



Department of Health & Community Services v JWB & SMB ("Marion's Case")

(1992) 175 CLR 218; [1992] HCA 15

Country: Australia

Region: Oceania

Year: 1992

Court: High Court

Health Topics: Child and adolescent health, Disabilities, Informed consent, Mental health, Sexual and reproductive health

Human Rights: Freedom from discrimination, Right to bodily integrity, Right to life, Right to privacy

Facts

Marion was a fourteen year old girl with an intellectual disability, severe deafness, epilepsy, an ataxia and behavioural problems. She could not care for herself. Her parents proposed that Marion undertake a hysterectomy and an ovariectomy (the Procedures). The hysterectomy was proposed to prevent natural pregnancy and menstruation and the psychological and behavioural consequences of these. The ovariectomy was proposed in order to stabilise hormonal fluxes with the aim of helping to eliminate consequential stress and behavioural responses. The Procedures would have the effect of sterilising Marion.

Consent declarations for the Procedures were initially sought from the Family Court, which held that parental consent was adequate to authorise the procedure. However, there was disagreement as to whether the Family Court was required to sanction parental consent, whether parents must seek a Family Court order of consent, or whether there was a general jurisdiction of the Court to consent to the Procedures.

Decision and Reasoning

The key issues in contention were the jurisdiction of the Court to hear the matter, the source and scope of parental power generally, the source and scope of parental power as it applied to sterilisation procedures and the jurisdiction of the Family Court to authorise sterilisation procedures.

The Court affirmed that s.73 of the Constitution provided jurisdiction to hear matters concerning the inherent jurisdiction of lower courts, and in this case they were therefore able to rule on the extent of the welfare jurisdiction of the Family Court.

The Court then considered who was able to consent to a sterilization procedure. It affirmed that a minor who is mentally handicapped is able to consent provided they have sufficient understanding and intelligence to enable him or her to understand fully what is proposed (majority, para. 19).

A parent, however, would not be able to consent to their child's sterilization. The Court accepted that the Family Law Act 1975, the common law, and the Criminal Code granted sources of parental power, including the power to consent to a child's medical treatment. Subject to the order of a competent court, each parent of a child under 18 years could generally exercise these powers in the child's best interest.

However, there were factors involved in a decision to authorise sterilisation of another person which indicate that, in order to ensure the best protection of the interests of a child, such a decision should not come within the ordinary scope of parental power to consent to medical treatment. The Court held that in this case, Court authorisation is necessary and is, in essence, a procedural safeguard. However, Court authorisation would not be necessary where sterilisation is a by-product of surgery appropriately carried out to treat some malfunction or disease (majority, para. 48).

This approach was necessary because of the significant risk of making the wrong decision, either as to a child's present or future capacity to consent or about what are the best interests of a child who cannot consent and because the consequences of a wrong decision are particularly grave (majority, para. 49). The Court also emphasised the vulnerability of children with intellectual disabilities both because of their minority and their disability (majority, [54]). Furthermore, the Court stated that their conclusion on this issue relies on

fundamental right to personal inviolability existing in the common law, a right which underscores the principles of assault, both criminal and civil law" (majority, para. 55).

The Court did consider that the Family Court was able to provide consent for a sterilization procedure. The Court held that 1983 and 1987 amendments to the Family Law Act "invest[ed] in the Family Court the substance of the *parens patriae* jurisdiction" (majority [66]). The *parens patriae* "springs from the direct responsibility of the Crown for those who cannot look after themselves; it includes infants as well as those of unsound mind. So the courts can exercise jurisdiction in cases where parents have no power to consent to an operation, as well as cases in which they have the power" (majority, para. 71).

Decision Excerpts

"For the above reasons, which look to the risks involved in the decision, particularly in relation to the threshold question of competence and in relation to the consequences of a wrong assessment, our conclusion is that the decision to sterilise a minor in circumstances such as the present falls outside the ordinary scope of parental powers and therefore outside the scope of the powers, rights and duties of a guardian under s.63E(1) of the Family Law Act. This is not a case where sterilisation is an incidental result of surgery performed to cure a disease or correct some malfunction. Court authorisation in the present case is required. Where profound permanent incapacity is indisputable, where all psychological and social implications have in fact been canvassed by a variety of care-givers and where the child's guardians are, in fact, only considering the interests of the child or where their own interests do not conflict with those of the child, court authorisation will ordinarily reproduce the wishes of the guardian. But it is not possible to formulate a rule which distinguishes these cases. Given the widely varying circumstances, it is impossible to apply a single rule to determine what are, in the respondents' words, the "clear cases". Majority, para. 53.

"As we have indicated, the conclusion relies on a fundamental right to personal inviolability existing in the common law, a right which underscores the principles of assault, both criminal and civil, as well as on the practical exigencies accompanying this kind of decision which have been discussed. Our conclusion does not, however, rely on a finding which underpins many of the judgments discussed; namely, that there exists in the common law a fundamental right to reproduce which is independent of the right to personal inviolability. We leave that question open. Majority, para. 55.

"The function of a court when asked to authorise sterilisation is to decide whether, in the circumstances of the case, that is in the best interests of the child. We have already said that it is not possible to formulate a rule which will identify cases where sterilisation is in his or her best interests. But it should be emphasised that the issue is not at large. Sterilisation is a step of last resort. And that, in itself, identifies the issue as one within narrow confines. Majority, para. 73.

"Those who are charged with responsibility for the care and control of an intellectually disabled girl (by which I mean a female child who is sexually mature) - whether parents, guardians or the staff of institutions - have a duty to ensure that the girl is not sexually exploited or abused. If her disability inclines her to sexual promiscuity, they have a duty to restrain her from exposing herself to exploitation. It is unacceptable that an authority be given for the girl's sterilization in order to lighten the burden of that duty, much less to allow for its neglect. Brennan J, para. 23.