. In cases after the conception, a key issue is whether an abortion could be obtained had there not been medical negligence. As to this point, the case 4 stated that induced abortion would not have been permitted in a case such as this under the current Eugenic Protection Act, and a similar opinion was expressed by the case 3. On the other hand, the case 2 concluded that there would be room for recognizing induced abortion as lawful, although as the basis for granting consolation money.
- ◆ More serious issue is concerned with financial damage. As noted in cases 3 and 4, regarding the expenses necessitated by the child's birth as damage leads to the idea that the child's birth itself is assessed as damage. This problem cannot be avoided as long as we assume the present legal framework that requires the proof of damage in order to award remedy in a lawsuit.

Hakodate District Court Judgment dated June 5, 2014

[Plaintiffs = X1 (child's mother) and X2 (her husband) ; defendants = Y1 (incorporated clinic) and Y2 (its owner and gynecologist)]

— X1 was advised that the ultrasound scan disclosed nuchal translucency in the fetus, which suggests the fetus was more likely to have Down syndrome and other disorders. Considering that she was at an advanced age (41), she chose to receive amniocentesis. The laboratory returned the following report: "We observed chromosomal abnormality. We also detected inversion in chromosome #9. We consider this as a normal mutation that does not affect phenotype." The report also contained an analysis chart indicating that the fetus had Down syndrome. Y2 told X1 that the test result was negative for Down syndrome. However, the child (A) was born with Down syndrome and developed disseminated intravascular coagulation (DIC). A died at 3.5 months from liver failure. X1 and X2 sought damages on the basis that they were deprived of an opportunity to have an abortion.

Hakodate District Court Judgment dated June 5, 2014

[A's claim for damages in connection with its birth]

The court dismissed the plaintiffs' claim for damages for 21,650,000 yen based upon the A's claim to solatium (consolation money) for the pain and suffering from the hospitalization and death that was allegedly inherited by the plaintiffs. The court denied causation between the defendants' erroneous reporting and A's birth, and between A's birth and A's death caused by its Down syndrome.

Hakodate District Court Judgment dated June 5, 2014

[Plaintiffs' claim for consolation money for being deprived of the opportunity to choose and prepare]

"The plaintiffs had received amniocentesis test to learn if the fetus had congenital abnormality, and as parents, the question of whether their child would be healthy was of the utmost importance in terms of future family planning. If the defendants had accurately reported the results of the amniotic fluid test, the plaintiffs would have been able to either choose abortion or, alternatively, prepare themselves mentally for the birth of a child with congenital abnormality and prepare an environment in which to raise the child. The plaintiffs were deprived of such an opportunity when Y2 misreported the amniocentesis test results."

Hakodate District Court Judgment dated June 5, 2014

[Plaintiffs' claim for consolation money for being deprived of the opportunity to choose and prepare]

“While the plaintiffs had initially believed in Y2’s diagnosis that the fetus had no congenital abnormality, immediately after A’s birth, they not only realized that A had Down syndrome and but also had to witness A to suffer from serious symptoms and to die in a short period of time. Therefore it can be concluded that the psychological shock received by the plaintiffs was extremely great.”

“On the other hand, the amniocentesis test report misread by Y2 contained the statement ‘we observed chromosomal abnormality’ and an analysis diagram indicating the presence of three copies of chromosome 21. Therefore, the negligence was concerned with too basic a matter and as such must be considered really serious.”

“It is reasonable to grant 5 million yen in consolation money to X1 and X2 each.”

Note: Legal Situation Abroad

- ◆ British and French laws have a fetus clause (a clause allowing selective abortion of a fetus with disabilities). Abortion is permitted at any time during pregnancy if there is a significant risk of the baby being born with a serious disability or disease.
- ◆ In the United States, the law recognizes the right to choose to have an abortion for any reason the pregnant woman deems fit (abortion-on-demand). In Canada, a mother can practically obtain an abortion for any reason.
- ◆ In these countries and many others, there are no barriers, in terms of causal relationship, to recognizing a wrongful birth claim. However, as pointed out in rulings in Japan, one could not measure the damages suffered by the parents without comparing the two possible scenarios (child born with disabilities vs. birth avoided through abortion) from the parents’ perspective.
- ◆ Even in the United States, wrongful birth claim is prohibited in about ten states.

Note: Legal Situation Abroad

- ◆ While there is some variation among the countries and states/provinces, when it is found that an act of negligence was committed by the medical personnel, many courts have awarded to the parents damages for the extra costs of bringing up a disabled child.
- ◆ The courts have coped with the problems associated with recognizing monetary damage, by giving one or more of the following explanations: (1) damage is not the child’s birth but the child’s disability, or (2) damage consists in being denied the option to have an abortion, or by invoking (3) the necessity of covering the costs of treatment and care necessitated by the disability. (4) Sometimes, the courts have justified imposing liability on the medical personnel and institution as a measure to ensure the appropriate implementation of genetic counselling.