

SUPREME COURT OF QUEENSLAND

CITATION: *Central Queensland Hospital and Health Service v Q* [2016]
QSC 89

PARTIES: **CENTRAL QUEENSLAND HOSPITAL AND HEALTH
SERVICE**
(Applicant)

v

Q BY HER LITIGATION GUARDIAN MLL
(First Respondent)

And

GM
(Second Respondent)

And

MLL
(Third Respondent)

FILE NO/S: S274/2016

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING
COURT: Supreme Court of Queensland

DELIVERED ON: 26 April 2016

DELIVERED AT: Rockhampton

HEARING DATE: 20 April 2016

JUDGE: McMeekin J

ORDER: 1. Order that:

- (a) the minor referred to in this application not be referred to by name but by the reference "Q";
- (b) the identity of Q be suppressed;
- (c) publication of the names of the deponents and the facts upon which this application is based be prohibited;

- (d) the application, the transcript of these proceedings and the affidavits, exhibits and submissions upon which this application is based be placed in a sealed envelope and be opened only upon order of a Judge and the envelope to be marked accordingly.
2. Declare that:
- (a) the termination of Q's pregnancy by the therapeutic administration of the drugs Mifepristone and Misoprostol is necessary to avoid danger to Q's mental and physical health and is lawful; and
- (b) if the administration of the said drugs fails to effect a termination of Q's pregnancy within 5 days then the termination of Q's pregnancy by surgical operations is necessary to avoid danger to Q's mental and physical health and is lawful.
3. Order that:
- (a) Q be permitted to undergo and the Applicant's servants or agents be permitted to perform termination of Q's pregnancy by the therapeutic administration of the said drugs;
- (b) the administration of the said drugs as determined by the Applicant's servant or agents be performed on or before the 23rd day of April, 2016; and
- (c) if the administration of the said drugs fails to effect a termination of the pregnancy within 72 hours of such administration that the Applicant's servants or agents perform such surgical procedure on or before the 27th day of April, 2016 as they deem meet in order to effect a termination of Q's pregnancy.

CATCHWORDS: CHILDREN – Court's inherent jurisdiction – *parens patriae* -
 – where 12 year old girl is 9 weeks pregnant – where the girl is a patient of a public hospital conducted by the applicant – where the applicant sought Court's authorisation of termination of pregnancy – where it is an offence unlawfully to administer a drug or use force or any other means with intent to procure an abortion – whether child can give informed consent – whether continuation of pregnancy is a danger to the girl's mental and physical health – whether termination is lawful

Criminal Code Act 1899 s 224, s 225, s 226, s 282, s 286
Supreme Court of Queensland Act 1991 s 8(2)
Uniform Civil Procedure Rules 1999 r 367

Gillick v West Norfolk & Wisbech Area Health Authority
 [1986] AC 112, cited
K v T [1983] 1 Qd R 396, cited
Department of Health and Community Services v JWB and
SMB (Marion's Case) (1992) 175 CLR 218, cited
R v Bayliss & Cullen (1986) 9 Qld Lawyer Reps 8, cited
R v Davidson [1969] VR 667, cited
Raybos Australia Pty Ltd v Jones (1985) 2 NSWLR 47, cited
Re Bayliss (Unreported, Supreme Court of Queensland,
 24 May 1985), cited
Scott v Scott [1913] AC 417, followed
State of Queensland v B [2008] 2 Qd R 562, followed
State of Queensland v Nolan [2002] 1 Qd R 454, followed
Veivers v Connolly [1995] 2 Qd R 326, cited

COUNSEL: S Gallagher (solr) for the applicant

J Cameron (solr) as *amicus curiae*

SOLICITORS: Corrs Chambers Westgarth for the applicant

McMeekin J:

- [1] The applicant is the Central Queensland Hospital and Health Service. The first respondent is a 12 year old child identified in these proceedings as “Q”. The second respondent is her father and the third respondent is her mother. The child appears by her litigation guardian, her mother. Ms Cameron, a solicitor with the Department of Communities, Child Safety and Disability Services, appeared as *amicus curiae*. The department had had some involvement with the family before the present problem emerged.
- [2] Q is pregnant. Q is a patient at a public hospital conducted by the applicant. She was referred to the medical staff at the hospital after attending on her general practitioner seeking a termination of the pregnancy. The applicant has now applied to the Court in its *parens patriae* jurisdiction for authorisation of the termination of Q's pregnancy.
- [3] On 20 April 2016, in addition to certain suppression orders designed to conceal the identity of the parties, I made the following declarations and orders:

