Eve, by her Guardian *ad litem*, Milton B. Fitzpatrick, Official Trustee
Appellant

v.

Mrs. E.
Respondent

and

Canadian Mental Health Association, Consumer Advisory Committee of the Canadian Association for the Mentally Retarded, The Public Trustee of Manitoba and Attorney General of Canada
Interveners

INDEXED AS: E. (MRS.) *v*. EVE

File No.: 16654.
Supreme Court of Canada
[1986] 2 S.C.R. 388

4 June 1985, 23 October 1986

Present: Dickson C.J. and Beetz, Estey, McIntyre, Chouinard, Lamer, Wilson, Le Dain and La Forest JJ.

The judgment of the Court was delivered by

1. LA FOREST J.--These proceedings began with an application by a mother for permission to consent to the sterilization of her mentally retarded daughter who also suffered from a condition that makes it extremely difficult for her to communicate with others. The application was heard by McQuaid J. of the Supreme Court of Prince Edward Island--Family Division. In the interests of privacy, he called the daughter "Eve", and her mother "Mrs. E".

Background

2. When Eve was a child, she lived with her mother and attended various local schools. When she became twenty-one, her mother sent her to a school for retarted adults in another community. There she stayed with relatives during the week, returning to her mother's home on weekends. At this school, Eve struck up a close friendship with a male student: in fact, they talked of marriage. He too is retarded, though somewhat less so than Eve. However, the situation was identified by the school authorities who talked to the male student and brought the matter to an end.

3. The situation naturally troubled Mrs. E. Eve was usually under her supervision or that of someone else, but this was not always the case. She was attracted and attractive to men and Mrs. E. feared she might quite possibly and innocently become pregnant. Mrs. E. was concerned about the emotional effect that a pregnancy and

subsequent birth might have on her daughter. Eve, she felt, could not adequately cope with the duties of a mother and the responsibility would fall on Mrs. E. This would understandably cause her great difficulty; she is a widow and was then approaching sixty. That is why she decided Eve should be sterilized.

4. Eve's condition is more fully described by McQuaid J. as follows:

> The evidence established that Eve is 24 years of age, and suffers what is described as extreme expressive aphasia. She is unquestionably at least mildly to moderately retarded. She has some learning skills, but only to a limited level. She is described as being a pleasant and affectionate person who, physically, is an adult person, quite capable of being attracted to, as well as attractive to, the opposite sex. While she might be able to carry out the mechanical duties of a mother, under supervision, she is incapable of being a mother in any other sense. Apart from being able to recognize the fact of a family unit, as consisting of a father, a mother, and children residing in the same home, she would have no concept of the idea of marriage, or indeed, the consequential relationship between, intercourse, pregnancy and birth.
>
> Expressive aphasia was described as a condition in which the patient is unable to communicate outwardly thoughts or concepts which she might have perceived. Particularly in the case of a person suffering from any degree of retardation, the result is that even an expert such as a psychiatrist is unable to determine with any degree of certainty if, in fact, those thoughts or concepts have actually been perceived, or whether understanding of them does exist. Little appears to be known of the cause of this condition, and even less of its remedy. In the case of Eve, this condition has been diagnosed as extreme.

From the evidence, he further concluded:

> [t]hat Eve is not capable of informed consent, that her moderate retardation is generally stable, that her condition is probably non-inheritable, that she is incapable of effective alternative means of contraception, that the psychological or emotional effect of the proposed operation would probably be minimal, and that the probable incidence of pregnancy is impossible to predict.

The Courts Below

5. Mrs. E. wanted to be sure she had a right to consent to the sterilization of Eve, so she applied to McQuaid J. for the following remedies:

(a) that Eve be declared a mentally incompetent pursuant to the provisions of the *Mental Health Act*;

(b) that Mrs. E. be appointed the committee of the person of Eve;

(c) that Mrs. E. be authorized to consent to a tubal ligation operation being performed on Eve.

