

Annie Nevala is a First Class Honours graduate of the BCL (International) Programme at University College Cork, School of Law. She is currently completing a Master of Science in Mental Health, Ethics & Law at King's College London.

Legal Lacuna in Irish Law for Pregnant Women Not Deemed ‘Properly Suicidal’

Annie Nevala

17 October 2017

Dear Editor,

In June 2017, the Child Care Law Reporting Project¹ reported a case concerning a young pregnant girl who came before the District Court in 2016.² The girl concerned had no wish to keep her baby and was therefore seeking to have an abortion. She had, in addition to her wishes to have an abortion, expressed suicidal ideation to her treating GP and as such she had been referred to a consultant psychiatrist for an evaluation.

Issues with suicidal ideation in cases concerning abortion are not unknown in Ireland. Most Irish people are all too familiar with the X-case from 1992,³ where it was held that Irish women have a right to abortion under Article 40.3.3 of the Constitution if there is a ‘real and substantial risk’ to their lives. This right does not exist if there is only a risk to the *health* of the woman and not to her life. The right does however include the risk of suicide.

The holdings in X are now included in statute via the 2013 Protection of Life During Pregnancy Act (PLDPA).⁴ Under section 9 of the Act it is lawful to carry out an abortion where three medical practitioners have certified, in good faith, that there is a ‘real and substantial risk’ of loss of the woman’s life by way of suicide if the abortion is not performed.⁵

In the instant case, the consultant psychiatrist found that the girl suffered from a mental disorder within the meaning of section 3 of the Mental Health Act 2001 (MHA).⁶ According to the psychiatrist, this mental disorder had no direct correlation with the pregnancy and was of the opinion that while the girl was at risk of suicide, this risk could be managed by treatment. The psychiatrist further held that a termination of the pregnancy would not be ‘the solution of all of the child’s problems’, indicating that the risk of suicide could not be fully averted by way

¹ Child Care Law Reporting Project, <<http://childlawproject.ie>> accessed 13 September 2017.

² Child Care Law Reporting Project, ‘Order detaining pregnant girl seeking abortion discharged’ <<https://www.childlawproject.ie/publications/order-detaining-pregnant-girl-seeking-abortion-discharged/>> accessed 13 September 2017.

³ *AG v X* [1992] 1 IR 1.

⁴ Protection of Life During Pregnancy Act (2013).

⁵ *AG v X* (n 3).

⁶ Mental Health Act 2001.

of an abortion.⁷ Based on this evaluation, involuntary admission proceedings commenced to have the girl detained.⁸

The initial order for detention was granted by the District Court, but quashed a few days later, as a result of an application from the girl's *Guardian ad Litem*. Upon request a second psychiatrist had at this stage been deployed to assess the girl. During this assessment, it was found that although the girl presented as being depressed, there was no evidence of a psychological disorder, nor was there evidence that she was not dealing with her depression well.⁹ It was also held that the girl was in no immediate danger of committing suicide.¹⁰

A consultant adolescent psychiatrist also gave evidence to the Court and submitted that while the young girl remained agitated and angry, she did not suffer from an acute mental disorder that warranted her detention.¹¹ Although there had been initial concerns of self-harm, such concerns were found to be primarily related to the distressing situation that the pregnancy gave rise to. Upon hearing this the new evidence, the Court quashed the initial order and the girl was discharged.

It is unclear whether the PLDPA was subsequently applied in the current case, but if applied, the facts of the case would suggest that this girl would not reach the threshold for a termination under the Act as she was held to not suffer from a real and substantial suicide risk. What in practice constitutes a 'real and substantial' risk to a woman's life in the context of suicide is however far from clear, which makes the situation somewhat of a guessing game.

The only guidance provided to practitioners on the matter is that of the Department of Health Guidance on the Act,¹² which only reiterates the test laid down in the PLDPA and focuses solely on the process of determining suicide risk.¹³ The document states that a suicidal woman can avail of an abortion if the assessing practitioners '[are] of the opinion' or of the 'reasonable opinion' that she satisfies the test.¹⁴ Yet this creates great uncertainty as to which situations

⁷ Child Care Law Reporting Project (n 2).

⁸ Mairead Enright, 'Ireland's Failing Abortion Law: Statutory Interpretation, Human Rights and the Detention of Pregnant Children' (*Human Rights in Ireland*, 13 June 2017) <<http://humanrights.ie/uncategorized/irelands-failing-abortion-law-statutory-interpretation-human-rights-and-the-detention-of-pregnant-children/>> accessed 12 September 2017.

⁹ Child Care Law Reporting Project (n 2)

¹⁰ *ibid.*

¹¹ *ibid.*

¹² Department of Health, 'Implementation of the Protection of Life during Pregnancy Act - Guidance Document for Health Practitioners' <<http://health.gov.ie/wp-content/uploads/2014/09/Guidance-Document-Final-September-2014.pdf>> accessed 23 June 2017.

¹³ *ibid.*

¹⁴ *ibid.*

will satisfy the requirements under the PLDPA, since the decision to grant the access to an abortion primarily depend on subjective assessments.¹⁵

Although the girl in the present case perhaps failed to reach the threshold for an abortion under the Act, one may argue that travelling abroad for a termination could have a positive effect on her mental health.¹⁶ A wish to not keep her baby was, after all, one major reason as to why the girl presented with depressive symptoms. It is in my mind however, unreasonable to presume that this girl, even though not suicidal within the meaning of Irish abortion-law ought to be forced to avail of this ‘second option’.

Even though travelling abroad could effectively improve her mental health, the presumption of such option wholly ignores the nature of mental illness and the way it affects someone’s physical and cognitive abilities. Yet, it is precisely this presumption that Irish law rests on when it comes to the ‘availability’ of an abortion where the threat to a woman’s life is not ‘serious’ enough. In this way, the law effectively ignores matters relating to the mental *health* of woman and any women that do not reach the undefined threshold for suicidal ideation are left with only two options, either to carry on with the pregnancy or to put themselves on a plane. To me, it seems wholly unreasonable to presume that a pregnant woman’s mental health would improve by travelling and that she in fact ought to travel in order to ‘self-treat’ her depressive and sometimes suicidal symptoms.

Is mise le meas,
Annie Nevala

¹⁵ Kitty Holland, ‘Accessing abortion is a “lottery” under Irish rules - psychiatrist’ *The Irish Times* (Dublin, 12 June 2017) <<https://www.irishtimes.com/news/social-affairs/accessing-abortion-is-a-lottery-under-irish-rules-psychiatrist-1.3116997>> accessed 13 September 2017.

¹⁶ Enright (n 8)