Sterilisation of minors: potential liability of doctors

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Are doctors who perform sterilisations without court or tribunal authorisation exposing themselves to potential legal liability?

The High Court of Australia ruled in 1992 that it is unlawful for a doctor to perform a nontherapeutic sterilisation procedure on an intellectually disabled minor without first obtaining authorisation from a court or guardianship tribunal, as well as from the patient's parent(s) (*Marion's case*).[1] This was reinforced by an amendment to the Medicare Benefits Schedule in 1998, stating that sterilisation without court or tribunal authority is unlawful if it is not 'a byproduct of surgery appropriately carried out to treat malfunction or disease'.

Since 1992, the number of sterilisations performed each year in Australia has declined significantly. However, some sterilisations are apparently still being performed without court or tribunal authorisation. Are these doctors exposing themselves to potential legal liability?

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Incidence of nontherapeutic sterilisation of minors

Between 1992, the year of the High Court's ruling, and 1997, there were apparently about 200 sterilisation procedures performed each year in Australia, according to a study by consultant gynaecologist at the Royal Children's Hospital and the Centre for Adolescent Health in Melbourne, Dr Sonia Grover, and her associate Susan Brady.[2] Their study was based on Medicare claims. They concluded that most of these procedures would have involved intellectually disabled girls and would have been nontherapeutic, since medically indicated procedures resulting in sterilisation are rare. According to Dr Grover, medically indicated procedures include hysterectomy for malignancy, massive postpartum haemorrhage in a young mother and congenital abnormalities associated with an absent cervix, rudimentary horn of a bicornuate uterus or torsion of the uterus (personal communication, Dr Grover).

The number of sterilisations in Australia has been considerably reduced since 1997 but some are still being done (personal communication, Dr Grover). This is attributed to the legal requirement that court or tribunal authority must be obtained for nontherapeutic sterilisation, and the promotion of this requirement to doctors, especially by the Royal Australian College of Obstetricians and Gynaecologists. The Federal Attorney-General has also publicised this requirement in an open letter to the Australian medical profession.[3] The numbers of sterilisations being authorised and performed are further discussed, along with other issues, in an update to Grover and Brady's 1997 report.[4]

Doctors' liability for 'unlawful' sterilisation

With regard to the small number of nontherapeutic sterilisations that are apparently still being performed without court or tribunal authority, issues arise concerning the potential legal implications for the doctors performing them. The High Court of Australia stated unequivocally in *Marion's case* that it is not lawful for a doctor to sterilise a girl under the age of 18 years with the consent of the parents alone: an application must be made to a court or tribunal for authorisation. Usually this application would be made to the Family Court of Australia, which has jurisdiction until the girl reaches the age of 18 years. In Victoria, the Victorian Civil and Administrative Tribunal has jurisdiction when the girl is 18 years or over (see the Guardianship and Administration Act 1986 (Vic) s 39 and definition of 'special procedure' in s 3: 'any procedure that is intended, or is reasonably likely, to have the effect of rendering permanently infertile the person on whom it is carried out').[5] In NSW, the Guardianship Tribunal has jurisdiction when the girl is 16 years or over. The provisions vary in the other States and Territories, according to their specific guardianship legislation. The Family Court has published guidelines on its website stating the matters that it will consider in approving an application for sterilisation.[6] These include whether the procedure is in the best interests of the child, whether there is any satisfactory alternative and the attitudes of the child and their parents, or carers. Legal assistance is granted for separate representation of the child and there is no means

test for that representation; the parents may get legal aid to represent themselves but only on the basis of a means test.[4]

If a court or tribunal has not approved the procedure, there is no lawful authority for it and the procedure may be a civil trespass (treatment without consent) for which damages might be awarded. It may even be a criminal trespass, for which the doctor might be prosecuted. If a court finds that the treatment does constitute a trespass, it is irrelevant that the doctor acted in what he or she believed to be the patient's 'best interests', at the request of the patient's parents and with their consent. Liability may be established by proving that the procedure was performed and that there was no valid legal consent.

