SECRETARY, DEPARTMENT OF HEALTH AND COMMUNITY SERVICES

v.

J.W.B. AND S.M.B. (MARION'S CASE.)

HIGH COURT OF AUSTRALIA

6 May 1992

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

F.C. 92/010

Mason C.J., Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

DECISION

MASON C.J., DAWSON, TOOHEY AND GAUDRON JJ. Marion, the pseudonym of the teenager who is the subject of this appeal, is now 14 years old. She suffers from mental retardation (1) (1) "Mental retardation" is the language of the application to the Family Court. Throughout this judgment different expressions are used to reflect the terminology of argument and of decisions under consideration. Current usage prefers the term "intellectual disability"., severe deafness and epilepsy, has an ataxic gait and "behavioural problems". She cannot care for herself. Her parents, who were married in 1976 and who, with their children, are residents of the Northern Territory, applied to the Family Court of Australia for an order authorising performance of a hysterectomy and an ovariectomy (referred to in the application as ovarienectomy) on Marion; alternatively, a declaration that it is lawful for them to consent to the performance of those procedures. A hysterectomy is proposed for the purpose of preventing pregnancy and menstruation with its psychological and behavioural consequences; an ovariectomy is proposed in order to stabilise hormonal fluxes with the aim of helping to eliminate consequential stress and behavioural responses. While the term "sterilisation" is used throughout this judgment, it must be understood that what the Court is concerned with are the two procedures proposed for Marion. The term is used as a shorthand for these procedures in the particular circumstances unless the context indicates that sterilisation in a different sense or in different circumstances is intended.

2. The question whether these operations are in Marion's best interests is not before us. That inquiry continues before the Family Court. This Court heard an appeal from the answers given by the Full Court of the Family Court to a case stated to the Full Court by Nicholson C.J. on 28 May 1990. As amended, the questions stated were as follows:

"(1) Can the Applicants as joint guardians of the child

(Marion) lawfully authorise the carrying out in the

Northern Territory, of a sterilisation procedure upon

the said child without an order of a Court?
(2) If no to question 1, does the Family Court of Australia have jurisdiction:
(a) to authorise the carrying out of such a procedure; or
(b) to enlarge the powers, rights or duties of the Applicants as guardians of the said child to enable them to lawfully authorise the carrying out of such a procedure; or
(c) to approve the consent of the Applicants, as guardians of the said child, to the proposed procedure to make the procedure lawful?
(3) Which (if any) of the steps referred to in (a), (b) or (c) of question 2 is required by law?"

3. The questions were answered as follows:

Nicholson C.J. (2) Re Marion (1990) 14 Fam LR 427, at p 452; (1991) FLC 92-193, at p 78,304:

"(1) No.
(2) (a) Yes.
(b) No.
(c) No.
(3) The step required in question (2)(a) is required by law to enable the sterilisation operation to be lawfully performed."

Strauss J. (3) ibid., at p 462; p 78,313 of FLC:

"(1) Yes.
However, the sanction of the Family Court should be obtained before the operation is carried out.
It follows that questions 2(a), (b) and (c) do not arise."

McCall J. (4) ibid., at p 481; p 78,329 of FLC:

"(1) Yes.
(2) If an application is brought by parents as in this case, the court has jurisdiction to make an order in terms of question 2(a).
(3) None."

Jurisdiction

4. There is an initial question as to whether s.73 of the Constitution confers jurisdiction on the High Court to hear and determine an appeal from answers given to a case stated in a court below. That question, which has been the subject of earlier decisions of the Court, is now effectively answered in the affirmative by the decision in Mellifont v. A-G. (Qld) (5) (1991) 66 ALJR 107; 104 ALR 89.. The Court has jurisdiction to dispose of the present appeal.

The issues

5. The appellant, the Secretary of the Northern Territory Department of Health and Community Services, supported by the Attorney-General of the Commonwealth as intervener, argued that the guardian of a child has no power to authorise the sterilisation of a child and that application to a court for authorisation of such an operation is mandatory. The Family Court, it was said, has jurisdiction to authorise sterilisation of a child. The respondents, Marion's parents (who are also her joint guardians and custodians), argued that the decision to sterilise a child is not significantly different from other major decisions that parents and guardians have to make for children and that the involvement of the Family Court is optional and of a "supervisory nature" only. Their argument was that, provided such a procedure is in the best interests of the child, parents as guardians can give lawful consent to a sterilisation on behalf of a mentally incompetent child. In anything but a "clear case", the respondents said, court involvement is desirable and they agreed with the appellant that the Family Court has jurisdiction to make orders with respect to sterilisation.

6. The Human Rights and Equal Opportunity Commission ("the Human Rights Commission") intervened in these proceedings pursuant to s.11(1)(o) of the Human Rights and Equal Opportunity Commission Act 1986 (Cth) which provides for such intervention, with leave of the court, in "proceedings that involve human rights issues". The Commission argued that an invasive surgical procedure which results in the removal of the healthy reproductive organs of a young woman, incapable of giving her own consent because of intellectual disability and minority, cannot be carried out lawfully without the authority of the appropriate judicial body. This requirement, the Commission said, represents a proper exercise of the parens patriae or statutory welfare jurisdiction of the Family Court and as such is sufficient safeguard of the rights of mentally retarded and disabled persons recognised in the international Conventions and Declarations incorporated in schedules to the Human Rights and Equal Opportunity Commission Act.

Can parents, as guardians, authorise the sterilisation of their child?

7. There is no decision of this Court answering the question whether a parent as guardian can authorise the sterilisation of a person who is disabled by age and mental incapacity from giving consent. And, apart from New South Wales and South Australia (6)For New South Wales, see the Children (Care and Protection) Act 1987 (N.S.W.), s.20B(2)(b) and the Disability Services and Guardianship Act 1987 (N.S.W.), s.36(b). For South Australia, see the Mental Health Act 1977 (S.A.), s.28b., no State or Territory has enacted legislation to deal with these circumstances. It is necessary therefore to consider the common law and statutory criminal law applicable in the Northern Territory to determine the principles to be applied in the present case. Two major issues are involved in the first question in the case stated. The first is the threshold question of consent; whether a child, intellectually disabled

or not, is capable, in law or in fact, of consenting to medical treatment on his or her own behalf. The second arises where a child is incapable of consenting. That issue is whether sterilisation is, in any event, outside the scope of a parent to consent to on behalf of his or her child. In considering these two issues this judgment looks first at the general rules of assault and of consent, then at parental power to consent to medical treatment on behalf of a child and its corollary, the capacity of a child to consent to his or her own treatment. Finally, the question whether sterilisation is, by its nature, a special case is considered.

Assault, consent, medical treatment

8. In a case such as the present one, it is primarily the prospect of surgical intervention which attracts the interest of the law. This is because the law treats as unlawful, both criminally and civilly, conduct which constitutes an assault on or a trespass to the person. Therefore it is the legality of the specific medical treatment amounting to a hysterectomy and ovariectomy (or, it may be, tubal ligation or vasectomy) which must be the focus of inquiry. However, to characterise intervention comprising sterilisation as "medical treatment" is already to make assumptions and to narrow the inquiry, perhaps inappropriately. As will become clear, it is the very fact that sterilisation implies more than medical, or surgical, treatment that is crucial to the central issue in this appeal.

9. The Criminal Code Act 1983 (N.T.) ("the Code") provides that an act is unlawful if it is done "without authorization, justification or excuse" (7) s.1. See also ss.24 and 25.. Section 26 of the Code provides:

" (1) An act, omission or event is authorized if it is

done, made or caused -

(a) in the exercise of a right granted or recognized

by law;

(b) ...

(c) ...; or

(d) subject to subsection (3), pursuant to authority,

permission or licence lawfully granted."

"Assault" is defined in s.187 of the Code to mean:

"(a) the direct or indirect application of force to a

person without his consent ...; or

(b) the attempted or threatened application of such force

...

other than the application of force -

(c) ... when giving any medical treatment or first aid

reasonably needed by the person to whom it is given ..."

Section 188 of the Code makes an unlawful assault an offence. A person who unlawfully causes grievous harm to another is guilty of a crime (8) s.181.

10. The corollary of these provisions, which embody the notion that, prima facie, any physical contact or threat of it is unlawful, is a right in each person to bodily integrity. That is to say, the right in an individual to choose what occurs with respect to his or her own person. In his Commentaries, Blackstone wrote (9) 17th ed. (1830), vol 3, p 120:

"(T)he 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".

11. Consent ordinarily has the effect of transforming what would otherwise be unlawful into accepted, and therefore acceptable, contact. Consensual contact does not, ordinarily, amount to assault. However, there are exceptions to the requirement for, and the neutralising effect of, consent and therefore qualifications to the very broadly stated principle of bodily inviolability. In some instances consent is insufficient to make application of force to another person lawful and sometimes consent is not needed to make force lawful. For example, a person in the Northern Territory cannot render a killing lawful by consenting to be killed (10) The Code, s.26(3). and at common law a comparable qualification exists with respect to assault in some circumstances. A.-G. Reference (No.6 of 1980) (11) (1981) QB 715 held that those entering into a consensual fight were guilty of assault if they intended to inflict bodily harm (12) See also The Queen v. Coney (1882) 8 QBD 534; The King v. Donovan (1934) 2 KB 498. The rationale for this exception appears to rest in the idea that some harms involve public, not just personal, interests (13)The Queen v. Coney (1882) 8 QBD, at p 549; and see Glanville Williams, Textbook of Criminal Law, 2nd ed. (1983), pp 582-583,586-587 Moreover, the absence of consent is irrelevant in a lawful arrest or in circumstances which amount to self-defence. A further exception of this kind is reflected in Collins v. Wilcock, where it was said (14) (1984) 1 WLR 1172, at p 1177; (1984) 3 All ER 374, at p 378 that in respect of physical contact arising from the exigencies of everyday life - jostling in a street, social contact at parties and the like - there is an implied consent "by all who move in society and so expose themselves to the risk of bodily contact", or that such encounters fall "within a general exception embracing all physical contact which is generally acceptable in the ordinary conduct of daily life".

12. Medical treatment of adults with full mental capacity does not come within any of the exceptions mentioned (15) In re F [1991] UKHL 1; (1990) 2 AC 1, per Lord Goff of Chieveley at pp 73-74; cf. Wilson v. Pringle (1987) QB 237, at p 252. It may fall within s.187(c) of the Code. The factor necessary to render such treatment lawful when it would otherwise be an assault is, therefore, consent. The Code impliedly treats non-consensual medical treatment as an assault by making it a form of "grievous harm" which may be consented to (16) s.26(3). This, again, reflects the principle of personal inviolability echoed in the well-known words of Cardozo J. in Schloendorff v. Society of New York Hospital (17) (1914) 105 NE 92, at p 93:

"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".

13. Sterilisation comes within the category of medical treatment to which a legally competent person can consent. That is to say, Denning L.J.'s minority view in Bravery v. Bravery that sterilisation was in itself an unlawful act to which consent gave no defence has not been followed (18)(1954) 1 WLR 1169, per Hodson L.J. (with whom Evershed M.R. agreed) at pp 1175-1176; per Denning L.J. at p 1181; (1954) 3 All ER 59, at pp 63-64 and p 68 respectively. But what of medical treatment of those who, because of incapacity, cannot consent? What, besides personal consent, can render surgical intervention lawful?

14. The reasons for, and circumstances of, incapacity differ greatly. An adult who is normally of full mental capacity may be temporarily unable to consent due to, for example, an accident resulting in unconsciousness. Or a child's parents may be temporarily unavailable to give or withhold consent to emergency medical treatment of their child. In the Northern Territory these circumstances are dealt with by the Emergency Medical Operations Act 1973 (N.T.). That Act provides (19)s.3(1) and (3)(b). The different nature and status of parental consent as opposed to personal consent is reflected in s.3(4)(b) of the Act which makes provision for a doctor to perform an emergency operation on a child even in the absence of parental consent which has been sought that a medical practitioner may perform an operation on a patient without consent (or without consent of the parents of a child) where the purpose of the operation is to prevent the patient from dying or suffering a serious permanent disability and it is impracticable to delay the operation in order to seek consent. On the other hand, an adult may suffer a permanent incapacity to consent to major medical treatment, including sterilisation, due to intellectual disability. In the Northern Territory this circumstance is met by the Adult Guardianship Act 1988 (N.T.). Sections 3 and 21 of that Act provide that the consent of the Local Court is required for such treatment. Neither of the Northern Territory Acts mentioned is, of course, applicable in the present circumstances and neither elucidates any principle upon which treatment is justified which may be relevant in considering the analogous situation of a permanently incapacitated child. In the case of medical treatment of those who cannot consent because of incapacity due to minority, the automatic reference point is the minor's parent or other guardian. Parental consent, when effective, is itself an exception to the need for personal consent to medical treatment.

Powers of parents, as guardians, to consent to medical treatment

The sources of parental power

15. The sources of parental power, including the power to consent to medical treatment of the child, where the parent is also a guardian of a child of a marriage, are the Family Law Act 1975 (Cth), the common law, and the Code. Subject to the order of a competent court, each parent of a child under 18 years is a guardian of the child (20) s.63F(1) of the Family Law Act. Section 63E(1) and (2) of the Family Law Act provides:

" (1) A person who is the guardian of a child under this

Act has responsibility for the long-term welfare of the

child and has, in relation to the child, all the powers, rights

and duties that are, apart from this Act, vested by law or

custom in the guardian of a child, other than:

(a) the right to have the daily care and control of

the child; and

(b) the right and responsibility to make decisions

concerning the daily care and control of the child.

(2) A person who has or is granted custody of a child under

this Act has:

(a) the right to have the daily care and control of

the child; and

(b) the right and responsibility to make decisions

concerning the daily care and control of the

child."

16. Section 63E(1) operates to identify the guardian, as against the world, as the person with the responsibility defined; it delineates the rights and duties of the guardian and the custodian of a child if they are different persons; and, possibly, the sub-section functions to impose the relevant duty on the person who is the guardian. It also vests in the guardian rights and duties which are, ordinarily, the incidents of parenthood at common law and impliedly preserves any specific rights and duties conferred by the general law and legislation, other than the Family Law Act, on a guardian. This preservation is achieved by conferring on the guardian "all the powers, rights and duties that are, apart from this Act, vested by law or custom in the guardian" (emphasis added). The phrase "long-term welfare" in s.63E(1) does not of itself indicate the content of a guardian's duty. Nicholson C.J. thought (21) Re Marion (1990) 14 Fam LR, at p 447; (1991) FLC, at p 78,300 that s.63E(1) "does no more than confer upon the guardians of the child, the normal incidents which the common law confers upon a guardian". On the other hand, McCall J. was of the view that the amendments to the Family Law Act in 1983, which included the predecessor of s.63E, "introduced significant changes" (22) ibid., at p 470; p 78,320 of FLC and "were deliberately intended to entrust to parents and guardians the responsibility for medical treatment other than of an immediate or urgent nature" (23) ibid., at p 471; p 78,320 of FLC But, his Honour added, the scheme of the Act was not to leave such decisions unsupervised, hence the power in s.64(1)(c) to make orders with respect to the welfare of a child and the power in s.70C(1)(a), introduced among the amendments of 1987, to grant injunctions for the personal protection of the child.

17. With respect to McCall J., we think that his Honour reads too much into the relevant provisions, at least in so far as he treats them as entrusting to parents and guardians responsibility for the sterilisation of a child suffering mental incapacity. We shall explain later in these reasons why we are of this view. Certainly there is no express power to authorise sterilisation conferred by the Family Law Act.

The scope of parental power

18. The two major issues referred to at the beginning of this judgment arise more specifically at this point in an examination of parental consent as an exception to the need for personal consent to medical treatment. As noted earlier, the first issue relates to the important threshold question of consent: whether a minor with an intellectual disability is or will ever be capable of giving or refusing informed consent to sterilisation on his or her own behalf. Where the answer to that question is negative the second question arises. Is sterilisation, in

any case, in a special category which falls outside the scope of a parent to consent to treatment? Is such a procedure a kind of intervention which is, as a general rule, excluded from the scope of parental power?

19. By virtue of legislation, the age of majority in all States and Territories of Australia is 18 years (24)Minors (Property and Contracts) Act 1970 (N.S.W.), s.9; Age of Majority Act 1977 (Vic.), s.3; Age of Majority Act 1974 (Q.), s.5; Age of Majority (Reduction) Act 1970 (S.A.), s.3; Age of Majority Act 1972 (W.A.), s.5; Age of Majority Act 1973 (Tas.), s.3; Age of Majority Act 1974 (N.T.), s.4; Age of Majority Act 1974 (A.C.T.), s.5. Every person below that age is, therefore, a minor and under the Family Law Act the powers of a guardian, generally speaking, cease at that age (25) s.63F. In some States a minor's capacity to give informed consent to medical treatment is regulated by statute (26)See Minors (Property and Contracts) Act 1970 (N.S.W.), s.49(2) and Consent to Medical and Dental Procedures Act 1985 (S.A.), s.6(1) but in the Northern Territory the common law still applies. The common law in Australia has been uncertain as to whether minors under 16 can consent to medical treatment in any circumstances (27)See the analysis by Devereux, "The Capacity of a Child in Australia to Consent to Medical Treatment - Gillick Revisited?", (1991) 11 Oxford Journal of Legal Studies 283 (hereafter "Devereux"), at pp 284-287. However, the recent House of Lords decision in Gillick v. West Norfolk AHA (28) [1985] UKHL 7; (1986) AC 112 is of persuasive authority. The proposition endorsed by the majority in that case was that parental power to consent to medical treatment on behalf of a child diminishes gradually as the child's capacities and maturity grow and that this rate of development depends on the individual child. Lord Scarman said (29) ibid., at pp 183-184:

"Parental rights ... do not wholly disappear until the age of majority. ... But the common law has never treated such rights as sovereign or beyond review and control. Nor has our law ever treated the child as other than a person with capacities and rights recognised by law. The principle of the law ... is that parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child."

A minor is, according to this principle, capable of giving informed consent when he or she "achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed" (30) ibid., at p 189, and see pp 169, 194-195.

20. This approach, though lacking the certainty of a fixed age rule, accords with experience and with psychology (31)The psychological model developed by Piaget (Piaget and Inhelder, The Psychology of the Child, (1969)), one of the leading theorists in this area, suggests that the capacity to make an intelligent choice, involving the ability to consider different options and their consequences, generally appears in a child somewhere between the ages of 11 and 14. But again, even this is a generalisation. There is no guarantee that any particular child, at 14, is capable of giving informed consent nor that any particular ten year old cannot: see Morgan, "Controlling Minors' Fertility", (1986) 12 Monash University Law Review 161. It should be followed in this country as part of the common law (32)As to the priority of parental rights and the capacity of a child to refuse medical treatment for mental illness, see In re R (A Minor) (1991) 3 WLR 592, per Lord Donaldson of Lymington M.R. at pp 600-

601; (1991) 4 All ER 177, at pp 185-186. But see also the comment on Lord Donaldson's judgment by Bainham in "The Judge and the Competent Minor", (1992) 108 Law Quarterly Review 194.

21. Of course, the fact that a child suffers an intellectual disability makes consideration of the capacity to consent a different matter. The age at which intellectually disabled children can consent will be higher than for children within the normal range of abilities. However, terms such as "mental disability", "intellectual handicap" or "retardation" lack precision. There is no essential cause of disability; those who come within these categories form a heterogeneous group. And since most intellectually disabled people are borderline to mildly disabled (33) Nelson Textbook of Pediatrics, 13th ed. (1987), p 102, there is no reason to assume that all disabled children are incapable of giving consent to treatment. In the case of children with intellectual disabilities, the situation is further complicated by the need for future, as well as present, assessment. The Committee on Rights of Persons with Handicaps (South Australia) agreed (34)"Sterilizing the mentally-handicapped: Who can give consent?", (1980) 122 Canadian Medical Association Journal 234, in Committee on Rights of Persons with Handicaps (South Australia), The Law and Persons with Handicaps, vol 2: Intellectual Handicaps (1981) (hereafter "The Law and Persons with Handicaps"), p 125:

"There is nothing inherent in mental handicap ... that

prevents a person from providing competent consent to a

sterilization."

Any rule which purports to apply to the group of intellectually disabled children therefore involves sweeping generalisation.

22. It may also be said, in this context, that not only are there widely varying kinds and consequences of intellectual disability but such handicaps, possibly more so than other forms of disability, are often surrounded by misconceptions on the part of others in society, misconceptions often involving an underestimation of a person's ability (35)Rassaby, "Informed Consent to Medical Care by Persons of Diminished Capacity" in Law Reform Commission of Victoria, Informed Consent, (1987) 77 (hereafter "Rassaby"), at pp 79-80. This applies particularly with respect to sexuality and sexual identity which are central to the question here. Although complex for everyone, these matters are especially complex for disabled persons, sometimes because of ignorance and misconceptions on the part of those on whose care disabled persons find themselves dependent.

23. The Committee on Rights of Persons with Handicaps (South Australia) said (36) The Law and Persons with Handicaps, p 123:

"(T)here are no formal assessment procedures which reliably

predict the future capabilities of intellectually

handicapped children, and (sterilisation) appears to be often

decided upon through fears of what might be, rather than by

reference to clear definite criteria."

24. To conclude this aspect, it is important to stress that it cannot be presumed that an intellectually disabled child is, by virtue of his or her disability, incapable of giving consent to treatment. The capacity of a child to give informed consent to medical treatment depends

on the rate of development of each individual. And if Gillick is taken to reflect the common law in Australia, as we think it now does, these propositions are true as a matter of law in the Northern Territory.

Is sterilisation a special case?

25. If it is clear, as it is in the present case, that the particular child is intellectually disabled to such an extent as to be incapable of giving valid informed consent to medical treatment, the second question arises; namely, whether there are kinds of intervention which are, as a general rule, excluded from the scope of parental power to consent to; specifically, whether sterilisation is such a kind of intervention. Thus the question concerns the limits of parental power other than limits arising from the child's capacity to give personal consent.

26. Where their child is incapable of giving valid consent to medical treatment, parents, as guardians, may in a wide range of circumstances consent to medical treatment of their child who is a minor. This is clear in the common law and, by implication, in the Emergency Medical Operations Act which creates an exception to the need for parental consent in the case of emergency treatment. It is also implicit in the duty to provide the necessaries of life imposed by ss.149 and 183 of the Code. Where this parental power exists, two principles are involved. First, the subjective consent of a parent, in the sense of a parent speaking for the child, is, ordinarily, indispensable. That authority emanates from a caring relationship. Secondly, the overriding criterion to be applied in the exercise of parental authority on behalf of a child is the welfare of the child objectively assessed. That these two principles become, for all practical purposes, one is a recognition that ordinarily a parent of a child who is not capable of giving informed consent is in the best position to act in the best interests of the child. Implicit in parental consent is understood to be the determination of what is best for the welfare of the child.

27. In arguing that there are kinds of intervention which are excluded from the scope of parental power, the Commonwealth submitted that the power does not extend to, for example, the right to have a child's foot cut off so that he or she could earn money begging, and it is clear that a parent has no right to take the life of a child. But these examples may be met with the proposition that such things are forbidden because it is inconceivable that they are in the best interests of the child. Even if, theoretically, begging could constitute a financially rewarding occupation, there is a presumption that other interests of the child must prevail. Thus, the overriding criterion of the child's best interests is itself a limit on parental power. None of the parties argued, however, that sterilisation could never be said to be in the best interests of a child with the result that it could never be authorised. On the contrary, the question whether parental power is limited only arises because the procedure may be authorised. But, the question whether it is in the best interests of the child and, thus, should be authorised is not susceptible of easy answer as in the case of an amputation on other than medical grounds. And the circumstances in which it arises may result from or involve an imperfect understanding of the issues or an incorrect assessment of the situation (37)See, for example, In re D (A Minor) (1976) 2 WLR 279, at p 288; (1976) 1 All ER 326, at p 334; Re Jane (1988) 94 FLR 1, at pp 26, 27; 85 ALR 409, at pp 435, 436; 12 Fam LR 662, at pp 685, 687; (1989) FLC 92-007, at pp 77,257, 77,258. See also In Re F (1990) 2 AC, per Lord Griffiths at p 69 and per Lord Goff at p 79.

28. It is useful, at this point, to look at how sterilisation has been treated in this regard in relevant cases. That is to say whether, and on what bases, sterilisation has been treated as a special case, outside the ordinary scope of parental power to consent to medical treatment.

Australia

29. There are four relevant Australian decisions concerning sterilisation, apart from the Family Court's decision in the present case. They are: Re a Teenager (38) (1988) 94 FLR 181; 13 Fam LR 85; (1989) FLC 92-006; Re Jane; Re Elizabeth (39) (1989) 13 Fam LR 47; (1989) FLC 92-023; and Attorney-General (Qld) v. Parents ("In re S") (40) (1989) 98 FLR 41; 13 Fam LR 660; (1990) FLC 92-124. All were first instance decisions, all involved minors, and the result of each decision was to permit the sterilisation of the girl or young woman involved. With respect to the question of mandatory court involvement, however, authority is evenly divided. Re a Teenager and In re S held that it was unnecessary for parents, as guardians, to seek approval from a court to authorise sterilisation; further, that parental consent was sufficient. Re Jane and Re Elizabeth held that a court's consent was required.

