The Society for Ethics and Law in Medicine

www.societyforethicsandlaw.org

Caesarean sections without consent

Dr D Bogod, Vice President, The Society for Ethics and Law in Medicine and Consultant Anaesthetist, Nottingham

In the UK, adults with capacity have complete autonomy to refuse medical intervention at any time, no matter whether the intervention would be regarded as being in their best interest. Such right of choice exists, in the words of Lord Donaldson, Master of the Rolls, '… whether the reasons for making that choice are rational, irrational, unknown or even non-existent'.[1] Long held to be the case in common law, the pre-eminent medical autonomy of the competent adult has now been enshrined in statute law in England and Wales within the Mental Capacity Act 2005 (Adults with Incapacity Act 2000 in Scotland).[2]

The Mental Capacity Act stresses a presumption of capacity in adult patients while reminding us that capacity is decision-specific: the more important the decision, the higher the level of capacity required. If a patient is determined not to have capacity, then a number of protections come into play, the most important being that any medical treatment then carried out must be in the patient's best interests.

What, then, of the parturient who needs a Caesarean section, but who withholds consent? The issues relating to the potential conflict between fetal well-being and maternal autonomy, while sometimes played out in the courts, are really a matter for ethical consideration and societal opinion. Autonomy has become, in recent decades, the overwhelmingly ethical principle driving modern medical practice, and it would be iniquitous for society to assume control over an individual's body solely because she was pregnant, particularly since, by definition, this would be an imposition which would only affect women. This is reflected in the fact that, in UK law, the fetus has no 'legal personality', as should be clear from the fact of the 1967 Abortion Act which permits legal termination of the existence of the fetus under a wide range of circumstances. Thus, the presence of the fetus does not impose any burden upon the mother to act in what might be perceived as its best interests, and does not allow others to impose on maternal autonomy to protect the fetus. The vast majority of parturient adults will be regarded as competent, even when in the throes of labour and under the influence of opioids, and are therefore able to refuse Caesarean section, whatever the anticipated fetal outcome. Despite this, there is something uniquely abhorrent to society in the idea of a woman who puts her unborn child at risk of severe cerebral damage or death, and this is reflected in the comments of many of the judges who have been confronted with this difficult dilemma.

Over the years, a number of cases have come to court, often at very short notice and with extremely tight deadlines, where hospitals have sought permission to carry out a Caesarean section on a woman who is refusing to consent to the procedure. These cases, rare though they are, must present judges with extraordinarily difficult decisions, and deserve careful consideration by those involved in the care of women in childbirth.

In *Re S (Adult: Refusal of Treatment)*,[3] Sir Stephen Brown, in the High Court, was asked to resolve the issue of a 'born again' Christian, who was refusing a Caesarean section despite being in active labour with the baby in an undeliverable transverse lie, with the fetal elbow projecting through the cervix. Without an immediate section, fetal demise was almost certain and severe maternal morbidity would ensue if, as was increasingly likely, uterine rupture were to occur. The hearing took place at 14:00, 30 minutes after the application came to the notice of the court, and judgement was made 18 minutes later, with Sir Stephen granting the application to carry out the Caesarean section against the patient's expressed will. Unsurprisingly, given the acute nature of the emergency, Mrs S was unrepresented at the hearing, although representation was made on behalf of the Official Solicitor, acting as a neutral 'friend of the Court'.

In support of his – rather hurried – judgement, Sir Stephen pointed out that the fundamental question of whether the presence of a viable fetus could trump the autonomy of a competent mother to refuse treatment had been deliberately left open by Lord Donaldson MR, in his judgment earlier the same year in Re T (*Adult: Refusal of Treatment*):[1]

'An adult patient who … suffers from no mental incapacity has an absolute right to choose whether to consent to medical treatment, to refuse it, or to choose one rather than another of the treatments being offered. The only possible qualification is where the choice may lead to the death of a viable fetus. That is not the case here and if and when it arises, the court will be presented with a novel problem of considerable legal and ethical complexity'.

