

The chances of living

In the course of the Galway inquest into the tragic death of Savita Halapannavar, it has emerged that there is some doubt as to the meaning of the test laid down by the majority judgments in the X case as to when it is lawful for Irish doctors to terminate a pregnancy.

The Supreme Court, in March, 1992, held:

“That the true interpretation of article 40, s.3, sub-s,3 of the Constitution required that termination of pregnancy was permissible only where it was established as a matter of probability that there was a real and substantial risk to the life of the mother if such termination were not effected. To prevent termination except in circumstances where there was a risk of immediate or inevitable death of the mother did not sufficiently indicate the right to life of the mother. “

The phrase *“established as a matter of probability that there was a real and substantial risk to the life of the mother “* is not without difficulty, as the evidence at the Galway inquest is demonstrating.

In my view, the phrase *“real and substantial risk”* does not mean that the mother is more likely than not to die.

If, as may be unlikely, it could be established that a pregnant mother found herself in a condition that, say, three women out of 10 women in the same condition lost their lives, no one could doubt but that there was a real and substantial risk to her life even if the statistical odds favoured her survival.

In my view the requirement that the *“real and substantial risk”* must be established as a matter of probability simply means that there is no legal requirement to establish *“beyond reasonable doubt”* that the risk exists – not that the risk itself is quantified at more than 50%.

In other words, in my view, what is legally required is that the doctors making a lawful decision to terminate a pregnancy in a manner that will end the life of the unborn must establish two things:

(a) as a matter of probability there is a risk to the life of the mother if the pregnancy is not terminated;
and

(b) that the identified risk is a real and substantial risk, as distinct from a very small risk, that the mother will die.

I cannot see in the Supreme Court’s decision in the X case any basis for concluding that termination is only possible where the doctors conclude that the mother will probably die if there is no intervention. Such an interpretation would mean that a mother in a condition with a 40% chance of dying would have to take her chances, even when, one way or the other, the fetus was in the doctors’ opinion 95% or 100% likely to die in utero.

In making these points, I am making no assumptions as to whether an earlier decision to terminate the pregnancy would have made, or would probably have made, any significant difference in the outcome for Savita.

All I am saying is that calculating differences between 51% and 49%, or for that matter between 55% and 45% or between 60% and 40%, cannot be the only or proper basis for making a decision to save the life of a pregnant mother by terminating her pregnancy.

Even if such odds could be reliably calculated, and I doubt that they often can, it seems to me that a pregnant mother has the right to have her pregnancy terminated if she is facing a known avoidable statistical 40% chance of death if her pregnancy proceeds. Such a risk is, in most people's view, a "real and substantial risk", even if less than a 50% chance.

That maternal right is all the stronger where it is certain, or almost certain, that the pregnancy if continued will not result in the survival of the un-born.

For this reason, I very much doubt that it is necessary or relevant, in the face of a growing, real and substantial risk to the life of the mother, to await the death of the fetus with little or no chance of survival or to delay termination until the fetal heartbeat can no longer be detected.

It seems to me that it would be very helpful indeed if the issue raised in Galway, namely the distinction between the existence, as a matter of probability, of a real and substantial risk to the life of a mother, on the one hand, and the existence of a probability that a pregnant mother will die, on the other, can be dealt with authoritatively by the terms of the new legislation which we are promised will be enacted in the near future to deal with the abortion issue.

It also seems to me that the Medical Council should provide guidance on this issue, having consulted with whatever lawyer lawyers it wishes, when we wait for our elected politicians to deal with this issue .