This is an unofficial translation of the summary of the Swedish Council on Medical Ethics' report Signs of life after late abortion (Smer 2019:1), published in February 2019.

Signs of life after late abortion

Summary of a report

In August 2017, Sveriges Television, a public service broadcaster, reported that a paediatrician at a Swedish hospital had tried to save the life of a fetus born after a late abortion. The fetus had shown clear signs of life after the abortion and the midwife had summoned the doctor. In an interview the doctor explained that since the twenty-second week of pregnancy had passed, her view was that, in legal terms, this was a child and when she meets an acutely ill child she wants to help it.

The incident attracted a great deal of media attention and led to a debate in which the doctor's actions attracted both criticism and support It also led to the Swedish Society of Obstetrics and Gynecology (SFOG) and the Swedish Association of Midwives (SBF) asking the Swedish National Board of Health and Welfare for a meeting to discuss how abortion care in Sweden can be designed in the best interests of the woman in conformity with the law. That meeting, which was held in September 2017, was also attended by representatives of the Swedish Neonatal Society (SNF), the National Board of Health and Welfare's Legal Advisory Board and the Swedish National Council on Medical Ethics (Smer). The meeting agreed that the ethical aspects needed to be highlighted and that a contribution by Smer would be welcomed. At its meeting on 27 October 2017, Smer decided to start a project to develop an

ethical analysis of the question of fetuses that show signs of life after a late abortion.

Ethical starting points for Smer's analysis

Abortions near the time limit for late abortions can be ethically justified

This report is not about the right to abortion. Smer holds, and has long held, the view that a fetus has the right to protection during its development but that the right to protection must be weighed against the woman's right to self-determination. At the start of the pregnancy, the woman's right to self-determination carries most weight, so free abortion should be permitted. As the fetus develops, its right to protection increases and the conflict of interest with the woman's right to self-determination becomes more pronounced. The fact that the Swedish Abortion Act (1974:595) sets a limit for the right to free abortion at the end of the eighteenth week of pregnancy (day 18+0[1]) is one expression of this perspective. However, Smer shares the view of the legislator that there may also be circumstances after the eighteenth week of pregnancy in which it should be possible to grant an abortion. Examples of such circumstances can be that the fetus has been diagnosed at a late stage as having a severe fetal anomaly, that the woman has a serious illness or that she is in a very vulnerable social situation. That there can be ethical reasons that indicate that it should be possible to have an abortion granted close to the present limit for late abortions is one of the starting points for this report.

Everyone born has human dignity

According to the principle of human dignity, every human being has a number of inherent and irrevocable rights deriving from their intrinsic worth as a human being – their human dignity – that have to be respected whatever their external characteristics or position in society. The most fundamental of these rights is the right to life. In

[1] Eighteen full weeks and zero full days.

health care the right to life means that life-sustaining treatment has to be given if it is in the interest of the individual.

In Smer's view, it is difficult from an ethical perspective to see that the point in time when someone should be granted human dignity can be later than the time of birth. This means, from the perspective of human dignity, that there is no difference between a fetus that shows signs of life after a late abortion and an extremely premature child; both are children and have human dignity and are therefore covered by fundamental rights, such as the right to life.

Saving the life of a fetus after a late abortion is not ethically uncomplicated

Saving the life of a fetus born after a late abortion and judged to be viable, is ethically more complicated than saving the life of an extremely premature child. If the National Board of Health and Welfare's Legal Advisory Board[2] (the Legal Advisory Board), which gives permission for late abortions, has judged that there are reasons for a late abortion and granted it, the woman has a legitimate interest in having the measure performed in the way she intended. Moreover, whatever the background, an extremely premature birth entails a high risk of ill health and disabilities. Depending on the particular circumstances present at the time of a late abortion, the risk of disability is probably even higher for a fetus whose life is saved after a late abortion. A fetus whose life is saved after a late abortion may also lack a parent or parents with the will and ability to look after it. It may be difficult to give the child a secure family situation.

Background facts

Late abortion may be granted until viability

Under the Swedish Abortion Act an abortion may be performed at the wish of the woman up until the end of the eighteenth week of pregnancy (free abortion). Under the National Board of Health and

[2] The full name of the board is " The National Board of Health and Welfare's Legal Advisory Board for certain legal, social and medical matters".

