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The approach of the Irish High Court to religious influences on medical law when X's life poses a threat to Y's life

Case Comment

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1. The case

The Irish case of *PP v Health Service Executive* [2014]¹ (*PP*) involved NP, a 26-year-old mother of two children, who was admitted to hospital with headaches and nausea on 27 November 2014. She was declared brain-dead on 3 December 2014, when she was carrying a foetus of approximately 15 weeks' gestation. Doctors placed NP on life support because they did not wish to contravene Article 40.3.3 of the Constitution of Ireland, which "acknowledges the right to life of the unborn and ... guarantees ... to respect, and, as far as practicable, ... to defend and vindicate that right". After hearing uncontested evidence that the foetus could not survive until it was sufficiently developed to be born alive, the Irish High Court held, on 26 December 2014, that it would be lawful for the court to switch off NP's somatic life-support system. Doctors' fear of contravening the Constitution thus led to NP's being kept artificially alive for over three weeks, to the understandable distress of her family.

This case has significant parallels with the English case of *In re A (Children) (Conjoined Twins: Surgical Separation)* [2001]² (*Re A*). Jodie and Mary were conjoined twins who were both kept alive by Jodie's heart, because Mary's heart was too weak to circulate oxygenated blood round her body. Doctors had to decide whether to allow both twins to die naturally when Jodie's heart failed, which would occur within a few months, or to separate them. The latter course of action would mean that Mary would die within a few minutes, but it was likely that Jodie would be able to live a relatively normal life. The English Court of Appeal held that, despite the twins' parents' faith-based opposition, the separation would be lawful.

2. Religious considerations

The current Constitution of Ireland no longer confers on the Catholic Church a "special position" as the guardian of most citizens' faith³, this provision having been removed by the Fifth Amendment of the Constitution Act 1972. It is, however, expressly founded on Christian principles. Its Preamble begins: "In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, we, the people of Éire, humbly acknowledging all our obligations to our Divine Lord, Jesus Christ ...".

A central tenet of Roman Catholicism, reflected in Article 40.3.3 of the Constitution of Ireland, is profound respect for the rights of the unborn child. This respect exists because: "From the first moment of his existence, a human being must be recognized as having the

¹ [2014] IEHC 622.

² [2001] 2 WLR 480.

³ Article 44.1.2 Constitution of Ireland 1937.

rights of a person - among which is the inviolable right of every innocent being to life ... Direct abortion, that is to say, abortion willed either as an end or a means, is gravely contrary to the moral law... Since it must be treated from conception as a person, the embryo must be defended in its integrity, cared for, and healed, as far as possible, like any other human being.”⁴. These words indicate that an embryo has the same right to life as any human being, but the words “as far as possible” in the final phrase acknowledge that there are circumstances in which some embryos cannot be “healed”.

The Irish approach to statutory interpretation encompasses the literal, golden and mischief rules, and the purposive approach⁵. Appearing to adopt the purposive approach, the Irish High Court accepted the submission of PP’s counsel that the purpose of Article 40.3.3 was to “copper fasten” section 58 of the Offences Against the Person Act 1861, which prohibits “administering drugs or using instruments to procure abortion”. This constitutional reinforcement of a statutory provision is entirely in keeping with the Roman Catholic principles on which the Constitution of Ireland is based and, if this had been the limit of statutory interpretation in the case, the court would without doubt have held that Article 40.3.3 was not engaged.

Instead, despite the fact that the threat to NP’s unborn child’s life had arisen because of a physiological catastrophe that PP’s counsel described as an unforeseeable “Act of God”, rather than the prospect of a deliberate abortion, the Irish High Court held that Article 40.3.3 was engaged. It stated that this was because the “plain and ordinary meaning” of Article 40.3.3 “may also be seen as acknowledging in simple terms the right to life of the unborn ...”. Had the court pursued this strictly literal interpretation of Article 40.3.3 to its logical conclusion, it could have ordered the continuation of NP’s somatic support until her unborn child naturally ceased to have a heartbeat. The court averted this undesirable outcome by holding that phrases such as “so far as practicable” enabled it to consider the best interests of the unborn child, thereby avoiding prolonging its distress until its inevitable ante-natal death.

