



An Address by Michael McDowell SC at the Graduation Ceremony for the Graduate Diploma in Healthcare (Risk Management and Quality)

Tuesday 5th September 2017, UCD Charles Institute, University College Dublin

I am honoured and grateful to have been invited to deliver a key-note address at this evening's graduation ceremony. At the outset, I would like to join in the warmest congratulations to the diploma graduates and their families.

Medical Ethics To Be Decided In Court?

I thought it appropriate this evening to address an issue at the intersection of law and medicine, namely the circumstances in which it is necessary or appropriate for those who practise medicine and for those who administer the provision of medical services in the health sector to refer issues of medical ethics for trial and adjudication by the courts.

There have been some notable occasions in recent years in which issues of medico-legal ethics have been referred to the courts for adjudication.

Some have related to cases where the status of a pregnant woman is in issue arising out of mental illness or incapacity or brain death and where the ethical issue centres on what, if anything can or should be done to attempt to preserve the life of the unborn foetus that she is carrying. Others have related to the status of persons in a permanent vegetative state or other catastrophic condition and whether their lives should be indefinitely prolonged by artificial means.

These circumstances are, of course, fraught with difficulty and, sometimes, with controversy from an ethical point of view.

The recent internationally high-profile English court case in relation to Charlie Gard arose from a genuine dispute between the infant's parents and the hospital service professional treating him as to what, if any steps, could or should be taken to sustain his life.

So too did the case of Ashya King, a young child with a brain tumour, whose parents wanted to take him abroad for proton beam therapy against the advice and opinions of medical professional personnel treating him in Southampton.

Closer to home, we have seen controversial cases where, for example, the HSE attempted unsuccessfully to have the High Court order a pregnant woman to undergo a caesarean birth or where a health board unsuccessfully attempted to force unwilling parents to permit a routine PKU test on their baby.

Such cases are extremely harrowing for the patients and families involved and for the medical professionals.

But at least in most of these cases, there were genuinely opposing medical views which were suitable for adjudication.



Abdication of Professional Ethical Functions – The PP Case

A wholly different set of circumstances arises where medical professionals and health service administrators confront a difficult medico-legal ethical situation and decide to resolve their difficulty by bringing about litigation in which their ethical options and duties are effectively transferred to the judiciary for advisory judgment.

This latter situation can arise where the dominant motive of the practitioners or administrators is to be relieved of moral or legal blame in making professional ethical decisions – in short a form of defensive medicine on ethical issues. Concerns about the legal issue of the rights of the unborn played a part in the poor treatment of Savita Halappanavar.

The case of *PP v HSE [2004] IEHC 622* is very much a case in point.

In that case decided by the Irish High Court in 2014, a patient who was either 13 or 15 weeks pregnant collapsed in hospital due to a major cerebral cyst and was pronounced brain dead. Her partner, her father and her family wanted her life support system to be turned off. But some of the medical professionals treating the woman professed concern about the ethical and legal implications of withdrawing life support on her unborn foetus or child.

Rather than make a profession decision based on the clear medical prognosis for the woman and the unborn child, the woman was transferred from one hospital to another where mechanical ventilation and tubal gastric feeding was continued, and after the development of medical conditions including pneumonia, fungal infections, fluid build-up, necrosis of the brain, high blood pressure, and massive body swelling, a decision to prolong her life by somatic support until delivery of the unborn was viable was taken. A tracheotomy was performed in an attempt to preserve the woman's remaining respiratory function.

The woman's father and her partner were utterly opposed to the hospital's proposed course of action and the woman's father was forced to start High Court proceedings to have it stopped.

The Evidence

In those proceedings, a large number of lawyers came to court representing the father, the woman, the HSE, and the unborn foetus on a wardship basis respectively.

A series of highly qualified health professionals gave evidence to a divisional court of the High Court – evidence that seemed all to converge in a single view, by then also held by the HSE, that there was no reasonable hope at the time of the hearing of the unborn foetus attaining viability to birth.

Evidence, rightly described by the Court as “*devastating*”, was given to the Court as to the appalling effects of the prolonged somatic support regime on the disintegrating body of the brain dead woman.

From a medical perspective then, there was no disagreement between the parties or between any of the experts that there was any prospect that the unborn could be delivered alive at any future point.



The Decision

Despite this, the case, and indeed the somatic support described as “grotesque”, was continued to the point of judgment.

Why that was done, is hard to understand. The issue had become moot on the un-contradicted evidence. The High Court could have and, I would say, should have, simply terminated the proceedings on that factual basis.

But worse was to follow in that the Court delivered, in very short order, a reserved judgment on the uncontested facts – a judgment although inevitable in its outcome, that had virtually no value as a precedent but which now left many “hanging threads” legally.

It raised points of principle by way of discursive legal analysis on what had in court become a non-issue - which analysis could only create further uncertainty in any similar future situations where the evidence was less clear.

In particular, the High Court considered issues which had become moot on the facts.

These included lengthy consideration of the meaning of term “*as far as is practicable*” in relation to the State’s duty under Article 40.3.3 to defend and vindicate the right to life of the unborn.