6. McQuaid J. saw no problem regarding the first two remedies. These in his view were simply a prelude to the third, on which he concentrated, i.e., the authorization to consent to a tubal ligation operation on Eve. He noted that every surgical procedure requires the

prior consent of the patient or someone lawfully authorized on her behalf; otherwise it constitutes battery. Though he thought a parent or a committee could give a valid consent for any strictly therapeutic procedure on behalf of a retarded person, in his view deeper issues arose where the procedure was only marginally therapeutic or, as in the present case, strictly contraceptive and specifically one of sterilization. It would depriveEve of the possible fulfilment of the great privilege of giving birth, a result that should cause a court to act with scrupulous caution even thoughEve might not be able to understand or fully appreciate this.

7. Having reviewed the Canadian and English case law and found no governing authorities, McQuaid J. considered whether the court should, in the exercise of its *parens patriae* jurisdiction, intervene on behalf of Eve. He had no doubt that the court could authorize a surgical procedure necessary to health even though a side-effect might be sterilization, and he postulated that it could also do so where the public interest clearly required it, though he found it difficult to come up with an example. However, McQuaid J. was of the view that Eve, like other individuals, was entitled to the inviolability of her person, a right that superseded her right to be protected from pregnancy. That this might result in inconvenience and even hardship to others was irrelevant. The law must protect those who are unable to protect themselves, it must ensure the protection of the higher right. He, therefore, concluded that the court had no authority or jurisdiction to authorize a surgical procedure on a mentally retarded person, the intent and purpose of which was solely contraceptive. It followed that, except for clinically therapeutic reasons, parents or other similarly situated could not give a valid consent to such a surgical procedure either, at least in the absence of clear and unequivocal statutory authority. He, therefore, denied the application.

8. An appeal to the Supreme Court of Prince Edward Island, *in banco*, was launched, and an order was then made appointing the Official Trustee as Guardian *ad litem* for Eve. The appeal was allowed. The general view of the court is set forth in an *addendum* to its notes of judgment as follows:

In rendering judgment in this matter, we are unanimously of the opinion that the Court has, in proper circumstances, the authority and jurisdiction to authorize the sterilization of a mentally incompetent person for non-therapeutic reasons. The jurisdiction of the Court originates from its parens patriae powers towards individuals who are unable to look after themselves and gives the Court authority to make the individual a ward of the Court.

9. The court, however, differed on the evidence. A majority (Large and Campbell JJ.) was of the view, MacDonald J. dissenting, that there was sufficient evidence to warrant the sterilization of Eve. The court, therefore, ordered that:

(a) "Eve" be appointed a ward of the Court pursuant to the parens patriae jurisdiction for the sole purpose of facilitating and authorizing her sterilization;

(b) the Court authorizes the sterilization of "Eve" by a competent medical practitioner;

(c) the Court reserves its approval of the method of sterilization to be followed pending further submissions of counsel as to the medically preferred surgical procedure.

10. Though the members of the court shared the general view already set forth, there were nonetheless significant differences in their approaches, particularly between that of MacDonald J. and those of the other two judges. To begin with, MacDonald J. took the position that since McQuaid J. had not dealt with the first two grounds in the application, the appeal was only as to the third ground. MacDonald J. expressed considerable doubt about the application of the *Mental Health Act*, and he added that if it did not apply, this raised questions about the burden and standard of proof the court should place on those seeking substituted consent. He, therefore, felt it would be improper for the court to address any other issue than the one strictly before it, especially when that issue was as fundamental as informed consent.

11. In particular, MacDonald J. was concerned with the fact that no one had appeared on behalf of Eve at the hearing of the application although the judge had requested that a department of the government do so. Counsel for the provincial Department of Justice had been present, it is true, but his role was unclear, and MacDonald J. felt that McQuaid J. would not have readily reached some of his conclusions hadEve been represented. He thus felt the sole question the court could deal with was whether the court appealed from had authority or jurisdiction to authorize a contraceptive sterilization on a mentally retarded person.