The Irish High Court cited, without comment, two highly pertinent academic articles. One stated that, where there was maternal brain death and all the medical evidence suggested that the foetus could not survive, the unborn child no longer had any best interest to protect⁶. The other concluded that a foetus’s right to life is dependent on some expectation of a live delivery, without which maternal somatic support would be impermissible because of its futility, and suggested an “arbitrary cut-off point” of sixteen weeks gestation⁷. In the case that led to these articles, a brain-dead mother had been placed on life support until her foetus died, so no court had the opportunity to consider the issues raised. The Irish High Court did not adopt the approach advocated in the articles; even after acknowledging that there was no realistic prospect of NP’s unborn

⁴ Libreria Editrice Vaticana, *Catechism of the Catholic Church* (1993) [English version online] http://www.vatican.va/archive/ENG0015/_INDEX.HTM (accessed 6 May 2015), paras 2270-2274.

⁵ The Law Reform Commission *Consultation Paper on Statutory Drafting and Interpretation: Plain Language and the Law* (1999) ISSN 1393-3140 [Online] http://www.lawreform.ie/_fileupload/consultation%20papers/cpPlainLanguage.htm (accessed 6 May 2015).

⁶ The article is described in the case report as: “*Maternal Brain Death, Pregnancy and the Foetus: The Medico-Legal Implications* (2001 *Medico Legal Journal*)” by Asim Sheikh and Denis Cusack. My research suggests that its reference should be: A Sheikh and D A Cusack, “Maternal brain death, pregnancy and the foetus: the medico-legal implications for Ireland (2004) 23 (2) *Medicine and Law* 237-250 (Source: Europe PubMed Central [Online] <http://europepmc.org/abstract/med/15270467> (accessed 8 May 2015)).

⁷ R Farragher, B Marsh, J G Laffey, “Maternal brain death – an Irish perspective” (2005) 175 (4) *Irish Journal of Medical Science*, 55-59.

child's surviving until it could be born alive, the penultimate paragraph of the judgment expressly refers to the child's best interests. This was because the court followed the principles that would have applied if it were exercising its *parens patriae* jurisdiction over wards of court: it cited as a precedent a case involving a brain-damaged six-year-old child. The court's decision to determine the best interests of NP's non-viable unborn child in exactly the same way as it would if the child that had been - or even could be - born alive goes significantly beyond the requirements of Article 40.3.3.

The tenets of Catholicism were pervasive in *PP*: had the doctors not feared breaching a law overtly based on them, the case would probably never have reached a court, and the Irish High Court went out of its way to treat the non-viable foetus as having a right to the life that it could never attain. By contrast, in *Re A*, overtly religious considerations were discussed only because the parents of Jodie and Mary were devout Roman Catholics.

The parents had told the English Court of Appeal that they firmly believed that God had a plan for their daughters, and they did not wish humans to interfere with that plan. Ward LJ acknowledged that both parents had "the right and the duty to give consent to medical treatment", but stressed that it was the court's duty to ensure that the children received "proper treatment" if the parents did not exercise their right in the children's best interests. The court had received a written submission from the Most Reverend Cormac Murphy-O'Connor, then the Catholic Archbishop of Westminster, who cited as his "overarching moral consideration" the fact that "human life is sacred ... so that one should never aim to cause an innocent person's death by act or omission". The judgment also mentions a joint statement by Anglican and Catholic archbishops that had been published after the House of Lords' decision in *Airedale NHS Trust v Bland* [1993]⁸. This included the words: "Because human life is a gift from God to be preserved and cherished, the deliberate taking of life is prohibited except in self-defence or the legitimate defence of others ...". In his leading judgment in *Re A*, Ward LJ acknowledges that the sanctity and inherent equality of all life underpin the policy of the law, and quotes with approval a passage from Lord Hailsham's speech in *R v Howe* [1987]⁹ in which the Lord Chancellor had stated that describing the taking of one innocent person's life to save another's as being "the lesser of two evils" is merely "embracing the cognate but morally disreputable principle that the end justifies the means". Having endorsed this purely deontological approach, Ward LJ relies upon the archbishops' *caveat* regarding "self-defence or the legitimate defence of others" to support his decision that doctors should be permitted to perform the surgery that would inevitably lead, within minutes, to Mary's death. Brooke LJ acknowledged that some people, including the Archbishop of Westminster, believed that it would be immoral to save Jodie by accelerating Mary's death, but pointed out that others would argue that it would be immoral not to perform an operation that had a good prospect of affording Jodie a happy and fulfilled life.

