

## Judith Lumley Centre

### **Episiotomy and Consent**

Dr Rhonda Tombros

Honorary Research Fellow

Judith Lumley Centre, School of Nursing and Midwifery

27 June 2014

# Non-consensual episiotomy

- Why does it matter?
- What happened?
- European Court of Human Rights (ECtHR) claim
- Potential human rights claims in Australia
- Potential civil claims in Australia

# Why does this topic matter?

- Focus on the role of control of decision/autonomy
- Autonomy is one of the most highly prized values in a modern liberal society
- On principle, an interference with personal autonomy does not depend on whether the procedure is considered 'minor' or 'major' (although whether the interference is legally justified may do)

# What is “personal autonomy”?

- Ability of a person to make their own decisions
- One of the fundamental principles of medical ethics
- Foundation of:
  - concept of “informed consent”
  - requirement to obtain consent to treatment
  - right to refuse medical treatment
- Ethical duty of practitioner to respect patient autonomy can sometimes conflict with ethical duty of beneficence

# **Changing childbirth: lessons from an Australian survey of 1336 women**

**Stephanie Brown** *Research Fellow*, **Judith Lumley** *Professor*

*Centre for the Study of Mothers' and Children's Health, La Trobe University, Melbourne, Australia*

“Over 96% of women stated they did want to be given a say in what happened during their labour and birth. The extent to which women perceived themselves as having a say in decision-making was directly related to their overall rating of intrapartum care ...”

RESEARCH ARTICLE

Open Access

# Birth control: to what extent do women report being informed and involved in decisions about pregnancy and birth procedures?

Rachel Thompson<sup>1,2</sup> and Yvette D Miller<sup>1,3\*</sup>

- 3,530 Queensland women who had baby in 2010 surveyed
- Of the 424 women (19% vaginal births) who experienced episiotomy:
  - 26% reported being neither informed nor consulted
  - 8% reported being both informed and making the decision
- Concluded that: there is an urgent need for interventions that facilitate information provision and consumer involvement in decision-making about perinatal procedures, especially those performed within intrapartum care

# The Facts – 1/2

- Primiparous, nearly 4kg baby, second stage of nearly 2 hours, no evidence of foetal distress
- Doctor recommended ventouse extraction with episiotomy
- D consented to ventouse but not to episiotomy
- Doctor noted tight perineum and warned that D risked a severe tear if she didn't cut episiotomy
- D replied she would rather tear than be cut
- Despite D's objection, doctor cut episiotomy
- D repeated that she didn't want an episiotomy
- Doctor extended episiotomy
- Baby delivered by ventouse, Apgar's = 9 and 10

## The Facts – 2/2

- D suffered psychological trauma, disfigured genitalia, ongoing problems with sexual relations and retained a sense of violation
- D initiated criminal proceedings in Italy against the doctor on the basis that she had not consented to the episiotomy AND that it was not necessary to prevent imminent risks (no duty to save life arose)
- Expert witness gave evidence that the episiotomy was necessary to complete the birth and to prevent D tearing, didn't do significant damage to D and was in conformance with scientific literature
- Investigator did not address issue of consent and dismissed proceedings
- D brought a claim against Italy in the ECtHR
- Claimed breach of her right to choose the circumstances in which she gave birth



# European Convention on the protection of Human Rights and Fundamental Freedoms (**ECHR**)

ECHR rights held by individuals against states

## Article 8(1)

“Everyone has the right to respect for his private and family life, his home and his correspondence”

“The Court considers that the decision to impose treatment on the first applicant in defiance of the ...objections gave rise to an interference with the ... right to respect for his private life...”

*(Glass v United Kingdom (App no. 61827/00) 9 March 2004)*

# Article 8 and Reproductive Rights

- Access to midwifery care for homebirth
- Access to lawful abortion
- Non-consensual sterilization
- Access to health information
- Donation of embryo's for scientific research
- Parental rights and gestational surrogacy
- Access to fertility treatment

## *Ternovszky v Hungary* (App No. 67545/09) 14 March 2011

- Access to midwifery care for homebirth
- Article 8(1) encompasses
  - the right to personal autonomy
  - the right concerning the decision to become a parent incorporates the right of choosing the circumstances of becoming a parent
- A woman has a right to determine the circumstances in which she gives birth

# ECHR – potential limitations

- Most rights are ‘qualified’:
  - Article 8(2) allows breaches of Article 8(1) that are based in law and justifiable on democratic and proportionality grounds
- Procedural hurdles:
  - Exhaust domestic remedies (or demonstrate that it would be futile to pursue legal action domestically)
  - Personally affected
  - Violation must be continuing at the time of the communication
- Often relief is declaratory, although sometimes damages are awarded

# Charter of Rights and Responsibilities Act 2006 (Vic)

- Section 13 protects the right to privacy

“The fundamental values which the right to privacy expresses are the physical and psychological integrity, the individual and social identity and the autonomy and inherent dignity of the person”

*(Kracke v Mental Health Review Board (2009) VCAT 646, 620)*

- Section 10:

“A person must not be ... (c) subjected to medical or scientific experimentation or treatment without his or her full, free and informed consent”

- No specific cause of action for breach of rights in Victoria (cf ACT)
- Corresponding duties only apply to public authorities

