Features

Chroniques

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Mother's rights can't be infringed to protect fetus, Supreme Court's landmark ruling states

Karen Capen

In brief

CASES INVOLVING CHILD ABUSE have received wide coverage lately, as has a case involving possible risk to a fetus because of a mother's addiction to solvents. Lawyer Karen Capen discusses the legal issues facing doctors over the reporting of child abuse and outlines their obligations and responsibilities.

En bref

DES CAS DE VIOLENCE FAITE AUX ENFANTS ont fait les manchettes récemment, tout comme un cas comportant un risque possible pour le fœtus parce que la mère était toxicomane. L'avocate Karen Capen, discute des enjeux légaux auxquels font face les médecins lorsqu'il s'agit de signaler des cas de violence faite aux enfants et présente un aperçu de leurs obligations et de leurs responsabilités.

The Supreme Court of Canada says no one has a legal right to interfere with a pregnant woman whose behaviour threatens her fetus. The landmark ruling put paid to the notion that the state can force a woman to receive treatment in order to protect an unborn child.

The well-publicized case, which involved an addicted pregnant woman from Winnipeg who had been ordered to enter a treatment program, raises some interesting points for physicians. The ruling affecting the Winnipeg woman[1] indicates how physicians' obligations in this area can become blurred: although child-abuse laws may indeed override their duty to maintain confidentiality, *no legislation requires them to report that a pregnant woman may be endangering her fetus.*

The case involved "G," 22, who was 22 weeks' pregnant with her fourth child and addicted to sniffing solvents when the courts became involved. Winnipeg Child and Family Services asked the Manitoba Court of Queen's Bench to confine her "at a place of safety" until the baby was born. The agency also demanded that she stop using "intoxicating substances" until after the birth.[2] Pending the trial, it filed notice for a mandatory injunction requiring "G" to enter a treatment program until the birth.

The judge ordered Manitoba's director of child and family services to take custody of the woman until she gave birth, with the power to have her treated. If she failed to complete the prescribed treatment or left the treatment facility before the baby was born, the province could apply to commit her for treatment.

The case then went to the Manitoba Court of Appeal, where the original rulings were rejected. The appeal court said only the legislature, and not the judiciary, can order that type of approach. The Winnipeg social service agency then took the forcible-treatment issue to the Supreme Court. Before ruling, the court heard from the principal parties and 11 interveners.

The issue is difficult. Where is the line to be drawn when the rights of a pregnant woman appear to conflict with a societal interest in her fetus? The issue clearly worried several Supreme Court justices. One of them referred to a possible infringement of a woman's "liberty interest" and questioned whether society can afford the safeguards needed to prevent some pregnant women from being treated as criminals.

In Manitoba's Court of Appeal, another justice described the case as "a classic dilemma. . . . An expectant mother sniffs solvent to the probable detriment of her unborn child. If nothing is done, the child when born will surely suffer. Yet, anything which can be done necessarily involves restricting the mother's freedom of choice and, if she persists in the habit, her liberty." The justice did not raise the fundamental issue that concerns physicians who treat women before and after birth: the way addiction affects a woman's own health.

The lower court's order for forcible treatment was based on the province's Mental Health Act, purportedly because of the patient's mental incompetence. In overturning the ruling, the Court of Appeal stated that its findings were not based on the evidence, which included reports of medical expert witnesses. The judgement also noted that the social service agency's action was not taken because of concern about "G" but because of worries about her fetus.

The court noted that a fetus is not a person, either under the Quebec Civil Code and Quebec charter,[3] or under the Criminal Code of Canada.[4] Unless there is reason to act when the child is born, it ruled, no one may stop a mother from taking a course of action, even if it is potentially harmful to the fetus. This is the ruling the Supreme Court upheld in October.

The appeal court said there is a public interest in having expectant mothers receive proper prenatal care and that this issue takes precedence over recognition of fetal rights. It said courts have no power to force a mentally competent person who is aware of her condition to accept treatment.

One of the interveners before the Supreme Court, a coalition of Manitoba community groups and health-service providers, noted in a spring 1997 newsletter that services to help pregnant women overcome drug and alcohol addiction are inadequate, and both treatment programs and sheltered housing are lacking. Some interveners said a focus on strict cessation of all drug or alcohol use and the rigid rules found in treatment programs can deter mothers from seeking prenatal care.

The coalition said governments must provide appropriate resources to ensure the health and well-being of pregnant women and their fetuses. "What are the human, social and financial costs of seeking a court order to force a pregnant woman into treatment versus providing adequate preventive and support services?" it asked.

The ruling doesn't affect existing child-abuse laws. Most physicians know that they must report suspicions of past and current abuse as well as observations the suspicions are based upon. The laws are governed by the provinces and territories and vary according to jurisdiction, but generally cover physical and sexual abuse and emotional harm.

The legislation usually contains age limits for mandatory reporting and includes sections that override the physician's duty to maintain patient confidentiality. It also provides immunity from civil actions. The usual penalty for failing to comply is a fine, but college proceedings concerning professional misconduct may follow.

Physicians seeking guidance should refer to the CMA's Code of Ethics, which says doctors "must respect the right of a competent patient to accept or reject any medical care recommended." The Royal College offers an additional guideline: when a physician's view of the best interests of the fetus conflicts with the rights of the pregnant patient, the physician's role is to provide counselling and persuasion, but not coercion.[5]

Although 2 justices dissented from the Supreme Court's ruling and said "the state does have an interest in trying to ensure the child's health," the majority found that issues of fundamental liberty were at stake in the Winnipeg case. If legal rights are ever extended to the unborn and the rights of women like "G" are to be affected, said the court, it will be elected legislators and not judges who make the decision.

References

1. *Winnipeg Child and Family Services* v. *G.* (D.F.), SCC File No. 25508.

2. *Winnipeg Child and Family Services (Northwest Area) and DFG*, Manitoba Court of Queen's Bench, Aug. 13, 1996. File CP 91-01-04256.

3. *Tremblay* v. *Daigle*, [1989] 2 SCR 530.

4. *R* v. *Sullivan*, [1991] 1 SCR 489.

5. Flagler E, Baylis F, Rodgers S. Bioethics for clinicians: 12. Ethical dilemmas that arise in the care of pregnant women: rethinking "maternal–fetal" conflicts. *Can Med Assoc J* 1997;156(12):1729-32.