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Criminal liability in negligent prenatal care

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The recent guideline of the Hellenic Society of Obstetrics and Gynecology (HSOG) (Guideline 60, July 2021 - Prenatal care: monitoring of an uncomplicated pregnancy) (1), describes the proposed integrated clinical and laboratory prenatal investigations on the Greek population for the prevention and early diagnosis of pathological conditions both for the mother and the fetus. It states that the main goal of the prenatal care is to help ensure the delivery of a healthy neonate while minimizing the associated risks to the mother.

Most of the examinations included in routine prenatal care are carried out in the first trimester. After 20 weeks of pregnancy, the recommendations are the following:

- Blood pressure, body weight and urine dipstick should be checked at each visit.
- An ultrasound scan performed by an Obstetrician specialized in Fetal Medicine is recommended at 20+0 - 23+6 weeks of pregnancy. The purpose of this population control is the identification of existing anatomical abnormalities of the fetus, so that the parents are subsequently given the possibility of appropriate

counseling to make timely decisions (invasive diagnostic techniques, intrauterine treatment of the fetus, termination of pregnancy depending on the severity of the abnormality, supportive treatment, delivery in a specialized center for the subsequent treatment of the neonate).

- During this same scanning session, two screening tests are also recommended:

- i) the assessment of the cervical length for the prediction of preterm labor and,
- ii) the measurement of the uterine artery blood flow resistance using Doppler for the prediction of preeclampsia and fetal growth restriction.

If pregnant women are found to be at increased risk for the above complications, the management of the pregnancy is modified accordingly.

- All pregnant women without pre-existing diabetes mellitus or previously diagnosed gestational diabetes mellitus should undergo a glucose tolerance test between 24 and 28 weeks of gestation.
- At 28 weeks of gestation, it is recommended to give Rhesus negative pregnant women hyperimmune anti-D-globulin.

- A universal ultrasound screening of pregnancies in the third trimester is a proposed method of monitoring the condition of the fetus, however, internationally, there is still no consensus on the timing or number of ultrasound examinations. At least one fetal growth ultrasound between 32+0-36+6 weeks is recommended.

- It is also recommended that all pregnant women should be screened for Group b-hemolytic streptococcal (GBS) colonization by vaginal and rectal swabs between 36+0 and 37+6 weeks.

- If labor is not completed by 40+0 weeks of gestation, ultrasound assessment of amniotic fluid and non-stress test or bi-weekly biophysical profile testing are recommended.

- In addition, it is recommended to inform the pregnant woman about the increased perinatal morbidity and mortality after 41+0 weeks of pregnancy and the induction of labor.

- Also, by its additional guideline (2), HSOG allows the induction of labor from 39+0 weeks, after a discussion between the pregnant woman and the obstetrician regarding the advantages and disadvantages of this intervention.

The above framework generally delimits the *lege artis* fulfillment of prenatal control, when it is judicially examined in cases of medical negligence, in order to be diagnosed whether the physician's performance has been at the same level of due care that is expected by their reasonable colleagues under the same circumstances.

Medical errors that may lead to such a criminal investigation can be distinguished into the following three main categories:

- a. Failure to recommend the appropriate tests during pregnancy (e.g. b-thalassemia, Toxoplasma, CMV, blood pressure measurement, proteinuria, anomaly scan).

- b. Careless interpretation of the test results during pregnancy (same as the previous ones).

- c. Deficient performance of tests during pregnancy or application of insufficient tests or interventions for the specific pregnancy (failure to recognize abnormalities, invasive tests i.e. amniocentesis, interventions during labor such as forceps or cesarean section).

It should be noted that under the previous Greek law the physicians were not criminally liable in cases of negligence, when offering prenatal care that led to the damage to the fetus. The criminalization of medical malpractice was limited to the commission of two criminal offences, namely:

1. manslaughter (article 302 of the Criminal Code) and
2. bodily harm by negligence (article 314 of the Criminal Code).

However, following the introduction of the new Greek Criminal Code in the year 2019 (law 4619/2019 enforced on 1/7/2019), criminal liability for medical malpractice has since been extended to cases of:

3. negligent termination of pregnancy (article 304 para. 5 of the new Greek Criminal Code) or
4. causing by negligence serious damage to embryos (article 304A para. 2 of the new Greek Criminal Code), i.e. in both offences in a time before the beginning of human life.

In the two above regulations, criminal liability is introduced for negligent conduct during prenatal care that leads to harm to the fetus, after the 20th week of pregnancy.