On the evidence, there was no prospect of doing so at all. So such discussion was legally redundant and strictly speaking hypothetical.

The Court also stated that “[g]iven that the unborn in this jurisdiction has the constitutional guarantee of a right to life, the Court is satisfied that a necessary part of vindicating that right is to enquire as to the practicality and utility of continuing life support measures”.

But, in saying so, the Court surprisingly expressed no view at all as to whether such an inquiry was primarily the duty and function of the medical practitioners as part of their professional competence or whether it was an enquiry more appropriate for judicial determination by the courts.

If it decided anything, the High Court ought to have dealt with that issue; failure to do so means that more cases with similar but non-identical facts may well come to court in the future.

Given the almost infinite spectrum of potential factual situations between the stark facts in PP, at one end, and those in a situation where a woman near full term with a perfectly viable child *in utero* capable of successful caesarean delivery suffers brain death, at the other end, any unnecessary attempt to devise and apply general legal and constitutional principles to the case was, I think, unwise and tendentious.

Likewise, despite receiving evidence that there was a significant chance that any child born from much-prolonged “somatic support” of a brain-dead mother would be severely damaged and disabled, the High Court expressly disclaimed any suggestion that it was taking into account the risk that the unborn child would be born impaired. It said:



“This is not a case where the Court on the evidence is required to consider that possibility. The case turns on its own facts which are entirely centred on whether the child can survive at all”.

But that begs the question as to whether, in a somewhat different case, the likelihood of impairment to a foetus where there was a less than even chance of live delivery in the case of maternal brain death is something that a medical practitioner, or indeed a court, could ever properly take into account in deciding whether to continue somatic support. No guidance emerged on that issue.

Intuitively, such a likelihood of impairment is something one might expect to be taken into account in deciding whether to prolong the life of a brain dead pregnant woman or to *“let nature take its course”* - much in the same way as medical professionals deal with DNR (“do not resuscitate”) instructions in the case of elderly patients for whom survival carries the substantial risk of chronic incapacity or disability or suffering.

The constitutional “right to life” of the born does not normally require medical practitioners or health service administrators to engage the courts in relation to DNR cases.

So it is hard to see how the Eighth Amendment requires routine recourse to the courts in ethical medical decision-making regarding the unborn whose right to life is declared to be equal to the right of the born.

In neither case is a judge usually in any better position, legally or ethically, to do what is right.

Staying Out Of Court

In my view, the PP case should never have proceeded to a lengthy written judgment that considered constitutional principles once it was clear that there was no medical or ethical controversy remaining on the central fact – namely that there was no realistic prospect of foetal survival.

I would go further. I strongly believe that the wishes of the family and the woman’s partner should have been implemented, without any need for court intervention, unless there was strong medical or legal grounds available to the practitioners suggesting that those wishes, if complied with, would have given rise to an unlawful outcome.

By forcing the woman’s father to court, nothing at all was achieved by way of valuable precedent or clarification of the law.

The only medico-legal outcome was an entirely redundant re-assurance for persons who lacked the courage to make obvious professional ethical decisions on their own.

The only other predictable human outcome was to subject decent suffering people to a harrowing legal experience even if, as was the case, the High Court tried to deal with the matter in a compassionate way.

The costs of such a redundant case inevitably fell on the public purse.



Nothing New Was Decided

I find it hard to believe that cases such as the PP case did not arise prior to the Eighth Amendment or that practitioners in those days would have dreamed of forcing relatives to take the issue to court - or dreamed of asking a court to decide on whether prolonged somatic support should be carried out on the body of a brain dead expectant mother.

I find it equally hard to believe doubt but medical practitioners in those days would not have taken on themselves the ethical responsibility of deciding whether or not to let nature take its course in such cases.

There are limits to the efficacy of the judicial process.

The Eighth Amendment Revisited

The Oireachtas is about to embark on a consideration of a report of the Citizens Assembly – arguably another instance of abdication of responsibility itself – as part of a process to revisit the Eighth Amendment.

My own personal view is that protection of the life of the unborn is inherently complex and cannot be properly done by any constitutional provision but should be left to the ordinary legislative process.

But whatever the outcome of that process and whatever the decision of the people, no paragraph in the Constitution and no future law enacted by the Oireachtas is going to alter the ethical dilemma that lay at the heart of the PP case.

The Medical Profession Should Shoulder Its Own Ethical Burden

The classic but, I think, still valid basis for distinguishing between professions and other activities was that the practice of a profession entailed a near constant engagement of ethical judgment.

If medicine, in that sense, is to vindicate its justified claim to be regarded as a profession, its practitioners, I think, should not attempt to unload their difficult professional ethical decisions on the courts and on the legal process.

Is there, or was there, any real risk of professional or legal sanction for practitioners who make reasonable ethical decisions in good faith in difficult cases such as PP? I think not.

Is recourse to the courts motivated by real ethical dilemmas or by a wish to abdicate moral responsibility? Sometimes, I suspect the latter.

Patients and their loved ones deserve better than to be forced into the legal process by those who would shirk the ethical obligations and responsibilities of the profession they practise or administer.