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Consent and informed decision-making: Central Queensland Hospital and Health Service v Q

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The High Court of Australia has held that parents are able to consent to medical treatment performed on their children *unless* the treatment is a "special medical procedure" requiring court authorisation. This article looks at *Central Queensland Hospital and Health Service v Q*,[1] a recent decision of the Supreme Court of Queensland which held that an abortion is a special medical procedure and which draws attention to the debate over whether termination procedures fall into the class of "special cases" identified by the High Court.

Introduction

In *Central Queensland Hospital and Health Service v Q*,[2] the Supreme Court of Queensland declared, under its parens patriae jurisdiction, that a 12-year-old woman, Q, could undergo an abortion to terminate her 9-week pregnancy at the Central Queensland Hospital and Health Service (CQHHS). In making this decision, McMeekin J heard from Q, her parents and CQHHS doctors. All were in agreement that an abortion was the appropriate course of action and his Honour accepted that it was clearly within Q's best interests for the procedure to be performed based on, inter alia, the principles outlined in the decision of *R v Davidson*.[3]

However, the decision is significant because McMeekin J found that Q was incapable of consenting to the procedure for herself. His Honour went on to apply the earlier case of *Queensland v B*[4] to hold that an abortion constituted a special medical procedure within the meaning of *Dept of Health and Community Services (NT) v JWB and SMB*[5] (*Marion's Case*) that required court approval, even where Q's parents were consenting.

Facts

Medical and psychiatric evidence: wishes of child and her parents

Q first sought medical assistance from a hospital managed by CQHHS in early 2016. She consulted with a social worker, two obstetricians and a psychiatrist. On all occasions, she had expressed the view that she wished to have a termination.[6] McMeekin J was satisfied that this decision was all her own.[7]

Q gave affidavit evidence to the court, in which she stated that she was finding pregnancy "very stressful emotionally" and that she had run away from home, cut herself and attempted suicide on multiple occasions.[8] This evidence was corroborated by Q's mother who gave evidence that Q would, in the mother's opinion, be "at a very real risk of self harm and or suicidal behaviour" if she continued with the pregnancy.[9] Q's father agreed.

Q's parents had recently separated, and that separation had been an exacerbating factor of Q's mental health. Neither parent was in a position to assist Q to raise a child.[10]

In their evidence, a psychiatrist and an obstetrician agreed with the assessment that the pregnancy carried significant risks to Q's psychical and mental health. Both doctors noted that proceeding with the pregnancy would have entailed "an increased risk of resuming patterns of self harm and suicidal thoughts" and that a pregnancy could potentially be life-threatening to the young woman.[11] McMeekin J concluded that "the evidence is all one way …While termination of the pregnancy carries some risks those risks are far outweighed by the alternative".[12]

Was Q capable of personally consenting to treatment?

Despite finding that Q was "quite a mature child" with "a level of maturity greater than her chronological age, at least in some respects",[13] McMeekin J was not satisfied that she was capable of consenting to the procedure. His Honour based this decision upon the evidence of a psychiatrist, who reported:[14]

> [Q] had little or no idea about the process of pregnancy and had no idea of the realistic emotional and physical demands that would be part of caring for and raising a child.

Accordingly, McMeekin J found Q was not *Gillick*[15] competent because she had not yet "achieve[d] a sufficient understanding … to understand fully what is proposed".[16] McMeekin J was fortified in his conclusions based on the decision of Wilson J in *Queensland v B* where it was noted that:[17]

> It seems unlikely that a 12 year old child of average intelligence and maturity could fully understand the significance of a termination of pregnancy, including the immediate and long term risks to herself as the mother of the baby.

Similarly, McMeekin J said: "The fact is that very few 12 year olds could have the maturity to comprehend the impact a decision like this might have on them in the longer term."[18]

The question then arose about who could consent on Q's behalf. Under the principles explained by the High Court majority in *Marion's Case*, a child's parents are capable of consenting to medical treatment on behalf of a child, except in limited circumstances where a court approval is required to perform a special medical procedure.

Is an abortion a special procedure?

Applying *Queensland v B*, McMeekin J held that an abortion was a special procedure and thus that the consent of Q's parents was insufficient to allow the procedure to be performed.[19] He adopted the reasoning of Wilson J from *Queensland v B*, where her Honour said:[20]

> In *Marion's Case*, Mason CJ, Dawson, Toohey and Gaudron JJ discussed why the parents of an intellectually disabled girl could not validly consent to her sterilisation, essentially because of the risks of their making the wrong decision and the grave consequences of their doing so. For similar reasons, B's parents should not be able to consent to the termination of her pregnancy. The Court in its role as parens patriae must act in the best interests of the child, B, whereas her parents may ultimately make a decision which favours other and possibly conflicting interests of the family as a whole (albeit one bifurcated by their own divorce). And, like the decision to sterilise, which was under consideration in *Marion's Case*, the medical profession might be expected to play a central role in the decision to terminate the pregnancy as well as in the procedure itself. To terminate a pregnancy is to negate the possibility of the mother ultimately giving birth to a live baby.