30. In Re a Teenager an application was made by an intellectually disabled 14 year old girl, through her next friend, to restrain her parents from permitting a planned hysterectomy on her to proceed. She was assessed as having the mental ability of a child of about two and a half years. A member of staff of a government centre, on hearing about the operation, contacted a solicitor. The solicitor, acting bona fide, informed the doctor who intended to carry out the operation that the procedure was unlawful without a court order. In dismissing the application, Cook J. held that it is within the scope of the powers of parents to authorise the sterilisation of their child. He said (41) Re a Teenager (1988) 94 FLR, at pp 220-221; 13 Fam LR, at p 120; (1989) FLC, at p 77,224:

"So far as the Family Law Act is concerned, prima facie thoughtful, caring and loving parents, acting in concert, aided by appropriate medical advice have a right and indeed a duty to make decisions as to medical treatment including major operations in respect of the children of their marriage, whether such children are normal or are mentally handicapped. There must be some clear and obvious factors, over and above those usually attendant on such operative treatment, before any form of interference by the Court at the behest of the child or any other person, is justified."

Sterilisation in itself, in his Honour's opinion, involved no such "clear and obvious factors".

31. His Honour's conclusion appears to have been based on the principle that in the "intimate environment" of family life "parents are given a unique opportunity to become aware of the special needs" (42) ibid., at p 196; p 98 of Fam LR; p 77,206 of FLC of their child and that, as against this experience and proximity, a court has no special expertise. Moreover, taking such a decision "out of the hands of thoughtful, caring and loving parents" (43) ibid., at p 197; p 99 of Fam LR; p 77,206 of FLC would risk the denial of the protection granted

families by s.43(b) of the Family Law Act which provides that the Court shall have regard to "the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children".

32. In Re Jane, the Acting Public Advocate of Victoria applied to the Family Court to be appointed the next friend of Jane and, on Jane's behalf, sought an injunction restraining her parents from permitting a hysterectomy to be performed on her without the approval of the Family Court. The Human Rights Commission intervened. Jane was 17 years old and was assessed to have the mental ability of a child of two. The purpose of the proposed operation was to prevent menstruation and the risk of pregnancy. In deciding that only a court, as distinct from the guardians of a child, can give lawful consent to a hysterectomy, Nicholson C.J. appears to have considered the fundamental, independent rights of a child involved in a sterilisation decision to be at too great a risk without the safeguard of a court's participation. His conclusion also rested on the characterisation of the sterilisation as "non-therapeutic" (44) Re Jane (1988) 94 FLR, at pp 30-31; 85 ALR, at pp 439-440; 12 Fam LR, at pp 689-690; (1989) FLC, at p 77,260. The Chief Justice identified two rights recognised by the common law and which might be said to be affected by such a decision: the fundamental principle that every person's body is "inviolate" (45) ibid., at p 8; p 417 of ALR; p 669 of Fam LR; p 77,243 of FLC and the right, or liberty, to reproduce or to choose not to do so (46) ibid., at pp 9-11; pp 418-420 of ALR; pp 670-672 of Fam LR; pp 77,244-77,245 of FLC It was argued before his Honour that if the Family Court has the power to consent to this kind of operation under its parens patriae jurisdiction, then parents have such power also because in the exercise of its parens patriae jurisdiction the Court simply stands in the place of the parents. Nicholson C.J. relied on the judgment of Sachs L.J. in Hewer v. Bryant (47) (1969) 3 WLR 425, at p 433; (1969) 3 All ER 578, at pp 584-585 to conclude that the powers of the Crown as the historic parens patriae were more extensive than those of a parent. He then went on to consider the consequences of the court's consent being held to be unnecessary (48) Re Jane (1988) 94 FLR, at p 26; 85 ALR, at p 435; 12 Fam LR, at p 685; (1989) FLC, at p 77,256:

" The consequences of a finding that the court's consent
is unnecessary are far reaching both for parents and for
children. For example, such a principle might be used to
justify parental consent to the surgical removal of a girl's
clitoris for religious or quasi cultural reasons, or the
sterilisation of a perfectly healthy girl for misguided,
albeit sincere, reasons. Other possibilities might include
parental consent to the donation of healthy organs such as a
kidney from one sibling to another."

And his Honour did not accept the unqualified trust in the medical profession expressed by Cook J. in Re a Teenager (49) (1988) 94 FLR, at p 223; 13 Fam LR, at p 122; (1989) FLC, at p 77,226, saying (50) Re Jane (1988) 94 FLR, at p 26; 85 ALR, at p 435; 12 Fam LR, at p 685; (1989) FLC, at p 77,257:

"Like all professions, the medical profession has members
who are not prepared to live up to its professional

standards of ethics ... Further, it is also possible that

members of that profession may form sincere but

misguided views about the appropriate steps to be taken."

33. In defining the circumstances in which a court's consent is required for an operative procedure to be performed on a minor or an intellectually retarded person, Nicholson C.J. employed, though somewhat tentatively, the distinction between "therapeutic" and "non-therapeutic" operations (51) ibid., at pp 30-31; pp 439-440 of ALR; pp 689-690 of Fam LR; p 77,260 of FLC, where the term "therapeutic" means treatment of some malfunction or disease. This criterion was used as a test in the Canadian case of E (Mrs) v. Eve ("Re Eve") (52) (1986) 2 SCR. 388; (1986) 31 DLR (4th) 1, but was criticised in In re B (A Minor) (53) (1988) AC 199, at pp 203-204, 205, 211-212 by the House of Lords as a test for determining the scope of the parens patriae jurisdiction. In the end Nicholson C.J. found both the distinction between therapeutic and non-therapeutic treatment and the idea of a basic human right to be determinative. He concluded that consent to a medical procedure which involves "interference with a basic human right such as a person's right to procreate" and which has as "the principal or a major aim" a non-therapeutic purpose was outside the scope of parental power (54) Re Jane (1988) 94 FLR, at pp 31, 30; 85 ALR, at p 440; 12 Fam LR, at p 690; (1989) FLC, at p 77,260.

34. Ross-Jones J. in Re Elizabeth agreed with Nicholson C.J., and for the same reasons, that the approval of the Family Court is required. His Honour also relied on the judgment of Lord Donaldson M.R. in the Court of Appeal's decision in In re F in saying (55) Re Elizabeth (1989) 13 Fam LR, at p 62; (1989) FLC, at p 77,376 that a sterilisation operation is "irreversible and is of an emotive, sensitive and potentially controversial character". But his Honour found it unnecessary to examine these factors any further or explain why they should mean that court involvement was necessary.

35. In In re S, Simpson J. relied on the conclusion of the House of Lords in In re F, that there is no necessity for the consent of a court to be obtained for medical procedures to be performed on an adult person under a disability, to come to the same conclusion with respect to a minor.

36. In the case now before the Court Nicholson C.J. adhered to the conclusion he had reached in Re Jane, saying (56) Re Marion (1990) 14 Fam LR, at p 448; (1991) FLC, at p 78,301:

"I think it can be said of sterilisation that it does

stand in the category of procedures that require the

authorisation of a court for all of the reasons contained in

the various passages from the speeches of the House of

Lords in Re B and Re F, which I have cited, to which further

support is given by the American and Canadian authorities."

He drew further support from the Human Rights and Equal Opportunity Commission Act. It is necessary to turn now to some of the decisions upon which Nicholson C.J. relied and later to the Family Law Act.

New Zealand

37. In Re X (57) (1991) 2 NZLR 365 Hillyer J., in the exercise of the parens patriae jurisdiction, made an order consenting to a child of 15 years, with a mental age of three months, undergoing a hysterectomy operation to prevent menstruation, which, according to the evidence, would have had extremely harmful consequences for the child. The application was made by the parents of the child who, by virtue of the relevant New Zealand legislation, had authority to consent to such an operation. Hillyer J. considered that doctors undertaking an operation which would result in sterilisation were obliged to satisfy themselves that the parental consent was an informed one and that the operation would be in the best interests of the child. His Honour held that, although this would in many cases call for an exercise of the court's jurisdiction, there would be obvious cases in which the existence of a consensus of opinion would make it unnecessary to approach the courts and for the parents to incur the expense, inconvenience and anxiety which such an approach would entail.

England

38. In In re B, a case concerning the sterilisation of a 17 year old girl assessed to have the understanding of a normal six year old, the House of Lords endorsed (58) (1988) AC, per Lord Bridge of Harwich at p 205; see also Lord Templeman at p 206 and Lord Oliver of Aylmerton at p 211 the reasoning of Heilbron J. in In re D, a case decided some 12 years earlier. In the earlier case Heilbron J. said (59) (1976) 2 WLR, at p 286; (1976) 1 All ER, at p 332:

" 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 be, if

performed on a woman for non-therapeutic reasons and

without her consent, a violation of such right".

Much of the discussion by the House of Lords in In re B about this "basic human right" was, however, in the context of the main question before the Court - whether or not sterilisation of a mentally disabled person could be authorised by the Court in any circumstances - and was in response to the issues raised by the decision of the Canadian Supreme Court in Re Eve that such a procedure "should never be authorized for non-therapeutic purposes under the parens patriae jurisdiction" (60) (1986) 2 SCR, at p 431; (1986) 31 DLR (4th), at p 32. See In re B (1988) AC, at pp 203-204, 204-205. The House of Lords found that the basic human right to reproduce did not preclude a sterilisation of a minor in appropriate circumstances but only Lord Templeman commented on the issue of mandatory court authorisation. He concluded (61) (1988) AC, at p 205 that consent to sterilisation of a minor was outside the scope of parental power and "should only be carried out with the leave of a High Court judge". Again, since the major issue before the House of Lords was the question whether any person or body could consent to sterilisation on behalf of a disabled minor, his Lordship did not elaborate his view that court authorisation is necessary. He said (62) ibid., at p 206 that "(n)o-one has suggested a more satisfactory ... method (than proceedings before a judicial tribunal) of reaching a decision which vitally concerns an individual but also involves principles of law, ethics and medical practice", and he referred again to "the fundamental right of a girl to bear a child".

39. Between publication of the judgments in Re Elizabeth and In re S in Australia, the judgment of the House of Lords in In re F was delivered. The House of Lords there held that a court's consent to the sterilisation of a 36 year old woman was unnecessary (63)(1990) 2 AC, per Lord Bridge at pp 51-52; per Lord Brandon of Oakbrook at p 56; per Lord Goff at p 79; per Lord Jauncey of Tullichettle at pp 83-84 and that the procedure was lawful if it was in the best interests of the woman (64) ibid., per Lord Bridge at pp 51-52; per Lord Brandon at p 55; per Lord Goff at pp 77-78; per Lord Jauncey at pp 83-84. However, as Nicholson C.J. said in the present case (65) Re Marion (1990) 14 Fam LR, at p 437; (1991) FLC, at p 78,291, the decision of the House of Lords is consistent with the proposition that, in the case of a minor, a court's consent is required. Furthermore, the House of Lords' decision was influenced by the particular jurisdictional framework involved. A lacuna in jurisdiction resulted from the revocation by Royal Warrant in 1960 of the parens patriae jurisdiction of the High Court with respect to adults with mental disability. Therefore, in the circumstances, the Court had no jurisdiction to authorise sterilisation. Even so, Lord Griffiths held (66) In re F (1990) 2 AC, at pp 70-71 that it should, on the grounds of "public interest", be the law that the consent of the High Court is necessary. Furthermore, each of their Lordships urged the wisdom of making an application to the Court (67) ibid., per Lord Bridge at p 51; per Lord Brandon (with whom Lord Jauncey agreed) at p 57; per Lord Goff at p 79, though such an application was not mandatory. In this regard Lord Brandon elaborated the special features of the procedure which make it "highly desirable" that the Court be involved (68) ibid., at p 56:

"These features are: first, the operation will in most cases be irreversible; secondly, by reason of the general irreversibility of the operation, the almost certain result of it will be to deprive the woman concerned of what is widely, and as I think rightly, regarded as one of the fundamental rights of a woman, namely, the right to bear children; thirdly, the deprivation of that right gives rise to moral and emotional considerations to which many people attach great importance; fourthly, if the question whether the operation is in the best interests of the woman is left to be decided without the involvement of the court, there may be a greater risk of it being decided wrongly, or at least of it being thought to have been decided wrongly; fifthly, if there is no involvement of the court, there is a risk of the operation being carried out for improper reasons or with improper motives; and, sixthly, involvement of the court in the decision to operate, if that is the decision reached, should serve to protect the doctor or doctors who perform the operation, and any others who may be concerned in it, from subsequent adverse criticisms or claims."

United States

40. The constitutional bases mentioned at times in the United States cases differ from our own, as does the social and legal history of that country, particularly with regard to the widespread acceptance in North America during the early part of this century of the theory of eugenics (69)See the statement of Mr Justice Holmes in Buck v. Bell (1927) 274 US 200, at p 207, that "(t)hree generations of imbeciles are enough"; Law Reform Commission of Canada (Working Paper No.24, 1979), Sterilization: Implications for Mentally Retarded and Mentally Ill Persons, (hereafter "the Canadian Report"), pp 24-29; see also Goldhar, "The Sterilization of Women with an Intellectual Disability", (1991) 10 University of Tasmania Law Review 157. Nevertheless, much of what is said in those cases derives from and discusses common law principles; given the number of cases concerning sterilisation in those jurisdictions, some reference to them is warranted.

41. The case of AL v. GRH (70) (1975) 325 NE 2d 501 is directly in point. AL filed a complaint seeking a declaration of her right under the common law attributes of the parent-child relationship to have her son, GRH, sterilised. The boy, aged 15, had suffered brain damage as the result of a car accident during his childhood. The Court of Appeals of Indiana said (71) ibid., at p 502:

"(T)he facts do not bring the case within the framework of

those decisions holding ... that the parents may consent on

behalf of the child to medical services necessary for the

child ...

(T)he common law does not invest parents with such power

over their children even though they sincerely believe the

child's adulthood would benefit therefrom".

42. In Stump v. Sparkman (72) (1978) 435 US 349. the Supreme Court of the United States held that a judge who had authorised, after an ex parte hearing, a sterilisation of a minor on the application of the minor's mother, had jurisdiction to do so under an Indiana statute conferring general jurisdiction on the Court. There, a "somewhat retarded" 15 year old girl was sterilised, having been told she was to have her appendix removed. Two years later, when she was married and unable to become pregnant, she was told that she had been sterilised. The Supreme Court referred without disapproval to the opinion of the court below with respect to parental powers of consent, which was in accordance with the decision in AL v. GRH just mentioned (73) ibid., at pp 358-359.

43. One of the leading United States cases in this context is that of In re Grady (74) (1981) NJ 426 A 2d 467 in which the Supreme Court of New Jersey held that the Court could, within its parens patriae jurisdiction, decide whether to authorise sterilisation of a legally incompetent person and that the decision should, ultimately, be made by a court, not by the guardian of the person concerned. The Court began with the idea of a fundamental right to procreate. It said (75) ibid., at pp 471-472:

"Sterilization may be said to destroy an important part of

a person's social and biological identity - the ability to

reproduce. It affects not only the health and welfare of the individual but the well-being of all society. Any legal discussion of sterilization must begin with an acknowledgment that the right to procreate is 'fundamental to the very existence and survival of the race' (76) Skinner v. Oklahoma (1942) 316 US 535, at p 541. ... This right is 'a basic liberty' of which the individual is 'forever deprived' through unwanted sterilisation."

The Court then examined the constitutional right of privacy which involved the right to choose among procreation, sterilisation and other methods of contraception. This was based on United States constitutional provisions but, as Nicholson C.J. said in the present case (77) Re Marion (1990) 14 Fam LR, at p 443; (1991) FLC, at p 78,296, that basic right has been held to be allied with, or to have been derived from, the common law principle of bodily inviolability as well as from written constitutional guarantees.

44. According to the Supreme Court of New Jersey, the right to procreate and the right of privacy could only be protected adequately if the decision to sterilise was the subject of independent, judicial decision-making (78) In re Grady (1981) NJ 426 A 2d, at p 475:

" We need not determine here the full range of persons who may assert such a right on behalf of the incompetent. The parents are unquestionably eligible to do so. The question of who besides the parents has standing to represent the purported interests of the incompetent can await future determination. Nevertheless, we believe that an appropriate court must make the final determination whether consent to sterilization should be given on behalf of an incompetent individual. It must be the court's judgment, and not just the parents' good faith decision, that substitutes for the incompetent's consent."

Thus, the two fundamental rights involved in the decision to sterilise required, in the Court's opinion, reference to the court to ensure sufficient protection against their abuse. That is to say, the nature of the rights themselves distinguished this decision from others made by parents in the ordinary course of caring for their children.

45. Other United States cases which have held that the court's consent is required on the basis that the operation interferes with the fundamental right to procreate include Ruby v. Massey (79) (1978) 452 F Supp 361. Matter of Guardianship of Hayes (80) (1980) Wash. 608 P 2d 635 and Matter of Moe (81) (1982) Mass. 432 NE 2d 712.

Summary of earlier decisions

46. In summary, Australian authority prior to the present case is evenly divided on the question whether court authorisation is a mandatory requirement. The New Zealand decision in Re X depended partly on legislation which enabled parents of an intellectually handicapped child to consent to an operation resulting in sterilisation. Neither of the English cases is directly in point, but in In re B Lord Templeman expressed the opinion that court authorisation was required. In re F concerned an adult, not a minor. It held that court authorisation was not required though this was in the context of the court having no jurisdiction to order a sterilisation. In Re Eve the Canadian Supreme Court held that non-therapeutic sterilisation can never safely be said to be in the best interests of a person and so can never be authorised by a court under the parens patriae jurisdiction. There is, on the other hand, strong United States authority to the effect that sterilisation for contraceptive purposes is outside the scope of parental power but comes within the scope of the court's parens patriae jurisdiction.

47. In the cases reviewed, the bases which emerge for isolating the decision to sterilise a child as a special case requiring authorisation from a source other than the child's parents appear to be: first, the concept of a fundamental right to procreate; secondly, in some cases, a similarly fundamental right to bodily inviolability or its equivalent; thirdly, the gravity of the procedure and its ethical, social and personal consequences, though these consequences are not examined in any detail.

Can parents, as guardians, consent to sterilisation? Conclusion

48. There are, in our opinion, features of a sterilisation procedure or, more accurately, 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. Court authorisation is necessary and is, in essence, a procedural safeguard. Our reasons for arriving at this conclusion, however, do not correspond precisely with any of the judgments considered. We shall, therefore, give our reasons. But first it is necessary to make clear that, in speaking of sterilisation in this context, we are not referring to sterilisation which is a by-product of surgery appropriately carried out to treat some malfunction or disease. We hesitate to use the expressions "therapeutic" and "non-therapeutic", because of their uncertainty. But it is necessary to make the distinction, however unclear the dividing line may be.

49. As a starting point, sterilisation requires invasive, irreversible and major surgery. But so do, for example, an appendectomy and some cosmetic surgery, both of which, in our opinion, come within the ordinary scope of a parent to consent to. However, other factors exist which have the combined effect of marking out the decision to authorise sterilisation as a special case. Court authorisation is required, first, 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 secondly, because the consequences of a wrong decision are particularly grave.

50. The factors which contribute to the significant risk of a wrong decision being made are:

(i) The complexity of the question of consent. Although

there are some cases, of which the facts in Re X are an example, in which the parents can give an informed consent to an operation of sterilisation on an intellectually disabled child and in which that operation is clearly for the benefit of the child, there is no unproblematic view of what constitutes informed consent
(82) Devereux, at pp 298-301; Rassaby, at pp 78-79. And, even given a settled psychological or legal rule, its application in many cases is fraught with difficulty. The fact that a child is disabled does not of itself mean that he or she cannot give informed consent or, indeed, make a meaningful refusal. And there is no reason to assume that those attempting to determine the capacity of an intellectually disabled child, including doctors, may not be affected by commonly held misconceptions about the abilities of those with intellectual disabilities
(83)Rassaby, at pp 79-80; the Canadian Report, pp 50, 60-70; and note the striking results of unconscious race, class and gender bias on decisions to sterilise which are recorded at pp 42-44. There is no doubt that some sterilisation operations have been performed too readily and that the capacity of a child to give consent (and, later, to care for a child) has been wrongly assessed both here and overseas, historically and at the present time
(84)Strahan (ed.) On the Record: A Report on the 1990 STAR conference on sterilisation (Victoria), pp 6-7; the Canadian Report, pp 36-49; Goldhar, op cit, at p 157 (reference to recent government reports). See also In re D and Stump v. Sparkman. In the latter case there was court involvement but the application for sterilisation was heard ex parte.
(ii) The medical profession very often plays a central role in the decision to sterilise as well as in the procedure itself. Indeed the question has been "medicalised" to a great degree
(85)See, for example, Re a Teenager (1988) 94 FLR, at pp 221-222,

223-224; 13 Fam LR, at pp 120-121, 122; (1989) FLC, at pp 77,224-77,225, 77,226; In re F (1990) 2 AC, per Lord Goff at p 78; Re Eve (1986) 2 SCR., at p 399; (1986) 31 DLR (4th), at pp 7-8, citing from the judgment of the provincial Supreme Court in that case. Two concerns emerge from this. It is hard to share the view of Cook J. in Re a Teenager (86) (1988) 94 FLR, at p 223; 13 Fam LR, at p 122; (1989) FLC, at p 77,226 that absolute faith in the integrity of all medical practitioners is warranted. We agree with Nicholson C.J. in Re Jane (87) (1988) 94 FLR, at p 26; 85 ALR, at p 435; 12 Fam LR, at p 685; (1989) FLC, at pp 77,257 that, as with all professions, there are those who act with impropriety as well as those who act bona fide but within a limited frame of reference. And the situation with which they are concerned is one in which incorrect assessments may be made (88) See cases mentioned in fn.(37). The second concern is that the decision to sterilise, at least where it is to be carried out for contraceptive purposes, and especially now when technology and expertise make the procedure relatively safe, is not merely a medical issue. This is also reflected in the concern raised in several of the cases reviewed, that the consequences of sterilisation are not merely biological but also social and psychological. The requirement of a court authorisation ensures a hearing from those experienced in different ways in the care of those with intellectual disability and from those with experience of the long term social and psychological effects of sterilisation.

(iii) The decision by a parent that an intellectually disabled child be sterilised may involve not only the interests of the child, but also the independent and possibly conflicting (though legitimate) interests of the parents and other family members (89)See, for example, Re Jane (1988) 94 FLR, at pp 27, 30; 85 ALR, at pp 436, 439; 12 Fam LR,

at pp 687, 689; (1989) FLC, at pp 77,258, 77,260; Re K and Public Trustee (1985) 3 WWR 204, per Wood J. at p 224, at first instance and (1985) 19 DLR (4th) 255, per Anderson J.A. at p 279, cited with approval by Cook J. in Re a Teenager (1988) 94 FLR, at p 208; 13 Fam LR, at p 108; (1989) FLC, at p 77,214. There is no doubt that caring for a seriously handicapped child adds a significant burden to the ordinarily demanding task of caring for children

(90)See Yura, "Family Subsystem Functions and Disabled Children: Some Conceptual Issues" in Ferrari and Sussman (eds), "Childhood Disability and Family Systems", (1987) 11 Marriage and Family Review, 1/2, 135; Kazak, "Professional Helpers and Families with Disabled Children: A Social Network Perspective" in Ferrari and Sussman (eds), op cit, 177. Subject to the overriding criterion of the child's welfare, the interests of other family members, particularly primary care-givers, are relevant to a court's decision whether to authorise sterilisation. However, court involvement ensures, in the case of conflict, that the child's interests prevail.

51. The gravity of the consequences of wrongly authorising a sterilisation flows both from the resulting inability to reproduce and from the fact of being acted upon contrary to one's wishes or best interests. The fact of violation is likely to have social and psychological implications concerning the person's sense of identity, social place and self-esteem. As the Court said in In re Grady (91) (1981) NJ 426 A 2d, at pp 471-472, a decision to sterilise involves serious questions of a person's "social and biological identity". As with anyone, reactions to sterilisation vary among those with intellectual disabilities but it has been said (92)The Canadian Report, p 50, reporting on Sabagh and Edgerton, "Sterilized Mental Defectives Look at Eugenic Sterilization", (1962) 9 Eugenics Quarterly 213 that "sterilized mentally retarded persons tend to perceive sterilization as a symbol of reduced or degraded status". Another study found (93)Roos, "Psychological Impact of Sterilization on the Individual", (1975) 1 Law and Psychology Review 45, at p 54, in the Canadian Report, pp 50-51 and see generally pp 49-52 that:

"Existential anxieties commonly associated with mental retardation are likely to be seriously reinforced by coercive sterilization of those who have had no children. Common sources of these anxieties include low self-esteem, feelings of helplessness, and need to avoid failure, loneliness, concern over body integrity and the threat of

death."

52. The far-reaching consequences of a general rule of law allowing guardians to consent to all kinds of medical treatment, as well as the consequences of a wrong decision in any particular case, are also relevant. As Nicholson C.J. pointed out in Re Jane in the passage quoted earlier (94) (1988) 94 FLR, at p 26; 85 ALR, at p 435; 12 Fam LR, at p 685; (1989) FLC, at p 77,256, such a rule may be used to justify other procedures such as a clitoridectomy or the removal of a healthy organ for transplant to another child.

53. 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".