12. To that question, we saw, he replied in the affirmative, but only on a very narrow basis. In his view, the court's jurisdiction was limited to protecting those who are unable to protect themselves. In the case of therapeutic treatment, a parent or guardian could give the required consent and in default the court could intervene under its power as *parens patriae*. But when a non-therapeutic operation was involved, the court must determine whether allowing or disallowing it would best protect the individual.

13. In MacDonald J.'s view, a court has authority to authorize the contraceptive sterilization of a mentally retarded person but only in exceptional cases. While he found it extremely difficult to conceive of sterilization as protective rather than violative, he felt it would be inappropriate to state as a binding rule that the court would never authorize sterilization for non-therapeutic purposes. If a court did so, however, it must act with extreme caution lest it open the way to abuse. Accordingly he set forth a number of criteria that must be followed in dealing with an application for the purpose. Some of these, he concluded, (in particular, the requirement that the individual proposed to be sterilized must be represented by counsel competent to deal with the medical, social, legal and ethical issues involved) had not been followed in the present case.

14. Campbell J. took a broader view of the court's powers. The court, he thought, could exercise its parental jurisdiction by making the individual in question its ward. It was possible that the court had implied authority to bring a person within the ambit of the *parens patriae*jurisdiction by its own order, but the *Mental Health Act* provided an adequate statutory base.

15. The *parens patriae* jurisdiction must, he stated, be exercised solely for the benefit of the mentally retarded person. Each case demanded an objective but compassionate assessment of all relevant facts and circumstances. It could not, in his view, be stated as a rule of law that the inviolability of the person supersedes the right to be protected from pregnancy. That conclusion, he felt, could only be reached by a consideration of the particular circumstances.

16. In Eve's case, Campbell J. held, the real and genuine object of the proposed sterilization was her protection. There was no overriding public interest against it. And there was a likelihood of substantial injury to her if the operation was not performed. In his view, that injury must be assessed in its social, mental, physical and economic contexts. In the absence of permanent sterilization, the protected environment Eveenjoyed would become a guarded environment. This would deprive her of social options and relative freedom.

17. Large J. agreed with Campbell J. that the court could exercise its parental jurisdiction through a committee appointed under the *Mental Health Act*. He also agreed with him on the substituted consent issue, but appears to have gone further. After reviewing the record, he commented:

In this unfortunate case I am unable to see how a choice between a chance pregnancy and the tubal ligation which is recommended by "Eve's" medical advisers poses any problem. I believe that the decision is first to be made by the doctor and then by the committee. I do not consider that the Courts should be concerned in each case of medical treatment or surgery which may arise in the future and would direct that "Eve's" doctor and her committee, when appointed, should be free to make a choice of whatever medical or surgical intervention is considered best for "Eve's" welfare.

18. The court, it will be remembered, had in its original order reserved its approval of the method of sterilization to be followed. After further representations, it later ordered that the method of sterilization be by way of a hysterectomy.

19. Leave to appeal to this Court was then granted to Eve's Guardian *ad litem* by the Prince Edward Island Supreme Court, Appeal Division. Subsequently this Court granted intervener status to the Consumer Advisory Committee of the Canadian Association for the Mentally Retarded, The Public Trustee of Manitoba, the Canadian Mental Health Association, and the Attorney General of Canada.

The Issues on this Appeal

20. The major issues raised in this appeal are substantially as follows:

1.Is there relevant provincial legislation that gives a court jurisdiction to appoint a committee vested with the power to consent to or authorize surgical procedures for contraceptive purposes on an adult who is mentally incompetent?

2. In the absence of statutory authority, does the court's *parens patriae* jurisdiction allow the court to consent to the sterilization of an adult who is mentally incompetent?

3. What is the appropriate standard of proof to be applied in a case where an application is made to the court for its substituted consent to a non-therapeutic procedure on behalf of a mentally incompetent adult? Upon whom is the onus of proof?

4. If the court has jurisdiction to provide substituted consent for a non-therapeutic procedure on behalf of a mentally incompetent adult, did the Supreme Court of Prince Edward Island, *in banco*, properly exercise its jurisdiction in granting an order authorizing the sterilization of Eve?

5. Does the *Canadian Charter of Rights and Freedoms* protect an individual against sterilization without that individual's consent?

