



Irish Journal of Family Law

2011

Taking Responsibility for the “Abortion Issue”: Some Thoughts on Legislative Reform in the Aftermath of A, B and C

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Subject: Family law. Other related subjects: Human rights

Introduction

The recent decision of the European Court of Human Rights (ECtHR) in the A, B and C case¹ has once more put what is described as “the abortion issue” on the political agenda. Since the Constitution was amended in 1983 to protect the life of the unborn, courts at various levels, both nationally and at a European level, have been obliged to fill the legislative lacuna which has been left by political inaction. Ireland is now under an obligation to introduce legislation which determines how the right to life of the unborn and the equal right to life of the mother are to be reconciled. This article will examine some of the issues which require attention by this legislation, and propose some solutions to the issues raised.²

Prior to beginning that analysis, however, it must be noted that what is most striking about the judgment in A, B and C is that it was entirely expected. If we reduce the judgment to its core, one might even say that the court simply reiterated the point made by McCarthy J. in the X case in 1992,³ and restated by Hardiman J. 17 years after that,⁴ when he stated in, admittedly, more trenchant terms:

“In the context of the eight years that have passed since the Amendment was adopted and the two years since Grogan's case the failure by the legislature to enact the appropriate legislation is no longer just unfortunate; it is inexcusable.”⁵

This failure was to be repeated time and again, with the legislature refusing to enact legislation, and rather than taking this type of proactive approach, preferred rather to leave the issue to the necessarily reactive judiciary. Indeed, it was argued in the ECtHR that this approach was the correct one, with the Irish Government arguing that C could have initiated a constitutional action, by which the courts would determine whether she was entitled to a constitutional termination of her pregnancy. The court vehemently rejected this argument for three reasons. First, the courts are not “the appropriate fora for the primary determination as to whether a woman qualifies for an abortion which is lawfully available in a State.”⁶ The ECtHR referred to, and approved of, the above cited statement of McCarthy J. in the X case, highlighting that this is not the role of the courts. It also approved of the statement by the court in the C case,⁷ in which Geoghegan J. believed that this type of approach would turn the High Court into a “licensing authority” for abortions.⁸ Second, the ECtHR believed that it would be inappropriate to require women to bring such proceedings when their constitutional right to an abortion in the case of a qualifying risk to life was not disputable.⁹ Finally, the ECtHR noted that it would not be clear as to how the courts could enforce a mandatory order requiring doctors to carry out an abortion.¹⁰ Thus, the approach of the legislature to allow the courts to determine “the abortion issue” on a case-by-case basis is no longer acceptable, and legislation is now required to ensure that Ireland's law is compatible with the Convention.

This article proposes to outline some of the issues that such legislation should address. In the X case, McCarthy J. posed three questions: “What are pregnant women to do? What are the parents of a pregnant girl under age to do? What are the medical profession to do?”¹¹ This article will use these three questions to frame an analysis for the proposed legislation, and will then briefly address some other issues which relate to the protection afforded by Art.40.3.3° of the

Constitution.

What are pregnant women to do?

The test for determining when a termination is constitutionally permissible was set out in the X case, where it was stated the test to be applied in interpreting Art.40.3.3° is:

“[I]f it can be established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy, such termination is permissible.”¹²

If the termination is constitutionally permissible or not, the woman can travel to another jurisdiction to terminate the pregnancy, in accordance with what is referred to as “the travel amendment”.¹³ Further, the woman can receive what is termed “abortion information” in accordance with “the information amendment” and the “Abortion Information Act”.¹⁴

However, while these three issues are reasonably clear, two issues remain: first, in what circumstances is a woman entitled to terminate her pregnancy in Ireland; and second, what happens where the father, married or unmarried, disagrees with the decision made by the pregnant woman to travel to terminate her pregnancy?

Constitutionally permissible terminations

The first question is in fact that which is at the heart of the ECtHR case in A, B and C. The Chairman of the Institute of Obstetricians and Gynaecologists in his oral comments to the All-Party Oireachtas Committee on the Constitution stated that four conditions will justify “therapeutic intervention” which would have the result of terminating the pregnancy of the woman: pre-eclampsia; cancer of the cervix; ectopic pregnancy; and where there is little or no prospect of life outside the womb which could result in the death of both the mother and the child.¹⁵ Terminating pregnancies in these situations, is not, he stated, considered “abortion” by the medical profession, but rather treatment for the underlying condition.¹⁶ Known as the doctrine of double-effect, this position is well-known to medics, but caused controversy in A, B and C.

