

## Sterilization of the mentally retarded — a review

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The whole subject of sterilization has, for many years, been a topical issue and the center for medico-legal controversy.

With the advent of broad social and legal acceptance of contraceptive sterilization procedures in the '60s, the advice of the Canadian Medical Protective Association has consistently been that doctors might safely perform such procedures on competent and consenting adults. Recently attention has shifted to become focused on the issue of sterilization of the mentally retarded. Unfortunately, there continues to be much controversy about the legalities of sterilization procedures on such persons.

When asked for advice on such matters, the association is always forced to preface its comments and suggestions with a statement that, regardless of the circumstances, sterilization procedures on the mentally retarded are fraught with the potential for medicolegal problems and, regardless of what precautions are taken, there can be no absolute assurance that legal difficulties may not arise subsequently. A review of several recent court decisions and legislative developments in the Province of Ontario will serve to highlight the various legal uncertainties which are always raised in any discussion about such sterilization procedures.

In 1975 a case came before the family division of the High Court in England involving an 11-year-old girl who suffered from Sotos syndrome, a condition which included symptoms of accelerated growth



during infancy, epilepsy, emotional instability and an impairment of mental function. She had a dull normal intelligence with an understanding of a child of about 9 to 9.5 years of age. The child's widowed mother looked after her and being concerned that the child might be seduced and give birth to a baby which she would be unable to care for and which might also be abnormal, she wanted the girl to be sterilized. The child's pediatrician shared the mother's concerns and shortly after the child reached puberty, he made arrangements

with a gynecologist to perform a sterilization procedure on the child, in this instance a hysterectomy.

The decision to sterilize became known to others who opposed the operation, among them, the plaintiff, an education psychologist, who made application to have the child made a ward of the court.

In the judgement following the hearing of the application, the judge commented that "the type of operation proposed is one which involves the deprivation of a basic human right, namely the right of a woman to reproduce, and therefore it would, if performed on a woman for nontherapeutic reasons and without her consent, be a violation of such right."

The judge went on to find that although the girl was incompetent to consent to the surgery at that time, the judge was satisfied on the evidence that she would almost certainly be able to understand the implications of the proposed sterilization by the time she reached 18 years of age. Indeed, it was common ground that she had sufficient intellectual capacity to enable her to marry in due course.

Based on these facts and other evidence to the effect that the child's opportunities for promiscuity, if she became so minded, were virtually nonexistent and that there were other less permanent methods of contraception which could be safely and satisfactorily used, the judge concluded that the proposed operation was neither medically indicated nor necessary, and that it would not be in the

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child's best interests for it to be performed. The judge refused to accept the proposition advanced by the pediatrician that provided there is parental consent, the decision to carry out a sterilization operation on a minor, even for nontherapeutic purposes was solely within a doctor's clinical judgement and that no interference could be tolerated in his clinical freedom. The judge appears to have agreed, however, that a decision to sterilize a child is within a doctor's clinical judgement when sterilization is a treatment of choice for some disease where the side-effect would be to sterilize, but the operation would be solely performed for therapeutic purposes.

### A Canadian case

The next and only other recent English or Canadian judgement dealing with the issue of sterilization of the mentally retarded involved a matter which came before the family division of the Supreme Court of Prince Edward Island in 1979. In that case, the widowed and elderly mother of a moderately retarded female applied to the court seeking an order that her daughter be declared mentally incompetent; that the mother be appointed committee of the person of the daughter; and that the mother be authorized to consent to a tubal ligation operation proposed to be performed on the daughter. The first two remedies sought presented no problem and could readily be granted on the facts of the case. The judgement therefore dealt with the latter aspect of the application.

The daughter was 24 years of age and suffered from extreme expressive aphasia. She had limited learning skills. It would appear from the evidence, including the testimony of a child psychiatrist that while the daughter might have been able to carry out the mechanical duties of a mother, under supervision, she would be incapable of being a mother in any other sense. She would also have no concept of the idea of marriage or of the consequential relationship between intercourse, pregnancy and birth. She was, however, a pleasant and affectionate person who was quite cap-

able of being attracted to, as well as attractive to, the opposite sex. Indeed, it was the result of a rather close acquaintance with a male student at her school for retarded adults that the mother was prompted to bring on the application. The mother was not only concerned as to what emotional effect a pregnancy and subsequent birth might have on her daughter, but also worried about her own ability to care for any child which might be born to her daughter. She therefore wished her daughter to be sterilized.

Pre-trial, the judge directed counsel to address certain specific issues at the hearing of the application. In response to the evidence adduced on these issues, the judge concluded in his judgement that the daughter was not capable of giving a valid consent, that her moderate retardation was generally stable, that her condition was probably noninheritable, that she was incapable of effective alternate means of contraception, that the psychological or emotional effect of the proposed operation would be minimal, and that the risk of pregnancy was impossible to predict. The judge then dealt with the main issue of the application.

Having determined that the court should accept its responsibility, as *parens patriae*, to intervene on behalf of a child or mentally retarded adult person in respect of proposed sterilization procedures, the judge turned to consider whether the facts of this particular case warranted the unprecedented step of the court actually authorizing the operation. Referring in his judgement to the English case of *In re D. (A minor)*, the judge stated that if the proposed surgical procedure was therapeutic in nature, necessary to the health of the individual, with sterilization merely being one of the side-effects thereof, then the court would be clearly justified in granting authorization.