Welfare's Abortion Regulations (SOSFS 2009:15) the last day for a free abortion is day 18+0.

Abortion after the end of the eighteenth week of pregnancy (late abortion) may only be performed if the Legal Advisory Board gives permission for the measure. Under the Abortion Act, permission for late abortion may only be given if there are exceptional reasons. Permission may not be given if there is reason to assume that the fetus is viable. The Legal Advisory Board has long set the limit for late abortion at day 22+0 and, in accordance with this, it gives permission up until day 21+6. The exceptions are that the fetus has such a severe anomaly that it will never be able to live outside the uterus and situations where the pregnancy is causing serious danger to the woman's life or health.

Number of late abortions rising

The number of applications to the Legal Advisory Board for late abortion shows a rising trend and has been between 550 and 600 per year in recent years. Around 20 of these applications apply to day 22+0 and later while the others apply to the period 18+1 till 21+6. An estimated 130–140 applications per year for late abortions are received in the last week before the Legal Advisory Board's limit at 22+0.

In its statistics the Legal Advisory Board differentiates between four types of reasons for late abortion: fetal anomaly, social reasons, mental illness of the woman and physical illness of the woman. The increase in the number of late abortions is explained by a rising number of applications for abortions on account of fetal anomaly. These now account for around two-thirds of all applications.

The increase in the number of applications for late abortions on account of fetal anomaly is explained by two interacting factors. Technical progress and greater knowledge have improved the possibilities of detecting fetal anomaly by ultrasound. At the same time, the ultrasound examination offered to all pregnant women in Sweden in the second trimester, which used to be performed in week 17+ or 18+[3], has been postponed and is now generally performed in week 19+. The later the examination is done, the more anomalies

[3] "Week X+" refers to the week from day X+0 to day X+6.

can be detected. The aggregate effect of these two factors is that more fetal anomalies are detected.

Downward movement of the medical limit for viability

The legislative history of the Abortion Act states that viability in the meaning of the Abortion Act depends on the ability of health care to save the lives of extremely premature children. When the Abortion Act was introduced in 1975, viability was judged to arise between the twenty-fourth and the twenty-eighth week. Since then the methods of neonatal care have advanced so that more and more extremely premature children survive. Today the health care professions judge that the limit for viability is at day 22+0. This is the point in time when Swedish national guidelines say that consideration should be given to preventive treatment in the event of impending premature birth and to cardiopulmonary resuscitation for the child in the event of an early birth.

The fact that the limit for viability is now judged to be day 22+0 does not mean that all premature children born at this day survive. Four out of ten children born in week 22+ are stillborn. A third of children born alive in week 22+ survive their first birthday, which is twice as many as ten years ago. There are also instances of survival among children born in week 21+. One reason why it has not been possible to set a clear limit for viability is the uncertainty in ultrasound dating of pregnancy, which means that a child can be both more and less mature than expected on the basis of this dating.

Many of the extremely premature children that survive suffer disabilities or ill health. Around half the children born in week 22+ have a moderate or severe neurological disability at the age of six years.

Description of problems

Conflict between objectives of the Abortion Act sharpened by advances in medical technology

The development of neonatal care has led to an ever clearer conflict between the ambition of giving women the possibility of late

abortion where there are strong reasons for this, and the provision in the Abortion Act that no viable fetuses may be aborted. This conflict has been sharpened further by developments in ultrasound diagnostics, which have led to the detection of more and more prenatal injuries.

Birth of viable fetuses after late abortions cannot be ruled out

There is no certain data about how common it is for a fetus to show signs of life after a late abortion, but the share is probably very small. One British study found that every twentieth fetus aborted on account of fetal anomaly in week 21+ showed signs of life.

Only a small share of children born alive after a premature birth in week 22+ are viable. Fetuses that show signs of life after a late abortion generally have poorer medical prospects than children born alive after a spontaneous birth. This is because many of them have a more or less severe fetal anomaly, but also because the abortion process as such can entail a risk of injury and because measures that increase the chances of survival have not been taken. The probability of a viable fetus being born after an abortion initiated on day 21+6 or earlier must therefore be judged to be very low. Considering that the current medical limit for viability is 22+0, it is nonetheless not completely impossible with current legal and medical practice, under which an abortion is granted and initiated up to and including day 21+6, for there to be isolated instances of the birth of a viable fetus after a late abortion. One contributing factor is the uncertainty in dating the length of the pregnancy.