The problem identified by C in her successful application was that no doctor would state with any degree of certainty whether her pregnancy posed a threat to her life. She claimed in her application to the court that as a result of the “chilling effect of the Irish legal framework”, she received “insufficient information as to the impact of the pregnancy on her health and life and of her prior tests for cancer on the foetus.”¹⁷ The response of the Irish Government was two-fold: first, it argued that there were medical standards in place to determine whether a termination was constitutionally possible; and second, that if any issue arose in the course of that consultation, the issue could be considered by the courts. Ultimately, the court found that neither the normal process of medical consultation, nor an application to the courts, were appropriate to determine whether a termination was constitutionally permissible in discrete cases.¹⁸ The court stated:

“[T]he uncertainty generated by the lack of legislative implementation of Article 40.3.3, and more particularly by the lack of effective and accessible procedures to establish a right to an abortion under that provision, has resulted in a striking discordance between the theoretical right to a lawful abortion in Ireland on grounds of a relevant risk to a woman's life and the reality of its practical implementation.”

Thus, in order for Irish law to be compliant with the Convention, this discordance needs to be resolved. Legislation is required which clearly sets out the circumstances in which the termination of a pregnancy is lawful. Rather than explicitly set out a list of such circumstances, the decision should be left to medical professionals, who are more than capable of determining such issues. The Twenty-Fifth Amendment to the Constitution (Protection of Human Life in Pregnancy) Bill 2002 used the standard of reasonableness, providing:

... abortion does not include the carrying out of a medical procedure by a medical practitioner at an approved place in the course of which or as a result of which unborn human life is ended where that procedure is, in the reasonable opinion of the practitioner, necessary to prevent a real and substantial risk of loss of the woman's life other than by self-destruction.

The Abortion Act 1967, which applies in England and Wales and uses a “good faith” requirement, requires the approval of two medical practitioners. It is suggested that this approach has merit. In

terms of the circumstances which justify termination, in order to comply with the current constitutional position, the test would have to include self-destruction as a ground for terminating pregnancy. Ultimately, this is a decision which should be reached by a woman and her doctor, and not by reference to an ethics committee of a hospital¹⁹ or a court.

The question as to whether limited viability outside the womb can justify termination of pregnancy also needs to be addressed. This issue arose in the *D v Ireland*²⁰ and *Miss D* cases.²¹ As noted previously, it was stated by the Chairman of the Institute of Obstetricians and Gynaecologists in his oral comments to the All-Party Oireachtas Committee on the Constitution that, where there is "little or no prospect of life outside the womb due to extreme immaturity", and failure to intervene by way of termination could cause the death of the mother, termination is performed routinely by members of the medical profession. However, in the *D* case, the medical condition was "Edward's Syndrome", a chromosomal abnormality which in most cases leads to stillbirth or death shortly after birth. In the *Miss D* case, the condition was anencephaly, and medical opinion in the case stated that the child would survive for a maximum of three days outside the womb.²² It is unclear whether either of the women in these two cases would be entitled to terminate her pregnancy in this jurisdiction.

The question of placing a time-limit on the availability of such terminations has also been mooted.²³ However, one could argue that where a termination is constitutionally permissible, that is, where the life of the mother is at risk due to the pregnancy, no time-limits can be placed on the availability of the termination, as to do so would not protect the "equal right to life of the mother". Again, this is an issue which should be decided between a pregnant woman and her doctor.

Fathers' rights and the right to travel

The second situation which arises in this context then, is what happens where a married woman wishes to travel to terminate her pregnancy for reasons which fall outside those which would justify a constitutionally permissible termination, and her husband disagrees with her decision. The question as to what is the extent of the right to travel under the Fourteenth Amendment arises here. Kingston, Whelan and Bacik²⁴ consider the issue. They are of the opinion that, were a husband to seek to restrain his wife from travelling abroad for an abortion, he would probably be granted *locus standi* as having more interest than most in the life of his unborn child.²⁵ The important question to be asked is whether that father would have the right to prevent the woman from travelling. Kingston and Whelan note that the Thirteenth Amendment