6. If the *Charter* provides such protection, when will it permit the non-therapeutic sterilization of a mentally incompetent who is incapable of giving consent?

7. Does the *Charter* give an individual the right to choose not to procreate, and if so does the court have jurisdiction to make that choice on behalf of an individual who is unable to do so?

General Considerations

21. Before entering into a consideration of the specific issues before this Court, it may be useful to restate the general issue briefly. The Court is asked to consent, on behalf of Eve, to sterilization since she, though an adult, is unable to do so herself. Sterilization by means of a tubal ligation is usually irreversible. And hysterectomy, the operation authorized by the Appeal Division, is not only irreversible; it is major surgery. Eve's sterilization is not being sought to treat any medical condition. Its purposes are admittedly non-therapeutic. One such purpose is to deprive Eveof the capacity to become pregnant so as to save her from the possible trauma of giving birth and from the resultant obligations of a parent, a task the evidence indicates she is not capable of fulfilling. As to this, it should be noted that there is no evidence that giving birth would be more difficult for Eve than for any other woman. A second purpose of the sterilization is to relieve Mrs. E. of anxiety about the possibility of Eve's becoming pregnant and of having to care for any child Eve might bear.

Does the Court have Statutory Jurisdiction?

22. On the application and in the Appeal Division, reliance was placed on certain provisions of the *Mental Health Act*, R.S.P.E.I. 1974, c. M-9, as amended by [the *Chancery Jurisdiction Transfer Act*] S.P.E.I. 1974, c. 65. These provisions read as follows:

2. (n) "person in need of guardianship" means a person

(i) in whom there is a condition of arrested or incomplete development of mind, whether arising from inherent causes or induced by disease or injury, or

(ii) who is suffering from such a disorder of the mind, that he requires care, supervision and control for his protection and the protection of his property.

30 A (1) When a person in need of guardianship is possessed of goods and chattels, lands and tenements or rights or credits, the Supreme Court may on petition, stating the name,

age and residence of the person therein alleged to be a person in need of guardianship, setting forth generally the real and personal estate, rights and credits of and belonging to that person, so far as they are known to the petitioner and the value thereof, and verified by the affidavit of the petitioner or some other credible person or persons, order that person so alleged to be a person in need of guardianship to be examined by two competent medical men, to ascertain his state of mind and capability of managing his affairs, and the medical men shall certify their opinion thereon.

(2) If by the certificate of two medical men issued pursuant to subsection (1) it appears to the satisfaction of the Supreme Court that the person is a person in need of guardianship and incapable of managing his affairs, and that under the circumstances it would be for his benefit that the custody of his person and the management of his estate should be committed to some other person, the Supreme Court may make an order appointing some fit and proper person to be a committee of the person and estate of the person in need of guardianship and if necessary direct such allowance to be made out of the estate for the maintenance and medical treatment of the person in need of guardianship as it deems proper, and the committee shall give security by way of bond or recognizance with such sureties and in such form as the Supreme Court shall direct conditioned for the faithful performance of his duties as the committee.

30 B Every order made under subsection (2) of section 30A for the appointment of a committee has the effect of vesting the person and estate of the person in need of guardianship in the committee in the same manner as a grant to the committee of the person and estate of a lunatic made by and under the order and direction of the Lord Chancellor of England would have done at the time of the passing of the Act 15 Victoria, Chapter 36; but when the fact the person being a person in need of guardianship is doubtful, the Supreme Court, before making the order, hold an inquiry in order that the state of the person's mind may be ascertained and until the completion of the inquiry may make such provisional order respecting the person and estate of the alleged person in need of guardianship as may seem necessary.

30 L Every act done by the committee of the estate of a person in need of guardianship under and by virtue of this Act, and every order of the Supreme Court are as valid and binding against the person in need of guardianship and all persons claiming by, from or under him, as if the person so being a person in need of guardianship had been in his sound mind and had personally done such act.