A declaration that:

- (1) the termination of Q's pregnancy by the therapeutic administration of the drugs Mifepristone and Misoprostol is necessary to avoid danger to Q's mental and physical health and is lawful; and

- (2) if the administration of the said drugs fails to effect a termination of Q's pregnancy within 5 days then the termination of Q's pregnancy by surgical operations is necessary to avoid danger to Q's mental and physical health and is lawful.

And orders that:

- (1) Q be permitted to undergo and the Applicant's servants or agents be permitted to perform termination of Q's pregnancy by the therapeutic administration of the said drugs;
- (2) that the administration of the said drugs as determined by the Applicant's servant or agents be performed on or before the 23rd day of April, 2016; and
- (3) if the administration of the said drugs fails to effect a termination of the pregnancy within 72 hours of such administration that the Applicant's servants or agents perform such surgical procedure on or before the 27th day of April, 2016 as they deem meet in order to effect a termination of Q's pregnancy.

- [4] I indicated then that I would deliver my reasons in due course. My reasons follow.

State of Queensland v B

- [5] The circumstances here, with four exceptions, are virtually identical to those that confronted Margaret Wilson J in *State of Queensland v B* [2008] 2 Qd R 562; [2008] QSC 231. Because of her Honour's careful and, with respect accurate, exposition of those considerations it is unnecessary for me to repeat them at length. I adopt her Honour's analysis here.
- [6] The four differences that I see in the facts are these. First, Q is nine weeks pregnant not 18 weeks pregnant. That means that any resort to surgery carries with it less risk to Q than concerned the court in *State of Queensland v B*. Secondly, Q is quite a mature child and not in any way intellectually handicapped as was the 12 year old child in *State of Queensland v B*. If anything, the report of the psychiatrist tends to suggest a level of maturity greater than her chronological age, at least in some respects. More weight can be safely given to Q's views. Thirdly, Wilson J was concerned solely with the potential mental harm that might befall B if the pregnancy was not terminated. Here, while there are strong grounds to believe that Q is at risk of suffering psychological harm, and serious harm, if the pregnancy is not terminated there is good reason to think that she is at considerable risk of physical harm as well. Hence the case in favour of terminating is stronger here. Finally, the obstetrician proposes to continue to surgery if the first option of a medical termination fails. That option was not open in *State of Queensland v B*.
- [7] I note that s 282 of the *Criminal Code Act 1899* (the Code) has been amended since *State of Queensland v B* and will require consideration here.

Relevant Factual Background

- [8] Since first seeking medical assistance about a month ago Q has seen a general practitioner, a social worker at the hospital on several occasions, two specialist obstetricians, and a psychiatrist. She has maintained her view consistently throughout that the pregnancy should be terminated.
- [9] Q has expressed the strong wish to have the pregnancy terminated. Q gave evidence before me. I was principally concerned that it was her own view that she expressed, not a view that she felt she ought to hold because of any perception of pressure from others. I am satisfied that Q has reached her own independent view of what she thinks is the best decision to take.
- [10] Q says in her affidavit that she is finding pregnancy “very stressful emotionally.” She reports that “earlier this year and during periods of emotional distress” she ran away from home, cut herself and attempted suicide on two occasions. Q’s mother, the third respondent, confirms these reports.
- [11] The conversations reported by the specialists show the following. Q appears to well understand the risks involved with the procedures that are contemplated to bring about the termination. She has no wish to be a mother. Unsurprisingly she feels that she is not fitted for that task.
- [12] Q’s own mother reports that Q needs reminding about basic matters involving her own grooming and dress. The third respondent doubts Q’s capacity to provide proper parenting for a baby. As well, in her opinion Q would be “at a very real risk of self harm and or suicidal behaviour if her pregnancy was to continue.” Q’s father agrees.
- [13] The various medical specialists and counsellors who have dealt with Q, and Q’s parents, all support the decision to terminate the pregnancy, as does the Department of Communities, Child Safety and Disability Services. The putative father of the child is a similar age to Q and does not know of the pregnancy.
- [14] The material filed shows that Q’s parents have separated, that since the separation Q has had significant difficulties in adjusting with episodes of self-harm, absconding from school, and thoughts of suicide. Q’s father is said to have a problem with alcohol. Q now lives with her mother, brother and sister. Q’s mother is not in a position to assist with raising a child.
- [15] According to the specialists there are significant risks to Q’s physical and mental health if the pregnancy is allowed to proceed. The psychiatrist opined: “I am concerned that, with her recent history of self harm and thoughts of suicide, having to proceed with the pregnancy is likely to precipitate further similar decompensations in [Q] and