"states only that nothing in Article 40.3.3° of the Constitution shall affect freedom to travel, leaving open the possibility that other rights, such as those of a husband or putative father, could be relied upon to prevent travel in order to procure an abortion outside the State".²⁶

However, Kingston and Whelan state that the two substantive arguments that would counter such an action are: first, that under the ruling in *L v L*²⁷ it is not clear whether a husband can automatically invoke the rights of the family against the wife.²⁸ Secondly, they also note that:

"any rights of the husband in respect of the unborn would have to be balanced against the right of the woman to individual privacy and to individual freedom and dignity, as well as to the independent exercise of the freedom to communicate".²⁹

However, they go on to note that if the courts were to find that the woman's rights superseded those of the unborn and the putative father, it would appear to undermine the prohibition of abortion in the State.

The issue was more generally raised in the Information Bill case,³⁰ where Hamilton C.J. stated:

"[I]t must be presumed that in the giving of such information, counselling and advice, the person giving same will have regard to and give advice in accordance with the principles of Constitutional justice and if there is any departure from these principles, such departure would be restrained and corrected by the Courts."³¹

The question has also been raised in other jurisdictions, where variously the courts found that the father could not prevent the termination due to the fact that he had no *locus standi* in relation to the child; or that as the unborn did not have a right to life, that the court could not intervene to uphold that right.³² Ultimately, it is argued that this issue cannot and should not be dealt with through legislation; though a requirement to give "due regard" to the wishes of the father could satisfy the requirements of Hamilton C.J.

What are parents of a pregnant girl to do?

A number of circumstances arise here, some of the answers to which are found variously in the X, ³³C ³⁴ and D ³⁵ cases. The circumstances are: first, where the young woman is in the care of her parents who support her terminating her pregnancy; second, where the young woman is in the care of her parents who do not support her terminating her pregnancy; third, where she is in the care of the HSE who support her terminating her pregnancy; and finally, where she is in the care of the HSE who do not support her terminating her pregnancy. Further complications arise where the young woman is under the age of 16 and over the age of 16, whether they are in the care of the HSE or not. The first issue is clear: the travel amendment provides that in such a case, the parents of a young girl can approve her travelling to another jurisdiction to terminate her pregnancy. The other three questions require some consideration.

Young woman in the care of the HSE

In the C case, ³⁶ which concerned a young woman in the care of the HSE whose parents opposed the decision to terminate the pregnancy, Geoghegan J. was of the opinion that, rather than conferring a right of abortion outside of the jurisdiction, the travel amendment “merely prevents injunctions against travelling for that purpose”. ³⁷ This case did not involve an injunction; rather, the case concerned the question of whether the Health Board could facilitate this girl travelling under the terms of the Child Care Act 1991 (the “1991 Act”). Geoghegan J. went on:

“... the fact that there may be different views as to the importance of the constitutional right to travel does not in my view affect the issue of whether the District Court under the Child Care Act 1991 can actually exercise a jurisdiction authoring travel for a particular purpose, namely, for an abortion in circumstances where the proposed abortion would not be allowed under Irish law. I think that the court would be prevented from doing so by the terms of the right to life of the unborn expressed in the Constitution.”³⁸

While these remarks are obiter, it is important to note that Geoghegan J. went so far as to say that if, on analysis, the abortion would not have been one that was permissible under the Constitution, he would have granted the order which would have had the ultimate effect of restraining the girl from travelling for an abortion. On the basis of this ruling, it was thought that, while parents could lawfully bring their children to another jurisdiction to terminate the pregnancy of that child (where consent of the court was required in order to medically treat a child, or for them to travel, such as children in the care of the Health Board, wards of court and certain children detained under the Mental Health Acts) unless the termination was a constitutionally permissible one, the court could not sanction the treatment, and the young person would be forced to bring her pregnancy to term. Arguably, the same position could apply where the father of the unborn sought an injunction preventing his wife from travelling to terminate her pregnancy.