54. Children with intellectual disabilities are particularly vulnerable, both because of their minority and their disability, and we agree with Nicholson C.J. (95) ibid., at p 27; p 436 of ALR; p 687 of Fam LR; p 77,258 of FLC that there is less likelihood of (intentional or unintentional) abuse of the rights of children if an application to a court is mandatory, than if the decision in all cases could be made by a guardian alone. In saying this we acknowledge that it is too costly for most parents to fund court proceedings, that delay is likely to cause painful inconvenience and that the strictly adversarial process of the court is very often unsuitable for arriving at this kind of decision. These are clear indications of the need for legislative reform, since a more appropriate process for decision-making can only be introduced in that way. The burden of the cost of proceedings for parents would in the meantime, of course, be alleviated by the application being made by a relevant public body pursuant to s.63C(1) of the Family Law Act (96)See generally Blackwood, "Sterilisation of the Intellectually Disabled: The Need for Legislative Reform", (1991) 5 Australian Journal of Family Law 138.

55. One more thing should be said about the basis upon which we have concluded that sterilisation is a special case with respect to parental powers. 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. It is debatable whether the former is a useful concept, when couched in terms of a basic right, and

how fundamental such a right can be said to be (97)See Kingdom, "The Right to Reproduce" in Ockelton (ed.), Medicine, Ethics and Law, (1986), 55; cf. Freeman, "Sterilising the Mentally Handicapped" in Freeman (ed.), Medicine, Ethics and the Law, (1988), 55. For example, there cannot be said to be an absolute right in a man to reproduce (except where a woman consents to bear a child), unless it can be contended that the right to bodily integrity yields to the former right, and that cannot be so. That is to say, if there is an absolute right to reproduce, is there a duty to bear children? But if the so-called right to reproduce comprises a right not to be prevented from being biologically capable of reproducing, that is a right to bodily integrity. The same applies, though in a different way, to a woman's "right to reproduce". Again, if the right is, in fact, a right to do with one's person what one chooses, it is saying no more than that there is a right to bodily and personal integrity. Furthermore, it is quite impossible to spell out all the implications which may flow from saying that there is a right to reproduce, expressed in absolute terms and independent from a right to personal inviolability. We think it is important, in the terms of this judgment, to make it quite clear that it is inviolability that is protected, not more.

Does the Family Court have jurisdiction to authorise sterilisation?

56. Neither the appellant nor the respondents suggested that the Family Court does not have jurisdiction to authorise a sterilisation in appropriate circumstances and when an application is made; their difference was as to the source of jurisdiction and, the question already dealt with, whether that jurisdiction must be invoked.

57. Despite the effective absence of argument in support of a broad proposition that the Family Court lacks jurisdiction in this matter and despite the fact that it was accepted that in any event the Court had, if not independent jurisdiction, then cross-vested parens patriae jurisdiction as a result of the Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth) and the Jurisdiction of Courts (Cross-vesting) Act (1987) (N.T.), considerable time was spent in argument on the question whether the Family Court had independently vested "welfare" jurisdiction conferred by the Family Law Act. The issue is of importance, also, in so far as it affects the related question of the impact of an order under the federal jurisdiction of the Family Court on existing State law, particularly criminal law.

58. In order to determine the Family Court's jurisdiction, it is necessary to examine two major amendments to the Act, one in 1983 and another in 1987. Before the 1983 amendments the Family Court had, by virtue of s.31(1) of the Family Law Act, jurisdiction in matrimonial causes. "Matrimonial cause" was defined in s.4(1) of the Act to include:

"(c) proceedings between the parties to a marriage with

respect to -

(i) the maintenance of one of the parties to the

marriage; or

(ii) the custody, guardianship or maintenance of, or

access to, a child of the marriage;

...

(cb) proceedings by or on behalf of a child of a marriage

against one or both of the parties to the marriage

with respect to the maintenance of the child".

59. Section 64(1) dealt with proceedings with respect to the "custody or guardianship of, or access to, a child of a marriage". There was no independent reference to welfare and it is clear that, as the Family Law Act stood before 1983, there was no general power in the Family Court to make orders relating to the welfare of a child. Orders were confined to those concerning custody, guardianship, or access (98)See the discussion of wardship jurisdiction by Mason J. in Fountain v. Alexander [1982] HCA 16; (1982) 150 CLR 615, at pp 634-635.

60. The amendments to the Family Law Act made in 1983 were the result of recommendations contained in the Watson Committee Report of 1982. Significantly, the Act was amended to enable orders to be made for the protection of the welfare of a child of a marriage (99) s.64(1). At the same time the definition of "matrimonial cause" in s.4(1) was amended to include:

"(cf) proceedings between the parties to a marriage with

respect to the welfare of a child of the marriage;

(cg) proceedings by or on behalf of a child of a marriage

against one or both of the parties to the marriage

with respect to the welfare of the child;

(ch) proceedings with respect to the welfare of a child

of

a marriage, being proceedings to which one party to

the marriage is a party ..."

61. The Attorney-General, in the second reading speech introducing the Family Law Amendment Bill of 1983, said(100) Australian Senate Parliamentary Debates (Hansard), 1 June 1983, p 1098.:

" The third way in which the Bill will expand the Act's

jurisdiction concerning children is to permit proceedings

concerning the welfare of a child. These amendments

reflect the Government's decision to implement the Watson

Committee recommendation that the Family Law Act be

amended to enable orders to be made for the protection of

the welfare of a child of a marriage, thereby investing

courts exercising jurisdiction under the Act with a power

similar to the wardship power of the State Supreme Courts.

The Joint Select Committee favoured the conferral of a

wardship jurisdiction on courts exercising jurisdiction

under the Act. The Watson Committee, however, concluded

that while the substance of the jurisdiction was highly desirable, the terminology or concept of wardship, which the committee described as 'archaic', ought to be abolished. In accordance with the Watson Committee's views, the Bill does not use the language of wardship but instead provides that proceedings concerning the welfare of a child of a marriage that involve at least one of the parties to the marriage are a matter, indeed an exclusive matter, for the Family Court."

62. It seems clear that the 1983 amendments were intended to, and did, confer jurisdiction on the Family Court similar to the parens patriae jurisdiction, without the formal incidents of one of the aspects of that jurisdiction, the jurisdiction to make a child a ward of court.

63. The 1987 amendments effected, among other things, the repeal of pars (cb) to (ch) of the definition of "matrimonial cause", which included the provisions relating to proceedings with respect to the welfare of a child, quoted above. Before the Full Court of the Family Court the Commonwealth argued(101) See Re Marion (1990) 14 Fam LR, at pp 431-436, 452-453, 474-479; (1991) FLC, at pp 78,286-78,291, 78,304, 78,323-78,327 that the deletion of these paragraphs from the definition of "matrimonial cause" had the effect of taking from the Family Court the independent head of jurisdiction to make orders with respect to the welfare of a child. That submission was, rightly, not pressed before this Court. The deletion, in 1987, of the paragraphs in the definition of "matrimonial cause" is consistent with an aim of gathering provisions relating to children into one Part of the Act(102) Pt VII, which was also effected by the 1987 amendments, and with the further aim of effecting the reference of powers from four States to the Commonwealth in relation to matters concerning ex-nuptial children(103) See Nicholson C.J. in Re Marion (1990) 14 Fam LR, at p 435; (1991) FLC, at p 78,290. And, at least at the time of these latter amendments, the same legislative scheme applied to orders with respect to child maintenance, in relation to which the Family Court's jurisdiction has not been doubted. Furthermore, if the intention of Parliament was, by the 1987 amendments, to divest the Family Court of this welfare jurisdiction and to revest it in State Supreme Courts, it would have been necessary to express such an intention in clear terms(104) Johnson v. Director-General of Social Welfare (Vic.) (1976) 50 ALJR 562, per Barwick C.J. at p 564; 9 ALR 343, at p 346; see also McCall J. in Re Marion (1990) 14 Fam LR, at pp 478-479; (1991) FLC, at p 78,327.

64. As the Family Law Act now stands, s.63(1) confers jurisdiction on the Family Court "in relation to matters arising under this Part". Section 64(1) of the Act provides:

" In proceedings with respect to the custody, guardianship or welfare of, or access to, a child -

...

(c) ... the court may make such order in respect of those matters as it considers proper, including an

order until further order."

The sub-section does not in terms confer jurisdiction on the Court but it confers power to make orders and presupposes jurisdiction.

65. Whether the source of jurisdiction is to be found primarily in s.64 along with s.63(1) as the appellant argued, or in a much wider range of sections in Pt VII as the Commonwealth argued(105) See, for example, ss.64(1B), 65, 70C, it is clear that the welfare of a child of a marriage is a "matter" which arises under Pt VII for the purposes of s.63(1) and is, therefore, an independent subject which may support proceedings before the Family Court. Although there are limits on that jurisdiction, there is no doubt that it encompasses the circumstances of the present case.

66. What was achieved by the amendments of 1983 and was not rescinded by the change to the Act in 1987 was a vesting in the Family Court of the substance of the parens patriae jurisdiction, of which one aspect is the wardship jurisdiction. And we agree with McCall J. in the present case(106) Re Marion (1990) 14 Fam LR, at p 480; (1991) FLC, at p 78,328 that the fact that the Family Court "may not have the power to make a child a ward of the court does not ... prevent it exercising the general parens patriae power with respect to children".

67. Before leaving this analysis of the Act we should add that, in our view, the Family Court has no power under s.63E(3) of the Act to enlarge the powers of a guardian under s.63E(1) so that he or she can consent to the sterilisation of a child. We agree with Nicholson C.J. that(107) ibid., at p 436; p 78,291 of FLC:

"the subsection is designed to give a court flexibility in

the assignment of custodial and guardianship powers to

parents so that, in appropriate cases, powers normally

regarded as incidents of guardianship can be conferred upon

the custodial parent and vice versa but I do not think that

the section operates to extend the court's powers".

The nature of the welfare jurisdiction

68. As already mentioned, the welfare jurisdiction conferred upon the Family Court is similar to the parens patriae jurisdiction. The history of that jurisdiction was discussed at some length by La Forest J. in Re Eve(108) (1986) 2 SCR., at pp 407-417; (1986) 31 DLR (4th), at pp 14-21. His Lordship pointed out(109) ibid., at p 410; p 16 of DLR that "(t)he Crown has an inherent jurisdiction to do what is for the benefit of the incompetent. Its limits (or scope) have not, and cannot, be defined." In Wellesley v. Duke of Beaufort, Lord Eldon L.C., speaking with reference to the jurisdiction of the Court of Chancery, said(110) (1827) 2 Russ 1, at p 20 (38 ER 236, at p 243):

"(I)t 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."

69. When that case was taken on appeal to the House of Lords, Lord Redesdale noted(111) Wellesley v. Wellesley (1828) 2 Bli N S 124, at p 131 (4 ER 1078, at p 1081):

" Lord Somers resembled the jurisdiction over infants, to

the care which the Court takes with respect to lunatics,

and supposed that the jurisdiction devolved on the Crown,

in the same way."

Lord Redesdale went on to say(112) ibid., at p 136 (p 1083 of ER) that the jurisdiction extended "as far as is necessary for protection and education".

70. To the same effect were the comments of Lord Manners who stated(113) ibid., at p 142 (p 1085 of ER) that "(i)t is ... impossible to say what are the limits of that jurisdiction". The more contemporary descriptions of the parens patriae jurisdiction over infants invariably accept that in theory there is no limitation upon the jurisdiction(114) See In re X (A Minor) (1975) 2 WLR 335, at pp 339-340, 342, 345, 345-346; (1975) 1 All ER 697, at pp 699-700, 703, 705, 706. That is not to deny that the jurisdiction must be exercised in accordance with principle. However, as appears from the authorities discussed earlier, the jurisdiction has been exercised in modern times so as to permit medical operations on infants which result in sterilisation.

71. No doubt the jurisdiction over infants is for the most part supervisory in the sense that the courts are supervising the exercise of care and control of infants by parents and guardians. However, to say this is not to assert that the jurisdiction is essentially supervisory or that the courts are merely supervising or reviewing parental or guardian care and control. As already explained, the parens patriae jurisdiction 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(115) The breadth of the wardship jurisdiction of the English courts was emphasised in In re R (A Minor).

What is involved in authorisation?

72. It is necessary to consider the precise function of a court when it is asked to authorise the sterilisation of an intellectually disabled child. It is to be remembered that what is sought is not the court's consent as, for example, in the signing of hospital forms, but its authorisation.

73. 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.

74. In the context of medical management, "step of last resort" is a convenient way of saying that alternative and less invasive procedures have all failed or that it is certain that no other procedure or treatment will work(116) See Wilson et al (eds), Harrison's Principles of

Internal Medicine, 12th ed. (1991), pp 10-11. The objective to be secured by sterilisation is the welfare of the disabled child. Within that context, it is apparent that sterilisation can only be authorised in the case of a child so disabled that other procedures or treatments are or have proved inadequate, in the sense that they have failed or will not alleviate the situation so that the child can lead a life in keeping with his or her needs and capacities.

75. It is true that the phrase "best interests of the child" is imprecise, but no more so than the "welfare of the child" and many other concepts with which courts must grapple. As we have shown, it is confined by the notion of "step of last resort", so that, for example, in the case of a young woman, regard will necessarily be had to the various measures now available for menstrual management and the prevention of pregnancy(117) As discussed in Re a Teenager (1988) 94 FLR, at pp 184, 187-195, 227-230; 13 Fam LR, at pp 87, 90-98, 125-129; (1989) FLC, at pp 77,196, 77,200-77,205, 77,229-77,231; Re Jane (1988) 94 FLR, at pp 4-5, 21, 22; 85 ALR, at pp 413-414, 430, 431; 12 Fam LR, at pp 666-667, 681, 682; (1989) FLC, at pp 77,240-77,241, 77,253; Re Elizabeth (1990) 13 Fam LR, at pp 49-51, 57-59, 61; (1989) FLC, at pp 77,365-77,366, 77,372, 77,375; In re S (1989) 98 FLR, at pp 45-47, 49; 13 Fam LR, at pp 663-666, 668; (1990) FLC, at pp 77,816-77,819, 77,820. And, if authorisation is given, it will not be on account of the convenience of sterilisation as a contraceptive measure, but because it is necessary to enable her to lead a life in keeping with her needs and capacities. With the range of expertise available to them, judges will develop guidelines to give further content to the phrase "best interests of the child" in responding to the situations with which they will have to deal.

76. In the circumstances with which we are concerned, the best interests of the child will ordinarily coincide with the wishes of the parents. In cases of that kind, all that will be necessary is for the court to declare that the procedure in question is or is not in his or her best interests.

77. On occasion, the courts may refuse to authorise a sterilisation desired by the parents. Again, in that case, a declaration will issue that the procedure is not in the best interests of the child and, if necessary, consequential injunctive relief will be granted. And it may be that in an exceptional case a court may authorise sterilisation against the wishes of the parents. In a case of that kind, the court will issue its declaration to that effect and, if necessary, will also appoint some person to give consent in accordance with its declaration. In an exceptional case in which a court authorises sterilisation against the wishes of the parents, it will do so with the benefit of a range of medical and other advice which will equip it to determine whether that course is necessary to enable a handicapped child to lead a life in keeping with his or her needs and capacities.

Limitations on the jurisdiction of the Family Court: Impact on State laws

78. Questions arose in the course of argument as to the effect of an order made by the Family Court in the exercise of its jurisdiction with respect to the welfare of a child, as to the impact of such an order on State laws and also whether there are any limits on this "welfare jurisdiction". It was asked, for example, what is the consequence of an order of the Family Court, authorising sterilisation, for State or Territory criminal laws regarding assault? Does the federal jurisdiction authorise the making of an order for the release from custody of a

minor convicted under State or Territory law of an offence if it were thought to be for the welfare of the minor? These are related questions to some extent in that it was suggested that if a consequence of certain orders of the Family Court rendered State laws somehow unworkable, this would indicate that the welfare jurisdiction of the Family Court was, or should be, limited.

79. Ultimately, however, any limitation on the jurisdiction of the Family Court conferred, or apparently conferred, by the Family Law Act must be constitutional. The Act is limited in its operation by reference to the constitutional powers under which it is enacted: "Marriage" (s.51(xxi)); "Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants" (s.51(xxii)); and, so far as the Northern Territory is concerned, the territories power (s.122). In the present case the emphasis was naturally on the marriage power and, as well, the territories power.

80. In Fountain v. Alexander Gibbs C.J. said(118) (1982) 150 CLR, at p 627:

"The power of the Parliament to make laws with respect to

marriage does not extend to laws for the protection or

welfare of the children of a marriage except in so far as

the occasion for their protection or welfare arises out of,

or is sufficiently connected with, the marriage

relationship."

Clearly there are limits on the scope of the welfare jurisdiction, as with the custody and maintenance jurisdictions, though the scope of the jurisdiction will nevertheless be very wide. So long as an order of the Family Court is constitutional, there can be no limitation on the Court's powers emanating from the need to preserve the scope of State legislative powers. To hold otherwise would be, as counsel for the Commonwealth said, to take the law back beyond the Engineers' Case(119) Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd. [1920] HCA 54; (1920) 28 CLR 129.

81. It is clear enough that a question of sterilisation of a child of a marriage arises out of the marriage relationship and that the sterilisation of a child arises from the custody or guardianship of a child. Therefore, jurisdiction to authorise a sterilisation is within the reach of power of the Commonwealth, quite apart from the operation of s.122 of the Constitution.

82. But what effect does an order of the Family Court have on State laws? We have already indicated that authorisation is a declaration that sterilisation is in the best interests of the child. When made, it provides the framework in which persons (including, of course, parents) appointed for the limited purpose of consenting in accordance with the declaration may give any requisite consent on behalf of the child. Accordingly, there is no question of overriding State laws about assault which require consent to surgery. Although the criminal law of the Northern Territory is collected in a Code, there are examples of its provisions resting on law from other sources. Parental consent to other kinds of treatment, itself, is an exception to personal consent not provided for in the Code. Although parents have a duty to provide necessaries of life, there is no Code provision allowing for parental consent to treatment of minors. An order from the Family Court can be characterised as part of family law, as is the

doctrine of parental consent and, as such, can be described as a substitute for personal consent, the operation of the laws of assault continuing to have effect.

83. Reference has already been made in this judgment to provisions of the Code which make it clear that, if there is an order of the Family Court authorising sterilisation, made within power, no criminal consequences are likely to ensue for the medical practitioner who performs the operation. There would be no unlawful assault (s.188) because the act was authorised(120) The definition of "unlawfully" is found in s.1 and also in s.26.

84. The Solicitor-General for New South Wales (the State was an intervener) drew attention to the Children (Care and Protection) Act 1987 (N.S.W.), s.20B of which provides that a person who carries out "special medical treatment" on a child who is under the age of 16 years, otherwise than in accordance with the section, commits an offence. Special medical treatment includes "any medical treatment that is intended, or is reasonably likely, to have the effect of rendering permanently infertile the person on whom it is carried out" (121) s.20B(3). The Supreme Court of New South Wales is empowered to give its consent to such treatment only if the treatment is necessary in order to save the child's life or to prevent serious damage to the child's health(122) s.20B(2A). A medical practitioner may carry out special medical treatment on a child who is under the age of 16 years without the consent of the Court in situations of urgency(123) s.20B(2)(a). The Children (Care and Protection) Act is a prescribed child welfare law within the meaning of s.60 of the Family Law Act. Section 60H(1) of the Family Law Act reads:

" A court having jurisdiction under this Act shall not

make an order under this Act in relation to a child who is in

the custody of, or under the guardianship, care and control

or supervision of, a person under a child welfare law unless

the order is expressed to come into effect when the child

ceases to be in such custody or under such guardianship,

care and control or supervision, as the case may be."

Section 60H(2) provides that nothing in the Family Law Act and no "decree" (which s.4(1) defines in broad terms to include "order") affects:

"(e) the operation in relation to the child of a child

welfare law".

85. No doubt, the existence of the New South Wales legislation may give rise to difficulties in view of the self-imposed limitation in s.60H(124) See The Queen v. Demack; Ex parte Plummer [1977] HCA 37; (1977) 137 CLR 40; The Queen v. Lambert; Ex parte Plummer [1980] HCA 52; (1980) 146 CLR 447. But they are not difficulties to be resolved by a judgment in the present appeal. It was not suggested that there was in the Northern Territory legislation anything comparable to the Children (Care and Protection) Act or otherwise that would bring s.60H into play in the present circumstances.

86. For present purposes it is enough to say that an order of the Family Court authorising a sterilisation operation would emanate from a constitutionally valid Commonwealth law and

that the order would have an effect, in conjunction with the relevant Territory legislation, which would remove the operation from the area of the criminal law.

Answers

87. In the light of the reasons in this judgment we would answer the questions in the case stated as follows:

(1) No.

(2) (a) Yes.

(b) No.

(c) No, though in authorising the carrying out

of such a procedure, the Family Court may, if necessary,

permit the Applicants to give any requisite consent.

(3) The step referred to in question 2(a) is required

by law.

BRENNAN J. Marion (that is not her true name) is a child of 14 years. She lives in the Northern Territory. She is said to be intellectually disabled and her parents think she should be sterilized. Subject to s.26(1)(d) of the Criminal Code of the Northern Territory, it would be an offence under ss.181 and 186 of the Code to remove Marion's uterus or ovaries without her consent. Subject to the same provision, removal of any of those organs without Marion's consent would amount also to an offence of assault punishable under s.188(2)(a) of the Code unless the removal falls within the exception of "medical treatment ... reasonably needed" in the definition of assault in s.187(c). Marion's intellectual disability is such that she is unable to give or refuse consent to the removal of her uterus and ovaries. But the removal would be lawful if an authority could lawfully be granted and were granted so as to satisfy s.26(1)(d) of the Code. That provision reads as follows:

" An act, omission or event is authorized if it is done,

made or caused -

...

(d) subject to subsection (3), pursuant to authority,

permission or licence lawfully granted."

Section 26(3) provides:

" A person cannot authorize or permit another to kill him

or, except in the case of medical treatment, to cause him

grievous harm."

This appeal was conducted on the footing that sub-s.(3) has no application in the present case because of Marion's disability. It is therefore only an "authority, permission or licence lawfully granted" by a competent third person that can justify for the purposes of the criminal law the performance on Marion of an hysterectomy or ovariectomy. Similarly it is only such an authority, permission or licence that can justify the performance of either of those surgical operations for the purposes of the civil law. Without obtaining such an authority, permission or licence, a doctor who removes any of Marion's organs would be liable in an action for

trespass(125) T v. T (1988) Fam 52, at p 67. The question is whether Marion's parents (who are her natural and legal guardians) or a court can, by giving an authority to remove her uterus or her ovaries or all those organs, attract the protection of s.26(1)(d) of the Code and convert what would otherwise be a trespass into a lawful (that is, non-actionable) procedure. In substance, that is the thrust of the amended questions set out in the case stated by Nicholson C.J. and variously answered by the members of the Full Court.

The Social and Legal Context

2. The questions raised by this case starkly demonstrate the quandary of the law when it is invoked to settle an issue which is a subject of ethical controversy and there are no applicable or analogous cases of binding authority. Although the issues in this case relate to the law's protection of the physical integrity of a person suffering from an intellectual disability, there is no clear community consensus on these issues which the courts or the legislature can translate into law. Nevertheless, concrete and poignant cases - Marion's among them - arise for decision. In such a case, a court must try to identify the basic principles of our legal system and to decide the issues in conformity with those principles.

3. The appeal to this Court does not require the ultimate merits of the application to be decided, but the questions of authority and jurisdiction raised by the amended stated case cannot be answered except by reference to the principles which define and govern the law's protection of physical integrity. The questions of authority and jurisdiction are adjectival and it is not possible to answer them without determining the substantive law which the respective repositories of authority and jurisdiction are to apply. To determine the repository of a power to grant a valid authority for sterilization without reference to the governing principles is simply to leave the repository to decide for or against sterilization according to an unguided discretion. Conversely, to ascertain the governing principles without determining the repository of the power is to state a rule without providing for its application.

4. The questions in the amended stated case are directed to ascertaining the repository of a power to grant a valid authority for the removal of Marion's organs without her consent but those questions do not in terms refer to the scope of the power. The questions, though stated with specific reference to Marion, were posed before the facts have been ascertained and the only fact which can therefore be assumed is Marion's incapacity to consent or to refuse consent to surgery. If the questions be understood as enquiring whether a parent, a guardian or a court has power validly to authorize the sterilization of any child who is intellectually incapable of giving or refusing consent to his or her sterilization, the answer is that there is no such broad power: neither parents nor other guardians nor courts have power to authorize sterilization simply because a child is intellectually disabled. It is necessary first to consider the relevant principles which govern the extent to which authority can lawfully be given to invade the physical integrity of the intellectually disabled and the circumstances in which such an authority can be given before answering the question: who can lawfully give that authority?

The right to integrity of the person

5. In Collins v. Wilcock(126) (1984) 1 WLR 1172, at p 1177; (1984) 3 All ER 374, at p 378, Robert Goff L.J. said:

"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."

6. Blackstone declared the right to personal security to be an absolute, or individual, right vested in each person by "the immutable laws of nature"(128) Blackstone, ibid., vol 1, pp 124, 129; vol 3, p 119. Blackstone's reason for the rule which forbids any form of molestation, namely, that "every man's person (is) sacred", points to the value which underlies and informs the law: each person has a unique dignity which the law respects and which it will protect. Human dignity is a value common to our municipal law and to international instruments relating to human rights(129) The inherent dignity of all members of the human family is commonly proclaimed in the preambles to international instruments relating to human rights: see the United Nations Charter, the International Covenant on Civil and Political Rights (which declares "the right to ... security of person": Art.9), the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child. The law will protect equally the dignity of the hale and hearty and the dignity of the weak and lame; of the frail baby and of the frail aged; of the intellectually able and of the intellectually disabled. Thus municipal law satisfies the requirement of the first paragraph of the 1971 United Nations Declaration on the Rights of Mentally Retarded Persons which reads:

"The mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings."