In the absence of an English authority, Sir Stephen drew on American case law, citing with approval a case from the District of Columbia where a terminally ill woman with hours or days to live was submitted to Caesarean section, apparently against her wishes, to deliver her baby at 26 weeks' gestation. Both mother and baby died within 48 hours of the procedure, and the relevance of this case to the situation in re S has been questioned very strongly by many legal commentators.

Matters did not lie dormant, however, and a sudden spate of cases came before the English courts in the late 1990's. These were, as befitted the prevailing orthodoxy, considered largely on the grounds of the mother's capacity. However, in retrospect, it is interesting to see how intelligent judges can elegantly bend the law to allow them to decide in favour of safe delivery of a healthy baby.

Thus, in *Tameside and Glossop Acute Services Trust vs CH*,[4] the court was approached to seek permission to carry out a Caesarean section against the wishes of the patient, a woman detained under the Mental Health Act 1983. Non-consensual treatment is only allowed under section 63 of the MHA if it is 'for the mental disorder from which [the patient] is suffering', but Wall J accepted the argument that (a) the birth was necessary to prevent mental deterioration, (b) it was necessary for CH to give birth to a live baby in order for her treatment to be effective, and (c) doctors could not give her the strong medication she required for treatment until after delivery for fear of harming the fetus. The Caesarean was consequently performed, albeit on rather disingenuous grounds.

Johnson J probably got it right in *Norfolk and Norwich (NHS) Trust v W* when he authorised a non-consensual Caesarean to be carried out on a patient whose long-standing psychiatric condition had deteriorated to the point that, despite being in obstructed labour, she refused to believe that she was pregnant.[5] The situation was worsened – if such is possible – by the fact that she had had three previous Caesareans, and was at imminent risk of scar rupture. The judge specifically considered W's competence and determined that it was lacking, then went on to confirm that it was in W's best long-term interests to deliver a live baby; he also stressed that the focus of his attention was the interests of the mother and not of the fetus. However, it should be noted that, again, the patient was not represented in court.

Remarkably, Johnson J, as he figuratively mopped the fevered judicial brow at the close of the case, was immediately presented with another request to authorise a Caesarean in the face of maternal refusal in *Rochdale NHS Trust v C*.[6] Perhaps feeling jaded at the end of a long and trying day, he declared after a two-minute hearing that, due to the stress and pain of labour, C was 'unable to make any valid decision about anything of even the most trivial kind', despite her own obstetrician's view that she was competent, and surgical delivery was approved.

A less hurried judgment in *Re MB (an adult: medical treatment)* related to the position of a patient who, while willing to undergo Caesarean section to allow delivery of her term breech baby, had such severe needle phobia that she refused to consent to cannulation for the anaesthetic and subsequently withdrew consent for gas induction when the risks were explained.[7] She went into labour with the situation unresolved, agreed to go to theatre, but again withdrew consent to needle or mask at the last minute. A declaration was obtained from Hollis J to carry out the surgery against her will and she instructed her representatives to appeal this. The following day, she changed her mind and underwent consensual Caesarean delivery, but the appeal was subsequently heard. Five weeks later, the Court of Appeal, led by Butler-Sloss LJ, ruled that the original judge was correct to hold that MB was temporarily incapacitated because, at the moment of decision, her fear of needles dominated all and rendered her unable to consider anything else. The court emphasised that loss of capacity could, in such cases, temporarily arise from severe phobia, and that the degree of capacity required in such cases was commensurate with the gravity of decision to be taken.

In response to recommendations in re MB, the Department of Health issued guidance in June 1997.[8] Key points include the need to make every effort to bring such cases to the attention of the court before a medical emergency arises; the desirability that all parties, including the mother, are represented; and the requirement for evidence to be presented, preferably from a psychiatrist, as to the woman's lack of capacity.

Following this, the Court of Appeal came down firmly against a judgement made to detain a woman with pre-eclampsia under section 2 of the Mental Health Act, and then to carry out a Caesarean section against her strongly expressed wishes, in *St George's Healthcare NHS Trust v S, R v Collins, ex parte S*.[9] The higher court ruled that S had been competent, that her autonomy should not have been compromised by the fact that her decision risked the well-being of the fetus, and that the judge who had hurriedly ordered the Caesarean section had been seriously misled about the urgency of the case.