If a viable fetus is born, this raises a number of ethical problems in which fundamental goals and values may come into conflict with one another. So, despite their very infrequent occurrence, there is a need to take a principled position on the question of fetuses that show signs of life after late abortions.

Positions taken by Smer

Everyone born alive has human dignity and the right to life

For Smer, it is incontestable that the principle of human dignity applies to all individuals born alive, irrespective of background, and that all such individuals have the same fundamental rights, including the right to life. Saying that some individuals who have been born do not have human dignity is contrary to the fundamental idea of the principle that everyone is covered irrespective of external characteristics or position in society. From a human dignity perspective, a fetus that shows signs of life after a late abortion is a child and must be placed on an equal footing with other children when it comes to fundamental rights. This means that the right to life also covers that child.

Most fetuses that show signs of life after a late abortion are probably not viable. In such a situation, an ethical approach means that the dying fetus has to be looked after in a dignified way, but does not lead to any requirement for life-sustaining treatment. If the fetus born shows signs of being viable, the situation is different. Then it is entitled to an expert medical assessment of whether to provide life-sustaining treatment. The decision to refrain from or to start life-sustaining treatment has to be based on what is in the best interests of the child. To take account in that decision of the woman's self-determination or what impact the decision would have on other people would be contrary to the human dignity principle and the child's right to life.[4]

Measures need to be taken to avoid the birth of viable fetuses after late abortions

When the Legal Advisory Board has judged that there are exceptional reasons for a late abortion and granted it, the woman has a legitimate interest in having the measure performed as intended, an interest that cannot be satisfied in a situation in which the life of

[4] A review of the Swedish legal position conducted by Smer in conjunction with the report shows that an individual who breathes or shows other signs of life after birth is a child, entitled to adequate health care. What care is adequate health care is determined by the viability of the child and the benefits of the care. There is no possibility of taking account of the fact that the child was born after an abortion.

the fetus is saved after the abortion. This means that the woman's self-determination, when it comes to achieving the purpose of the abortion, will be restricted. It is also very likely that a situation of that kind would have negative impacts on the woman's well-being. For the child, it would mean running the risk of suffering a substantial disability and ill health as a direct consequence of a measure granted and performed by society. There is also a risk that it would be difficult to give the child a secure family situation.

In Smer's assessment, the interests that must give way in a situation when the life of a fetus born after a late abortion is saved are very strong. Therefore, the aim of society and of health care must, in Smer's view, be that no viable fetuses are born after late abortions. The picture obtained by Smer is that, with current legal and medical practice, it is not possible to exclude this happening in isolated instances. Smer therefore makes the assessment that measures need to be taken to avoid the birth of viable fetuses after late abortions.

A lowered time limit for late abortions should be avoided

At present the possibilities of late abortions are already more limited in Sweden than in many other countries, where abortions for severe fetal anomalies are permitted far into pregnancy, in certain cases without any final time limit. Smer makes the assessment that there will also be cases in the future where there may be strong reasons for granting an abortion but where, for various reasons, the abortion cannot be performed until week 21+, and, in isolated cases, not before the end of that week. Smer therefore considers that measures other than lowering the abortion limit should, where possible, be given priority so as to avoid the birth of viable fetuses after late abortions.

Smer's proposals

Take measures to reduce the number of abortions close to the limit for late abortions

Smer proposes taking measures to reduce the number of late abortions close to the limit for late abortions (day 22+0). Measures that should be considered are:

Review the offer of obstetric ultrasound to pregnant women

According to the Swedish Society of Obstetrics and Gynecology (SFOG), it would be possible, with the right training and skills, to bring the time for ultrasound in the second trimester down to week 18+ of pregnancy while striking a reasonable balance between, on the one hand, a high detection rate for severe anomalies and, on the other hand, time for information, for reflection and – for the women who so wish – for the performance of late abortions. Another change that could lead to earlier detection of many prenatal injuries would, according to the SFOG, be to offer all pregnant women ultrasound in the first trimester, which around half of them currently undergo as part of the Combined ultrasound and biochemistry, or KUB, test.