Our law admits of no discrimination against the weak and disadvantaged in their human dignity. Intellectual disability justifies no impairment of human dignity, no invasion of the right to personal integrity.

7. Although the law's respect for the unique dignity of every person is the same, the protection of physical integrity which is required to preserve the dignity of one person may change from time to time and it may differ from the protection of physical integrity required to preserve the dignity of another. Differing measures of protection are required according to the physical and mental capacities of individuals at particular times: the baby whose dignity is respected by being carried and cared for by his or her parents grows into a man or woman whose dignity would be offended by such treatment; a donation of blood by a person of full

age and understanding may enhance dignity, while the extraction of blood from a person who is incapable of consenting is an invasion of that person's physical integrity. Human dignity requires that the whole personality be respected: the right to physical integrity is a condition of human dignity but the gravity of any invasion of physical integrity depends on its effect not only on the body but also upon the mind and on self-perception. In assessing the significance of sterilization of a female child, it is erroneous to have regard only to the physical acts of the anaesthetist and surgeon (even when major surgery is performed involving the removal of the uterus and ovaries) and to the physiological consequences. Regard must also be had to the disturbance of the child's mind and the emotional aftermath of the sterilization and a comparison must be made between her self-perception when sterilized and the perception she would have had of herself if she had been permitted to live with her natural functions intact.

8. A person who is sui juris is capable of waiving his or her right to personal integrity unless the waiver is contrary to the public interest(130) Reg. v. Coney (1882) 8 QBD 534; A-G. Reference (No.6 of 1980) (1981) QB 715, at pp 718-719. The law accepts that a person who is sui juris can consent to what would otherwise amount to an assault or trespass without impairment of dignity, although the interest of society in the physical integrity of its members precludes the law from giving effect to a consent to the doing of grievous harm(131) Pallante v. Stadiums Pty. Ltd. (No.1) (1976) VR 331, at pp 340-341. Judicial views have differed(132) Bravery v. Bravery (1954) 1 WLR 1169, at pp 1180-1181; (1954) 3 All ER 59, at pp 67-68; Thake v. Maurice (1986) QB 644 as to whether at common law a person who is sui juris can give an effective consent to his or her own sterilization. Under the Northern Territory Code, the exception in s.26(3) arguably permits sterilization of a person who, being sui juris, consents to the procedure, but it is not necessary to decide that question in this case. The hypothesis on which these proceedings are conducted is that Marion is intellectually disabled to the extent that any operation upon her would be done without her consent. Sterilization of an intellectually disabled child requires justification of a compelling kind, for involuntary sterilization is a serious invasion of that child's personal integrity and a grave impairment of that child's human dignity.

9. It is misleading to speak of an authorization given by a third party to administer medical treatment to an intellectually disabled child as a substituted consent. "Substituted consent" is semantic legerdemain(133) See Matter of Guardianship of Eberhardy (1981) Wis 307 NW 2d 881, at p 893, where the Court, speaking of authorization of sterilization of a mentally incompetent child said: "It clearly is not a personal choice, and no amount of legal legerdemain can make it so.". Such an authorization is the very antithesis of consent, for it authorizes the administration of medical treatment to the child irrespective of consent. Unlike an informed and actual consent to medical treatment given by a person who is sui juris, such an authorization is not a protection of the dignity of the child who is subjected to the treatment. The extent and significance of the invasion of personal integrity involved in sterilization varies, of course, with the procedure proposed. A radical hysterectomy with ovariectomy is far more invasive than a tubal ligation or the depositing of long-acting hormones. And any of these procedures is more invasive than the oral administration of hormones that produce temporary infertility. In assessing the impairment of human dignity in any of these cases, it is necessary to take into account the measure of physical invasion and, importantly, the effect on the child's mind and self-perception of the proposed procedure.

10. Each of us perceives his or her own identity and personality in terms which reflect the subjective appreciation of his or her own body, its attributes and functions. We may not see ourselves as others see us but our own perception of ourselves is entirely valid. The right to physical integrity protects a person's self-estimate The law can reasonably assume that a person who is sui juris and who consents to the application of force to his or her body can adjust his or her self-estimate to comprehend an invasion of physical integrity. But such an assumption cannot be made in a case where a child who is intellectually disabled to a significant degree is subjected to a substantial invasion of his or her physical integrity. In the world in which that child perceives himself or herself to be living, the child's self-estimate is entirely valid, however defective or limited that estimate may appear to an observer to be. Moreover, that world and that self-estimate live in the mind of the child to which the outside world, even loving parents, have only limited access. The more profound the intellectual disability, the more limited the access. Yet, if a third party is to be empowered to authorize the compulsory sterilization of an intellectually disabled child, the third party must be able to take account of the degree of impairment of the child's dignity entailed by the sterilizing procedure. It follows that no authority for sterilization should be given unless some compelling justification is identified and demonstrated. A substituted "consent" does not provide its own justification. I turn to examine the circumstances in which a repository of a power to authorize sterilization can be justified in exercising it. An obvious justification exists when the proposed treatment is therapeutic.

Therapeutic medical treatment

11. It is necessary to define what is meant by therapeutic medical treatment. I would define treatment (including surgery) as therapeutic when it is administered for the chief purpose of preventing, removing or ameliorating a cosmetic deformity, a pathological condition or a psychiatric disorder, provided the treatment is appropriate for and proportionate to the purpose for which it is administered. "Non-therapeutic" medical treatment is descriptive of treatment which is inappropriate or disproportionate having regard to the cosmetic deformity, pathological condition or psychiatric disorder for which the treatment is administered and of treatment which is administered chiefly for other purposes.

12. The distinction between therapeutic and non-therapeutic medical treatment was adopted by the Supreme Court of Canada in Re Eve(134) E (Mrs) v. Eve ("Re Eve") (1986) 2 SCR.388; (1986) 31 DLR (4th) 1 as the criterion for distinguishing permissible from impermissible sterilization of an intellectually disabled child, though the definitions which I have attempted were implied rather than expressed in the judgment of the Court delivered by La Forest J. Notwithstanding the unanimous judgment of that Court, in In re B (A Minor)(135) (1988) AC 199, at p 204, Lord Hailsham of St Marylebone L.C. dismissed the distinction in relation to the facts in that case as "totally meaningless, and, if meaningful, quite irrelevant to the correct application of the welfare principle" which his Lordship stated in these terms(136) ibid., at p 202; see, to the same effect, the speech of Lord Oliver of Aylmerton, at p 211:

"in the exercise of its wardship jurisdiction the first and

paramount consideration is the well being, welfare, or

interests (each expression occasionally used, but each, for

this purpose, synonymous) of the human being concerned,

that is the ward herself or himself."

Similarly, Lord Bridge of Harwich(137) ibid., at p 205 thought that the drawing of a distinction between therapeutic and non-therapeutic therapeutic operations would "divert attention from the true issue, which is whether the operation is in the ward's best interest".

13. The welfare principle is, in England and elsewhere, statutorily binding on courts exercising jurisdiction over the guardianship and custody of infants. The effect of a statute which declares the welfare of an infant to be "the first and paramount consideration" was explained by Dixon J. in Storie v. Storie(138) [1945] HCA 56; (1945) 80 CLR 597, at pp 611-612:

"The word 'first' as well as the word 'paramount' shows that other considerations are not entirely excluded and are only subordinated. The provision proceeds, however, to deny superiority to the claim of one parent over the other 'from any other point of view' scil. other than the welfare of the child. Section 145, which comes from the earlier Guardianship of Infants Act 1886 s.5, gives the Court power to make such order as it thinks fit 'having regard to the welfare of the infant and to the conduct of the parents and to the wishes as well of the mother as of the father.' In administering these provisions the courts do not assume the functions of a children's welfare board seeking to discover, independently of parental and family relationship, the most eligible custodian, locality and environment for the upbringing of the infant: cf. per Lord Clyde and Lord Sands, Hume v. Hume(139) (1926) SC 1008, at p 1014 and p 1015 respectively. The traditional view is still followed in the courts that prima facie it is for the welfare of a child that it should enjoy the affection and care of parents and be brought up under their guidance and influence."

In ascertaining where the welfare of a child lies, the courts have sought to discover what is in the child's "best interests". The "best interests" approach focusses attention on the child whose interests are in question. By asserting that the child's "best interests" are "the first and paramount consideration", the law is freed from the degrading doctrines of earlier times which gave priority to parental or, more particularly, paternal rights to which the interests of the child were subordinated(140) As in In re Agar-Ellis. Agar-Ellis v. Lascelles (1878) 10 ChD 49. But, that said, the best interests approach does no more than identify the person whose interests are in question: it does not assist in identifying the factors which are relevant to the best interests of the child(141) As Grubb and Pearl point out in "Sterilization and the Courts", (1987) 46 Cambridge Law Journal 439, at p 442. The summary rejection by the

House of Lords of the criterion offered by Re Eve left their Lordships without any guidelines by which to decide In Re B - or, at least, without guidelines that could be articulated for general application.

14. That is because the best interests approach offers no hierarchy of values which might guide the exercise of a discretionary power to authorize sterilization, much less any general legal principle which might direct the difficult decisions to be made in this area by parents, guardians, the medical profession and courts. It is arguable that, in a field where the law has not developed, where ethical principles remain controversial and where each case turns on its own facts, the law should not pretend to too great a precision. Better, it might be said, that authority and power be conferred on a suitable repository - whether it be parents or guardians, doctors or the court - to decide these difficult questions according to the repository's view as to the best interests of the child in the particular circumstances of the case. In that way, it can be said, the blunt instrument of legal power will be sharpened according to the exigencies of the occasion. The absence of a community consensus on ethical principles may be thought to support this approach. But it must be remembered that, in the absence of legal rules or a hierarchy of values, the best interests approach depends upon the value system of the decision-maker. Absent any rule or guideline, that approach simply creates an unexaminable discretion in the repository of the power. Who could then say that the repository of the power is right or wrong in deciding where the best interests of an intellectually disabled child might lie when there is no clear ethical consensus adopted by the community? An authorization to sterilize might be reviewable by a tribunal, but what guidance would the best interests approach give the tribunal? The problem was identified by Professor Ian Kennedy(142) In his paper "Patients, doctors and human rights", in Blackburn and Taylor (eds), Human Rights for the 1990s, (1991), pp 90-91:

"To decide any case by reference to the formula of the best interests of the child must be suspect. To decide Re B this way is profoundly to be regretted. The best interests formula may be beloved of family lawyers but a moment's reflection will indicate that although it is said to be a test, indeed the legal test for deciding matters relating to children, it is not really a test at all. Instead, it is a somewhat crude conclusion of social policy. It allows lawyers and courts to persuade themselves and others that theirs is a principled approach to law. Meanwhile, they engage in what to others is clearly a form of 'ad hocery'. The best interests approach of family law allows the courts to atomise the law, to claim that each case depends on its own facts. The court can then respond intuitively to each case while seeking to legitimate its conclusion by asserting that it is derived from the general principle contained in the best interests formula. In fact, of course, there is no general principle other than the

empty rhetoric of best interests; or rather, there is some principle (or principles) but the court is not telling. Obviously the court must be following some principles, otherwise a toss of a coin could decide cases. But these principles, which serve as pointers to what amounts to the best interests, are not articulated by the court. Only the conclusion is set out. The opportunity for reasoned analysis and scrutiny is lost."

15. Of course the variable circumstances of each case require evaluation and judicial evaluations of circumstances vary, but the power to authorize sterilization is so awesome, its exercise is so open to abuse, and the consequences of its exercise are generally so irreversible, that guidelines if not rules should be prescribed to govern it. The courts must attempt the task in the course of, and as a necessary incident in, the exercise of their jurisdiction. That is not to say that the courts should arrogate to themselves the power to authorize sterilizations of intellectually disabled children, but it is to say that it has become the duty of the courts - and, in the present case, specifically the duty of this Court - to define the scope of the power to authorize sterilizations of intellectually disabled children and the conditions of exercise of the power, and to determine the repository of the power. The power cannot be left in a state so amorphous that it can be exercised according to the idiosyncratic views of the repository as to the "best interests" of the child. That approach provides an insubstantial protection of the human dignity of children; it wraps no cloak of protective principle around the intellectually disabled child. And yet, as Professor Kennedy points out, that is the very purpose of involving the legal process - a purpose which the best interests approach defeats so that "the law fails the woman-about-to-be-sterilised" (143) Kennedy, ibid., at p 91.

16. The anxious goodwill of the repository of the power - whether parents, guardians or courts - can generally be assumed, but there are too many factors which tend to distort a dispassionate and accurate assessment of the true interests of the child. There are some powerful if unarticulated influences affecting, albeit in good faith, the presentation of information on which a decision as to the best interests of the child is to be made and the making of that decision. I mention some of those influences: the interests of those who bear the burden of caring for the child, the interests of those who will be involved in the sterilization if it proceeds, the scarcity of public resources, the widespread tendency to dismiss intellectually disabled people as not deserving of full human dignity (especially if their powers of communication are defective) and common misconceptions(144) See the factors referred to by Professor F.J. Bates, "Sterilising the Apparently Incapable: Further Thoughts and Developments", (1987) 12 Australian Child and Family Welfare 4 at p 5 (for example, that there is a substantial risk that any intellectually disabled female will bear defective children). Again, Professor Kennedy points out that, by transforming a "complex moral and social question" into a question of fact, the best interests approach leaves the court in the hands of "experts" who assemble a dossier of fact and opinion on matters which they deem relevant "without reference to any check-list of legal requirements"(145) Kennedy, op cit, at pp 91-92. It is not possible for the law to neutralise those influences, but it is possible for the law to define the issues with sufficient objectivity to minimize the prospect that those

influences will undermine the law's protection of the human dignity of the intellectually disabled child.

17. If the pragmatism of the best interests approach were to be embraced for want of principle to govern the exercise of the power, the choice of the repository of power would be extremely difficult. On the one hand, parents and guardians, who bear the immediate responsibility for a child's welfare and frequently bear the burden of her care, would have a strong claim to be the repository of the power. On the other, the courts, whose judges are removed from the burdens of and pressures upon parents and guardians and who would bear no personal responsibility for any decision they might make, could offer some check upon abuses of the power. A third choice would be to require the concurrence both of parents or guardians and of the court as a condition of the exercise of the power. If no principle other than the best interests approach is to govern the exercise of the power, it would be necessary to adopt the third choice to secure for the child the protection which neither of the first two choices could offer, making provision for a special procedure (as was proposed in In re F (Mental Patient: Sterilization)(146) [1991] UKHL 1; (1990) 2 AC 1, at p 65; and cf. In re Grady (1981) NJ 426 A 2d 467, at pp 481-483; Matter of Guardianship of Hayes (1980) Wash. 608 P 2d 635, at pp 639-641, 643) in an attempt to safeguard the interests of the child. That would be a cumbersome and costly expedient which, if the approach in Re Eve is followed, need not be adopted.

18. With the greatest respect for the views expressed by their Lordships in Re B, I find the decision of their Lordships in Re Eve more conducive to the maintenance of the human dignity of the intellectually disabled and more in accord with legal principle. The test of therapeutic medical treatment recognizes the importance of personal integrity and of the maintenance and enhancement of natural attributes to the welfare of the child. By comparison, the best interests approach is useful only to the extent of ensuring that the first and paramount consideration is the interests of the child, not the interests of others. That approach furnishes no general guidance as to the factors which are relevant to the welfare of the child.

19. Of course, factual difficulties are unavoidable in deciding whether medical treatment is therapeutic or non-therapeutic but, in principle, the distinction is clear and, in particular, the purpose of therapeutic medical treatment can be clearly distinguished from other purposes. Therapeutic medical treatment is calculated to enhance or maintain as far as practicable the physical or mental attributes which the patient naturally possesses; it is not calculated to impair or destroy those attributes and the capacities they afford. Thus, there is a rationale which justifies the administration of therapeutic medical treatment without the patient's consent when the patient is incapable of consenting or refusing consent. It needs no argument to show that a malignant tumour of the uterus justifies the performance of an hysterectomy or that multiple cysts on an ovary may dictate its surgical removal. However, where menstruation produces or is likely to produce a psychiatric disorder of such severity as to require its suppression - as occurred in Re X(147) (1991) 2 NZLR 365 - consideration must be given to the different treatments reasonably available and appropriate to suppress menstruation and to their medical advantages and disadvantages in order to ensure that the least invasive of the treatments is selected. Proportionality and purpose are the legal factors which determine the therapeutic nature of medical treatment. Proportionality is determined as

a question of medical fact. Purpose is ascertained by reference to all the circumstances but especially to the physical or mental condition which the treatment is appropriate to affect.

20. The propriety of authorizing sterilization for therapeutic purposes is not reasonably open to doubt. Therapeutic medical treatment falls clearly within the exception of "medical treatment ... reasonably needed" in s.187(c) of the Code. When the purpose of a proposed sterilization is therapeutic, the invasion of the child's physical integrity, the disquieting of her mind and any change in her self-perception are justified by the need to maintain to the maximum extent or to enhance the child's natural physical and mental attributes. The invasion of the child's personal integrity is then the means of maintaining or enhancing the attributes and functions which, so far as they may, contribute to her human dignity. The propriety of authorizing sterilization for non-therapeutic purposes is more problematic.

Non-therapeutic sterilization

21. If sterilization is contemplated to secure a non-therapeutic purpose, the invasion of the child's personal integrity can be justified only if it can be shown that the non-therapeutic purpose possesses some higher value than the preservation of her physical integrity. Clearly, sterilization could not be justified in order to secure some base purpose - for example, to prevent the birth of a child who would disappoint the testamentary expectations of a residuary beneficiary. Another base purpose which would now be commonly recognized as such, though it was given a higher value in earlier days(148) See per Holmes J. in Buck v. Bell (1927) 274 US 200, at p 207 before the uncivilized practices of Nazism revealed its hideous implications, is the purpose of eugenic selection. Economic arguments can be mounted in support of a policy of preventing the birth of defective children and those arguments can be supported by a desire to alleviate the emotional and physical burden of caring for them but, even in a case where an intellectual disability is transmissible, the involuntary sterilization of a girl is too high a price to pay to avoid the risk. A law which sacrifices the human dignity of individuals in order to avoid reasonable calls by the disabled upon public resources and to avoid the need for compassionate assistance to the disabled inverts the civilized priority of values and depletes the humanity of society. Financial security and comfort, though legitimate objectives in themselves, are not to be preferred over the equal protection by the law of the human rights of every member of the community. The sterilization of a human being simply in order to prevent him or her from becoming a parent is an extreme denial of that person's human rights.

22. However, between therapeutic purposes on the one hand and manifestly base purposes on the other, a variety of different purposes may appear which many would regard as of significant value in assessing the "best interests" of an intellectually disabled child. The purposes which fall into this category can be gathered under the broad description of "preventative": to prevent the risk of a pregnancy which the child could not properly understand and the concomitant risk of parenthood with responsibilities beyond the capacity of the child to discharge. These risks are an understandable source of anxiety to parents, guardians and others who have a genuine concern for the welfare of an intellectually disabled child. These are risks which create an understandable anxiety in many parents, guardians and others who have a genuine concern for the welfare of a normal child. In the case of a normal female child, it would be wholly unacceptable to permit sterilization in order to prevent pregnancy or parenthood, though those events might be thought to be tragedies in particular

circumstances by reasonable persons concerned with the welfare of the child. Depending on the circumstances, the use - or, a fortiori, the exploitation - of the sexual attributes of a female child may entail tragic consequences, yet the risk or even the likelihood of tragic consequences affords no justification for her sterilization. What difference does it make that the risk is occasioned by an intellectual disability? The answer to this question depends on the view taken of the proposition earlier set out in the Declaration on the Rights of Mentally Retarded Persons: they are entitled to the same rights as other humans to the maximum degree of feasibility. To accord in full measure the human dignity that is the due of every intellectually disabled girl, her right to retain her capacity to bear a child cannot be made contingent on her imposing no further burdens, causing no more anxiety or creating no further demands. If the law were to adopt a policy of permitting sterilization in order to avoid the imposition of burdens, the causing of anxiety and the creating of demands, the human rights which foster and protect human dignity in the powerless would lie in the gift of those who are empowered and the law would fail in its function of protecting the weak.

23. Where it is desirable to avoid the risk of pregnancy, the risk may be avoidable by means which involve no invasion of the girl's personal integrity. 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. In any event, though pregnancy be a possibility, sterilization, once performed, is a certainty. If a non-therapeutic sterilization could be justified at all, it could be justified only by the need to avoid a tragedy that is imminent and certain. Such a situation bespeaks a failure of care, and sterilization is not the remedy for the failure. Nor should it be forgotten that pregnancy and motherhood may have a significance for some intellectually disabled girls quite different from the significance attributed by other people. Though others may see her pregnancy and motherhood as a tragedy, she, in her world, may find in those events an enrichment of her life.

24. Because non-therapeutic purposes are, by definition, related to social values or values other than the maintenance and enhancement of the natural attributes and functions of the intellectually disabled female child, I am unable to postulate a case where it would be justifiable to authorize her sterilization. I am conscious that courts which have adopted the best interests approach have been accustomed to balance the risks of what may appear to be likely social tragedies against the physical invasion, incapacitation and mental and emotional impact of sterilization. In my respectful opinion, a balancing exercise is impossible to perform. On one side is the immediate and serious invasion of physical integrity with the resulting grave impairment of human dignity. On the other, there is a risk of what is adjudged to be a future tragedy involving dependence on others, inability to cope, social incompetence or some other matter apparently diminishing the quality of the child's life. The values on either side of the balance are not comparable. If there is to be a rule - as, in my view, there must be - the rule must give priority to the right to physical integrity and the human dignity it protects, even though such a rule imposes burdens on parents, guardians and those having the care of the intellectually disabled child who are entitled to the active support of the State which must bear the ultimate burden.

25. Such a rule, it may be said, is too idealistic and is out of touch with contemporary community standards. There is much force in that criticism but this is an area of the law in which it is necessary to guard against the tyranny which majority opinion may impose on a weak and voiceless minority. The history of intellectually disabled people contains a surfeit of examples of degrading treatment administered under laws which reflected the standards of the time - standards which were a reproach to the civilization then enjoyed. If equality under the law, human rights and the protection of minorities are more than the incantations of legal rhetoric, it is in this area of the law that they have real work to do.

26. I would hold that the power to authorize sterilization of an intellectually disabled child extends to therapeutic sterilizations but no further. That view is confirmed when we turn to the question: who can exercise this power?

Powers of Parents and Guardians

27. The parents of a child are his or her natural guardians and custodians. Section 63F(1) of the Family Law Act 1975 (Cth) ("the Act") recognizes their status as guardians and custodians, subject to any order of a court, until the child attains the age of 18 years. Guardianship and custody impose responsibilities and confer powers sufficient to enable parents to discharge those responsibilities. Section 63E(1) and (2) defines the extent of those responsibilities and powers:

"(1) A person who is the guardian of a child under this

Act has responsibility for the long-term welfare of the

child and has, in relation to the child, all the powers,

rights and duties that are, apart from this Act, vested by

law or custom in the guardian of a child, other than:

(a) the right to have the daily care and control of the

child; and

(b) the right and responsibility to make decisions

concerning the daily care and control of the child.

(2) A person who has or is granted custody of a child under

this Act has:

(a) the right to have the daily care and control of the

child; and

(b) the right and responsibility to make decisions

concerning the daily care and control of the child."

28. The responsibilities and powers of parents extend to the physical, mental, moral, educational and general welfare of the child(149) cf. the powers of a custodian described in Fountain v. Alexander [1982] HCA 16; (1982) 150 CLR 615, per Gibbs C.J. at p 626. They extend to every aspect of the child's life. Limits on parental authority are imposed by the operation of the general law, by statutory limitations or by the independence which children are entitled to assert, without extra-familial pressure, as they mature. Within these limits, the

parents' responsibilities and powers may be exercised for what they see as the welfare of their children. Within those limits, the parents' authority is wide enough to permit them to authorize therapeutic medical treatment for a child, whether or not the child consents to the administration of that treatment. A fortiori, if the child is incompetent to give consent, whether by reason of age, illness, accident or intellectual disability, the parents have the responsibility and power to authorize the administration of therapeutic medical treatment, whether or not that treatment involves sterilization. Such a power is exercised without question when the treatment does not involve sterilization and there is no reason to distinguish treatment that does involve sterilization when the sterilization is merely a necessary incident of therapy directed to some other physical or mental condition. It cannot be right to deny therapeutic treatment to a child unless the parents first obtain the leave of a court(150) cf. per Lord Templeman in In re B (1988) AC, at p 205. The power to authorize therapeutic medical treatment exercisable by parents who are guardians and custodians of a child is exercisable by duly appointed guardians or custodians according to the nature of the treatment and the urgency with which it needs to be administered. Ordinarily, the power to authorize the therapeutic sterilization of an intellectually disabled child would be reposed in the child's guardians. Although it may sometimes be difficult objectively to determine whether a sterilization proposed in a particular case is therapeutic, the power to authorize the performance of a therapeutic sterilization must rest with the parent or other guardian. But where there is a doubt about the therapeutic character of a proposed procedure, those who would be involved in the procedure may be at risk if they act merely upon a purported authorization given by the parent or other guardian.