The Irish High Court's approach to the interpretation and application of Article 40.3.3 goes beyond merely giving practical effect to Catholic teaching as expressed in Irish law; the court appears anxious to explore every possible interpretation of the law that could suggest that NP's body should continue to be subjected to prolonged somatic support in order to prolong the life of her unborn child. The Catholic Church has historically exerted significant influence in Ireland, and in 2011 some 87% of the Irish population described themselves as Catholics¹⁰. It is therefore possible that cultural and social factors, as well

⁸ [1993] AC 789.

⁹ [1987] AC 417.

¹⁰ Central Statistics Office, *Census 2011 This is Ireland (Part 1)* [Online] http://www.cso.ie/en/media/csoie/census/documents/census2011pdr/Tables_and_Appendices.pdf (accessed 7 May 2015).

as purely legal considerations, influenced the court's decision to interpret Article 40.3.3 literally as well as purposively.

All three English Court of Appeal judges in *Re A* acknowledged the sincerity of the views held by the twins' parents and archbishops, but ultimately those views did not mitigate the Lord Justices' opinions about the lawfulness of an operation that some commentators consider may have amounted to Mary's murder¹¹. Brooke LJ noted that the UK's common law judges were "steeped in the Judaeo-Christian tradition", and that the principles of that tradition continue to underlie the law that protects human life between birth and death, yet his decision departed from those principles in favour of the alternative view that there was a moral imperative to give Jodie the opportunity to lead a potentially full life. The court's decision not to interpret the law in a way consistent with the tenets of the Catholic faith may reflect the fact that the population of England and Wales is significantly more religiously diverse than is that of Ireland; in 2011, only 59.3% described themselves as Christian¹².

It is interesting to speculate on the likely outcome of *PP* if it had been decided under the Irish Constitution by judges in the English Court of Appeal. It seems certain that there would have been an order confirming the lawfulness of discontinuation of somatic support for NP, and it is likely that the judgment would have been shorter, omitting comparisons with the court's duty in respect of a living six-year-old child. This hypothetical change of jurisdiction would not affect the outcome but, if *Re A* had been decided under English law by the High Court of Ireland, it is almost impossible to imagine a judgment that would have led to Mary's death in blatant contravention of the expressed view of a Catholic Archbishop.

3. "Innocent" "killers"?

As mentioned above¹³, the *Catechism of the Catholic Church* refers to "... the inviolable right of every innocent being to life". Neither "innocence" nor "innocent" appears in the Irish High Court's judgment, though there was no doubt that NP was a "killer" in the sense that her continued, albeit artificially sustained, life was killing her unborn child. Her uterus was described by the court as an environment that was "neither safe nor stable, and ... failing at an alarming rate". Her unborn child was believed to be subject to temperatures of up to 40 degrees, which would increase the rate at which it used up the available oxygen, and there were indications that NP's abdomen could be inflamed or infected, which would worsen the foetus's environment. The court accepted that the child had no realistic prospect of survival, and that its prospects consisted only of distress and death. The termination of the life of the "killer" was accepted by the court as being in NP's own best interests, despite the fact that it had not considered whether she was "innocent"; its concern was whether the inevitable immediate death of her non-viable foetus was a lawful consequence of discontinuing her somatic support. The court's starting premise is that the mother and unborn child have an equal right to life, irrespective of the fact that one is killing the other.

"Innocence" was discussed two Lord Justices in *Re A*. Perhaps because his speech sanctioned an act that would rapidly lead to Mary's death, Ward LJ classified her as not

¹¹ See, for example, Suzanne Uniacke, "Was Mary's Death Murder?" (2001) 9 *Medical Law Review*, 208-220. Uniacke systematically questions the grounds on which each Lord Justice reached the conclusion that Mary's death would not be murder, and appears unconvinced by all of them.

¹² Office for National Statistics, *Religion in England and Wales 2011* [Online] <http://www.ons.gov.uk/ons/rel/census/2011-census/key-statistics-for-local-authorities-in-england-and-wales/rpt-religion.html> (accessed 7 May 2015).

¹³ See Note 4, above.