The Miss D case concerned a 17-year-old girl in the care of the HSE. The HSE refused to give her permission to travel, and attempted to prevent her from obtaining a passport. Miss D took an action seeking to prevent the HSE from restraining her from travelling to the UK for the abortion. The application was heard in the District Court, where permission to travel was refused. McKechnie J. in the High Court thus had to consider two questions: first, whether Miss D was entitled to an order restraining the HSE from preventing her travelling abroad for an abortion; and second, whether an appeal lay from the decision of Justice Brennan refusing to grant the HSE an order allowing the girl to travel to the United Kingdom. McKechnie J., in delivering his *ex tempore* decision, stated that he “firmly and unequivocally held the view that there was no law or constitutional impediment preventing Miss D travelling for the purpose of terminating her pregnancy”, ³⁹ and that the right to life of the unborn cannot interfere with the right to travel for an abortion.

Considering the question of whether the HSE were correct in seeking District Court approval for Miss D to travel to the UK to terminate her pregnancy, he stated:

“... there was no law or provision of the Child Care Act which restrained a child in care from travelling for an abortion or which would support the HSE's claim that District Court permission was required for travel. Miss D's right to travel for an abortion was unaffected by Article 40.3.3 of the Constitution.”⁴⁰

Thus, McKechnie J. held that Miss D's right to travel took precedence over the right to life of the unborn. There was a seismic shift from Geoghegan J.'s position, where he believed that the

State, and the courts, were under an obligation to protect the right to life of the unborn, to the point that the court could not positively sanction travel for an unconstitutional abortion, to McKechnie J.'s decision, where the right to travel was paramount, trumping the right to life of the unborn child. Again, legislation must clearly set out the limitations, if any, which should be put on the travel amendment.

Under 16 and over 16?

It could be presumed that the reason McKechnie J. held that Miss D was capable of making a decision to travel to the United Kingdom to terminate her pregnancy when Miss C was not, is due to s.23 of the Non-Fatal Offences Against the Person Act 1997 (the "1997 Act"), which governs the law concerning the medical treatment of young people. This section is a replica of s.8 of the English Family Law Reform Act 1969 and provides:

- (1) The consent of a minor who has attained the age of 16 years to any surgical, medical or dental treatment which, in the absence of consent, would constitute a trespass to his or her person, shall be as effective as it would be if he or she were of full age; and where a minor has by virtue of this section given an effective consent to any treatment it shall not be necessary to obtain any consent for it from his or her parent or guardian.
- (2) Nothing in this section shall be construed as making ineffective any consent which would have been effective if this section had not been enacted.

There has been a large amount of academic scrutiny of the provision, where it has been argued that the right to consent to medical treatment is limited by, for example, Article 41 and 42 rights of parents. McMahan and Binchy consider the impact of the section and argue that, on the one hand, it could mean that the parents or guardians are disentitled in any case to take any legal steps in respect of the treatment.⁴¹ This would mean that s.23 endows 16 and 17-year-old young people with an absolute right to consent to medical treatment in the absence of parental consent. However, they note that there is another perspective:

"On the other view, what s 23 does is to render the consent lawful to the extent that it can not be regarded as unlawful by reason merely of the failure to obtain the consent of the parents or guardians. On this latter view, the trusteeship function is not disturbed and parents or guardians remain entitled (to the uncertain extent that they have such an entitlement) to take proceedings with respect to the treatment in the same way as they can with respect to any other lawful activity - an employment contract, for example - in which their minor child engages."⁴²

Quill argues that the position is even muddier—s.23, he observes, certainly provides that the consent of a minor aged 16 or over to medical or dental treatment will provide a defence against a criminal assault charge, but it is not clear whether the Act also applies to a civil claim, though he admits that one would expect the courts to take some guidance from this in respect of such a claim.⁴³ Thus, it could be argued that s.23 is not, in fact, a facilitative section at all; rather it simply provides a defence for a doctor to a criminal action post-treatment.

It would appear from the decision in the Miss D case that when a young person in the care of the HSE reaches the age of 17—and perhaps 16—they can make decisions as to their medical treatment and lifestyle generally. It is expected that McKechnie J. based his decision on ss.3 and 24 of the 1991 Act, which provide that where the court or the HSE are concerned with the care of a child, they must "give due consideration, having regard to his age and understanding, to the wishes of the child". Miss D was deemed capable by McKechnie J. of making decisions as to her welfare and care, and thus, her decision was determinative of the issue. Whether the case was decided on the basis of Miss D's stated maturity, or on the basis of s.23 of the 1997 Act, remains unclear.