23. The Act, as can be seen, provides a procedure for determining whether persons are in need of guardianship as defined in s. 2(n). It also gives certain powers over such persons, or at least their property, to a committee. However, it is by no means clear that the Act applies toEve. The opening words of s. 30A(1), which provides for the psychiatric assessment of a person alleged to be in need of guardianship, at first sight at least, appear to be directed solely to persons in need of guardianship who are also possessed of property. Taken by itself, then, s. 30A(1) gives the impression that it is aimed at the management of an incompetent person's estate. Nothing in the evidence indicates that Evehas any property.

24. Section 30A(2), however, empowers the court to appoint a committee of the person as well as of the estate of a person in need of guardianship. It does not, however, expressly empower it to authorize any medical procedure, but only to make allowances from the person's estate for maintenance and medical treatment. It may impliedly empower the court to authorize medical treatment by its grant of custody, but any such implication would have to be read in light of the fact that the court's power to make an allowance for medical purposes does not extend to all medical procedures, but only to medical treatment. Eve, we have seen, is not being treated for any medical condition. The sole purpose for her proposed sterilization is non-therapeutic.

25. Even assuming, therefore, that these provisions apply to a person who has no property, and that they confer powers beyond property management, including an implied power in a committee to authorize medical treatment, matters that are by no means free from doubt, it would take much stronger language to persuade me that they empower a committee to authorize the sterilization of an individual for non-therapeutic purposes.

26. Finally, s. 30B provides that a committee appointed under s. 30A(2) has the effect of vesting the person and estate of the person in need of guardianship in the committee in the same manner as a grant to the committee of a person and estate of a lunatic by the Lord Chancellor of England at the time of the passing of the Island Act, (1852), 15 Vict., c. 36. That, however, does not dispel the doubts that a committee can only be appointed for a person who owns property, especially since the reference to the grant by the Lord Chancellor is to the person and estate of the incompetent, and (though this is less cogent) the Island Act of 1852 appears also to have been limited to incompetents who owned property. In any event, any relevant power the Lord Chancellor had at the time is related to the *parens patriae* jurisdiction, which I shall be discussing at length later.

27. In a word, I am unable to see how the *Mental Health Act* much advances the case of the applicants. It does provide a procedure for a declaration of mental incompetency, at least for those who own property, but its ambit is unclear. Certainly, power to obtain an authorization for sterilization, if it exists, must be found elsewhere. It is significant that in this Court the respondent did not rely on the *Mental Health Act* but on s. 48 of the *Hospital Management Regulations*, R.R.P.E.I., c. H-11 adopted pursuant to s. 16 of the *Hospitals Act*, R.S.P.E.I. 1974, c. H-11.

28. Section 48 of these Regulations reads as follows:

48. No surgical operation shall be performed on a patient unless a consent in writing for the performance of the operation has been signed by

(a) the patient;

(b) the spouse, one of the next of kin or parent of the patient, if the patient is unable to sign by reason of mental or physical disability; or

(c) the parent or guardian of the patient, if the patient is unmarried and under eighteen years of age,

but if the surgeon believes that delay caused by obtaining the consent would endanger the life of the patient

(d) the consent is not necessary; and

(e) the surgeon shall write and sign a statement that a delay would endanger the life of the patient.

Section 16 of the Act under which it was enacted reads as follows:

16. Upon the recommendation of the Commission, the Lieutenant Governor in Council may make such regulations with respect to hospitals as may be deemed necessary for

(a) their establishment, construction, alteration, equipment, safety, maintenance and repairs;

(b) their classification, grades, and standards;

(c) their inspection, control, government, management, conduct, operation and use;

(d) respecting the granting, refusing, suspending and revoking of approval of hospitals and of additions to or renovations in hospitals;

(e) prescribing the matters upon which bylaws are to be passed by hospitals;

(f) prescribing the powers and duties of inspectors;

(g) providing that certain persons shall be by virtue of their office members of the Board in addition to the members of the Board appointed or elected in accordance with the authority whereby the hospital is established;

(h) respecting their administrators, staffs, officers, servants, and employees and the powers and duties thereof;

(i) providing for the certification of chronically ill persons;

