Neutral Citation: [2016] IEHC 605

THE HIGH COURT

[2016 No. 8730P]

IN THE MATTER OF B AND IN THE MATTER OF ARTICLES 40.3.3°, 40.4.2° AND 42A OF THE CONSTITUTION AND IN THE MATTER OF THE INHERENT JURISDICTION OF THE HIGH COURT

BETWEEN:

HEALTH SERVICE EXECUTIVE

PLAINTIFF

-AND-

B

DEFENDANT

-AND-

BABY B

THIRD PARTY

EX TEMPORE JUDGMENT of Mr. Justice Twomey delivered on the 2nd day of November, 2016.

Introduction

1. This is a very urgent case which was heard at great haste in light of the risk to the life of a mother and her unborn child. It involves an application by the HSE for an order to force a pregnant woman to have a caesarean section against her will in order to vindicate the right to life of her unborn child. According to counsel, it is the first case of its kind in this jurisdiction. The HSE, the expectant mother and the unborn child were all separately represented at the hearing. The father of the unborn child was not represented.

Facts

2. This case involves a pregnant woman ("Ms. B") who is a patient in a hospital in the State and her due date was yesterday so the unborn child is full-term and therefore has a gestational age of 40 weeks. Her three other children were delivered by caesarean sections. This is a crucial factor in this case. This is because as Ms. B has already had three caesarean sections, this means that if she were to have her unborn child delivered naturally, there is a risk of her uterus rupturing which could lead to the death of her baby and the death of Ms. B herself. Hence, the medical advice she has received is that she should have an elective caesarean section, rather than attempting a natural delivery which risks uterine rupture. Even if during a normal delivery, uterine rupture is avoided, the medical advice was that opting for a natural delivery after a third caesarean section could require an emergency caesarean section with all the greater risks to the health and life of the mother and unborn child which are attached to an emergency caesarean section, compared to an elective caesarean section.

3. Expert medical evidence was provided by Dr. D (who is not Ms. B's consultant obstetrician, but is a leading obstetrician in Ireland) to the effect that there is a 1 in 150 chance of the uterus rupturing during a natural birth, where the mother has previously delivered once by caesarean section. This is because the uterus is weakened by the surgery involved in a caesarean section. Dr. D gave evidence that there is a 1 in 50 chance of the uterus rupturing during natural delivery, where an individual has previously undergone two caesarean sections. He was initially reluctant to give any figures for the chances of uterine rupture after a third caesarean section, as in the case of Ms. B, on the grounds that it is unheard of in this country that a woman would give birth naturally after a third caesarean section. This is because such babies would always be delivered by elective caesarean section. However, when pressed, he gave a "guesstimate" of a 1 in 10 chance of Ms. B's uterus rupturing and a consequent risk of serious injury, even death, to the foetus and Ms. B, if she were to proceed with a natural birth.

4. Ms. B's own obstetrician, Dr. A gave evidence that he told Ms. B that he had never overseen a normal birth after three caesarean sections, and therefore he was not in a position to provide this service to her in view of the increased risk to the health and life of the mother and the baby. Evidence was also provided to the Court on behalf of the HSE that no other hospital in Ireland was available or willing to supervise a natural delivery of a baby after three caesarean sections, in view of the risks involved.

5. No contrary medical evidence was provided, although it should be noted that counsel for Ms. B was only instructed in this case at 10 a.m. this morning and so this is perhaps not surprising. What counsel for Ms. B did refer to in his cross-examination of Dr. D and Dr. A, was the October 2015 Guidelines of the Royal College of Obstetricians & Gynaecologists in the United Kingdom in relation to *Birth After Previous Caesarean Birth*. In particular he referred to paragraph 6.3 of those Guidelines which states (and it should be noted that VBAC means 'vaginal birth after caesarean' and NICHD is the 'National Institute of Child Health and Human Development') :-