That does not mean, however, that doctors performing 'unlawful' sterilisations will be sued or prosecuted, or found liable, or ordered to pay compensation. The matter must first be raised in the courts. If the parents have initiated and consented to the procedure, who will commence litigation? It is true that a third party who becomes aware of the procedure and is concerned about the abuse of the patient's civil rights might sue on her behalf. But the carrying out of the procedure will not generally be known (given medical confidentiality) unless carers or family members had reported it. If that occurred and there was sufficient evidence for the police to obtain a search warrant, they might gain access to medical records and establish that the procedure had been performed and the reasons for it. A doctor in Victoria could be legally compelled to answer questions in criminal, but not civil, proceedings, subject to the privilege against self-incrimination. (Under the Evidence Act 1958 (Vic) s 28 patients have a legal privilege to prevent disclosure of personal information without their consent in civil proceedings; this privilege does not apply in criminal proceedings.[7]) The medical records might also be accessed by a person acting on behalf of the patient in civil proceedings, or even directly before litigation has been commenced, under the Health Records Act 2001 (Vic) s 85(2) – which will come into effect in the middle of this year.[8] Other jurisdictions also have provision for patients to gain access to health records for litigation but they are different from these Victorian provisions.

Even if the records are obtained and indicate that a sterilisation has been performed on an intellectually disabled girl or woman without court or tribunal authority, that is not the end of the matter. It is possible, although perhaps unlikely, that the patient was herself legally competent to consent to the procedure. In *Marion's case*, the High Court emphasised that many intellectually disabled patients are mentally competent to consent on their own behalf and that their consent should be sought in appropriate cases. Given the invasiveness and finality of sterilisation procedures, a relatively high level of competence would be required, and this may be hard to show in these cases (the burden of proof would fall on the doctor). Nevertheless, and especially for reversible tubal ligation, it is a possibility.

A more likely argument for the doctor is that the procedure was, at least in some regard, therapeutic. The requirement for court or tribunal authority in *Marion's case* applies to nontherapeutic sterilisation. In Victoria, consent must be obtained from the Victorian Civil and Administrative Tribunal for all sterilisation, whether therapeutic or not, when the woman is 18 years or over.[5]

The term 'nontherapeutic sterilisation' has not been defined in the legislation and may be open to interpretation. In cases that have come before the courts, medical indications for sterilisation have been argued in addition to the desire to prevent pregnancy. 'Marion', for example, was subject to hormonal variations associated with epilepsy. If there is a 'medical indication' for a procedure, albeit that it involves sterilisation, the doctor might argue that the case falls outside the ones covered by the High Court's requirements in *Marion's case*.

In practice, courts are likely to be sympathetic to doctors in these circumstances. A finding that the doctor has committed a trespass has serious consequences, not only in the imposition of an order for damages and costs. There may also be disciplinary proceedings against the doctor. Yet juries understand the problem that doctors (and families) face in these difficult cases and take these into account. It is significant that no doctor has been prosecuted for unlawful sterilisation despite the revelation of the studies by Dr Grover and others.

Conclusion

For these reasons, I do not consider that the risk of liability is high but doctors would nevertheless be well advised to seek court or tribunal authority for any sterilisation of an intellectually disabled girl or woman that is not clearly 'therapeutic'. Further information about the legal requirements is available from the Family Court in the relevant State or Territory.

Series editor's comment

The decision in *Marion's case* is a far cry from the decision handed down in a similar case by the Supreme Court in the USA in 1927. That Court, in *Buck v. Bell*, allowed the sterilisation of a mentally retarded woman who already had a child and who was herself the daughter of a similarly retarded mother.[9] Justice Oliver Wendell Holmes, who is often described as the greatest common law judge of the twentieth century, speaking for the majority (there was only one dissenting view), granted the order allowing sterilisation, and expressed the general view that: 'It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.'

In the specific case before the court, Justice Holmes felt sterilisation was justified because: 'Three generations of imbeciles are enough.'