an increased risk of resuming patterns of self harm and suicidal thoughts. The most accurate predictor of future behaviour is past behaviour, and [Q] has a very recent history of self harm and suicidal thoughts. It is my opinion that termination of pregnancy would reduce those risks.”

- [16] The obstetrician who eventually came to advise Q concluded, after summarising the various risks involved in terminating the pregnancy or continuing with it, that the risks of continuing the pregnancy (some of which were potentially life threatening) “far outweigh” the risks involved in terminating. He also commented that there were psycho-social implications of having a child at the age of 12 with a “lifelong burden which is likely to affect mental health.”
- [17] In summary, the evidence is all one way. While termination of the pregnancy carries some risks those risks are far outweighed by the alternative. As to the physical risks - if the pregnancy is allowed to continue Q’s life may be threatened. The procedures that are contemplated to terminate the pregnancy include firstly the use of medication with very little risk of any harmful consequences and, if that fails, surgical procedure. Those risks, as with any surgery, are not insignificant but the chance of serious complications is small. The potential mental health problems of not terminating are significant and possibly lifelong.

The Court's jurisdiction

- [18] As to the nature of the *parens patriae* jurisdiction the significant matter to note is that the jurisdiction is “exercised to protect the person and property of subjects, particularly children who are unable to look to their own interests. The court has a wide power in relation to the welfare of infants. The dominant factor in the exercise of the jurisdiction is always what is in the best interests of the child in question”: *State of Queensland v Nolan* [2002] 1 Qd R 454 at [7] per Chesterman J. The court’s *parens patriae* jurisdiction clearly extends to Q, but it does not extend to her unborn child: *K v T* [1983] 1 Qd R 396 at 400–401.
- [19] There is no doubt that the jurisdiction entitling the Court to intervene exists.
- [20] As to the need for the Court’s intervention there are two issues. The first relates to the issue of consent. Can Q give informed consent to the medical or surgical treatments that are proposed? If not then administration of such treatment may be an assault or trespass to the person and so unlawful. A child’s capacity to give her informed consent is not a static thing – it changes with the child’s emerging maturity. Until sufficiently mature a child’s parent can consent to some, and perhaps most, procedures. But it is only when a child “achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed” that the child is considered to be capable of giving an informed consent. The principles are discussed in *Gillick v West Norfolk & Wisbech Area Health Authority* [1986] AC 112; and see *Marion's Case* (1992) 175 CLR 218 at 236–238. And a decision to terminate a pregnancy is one procedure where the parent’s consent is arguably not sufficient. Wilson J came to that view in *State of*

Queensland v B based on analogous reasoning to that adopted by the High Court in *Marions' Case*. I agree.

[21] The second issue concerns the criminal law. As Wilson J said in *State of Queensland v B* (at [6]): “There are potentially difficult issues of criminal responsibility whenever the question of terminating a pregnancy arises. There may also be complex moral, ethical and religious issues, but these are beyond the province of the Court to determine.”

[22] Criminal responsibility turns on the application of sections 224, 225, 226, 282 and 286 of the Criminal Code. Section s 224 provides:

Attempts to procure abortion

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.

[23] Section 225 provides:

The like by women with child

Any woman who, with intent to procure her own miscarriage, whether she is or is not with child, unlawfully administers to herself any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, or permits any such thing or means to be administered or used to her, is guilty of a crime, and is liable to imprisonment for 7 years.

