



Protection of Conscience Project

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Therapeutic homicide in a neonatal unit? The Mary Dilemma: Case Study on Moral Distress

Sean Murphy, Administrator
Protection of Conscience Project

The Canadian Fellowship of Catholic Scholars *Journal* published an article in late 2013 about the moral distress suffered by a Catholic nurse who witnessed the death of a newborn infant. The baby was allegedly starved to death in a neonatal intensive care unit at a Toronto hospital between 27 October and 22 November, presumably in 2012 or earlier.¹ The following summary is drawn from the article.

The story

“Baby Mary” had a difficult birth at about 35 weeks gestation and experienced hypoxia. She was transferred to a neonatal intensive care unit in the Toronto area where she was found to have some brain damage, the extent of which could not be determined. She had limited movement in her right arm but movements were otherwise normal, and she responded appropriately to stimulation. Her birth weight was appropriate for her gestational age.

Her parents directed physicians to withdraw care from her a few days after she was born, so she was removed from the ventilator. It was thought that she would stop breathing, but she began breathing on her own and maintained normal oxygen levels in her blood. Her condition was stable. Ordinarily, feeds would have been slowly introduced, assisted, if need be, by nasogastric tube, and she would have been sent home with her parents once she was feeding well and gaining weight.

However, her parents told the physicians that they did not want a handicapped child and that they wanted to leave her to die. The physicians complied with their directions, transferring her to a level two nursery with an order to “withdraw care.” Nurses put her into a crib in a corner with a screen around it. On 8 November she was fed for the last time: 40 mls. quickly consumed from a bottle. A new physician ordered that she be given “no stimulation” (i.e., no cuddling or holding) and phenobarbital for comfort. The *Journal* article recounts the death of “Baby Mary” by starvation over the next two weeks through diary entries made by the Catholic nurse. It provides a vivid illustration of the conflicts of conscience that can arise in such circumstances, and of the extraordinary sense of isolation and vulnerability experienced by objecting health care workers.

The *Journal* article does not disclose the names of the hospital or the people involved “for reasons of confidentiality,” and its focus is on the moral distress of the Catholic nurse who provided the account. She consulted with her spiritual director and with friends, and offered to take the child home herself,

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but was rebuffed by a social worker who emphasized the need to respect the parents' wishes. We are told that she was afraid to speak out because she believed she might lose her job, and had to speak guardedly because of the attitude of some colleagues. One of them said she had "no religious hangups" about doing as the parents wished; another wished they could provide euthanasia.

However, it seems that a number of other nurses were as troubled as the Catholic nurse. One of them asked a very pointed question: "[I]f they took her home and didn't feed her they would be charged - why is it okay for us to do this?"

Commentary

Indeed: had the parents taken Baby Mary home and refused to feed her, anyone who was aware of it would have been legally obliged to report the situation "forthwith" to child protection authorities. They, in turn, would then have been obliged to take action to protect her. Child protection authorities could, if need be, apprehend her with or without warrant, calling upon police to assist with the apprehension if necessary.²

The key point is that, if Baby Mary was being starved to death as reported by the *Journal* article, it was irrelevant that she was being starved to death by health care professionals wearing white coats in a neonatal intensive care unit. On the contrary: if she was a "child in need of protection" - which, according to the *Journal* article, she was - then every one of those professionals was obliged to immediately report what was happening to the Children's Aid Society, and their failure to do so was an offence.³

Further: under Canadian law it would have been a criminal offence for the parents and health care staff to deny food to an infant in the circumstances described in the *Journal* article.⁴ To starve an infant to death in the manner described would amount to at least criminal negligence causing death,⁵ if not first degree murder.⁶

It is now too late for charges to be laid for failing to report a child in need of protection as the limitation of action period has expired.⁷ On the other hand, there is no limitation period for criminal negligence causing death or murder, so it is still possible for police to investigate the allegations and lay criminal charges if appropriate. Assuming that the *Journal* article has accurately stated the dates of the birth and death of Baby Mary, it should be possible to determine her actual identity by searching Vital Statistics records for the months of October and November from 2012 and earlier. Records of her birth and death would provide police with the names of the parents and the institution where she died, and they would then be able to pursue the investigation by questioning the authors of the *Journal* article and health care workers involved with her care.

While the *Journal* article raises very interesting questions from the perspective of freedom of conscience and religion for health care workers, it is prudent to withhold further comment on the allegations until it is clear what action, if any, will be undertaken by state authorities in the Province of Ontario.

Notes

1. Penna MD, Burg-Feret F. "The Mary Dilemma - A Case Study on Moral Distress." Fellowship of Catholic Scholars (Canada) *Journal*, Summer/Fall, 2013.

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2. Under Section 37(2) of the *Ontario Child and Family Services Act*, an infant being deprived of food would be a “child in need of protection”: that is, a child under 16 years old “likely to suffer physical harm” inflicted by her caregivers as a result of their neglect or failure to adequately care for or protect her. Section 72 of the Act imposes a duty on any person who even suspects that a child is in need of protection to report the situation “forthwith” to child protection authorities. Section 40 sets out provisions for apprehension of children in need of protection. (http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90c11_e.htm) Accessed 2014-03-17
 3. Section 72(4) and 72(5) of the *Ontario Child and Family Services Act* explicitly extends the offence of failure to report a suspicion to include professionals of various types.
 4. *Criminal Code*, Section 215 (<http://laws-lois.justice.gc.ca/eng/acts/c-46/page-111.html#h-75>) Accessed 2014-03-18
 5. *Criminal Code*, Section 219, 220 (<http://laws-lois.justice.gc.ca/eng/acts/c-46/page-112.html#h-76>) Accessed 2014-03-18
 6. *Criminal Code*, Section 229, 231 (<http://laws-lois.justice.gc.ca/eng/acts/c-46/page-114.html#h-78> | <http://laws-lois.justice.gc.ca/eng/acts/c-46/page-115.html#docCont>) Accessed 2014-03-18.
 7. Since the *Ontario Child and Family Services Act* does not specify a limitation period, a six month period is set by Section 76(1) of the *Provincial Offences Act* (Ontario). (http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90p33_e.htm) Accessed 2014-03-18