It is this element of McMeekin J's decision that poses interesting questions for hospitals and health services. It is discussed further at the conclusion of this article.

Parens patriae jurisdiction

Being satisfied that a termination was a procedure requiring court approval where the consent of the parents alone would be insufficient, McMeekin J noted that the protective parens patriae jurisdiction of the court is allowed to exercise wide powers to protect those who are unable to protect their own interests, such as children.[21] Exercising its powers under this jurisdiction, the court is empowered to make decisions to consent to medical treatment on behalf of the protected person.

The lawfulness of the termination and the orders made

Abortions are criminalised in Queensland. Accordingly, even where a valid consent is provided, in this case by the court, for CQHHS to perform the procedure, it was necessary to avoid any potential criminal liability.

Sections 224 and 225 of the Criminal Code Act 1899 (Qld) (Code) create offences against "procuring a miscarriage" by the administration of medication, or by surgery. Relevantly, s 224 provides:

> Any person who, with intent to procure the miscarriage of a woman, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, is guilty of a crime, and is liable to imprisonment for 14 years.

It is well-established that the conventional phrasing of abortion offences, which typically refer to unlawfulness, leaves a space for the performance of a lawful procedure or treatment. In Queensland, s 282 of the Code provides this space. It reads:

> **Surgical operations and medical treatment**
>
> (1) A person is not criminally responsible for performing or providing, in good faith and with reasonable care and skill, a surgical operation on or medical treatment of—
>
> (a) a person or an unborn child for the patient's benefit; or
>
> (b) a person or an unborn child to preserve the mother's life;
>
> if performing the operation or providing the medical treatment is reasonable, having regard to the patient's state at the time and to all the circumstances of the case.

McMeekin J explained that where a procedure falls into the purview of s 282 or s 286, which relates to duties owed by people with care of a child to that child, the procedure will be lawful and not an offence against the Code.[22] Whether a procedure was permitted under the Code was determined by an application of the principles articulated in *R v Davidson*, which was adopted in Queensland.[23] The test of lawfulness under that decision arose under the (now repealed) Victorian equivalent of s 224 and asked whether the procedure that procured a miscarriage was:

- necessary to preserve the woman from serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of the pregnancy would entail; and
- in the circumstances, not out of proportion to the danger to be averted.

McMeekin J also noted that: "The dangers to health are not confined merely to the duration of the pregnancy."[24]

His Honour was clearly satisfied that both limbs of the test were made out. In the opinion of the court, the administration of drugs to procure a termination of Q's pregnancy was reasonable given the dangers posed to her physical and mental health outlined in the evidence before the court.[25] His Honour also declared that surgical termination would be justifiable if the Mifepristone and Misoprostol failed to successfully effect a termination. Accordingly, the procedure was lawful, either under s 282 or 286 of the Code.

Discussion — special medical procedures

The case demonstrates the complexities surrounding abortion procedures for minors who may not be *Gillick* competent, especially in jurisdictions where abortion is criminalised. Interestingly, *Central Queensland Hospital and Health Service v Q* entrenches the position of an abortion as a special medical procedure in Queensland. McMeekin J's application of *Queensland v B* to hold that an abortion performed on a minor was a procedure requiring court approval in accordance with *Marion's Case* appears to expand the effect of that High Court authority.

Marion's Case was a majority decision with three dissenting decisions. The case concerned a 14-year-old adolescent with severe disabilities. Her parents believed that the child should be sterilised to avoid the possibility of pregnancy and to avoid the "psychological and behavioural consequences" of menstruation.[26] The majority, Mason CJ, Dawson, Toohey and Gaudron JJ, held that while a parent could consent to a child's medical treatment, in certain special cases, court approval was required to ensure that the decision was made in the best interests of the child. The majority explained that the intervention of the court was warranted in these special cases because there were significant risks of making a wrong decision. Three non-exhaustive factors were identified as relevant to whether a procedure was a special case:[27]

- the complexity of the question of consent, specifically that there may be an erroneous assumption that a vulnerable person, such as a child or person with a disability, was incapable of consenting;
- the role of the medical profession in the decision-making process concerning a procedure, as well as the performance of the procedure. The majority was clearly concerned that some doctors may act "within a limited frame of reference" that could lead to the making of an incorrect decision;
- conflicts of interest between the interests of the child and the parents that may adversely impact the capability of the parents to act in the best interests of the child.