(j) defining residents of the province for the purposes of this Act and the regulations;

(k) respecting the admission, treatment, care, conduct, discipline and discharge of patients or any class of patients;

(l) respecting the classification of patients and the lengths of stay of and the rates and charges for patients;

(m) prescribing the manner in which hospital rates and charges shall be calculated;

(n) prescribing the facilities that hospitals shall provide for students;

(o) respecting the records, books, accounting systems, audits, reports and returns to be made and kept by hospitals;

(p) respecting the reports and returns to be submitted to the Commission by hospitals;

(q) prescribing the classes of grants by way of provincial aid and the methods of determining the amounts of grants and providing for the manner and times of payment and the suspension and withholding of grants and for the making of deductions from grants;

(r) respecting such other matters as the Lieutenant Governor in Council considers necessary or desirable for the more effective carrying out of this Act.

29. As will be evident from a reading of s. 16, the purpose of the regulations is to regulate the construction, management and operation of hospitals. They are not aimed at defining the rights of individuals as such. Section 48 of the regulations (which appears to have been enacted under s. 16(*k*)) does not so much authorize the performance of an operation as direct that none shall be performed in the absence of appropriate consents, except in cases of necessity. The enumerated consents and necessity are at law valid defences in certain circumstances to a suit for battery that might be brought as a result of an unauthorized operation. So, for the purposes of managing the workings of the hospital, the regulations require that these consents be signed. They do not purport to regulate the validity of the consents; this is otherwise governed by law. Indeed, I rather doubt that the Act empowers the making of regulations affecting the rights of the individual, particularly a basic right involving an individual's physical integrity. For in the absence of clear words, statutes are, of course, not to be read as depriving the individual of so basic a right. In a word, the intent of the regulations is to provide for the governance of hospitals, not human rights.

30. In summary, MacDonald J. appears to have been right in doubting that the trial judge had properly addressed the threshold question of whether Eve was incompetent. In truth, however, these questions of possible statutory power only amounted to a preliminary skirmish. Argument really centred on the question of whether a superior court, as successor to the powers of the English Court of Chancery could, in the exercise of its parental control as the repository of the Crown's jurisdiction as *parens patriae*, authorize the performance of the operation in question here. It is to that issue that I now turn.

<u>*Parens Patriae* Jurisdiction--Its Genesis</u>

31. There appears to have been some uncertainty in the courts below and in the arguments presented to us regarding the courts' wardship jurisdiction over children and the *parens patriae* jurisdiction generally. For that reason, it may be useful to give an account of the *parens patriae* jurisdiction and to examine its relationship with wardship.

32. The origin of the Crown's *parens patriae* jurisdiction over the mentally incompetent, Sir Henry Theobald tells us, is lost in the mists of antiquity; see H. Theobald, *The Law Relating to Lunacy* (1924). *De Prerogativa Regis*, an instrument regarded as a statute that dates from the thirteenth or early fourteenth century, recognized and restricted it, but did not create it. Theobald speculates that "the most probable theory [of its origin] is that either by general assent or by some statute, now lost, the care of persons of unsound mind was by Edw. I taken from the feudal lords, who would naturally take possession of the land of a tenant unable to perform his feudal duties"; see Theobald, *supra*, p. 1.

33. In the 1540's, the *parens patriae* jurisdiction was transferred from officials in the royal household to the Court of Wards and Liveries, where it remained until that court was wound up in 1660. Thereafter the Crown exercised its jurisdiction through the Lord Chancellor to whom by letters patent under the Sign Manual it granted the care and custody of the persons and the estates of persons of unsound mind so found by inquisition, i.e., an examination to determine soundness or unsoundness of mind.

34. Wardship of children had a quite separate origin as a property right arising out of the feudal system of tenures. The original purpose of the wardship jurisdiction was to protect the rights of the guardian rather than of the ward. Until 1660 this jurisdiction was also administered by the Court of Wards and Liveries which had been created for the purpose.