Young woman in the care of her parents who do not know/approve

Whatever about the general position in relation to consent to medical treatment, other commentators question the application of s.23 when it applies to consenting to contraceptive treatment. The question as to whether there is any constitutional barrier to medical treatment is

further complicated by the case of Re Article 26 and the Regulation of Information (Services Outside the State for the Termination of Pregnancies) Bill 1995.⁴⁴ Here, it was argued that because the term “woman” was not defined in the Act, a young person could seek abortion information without the knowledge or consent of her parents, leading Hamilton C.J. to state that where information is provided, it should be done so in accordance with the principles of constitutional justice.

As regards the provision of contraceptive treatment and particularly abortion information, Donnelly notes that it is “at least arguable” that Art.42 of the Constitution would prevent an interpretation of the 1997 Act that would interfere with a parental right to control their children's right to contraceptive treatment.⁴⁵ This is an issue which must face doctors on a regular basis, and Donnelly observes that, while each doctor's decision will be based on the individual circumstances of the case, “he is hampered in reaching this decision by the absence of clarity in relation to the legal framework that binds him”.⁴⁶ The only guidance given to doctors is equally lacking in clarity: the Medical Council's Guide to Ethical Conduct and Behaviour from 2004 states:

“If the doctor feels that a child will understand a proposed medical procedure, information or advice, this should be explained fully to the child. Where the consent of parents or guardians is normally required in respect of a child for whom they are responsible, due regard must be had to the wishes of the child. The doctor must never assume that it is safe to ignore the parental/guardian interest.”

Where a young person is in the care of her parents, it would appear that a doctor would at least have to consider asking the young person to involve her parents in the decision. Without this, it would be possible that the parents could take a civil action against the doctor.⁴⁷

However, by referring back to the Miss D decision, if the HSE acting in loco parentis, are legally incapable of preventing a young woman travelling to terminate her pregnancy, one could assume that parents of a 17-year-old are equally incapable of preventing her from travel. The provision of medical treatment to those under the age of 18 has been the subject of much scrutiny in recent months.⁴⁸ Legislation which seeks to determine the circumstances in which termination of pregnancy is permissible must address these complex issues.

What are the medical profession to do?

The Medical Council have attempted, in their Guidelines, to ensure that Irish doctors comply with constitutionally permissible practices. From the All Party Oireachtas Committee Report it would appear that it is commonly accepted in the profession that three medical conditions justify termination in Ireland: cancer of the cervix, ectopic pregnancies and pre-eclampsia.⁴⁹ Termination is also permitted where the unborn has a medical condition which means it has little or no prospect of life outside the womb, and where this condition poses a threat to the life of the pregnant woman. However, where a pregnant woman has a medical condition which falls outside these limited categories and which, due to her pregnancy, has a life-threatening effect, it would appear that the medical profession will not make a determination as to whether the pregnancy will be terminated.

The Medical Council have made a number of attempts to determine the response of the profession to various cases. It responded to the X case by publishing a statement relating to guidelines on abortion in 1993.⁵⁰ It states:

“It has always been the tradition of the medical profession to preserve life and health. Situations arise in medical practice where the life and/or health of the mother or of the unborn, or both, are endangered. In these situations it is imperative ethically that doctors shall endeavour to preserve life and health ...

While the necessity for abortion to preserve the life or health of the sick mother remains to be proved, it is always unethical to withhold treatment beneficial to a pregnant woman, by reason of her pregnancy.

Departures from these principles in practice may leave the doctor open to a charge of professional misconduct.”

In 1998, the Council issued another set of guidelines, the relevant part of which states:

“The deliberate and intentional destruction of the unborn child is professional misconduct. Should a child in utero suffer or lose its life as a side effect of standard medical treatment of

the mother, then this is not unethical. Refusal by a doctor to treat a woman with a serious illness because she is pregnant would be grounds for complaint and could be considered to be professional misconduct.”