- <http://www.humanrights.gov.au/>
- Investigates alleged infringements by Commonwealth of:
  - anti-discrimination laws (including pregnancy and breastfeeding)
  - *International Covenant on Civil and Political Rights, 1966*
    - Article 7 (right to protection from cruel, inhuman or degrading treatment)
    - Article 9 (right to liberty and security of person)
    - Article 17 (right to privacy)
- **Most complaints relate to immigration, not healthcare**

# Health Services Conciliation and Review Act 1987 (Vic)

- A guiding principle to be promoted in the Victorian healthcare system is:

“an environment of informed choice in accepting or refusing treatment”
- If a health service acts unreasonably by not following the guiding principles, a complaint may be made to the Health Services Commissioner

# What is “informed consent”?

- Elements of informed consent:
  - Threshold: competence and voluntariness
  - Information: disclosure, recommendation, understanding
  - Consent: decision, authorisation

(Beauchamp & Childress, *Informed Consent: Legal Theory and Clinical Practice* (2<sup>nd</sup> ed, Oxford University Press, 2001)

- Issues with information and issues with consent potentially **lead down different legal paths**



## Right to refuse consent to medical treatment

“Competent adults have the right to accept or refuse medical treatment and performing an operation without consent constitutes assault.”

*Department of Health & Community Services v JWB & SMB*  
(*"Marion's Case"*) (1992) 175 CLR 218

# Consent in pregnancy, labour and birth

“[A] competent woman ... may ... chose not to have medical intervention, **even though ... the consequence may be the death ... of the child ... or her own death.**”

*Re MB* [1997] EWCA Civ 3093

**“A pregnant woman has the same rights to privacy, to bodily integrity, and to make her own informed, autonomous health care decisions as any competent individual.”**

*AMA, Position Statement on Maternal Decision Making (2013)*

# Valid Consent

- The woman has **capacity** to make the decision in question
- Irrationality or unreasonableness do not amount to incapacity
- The decision is made **freely** and voluntarily
- The consent **covers the act** to be performed
- Consent to ventouse extraction does not cover episiotomy

## Consent is not implied by admission to hospital

“By going into hospital [the patient] does not consent to such surgical treatment as the doctor may consider necessary. By going into hospital he does not give up or waive his right of absolute security of the person ...”

*(Stoffberg v Elliott 1922 CPD 148)*

SECTIONS HOME SEARCH The New York Times SUBSCR

Rangel Fends Off Espaillat in House Primary Race For Espaillat, a Strong Start Marred by Missteps Former White House Aide Wins G.O.P. Congressional Primary in New York Breakaway Faction to Rejoin Fellow Democrats in New York Senate

Sotheby's INTERNATIONAL REALTY PROPERTIES

N.Y. / REGION

***Mother Accuses Doctors of Forcing a C-Section and Files Suit***

By ANEMONA HARTOCOLLIS MAY 16, 2014



“I have decided to override her refusal to have a C-section”

# Medical Treatment Act 1988 (Vic)

- Clarifies the common law right refuse treatment
- Gives protection from professional misconduct, criminal or civil liability to the medical practitioner who acts:
  - in good faith and
  - in accordance with the expressed wish of the fully informed, competent person refusing treatment
- Offence of **medical trespass** where a medical practitioner carries out or continues a procedure or treatment that a competent person refuses

# Potential civil legal action

- Potential claim against doctor or midwife in trespass
  - Claimant shows force was applied to her body
  - Consent is a defence
  - Irrelevant whether **episiotomy was in best interests**
  - Damages for direct consequences (even unlikely)
- Potential claim in negligence for failure to obtain consent
- Trespass claim better captures the woman's sense of violation than a negligence claim
- "I don't care if it was "appropriate". I said no. That's violence. I felt raped. That is my point."

# No Consent?

- A competent woman may refuse any medical procedure
- If woman lacks competence and if no emergency, seek consent from substitute decision-maker (agent, guardian)
- Document information provided and refusal
- Duty to provide care to the best of your ability in the circumstances (within the boundaries of consent)
- No duty to provide treatment you believe is clinically inappropriate
- Duty to provide reasonable assistance in an emergency



# Emergency Exception

- Defence to an action in trespass if reasonably and honestly believes that treatment necessary to avert **serious and imminent threat** to woman's life or mental health
- Applies when:
  - woman is **unable to consent** due to unconsciousness or incapacity
  - time is of the essence
  - it is reasonable to expect that the woman would consent
- Partially based on doctrine of implied consent
- Probably not applicable if woman had previously explicitly refused the treatment in question (*In re F* [1990] 2 AC 1)
- Query whether refusal of treatment can later be overridden by a guardian  
(*Qumsieh v Guardian and Administration Board and Lance Pilgrim* [1998] VSCA 45)
- Treatment to avert emergency in accordance with accepted practice

# Summary

- Consent to medical treatment, however minor, is an important expression of personal autonomy
- Legal issues related to lack of consent spans civil, criminal and public law and professional regulation
- Human rights law captures nuances of decision-making and personal autonomy well
- Human rights law affects relations between public authorities and individuals
- Claims can be made in civil law for non-consensual treatment
- The law provides procedures to be followed if a woman lacks capacity to consent

**Thank you**