> *"6.3 Can women with two or more prior caesareans be offered planned VBAC?*
>
> **Women who have had two or more prior lower segment caesarean deliveries may be offered VBAC after counselling by a senior obstetrician. This should include the risk of uterine rupture and maternal morbidity, and the individual likelihood of successful VBAC (e.g. given a history of prior vaginal delivery). Labour should be conducted in a centre with suitable expertise and recourse to immediate surgical delivery**. [emphasis in original]
>
> A multivariate analysis of the NICHD study showed that there was no significant difference in the rates of uterine rupture in VBAC with two or more previous caesarean births (9/975, 92/10,000) compared with single previous caesarean birth (115/16,915, 68/10,000). These findings concur with other observational studies, which, overall, have shown similar rates of VBAC with two previous caesarean births (VBAC success rates of 62-75%) and single prior caesarean birth. It is notable that more than half of the women with two previous caesarean deliveries had also had a previous vaginal birth and almost 40% had a previous VBAC. Hence, caution should be applied when extrapolating these data to women with no previous vaginal delivery.
>
> A systematic review has suggested that women with two previous caesarean deliveries who are considering VBAC should be counselled about the success rate (71.1%), the uterine rupture rate (1.36%) and the comparable maternity morbidity to the repeat caesarean delivery option. The rates of hysterectomy (56/10 000 compared with 19/10 000) and transfusion (1.99% compared with 1.21%) were increased in women undergoing VBAC after two previous caesarean births

compared with one previous caesarean birth. Therefore, provided the woman has been fully informed by a senior obstetrician of the increased risks and a comprehensive individualised risk analysis has been undertaken of the indication for and the nature of the previous caesarean deliveries, then planned VBAC may be supported in women with two or more previous lower segment caesarean deliveries."

While this Guideline would suggest that a woman with two or more caesarean sections could be a candidate for a natural delivery, it is to be noted that the Guideline itself makes it clear that these figures are to be treated with caution and that more than half of the women with two previous caesarean section deliveries, had also had a previous vaginal birth and 40% had a previous vaginal birth after caesarean. In this regard, it is important to note that Ms. B has never had a vaginal birth.

6. Counsel for Ms. B also referred to a Guideline issued by the Institute of Obstetricians & Gynaecologists Guidelines of Ireland (which the Court was advised is part of the Royal College of Obstetricians and Gynaecologists) and is dated October 2013 on *Delivery after previous Caesarean Section* and in particular para 5.8 which states (and it should be noted that UR means 'uterine rupture', CS means 'caesarean section' and TOLAC means 'trial of labour after caesarean'):-

"5.8 Delivery after two or more caesarean sections

> It is normal practice to advise women with two or more previous CS to have a repeat elective CS at term because there are concerns about an increased risk of UR with multiple prior caesareans (Turner, 2002; Landon, 2010). Studies on the subject in women with >1 previous CS are limited and the risks of UR may be less in women with a history of a prior vaginal delivery or a successful VBAC (Landon, 2010).
>
> In individual circumstances where a woman strongly desires a trial of labour after two previous CS, it may be considered. If the head is engaged, if the cervix is favourable, if there is a history of a prior vaginal delivery and if labour starts spontaneously the risk of a successful VBAC may be high and the risk of UR may be low. However, the risks and benefits of a TOLAC in such cases should be documented antenatally in the notes. There is also a case for not using oxytocic agents either to induce or augment labour in such circumstances (Turner, 2002). Women with >1 previous CS should also be advised to attend their maternity hospital early if they experience any abdominal pains or signs of labour."

It is to be noted that this Guideline refers only to labour after a maximum of two previous caesarean sections and so does not contemplate normal labour for a woman who has had three caesarean sections. It is also clear that Ms. B, even if she had had only two caesarean sections, rather than the three which she has actually had, would still not satisfy the pre-conditions in the Guidelines for her to be considered for having a normal birth, since she does not have a history of a normal delivery, as she has never had a vaginal delivery.

7. This Court concludes, based on the somewhat contradictory evidence provided by the two sets of Guidelines (and noting the caveats contained in the Guidelines issued by the Royal College of Obstetricians and Gynaecologists) on the one hand, and the uncontradicted evidence of Dr. D, an obstetrician with over 30 years' experience and the uncontradicted evidence of Dr. A, an obstetrician over 20 years' experience, that the decision of Ms. B to seek to have a trial of labour after section involves the taking of an unnecessary risk in relation to her health and the health of her child.