In 1927, eugenic reform was regarded by many as a liberal and progressive concept: 'The idea of eugenic reform…was not thought to be a repressive one in the early twentieth century...The eradication of "feeble minded" persons from the population, through sterilisation procedures…was regarded as an enlightened effort to produce a better society.'[10]

Two decades later, in the immediate postwar period, the world reeled in horror at Nazi Germany's approach to genetic reform. In a recent Irish High Court decision, the decision in *Buck* is described as: '…a chilling example of logic, rationality or utilitarianism taken to an extreme which subverts the essential human dignity of the people involved.'[11]

Parental or guardian authority

Philosophy aside, *Marion's case* is an extreme illustration of a more general point – i.e. a parent or guardian's authority to make decisions for a person not competent to make their own (either because they are a minor or not mentally competent) is not absolute but can only be exercised in the 'best interests' of that person. A doctor who is asked by a parent or guardian to assess and treat a child must only proceed if the three questions below can all be answered affirmatively.

- Does this person have the authority to give or withhold consent? The child may be brought to see you by one parent, but with such a high rate of marriage breakdowns, are you sure this parent has custody of the child, or the right, alone, to direct the child's treatment? If you are at all in doubt, you should ask for the other parent's consent as well, or ask the presenting parent to prove to you that they have sole custody.
- Is the medical treatment requested in the best interests of the child? If you do not agree, you must not proceed. You may need to point out to the parent that with very serious matters only the Family Court can make the decision. In less serious matters, you still must not proceed if you do not agree that the treatment requested is in the best interests of the child.
- Does the child agree? While there are a number of benchmarks for 'legal maturity' – such as minimum ages specified by law to be allowed to vote, hold a driver's licence or buy cigarettes or alcohol – the age at which children can direct their own medical care varies with the circumstantial, intellectual and emotional maturity of the child. In the Gillick case in 1985 the House of Lords considered a teenage child's right to consent to medical treatment (specifically a teenage girl's right to seek and obtain 'the Pill') without her parents' knowledge – or rather, whether the doctor who provided the prescription had acted outside the law.[12] Lord Fraser said that the degree of parental control varied according to the child's understanding and intelligence. Lord Scarman also iterated a 'best interests' test (i.e. parental rights only exist so long as they are needed to protect the child), but he added: 'As a matter of law the parental right to determine whether or not their minor child below the age of 16 will have medical treatment terminates if and when the child achieves sufficient understanding and intelligence to enable him to understand fully what is proposed.'

Gillick competency

There have been cases where 17-year-old patients have been found insufficiently competent to direct their medical treatment, i.e. they are not Gillick-competent, while in other cases much younger children have been deemed sufficiently competent. Doctors have both a duty and a right to judge for themselves whether a child is 'Gillick competent', but could be challenged to defend that view.

A child having a ritual circumcision at one week of age is clearly not Gillick-competent. You'll probably need to ask your practice nurse to hold down a 5-year-old while you give him or her, involuntarily, an immunisation injection. But you would not hold down a 13-year-old girl to have an anaesthetic for, say, a termination of pregnancy, solely at her parents' request and in the light of her expressed refusal of consent. Conversely, you probably would prescribe an oral contraceptive to a 15-year-old girl without seeking parental consent if you thought she was emotionally and intellectually competent to understand fully the ramifications of her request.

Access to a child's medical records

All of this also applies to access to the health records and health information concerning a child. The Medical Indemnity Protection Society is often asked for advice when one parent demands access to his or her child's medical records to seek evidence to use against the other parent in the Family Court. If a subpoena to produce the records is served, you must comply with it – but that means sending the records to the Court, not giving them to one of the parties. Otherwise, as a general rule you should seek the permission of the other parent before granting access to the records to the requesting parent.

Finally...

If that 15-year-old, Gillick-competent girl says 'Don't tell Mum I'm on the Pill', divulging the information to her mother will be in breach of both your common law duty of confidentiality to the patient and, in Victoria, of the Health Records Act 2001 when it comes into force on 1 July of this year.[13] MT

A list of references is available on request to the editorial office.

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