The Society for Ethics and Law in Medicine

www.societyforethicsandlaw.org

After a long period without any similar cases coming to the public gaze, there has been a series of forced Caesarean sections in recent months. One which received considerable publicity related to an Italian citizen who came to the UK for a training course late in pregnancy, and was restrained and detained under the Mental Health Act after failing to take medication for what was reported in the press as a bipolar condition but was, according to the court transcripts, 'a schizophrenic disorder…psychotic in nature'. In August 2012 the Court of Protection, established by the Mental Capacity Act, gave the applicant trust permission to deliver her by Caesarean section, and the baby was subsequently placed in care with a view to adoption. The reason for the decision to deliver by Caesarean section was widely misreported as being in order to allow the baby to be removed from the mother in controlled circumstances; in fact, she had undergone her two previous births by Caesarean and the applicant trust was concerned that she would suffer uterine rupture if she went into labour. The patient was represented by an experienced Queen's Counsel instructed by the Official Solicitor, who looks after the interests of incapacitous adults, and the court was presented with a report from a consultant psychiatrist who had been able to assess the patient over a period of five weeks. In short, all appropriate steps appear to have been taken in this high-profile case to ensure the best interests of all parties.[10]

The very inaccurate initial reporting of the case of the Italian patient, in particular by the Daily Mail,[11] led the most senior judge in family law in England and Wales, Sir James Munby, to insist on much greater transparency in such cases in order to allow free and unrestricted public debate. As a result, two further non-consensual Caesarean sections have since been reported, both heard in the High Court within one week in January 2013. The first related to a woman with bipolar disorder whose membranes had ruptured, who was possibly already showing evidence of sepsis and who was refusing intervention to augment labour. Having said at the time that his decision was 'an extremely draconian one' and that 'Doctors do not embark on this lightly. It occurs extremely rarely', Hayden J was faced with the same issue three days later relating to a paranoid schizophrenic patient with diabetes and reached the same conclusion.[12]

It is unlikely that we have seen the end of such cases, but at least now we know that they will be reported publicly, that parturients will be represented and that informed debate will be encouraged. All the cases described – and all that I can find in the literature – have resulted in the hospital being given the go-ahead to carry out the Caesarean section, despite maternal objection. This is perhaps unsurprising; such cases will not come to court unless capacity is seriously in doubt, and judges will be likely to rule that a mother's long-term interests are best served by delivering a healthy baby. Some might argue further that it is in the best interests of society that the expense involved in the care of a baby with cerebral birth trauma be avoided, but such a strictly utilitarian argument will not generally carry much weight in a modern, rights-driven culture.

References

1 Re T (Adult: Refusal of Treatment) [1992] 4 All ER 649.

2 McCombe K. The evolution of informed consent. RCoA *Bulletin* 2014;**83**:24-26.

3 Re S (Adult: Refusal of Treatment) [1992] 4 All ER 671, Fam Div.

4 Tameside and Glossop Acute Services Trust vs CH [1996] 1 FLR 762.

5 Norfolk and Norwich (NHS) Trust v W [1996] 2 FLR 613.

6 Rochdale NHS Trust v C [1997] 1 FCR 274.

7 Re MB (an adult: medical treatment) [1997] 38 BMLR 175 (CA).

8 Department of Health Circular EL (97) 32, 1997.

9 St George's Healthcare NHS Trust v S, R v Collins, ex parte S (1998) 44 BMLR 160 (CA).

10 Court approved caesarean section for mentally ill woman because of two previous caesareans. *BMJ* 2013;347:f7334.

11 Please don't take my baby: Agony of mother whose baby girl was put up for adoption after secret court judge forced her to have a caesarean. *Daily Mail*, 1 December 2013 (www.dailymail.co.uk/news/article-2516270/Please-dont-baby-Agony-mother-baby-girl-adoption-secret-court-judge-forced-caesarean.html) (accessed 15.2.14).

12 Judge gives permission for compulsory caesarean sections twice in a week. *BMJ* 2014;348:g1334.