Offer all pregnant women an NIPT examination

Smer proposes considering the possibility of offering all pregnant women prenatal diagnostics by means of non-invasive prenatal testing (NIPT) so as to be able to detect trisomies 13, 18 and 21 at an early stage with high accuracy.

Review procedures and organisation for late abortions

It has been stated in Smer's discussions with profession representatives that, at present, late abortions are perhaps not always initiated immediately after being granted, but may be delayed by one or a few days. Smer considers that late abortions should be regarded as acute health care that has to be delivered promptly. In addition to guidelines at national level, there should be procedures and monitoring to ensure that a late abortion that has been granted is

performed without delay. Smer also considers that there may be reasons to review how health care should be organised in the case of late abortions so as to ensure good and safe health care.

Assure the quality of information to the woman on detecting fetal anomaly

A pregnant woman who has been told that her fetus has a fetal anomaly must be offered expert information, without delay, about the nature and severeness of the anomaly and the treatment possibilities available, so that she can take a well-informed decision about whether or not to interrupt her pregnancy.

Produce national knowledge support for late abortions

So as to support care providers and professions in their work to ensure that late abortions are delivered promptly and that the woman is offered good and safe care, Smer proposes the production of national knowledge support for late abortions.

Review the Legal Advisory Board's handling of applications for late abortions

Smer considers that there may be reasons to review whether the Legal Advisory Board's handling of applications for late abortions could be speeded up, thereby contributing to fewer late abortions close to the Legal Advisory Board's limit at 22+0.

Review the concept of viability in the Swedish Abortion Act

The present Abortion Act was put into place at a time when the possibilities of saving extremely premature children were more limited than they now are. As recently as 20 years ago the legislator thought that developments would soon reach the limit of the possible and that week 23+ was a physiological limit under which it is not possible to save premature children. Since then, advances have been made and the medical limit for viability is now judged to be

22+0. Even if developments may be moving more slowly today, there is no indication that a definitive limit has been reached. At the same time there is more and more serious discussion of the possibility of designing "artificial uteruses" which would be able to radically alter the possibilities of treating extremely premature children. In other words, the conflict we already see today between giving women the possibility of late abortion when there are strong reasons for this and the Abortion Act's provision that no viable fetuses may be aborted risks being even more pronounced in the future.

Smer's assessment is that situations will also arise in the future when there will be strong reasons for granting an abortion in the second half of the second trimester. With the present legislation for late abortions we can expect to see a development in which the scope for late abortion, which is already more limited in Sweden than in many other countries, decreases gradually. In Smer's view, this would be a very unfortunate development. Against that background, Smer considers that there may be reasons for the Government to consider investigating the concept of viability in the Abortion Act and looking at whether there are reasons to introduce a fixed week limit for late abortions in the same way as in the abortion legislation of many other countries.

Investigate the conditions for offering feticide in conjunction with late abortion

A fetus born after a late abortion that is viable is entitled to the care that is in its best interests. If a fixed week limit is introduced and the medical limit for viability continues to shift downwards, one consequence could be that this situation will occur more frequently in the long term. In such a situation the purpose of the abortion is not achieved.

To ensure that a living fetus is not born in a late abortion, many countries use feticide, which means that a pharmaceutical is injected into the fetus before the abortion is initiated and leads to the fetal heart stopping.

Smer considers that there are several arguments in favour of offering feticide in conjunction with abortion at the limit of medical viability. The most important is that the woman's purpose for the

abortion can be secured and that a situation in which the woman's right to self-determination is set against human dignity is avoided. Feticide also means that the woman/parents/health care professionals are spared the possible discomfort that may be involved when the fetus born shows signs of life.

Smer's assessment is that before any position is taken on introducing the method, the conditions for doing so need to be investigated more closely; this applies, for example, to effectiveness, safety, qualifications and organisational requirements. Smer therefore proposes that the Government commission the National Board of Health and Welfare to investigate the specific conditions for being able to offer feticides in conjunction with late abortions.