Specifically, in the article 304 para. 5 of the Criminal Code, a sentence of imprisonment of up to three years or a fine is prescribed for whomever, either during the prenatal care after the 20th week of pregnancy or during childbirth and before the appearance of the child in the outside world, causes, by negligence, termination of the pregnancy (i.e. the demise of the fetus inside the mother's body) or severe physical damage to the fetus, resulting in the death

of the neonate.

Also, in the article 304A para. 2 of the Criminal Code, a sentence of imprisonment of up to two years or a fine, is prescribed for whomever, during the prenatal care after the 20th week of pregnancy or during childbirth and before the appearance of the child in the outside world, causes by negligence serious damage to the fetus or becomes culpable in causing to the neonate a development of a serious illness of its body or mind.

In the offense referred to in article 304 para 5 of the Criminal Code, the punishable result consists either in the termination of the pregnancy, i.e. stillbirth, or in causing severe physical damage to the fetus, which results in neonatal death.

Correspondingly, in the article 304A para. 2 of the Criminal Code, the punishable result is the infliction of serious (i.e. not simple or completely slight) physical damage to the fetus or the appearance of a serious physical or mental illness in the neonate. The meaning of the above is interpreted through the provision of the article 310 para. 3 of the Criminal Code, which defines that serious bodily harm should be acknowledged especially in case the act caused the victim a life-threatening or serious and long-term illness or serious mutilation or disability or permanent disfigurement or it prevented them significantly and for a long time to use their body or mind. The explanatory statement of the new Greek Criminal Code defines physical damage as the derangement of the external appearance of the body, while health damage refers to the functioning of the internal organs. Hence, physical damage may simultaneously provoke damage to health, while health damage may occur without physical damage.

Regarding the criterion of the transition from the state of the fetus to that of the newborn, this is self-evidently the beginning of human life, that sets the distinction between an abortion (non-survival of the fetus) and the death of the newborn. It is emphasized

that the criterion of this transition for the diagnosis of corresponding criminal responsibility, as it has now been authentically defined by the legislator in the new Greek Criminal Code, is the appearance, during childbirth, of even a part of the fetal body to the outside world. On the other hand, a troublesome issue is raised since the time limit of the neonatal period is not specified in the provisions of the Greek Criminal Code, while death or serious damage in this period can establish the corresponding criminal liability. It is crucial to be clarified therefore, that in medical terms the neonatal period is generally defined as the first 28 days of life.

It should also be noted that in this case the error must have occurred before the delivery, since otherwise the offenses of bodily harm or manslaughter take place. Furthermore, it should be mentioned that a definition of death is not found in the provisions of the Greek Criminal Code. However, in the article 9 para. 5 of Law 3984/2011, it is stated that the criterion for the occurrence of death is the necrosis of the brain stem.

In conclusion:

1. The physician is now criminally liable for malpractice not only in cases of damages caused after the beginning of human life, but also in cases where during the prenatal care after the 20th week of pregnancy, severe damage to the fetus or termination of pregnancy is caused.

2. In obstetrical clinical practice, the situations that may be associated with termination of pregnancy or severe damage to the fetus and by extension lead to a criminal investigation for the above offenses, can be distinguished in the following three basic categories:

- a. Failure to recommend the appropriate tests during pregnancy.
- b. Careless interpretation of test results during pregnancy.
- c. Deficient performance of tests during pregnancy

or application of insufficient tests or interventions for the specific pregnancy.

3. According to the wording of the Greek law, errors are penalized, as long as they occur during prenatal care, after the 20th week of pregnancy (e.g. during amniocentesis at 21 weeks). Therefore, the physician is still not criminally liable for damage to the fetus, if the critical test or intervention has taken place during the prenatal care but before the completion of the 20th week of pregnancy (e.g. during chorionic villus sampling or amniocentesis before 20 weeks).

4. The explanatory statement of the new Greek Criminal Code does not clarify the reason why the limit of 20 weeks of pregnancy was chosen as the appropriate for the establishment of criminal liability in medical malpractice. However, given that the limit of viability and, by extension, the distinction between abortion and stillbirth is now set at 22 weeks, possibly the set limit should be reconsidered by the legislator. Otherwise, there may be a risk of performing some tests in advance, especially the invasive ones, so that they precede the completion of the 20th week of pregnancy.

5. According to articles 304 para. 5 and 304A para. 2 of the Greek Criminal Code, physicians are not criminally culpable for simple and completely slight damages to the fetus due to their negligence even after the 20th week of pregnancy.

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