However, the judge did not accept that any clinical therapeutic reasons had been established for the proposed sterilization, apparently finding instead that the procedure was to be performed solely for contraceptive means to protect the

daughter against possible pregnancy and as a matter of convenience for the mother. Although sympathetic to the plight of the mother, the judge stated that the duty of the court was to preserve the rights of those who were unable to care for themselves. As the proposed sterilization procedure would deprive the daughter of the basic human right, i.e. the right to reproduce, and was not required to preserve and protect the health or quality of life of the daughter, the law did not permit the court to authorize the same. He therefore dismissed the application.

### Legislative action

In December of 1978, the issue of sterilization of minors and the mentally retarded came before the Ontario legislature, apparently prompted by a study undertaken in London, Ontario which indicated that 686 sterilization operations were performed in hospitals in Ontario in 1976 on persons who were unable to give consent on their own behalf. Of these 686 operations, 308 were performed on children and all but 50 were performed on females. At the same time as this debate in the legislature, the official guardian of Ontario publicly stated his view that sterilization of a person incapable of giving legal consent on their own behalf was illegal. He apparently expressed the opinion that the regulations made under The Public Hospitals Act giving parents the right to give permission for surgery on children under 16 was never intended to deal with sterilization.

In response to the controversy, the minister of health proposed a moratorium on sterilizations so as to allow the government time to study the problem and act accordingly. The moratorium was accomplished by means of an amendment to the regulations made under The Public Hospitals Act prohibiting, for a period of approximately 9 months, any surgical operation for the purpose of rendering a patient under the age of 16 years incapable of insemination or of becoming pregnant. This prohibition did not

apply, however, "where the surgeon or the attending physician believes that the surgical operation is medically necessary for the protection of the physical health of the patient or outpatient." Also in December of 1978, the government established an interministerial committee to examine the entire matter of consent to medical and surgical treatment for minors and for mentally incompetent individuals.

### Extended prohibition

The prohibition against sterilization procedures on persons under the age of 16 years was subsequently extended another 3 months and in September of 1979, the interministerial committee published a discussion paper entitled *Options on Medical Consent*. In that discussion paper entitled *Options on Medical Consent*. In that discussion paper, the committee dealt not only with the issue of nontherapeutic medical and surgical procedures, including sterilization but as well, perceived 10 other issues dealing with consent and 'health care service' generally which it thought required consideration and public discussion. Shortly thereafter, the interministerial committee submitted its final recommendations, including a draft bill, dealing with all of the 11 issues studied. To allow for public discussion of the proposed legislation, the government once again extended the moratorium on sterilization of mentally incompetent young people until Mar. 31, 1980.

### Several provisions unacceptable

Unfortunately, it became very clear that several provisions of the proposed legislation, dealing for the most part with issues other than sterilization, were not generally acceptable and the government indicated its intention not to proceed with the bill. The minister of health stated that, in the circumstances, the prohibition against sterilization procedures for persons under 16 years of age in Ontario will continue indefinitely.

Also in 1979 the Law Reform Commission of Canada published a working paper on sterilization and

its implications for mentally retarded and mentally ill persons. This publication was intended to stimulate public opinion and comment about the general direction of the policies and of the tentative recommendations proposed by the commission in the working paper to deal with the current problems associated with the sterilization of mentally retarded persons. It was clear to the commission, however, that any successful solution to these problems will require the joint efforts of the federal and provincial governments. It remains to be seen how quickly the federal, and in particular, the provincial governments react to pass the perceived necessary legislation. The recent experience in the Ontario legislature does not augur well.

### Summary advice

Where does all of this leave a doctor who has received a request from a parent or guardian that their mentally retarded child or other mentally retarded individual in their charge be sterilized? Clearly, when after giving very clear consideration to the circumstances of the specific request the doctor concludes that the proposed sterilization can be justified only on nonmedical grounds, as a contraceptive measure or for the convenience of the parent or guardian, he must refuse the request. Secondly, in Ontario and probably in all provinces, a doctor should refuse to perform a sterilization procedure on a mentally retarded child under the age of 16 unless the operation is medically necessary for the protection of the *physical* health of the child. Notice should be taken here of the use of the word "physical" as opposed to the word "medical" which might be more broadly interpreted in scope to relate to and include the mental health of the child.

There may, however, remain selected instances, small in number, when after very careful consideration of the individual circumstances of the particular case the doctor may conclude that there exists very clear medical indications for the requested sterilization of the mentally retarded person 16 years of age

or over. The doctor might therefore tend to view the proposed operation to be therapeutic in nature and conclude that any decision to proceed or not is a matter solely within his clinical judgement.

It should be pointed out that any decision to proceed with the sterilization procedure, even in these instances, does not provide the doctor with any absolute assurance as to his medicolegal position.

### Diagnosing the need

What a doctor considers to be a clear medical indication for the requested sterilization of a mentally retarded person may vary from an operation medically necessary for the direct physical well-being of the patient, to what might be considered medically necessary from a solely psychiatric standpoint for the protection and preservation of the health and quality of life of the patient. Predictably, there will be differences of opinion as to what properly constitutes a clear medical necessity. Until there is further judicial pronouncement on the subject or some clear and unequivocal statutory legislation in the area, it is difficult to know where the line might be drawn. In the present climate, even in the case of mentally retarded persons over the age of 16 years, it is suggested that the potential of medicolegal problems increases as the doctor moves from the physical to the nonphysical health of the patient as a basis for the medical necessity of the procedure.

Further, when the mentally retarded person has reached the age of majority there is the added difficulty about the parent's ability to give valid consent to the proposed surgical procedure without first obtaining costly court appointment and approval. Again, specific legislation is needed to fill the void.

Until the current debate and legal controversy about sterilization procedures on minors and the mentally retarded is resolved, doctors would be well advised to exercise caution and seek advice before proceeding with any such operation. ■