When a mother's rights clash with the needs of her unborn child

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The recent report of case of a pregnant woman who refused life-saving cancer treatment while heavily pregnant has once again ignited debate within the community about how we should resolve conflicts between a mother's rights and those of her unborn child.

The facts of the case, which occurred in 2009 but was reported in the Journal of Internal Medicine this month, were that a young woman presented to hospital with acute promyelocytic leukaemia and pre-eclampsia, requiring urgent treatment. Her doctors recommended that she receive chemotherapy combined with blood products so that her body could tolerate the cancer treatment, but because of her Jehovah's Witness faith, she refused. She remained steadfast in this decision even though she was told she might die as a result. To further complicate matters, she was nearly 27 weeks pregnant at the time. As her illness progressed her fetus died in utero, and the woman herself died from multiple organ failure just short of two weeks after her admission.

The controversy which has emerged centres on the rights of women to refuse medical treatment when to do so will endanger the lives of their fetuses.

From a legal point of view this case engages two well-established principles: the first is that an adult who has mental capacity, may refuse medical treatment for any reason whatsoever, even if the consequences of that decision is that she will die. The courts are clear that all medical treatment is optional, and when it comes to decisions about our own life and health, our wishes will be respected.

The second is that a fetus is not a legal person with rights of its own, until it is born. This is not to say that the law to does not protect fetuses at all. Abortion is still a criminal offence in NSW and it is also grievous bodily harm to destroy the fetus of a pregnant woman, whether or not the woman herself is injured – an offence punishable with imprisonment for up to 20 years. Children can also sue people who have caused them injury in the womb after they are born. However it does mean that while a fetus is still in the belly of its mother, the mother's right to make decisions about her own body will prevail.

In the wake of the tragedy of the preventable death of a young woman and her unborn child, some have suggested that we would be better off as a community if the law required that mothers should be forced to have medical treatment, particularly as pregnancy advances. Some might think that women should be required to make certain choices, or refrain from them more broadly, wherever a fetuses health might suffer. But all of these suggestions are bound for unintended consequences – and they all deserve careful thought.
While the needs of fetuses and their mothers usually coincide, it is not uncommon for conflicts arise, such as the mother bring diagnosed with a life-threatening condition, the treatments for which are likely to hurt or even kill her fetus. As the law stands we are permitted to decide to save ourselves, with all the bitterness that might entail, and doctors who act to save a woman in an emergency need not concern themselves with fear of prosecution if she happens to be pregnant.

But we often assert out interests in more subtle ways. For now we cannot be forcibly restrained from smoking, drinking, having sex or exercising while pregnant, even though all of those activities have been implicated as real or potential dangers to our fetuses.

Women and their doctors would face potential liability in all of these situations if fetuses were themselves legal persons with enforceable rights. And if women's rights to refuse treatment were curtailed in the case of pregnancy, women could be prevented from the refusing burdensome treatment – life support, chemotherapy and so on, no matter how sick we are or how strongly we and our loved ones hold our personal desire to be allowed live or die on our own terms.

Just this sort of situation was considered by an Irish court last year when a father won the right to have his pregnant daughter’s life support switched off, to prevent her being kept alive with invasive care, solely as an incubator for her fetus. The treatment on the woman, who was brain dead, was acutely distressing to her family - including her other children - and was initiated because the Irish constitution imposes an obligation on doctors to protect the lives of foetuses.

Law cannot prevent tragedy. And no one can fail to be moved by these most difficult of medical dilemmas. But for now we have accepted that a woman’s right to refuse treatment will be the deciding factor in a choice between evils.