8. The Court cannot see why Ms. B. would want to take such an unnecessary risk with such serious consequences. However, the issue in this case is not whether the Court agrees or not with Ms. B, but rather whether she can be forced, against her will, to submit to a surgical procedure in her interest and in the interests of her unborn child. This is because people regularly take unnecessary risks, some large, some small, in relation to their own health and the health of their children, born and unborn. Accordingly, the fact that Ms. B is taking an unnecessary risk should not *per se* lead to this Court's intervention. It is necessary for the Court to consider the extent and nature of the risk and the intervention which is being sought by the HSE. Before doing so, consideration needs to be given to the capacity of Ms. B, as this issue was raised during the hearing.

Capacity of Ms. B to make this decision regarding the risks involved

9. An issue was raised by the HSE during the hearing regarding the capacity of Ms. B to make the decision to proceed with a natural delivery. It was confirmed by Dr. A that he had explained the increased risks. Despite this fact, Ms. B, is very strongly of the view that she should be allowed to try to deliver her child naturally. Evidence was provided by the HSE to the effect that Ms. B believes that her decision to refuse an elective caesarean section and opt for natural delivery means that she is taking a 3% risk of uterine rupture (and therefore a 3% risk to her health and life and the health and life of her child), while if she opted for an elective caesarean section, the risk of uterine rupture would be between 0% and 1%. As previously noted, Dr. D was of the view that the risk was higher than 3%, since he "guesstimated" that it was closer to 10%, his guesstimate at this higher level perhaps not that surprising on the basis that it was something which had never happened in an Irish hospital.

10. For his part, Dr. A confirmed that Ms. B was an articulate person and understood the risks involved. There was no suggestion that she suffers from any psychiatric condition and the only evidence regarding her capacity was the suggestion by Nurse & Midwife C that she felt that Ms. B was being unduly influenced by a doula, or birthing assistant, who was constantly with her and was introduced to Nurse & Midwife C as Ms. B's friend.

11. Based on the decision of Laffoy J. in *Fitzpatrick v. FK* [2009] 2 IR 7, it is this Court's view that Ms. B, as an adult patient, must be presumed to have capacity to refuse to take medical advice and this Court does not believe that this presumption has been rebutted by the evidence regarding the role of the doula in this case which has been produced by the HSE.

Refusal of medical advice to the detriment of Ms. B

12. On this basis, this Court concludes that if this were a case involving Ms. B's health alone, she would be entitled to refuse to follow medical advice, even though this increases the risk of injury and the risk of death to her.

Refusal of medical advice to the detriment of Ms. B's unborn child

13. The refusal of Ms. B to follow medical advice, in the context of her unborn child, is a more difficult issue because of Article 40.3.3° of the Constitution which protects the right to life of the unborn.

14. A relevant case in the consideration of this issue is that of *North Western Health Board v. HW and CW* [2001] 3 IR 622. In that case, the Supreme Court held that the Health Board was not entitled to carry out a PKU screening test (involving the taking of blood by means of a heel prick) on an infant child against the wishes of the parents, even though this was contrary to medical advice. This decision put the child's health at risk, since the child would not be screened for very serious conditions. This case establishes the principle that the Courts should be very slow to substitute their decisions for the decisions of parents and that this should only

happen in exceptional cases. At p. 712, Denham J, as she then was, stated:-

> "Parents constantly make decisions of this nature, and subject their children to risks which objectively may not be justified, and which may have disastrous results. Examples outside the medical field may be decisions to allow a child to cycle to school on a busy road, or decisions to allow a teenager to find his or her own way home from a disco. Of course, in extreme cases the putting of children into a situation of risk may justify the intervention of the State but such cases would be extreme and therefore exceptional cases."

15. In this case, unlike the *HW and CW* case, we are dealing with an unborn child. In this Court's view, the right of the Courts to intervene in a parent's decision in relation to an unborn child could not be any greater than the Court's right to intervene in relation to born children. Accordingly, the principles laid out in the *HW and CW* case regarding the right to the Courts to intervene in a parent's decision are equally applicable to this case.

Is this an exceptional case permitting court intervention in a parent's decision?
16. This raises the question of whether this is an exceptional case justifying court intervention. In considering this issue, this Court has to take account of the wording of Article 40.3.3°. This constitutional provision is not unlimited, in the sense that the vindication of the right to life of the unborn under Article 40.3.3° applies "*as far as practicable*"

17. In this case, the HSE is requesting, *inter alia*, the Court to authorise the HSE, to use "*such reasonable and proportionate force and/or restraint*" to perform invasive surgery upon Ms. B against her will. If Ms. B was not pregnant, the performance of invasive surgery upon her, against her will, would be a gross violation of her right to bodily integrity, her right to self-determination, her right to privacy and her right to dignity.