[24] Section 226 provides that the unlawful supply of drugs or instruments to procure an abortion is an offence.

[25] The effect of these provisions is that it is unlawful to administer a drug or to perform a surgical or other medical procedure intending to terminate a pregnancy unless that conduct is authorised, justified or excused by law. It is unlawful for Q to permit that to be done without such authorisation or justification.

[26] The authorisation or justification for administering such a drug or performing a surgical or other medical procedure for that purpose is provided for in s 282 or s 286 of the Code:

282 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.

[27] Section 286 is also relevant. It provides:

Duty of person who has care of child

(1) It is the duty of every person who has care of a child under 16 years to—

(a) provide the necessaries of life for the child; and

(b) take the precautions that are reasonable in all the circumstances to avoid danger to the child's life, health or safety; and

(c) take the action that is reasonable in all the circumstances to remove the child from any such danger;

and he or she is held to have caused any consequences that result to the life and health of the child because of any omission to perform that duty, whether the child is helpless or not.

(2) In this section—

person who has care of a child includes a parent, foster parent, step parent, guardian or other adult in charge of the child, whether or not the person has lawful custody of the child.

[28] I think it beyond argument that danger to a child's health includes danger to her mental health. Wilson J thought so in *State of Queensland v B*.

[29] Both Wilson J in *State of Queensland v B* and Chesterman J in *State of Queensland v Nolan* held that the definition of "*person who has care of a child*" is capable of extending to the hospital and doctors who have undertaken the care of a child in Q's position. I agree.

Q's Capacity to Consent

[30] As to Q's capacity to give consent I record that in my view Q has a very good understanding of the risks attendant on the procedures that the doctors have spoken of. That appears from the discussions that the medical specialists have had with her as recounted in the various reports tendered. But there is more to the issue than those risks, important though they are. The principal question mark is over her ability to comprehend the long term consequences of a decision not to terminate. As Ms Gallagher who appeared for the applicant submitted it is difficult to accept that the child can make an "informed decision" if the consequences of the alternative choice - not terminating - are not fully apparent to her.

[31] A psychiatrist provided a report. He had spoken to Q only once. He formed the view that Q had the understanding that was typical of a 12 year old. He reported: "She 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."

[32] 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. Wilson J made the same observation in *State of Queensland v B*.

[33] It is appropriate to invoke the jurisdiction of the court.

Is a Termination lawful?

[34] As Wilson J observed in *State of Queensland v B* the Court cannot authorise what would otherwise be criminal conduct and nor would it be in Q's best interests to subject her to an unlawful act, especially a criminal act (and see Chesterman J's observation in *State of Queensland v Nolan* [2002] 1 Qd R 454 at [10]).

[35] It is proposed to administer the drugs Mifepristone and Misoprostol, which would induce labour, resulting in the termination of the pregnancy by the expulsion of the foetus. The procedure may need to be repeated. There is no risk to future fertility. There may be some pain but it is expected that it can be controlled with simple analgesia. If not successful it is proposed to proceed to surgery - dilatation of the cervix and evacuation of the uterus. While there are risks associated with any surgery the pregnancy is still at an early stage and the procedure considered beneficial to Q. There are greater risks with continuing the pregnancy as identified in the obstetrician's affidavit.

[36] Q's consent to the procedures does not of course make them lawful. If the consent was a fully informed consent then there would be no assault. But ss 224 and 225 still make those actions unlawful unless authorised or justified by law.

[37] There is a potential conflict in the duties owed to Q and to her foetus. What would be unlawful under s 224 to 226 is made lawful if the circumstances of the case bring it within the purview of s 282 or 286: *K v T* [1983] 1 Qd R 396 per GN Williams J.

[38] In *R v Davidson* [1969] VR 667 Menhennitt J of the Supreme Court of Victoria considered lawfulness in the context of the Victorian analogue of s 224 of the Code. His Honour held that for the use of an instrument with intent to procure a miscarriage to be lawful on therapeutic grounds, the accused must have honestly believed on reasonable grounds that the act done by him was:

(a) 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

(b) in the circumstances, not out of proportion to the danger to be averted (at 672).

