4.2.2 Abortion and the Mature Minor

Erin L. Nelson, BScPT, LLB, LLM, JSD

Educational Objectives

1. To appreciate the legal and ethical issues around consent to abortion in the case of minors.
2. To understand the legal basis of the mature minor doctrine.
3. To appreciate the legal and ethical implications of the mature minor doctrine.

Case

Casey is a 14-year-old female patient who has been referred to an abortion provider by her family physician. Casey says that she is pregnant, having taken a home pregnancy test. She explains that she was at a party with some friends, that she had a few alcoholic drinks and that she had sexual intercourse with a boy she does not know well. Based on what she says about the timing of her last menstrual period, the physician determines that Casey is 7 weeks pregnant. Casey is very frightened, particularly that her family and friends will find out about her pregnancy. She feels that abortion is her only option. She also insists that the physician keep all information about the pregnancy and abortion confidential. Casey tells the physician that her family is Catholic and her parents are strongly opposed to abortion under all circumstances. When asked about her feelings as to the religious and ethical implications of having an abortion, Casey says “I don’t care about any of that right now. All I want to do is have an abortion and forget that this ever happened. My parents can’t find out about this, no matter what.”

Questions

1. Can Casey provide valid consent to the abortion procedure?
2. What must Casey be capable of understanding in order to be considered a mature minor?
3. If the physician determines that Casey is a mature minor and can provide consent, does she also need to seek consent from Casey's parents, or from the “father”? Must the physician inform Casey's parents of her pregnancy?
4. If the physician is not required to seek Casey's parents' consent, may she inform them of the pregnancy and Casey's wish for an abortion? Are there any exceptions to patient confidentiality that require consideration here?

(Also see case 1.5.2 "Decision-Making by Minors.")

Discussion

Q1. Can Casey provide valid consent to the abortion procedure?

Canadian law stipulates that no medical treatment can be provided without the consent of the patient. There are a number of elements that must be present in order for consent to be considered valid. Consent must be provided voluntarily, by a person capable of providing consent, and it must refer to the treatment and provider who will perform or undertake the treatment. Consent must also be informed, meaning that certain issues must be discussed with the patient prior to consent being obtained, such as material, special or unusual risks of the treatment, alternatives to treatment (and their risks), the likely prognosis if no treatment is undertaken and the success rates of different methods of treatment. The ethical principle of respect for autonomy, at least in part, underpins the legal and moral right to informed consent.

The primary consent issue in the presented case is Casey's capacity to consent. While there is no “age of consent” to medical treatment, younger minors, in general, lack the capacity to provide legally valid consent to medical treatment. Instead, the parents or guardians of the minor are the decision-makers. The courts have recognized, however, that adolescents are persons with evolving capacity and that they can be sufficiently mature to make some or all of their own medical decisions. “Mature” in this context is a term with specific legal meaning. Individual adolescents who are considered “mature minors” are capable of providing consent to treatment. Thus, if Casey is considered a “mature minor,” she is indeed capable of providing valid consent to the abortion procedure. In some
provinces, an age of presumed capacity is set in legislation; in others, there is no set age. In these jurisdictions, capacity is determined on a case-by-case basis.

The complexity of consent and capacity from a legal standpoint reflects the intricate ethical considerations at play. In the context of adolescents who are faced with making health care decisions, the ethical principles of autonomy and beneficence/non-maleficence are of particular significance. As has been noted, the capacity to make one's own health care decisions evolves gradually. The ethical treatment of adolescents requires that physicians recognize the emerging autonomy of their patients as well as acknowledge the need to act in their patients' best interests and protect them from harm. If Casey is autonomous and we fail to treat her as such then we risk doing harm. By the same token, if we err in concluding that Casey has the requisite capacity to make her own decisions then we will fail to protect her best interests.

In addition to the multifaceted nature of the ethical concerns involved, the factual determination of whether an adolescent is a mature minor can be challenging. If Casey tells her physician that she is seeking an abortion because she knows that she is not capable of raising a child at this time in her life, this suggests that she is capable of making this decision for herself. By contrast, if the reason she gives for seeking an abortion is that she is experiencing some minor back pain and nausea, this might lead her physician to a different conclusion about her capacity to understand the nature and consequences of the health care decision she is seeking to make.

Capacity is a functional rather than a global assessment. This means that capacity is decision-specific. It need not be decided that Casey is capable of making all medical decisions for herself in order for her to be considered a mature minor in respect of the decision to terminate her pregnancy. This can create uncertainty for physicians who are attempting to ascertain whether a patient is a mature minor. However, it also permits individually tailored decisions that focus on each individual patient.