18. The question for this Court is whether the circumstances of this case are so "*exceptional*", in the words of the Denham J. in the *HW and CW* case, as to justify actions which would otherwise be a breach of Ms. B's constitutional rights.

19. This Court does not understand why she does not follow medical advice, just as it may have been puzzling why the parents in the *HW and CW* case did not follow medical advice. However, this Court does not believe that the increased risk which she is undertaking for her unborn child is such as to justify this Court in effectively authorising her to have her uterus opened against her will, something which would constitute a grievous assault if it were done on a woman who was not pregnant.

20. This Court wishes to emphasis that it cannot see why she would choose to increase the risk of injury or death to herself or her child. This Court also wishes to emphasise that the doctors and nurses who gave evidence cannot be criticised for their concern for the health and life not only of the unborn child, in light of the constitutional protection granted to the unborn in Article 40.3.3°, but also their concern for the health and life of Ms. B, such that they sought court intervention in order to protect both lives. They must also be commended for the efforts they have made to try and persuade Ms. B to re-consider her decision.

Court decision on the application for forced caesarean section
21. However, this Court concludes that it is a step too far to order the forced caesarean section of a woman against her will, even though not making that order increases the risk of injury and death to both Ms. B and her unborn child.

22. If Ms. B persists with her decision to ignore the committed and expert nursing and medical advice she has received, it is hoped that despite the increased risk of injury which she is unnecessarily assuming, no harm will come to Ms. B or her unborn child. Ms. B should be aware of the fact that if she or her child are injured as a result of her decision to go against medical advice (and reference was made to the increased risk of cerebral palsy for her child caused by her actions), she is likely to have to bear the financial burden of the costs of same, since she is unlikely to have any right to damages from the HSE for any harm which results from her refusal to follow medical advice.

Happy conclusion to the proceedings
23. After the foregoing judgment was delivered, Ms. B's waters broke and it seems that at that stage she decided to follow medical advice and underwent an elective caesarean section. Thankfully, Ms. B was delivered of a healthy baby girl, ("Baby B"), with no harm caused to Ms. B during the process.

Subsequent application to lift in camera order
24. The original proceedings had been held *in camera*. Accordingly, counsel on behalf of Ms. B and her newly born daughter sought an order from this Court, after the birth of Baby B, to lift the order under s. 45 of the Courts (Supplemental Provisions) Act 1961, which order prohibited the publication or broadcast of any matter relating to the proceedings between Ms. B and her then unborn daughter and the HSE. The original proceedings had been held *in camera* on the application of the HSE and the *in camera* nature of the proceedings was not objected to by counsel for Ms. B at the time of the original hearing. This is perhaps understandable, since at the time, there were matters of much greater concern than whether the proceedings were *in camera* or not, namely the welfare of Ms. B and welfare of her unborn child.

25. In seeking to have the *in camera* order lifted, counsel for Ms. B. has confirmed that his application is also being made on behalf of Baby B, since she is now born, and Ms. B is authorised to represent the best interests of her minor daughter (as is clear from the case of *McKay v. Information Commissioner*, (unreported High Court, 14th January, 2004).

26. Opposing the application for the lifting of the *in camera* order is counsel for the unborn child. As previously noted, counsel for the unborn child was involved in this case when the Court gave its initial decision. At that stage Baby B was as yet unborn (an indeed this was a central issue in the case) and was separately represented, in light, *inter alia*, of this country's Constitutional protection for the unborn child. It is arguable that counsel for the unborn child ceased to have any role once Baby B was born and so has no role in these proceedings regarding the lifting of the *in camera* order, since Ms. B represents the view of her daughter Baby B and there is no need for the views of the unborn child to be separately represented, now that Baby B has been born.

27. However, when this was canvassed during the course of the hearing, counsel for the unborn child sought to adjourn the proceedings if the Court was going to rule that he was not entitled to be party to these proceedings, in order to enable him to make detailed submissions regarding his entitlement to represent the unborn child in relation to the lifting of the *in camera* order. In the interests of efficiency in relation to these proceedings, this Court took the view that it did not need to rule on the entitlement of counsel for the unborn child to make submissions in this case, so it was not necessary to adjourn the proceedings for this purpose.