Again, this gives the impression that the Medical Council will only tolerate termination of pregnancy by way of the doctrine of double effect. The Guide to Ethical Conduct and Behaviour from 2004 sets out the current position of the Medical Council, that is, that termination of pregnancy can occur when there is real and substantial risk to the life of the mother. It also includes the submission of the Institute of Obstetricians and Gynaecologists to the All-Party Oireachtas Committee on the Constitution in its interpretation of the Ethical responsibilities to the child in utero. The relevant element to this submission states:

“In current obstetrical practice rare complications can arise where therapeutic intervention is required at a stage in pregnancy when there will be little or no prospect for the survival of the baby, due to extreme immaturity. In these exceptional situations failure to intervene may result in the death of both mother and baby. We consider that there is a fundamental difference between abortion carried out with the intention of taking the life of the baby, for example for social reasons, and the unavoidable death of the baby resulting from essential treatment to protect the life of the mother.”⁵¹

Thus, it is established that in circumstances where the life of a woman is at risk, including a risk of suicide, it is constitutional for a doctor to terminate the pregnancy of the woman. Nonetheless, the medical profession refuse to carry out terminations in these circumstances. The reason for this seems to be that, while the law will allow terminations in these circumstances, the risk of prosecution if the decision is wrongly made is high. The ECtHR noted that the potential for a criminal prosecution under the 1861 Act would constitute “a significant chilling factor for both women and doctors in the medical consultation process”, while Donnelly notes that a doctor who proceeded to carry out the procedure could face disciplinary action and face being struck off the registrar “if they perform a termination which is subsequently judged not to qualify as life-saving”.⁵² This decision could be appealed by the doctor, in a *R v Bourne*⁵³ type of case, but it is a risk that few, if any, practitioners would take.

In interpreting the guidelines of the Medical Council, the Constitutional Amendment and the *X* case in tandem, it would seem that a doctor in Ireland has the capacity to terminate a pregnancy where she is of the opinion that there is a real and substantial risk to the life of the mother, which includes a risk of suicide. Kingston and Whelan go so far to say that if the doctor did not terminate an *X*-case type pregnancy, he or she could face a civil suit.⁵⁴ This, however, is unlikely given the marked reluctance of the courts to impose positive obligations on doctors to treat patients.

Summing up the issues in relation to the absence of guidance on this question, the ECtHR stated:

“There is no framework whereby any difference of opinion between the woman and her doctor or between different doctors consulted, or whereby an understandable hesitancy on the part of a woman or doctor, could be examined and resolved through a decision which would establish as a matter of law whether a particular case presented a qualifying risk to a woman’s life such that a lawful abortion might be performed.”⁵⁵

Legislation must first clearly establish the general circumstances in which a termination of pregnancy is permissible. It must then allow a doctor to terminate pregnancies, on his own counsel or on the advice of other medical professionals, without running the risk of imprisonment or loss of their medical licence. Further, it will, as Donnelly notes, allow healthcare professionals to provide the best medical care to women without any compromise.⁵⁶

Some other issues deserving attention

Other issues then arise which are outside the scope of McCarthy J.’s trilogy of questions. For example, legislation is urgently required in line with recommendations by the Commission on Artificial Reproductive Technology regarding embryonic life outside the womb. Again, the absence of legislation in this area was noted by Hardiman J. in the decision in *Roche v Roche*.⁵⁷ Issues regarding the potential scope of the constitutional provision in the context of in utero drug exposure and third party foetal assault also need careful consideration.⁵⁸ For example, women in other jurisdictions have been convicted of homicide for ingesting drugs while pregnant: it must be

clarified that this will never occur in Ireland.⁵⁹ It is currently not a crime to kill a child in the process of being born.⁶⁰ A simple clarification of these issues is required, and legislation is readily available in other jurisdictions from which we could borrow.⁶¹

Conclusion

Ultimately, the legislature is now failing in its obligations under both the Constitution and the ECHR. There have now been three major reports written by the Government on the abortion issue: the time has come to legislate. The ECtHR has made its feelings very clear on the traditional legislative approach of passing the hot potato that is the abortion issue, and the legislature can no longer rely on the courts to clarify the scope, depth and breadth of the constitutional provision. It must either legislate comprehensively for how the right to life of the unborn and the equal right to the mother are to be protected and vindicated, or to propose a removal of a provision which has caused nothing but confusion, turmoil and upheaval in this State.

This journal may be cited as e.g. [2005] 2 I.J.F.L. 1 [[year] (Volume number) I.J.F.L. (page number)]

Irish Journal of Family Law 2011, 2, 50-56



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1. A, B and C v Ireland, Application No. 25579/05 December 16, 2010.