[39] That approach has been adopted in Queensland: *K v T* 1983] 1 Qd R 396 (which went on appeal but on a matter not germane here [1983] 1 Qd R 404); *Re Bayliss* (Unreported, Supreme Court of Queensland, 24 May 1985) per McPherson J; and see Judge McGuire's analysis in *R v Bayliss & Cullen* (1986) 9 Qld Lawyer Reps 8. The

dangers to health are not confined merely to the duration of the pregnancy: see *Veivers v Connolly* [1995] 2 Qd R 326 at 329 per de Jersey J.

Conclusion

- [40] It is clearly in Q's best interests for termination of her pregnancy to proceed. It is necessary to do so in order to avoid danger to her mental and physical health.
- [41] Here the two conditions identified in *Davidson* are present. The proposed response is not out of proportion to the danger to health. In the circumstances of this case, the administration of the drugs Mifepristone and Misoprostol in order to terminate Q's pregnancy would be reasonable to avoid danger to her mental and physical health, and so it would not be unlawful to do so. The duty imposed on the applicant's servants or agents by s 286(1)(b) and (c) authorises or justifies that administration. It is justified too by s 282.
- [42] If that medical approach fails then surgery is also justified. It is well accepted that a medical practitioner who performs a surgical operation on a pregnant woman is not criminally responsible for the death of the foetus if the operation is for the preservation of the mother's life: *K v T* [1983] 1 Qd R 396 at 398; *Re Bayliss* (Unreported, Supreme Court of Queensland, 24 May 1985) per McPherson J p 3. Here continuation of the pregnancy has as one of its risks some risk to the mother's life. In any case the test is not so demanding. Rather the correct question is whether the response envisaged is proportional to the risk to Q's health?
- [43] In the circumstances of this case, performance of the proposed operation, to use the test provided in s 282, "is reasonable, having regard to the patient's state at the time and to all the circumstances of the case". The surgery, if it becomes necessary to undertake it, would not be unlawful.
- [44] The foregoing is of course predicated on the assumption that the servants and agents of the applicant who will conduct the proposed procedures will proceed with reasonable care and skill as required by the law.
- [45] The orders sought should be made.
- [46] I record my appreciation for the assistance provided by Ms Gallagher and Ms Cameron who appeared as *amicus curiae* on very little notice.
- [47] It is necessary in the interests of Q's welfare that her identity and the identity of her parents be concealed. The usual rule that all proceedings in a Court should be conducted in public should here give way to the paramount duty to do what is in the interests of the child: *Scott v Scott* [1913] AC 417, per Viscount Haldane LC at 437;

Earl Loreburn at 445; *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47 per Kirby J at 54; and see s 8(2) *Supreme Court of Queensland Act 1991*; r 367 *Uniform Civil Procedure Rules 1999*. I determined to make the orders necessary to protect the identities of the parties involved.

[48] The orders are:

1. Order that:
 - (a) the minor referred to in this application not be referred to by name but by the reference “Q”;
 - (b) the identity of Q be suppressed;
 - (c) publication of the names of the deponents and the facts upon which this application is based be prohibited;
 - (d) the application, the transcript of these proceedings and the affidavits, exhibits and submissions upon which this application is based be placed in a sealed envelope and be opened only upon order of a Judge and the envelope to be marked accordingly.

2. A declaration that:
 - (a) the termination of Q’s pregnancy by the therapeutic administration of the drugs Mifepristone and Misoprostol is necessary to avoid danger to Q’s mental and physical health and is lawful; and
 - (b) if the administration of the said drugs fails to effect a termination of Q’s pregnancy within 5 days then the termination of Q’s pregnancy by surgical operations is necessary to avoid danger to Q’s mental and physical health and is lawful.

3. Order that:
 - (a) Q be permitted to undergo and the Applicant’s servants or agents be permitted to perform termination of Q’s pregnancy by the therapeutic administration of the said drugs;
 - (b) the administration of the said drugs as determined by the Applicant’s servant or agents be performed on or before the 23rd day of April, 2016; and
 - (c) if the administration of the said drugs fails to effect a termination of the pregnancy within 72 hours of such administration that the Applicant’s servants or agents perform such surgical procedure, on or before the 27th day of April, 2016, as they deem meet in order to effect a termination of Q’s pregnancy.