29. A parent or guardian has no authority to authorize sterilization of a child for non-therapeutic purposes or sterilization by a procedure which is not appropriate and proportionate for the therapeutic purpose for which it is intended to be administered. As the Indiana Court of Appeals held (151) In AL v. GRH (1975) 325 NE 2d 501, at p 502:

"the common law does not invest parents with such power to

authorize sterilization for contraceptive purposes) over

their children even though they sincerely believe the

child's adulthood would benefit therefrom."

If the authority of parents or guardians to authorize sterilization is limited, it will be necessary in a doubtful case to obtain an affirmative declaration from the court in order to safeguard those involved in the proposed procedure from the consequences of proceeding without lawful authority. And, of course, the parents or guardians may wish to obtain the court's assurance that they are acting lawfully in giving their authority to the proposed procedure. The parents sought the court's approval in Re X and they seek it in this case. In Re X, Hillyer J. made an order actually consenting to the performance of an hysterectomy in exercise of the parens patriae jurisdiction. I would respectfully agree that the performance of the operation was justified on the view his Honour formed (he described the proposed procedure as "an amenorrhoea operation - for the purpose of preventing menstruation ... not ... for the purpose of sterilization"(152) (1991) 2 NZLR, at p 369), but I would find the power to authorize the performance of such an operation to reside in the child's parents, not in the court, though the court's declaratory jurisdiction is available to be invoked.

30. Although a power to authorize a therapeutic sterilization resides in parents or other guardians, its exercise is subject to supervision by the court in exercise of its parens patriae jurisdiction. That jurisdiction was originally vested by the royal prerogative in the English

Court of Chancery(153) Fountain v. Alexander (1982) 150 CLR, per Mason J. at p 633; and see Lowe and White, Wards of Court, 2nd ed. (1986), par.1-2 and is vested in courts whose jurisdiction is defined by reference to the jurisdiction of that Court(154) Carseldine v. Director of Department of Children's Services [1974] HCA 33; (1974) 133 CLR 345, at p 363 as it stood before the warrant delegating the prerogative power to the Lord Chancellor was revoked(155) In re F (1990) 2 AC, at pp 57-58, 71. The nature of the jurisdiction was stated by Lord Esher M.R. in R. v. Gyngall(156) (1893) 2 QB 232, at p 241:

"The Court is placed in a position by reason of the

prerogative of the Crown to act as supreme parent of

children, and must exercise that jurisdiction in the

manner in which a wise, affectionate, and careful parent

would act for the welfare of the child."

The parens patriae jurisdiction has become essentially protective(157) In re McGrath (Infants) (1893) 1 Ch 143, at pp 147-148; (1892) 2 Ch 496, at pp 510-511 in nature and protective orders may be made either by the machinery of wardship(158) Fountain v. Alexander (1982) 150 CLR, per Gibbs C.J., at p 626 or by ad hoc orders which leave the guardianship and custody of the child otherwise unaffected(159) In re N (Infants) (1967) Ch 512, at p 531; In re L (An Infant) (1968) P 119, at pp 156-157. The court is thus vested with a jurisdiction to supervise parents and other guardians and to protect the welfare of children(160) Johnson v. Director-General of Social Welfare (Vict.) [1976] HCA 19; (1976) 135 CLR 92.

31. Although the jurisdiction is extremely broad, it is exercised cautiously in the manner stated by Fitzgibbon L.J. in In re O'Hara(161) (1900) 2 IR 232, at p 240 and adopted by the House of Lords in J v. C(162) [1969] UKHL 4; (1970) AC 668, at p 695:

"In exercising the jurisdiction to control or to ignore the

parental right the court must act cautiously, not as if it

were a private person acting with regard to his own child,

and acting in opposition to the parent only when judicially

satisfied that the welfare of the child requires that the

parental right should be suspended or superseded."

There must be some clear justification for a court's intervention to set aside the primary parental responsibility for attending to the welfare of the child(163) See Fountain v. Alexander (1982) 150 CLR, at p 645; In re KD (1988) AC 806, at pp 824-825, and the note on this case in (1991) 107 Law Quarterly Review 386. Of course, in a case where the welfare of a child involves consideration of a parent's function of providing religious or moral upbringing, minds may differ as to the desirability of court intervention. For example, I would respectfully doubt whether the primacy of parental responsibility was sufficiently recognized in the leading English case of Gillick v. West Norfolk AHA(164) [1985] UKHL 7; (1986) AC 112 in relation to so much of the declaration sought by Mrs Gillick as related to the welfare of her own children and her ability to discharge her duties as parent and custodian of those children(165) cf. Ginsberg v. New York (1968) 390 US 629, at p 639. But judicial opinion has a much narrower role when the welfare of a child turns on the therapeutic character of a proposed sterilization. The supervisory jurisdiction in questions of sterilization of intellectually disabled children requires consideration only of purpose and proportionality.

If parents or guardians have authorized the sterilization of a child but the court is of opinion that the proposed sterilization would not be therapeutic and on that account would violate the child's right to personal integrity, the court may prohibit by injunction the carrying out of the sterilization(166) As in In re D (A Minor) (1976) Fam.185. Conversely, if a therapeutic sterilization is required but the child's parents or guardians have failed or refused to authorize the procedure, the court may authorize sterilization by an appropriate and proportionate procedure(167) See, by analogy, Rolands v. Rolands (1983) 9 Fam LR 320; sub nom. Director General of Youth and Community Services (as tutor of child Rolands) v. Rolands (1984) FLC 91-519; In re B (A Minor) (1981) 1 WLR 1421; (1990) 3 All ER 927.

The jurisdiction of the court to grant an authority for sterilization

32. If there be a power to authorize the non-therapeutic sterilization of an intellectually disabled child, further questions arise for consideration. Clearly there are dangers in entrusting such a power to parents or guardians, as Nicholson C.J. recognized in Re Jane(168) (1988) 94 FLR 1, at p 26; 85 ALR 409, at p 435; 12 Fam LR 662, at p 685; (1989) FLC 92-007, at p 77,256:

"The consequences of a finding that the court's consent is unnecessary are far reaching both for parents and for children. For example, such a principle might be used to justify parental consent to the surgical removal of a girl's clitoris for religious or quasi-cultural reasons, or the sterilisation of a perfectly healthy girl for misguided, albeit sincere, reasons. Other possibilities might include parental consent to the donation of healthy organs such as a kidney from one sibling to another."

33. Nevertheless, some judges have held that parents or guardians do have a power to authorize non-therapeutic sterilization of an intellectually disabled child(169) Re a Teenager (1988) 94 FLR 181; (1988) 13 Fam LR 85; (1989) FLC 92-006; Attorney-General (Qld) v. Parents (1989) 98 FLR 41; sub nom. In re S (1989) 13 Fam LR 660; (1990) FLC 92-124 Other judges have held(170) Re Jane; Re Elizabeth (1989) 13 Fam LR 47; (1989) FLC 92-023; In re Grady; Ruby v. Massey (1978) 452 F Supp 361; Matter of Guardianship of Hayes; Matter of Moe (1982) Mass. 432 NE 2d 712 that parents and guardians have no such power but that the court has the power and that an application to the court is required to obtain its exercise. To differentiate between a power to authorize sterilization that is vested in parents or guardians and a power to authorize sterilization that is vested in a court, there must be some ground of distinction. If there be only a single power to authorize sterilization when it is in the child's best interests, then of necessity that power must be vested in parents or guardians for the circumstances which will compel its exercise cannot always wait upon an application to and order by a court. If there be distinct powers, however, one power can be vested in parents or guardians, the other in the court. But what is the ground of distinction? Nicholson C.J., recognizing the problem in Re Jane(171) (1988) 94 FLR, at pp 30-31; 85 ALR, at pp 439-440; 12 Fam LR, at pp 689-690; (1989) FLC 92-007, at p 77,260, drew a distinction between therapeutic and non-therapeutic sterilizations and held that parental power did not extend to authorizing non-therapeutic sterilizations. That view is consistent with the decision in AL v. GRH. Sheer prudence powerfully supports this view, as Mason C.J., Dawson, Toohey and Gaudron JJ. have noted. But, if parents and guardians have no

such power, how does the court acquire the power? Leaving aside for the moment the possibility of statutory investiture of a specific jurisdiction in that behalf, the only legal explanation advanced is that a court, in exercising its parens patriae jurisdiction, enjoys a wider power than parents or guardians possess in respect of the personal integrity of their children. That proposition, in my respectful view, is erroneous in law and disturbing in its social implications.

34. Sachs L.J. in Hewer v. Bryant(172) (1970) 1 QB 357, at p 372 offered as an explanation of some 19th century cases the theory that the court, in the exercise of the parens patriae jurisdiction, had greater physical control over a child than the child's father possessed. This dictum did not persuade Staughton L.J. in In re R (A Minor) (Wardship: Consent to Treatment)(173) (1991) 3 WLR 592, at p 605; (1991) 4 All ER 177, at pp 189-190 who reserved his opinion as to whether the parens patriae jurisdiction vested more than parental powers. In fact there appear to be no instances (save in the class of case now under consideration) where the court has held that it has jurisdiction to authorize interference with the physical integrity of a child which could not have been authorized by parents or guardians. There are some instances where a court exercising its wardship jurisdiction has accepted that it has a jurisdiction to make orders against strangers to protect the welfare of a ward although a parent or guardian could not have taken the step ordered(174) See, for example, Re X (A Minor) (1975) Fam.47, at pp 57-58,60,61; Re Harris (an Infant) (1960) referred to in Lowe and White, op cit, par.6-34; In re D (A Minor) (Adoption Order: Validity) (1991) 2 WLR 1215, at p 1225; In re R (A Minor) (Wardship: Consent to Treatment) (1991) 3 WLR, at p 602; (1991) 4 All ER, at pp 186-187, but those cases do not suggest that the court has any powers wider than the powers of parents or guardians to authorize interference with the personal integrity of children. This consideration is not conclusive, but it demonstrates that the power to authorize non-therapeutic sterilization of an intellectually disabled child is a novel power which some courts have, by their own decision, assumed to themselves(175) In the United States, judicial opinion as to the existence of the power has fluctuated: see the cases collected in In re Grady (1981) NJ 426 A 2d, at p 480. It is not only the assumption of a novel power which is significant but the assertion that it is assumed in exercise of the wardship or parens patriae jurisdiction. If that be so, the power is exercisable over the objection of parents or guardians and simply on the footing that the court deems its exercise to be in the "best interests" of the child. Of course the parents or guardians will be heard on any application to the court, but the idiosyncratic views of the judge are given, by this theory, overwhelming effect.

35. In the United States, the assumption by courts of a power to authorize sterilization of intellectually disabled people has been accompanied by judicial prescription of protective procedures and criteria for determining whether sterilization is in the patient's best interests: see In re Grady(176) ibid., at pp 481-483 and Matter of Guardianship of Hayes(177) (1980) Wash. 608 P 2d, at pp 639-641, 643. Though the desirability of protective procedures and criteria is manifest, their prescription gave the Courts' decisions a legislative character in the eyes of Rosselini J. who, speaking for the minority in Matter of Guardianship of Hayes, expressed his concern that the courts not become "an imperial judiciary"(178) ibid., at p 646. I share his concern. The hypothesis that a court is empowered to authorize the non-therapeutic sterilization of intellectually disabled children is asserted in order to satisfy what the court perceives to be a lacuna in the powers which ought to be available to satisfy the exigencies of the situation of some disabled children. But the court is an instrument of State

power, and the powers of the State to authorize interference with the personal integrity of any of its subjects otherwise than for therapeutic purposes is not self-evident. If such a power can be exercised to secure what the court may deem to be the welfare of an intellectually disabled child, may not a like power be exercised to secure what the court may deem to be the welfare of any child? It is a power which would be exercised not by an anxious and anguishing parent or guardian who can be called to account, but by a judge to whom the case is assigned in a court's list and who, having exercised his or her discretion, is discharged from all responsibility for the consequences. The case of Stump v. Sparkman(179) (1978) 435 US 349, which left the sterilized woman and her husband without remedy, despite a demonstrably erroneous exercise of judicial power to authorize her sterilization, is a distressing reminder that courts, for all their independence and wisdom, are not appropriate repositories of so awesome a power.

36. Moreover, the assumption of a power to authorize non-therapeutic sterilizations without legislative authority is tantamount to the assumption of a power to dispense from compliance with the criminal laws which otherwise protect personal integrity. Justification by court order for what is otherwise an offence is neither an orthodox doctrine of the common law nor consistent with the proper function of a court. Though some statutes create offences exempting instances in which a court is satisfied that particular circumstances exist, the proposition that a court can assume a power to dispense from the criminal laws which protect personal integrity when the judge believes the dispensation is for the welfare of a child is truly judicial imperialism. If that proposition were valid, the laws which presently bear on organ and tissue donations, medical experimentation, abortion or other surgical procedures could be overridden if an application were made to a judge vested with the parens patriae jurisdiction who took the view that the application of the law in the particular circumstances of the case would not be in the child's best interests. It is one thing for a court to exercise the power possessed by parents and guardians to authorize surgical procedures on a child and for the criminal law to accept that authorization, as it accepts an authorization by the parents or guardians, to be the equivalent of consent to what would otherwise be an unlawful application of force. It is another thing for a court to exercise an exclusively curial power to authorize a surgical procedure and to require that authorization to be treated both as an effective consent and as conclusively determining the lawfulness of the procedure. In the former case, the criminal law is simply construed to take account of the parental power which has always been recognized; in the latter case, protection which the criminal law has been fashioned to provide is undone by the exercise of a novel power, created by declaration of the instrument of government claiming to exercise it.

37. However, in the Northern Territory, s.26(1)(d) of the Code furnishes a legislative exception to criminal liability which can be filled by any valid authority. Even if it were right to hold that a Court in the Northern Territory could validly declare that its authority was sufficient to satisfy s.26(1)(d), the same view could not be taken by courts in States and Territories where statute or the common law does not provide that court authorization is a justification or excuse.

38. For these reasons, I am unable to agree that either parents or guardians on the one hand or courts on the other possess any power under the general law to authorize the non-therapeutic

sterilization of intellectually disabled children. It remains to consider whether the Family Law Act purports to confer such a power.

39. Jurisdiction is conferred on the Family Court by s.63(1) of the Family Law Act "in relation to matters arising under this Part", that is, under Pt VII - Children. Part VII omits to prescribe the matters that may arise in relation to which proceedings may be instituted. However, s.64(1) gives the Court directions as to the conduct of "proceedings with respect to the custody, guardianship or welfare of, or access to, a child". It is probably necessary for courts to construe this unsatisfactory drafting as conferring on the Family Court jurisdiction in matters where "the custody, guardianship or welfare of, or access to, a child" is in issue, for otherwise the extensive provisions of Pt VII would be nullified. But the jurisdiction with respect to welfare can hardly be construed as authorizing the Family Court to make whatever order a judge may deem to be for the welfare of a child, irrespective of the general law or the rights of other people. The "welfare" jurisdiction of the Family Court does not permit the making of orders which exempt the child from compliance with laws that bind him or her or which remove the protection which laws confer on the child. In particular, the terms in which ss.63(1) and 64(1) are drawn do not suggest that the Court has been invested with a power to authorize an invasion of the personal integrity of a child greater than the power possessed by the child's custodians or guardians. Rather the reference to "welfare" in the context of custody, guardianship and access suggests that the jurisdiction is to determine disputes in which a decision (or a failure to make a decision) as to the welfare of a child by the custodian or guardian or person having access is challenged by another and the jurisdiction is invoked to hear and determine that dispute. As the "welfare" jurisdiction of the Family Court does not extend to wardship, it does not correspond with the parens patriae jurisdiction of which the wardship jurisdiction forms an important part.

40. Although s.63A(1) provides that proceedings "that may be instituted under this Part shall not ... be instituted otherwise than under this Part", that provision does not purport to remove the parens patriae jurisdiction from the courts in which it is vested. To remove the parens patriae jurisdiction from the courts of equity, a statute must do so "expressly or by necessary, indeed inescapable, implication"(180) Minister for the Interior v. Neyens [1964] HCA 71; (1964) 113 CLR 411, at p 419. The courts of equity retain a residual parens patriae jurisdiction(181) See Fountain v. Alexander (1982) 150 CLR, at pp 634-635., though its exercise must conform to the provisions of the Family Law Act which deal with guardianship and custody(182) Carseldine v. Director of Department of Children's Services (1974) 133 CLR, at pp 366-367. However, the equitable jurisdiction of the Supreme Court of the Northern Territory is cross-vested in the Family Court(183) Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth), s.4(2) and Jurisdiction of Courts (Cross-vesting) Act 1987 (N.T.), s.4(2) and the equitable jurisdiction of the Supreme Court of the Northern Territory is, by operation of the Supreme Court Act 1979 (N.T.), s.14(1)(b), the same general equitable jurisdiction as that vested in the Supreme Court of South Australia(184) See the Equity Act 1866 (S.A.). That jurisdiction includes the parens patriae jurisdiction, but it does not suffice to support a power in the Family Court to authorize the non-therapeutic sterilization of intellectually disabled children.

41. In my opinion, there are other grounds for rejecting the notion that such a power is supported by the "welfare" jurisdiction conferred by Part VII of the Family Law Act. If a

Court were to authorize a surgical procedure to which the parents or guardians are incapable of consenting and which is otherwise prohibited by the criminal law of a State, there would be a conflict between the State law and the Court's order. In exercising their jurisdiction, Federal Courts, no less than State Courts, are bound to apply the laws of the respective States subject, of course, to the Constitution and to any valid law of the Commonwealth with which the State law is inconsistent(185) Under our Constitution, there can be no justiciable issue which is either outside the combined scope of Federal and State laws or subject to a State law when there is an applicable but inconsistent Federal law. The problem of conflict between State and Federal legal systems which was resolved in the United States by Erie R. Co. v. Tompkins (1938) 304 US 64 does not arise under our Constitution. Unless the context otherwise requires, a provision in a law of the Commonwealth investing a jurisdiction in a court is not construed as empowering the court to disregard the laws of the State in exercising the invested jurisdiction. If the Commonwealth law purports to override the State law, the Commonwealth law must itself find Constitutional support. If valid, the State law is overridden by operation of s.109 of the Constitution, engaged by the enactment of the Commonwealth law rather than by the making of an order by the court. Orders made in exercise of invested federal jurisdiction are not themselves "laws of the Commonwealth" which are capable of engaging the operation of s.109. Indeed, it is difficult to conceive of an order creating an inconsistency with a State law that could be made by a court in exercise of a jurisdiction to hear and determine a "matter" within the meaning of that term in ss.76 and 77 of the Constitution. An exercise of judicial power, unlike an award of the Industrial Relations Commission, has no legislative effect.

42. Apart from certain well-known and traditional exceptions to which Dixon C.J. and McTiernan J. referred in Reg. v. Davison(186) [1954] HCA 46; (1954) 90 CLR 353, at pp 367-368; see also Reg. v. Spicer; Ex parte Australian Builders' Labourers' Federation [1957] HCA 81; (1957) 100 CLR 277, at pp 297-298; Reg. v. Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty. Ltd. [1970] HCA 8; (1970) 123 CLR 361, at p 387, jurisdiction in "matters" is exercised to hear and determine disputes as to legal rights and obligations. A novel power to authorize a doctor to remove the organs of a child, exercisable on the application of any interested person according to the repository's opinion as to the child's best interests(187) See Reg. v. Spicer; Ex parte Waterside Workers' Federation of Australia [1957] HCA 96; (1957) 100 CLR 312, at p 317; Reg. v. Trade Practices Tribunal; Ex parte Tasmanian Breweries (1970) 123 CLR, at p 376; cf. Cominos v. Cominos [1972] HCA 54; (1972) 127 CLR 588, at pp 592-593, does not bear the character of a judicial power which might be exercised under a jurisdiction to hear and determine a "matter". Unless such a power were a recognized incident of the parens patriae jurisdiction so that it formed part of the well-known and traditional exceptions - and clearly it is not - a law of the Commonwealth could not commit the exercise of such a power to a court. However, I do not construe Pt VII of the Family Law Act as purporting to do so. In my opinion, neither the parens patriae jurisdiction nor the "welfare" jurisdiction of the Family Court confers on that Court a power to authorize any invasion of a child's personal integrity which could not be authorized by its parents or guardians. It follows that the Family Law Act does not, in my view, confer power to authorize the non-therapeutic sterilization of Marion. No question arises as to the jurisdiction which the Supreme Court would have if Marion were a ward of that Court nor as to the jurisdiction of the Family Court if, by cross-vesting, that Court was vested with wardship jurisdiction.

43. The Family Court may, however, exercise under the cross-vesting legislation the equitable jurisdiction to make a declaration as to whether Marion's sterilization would be justified as therapeutic and, accordingly, as to whether an authorization given by her parents for her sterilization would or would not be valid.

44. I would therefore answer the questions in the case stated by Nicholson C.J. as follows:

Q. 1. Can the Applicants as joint guardians of the child (Marion) lawfully authorise the carrying out in the Northern Territory, of a sterilisation procedure upon the said child without an order of a Court?

A. 1. Yes, but only if the procedure is therapeutic.

Q. 2. If no to question 1, does the Family Court of Australia have jurisdiction:

(a) to authorise the carrying out of such a procedure; or

(b) to enlarge the powers, rights or duties of the Applicants as guardians of the said child to enable them to lawfully authorise the carrying out of such a procedure; or

(c) to approve the consent of the Applicants, as guardians of the said child, to the proposed procedure to make the procedure lawful?

A. 2. The Family Court has no jurisdiction to take any of the steps referred to which the applicants could not authorize in the absence of that step.

Q. 3. Which (if any) of the steps referred to in (a), (b) or (c) of question 2 is required by law?

A. 3. None, but the Family Court may make a declaration as to the lawfulness of a proposed procedure of sterilization.

DEANE J. The essential facts, the relevant statutory provisions and the questions in the stated case are set out in the joint judgment of Mason C.J., Dawson, Toohey and Gaudron JJ. That judgment also contains, as do the judgments in the Full Court of the Family Court(188) Re Marion (1990) 14 Fam LR 427; (1991) FLC 92-193, a detailed examination of the four earlier cases in this country involving the proposed sterilization of a girl or young woman(189) See Re a Teenager (1988) 94 FLR 181; 13 Fam LR 85; (1989) FLC 92-006; Re Jane (1988) 94 FLR 1; 85 ALR 409; 12 Fam LR 662; (1989) FLC 92-007; Re Elizabeth (1989) 13 Fam LR 47; (1989) FLC 92-023 and Attorney-General (Qld) v. Parents ("In Re S") (1989) 98 FLR 41; 13 Fam LR 660; (1990) FLC 92-124; and see, also, Public Guardian v. MA (1990) 68 NTR 9 and of some of the relevant cases in other common law jurisdictions(190) See, in particular,

Re Eve (1986) 31 DLR (4th) 1; In re B (A Minor) (1988) AC 199; In re F (Mental Patient: Sterilisation) [1991] UKHL 1; (1990) 2 AC 1; In re Grady (1981) NJ 426 A 2d 467; Re X (1991) 2 NZLR 365. It can be said at once that, subject to the qualification mentioned below, I agree with the conclusion reached by their Honours to the effect that the authority of parents does not, in the absence of special statutory provisions, extend to authorizing surgery involving the sterilization of a profoundly intellectually disabled child for other than the conventional medical purposes of preserving life and treating and preventing grave physical illness. The reasoning which leads me to that conclusion diverges, however, from that of their Honours in that, as will be seen, it is based not upon a denial of the authority of parents to authorize such surgery in any circumstances but upon the obligation of the parents of a child to exercise their authority in relation to the child in serious matters only after due inquiry about, and adequate consideration of, what truly represents the interests of the child. The qualification is that, for the reasons given in this judgment, it appears to me to be possible to identify one category of case in which surgery for other than conventional medical purposes is so obviously in the interests of the welfare of such a child that there is no basis in legal theory (or, for that matter, in considerations of policy) for insisting that parents, who have obtained appropriate multi-disciplinary medical advice to establish that the case falls within that special category, subject themselves and their families to the costs, delays and emotional strain of court proceedings.

2. Section 63F(1) of the Family Law Act 1975 (Cth) ("the Family Law Act") provides that, subject to any order of a court for the time being in force, each of the parents of a child who has not reached eighteen years is a guardian of the child. Section 63E(1) reads:

"A person who is the guardian of a child under this Act has

responsibility for the long-term welfare of the child and

has, in relation to the child, all the powers, rights and

duties that are, apart from this Act, vested by law or

custom in the guardian of a child, other than:

(a) the right to have the daily care and control of the

child; and

(b) the right and responsibility to make decisions

concerning the daily care and control of the child."

Section 63E(2) provides that a person who has or is granted custody has the rights and the responsibility referred to in pars (a) and (b) of s.63E(1) (see above). It follows that, in a case such as the present where the parents are guardians and have the custody of a child, they are responsible for the long-term welfare of the child, have "the right to have the daily care and control of the child", have "the right and responsibility to make decisions" concerning that daily care and control, and enjoy the general powers, rights and duties "vested by law or custom in the guardian of a child". In my view, "the right to have the daily care and control" of a child under eighteen years and "the right ... to make decisions" in relation thereto referred to in s.63E(1) and (2) should be understood in the context of the common law and do not subject such a child to greater control and authority than that possessed at common law by parents who have custody. That being so, and subject to some presently irrelevant variations, the effect of s.63E(1) and (2) of the Family Law Act is, as regards infants in the custody of their parents, to grant statutory recognition and confirmation of the common law

powers, rights and duties of such parents(191) See In the Marriage of Holmes (1988) 12 Fam LR 103, at p 113; Re Marion (1990) 14 Fam LR, at p 462; (1991) FLC, per Strauss J. at pp 78,312-78,313; Public Guardian v. MA (1990) 68 NTR, per Asche C.J. at p 25 but cf., for a wider view of the scope of the rights and responsibility referred to in s.63E(1) and (2), the judgment of McCall J., Re Marion, (1990) 14 Fam LR, at pp 470-472; (1991) FLC, at pp 78,320-78,321. In the absence of any Northern Territory statutory provisions dealing with consent to non-emergency surgery or medical treatment in the case of an infant, it is necessary to identify the nature and extent of those common law powers, rights and duties for the purpose of answering the questions before the Court in this case.