“innocent” because her living was “parasitic” and she was killing Jodie “as surely as a slow drip of poison”. Walker LJ, however, described her as “a pitiful and innocent baby” who could not reasonably be deemed an “unjust aggressor”.

If one takes the word “innocent” to mean “doing no evil”¹⁴ - where the noun “evil” means: “In the widest sense: that which is the reverse of good; whatever is censurable, mischievous, or undesirable”¹⁵ - NP was not innocent, because her somatic support prolonged the time during which her unborn child must suffer distress before its inevitable death. Similarly, Ward LJ’s assertion about Mary must be right: her life deprived Jodie of the chance of a life that was expected to be close to normal in its duration and quality. The post-*Bland*¹⁶ joint statement by Catholic and Anglican archbishops can be interpreted as permitting taking the life of a non-innocent person, but it is unclear whether Catholic doctrine, which asserts “the inalienable right to life of every innocent human individual”¹⁷, impliedly includes that corollary.

If, on the other hand, “innocent” means “free from moral sin”¹⁸, NP and Mary were wholly innocent, in that the danger they each posed to another person’s life was not of their own making. Catholic doctrine - and the law of England and Wales - expressly prohibits the taking of such lives. In *PP*, NP was described as being dead, so the cessation of her artificial ventilation could not reasonably be described as terminating her life; the principal life considered by the court was that of her child. The same cannot be said for Mary: she was alive, and the operation to sever the artery that she shared with Jodie undoubtedly brought forward the moment of her death. This act was, as the Archbishop of Westminster said, directly contrary to Catholic doctrine, so it clearly demonstrates that legal principle prevailed over religious considerations.

4. Conclusion

PP v HSE is distressing to read and involves unusual circumstances. It is almost inevitable, however, that similar circumstances will arise in the future, so it is appropriate to conclude by reflecting briefly on the implications of this decision for future cases.

The Irish common law system includes the doctrine of *stare decisis*, which means that the High Court’s decision will influence any future decisions on similar facts. The judgment in *PP*, under the heading “Assessment of the evidence and findings of fact” states: “This case turns on its own particular facts which are centred entirely on whether the unborn child can survive at all.” Despite this judicial *caveat*, it has been described as “inevitable” that *PP* will be used as a guide to the interpretation of the Article 40.3.3 of the Constitution of Ireland¹⁹.

In *Re A*, Ward LJ expressly stated that the decision was confined to the “unique” circumstances of the case, which had three features: that it was impossible to preserve X’s life without killing Y, that Y’s continued existence would rapidly cause X’s death, and that X was, but Y could never be, capable of living an independent life. The adjective is

¹⁴ Oxford University Press, *The Oxford English Dictionary* (2015) [Online] <http://www.oed.com/> (accessed 7 May 2015).

¹⁵ *Ibid.*

¹⁶ See above, note 9.

¹⁷ Libreria Editrice Vaticana, *Catechism of the Catholic Church* (1993) [English version online] http://www.vatican.va/archive/ENG0015/_INDEX.HTM (accessed 6 May 2015), para 2273.

¹⁸ Oxford University Press, *The Oxford English Dictionary* (2015) [Online] <http://www.oed.com/> (accessed 7/5/15).

¹⁹ Michaela Herron and Kevin Power, “A matter of life and death” (2015) 109 (1) *Law Society Gazette* (www.gazette.ie) at 24-27.

inappropriately strong, because it is perfectly possible to imagine these features applying in future cases involving either conjoined twins or pregnancy. The judgment remains prominent in English law, suggesting that judicial attempts to limit its influence were ineffective.

The Irish High Court was subordinate only to the Irish Supreme Court until 28 October 2014, when the Irish Court of Appeal was established²⁰. *PP* was therefore decided by a court whose status had recently been reduced from that of the court that had decided *Re A*, but - like *Re A* - its facts meant that it received a great deal of press coverage and attracted a high level of public interest. It is likely that, despite attempts to limit its legal effect, *PP* will be closely examined in, and influential on, future Irish cases involving a foetus's right to life.

²⁰ The Courts Service of Ireland, *The Courts* (homepage) (2015) [Online] <http://www.courts.ie/courts.ie/library3.nsf/pagecurrent/5E9C21E72309A7D280257D7F0045A86A?opendocument&l=en> (accessed 23 June 2015).