Recent cases have highlighted the tension between the competing ethical values of autonomy and beneficence in illustrating the complex interaction between the mature minor principle and child welfare legislation. For further reading on this point, see *BH (Next friend of) v. Alberta (Director of Child Welfare)*, [2002] AJ No. 518 (QL), 2002 ABQB 371; *CU (Next friend of) v. McGonigle*, [2000] AJ No. 1067 (QL), (2000) 273 AR 106 (QB).

Q2. What must Casey be capable of understanding in order to be considered a mature minor?

From a legal perspective, Casey must be capable of understanding the nature and consequences of the treatment or procedure. She must, therefore, be able to understand the physical nature of the abortion procedure as well as the fact that the procedure will cause the death of the fetus and end the pregnancy.

There are few reported cases in Canada that speak to the question of what a minor must be capable of understanding in order to be considered a mature minor. One Alberta Court of Appeal case considered the question of whether a young woman must be capable of understanding the ethical issues around abortion.¹ The Court held as follows:

“The law in Alberta is that a surgeon may proceed with a surgical procedure immune from suits for assault if she or he has informed consent from the patient. That test was applied by the learned trial judge, and he found on the evidence before him that this child was capable of giving informed consent and had done so. Without more, that is an end to the matter.”

“It is argued before us today that informed consent means consent after consideration of issues like the ethics of abortion and the ethics of obligation by children to parents. It may be, as Lord Fraser has said in *Gillick v. West Norfolk & Wisbech Area Health Authority*, [1985] 3 WLR 830, [1985] 3 All ER 402 (HL), that doctors have an ethical obligation in circumstances like this to discuss issues of that sort with young patients. If so, the doctor would account to the College of Physicians and Surgeons for the performance of that obligation. That is not the issue before us today. Rather, the issue is whether these issues relate to the defence of consent to assault. In our view, they do not.”

This case is generally taken to imply that a minor seeking an abortion need not show that she is capable of fully appreciating all of the ethical or moral implications of the procedure in order to have capacity to provide legally valid consent.

Q3. If her physician determines that Casey is a mature minor and can provide consent, does she also need to seek consent from Casey's parents, or from the ‘father’? Must the physician inform Casey’s parents of her pregnancy?
In legal terms, if Casey is a mature minor then her consent to the procedure is both necessary and sufficient, just as in the case of an adult patient. In other words, treatment cannot proceed without her consent, and no-one else need provide consent. There is also no requirement that either Casey's parents or the “father” be notified of the fact that Casey is pregnant and seeking to have an abortion.

From an ethical perspective, there may be good reasons to encourage Casey to involve her parents in her decision. Relevant ethical considerations include respect for the family as a moral unit and beneficence. Although she would not agree, it might be in Casey's best interests to include her family in her decision-making process. They might well be more supportive than she thinks and, even if Casey's decision is ultimately the same as it would have been without involving her parents, having their support and understanding could go a long way toward helping Casey. This is particularly the case if she has ongoing psychological and/or emotional issues to resolve after the pregnancy is terminated. Casey might also come to value the opportunity to speak to those closest to her about what is probably a difficult decision, especially if she has mixed feelings about abortion due to her religious upbringing.

There are also reasons to be cautious in suggesting that Casey speak to her parents about her pregnancy, as she might feel as though she is being required to inform them. If she perceives that informing her parents is a condition of receiving care, she may hesitate to seek appropriate reproductive health care, both now and in the future. It is also possible that Casey's parents would not support her decision to end the pregnancy, but instead might pressure her to have the baby, as this would be more in keeping with their religious beliefs.

Q4. If the physician is not required to seek Casey's parents' consent, may she inform them of the pregnancy and Casey's wish for an abortion? Are there any exceptions to patient confidentiality that require consideration here?

Legally speaking, if Casey is a mature minor then she is entitled to be treated as an adult patient. This not only means that her consent to treatment is necessary and sufficient, but that disclosure of her health information also requires her consent.

What if Casey is not, in her physician's view, a mature minor, but she nevertheless insists upon keeping the information about her pregnancy from her parents? There is no clear legal guidance on this point. Some commentators argue that a minor is entitled to insist upon confidentiality even if the minor is not decisionally capable, while others assert that health care providers may (or even must) disclose health information about the minor to his/her parents where the information is important to the minor's well-being.

There are, of course, situations in which health information can or must be disclosed even without the consent of the patient; generally, these involve reporting such things as communicable diseases and suspicions of child abuse. So, if as part of the physician's care of Casey, she is tested for sexually transmitted infections and she tests positive for one or more reportable infections, the physician would have no alternative but to notify the public health authorities. Health information laws vary from province to province, and providers need to be aware of the specific legal rules in the jurisdiction in which they practice.

As with the other questions relevant to this case, ethical values are in tension. Recognizing autonomy and shielding the patient from harm are the two chief considerations for the physician.

References


Further Reading

- CGillick v West Norfolk and Wisbech Area Health Authority and another, [1986] 1 AC 112, [1985] 3 All ER 402 (UK HL).