2. This article is based on a posting I made to the Human Rights in Ireland blog, <http://www.humanrights.ie>, and I would like to thank the authors of the blog for inviting me to comment on the A, B and C case.

3. Attorney General v X [1992] I.R. 1.

4. Roche v Roche [2009] IESC 82.

5. Attorney General v X [1992] I.R. 1 at 90.

6. A, B and C v Ireland, Application no. 25579/05 December 16, 2010, para.258.

7. A and B v Eastern Health Board and C [1998] I.L.R.M. 464.

8. A and B v Eastern Health Board and C [1998] I.L.R.M. 464 at 474.

9. A and B v Eastern Health Board and C [1998] I.L.R.M. 464 at para.259.

10. A and B v Eastern Health Board and C [1998] I.L.R.M. 464 at para.260.

11. Attorney General v X [1992] I.R. 1 at 82.

12. Attorney General v X [1992] I.R. 1 at 53-54.

13. The Thirteenth Amendment to the Constitution provides: "This subsection shall not limit freedom to travel between the State and another state."

14. The Fourteenth Amendment to the Constitution provides: "This subsection shall not limit freedom to obtain or make available in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state." The law put in place was the Regulation of Information (Services outside the State for Termination of Pregnancies) Act 1995 which was referred by the President to the Supreme Court, see Re Article 26 and the Regulation of Information (Services Outside the State for the Termination of Pregnancies) Bill 1995 [1995] I.R. 1.
15. All Party Oireachtas Committee on the Constitution (2000) Fifth Progress Report: Abortion Dublin: Stationery Office, p.45.
16. All Party Oireachtas Committee on the Constitution (2000) Fifth Progress Report: Abortion Dublin: Stationery Office, p.45.
17. A, B and C v Ireland, Application no. 25579/05 December 16, 2010, para.24.
18. A, B and C v Ireland, Application no. 25579/05 December 16, 2010, para.255. See p.54 for an examination of the issues facing doctors.
19. As occurred in the case concerning a terminally ill woman in Cork University Hospital. See, "Woman with cancer tells of her abortion ordeal" Irish Times, December 21, 2010.
20. D v Ireland, Application No 26499/02 June 28, 2006.
21. D (A Minor) v District Judge Brennan, the Health Services Executive, Ireland and the Attorney General, unreported, High Court, May 9, 2007. There is no unreported judgment of the case available, although an ex tempore judgment seems to have been provided to the ECtHR. See A, B and C v Ireland, Application no. 25579/05 December 16, 2010, para.99.
22. Anencephaly is a condition whereby the brain of the child develops abnormally.
23. Constitution Review Group, Report of the Constitution Review Group (Stationery Office, 1996); Drislane "Abortion and the Medical Profession in Ireland" (2009) 15(1) M.L.J.I. 35.
24. Kingston, Whelan and Bacik, Abortion and the Law (Dublin: Round Hall Sweet & Maxwell, 1997).
25. Kingston, Whelan and Bacik, Abortion and the Law (Dublin: Round Hall Sweet & Maxwell, 1997), pp.213-217.
26. Kingston, Whelan and Bacik, Abortion and the Law (Dublin: Round Hall Sweet & Maxwell, 1997), pp.214-215.
27. [1992] 2 I.R. 77.
28. The L v L case involved a woman seeking a beneficial interest in the family home. In the High Court, Barr J. found that she was entitled to rights in the property under Art.41, but the Supreme Court found that the wife could not rely on Art.41 against the husband.
29. Kingston, Whelan and Bacik, Abortion and the Law (Dublin, Round Hall, Sweet and Maxwell, 1997), p.216.
30. The point was also made in relation to young women seeking to travel without the consent or knowledge of their parents—this issue is discussed at p.54.
31. Re Article 26 and the Regulation of Information (Services Outside the State for the Termination of Pregnancies) Bill 1995 [1995] I.R. 1 at 115.
32. See for example, Paton v British Pregnancy Advisory Service Trustees [1979] 1 Q.B. 276; (1980) 3 E.H.R.R. 408; C and another v S and another [1988] Q.B. 135; Tremblay v Daigle 62 D.L.R. (4th) 634 (1989); Kelly v Kelly [1997] 2 F.L.R. 828.
33. Attorney General v X [1992] I.R. 1.
34. A and B v Eastern Health Board and C [1998] 1 I.L.R.M. 464.
35. D (A Minor) v District Judge Brennan, the Health Services Executive, Ireland and the Attorney General, unreported, High Court, May 9, 2007.
36. A and B v Eastern Health Board and C [1998] 1 I.L.R.M. 464.