3. The age at which a person becomes an "adult" in this country is universally fixed by legislation as eighteen. That does not mean that a person lacks all legal capacity until she or he reaches that age, or that the views of even a young child will ever be completely irrelevant(192) See, e.g., Reg. v. Gyngall (1893) 2 QB 232, per Esher M.R. at pp 245; per Kay L.J. at p 251; Guardianship and Administration Act 1990 (W.A.), s.51(2)(e); Family Law Act, s.64(1)(b). The common law has long recognized that the transition from the complete legal disability of the newly-born baby to the full capacity of the mentally competent adult is, in many respects, a gradual one(193) See, e.g., Blackstone, Commentaries, 17th ed. (1830), vol 1, p 463. Well before a young person reaches the age of eighteen, she or he possesses legal capacity in a variety of different areas: the capacity to commit (and to be liable to be punished for) crimes requiring criminal intent; within limits, the capacity to make a contract and to be guilty of a tort; subject to any necessary authorization, the capacity to marry. As Lord Fraser of Tullybelton pointed out in Gillick v. West Norfolk AHA(194) [1985] UKHL 7; (1986) AC 112, at p 169, a girl under sixteen can even give sufficiently effective consent to sexual intercourse so as to negative a charge of rape. Even when the law insisted that a person did not become an adult until the age of twenty-one, the common law recognized that, at least in relation to custody cases, a male attained the age of discretion at fourteen years and a female at sixteen years(195) See Reg. v. Howes (1860) 3 ELand EL 332, at pp 336-337 (121 ER 467, at pp 468-469); Reg. v. Gyngall (1893) 2 QB, at p 250 (Kay L.J.); Gillick v. West Norfolk AHA (1986) AC, at pp 132, 187. Once the age of discretion was reached, habeas corpus would ordinarily no longer issue at the suit of the father to force an unwilling child to return to his custody(196) See, e.g., Thomasset v. Thomasset (1894) P 295, at pp 298, 306.

4. It must, however, be acknowledged that the cases contain some extreme statements (and decisions) about the nature and extent of "the sacred right of a father over his own children"(197) per Bacon V.C., Re Plomley; Vidler v. Collyer (1882) 47 LT (N.S.) 283, at p 284 up until the age of majority. Thus, it was said by Sir William Brett M.R. in In re Agar-Ellis. Agar-Ellis v. Lascelles(198) (1883) 24 ChD 317 that a father was merely "insisting upon his right" when he refused to allow a daughter who was nearly seventeen "to live with her mother, and (had) put her into many and various places to live"(199) ibid., at p 324 to an extent that led the daughter to feel that she was "always amongst strangers" and "longing to see some of (her) relations"(200) ibid., at p 319. The actual decision in In re Agar-Ellis was based on an assertion of almost absolute paternal authority until the age of twenty-one(201) i.e. that it was "the law of England ... that the father has the control over the person, education, and conduct of his children until they are twenty-one years of age": per Brett M.R., ibid., at p 326 (emphasis in text) and was to the effect that the father was entitled to prevent free access and correspondence between the mother, who was not suggested to have been of bad character, and the daughter. The father was recognized(202) per Cotton L.J., ibid., at p 330 as having, when living, "the right to the custody and tuition of his children

whilst they are under the age of twenty-one years" and "power by a will, or by a deed, to dispose of the custody and tuition of his child or children for and during such time as he or they shall respectively remain under the age of twenty-one years or any lesser time". Notwithstanding that the daughter in In re Agar-Ellis was already a ward of court, it was held that it was outside the power of the Chancery Court "to go into the question as to what (the court thought was) for the benefit of this ward"(203) per Cotton L.J., ibid., at p 334. The guiding principle was said to be that "when, by birth, a child is subject to a father, ... the Court should not, except in very extreme cases, interfere with the discretion of the father, but leave to him the responsibility of exercising that power which nature has given him by the birth of the child"(204) ibid.

5. The tension between the law's recognition of the gradual transition from the disability of infancy to the full capacity of adulthood and such extreme judicial statements of the extent of the rights of a father with respect to his legitimate children who have not reached the age of full adulthood must be resolved in this country by the rejection of the extreme view that parental authority persists unabated until a child attains full adulthood. For one thing, the basis of that extreme view was not merely that the father enjoyed the right of legal guardianship. It was a perception of "the natural rights of a father" which were "greater ... than those which a testamentary guardian, or any other guardian, can have"(205) per Brett M.R., ibid., at p 327. That perception could not survive, without significant qualification, either the law's recognition, under the impetus of legislative developments, that the position of the father in relation to a child was "not superior to that of the mother"(206) Storie v. Storie [1945] HCA 56; (1945) 80 CLR 597, at p 608 or the law's increasing insistence that, while it is commonly convenient and accurate to speak of parental "authority" and parental "powers", the relationship between parents and a child is, from the parents' point of view, more appropriately expressed in terms of duty(207) See, e.g., J v. Lieschke [1987] HCA 4; (1987) 162 CLR 447, at pp 458, 463; Gillick v. West Norfolk AHA (1986) AC, at p 184; Report by Justice, the British Section of the International Commission of Jurists, Parental Rights and Duties and Custody Suits (1975), pp 6-7; Dingwall, Eekelaar and Murray, The Protection of Children (1983), p 224. For another, even in the nineteenth century, the jurisdiction of the Chancery Court to intervene to protect the welfare of a child in the exercise of the authority of the Crown as parens patriae was considerably more extensive than was acknowledged by such extreme statements of the extent of the father's "natural" or "sacred" rights as those quoted above. Thus, Lindley L.J. in Thomasset v. Thomasset(208) (1894) P 295, at pp 297-299 equated the "rights" of a father with those of a "legal guardian" and pointed out(209) ibid., at p 299 that in the exercise of the parens patriae jurisdiction, "the rights of fathers and legal guardians were always respected, but controlled to an extent unknown at common law by considering the real welfare of the infants". His Lordship added(210) ibid., at p 300 that the effect of the Judicature Act 1873 (U.K.)(211) See, in particular, s.25(10): "in questions relating to the custody and education of infants, the rules of equity shall prevail" was that all the Divisions of the English High Court were required to "recognize the cardinal principle on which the Court of Chancery always proceeded, namely, that in dealing with infants the primary consideration is their benefit". In this Court, it has consistently been accepted as "settled law that in the exercise of the paternal jurisdiction of the Court of Chancery the dominant matter for the consideration of the Court is the welfare of the child"(212) Goldsmith v. Sands [1907] HCA 47; (1907) 4 CLR 1648, at p 1653; Moule v. Moule [1911] HCA 50; (1911) 13 CLR 267, at p 269. Indeed, in a modern context, it is preferable to refer to the traditional parens patriae jurisdiction as "the welfare jurisdiction"

and to the "first and paramount consideration" which underlies its exercise as "the welfare principle"(213) See, e.g., In re B (A Minor) (1988) AC, at p 203.

6. The most important influence making it inevitable that the extreme view of parental authority would yield to the common law's traditional recognition of the gradual development of the legal capacity of a young person to decide things for herself or himself has, however, undoubtedly been the social fact of the increasing independence of the young. In times when it is not unusual for fifteen and sixteen-year-olds to be supporting themselves as members of the workforce, to insist upon complete parental authority up until the age of eighteen would be to propagate social anachronism as legal principle. In the context of contemporary circumstances, the extreme statements in nineteenth century cases have, depending upon preference for irony, understatement or plain speaking, rightly been dismissed as "superbly Victorian"(214) per Sachs L.J., Hewer v. Bryant (1970) 1 QB 357, at p 372, "historical curiosity"(215) per Lord Fraser, Gillick v. West Norfolk AHA (1986) AC, at p 173 or simply "horrendous"(216) per Lord Scarman, ibid., at p 183.

7. The effect of the foregoing is that the extent of the legal capacity of a young person to make decisions for herself or himself is not susceptible of precise abstract definition. Pending the attainment of full adulthood, legal capacity varies according to the gravity of the particular matter and the maturity and understanding of the particular young person. Conversely, the authority of parents with respect to a young person of less than eighteen years is limited, controlled and varying. It is limited to what is in the interests of the welfare of the young person. That being so, it can, at least as regards really serious matters, be validly exercised only after due inquiry about, and adequate consideration of, what truly represents the welfare of the child. It is controlled in that, if it is exceeded or if it is exercised other than for the benefit or welfare of the child, a court invested with the welfare jurisdiction of the old Chancery Court has jurisdiction to intervene to prevent excess, abuse or neglect of authority. Such a court can, when its jurisdiction is invoked, make an order directed to ensuring that what should, within the limits imposed by financial and other practical constraints, be done or not done in the interests of the welfare of an infant is done or not done. It is varying in that, to adopt Lord Denning M.R.'s expression(217) See Hewer v. Bryant (1970) 1 QB, at p 369; Gillick v. West Norfolk AHA (1986) AC, at pp 172, 186, it is a "dwindling right" which diminishes as the legal competence of the child to make decisions for herself or himself increases. That means that the relationship between a child and her or his parents will ordinarily pass through a transitional stage in which authority is shared. It is, however, unnecessary to discuss that aspect of parental authority in the present case since it is common ground that the fourteen-year-old girl ("Marion") in respect of whom an order is sought authorizing the performance of a hysterectomy and ovariectomy is, by reason of intellectual disability, presently quite incapable of having an informed view or making a responsible decision about whether the operation should be performed. In these circumstances, the authority of the parents is not diminished by reason of any relevant decision-making capacity of the child.

8. There was some discussion in the course of argument about whether the Family Court is invested with the traditional welfare jurisdiction. At least as regards a child of a marriage, such as Marion, the combined effect of s.63(1) and s.64(1) of the Family Law Act is to confer jurisdiction upon the Family Court to make such orders "as it considers proper"(218)

s.64(1)(c) "in relation to the welfare of ... a child"(219) s.64(1). In my view and subject to constitutional limitations (whether overriding, or recognized by, the legislation), the jurisdiction so conferred upon the Family Court corresponds with the welfare jurisdiction of the old Chancery Court (so far as it relates to minors) freed from the preliminary requirement of a wardship order(220) See Family Law Council, Watson Committee Report (1982), pp 8-9; In the Marriage of Brown and Pedersen (1988) 93 FLR 223, at pp 228-230; 12 Fam LR 506 at pp 510-512; (1988) FLC 91-967, at pp 76,995-76,997; Re Jane (1988) 94 FLR, at pp 6-7; 85 ALR, at pp 415-416; 12 Fam LR, at p 668; (1989) FLC, at p 77,241-77,242; Public Guardian v. MA (1990) 68 NTR, at p 25; Re Marion (1990) 14 Fam LR, at p 435; (1991) FLC, at pp 78,289-78,290. There is no statutory provision applicable to expand or modify parental power or the jurisdiction of the Family Court in the Northern Territory in the special case of an operation involving the irreversible sterilization of an incapable child. That being so, the extent of the relevant authority of Marion's parents and the scope of the relevant jurisdiction of the Family Court fall to be determined by reference respectively to the common law powers of parents and the welfare jurisdiction exercised by courts.

9. In the light of the above, one can identify two broad common law propositions relating to the authority of parents to authorize surgery in the case of a relevantly incapable child such as Marion. By a relevantly incapable child ("an incapable child"), I mean a child who is, as a matter of fact, completely unable to make a reasoned decision for herself or himself about the desirability of the particular treatment. The first of those propositions is that parental authority exists to authorize such surgery for the purpose, and only for the purpose, of advancing the welfare of the child. It does not extend to authorizing surgery because of a perception that it is in the interests of those responsible for the care of the child or in the interests of society in general (e.g. for eugenic reasons). That which constitutes the welfare of a child in a particular case falls to be determined by reference to general community standards, but making due allowance for the entitlement of parents, within the limits of what is permissible in accordance with those standards, to entertain divergent views about the moral and secular objectives to be pursued for their children(221) See, e.g., In the Marriage of Horman (1976) 5 Fam LR 796, at p 797; (1976) FLC 90-024, at p 75,114; In the Marriage of Griffiths (1981) 7 Fam LR 322, at p 324; (1981) FLC 91-064, at p 76,500. The second broad proposition is that, at least in relation to a serious matter such as a major medical procedure, parental authority can be validly exercised only after due inquiry about, and adequate consideration of, what truly represents the welfare of the child in all the circumstances of the case. Those two broad common law propositions appear to me to be beyond serious dispute. Ordinarily, their application will be straightforward. Most surgery is for the conventional medical purpose of treating or preventing physical illness. Competent medical advice that the particular surgical procedure is necessary to preserve life or to treat physical illness will suffice to satisfy the requirement of due inquiry and adequate consideration. Indeed, at least where medical opinion is unanimous in recommending immediate major surgery to avoid death or to treat or prevent grave illness or physical incapacity, parental duty will ordinarily dictate the authorization of such surgery. However, circumstances may exist where the purposes of major surgery lie outside or extend beyond those conventional medical purposes or where the detriment of grave adverse consequences must be weighed against medical advantages. While the above propositions remain applicable to identify the extent and regulate the exercise of parental authority in respect of an incapable child in such circumstances, their application may be complicated and uncertain by reason of difficulty in determining the content of controlling community standards or in deciding what

is truly conducive to the overall welfare of the particular child in all the circumstances. It is so in the category of case with which the Court is at present concerned.

10. Irreversible sterilization involves the destruction of a natural human attribute and the removal of an integral part of complete human personality. Its eventual psychological consequences will commonly be unforeseeable. They may include emotional devastation, destruction of self-esteem and perceived deprivation of an essential element and purpose of life itself. Nonetheless, circumstances can arise in which surgery involving irreversible sterilization is, according to general community standards, clearly conducive to the welfare of an incapable child. The most obvious example of such circumstances is where such surgery is necessary to preserve the life of the child: e.g., excision or other treatment to avert death by reason of cancer of the ovaries or testicles. Where that is so, it is, as a matter of general principle, within the authority of parents to authorize the surgery in the same way as it is within the authority of parents of an incapable child to authorize the amputation of an incurably gangrenous limb. Similarly, the parents of an incapable child have authority to authorize surgery involving irreversible sterilization in a case where such surgery is, according to competent medical advice, necessary for the conventional purpose of treating or preventing grave physical illness. In such cases, the common law requirement of due inquiry and adequate consideration is satisfied by competent medical advice, including or supplemented by appropriate multi-specialist and inter-disciplinary input (e.g., psychological or vocational).

11. In the present case, the reasons for the suggested surgery are not purely medical. In some judgments in the decided cases, and in argument in the present case, the phrases "therapeutic surgery" and "non-therapeutic surgery" have been used to distinguish between surgery for the traditional medical purpose of preserving life or directly treating or preventing physical illness and surgery for other or wider purposes, such as the enhancement or preservation of the quality of life. The use of those phrases in a context such as the present must, however, be accompanied by two important caveats. The first is that the borderline between "therapeutic" and "non-therapeutic" surgery is far from precise and, particularly where psychiatric illness is involved, may be all but meaningless. In particular, surgery involving the sterilization of a young intellectually disabled female to avoid the special and aggravated problems of menstruation would not appear to me to be for conventional medical purposes but is often described as being for "therapeutic purposes"(222) See, e.g., Re E (A Minor) (Medical Treatment) (1991) 2 FLR 585, at p 586; Re GF (A Patient) (1991) FCR 786, at pp 787-788. The second is that the common law does not, as a matter of principle, draw a general distinction between "therapeutic" and "non-therapeutic" surgery for the purposes of parental authority(223) See, e.g., per Lord Hailsham of St. Marylebone L.C., In re B (A Minor) (1988) AC, at pp 203-204.

12. Even in the area of surgery for other than conventional medical purposes, there are circumstances in which it plainly lies within the authority of the parents of an incapable child to authorize surgery on the basis of medical advice. Plastic surgery to correct serious disfigurement for purely cosmetic purposes is not "therapeutic" within the accepted meaning of that word(224) "concerned with the treatment of disease, palliative or curative": Butterworth's Medical Dictionary, 2nd ed. (1978), p 1700 and constitutes an obvious example. Male circumcision for perceived hygienic - or even religious - reasons is another.

On the other hand, one can think of equally obvious examples where parental authority would not extend to authorize surgery for other than conventional medical purposes even though it was thought by the parents to be for the ultimate welfare of an incapable child. The surgical amputation of the right hand of a child who was an habitual "pickpocket" might conceivably be seen by parents who were fanatical biblical literalists(225) See The Bible, New Testament, Mark 9:43 as being justified as conducive to the child's overall welfare. The authorization of such an operation would be beyond parental authority, however, for the reason that it could not, according to the standards of our society, properly be seen as so justified. Similarly, there are circumstances in which it is plain that, according to the general standards of our society, surgery involving sterilization of an incapable child for reasons other than the conventional medical ones of preventing death or treating or preventing physical illness is or is not clearly in the interests of the welfare of the child. The New Zealand case of Re X(226) (1991) 2 NZLR 365 provides a convenient example of circumstances in which such surgery is plainly in the interests of the welfare of an incapable child.

13. The judgment in Re X was delivered on X's fifteenth birthday. She was a profoundly multi-handicapped girl with the intellectual capacity (other than as regards gross motor skills such as walking) of a three to eight-month-old infant. She could not speak, was not toilet-trained despite intensive efforts by both her family and the staff of the special school which she attended, had no "control whatever over her bodily functions"(227) ibid., at p 367 and was, and would obviously remain, quite incapable of understanding human relations, sex or human procreation. This lack of understanding and her inability to express herself meant that the only indications that she gave when sustaining pain were non-specific reactions which included fits of irritability capable of lasting for an entire day and involved threatening conduct and violence towards others and a degree of self-mutilation. The onset of menstruation was imminent and the overall evidence, both lay and medical, led inevitably to the conclusion that the child's reaction to menstrual pain would be uncomprehending irritability involving likely violence and some self-mutilation. X's parents, who were unusually knowledgeable about retarded children and heroically devoted to X and her interests, were convinced that she could not cope either with menstrual periods or with the associated hygienic problems. The trial judge, Hillyer J., summarized(228) ibid., at p 368 their approach, with which he agreed, as follows:

"X's parents believe there is very little point in her having monthly periods for the next 30 years. She has a very strong heart and is likely to live that long. She will never be able to have children, and that function in her life is quite unnecessary. They believe X goes through enough pain and agony without having to deal with monthly periods as well. She has had to have operations to cure club feet and to straighten her back. She came through these well, and in hospital was given pain relief mainly by suppositories because of the difficulty in getting her to swallow anything, let alone giving her injections. The mother says X is hopeless with medicines. She will not let other people

touch her or put anything in her mouth except food."

In circumstances where there was no prospect of any significant improvement in X's condition as she grew older, it was obvious - as Hillyer J. found(229) ibid., at p 367 - that it was "absolutely vital" that "she should not become pregnant" since she "most certainly could not cope with motherhood, pregnancy or labour" and the "only way she could become pregnant would be by being raped, because she is unable under any circumstances to consent". The application by X's parents for an order consenting to a hysterectomy operation upon X was supported by medical evidence that the surgery was desirable and that there was no less drastic treatment which would, in the circumstances, be appropriate. Hillyer J. held that the High Court of New Zealand had jurisdiction to make such an order under its residual parens patriae jurisdiction(230) See, generally, per Cooke J., Pallin v. Department of Social Welfare (1983) NZLR 266, at p 272 and that, in the circumstances of the case, such an order should be made. His Honour made clear(231) (1991) 2 NZLR, at p 369 that he saw the purpose of the operation as not sterilization but the prevention of menstruation. That being so, the importance of his Honour's conclusion that it was "absolutely vital" that X should never become pregnant was that it turned what would, in the case of a normal child, have probably been a decisive countervailing consideration into a supporting factor.

14. As I have indicated, the reason for my referring at length to the facts of Re X is that the case provides an example of circumstances in which it is quite clear that surgery involving irreversible sterilization for other than conventional medical purposes is necessary for the welfare of an incapable child. Once it is recognized that parental authority to authorize medical treatment extends, in some circumstances, to the authorization of surgery involving irreversible sterilization (e.g. for the treatment of serious illness), there is no basis in legal principle for excluding from the scope of that parental authority circumstances such as those involved in Re X. Certainly it cannot be said that such surgery for the treatment of a serious illness, in a case where it involves the sterilization of a mentally normal child, is more obviously for the overall welfare of the child than surgery involving irreversible sterilization in a case such as Re X where there are, from the point of view of the child's interests and welfare, compelling physical and social reasons for such surgery and where there is no significant countervailing detriment. It is true that there is a passage in the judgment of La Forest J. in Re Eve(232) See (1986) 31 DLR (4th), at p 32 which, if read in isolation, suggests that the Supreme Court of Canada accepted the proposition that it can never be safely concluded that "non-therapeutic sterilization" is for the benefit of a person incapable of consenting to it. Re Eve was, however, a case involving the suggested sterilization for contraceptive purposes of an intellectually disabled woman of whom it was said(233) ibid., at p 9 that "there is no evidence that giving birth would be more difficult for Eve than for any other woman". The circumstances of the case were simply not comparable to a case such as Re X and it seems to me to be quite clear that the references to "non-therapeutic sterilization" in the judgment of La Forest J. should not be understood as intended to cover a case where what is involved is surgery upon a profoundly mentally disabled girl to prevent extraordinary difficulty, discomfort and pain which would accompany menstruation(234) See, in particular, La Forest J.'s comments (ibid., at p 22) about Re K and Public Trustee (1985) 19 DLR (4th) 255; and see, also, the use of the phrases "therapeutic reasons" and "therapeutic purposes" in Re E (A Minor) (Medical Treatment) (1991) 2 FLR, at p 586 and Re GF (A Patient) (1991) FCR, at p 787. Be that as it may, I respectfully agree with Lord Bridge of Harwich(235) In re B (A Minor) (1988) AC, at p 205 that:

"To say that the court can never authorise sterilisation of a

ward as being in her best interests would be patently

wrong. To say that it can only do so if the operation is 'therapeutic' as opposed to 'non-therapeutic' is to divert attention from the true issue, which is whether the operation is in the ward's best interest, and remove it to an area of arid semantic debate as to where the line is to be drawn between 'therapeutic' and 'non-therapeutic' treatment."

Nor can such a confinement of the authority of parents be justified by reason of the gravity of irreversible sterilization since, as has also been seen, it is plainly within the authority of parents to authorize surgery involving irreversible sterilization in at least some circumstances. Indeed, the consequences of surgery involving irreversible sterilization are immeasurably less grave in a case, such as Re X, where it is meaningless to speak of the fundamental right to procreate than they are in the case of such surgery upon an intellectually normal child for conventional medical purposes.

15. On the other hand, the requirement that parental authority to authorize surgery be exercised for the purpose, and only for the purpose, of advancing the welfare of the child necessarily excludes from the scope of that authority some categories of case involving the surgical sterilization of an incapable child for other than conventional medical purposes. The most obvious example of such a category of case is surgery for so-called "eugenic" purposes. Whatever may have been the approach accepted in other times and in other places, surgery upon a retarded person cannot, within the limits imposed by general community standards in this country, be justified by eugenic or "public welfare" reasons such as those advanced by Holmes J. in Buck v. Bell(236) (1927) 274 US 200, at p 207. Nor can such surgery upon a mentally retarded child be justified as necessary for the welfare of the child merely because it will make easier the task of those responsible for the child's protection and care. That is not, of course, to deny that the easing of the burden of protecting and caring for an incapable child may, in most cases, be also at least indirectly in the interests of the welfare of the child.

16. Between the extreme categories of case where surgery involving irreversible sterilization plainly can and plainly cannot be justified as necessary for the welfare of an incapable child are other cases in which there may be room for legitimate differences of opinion about what promotes the welfare of an incapable child in the circumstances of a particular case. Within that area, the welfare principle embodied in the common law propositions stated earlier operates at two levels to define the extent of parental authority. If the circumstances of a particular case are such that surgery involving irreversible sterilization can reasonably be seen, according to general community standards, as being necessary for the welfare of the particular child, it will lie within the scope of parental authority to authorize it. That parental authority is, however, confined to the authorization of what the parents, after due inquiry and adequate consideration, consider to be in the interests of the welfare of the child. The question arises as to what represents due inquiry and adequate consideration in such cases. That question must necessarily be answered in the context of any relevant jurisdiction of the courts or statutory tribunals to determine what is in fact in the interests of the welfare of a particular incapable child. It is common ground that, subject only to the continuing existence of some traditional jurisdiction in the Supreme Court, the only relevant jurisdiction as regards non-emergency surgery upon a child in the Northern Territory is that originally vested in the Family Court.

