



Abortion decisions by courts and tribunals for women with impaired capacity: Compliance with human rights

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The 'right to decide'



CAPACITY = an adult understands information relevant to a decision and communicates the decision in some way.

The cases – post-decriminalisation

Case	Brief facts	Outcome
BSE [2020] QCAT 494	19-year-old, 15 weeks, in mental health unit.	Capacity
GKB [2020] NSWCATGD 99	18-year-old	Capacity
NGN [2020] NSWCATGD 100	17-year-old, 10 weeks, Fragile X diagnosis, Iraqi refugee	Capacity
LKZ [2023] QCAT 315	28-year-old – acute onset impairment	Impaired capacity - Authorised termination
C [2024] WASAT 50	34-year-old, 10 weeks', schizophrenia and polysubstance use disorder.	Capacity
FXB [2024] NSWCATGD 14	30-year-old Aboriginal woman, 19 weeks, in mental health unit	Capacity

BSE – Qld Civil and Administrative Tribunal

Facts

- 15 weeks, in a ‘short stay’ mental health unit.
- Psychiatrist assessed her as having capacity to consent to termination. Capacity fluctuated but could “weigh up the pros and cons of her decisions, including personal matters and complex ones...”.
- Further, the doctor opined that she could understand the risks and benefits.

Tribunal

- BSE lacked capacity for accommodation and services but those areas required ongoing decision-making with significant consequences.
- Cf. abortion is a one-off decision and could be described as “black and white” even though an “extremely serious decision”.
- Had capacity to consent to the termination:

...understands the nature and effect of the decision. She communicated very clearly to the Tribunal her views and wishes, and the Tribunal is satisfied that she was not subject to undue influence and that she could make this decision freely and voluntarily.

On the particular facts of BSE, a lower level of capacity was required for making a decision on abortion than for other personal matters, for which a guardian had been appointed

C - WA State Administrative Tribunal

Facts

- AB, schizophrenia, polysubstance use disorder, AB had for some months been in hospital for treatment of her
- Symptoms had greatly improved.
- Had already been found to lack capacity to make decisions on health care and services, and the Public Advocate had been appointed her guardian, and an administrator for financial decisions.

Tribunal

- *‘...we do not consider that a person needs to be able to demonstrate a sophisticated medical knowledge in order to be able to make a reasonable judgment in respect of a decision as to whether to have an abortion. We think it is sufficient if they are capable of understanding the main elements of the procedure, and its risks and consequences, rather than the technical or exact details of the treatment or its effect.’*
- *“If anything, her reasons suggested to us that AB had taken a perfectly rational approach in deciding whether an abortion is the appropriate choice for her.”*

Once again, a lower level of capacity was found to be required to consent to an abortion than to make decisions on other personal matters. The tribunal considered the cogency of her reasons for wanting the abortion, and whether she had a general understanding of the nature of the procedure.

FXB – NSW Civil and Administrative Tribunal

Facts

- Aboriginal woman, 19 weeks, involuntary mental health unit.'
- consistently said she wanted a termination.
- Psychiatrists were of the view she lacked capacity to consent, with illogical reasoning for the termination.
- Contrary view held by two obstetrician-gynaecologists, that she had a full understanding of the fact that she was pregnant and of the consequences of terminating her pregnancy.

Tribunal

- Found she had capacity to consent to the termination.
- She lacked interest in the baby or a desire to be pregnant.
- Focused on the negative impact of pregnancy on lower back pain and getting discharged from hospital.
- Accepted evidence of the obstetrician / gynaecologists that she understood the different procedures, the risks and benefits.
- So, despite the thought disorder reported by the psychiatrists, FXB had capacity to consent to an abortion.

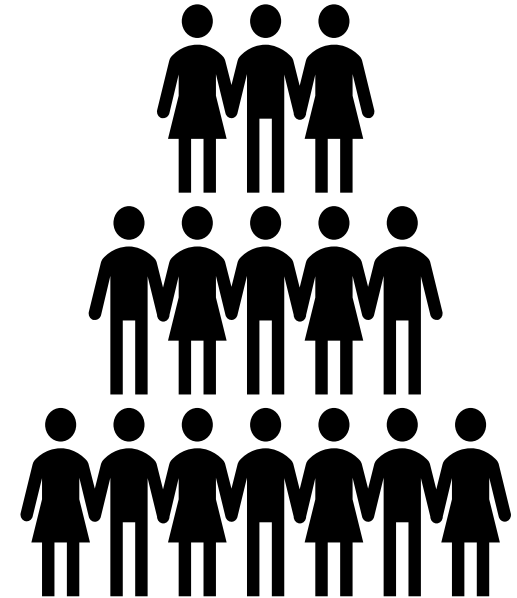
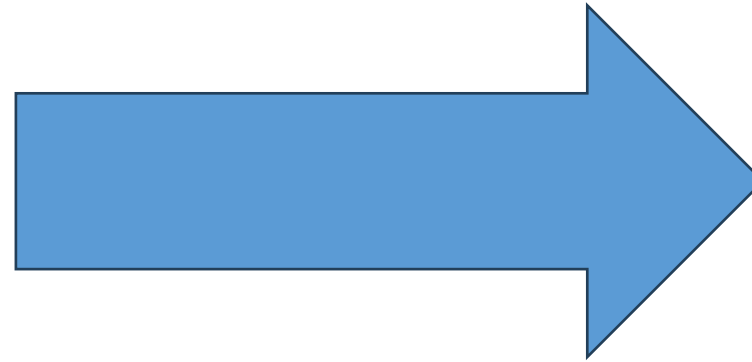
Based on the tribunal's ultimate dismissal of the psychiatric opinion, the tribunal set a relatively low bar for capacity to consent to an abortion

What does this say about women's right to choose? And the ethics of abortion?

Are reasons for the decisions on abortion –as re-articulated or divined by the tribunal or by the woman herself - formulated to meet the expectations and requirements of medico-legal institutions?

Can their decisions be better explained under a framework of care ethics?

Care ethics



Ethically justified or maybe ethically compelled to end or avoid an uncaring relationship – in having an abortion. And society is ethically compelled to allow us.



The End

References

- Gilligan, Carol, *Psychological Theory and Women's Development*. (Harvard UP, 1993)
- Held, Virginia, *The Ethics of Care* (Oxford University Press, 2006)
- Herring, Jonathan, 'Feminism, Ethics of Care, and Medical Ethics' in: *Philosophical Foundations of Medical Law*. M Phillips, Thana C de Campos, and Jonathan Herring (eds), (Oxford University Press 2019).