28. Also opposing the application for the lifting of the *in camera* order is counsel for the HSE. It was argued by counsel for the HSE that it was not in the best interests of Baby B for the *in camera* order to be lifted, since this was likely to lead to Baby B becoming

aware of the decision of her mother to risk Baby B's health by undergoing natural delivery in the face of the medical evidence that an elective caesarean section would be safer.

29. However, as is clear from the decision of *North Western Health Board v. HW and CW* [2001] 3 IR 622, save in exceptional circumstances, what is in the bests interests of Baby B is a matter for her mother, Ms. B, and not a matter for the HSE. In this regard, it is to be noted that in the original court application, Ms. B was going against medical advice right up and until the last moment in refusing to have an elective caesarean section (which necessitated the HSE in bringing the court application). Yet at the last moment, after this Court had decided that it was Ms. B's decision to make and not a decision for the HSE to make on her behalf, Ms. B followed medical advice and consented to undergo an elective caesarean section.

30. It is the view of this Court that, in relation the *in camera* order, just as it was in relation to the substantive proceedings regarding whether to have an elective caesarean section or not, it is Ms. B's choice to make and not a decision for the HSE to make. Accordingly, Ms. B is entitled to seek the lifting of the *in camera* order, as she has done, and to publicise the details of this court case, even though it may not be in her daughter's best interests. Indeed, one can see why the HSE might believe that it would not be in Baby B's interests for this matter to be publicised and therefore why the HSE's views appear to be well-intentioned. Nonetheless this remains a matter exclusively for Ms. B to decide, and not a matter for the HSE to decide.

31. In addition to arguing for the retention of the *in camera* order by saying that it was in Baby B's best interests, counsel for the HSE also argued that the retention of the *in camera* order on other grounds. Counsel for the HSE referred in particular to the fact that the nurses and doctors who gave evidence did so on the understanding that the proceedings were *in camera* and on the understanding that their identities would not be publicised

32. However, it seems to this Court that the primary reason for the *in camera* rule is to provide protection from publicity to the persons who are the subject of the court orders being sought, not the party that is seeking the order. It is relevant to refer to the case of *Eastern Health Board v. Fitness to Practise Committee* [1998] 3 IR 399 at p 428, where Barr J considered s 45 of the Courts (Supplemental Provisions) Act, 1961 and noted in his review of the authorities that :

> "The primary reason for the *in camera* rule in such cases is to provide protection for minors from hamful publicity arising out of the disclosure of evidence and other related matters in protected proceedings"

33. In the case before this Court, the court orders which were sought were urgent in camera orders for the forced caesarean section of Ms. B. Accordingly, it is this Court's view that the persons who were the subject of those orders, and therefore the persons being protected from harmful publicity by those in camera orders, were Ms. B and Baby B and not the HSE or its staff. Since Ms. B and Baby B (through her mother Ms. B) are both now saying that they wish to have the reporting restriction lifted, and as the purpose of this reporting restriction is to protect Ms. B and Baby B, this Court can see no basis for refusing to lift the reporting restriction. This is particularly so because, as is clear from Article 34 of our Constitution, this State attaches particular significance to justice being administered in public and it is the general rule that justice should be administered in public:

> "Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public."

34. Accordingly, this Court does not believe that any perceived interest that the HSE or its staff might have in the proceedings remaining *in camera* is such as to outweigh the requirement in Article 34 that justice be administered in public.

35. However, in light of the concerns expressed by Counsel for the HSE regarding the fact that evidence was provided by the medical and nursing staff on the understanding that the proceedings were *in camera*, this Court will, in the copy of the judgment which is now being released, use initials which are unconnected with all parties' names, and it will eliminate, insofar as possible, any personal indentifying details from all the parties to the litigation.

36. For the foregoing reasons, this Court orders the lifting of the order under s. 45 of the Courts (Supplemental Provisions) Act, 1961, in relation to these proceedings. Pursuant to the lifting of the order, this Court has made appropriate redactions and amendments to its judgment (including the use of non-identifying initials for all parties), which it issues as of today's date, in order to seek to protect the identity of the mother, her daughter and all the other parties to this litigation as much as possible.