17. In a case where parental authority existed in relation to an incapable child, the welfare jurisdiction of the Chancery Court was supervisory in the sense that it was exercisable only where actual or threatened abuse or neglect of that parental authority justified the making of a wardship order. While the jurisdiction of the Family Court to make orders for the welfare of a child is not structured upon a wardship order, it nonetheless remains, in a case where the parents retain full parental authority, primarily supervisory in its character. In its exercise, the Family Court must give due weight to genuine parental views about what is and what is not in the interests of the welfare of the particular child and, in an appropriate case, recognize that there is scope for parental decision(237) See J v. C [1969] UKHL 4; (1970) AC 668, per Lord MacDermott at pp 711, 715; per Lord Upjohn at p 724; Re a Teenager (1988) 94 FLR, at p 197; 13 Fam LR, at p 99; (1989) FLC, at p 77,206. The welfare jurisdiction of the Chancery Court was not, however, exclusively supervisory. It was neither derivative from the rights and responsibilities of parents(238) See the history of the jurisdiction in Re Eve (1986) 31 DLR (4th), at pp 14-19 nor confined to what lay within parental - or paternal - authority(239) See, e.g., In re R (A Minor) (Wardship: Consent to Treatment) (1991) 3 WLR, at pp 601-602; In re C (Wardship: Treatment) (No. 2) (1990) Fam. 39, at p 46; see, also, Lowe and White, Wards of Court, 2nd ed. (1986), Ch 1 (esp pars 1-7, 1-8), pars 6-54, 6-55, 7-18. It could, for example, be invoked, at the suit of the parents themselves, to make binding orders for the protection of the child which were plainly beyond the powers of the parents(240) See In re R (A Minor) (Wardship: Consent to Treatment) (1991) 3 WLR, at p 602; In re Harris (An Infant), The Times, 21 May 1960; In re X (A Minor) (1975) Fam. 47, esp at pp 57, 60, 61. It could be invoked to override and determine the authority of the parents(241) See, In re B (A Minor) (Wardship: Medical Treatment) (1981) 1 WLR 1421; (1990) 3 All ER 927; Re P (A Minor) (1986) 1 FLR 272. Similarly, the fact that the jurisdiction of the Family Court is primarily supervisory in the case of an infant in the custody of her or his parents does not preclude the Family Court from intervening in a case where it considers that, giving due weight to genuine parental views, the gravity of the question involved and the protection of the welfare of the child require its intervention(242) Reg. v. Gyngall (1893) 2 QB, at pp 241-242; De Laurier v. Jackson (1934) 1 DLR 790, at p 791; Re K and Public Trustee (1985) 19 DLR (4th), at p 270. Where appropriate, it can, in such a case, override a parental refusal to authorize necessary surgery(243) K v. Minister for Youth and Community Services (1982) 1 NSWLR 311, at p 323; Rolands v. Rolands (1983) 9 Fam LR 320; (1984) FLC 91-519. In such a case, the preferable course will ordinarily be to appoint a guardian of the child for the limited period necessary for the authorization and performance of the surgery. If, however, circumstances were to arise in which there was no appropriate person prepared to accept appointment as such a temporary guardian, the court could, in my view, itself directly authorize it(244) See, e.g., In re L (An Infant) (1968) P 119, per Denning M.R. at p 157; K v. Minister for Youth and Community Services (1982) 1 NSWLR, at p 323; Rolands v. Rolands (1983) 9 Fam LR, at pp 320, 322; (1984) FLC, at pp 79,203, 79,204. More important for present purposes, the jurisdiction extends to granting, at the suit of a parent or interested party, declaratory or other relief in relation to the existence and proper exercise of parental authority. That jurisdiction extends to the making of a declaration that a parent or the parents of an incapable child would or would not, in the particular circumstances of a case, be justified in authorizing surgery involving irreversible sterilization.

18. In In re B (A Minor)(245) (1988) AC, at p 205, Lord Templeman expressed the opinion that, in England, "sterilisation of a girl under 18 should only be carried out with the leave" of a judge of the Family Division of the English High Court. The other members of the House of

Lords in that case did not express any opinion on that question but a similar view was expressed by Lord Goff of Chieveley in the case of an operation for the sterilization of an intellectually disabled adult woman who lacked the capacity to consent(246) In re F (Mental Patient: Sterilisation) (1990) 2 AC, at p 79. There are powerful considerations which support those views, including the grave consequences, both physical and psychological, of irreversible sterilization and the need to protect the weak and vulnerable from eugenic and utilitarian theories which discount the importance of human integrity and complete personality and which are repugnant to the standards of our community. Those considerations also include the fact that there may well exist a divergence or conflict - sometimes unappreciated - between the interests of the incapable child and the interests of those who are or will be responsible for looking after her or him and for caring for any offspring. In a context where the factors militating against surgery involving sterilization will not be confined to medical considerations, the courts are likely to be better able than medical practitioners, even acting as members of a multidisciplinary team, to ensure that due regard is paid to, and only to, relevant factors in ascertaining what is truly in the interests of the welfare of the child. All these considerations strongly support a conclusion that the effect of the requirement that parental authority be exercised only after due inquiry and adequate consideration is that, in the absence of any applicable statutory procedure or jurisdiction in any other competent tribunal, the parents of an incapable child must obtain a declaratory order from the Family Court (or some other court vested with applicable welfare jurisdiction) before they can validly authorize surgery involving irreversible sterilization for a purpose other than the conventional medical ones of preserving life and treating or preventing grave physical illness.

19. On the other hand, one cannot but be conscious of the undeniable fact that a general requirement that the parents of an incapable child maintain proceedings for declaratory relief in the Family Court before authorizing such surgery would represent an extraordinarily onerous burden upon them. Proceedings in the superior courts of this country are commonly protracted(247) For example, each of the first four cases referred to in footnote (189) (above) extended over at least 3 hearing days and, at least in the many cases where legal aid is not provided, oppressively expensive(248) See, e.g., Re Marion (1990) 14 Fam LR, at p 462; (1991) FLC, at pp 78,312-78,313; Re K and Public Trustee (1985) 19 DLR (4th), at p 278; Professor T.W. Church, "A Consumer's Perspective on the Courts", The Second Annual Oration in Judicial Administration, 31 October 1990, pp 6-7. The delays which are likely to be involved in such litigation are notorious. Inevitably, proceedings about whether surgery involving irreversible sterilization is in the interests of the welfare of an incapable child will impose a heavy and additional load of anxiety upon the shoulders of caring parents. A consequence of such a general requirement would be that the understandable reluctance of parents to become involved in such legal proceedings would prevent such surgery taking place in at least some cases where it was obviously for the welfare of an incapable child.

20. What then is the legal resolution of the different considerations favouring and militating against a conclusion that the common law requirement of due inquiry and adequate consideration can only be satisfied by recourse to the Family Court (or to the Supreme Court exercising cross-vested or any residual jurisdiction) in the case of surgery involving the irreversible sterilization of an incapable child in the Northern Territory? That question arises in this Court as a question of law. The processes of legal reasoning by induction and deduction from legal principle are, however, inadequate to provide an answer to it. The

reason why that is so is that, while the question arises in a legal context, the issues which it involves are as much social or moral as they are legal and the answer to it is inevitably affected by personal perceptions of current social conditions, standards and demands. The answer which I would give to it is that the reconciliation of the conflicting considerations requires that a distinction be drawn between those cases where the need for such surgery in the interests of the welfare of the child is, according to general community standards, obvious and those cases where it is not. In a case where such surgery is obviously necessary, a requirement of court approval would impose an unjustifiable burden upon the parents of an incapable child. More important, the requirement would itself be undesirable in that its only significant effect would be to prevent parents, who were not prepared to subject themselves and their families to the expense, inconvenience and anxiety of court proceedings, from authorizing surgery which was obviously in the interests of the welfare of the child. In a case where such surgery is not obviously necessary, the need to protect an incapable child from unjustified surgery involving irreversible sterilization outweighs all other considerations. Notwithstanding the expense, inconvenience and other disadvantages of court proceedings, it appears to me that, in the absence of some special statutory procedure, such proceedings represent the only adequate protection.

21. In what has been written above, I have already identified the two principal categories of case in which surgery involving irreversible sterilization of an incapable child is, according to general community standards, obviously necessary for the welfare of the child. The first is where such surgery is immediately necessary for conventional medical purposes, that is to say, the preservation of life or the treatment or prevention of grave physical illness.

22. The second category is that of which Re X constitutes an example(249) See, also, Re E (A Minor) (Medical Treatment) (1991) 2 FLR 585; Re GF (A Patient) (1991) FCR 786. A case will fall into this category if, but only if, it involves surgery upon a girl and the following conditions are all clearly and convincingly satisfied(250) See the discussion of standard of proof in Re K and Public Trustee (1985) 19 DLR (4th), at pp 268-272; and the implicit approval of the "clear and convincing" standard in Re Jane (1988) 94 FLR, at pp 20-21; 85 ALR, at pp 429-430; 12 Fam LR, at pp 680-681; (1989) FLC, at pp 77,252-77,253. First the child is so profoundly intellectually disabled that she is not and never will be capable of being a party to a mature human relationship involving informed sexual intercourse, of responsible procreation or of caring for an infant. Second, the surgery must be necessary to avoid grave and unusual problems and suffering which are or would be involved in menstruation which has either commenced or which is virtually certain to commence in the near future. These problems could arise from inability to comprehend or cope with pain; a phobic aversion to blood; a complete inability to cope with problems of hygiene with psychiatric or psychological consequences; or any of a variety of other possible complications. The problems or suffering which would result from menstruation must be such that it is plain that, according to general community standards, it would be quite unfair for the child and ultimate adult to be required to bear the additional burden of them. Third, the surgery must be a treatment of last resort in the sense that no alternative and less drastic treatment would be appropriate and effective. I would expect that the second and third requirements could not be satisfied in many cases until menstruation had actually commenced. Fourth, there must be competent medical advice from a multidisciplinary team, acting on the basis of appropriate paediatric, social and domestic reports, that the above conditions are all satisfied. When parents have received such multidisciplinary advice, they

will have discharged the obligation of due inquiry and adequate consideration and will be justified in authorizing the particular surgery.

23. The question arises whether there are any other categories of case in which surgery involving irreversible sterilization of an incapable child can be said to be obviously necessary for the welfare of the child. On balance, it seems to me that there are not. Like Hillyer J. in Re X(251) (1991) 2 NZLR, at pp 369-370, Anderson J.A. in Re K and Public Trustee(252) (1985) 19 DLR (4th), at pp 274-275 and Brown P in Re E (A Minor) (Medical Treatment)(253) (1991) 2 FLR, at p 586, I would draw a distinction between the category of case (see above) in which the primary purpose of the surgery is to prevent pain and extraordinary behavioural and personal problems which are, in the circumstances of a particular case, involved in menstruation and the case where the purpose of the operation is sterilization for contraceptive purposes. Notwithstanding the views expressed by the Supreme Court of Canada in Re Eve(254) (1986) 31 DLR (4th), esp at p 32, it appears to me that there may well be circumstances in which surgery involving sterilization of a profoundly intellectually disabled child for contraceptive purposes may, in the circumstances of a particular case, be necessary for the welfare of the child. I am not, however, persuaded that sterilization for contraceptive purposes could ever be said to be so obviously necessary for the welfare of an incapable child that parents would be justified in dispensing with the impartial and independent advice of a court or other statutory tribunal which has the capacity to deliver an authoritative and binding opinion on the question.

24. The judges of the Family Court have, in earlier cases and in the present case, made evident their appreciation of the multiplicity of factors which may be relevant to the question whether parents would be justified in authorizing surgery involving irreversible sterilization in the circumstances of a particular case. A list of a number of those factors is set out near the end of the thoughtful and helpful judgment of Hillyer J. in Re X(255) (1991) 2 NZLR, at pp 376-378. His Honour, in my view correctly, places at the forefront of those factors the need to identify the child's level of functioning and development and to consider whether there is any real likelihood of a significant increase in the child's capabilities in the future. The importance of those two aspects cannot be over-emphasized. In dealing with them, a court must be vigilant against the danger of making false and adverse assumptions about the ability of an intellectually disabled person to become a party to a mature human relationship involving informed sexual relations, to engage in responsible procreation and to care for an infant. A court must also be vigilant against the danger of discounting the possibility of significant future improvement in the capabilities of an intellectually disabled person with regard to those matters. Indeed, unless the case is one in which there is no real likelihood that the child in question will ever be able to make a responsible decision for herself or himself about surgery involving irreversible sterilization, it is difficult to envisage circumstances in which a court would be justified in pre-empting that decision in a case where such surgery was not at that time necessary for compelling medical or quasi-medical (e.g. the near certainty of trauma or psychological damage) reasons.

25. The material before the Court in the present case does not establish that the case falls within either of the categories of case (conventional medical reasons or the Re X type of case) in which it can be said that surgery involving sterilization of an incapable girl is obviously justified in the interests of the child's welfare. On the other hand, the material

before the Court does not seem to me to preclude the possibility that the present case does fall within the second of those categories. In these circumstances, I would answer the questions in the stated case as follows:

Question: (1) Can the applicants, as joint guardians of the child, Marion, lawfully authorise the carrying out in the Northern Territory of a sterilization procedure upon the said child without an order of a court?

Answer: The applicant may only validly authorize the carrying out of the sterilization procedure upon Marion after due inquiry and adequate consideration. Unless the case falls within one of the categories identified in this judgment, such due inquiry and adequate consideration involves obtaining an order of a court.

Question: (2) If 'no' to question 1, does the Family Court of Australia have jurisdiction:

(a) to authorise the carrying out of such a procedure; or (b) to enlarge the powers, rights or duties of the applicants as guardians of the said child to enable them to lawfully authorise the carrying out of such a procedure; or

(c) to approve the consent of the applicants, as guardians of the said child, to the proposed procedure to make the procedure lawful?

Answer: The Family Court has jurisdiction to make an order declaring whether, in the circumstances of the particular case, the parents of Marion would or would not be justified in authorizing the proposed sterilization procedure. Otherwise, it is unnecessary to answer this question.

Question: (3) Which (if any) of the steps referred to in

(a), (b) or (c) of question 2 is required by
law?
Answer: Unless the case falls within one of the
categories identified in this judgment, Marion's parents
could not validly authorize the proposed sterilization
procedure without a court order to the effect that they
would be justified in so doing.

26. There are two further matters which should be briefly mentioned. The first is that, since the argument of the present case, any doubt about the jurisdiction of the Court to entertain this appeal was removed by the decision of the Court in Mellifont v. Attorney-General (Qld)(256) (1991) 66 ALJR 107; (1991) 104 ALR 89. The other is that it was submitted by the learned Solicitor-General for New South Wales that where, as in that State, special statutory provisions exist prohibiting sterilization procedures on a child under sixteen years for other than urgent medical reasons without the consent of the Supreme Court(257) See Children (Care and Protection) Act 1987 (N.S.W.), s.20B (or, under the cross-vesting legislation, the Family Court)(258) Jurisdiction of Courts (Cross-vesting) Act 1987 (N.S.W.), s.4(2), those statutory provisions are applicable to control the general welfare jurisdiction of the Family Court. It is unnecessary to express a concluded view about the correctness of that submission since, as has been seen, there is no such statutory provision applicable in the Northern Territory. In deference to the careful argument of the Solicitor-General, however, I would indicate that I see considerable force in the submission. Certainly, my conclusion that there are circumstances where a sterilization procedure can be authorized by parents in the Northern Territory for other than urgent medical reasons without the consent of the Family Court or the Supreme Court of the Territory should not be understood as automatically applicable to a jurisdiction, such as New South Wales, in which special statutory provisions have been enacted.

McHUGH J. The first question in this appeal is whether the Court has jurisdiction to hear it. That question has been resolved by the decison of this Court in Mellifont v. Attorney-General (Qld)(259) (1991) 66 ALJR 107; 104 ALR 89. The second question is whether under the law of the Northern Territory, parents have the power to authorise the sterilisation of an intellectually disabled female under the age of 18 without the order of a court. If the answer to that question is no, the third question in this appeal is whether the Family Court of Australia has jurisdiction to give its consent to the procedure and, if so, whether the effect of that consent is to make the carrying out of the procedure lawful for the purposes of the civil and criminal law. These questions raise other issues: why does the law require consent to medical treatment and what effect does consent have; what is the source and scope of a parent's authority to consent to medical treatment for a child; is there any difference, so far as the giving of consent is concerned, between sterilisation and other surgical and medical procedures; is the law in the Northern Territory different from the common law?

2. After considering these issues, my conclusion is that custodial parents can give lawful consent to the sterilisation of an intellectually disabled child in the Northern Territory. Parents can give lawful consent if the procedure is necessary for the protection of the health of the child or to alleviate pain, fear or discomfort of such severity and duration or regularity

that it is not reasonable to expect the child to bear it. They can also give lawful consent if the procedure is required to eliminate a real risk of the child becoming pregnant if she does not, and never will, have any real understanding of sexual relationships or pregnancy. In addition, parents can give lawful consent if sterilisation is required for a purpose analogous to any of the foregoing purposes. The custodial parents have no authority to consent to such an operation, however, if the harm can be reasonably avoided by means less drastic than sterilisation. If, for any reason, such as a conflict of interest, the parents are not able to give consent to sterilisation, the Family Court of Australia may give its consent in substitution for that of the parents. In such a case, the consent of the Family Court has the same effect for the purposes of the civil and criminal law as the consent of the custodial parents would have.

The need for consent to the carrying out of a surgical procedure

3. It is the central thesis of the common law doctrine of trespass to the person that the voluntary choices and decisions of an adult person of sound mind concerning what is or is not done to his or her body must be respected and accepted, irrespective of what others, including doctors, may think is in the best interests of that particular person. To this general thesis, there is an exception: a person cannot consent to the infliction of grievous bodily harm without a "good reason"(260) Attorney-General's Reference (No.6 of 1980) (1981) 1 QB 715, at p 719. But save in this exceptional case, the common law respects and preserves the autonomy of adult persons of sound mind with respect to their bodies. By doing so, the common law accepts that a person has rights of control and self-determination in respect of his or her body which other persons must respect. Those rights can only be altered with the consent of the person concerned. Thus, the legal requirement of consent to bodily interference protects the autonomy and dignity of the individual and limits the power of others to interfere with that person's body.

4. At common law, therefore, every surgical procedure is an assault unless it is authorised, justified or excused by law. The law draws no lines between different degrees of violence, "every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner"(261) Blackstone, Commentaries, 17th ed. (1830), vol 3, p 120. A person who inflicts harm upon another must justify the doing of the harm. He or she may do so by proving that the harm was lawfully consented to or that the harm occurred in circumstances which the law recognises as a justification or excuse(262) Collins v. Wilcock (1984) 1 WLR 1172, at p 1177. Because a surgical procedure necessarily involves the touching and usually the infliction of bodily harm on a patient, the carrying out of such a procedure is an assault unless the patient or that person's legally authorised representative has consented to the procedure(263) In re F (Mental Patient: Sterilisation) [1991] UKHL 1; (1990) 2 AC 1, at pp 55, 72. In Schloendorff v. Society of New York Hospital(264) (1914) 105 NE 92, at p 93, Cardozo J. said:

"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 for which he is liable in

damages."

Consent is not necessary, however, where a surgical procedure or medical treatment must be performed in an emergency and the patient does not have the capacity to consent and no legally authorised representative is available to give consent on his or her behalf.

5. In England, the onus is on the plaintiff to prove lack of consent(265) Freeman v. Home Office (No.2) (1984) QB 524, at p 539. That view has the support of some academic writers in Australia(266) See Balkin and Davis, Law of Torts, (1991) pp 38-39; Luntz and Hambly, Torts: Cases and Commentary, 3rd ed. (1992), pp 680-681; Blay, "Onus of Proof of Consent in an Action for Trespass to the Person", (1987) 61 Australian Law Journal, 25, but it is opposed by other academic writers in Australia(267) See Fleming, The Law of Torts, 7th ed. (1987), p 72; Trindade and Cane, The Law of Torts in Australia, (1985), pp 39-40. It is opposed by Canadian authority(268) Hambley v. Shepley (1967) 63 DLR (2d) 94, at p 95; Kelly v. Hazlett (1976) 75 DLR (3d) 536, at p 556; Allan v. New Mount Sinai Hospital (1980) 109 DLR (3d) 634. It is also opposed by Australian authority(269) Hart v. Herron (1984) Aust. Torts Reports 80-201; Sibley v. Milutinovic (1990) Aust. Torts Reports 81-013. Notwithstanding the English view, I think that the onus is on the defendant to prove consent. Consent is a claim of "leave and licence". Such a claim must be pleaded and proved by the defendant in an action for trespass to land(270) Kavanagh v. Gudge 7 Man. and G. 316 (135 ER 132); Wood v. Manley (1839) 11 AD and E 34 (113 ER 325); Plenty v. Dillon [1991] HCA 5; (1991) 171 CLR 635, at p 647. It must be pleaded in a defamation action when the defendant claims that the plaintiff consented to the publication(271) See Loveday v. Sun Newspapers Ltd. [1938] HCA 28; (1938) 59 CLR 503, at p 525. The Common Law Procedure Act 1852 (15 and 16 Vict. c.76)(272) Sched. B. 44 also required any "defence" of leave and licence to be pleaded and proved. However, those who contend that the plaintiff must negative consent in an action for trespass to the person deny that consent is a matter of leave and licence. They contend that lack of consent is an essential element of the action for trespass to a person. I do not accept that this is so. The essential element of the tort is an intentional or reckless, direct act of the defendant which makes or has the effect of causing contact with the body of the plaintiff. Consent may make the act lawful, but, if there is no evidence on the issue, the tort is made out. The contrary view is inconsistent with a person's right of bodily integrity. Other persons do not have the right to interfere with an individual's body unless he or she proves lack of consent to the interference.

Consent by or on behalf of a minor

6. Until recently, it was doubtful whether at common law a minor could validly consent to the carrying out of a medical procedure. It is now established that if a minor has the requisite capacity, he or she may do so(273) Gillick v. West Norfolk AHA [1985] UKHL 7; (1986) AC 112. A minor has that capacity where he or she possesses sufficient intellectual capacity and emotional maturity to understand the nature and consequences of the procedure to be performed. Consequently, if a minor lacks the intellectual capacity and emotional maturity required to understand the nature and consequences of a medical procedure, his or her agreement to the carrying out of that procedure will be of no effect(274) See, for example, Agnew v. Jobson (1877) 13 Cox C.C. 625.

7. In some States, legislation now provides that, in some circumstances, minors may give a lawful consent to medical treatment(275) See Minors (Property and Contracts) Act 1970 (N.S.W.), s.49; Consent to Medical and Dental Procedures Act 1985 (S.A.), s.6.

8. However, the common law would be socially unacceptable and deserving of condemnation if its doctrines led to the result that, in the absence of an emergency, the carrying out of an ordinary medical procedure on a minor constituted an assault whenever the minor lacked the capacity to consent to the procedure. Consequently, the common law has conferred power upon a parent who has the lawful custody of a minor to give a lawful consent to the carrying out of medical procedures on that minor, including submission to a blood test for forensic purposes(276) In re L (An Infant) (1968) p 119, at p 132; B(BR) v. B(J) (1968) p 466, at p 475.

The source of the common law power of parents to consent to the medical treatment of their children

9. The basis and scope of the common law power of a parent to consent to medical treatment on behalf of a child has been given little attention by the courts. Although the existence of the power had long been assumed, it was not the subject of judicial pronouncement until 1968(277) See Skegg, Law, Ethics, and Medicine, (1988), p 58.

10. There appear to be three possible sources of the power: (1) a duty to provide medical treatment; (2) a natural right in a custodial parent to control the person and property of the minor; and (3) a right which, in the public interest, the law confers on parents to take such steps as will advance and protect the interests of the child.

1) Duty

11. Blackstone asserted that the "power of parents over their children is derived from ... their duty"(278) Blackstone, Commentaries, 17th ed. (1830), vol 1, p 452. He contended that the duty(279) ibid., pp 446-447:

"to provide for the maintenance of their children, is a
principle of natural law; an obligation ... laid on them not
only by nature herself, but by their own proper act, in
bringing them into the world: for they would be in the
highest manner injurious to their issue, if they only gave
their children life, that they might afterwards see them
perish. By begetting them, therefore, they have entered into
a voluntary obligation, to endeavour, as far as in them lies,
that the life which they have bestowed shall be supported
and preserved."

There is no difficulty in concluding that a person who has the duty to ensure that a minor obtains medical treatment also has the power to authorise that treatment. Whenever the law imposes a duty, it will imply, if necessary, the power to carry out that duty to the extent required by the need(280)Board of Fire Commissioners (N.S.W.) v. Ardouin [1961] HCA 71; (1961) 109 CLR 105, at p 118. But while many of the powers that parents exercise for the

benefit of their children are explicable on the basis of duty, the power to consent to medical treatment cannot be explained on that basis because the law imposes no general duty on parents to provide medical treatment for their children.

12. It is not surprising that the common law has imposed no general duty on parents to provide medical treatment for their children. As Lord Devlin has pointed out(281) Samples of Law Making, (1962), p 83:

"in the centuries when the common law was in the making,

medical men were of little account in the community. The

apothecary and the leech were not socially esteemed and

medicine had still to become a learned profession."

The combination of the common law and the Poor Relief Act 1601 (43 Eliz c 2) imposed a duty on a father to protect his children and to maintain them until they reached an age where they could lawfully and physically support themselves. But a father was not obliged to provide more than the necessaries of life(282) Bazeley v. Forder (1868) L.R. 3 QB 559, per Cockburn C.J. (dissenting), at p 565. Moreover, even in the case of necessities, he was not liable for any debt incurred by his child without his authority(283) Mortimore v. Wright (1840) 6 M and W 482 (151 ER 502). Since a power implied from the imposition of a duty is "limited by the extent of the need"(284) Ardouin (1961) 109 CLR, at p 118, the common law and Poor Relief Act duties of a parent to provide the necessities of life could not be made the source of the power to consent to those medical procedures which, though desirable, were not necessaries.