Also relevant to the majority's decision was that the sterilisation procedure entailed "irreversible and major surgery", though this was not determinative because other surgeries such as "appendectomy and some cosmetic surgery" came within the legitimate scope of the parental power to consent.[28] Subsequently, the decision in *Marion's Case* has been applied to hold that gender reassignment treatment and the collection of bone marrow procedures performed on minors were "special medical procedures" requiring court authorisation.[29]

Comment

Whether an abortion is such a procedure is a matter of debate. The basis of McMeekin J's decision was Wilson J's comments in *Queensland v B*.[30]

It is true that there may be a risk of a complex question of consent for a child and that the termination procedure will likely involve the medical profession. However, as pointed out by Benjamin White and Lindy Willmott, these elements are common to many types of treatment decisions.[31] On this view, the only element from *Marion's Case* that is activated in the decision-making processes surrounding a termination involved a potential conflict between the interests of the child and their parents.

Arguing for the view that an abortion is a special case necessitating court approval, one may point to the irreversible nature of the procedure. This argument underpins Wilson J's comment that "to terminate a pregnancy is to negate the possibility of the mother ultimately giving birth to a live baby".[32] Conversely, it may be suggested that, unlike a sterilisation procedure, a termination does not permanently deprive a child of her fertility.

It may also be noted that Queensland appears to be the only jurisdiction in which this view has been expressed. This effect may be a by-product of the Code's prohibitions on procuring a miscarriage because it is in the interests of hospitals to obtain a declaration that their actions in performing a termination will be lawful under the parens patriae jurisdiction of the Supreme Court, thereby offering the opportunity for a decision on the nature of the procedure. Given that *Central Queensland Hospital and Health Service v Q* and *Queensland v B* are single judge decisions from the same jurisdiction, whether the same view would be reached in other states and territories where abortion has been decriminalised or is the subject of a detailed exception[33] is another question.

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Footnotes

1. *Central Queensland Hospital and Health Service v Q* [2016] QSC 89; BC201602903.
2. *Central Queensland Hospital and Health Service v Q* [2016] QSC 89; BC201602903.
3. *R v Davidson* [1969] VR 667, also known as "the Menhennitt Ruling".
4. *Queensland v B* [2008] 2 Qd R 562; [2008] QSC 231; BC200808413.
5. *Dept of Health and Community Services (NT) v JWB and SMB (Marion's Case)* (1992) 175 CLR 218.
6. Above n 1, at [8].
7. Above, n 1, at [9].
8. Above n 1, at [10]–[11].
9. Above n 1, at [12].
10. Above n 1, at [14].
11. Above n 1, at [15]–[16].
12. Above n 1, at [17].
13. Above n 1, at [6].
14. Above n 1, at [31].
15. *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.
16. Above n 14 at 189; *Marion's Case*, above n 4 at 236–38 (Mason CJ, Dawson, Toohey and Gaudron JJ).
17. Above n 4, at [16].
18. Above n 1, at [32].
19. Above n 1, at [20].
20. Above n 4, at [17].
21. Above n 1, at [18].
22. Above n 1, at [37].
23. See *K v T* [1983] 1 Qd R 396.
24. Above n 1, at [39], citing the case of *Veivers v Connolly* [1995] 2 Qd R 326 at 329 (de Jersey J).
25. Above n 1, at [41].
26. Above n 5, at 229 (Mason CJ, Dawson, Toohey and Gaudron JJ).
27. Above n 5, at 250 (Mason CJ, Dawson, Toohey and Gaudron JJ).
28. Above n 5, at 250.
29. See for example *Alex; Re: Hormonal Treatment for Gender Identity Dysphoria* (2004) 180 FLR 89; *GWW and CMW* (1993) 16 Fam LR 715 but compare with *Inaya (Special Medical Procedure), Re* (2007) 213 FLR 278; (2007) 38 Fam LR 546; [2007] FamCA 658; BC200750567.
30. Above n 4, at [17].
31. B White and L Willmot "Termination of a minor's pregnancy: critical issues for consent and the criminal law" (2009) 17(2) *Journal of Law and Medicine* 249.
32. Above n 4, at [17].
33. See for example Abortion Law Reform Act 2008 (Vic); Crimes (Abolition of Offence of Abortion) Act 2002 (ACT); Reproductive Health (Access to Terminations) Act 2013 (Tas); Medical Services Act 1982 (NT), s 11; Health Act 1911 (WA), s 334; and Criminal Law Consolidation Act 1935 (SA), s 82.