- [37.](#) A and B v Eastern Health Board and C [1998] 1 I.L.R.M. 464 at 478.
- [38.](#) A and B v Eastern Health Board and C [1998] 1 I.L.R.M. 464 at 479 (emphasis added).
- [39.](#) "High Court rules that girl can travel for abortion", The Irish Times, May 10, 2007.
- [40.](#) "High Court rules that girl can travel for abortion", The Irish Times, May 10, 2007.
- [41.](#) McMahon and Binchy, Law of Tort (Dublin: Butterworths, 2000), p.641.
- [42.](#) McMahon and Binchy, Law of Tort (Dublin: Butterworths, 2000), p.641.
- [43.](#) Quill, Torts in Ireland, 3rd edn (Dublin: Gill and Macmillan, 2009), p.210.
- [44.](#) [1995] I.R. 1.
- [45.](#) Donnelly, Consent: Bridging the Gap Between Doctor and Patient (Cork: Cork University Press, 2002).
- [46.](#) Donnelly, Consent: Bridging the Gap Between Doctor and Patient (Cork: Cork University Press, 2002), p.50.
- [47.](#) Quill, Torts in Ireland, 3rd edn (Dublin: Gill and Macmillan, 2009).
- [48.](#) See, McMahon et al., "The Prescribing of Contraception and Emergency Contraception to Girls Aged Less Than 16—What are the Views and Beliefs of GPs and of Parents?" (2010) 16(2) M.L.J.I. 91.
- [49.](#) All Party Oireachtas Committee on the Constitution Fifth Progress Report: Abortion (Dublin: Stationery Office, 2000).
- [50.](#) Which were incorporated into the Medical Council's Guidelines in the publication, A guide to Ethical Conduct and Behaviour and to Fitness in Practise (1994), at paras 39.03, 30.04 and 39.05 respectively.
- [51.](#) All Party Oireachtas Committee on the Constitution, Fifth Progress Report: Abortion (Dublin: Stationery Office, 2000), p.45.
- [52.](#) Donnelly, "A, B and C v Ireland: Will the European Court of Human Rights Address Ireland's Restrictive Abortion Laws?" (2010) 16(1) M.L.J.I. 16.
- [53.](#) Here, a 14 year old girl became pregnant as a result of rape. Bourne performed an abortion on her, as her parents feared that the continuation of her pregnancy would have an adverse affect on her mental state. Bourne, having performed the abortion, then contacted the police to obtain clarification on the law. He was prosecuted under the 1861 Act, and the court, in directing the jury, held that in the case of abortion under the Act, there may be justification for the Act when "it is reasonably certain that a pregnant woman will not be able to deliver the child which is in her womb and survive". See further, Kingston, Whelan and Bacik, Abortion and the Law (Dublin: Round Hall Sweet & Maxwell, 1997), pp.62-65.
- [54.](#) Kingston, Whelan and Bacik, Abortion and the Law (Dublin: Round Hall Sweet & Maxwell, 1997), p.24.
- [55.](#) Paragraph 253.
- [56.](#) Donnelly, Consent: Bridging the Gap Between Doctor and Patient (Cork: Cork University Press, 2002).
- [57.](#) Roche v Roche [2009] IESC 82.
- [58.](#) See Casey, "Pregnant Woman and Unborn Child: Legal Adversaries?" (2002) 8 M.J.L.I. 75; Schweppe, The Unborn Child, Article 40.3.3 and Abortion in Ireland: 25 Years of Protection (Dublin: The Liffey Press, 2008), Chs 4-7.
- [59.](#) See, for example, State v McKnight 576 SE 2d 168.
- [60.](#) See, Charlton, "Judicial Discretion in Abortion: The Irish Perspective" (1992) 6 International Journal of Law and the Family 349; Schweppe, "Revisiting Art. 40.3.3. Part 1: Third Party Foetal Assault" (2005) 4 I.J.F.L. 19.

[61.](#) For example, the Infant Life Preservation Act 1929.

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