13. However, the duty of a parent to provide medical treatment for a child is no longer the exclusive domain of the common law or the Poor Relief Act. During the last hundred years, legislation has made it an offence in certain circumstances for parents to fail to provide medical treatment for their children. Some jurisdictions in Australia make it an offence if the parents wilfully neglect to provide medical treatment for a child and the neglect is likely to result in harm to the child(285) Community Welfare Act 1972 (S.A.), s.72; Children and Young Persons Act 1989 (Vic.), s.261; Children's Services Act 1965 (Qld), s.69. Some jurisdictions make it an offence to wilfully neglect to provide medical aid(286) Child Welfare Act 1960 (Tas.), s.66; Child Welfare Act 1947 (W.A.), s.31A. And some jurisdictions make it an offence to neglect to provide medical aid to a child unless there is a reasonable excuse for not doing so(287) Children (Care and Protection) Act 1987 (N.S.W.), s.26; Criminal Code Act 1983 (N.T.), s.149. But nothing in the terms of this legislation nor in the implied duties which they impose give any ground for concluding that parents have a general power to consent to the medical treatment of their children. None of this legislation, for example, provides, even by implication, a duty to provide cosmetic surgery or treatment. At most, the legislation imposes a duty on parents not to neglect to provide necessary medical treatment for their child.

2) Natural right of control of person and property

14. In the 19th and for much of the 20th century, the power of a parent to consent to the medical treatment of a child was almost certainly derived from what was considered to be a natural right in the father of near absolute control over the person and property of his child. Many cases decided in the last century can only be explained on the basis that a father had such control over his children. In R. v. De Manneville(288) (1804) 5 East 221, at p 221 (102 ER 1054, at p 1054), for example, the King's Bench held that a father had the right to seize

and retain custody of a "child then at the breast". In In re Agar-Ellis. Agar-Ellis v. Lascelles(289) (1883) 24 Ch D 317, it was not suggested that the mother was of bad character, yet the Court of Appeal held that the father had the right to refuse permission to his daughter, aged 17, to see or correspond with her mother without showing the correspondence to him or his nominee. Brett M.R. said(290) ibid., at p 326 that "the father has the control over the person, education and conduct of his children until they are twenty-one years of age. That is the law."

15. However, the father's near absolute right of control over the person, education and conduct of his children has been taken away by a series of enactments in England and Australia in the last hundred and fifty years and by the social and judicial recognition of children as persons with independent rights. Thus, legislation has given the mother as well as the father the right to the custody of their children. Moreover, the "welfare of the child" criterion means that, where the child is young, a custody dispute between the father and mother will usually be resolved in favour of the mother. Furthermore, the courts have increasingly recognised the "rights" of children by taking account of their wishes in custody disputes. In other cases, the courts have recognised the ability of mature children to make decisions concerning their own affairs. In an era in which many children over the age of fourteen leave home, support themselves, and enter into commercial dealings and de facto and sexual relationships, the Courts could hardly do otherwise. Consequently, in Hewer v. Bryant(291) (1970) 1 QB 357, at p 369, Lord Denning said:

"that the legal right of a parent to the custody of a child

ends at the 18th birthday: and even up till then, it is a

dwindling right which the courts will hesitate to enforce

against the wishes of the child, and the more so the older he

is. It starts with a right of control and ends with little more

than advice."

Lord Fraser of Tullybelton gave his approval to "every word" of this passage in Gillick(292) (1986) AC, at p 172 where the House of Lords held that, if a female under the age of 16 years has sufficient intelligence and maturity to understand the nature of and need for contraceptive treatment, she has the legal capacity to obtain contraceptive treatment notwithstanding the objections of her parents. Other cases have also held that a minor of sufficient intelligence and maturity can give a lawful consent to acts which require consent as a condition of their legality(293) See, for example, Reg. v. D (1984) AC 778, at p 806; Reg. v. Howard (1966) 1 WLR 13. Modern case law makes it impossible, therefore, to assert that parents have a natural right of almost absolute control over the person, education, conduct and property of their children. Consequently, the power of parents to consent to medical treatment and surgical procedures in respect of their children can no longer be regarded as existing as an incident or corollary of such a right.

3) Right of advancement

16. Once it is accepted that the power of parents to give a valid consent to the medical treatment of their children does not arise from a duty or from a natural right of almost absolute control over the person of the child, it follows that the common law gives this power to parents simply because it perceives them to be the most appropriate repository of such a power. Both the interests of the child and the interests of society require that, wherever

possible, a child should not be deprived of medical treatment that is for his or her benefit. Consequently, a just and rational legal system must make provision for the care of those who, by reason of infancy, lack the capacity to control and manage their own affairs. This means that the legal system must give a person or persons authority to act on behalf of children in respect of matters in which they are unable to act for themselves. In the case of children(294) Bromley and Lowe, Family Law, 7th ed. (1987), p 254:

"Apart from a public authority, the most obvious candidates

are one or both of the child's parents and it is in such

persons that English law, in keeping with most other

societies, has vested such authority and responsibility."

Although the case for making the parents the repository of such authority is not perhaps as clear cut as is conventionally thought, that case is, nevertheless, supported by strong sociological, psychological and administrative considerations(295) See G. Dworkin, The Theory and Practice of Autonomy, (1988), p 95. As Dworkin points out, these grounds include respect for the family as the decision making unit, the appropriateness of giving the power to those who possess a moral duty to protect the child and who are, therefore, likely to have the child's best interests in mind, and the cost and inconvenience of vesting the power in others such as government officials.

17. The authority to act for children is conferred on parents, however, for the benefit of the child and not for the benefit of the parents(296) Gillick (1986) AC, at p 170. Once that is acknowledged, "the family is to be conceived as a community of individuals with separable interests and not merely as a unitary state to be controlled by a (benevolent?) despot"(297) Montgomery, "Children As Property?", (1988) 51 Modern Law Review 323, at p 332. Consequently, when a custodial parent gives consent to the medical treatment of his or her child, the parent does so as agent for the child. However, the parent's consent is not substituted for that of the child in the sense that the parent should make the decision which the child would have made if the child was mature enough to give consent. Ex hypothesi, the child will not have reached the stage where he or she has been able to make realistic plans or to formulate goals for the future. Accordingly, it would be unreal to suggest that a parent should make the decision which the child would make. What the child would have decided, if confronted with the problem, can only be a matter of speculation.

18. Furthermore, because parents are given authority to act for the benefit of the child, their authority is limited to those acts which advance or protect the welfare of the child. This criterion is a matter which must be determined objectively and not by reference to the good faith opinions of the parent. A parent has no authority, therefore, to consent to medical treatment unless it can be seen objectively that the treatment is for the welfare of the child. If a parent purports to give consent to treatment which is not for the welfare of the child, the consent is of no effect. A person who acts on such "consent" is guilty of assaulting the child if the treatment involves any physical interference with the child. Moreover, the parent's authority is at an end when the child gains sufficient intellectual and emotional maturity to make an informed decision on the matter in question. In so far as Re R (A Minor) (Wardship: Consent to Treatment)(298) (1991) 3 WLR 592 suggests the contrary, it is inconsistent with Gillick.

19. One other matter needs to be noted. The powers which the parent exercises on behalf of the child are exercised in the course of a fiduciary relationship(299) See the description of a "fiduciary" in Hospital Products Ltd. v. United States Surgical Corporation [1984] HCA 64; (1984) 156 CLR 41, at pp 96-97. At all events, the role of the parent, when acting for the benefit of his or her child, and the role of a fiduciary are sufficiently similar to make at least some of the principles concerning fiduciaries applicable to the parent-child relationship. Thus, in principle, a parent can have no authority to act on behalf of his or her child where a conflict arises between the interests of the parent and the interests of the child. In A.M. Spicer and Son Pty. Ltd. (In Liquidation) v. Spicer(300) [1931] HCA 30; (1931) 47 CLR 151, at p 175, Starke J. pointed out:

"it is a rule of universal application, in the absence of any

stipulation to the contrary, that no one having such

(fiduciary) duties to perform should be allowed to enter into

engagements in which he has or can have a personal interest

conflicting or which possibly might conflict with the

interests of those whom he is bound to protect".

This is a matter of significance in cases where the carrying out of or failure to carry out an operation or treatment affects the interests of the parents as well as those of the child. No doubt in most cases of medical treatment or surgery, no conflict will arise between the interests of the parents and those of the child. In other cases, the risk of conflict may be so slight or theoretical that it can be disregarded. But in some cases - and claims that an abortion or sterilisation operation is in the best interest of a child are likely to be among them - a conflict between the interests of the parents and the child may arise. In such a case, the application of established and fundamental principle will deny the right of the parents to consent to the operation or treatment. If an operation or treatment is to be performed or carried out in such a case, only a court of general jurisdiction exercising the parens patriae jurisdiction or the Family Court acting under s.64(1)(c) of the Family Law Act 1975 (Cth) can authorise the operation or treatment. In such a case, the consent of the court has the same effect in law as a valid consent given by a parent or a child with the requisite capacity.

The effect of the Family Law Act

20. A question arose in this case as to whether s.64 of the Family Law Act 1975 (Cth) conferred a "welfare" jurisdiction on the Family Court equivalent to or extending beyond the parens patriae jurisdiction of the Court of Chancery. For the reasons given by Mason C.J., Dawson, Toohey and Gaudron JJ., I am of the opinion that that Court does have a jurisdiction similar to the parens patriae jurisdiction. I am also in general agreement with what their Honours have written concerning the construction, operation and effect of the provisions of the Family Law Act. The Family Court has power, therefore, to give a lawful consent to the carrying out of operations or the rendering of medical treatments in situations where parents are unable or unwilling to act or where there is no person who can give consent on behalf of the child. In addition, I agree with the statement of Nicholson C.J. in the Full Court of the Family Court that s.63E(1) of the Family Law Act "does no more than confer upon the guardians of the child, the normal incidents which the common law confers upon a guardian"(301) Re Marion (1990) 14 Fam LR 427, at p 447; (1991) FLC 92-193, at p 78,300.

Parental consent to sterilisation

21. In principle, no reason exists for denying to parents the power to consent to the sterilisation of a child in their custody. Public policy does not prevent a person from consenting to an operation which will irreversibly sterilise that person(302) Thake v. Maurice (1986) QB 644. Since the parent is the person whom the law entrusts with the power and authority to consent to surgical and medical treatment for the welfare of a child, logically the parent must have the power and authority to consent to any operation or treatment for the welfare of the child which is not contrary to law or public policy.

22. In the United States, however, courts have consistently held that parents do not possess the authority to consent to the sterilisation of their children(303) AL v. GRH (1975) 325 NE 2d 501 (Indiana Court of Appeals); Ruby v. Massey (1978) 452 F.Supp 361 (United States District Court); In re Grady (1981) NJ 426 A. 2d 467 (New Jersey Supreme Court); Matter of Moe (1982) Mass. 432 NE 2d 712 (Massachusetts Supreme Court). Moreover, in Stump v. Sparkman(304) (1978) 435 U.S. 349, at pp 358-359 the United States Supreme Court appeared to approve the decision of the Indiana Court of Appeals in AL v. GRH which held that parents had no authority to consent to the sterilisation of their child. The reasons given for rejecting parental consent as sufficient authority for sterilising a child include the history of abuse of sterilising the intellectually disabled - particularly the fear that they will be sterilised for the convenience of the guardians; the destruction of "an important part of a person's social and biological identity - the ability to reproduce"; and the irreversibility of the procedure. The effect of the blanket rule applied in the United States, however, is that parents cannot consent to an operation which results in the sterilisation of a child even though the procedure is necessary to remove or treat a diseased reproductive organ.

23. Understandable as the United States approach is, as a matter of principle, a line cannot be drawn between sterilisation procedures and other forms of surgical and medical treatment. It is true, as Holmes said(305) The Common Law, (1881), p 5:

"The life of the law has not been logic: it has been

experience. The felt necessities of the time, the prevalent

moral and political theories, intuitions of public policy,

avowed or unconscious, even the prejudices which judges

share with their fellow-men, have had a good deal more to do

than the syllogism in determining the rules by which men

should be governed."

But none of these matters provides any sure ground, in my respectful opinion, for a court to hold that sterilisation procedures should be treated as an exception to the rule that parents can consent to medical treatment and surgical procedures involving their child. If the consensus of the community was that parents ought not to have an unsupervised right to consent to the sterilisation of children, it might be proper to mould common law doctrine to give effect to that consensus, even though the demands of legal principle suggest a contrary course. It might be proper, therefore, to hold that parents cannot give consent to such a procedure without the consent of a court. But as no community consensus on the issue exists, and as the subject of sterilisation "gives rise to moral and emotional considerations to which many people attach great importance"(306) In re F (1990) 2 AC, at p 56, the proper course for a

court is to give effect to established principle instead of laying down a rule which gives effect to what that court thinks is the best social solution to the issue.

24. In any event, the social utility of requiring the consent of the court in all cases of sterilisation is debatable. Beneficial as such a course may prove to be in some cases, it would require a depressing view of the discharge of the responsibilities of parents and doctors to conclude that the unnecessary sterilisation of children is so widespread that a blanket rule is the only remedy which can protect children from the abuse of their right to bodily integrity. This is especially true in an era when litigation is always expensive and frequently protracted with the result that, in cases where sterilisation is warranted, applications for consent might not be made. Moreover, as Lord Brandon of Oakbrook pointed out in In re F(307), ibid if every sterilisation operation required curial consent "the whole process of medical care for such patients would grind to a halt". A better remedy for the protection of children than requiring curial consent in all cases of sterilisation is the development of objective standards which the courts can supervise and enforce where necessary. Such standards will promote certainty and consistency in decision making. They will also enable parents to give a valid consent to an operation which will sterilise their child without the cost and trauma associated with litigation.

25. It follows that, as a matter of principle, a parent has authority to consent to the sterilisation of a child in his or her custody if it will advance or protect the welfare of the child. What is in the best interests of the child is conventionally seen as being synonymous with the welfare of the child. To say that a medical or surgical procedure is in the best interests of a child, however, is merely to record a result. Before the best interests of the child can be determined, some principle, rule or standard must be applied to the facts and circumstances of the case(308) cf. Kennedy, "Patients, doctors, and human rights", Blackburn and Taylor (eds.), Human Rights for the 1990s, (1991), pp 90-91.

26. Since sterilisation has grave consequences for a person's adult life, it cannot be in the best interests of a child to pre-empt a choice about that procedure which the child would otherwise have as an adult person. If there is any real possibility that, at some future time, the child will acquire the capacity and maturity to choose whether he or she should be sterilised, the carrying out of that procedure cannot be in the best interests of the child unless, of course, protection of the child's health urgently requires that the procedure be carried out during incompetency. Moreover, it must not be assumed that, simply because the child is intellectually disabled, he or she does not have or cannot acquire the capacity to consent to sterilisation. Intellectually disabled persons will frequently have the capacity to make the choice as to whether they should be sterilised(309) Committee on Rights of Persons with Handicaps (South Australia), The Law and Persons with Handicaps, vol 2: Intellectual Handicaps, (1981), p 125. Furthermore, sterilisation involves invasive procedures resulting in the permanent deprivation of a person's right or liberty to reproduce, with the potentiality for psychological harm including the lowering - perhaps the destruction - of self-esteem and, in the case of the intellectually disabled, the reinforcement of anxieties which are commonly the result of intellectual disability(310) See Law Reform Commission of Canada, (Working Paper No.24 1979), Sterilization: Implications for Mentally Retarded and Mentally Ill Persons, pp 49-52.

27. So grave are the certain and potential effects of sterilisation that that procedure can only be for the welfare of the child if the circumstances are so compelling and so likely to endure that they justify the invasive surgery or procedure involved in sterilisation. The circumstances may be compelling if the failure to carry out the procedure is likely to result in the child's physical or mental health being seriously jeopardised or if it is likely to result in the suffering of pain, fear or discomfort of such severity and duration or regularity that it is not reasonable to expect the child to suffer that pain, fear or discomfort. In these cases, the right of the incompetent person to have his or her body protected against invasive procedures resulting in removal or destruction of reproductive organs is outweighed by the necessity for appropriate "treatment". The circumstances may also be compelling if the failure to carry out the procedure is likely to result in a real risk that an intellectually disabled child will become pregnant and she does not, and never will, have any real understanding of sexual relationships or pregnancy. In such a case, to speak of a fundamental right of reproduction is meaningless. The human dignity of an intellectually disabled child is not advanced, and indeed is denied, by allowing her (by, what is in point of law, rape) to become pregnant and to give birth in circumstances which she cannot understand and which may result in a frightening ordeal for her not only at the time of birth, but for many months prior thereto.

28. What constitutes sufficiently compelling circumstances to justify sterilisation will have to be worked out on a case by case basis. But, unless the case falls within one of the above categories or a category analogous thereto, it should be held that the sterilisation of a child is not for his or her welfare. In particular, it is not for the welfare of an intellectually disabled child to sterilise that child merely to avoid pregnancy or to give effect to eugenic policies. Nor is it for the welfare of the child to sterilise her merely because of the hygiene problems associated with menstruation. As the Law Reform Commission of Canada has pointed out, intellectually disabled females who require a great deal of assistance in managing their menstruation are already likely to require assistance with urinary and faecal control, problems which are much more troublesome in terms of personal hygiene(311) ibid., at p 34. Moreover, even if the case falls within one of the three categories which I have mentioned or an analogous category, it is not in the best interests of a child to sterilise him or her if the harm can reasonably be avoided by means less drastic than sterilisation.

29. Furthermore, as I have indicated, sterilisation is one area where the potential for conflict between the parent's interests and the child's interest exists. As Justice Horowitz pointed out in Matter of Guardianship of Hayes(312) (1980) Wash 608 p 2d 635, at p 640:

"unlike the situation of a normal and necessary medical

procedure, in the question of sterilisation the interests of

the parent of a retarded person cannot be presumed to be

identical to those of the child."

Thus, parents may see sterilisation as relieving them of the worry and distress of the child becoming pregnant or of the burden of caring for a grandchild whom the child would not be able or fully able to care for. If a decision to consent is actuated by interests such as these, a conflict of interest arises. In such a case, the parents have no authority to consent to the sterilisation of their child. However, since parents have authority to consent to a sterilisation procedure only in cases where the grounds for the procedure are compelling it is unlikely that, in practice, conflict will arise. If it does, a court of general jurisdiction invested with the

parens patriae jurisdiction or the Family Court may give consent in substitution for the parents.

30. The principles which apply to the sterilisation of children, as I have adumbrated them, fall somewhere between the approach of the Supreme Court of Canada in Re Eve(313) E (Mrs) v. Eve ("Re Eve") (1984) 2 SCR 388; 31 DLR (4th) 1 and the approach of the House of Lords in In re F. In Re Eve, the Supreme Court held that, in the exercise of the parens patriae jurisdiction, a court should not give consent to a non-therapeutic sterilisation. The distinction between therapeutic and non-therapeutic treatment was strongly criticised by members of the House of Lords in In re B (A Minor)(314) (1988) AC 199, at pp 203-204, 205. I agree with Professor Kennedy, in the article to which I have earlier referred, where he said(315) Kennedy, op cit, p 102 that, although "there are problems at the edges" of the two concepts, "(a)n intervention is therapeutic if treatment (therapy) is intended thereby." This definition would include the first two categories of justification to which I have referred but exclude the third category. However, for the reasons that I have already given, I think that, where the child has no real understanding of sexual relationships or pregnancy, sterilisation may be justified if no method of contraception is reasonably feasible. In that respect, I would go beyond the approach of the Supreme Court in Re Eve. Moreover, it would be inconsistent with the historical development of common law principles to close the categories to which they apply. Consequently, unlike the Supreme Court of Canada, I would hold that sterilisation may also be carried out for purposes which are analogous to the three categories to which I have referred. Such an approach allows the law to develop incrementally, guided by the overarching principle that the circumstances must be so compelling that they justify such an invasive procedure as sterilisation.

31. In In re F, the House of Lords held that sterilisation of an incompetent child was justified if it was necessary or in the public interest and that it would be in the public interest if the procedure was in the best interests of the child. Their Lordships held that it will be in the best interests of the patient if a doctor has formed the opinion that sterilisation should be carried out provided that that opinion corresponds with a respectable body of medical opinion among those experienced in the field. Their Lordships (Lord Griffith dissenting on this point) held that the involvement of a court was highly desirable as a matter of good practice although it was not necessary as a matter of law. The approach of their Lordships goes well beyond what I consider is the proper view of the common law, even when the decision to sterilise is ultimately made by a court.

32. In effect, the approach of their Lordships transfers the issue to the medical profession for determination. As Professor Kennedy points out(316) ibid., at pp 89-90, 91, 98, once the doctors approve the procedure, the court gives its consent to the procedure on the basis of what the doctors and social workers "regard as important or significant". In substance, as Professor Kennedy asserts(317) ibid., at p 90:

"The courts will be presented with a fait accompli. Those

who wish to challenge it will have what amounts to a near

impossible task. They will have to persuade the court to

reject, wholly or in part, the evidence of the 'experts',

evidence that is often unanimous and which has all the

trappings of expertise. It will be too late to argue that the

answers may be wrong because the questions were wrong."

Whatever may be the position in England, the approach of their Lordships is not consistent with the common law of Australia.

The law of the Northern Territory

33. So far I have dealt with the question of the common law rights of the parent to consent to a sterilisation procedure. In New South Wales(318) Children (Care and Protection) Act; Disability Services and Guardianship Act 1987 (N.S.W.) and South Australia(319) Mental Health Act Amendment Act 1985 (S.A.) the common law position in relation to children is altered by legislation. In the Northern Territory, s.21 of the Adult Guardianship Act 1988 (N.T.) requires that curial consent be obtained for the sterilisation of an intellectually disabled adult, but no specific legislation regulates the sterilisation of minors. Consequently, the lawfulness of a consent to the sterilisation of a minor in the Northern Territory depends upon the common law, subject to any general statutory provisions which are applicable to such cases.

34. Section 188 of the Criminal Code Act 1983 (N.T.) makes an unlawful assault an offence. Section 187 defines "assault" to mean, inter alia, the direct or indirect application of force to a person without his or her consent. But "assault" does not include "medical treatment ... reasonably needed". The removal of the uterus or ovaries of a female would also be an indictable offence under ss.181 and 186 of the Code unless it was an act or event authorised "in the exercise of a right granted or recognised by law"(320) Criminal Code, s.26(1)(a) or "subject to subsection (3), pursuant to authority, permission or licence lawfully granted"(321) Criminal Code, s.26(1)(d). Subsection (3) of s.26 provides that a person cannot authorise or permit another person to cause him or her grievous bodily harm "except in the case of medical treatment". Neither in terms nor in principle do these provisions make unlawful any consent to the sterilisation of a child which would be lawful at common law. Thus, it would be a "defence" to a charge brought under any of these provisions in respect of the sterilisation of a minor that the procedure was authorised by the common law. For the reasons I have already given, a consent given by the Family Court is also a "defence" to any such charge.

The question stated

35. I would answer the question stated to the Full Court by Nicholson C.J. as follows:

Q.(1) Can the Applicants as joint guardians of the child (Marion)

lawfully authorise the carrying out in the Northern

Territory of a sterilisation procedure upon the said child

without an order of a court?

A. Yes, if the circumstances are so compelling that the

welfare of the child justifies the invasive procedure involved,

there is no real possibility that in the future Marion will acquire

the capacity and maturity to choose whether she should be

sterilised, and in giving their consent the Applicants do not have

any conflict of interest with her interests.

Q.(2) If no to question 1, does the Family Court of Australia have jurisdiction:

(a) to authorise the carrying out of such a procedure;

or

(b) to enlarge the powers, rights or duties of the Applicants as guardians of the said child to enable them to lawfully authorise the carrying out of such a procedure; or

(c) to approve the consent of the Applicants, as guardians of the said child, to the proposed procedure to make the procedure lawful?

A. (a) Yes if the Applicants are disqualified from giving consent.

(b) No.

(c) The Family Court may make a declaration as to lawfulness of a proposed procedure of sterilisation.

Q.(3) Which (if any) of the steps referred to in (a), (b) or (c) of question 2 is required by law?

A. Step (2)(a) is required if the parents are disqualified from giving their consent.

ORDER

Appeal allowed.

Set aside the answers to the case stated given by the Full Court of the Family Court.

Answer the questions in the case stated as follows:

Question: (1) Can the Applicants (the respondents in this Court) as joint guardians of the child (Marion) lawfully authorise the carrying out in the Northern Territory, of a sterilisation procedure upon the said child without an order of a Court?

Answer: No.

Question: (2) If no to quesxtion 1, doesx the Family Court of Australia have jurisdiction:

(a) to authorise the carrying out of such a procedure; or

(b) to approve the consent of the Applicants, as guardians of the said

child, to the proposed procedure to make the procedure lawful?

Answer: (a) Yes.

(b) No.

(c) No, though in authorising the carrying out

of such a procedure, the Family Court may, if necessary, permit the Applicants to give any requisite consent.

Question: (3) Which (if any) of the steps referred to in (a), (b) or (c) of question 2 is required by law?

Answer: The step referred to in question 2(a) is required by law.