

Marion's Case

This case was decided by the High Court and contains some important explanations about the existence and origins of our common law rights in relation to health and medical treatment.

This case concerned a 14 year old girl named Marion (not real name) who had an intellectual disability, was severely deaf, epileptic, ataxic gait and had behavioural problems and lived in the Northern Territory. She was highly dependent on others for her care. Her parents originally made an application to the Family Court to determine whether they had authority to consent to their daughter's sterilization (hysterectomy) and removal of ovaries. The reasons put forward by the parents were that she was unable to properly manage her menstruation, and the regular fluctuating hormonal changes made her behaviour quite difficult to manage. The Family Court was uncertain as to who should provide consent in these circumstances and the case was referred to the High Court.

The High Court judges endorsed long held common law principles that if someone was "touched" without lawful excuse, this amounted to assault under the criminal law. The basis or principle for this understanding is the principal of "bodily integrity", that is the right of an individual to decide what happens to their own person. This is the fundamental principle that underlines the criminal and civil law of assault.

The High Court also noted that "consent" by a person makes lawful what is otherwise unlawful conduct regarding contact between people. For example, surgery or other medical treatment that is performed without consent is an assault, as seen in the following quote from an American judge.

"Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault"

The Court found that the procedure that was proposed for Marion was one that ordinarily a person could consent to, however because of Marion's intellectual disability and age, she lacked capacity to consent. There was also concern expressed by the court about the psychological distress that may follow the loss of her fertility.

Amongst other legal principles (such as the idea that children or minors are able to consent if they are able to understand the nature and effect of the procedure known as Gillick competency), this case identified the protective purpose of the *parens patriae* (or welfare) jurisdiction of the court, as outlined in the following:

"It belongs to the King, as parens patriae, having the care of those who are not able to take care of themselves, and is founded on the obvious necessity that the law should place somewhere the care of individuals who cannot take care of themselves, particularly in cases where it is clear that some care should be thrown round them."

The courts therefore have a role in protecting vulnerable people with impaired capacity who are unable to provide consent.

In this case Justice Brennan made some very strong observations about the principle of personal integrity that underlines our criminal code. This is seen in the following quote:

"The fundamental principle, plain and incontestable, is that every person's body is inviolate, it has long been established that any touching of another person, however slight, may amount to a battery. ..."

The breadth of the principle reflects the fundamental nature of the interest so protected. As Blackstone wrote in his Commentaries (127) 17th ed. (1830), vol 3, p 120:

"the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner.' The effect is that everybody is protected not only against physical injury but against any form of physical molestation."

Justice Brennan then looked to the common law legal principles that provide guidance for how a decision is to be made in these circumstances. He noted that the "best interest" test is one that is often preferred in these circumstances, but he also noted that as there is not any clearly articulated set of values or principles to guide what is meant by "best interests". The concern is that whoever is given the power to decide in relation to someone with a disability who is unable to make their own decisions, will decide the matter in accordance with their own values and state that it was done in accordance with the "best interests" principle. This then prevents sufficient scrutiny of the reasons that the decision was made in a particular way, and this may not ultimately protect the person with impaired capacity.

Justice Brennan ruled that whilst parents may consent to medical treatment for their children, this authority does not extend to treatment which is not in the child's best interests. The decision whether or not to allow Marion's sterilisation was then made by the Family Court, who ruled in favour of Marion's sterilisation.