35. When tenures and the Court of Wards were abolished, the concept of wardship should, in theory, have disappeared. It was kept alive, however, by the Court of Chancery, which justified it as an aspect of its *parens patriae* jurisdiction; see, for example, *Cary v. Bertie* (1696), 2 Vern. 333, at p. 342, 23 E.R. 814, at p. 818; *Morgan v. Dillon* (Ire.) (1724), 9 Mod. R. 135, at p. 139, 88 E.R. 361, at p. 364. In time wardship became substantively and procedurally assimilated to the *parens patriae* jurisdiction, lost its connection with property, and became purely protective in nature. Wardship thus is merely a device by means of which Chancery exercises its *parens patriae* jurisdiction over children. Today the care of children constitutes the bulk of the courts' work involving the exercise of the *parens patriae* jurisdiction.

36. It follows from what I have said that the wardship cases constitute a solid guide to the exercise of the *parens patriae* power even in the case of adults. There is no need, then, to resort to statutes like the *Mental Health Act* to permit a court to exercise the jurisdiction in respect of adults. But proof of incompetence must, of course, be made.

37. This marks a difference between wardship and *parens patriae* jurisdiction over adults. In the case of children, Chancery has a custodial jurisdiction as well, and thus has inherent jurisdiction to make them its wards; this is not so of adult mentally incompetent persons (see *Beall v. Smith* (1873), L.R. 9 Ch. 85, at p. 92). Since, however, the Chancellor had been vested by letters patent under the Sign Manual with power to exercise the Crown's *parens patriae* jurisdiction for the protection of persons so found by inquisition, this difference between the two procedures has no importance for present purposes.

38. By the early part of the nineteenth century, the work arising out of the Lord Chancellor's jurisdiction became more than one judge could handle and the Chancery Court was reorganized and the work assigned to several justices including the Master of the Rolls. In 1852 (by 15 & 16 Vict., c. 87, s. 15 (U.K.)) the jurisdiction of the Chancellor regarding the "Custody of the Persons and Estates of Persons found idiot, lunatic or of unsound Mind" was authorized to be exercised by anyone for the time being entrusted by virtue of the Sign Manual.

39. The current jurisdiction of the Supreme Court of Prince Edward Island regarding mental incompetents is derived from the *Chancery Act*which amalgamated a series of statutes dealing with the Court of Chancery, beginning with that of 1848 (11 Vict., c. 6 (P.E.I.)) Section 3 of*The Chancery Act*, R.S.P.E.I. 1951, c. 21, substantially reproduced

the law as it had existed for many years. It vested in the Court of Chancery the following powers regarding the mentally incompetent:

...and in the case of idiots, mentally incompetent persons or persons of unsound mind, and their property and estate, the jurisdiction of the Court shall include that which in England was conferred upon the Lord Chancellor by a Commission from the Crown under the Sign Manual, except so far as the same are altered or enlarged as aforesaid.

By virtue of the *Chancery Jurisdiction Transfer Act*, S.P.E.I. 1974, c. 65, s. 2, the jurisdiction of the Chancery Court was transferred to the Supreme Court of Prince Edward Island. It will be obvious from these provisions that the Supreme Court of Prince Edward Island has the same*parens patriae* jurisdiction as was vested in the Lord Chancellor in England and exercised by the Court of Chancery there.

Anglo-Canadian Development

40. Since historically the law respecting the mentally incompetent has been almost exclusively focused on their estates, the law on guardianship of their persons is "pitifully unclear with respect to some basic issues"; see P. McLaughlin, *Guardianship of the Person* (Downsview 1979), p. 35. Despite this vagueness, however, it seems clear that the *parens patriae* jurisdiction was never limited solely to the management and care of the estate of a mentally retarded or defective person. As early as 1603, Sir Edward Coke in *Beverley's Case*, 4 Co. Rep. 123 b, at pp. 126 a, 126 b, 76 E.R. 1118, at p. 1124, stated that "in the case of an idiot or fool natural, for whom there is no expectation, but that he, during his life, will remain without discretion and use of reason, the law has given the custody of him, and all that he has, to the King" (emphasis added). Later at the bottom of the page he adds:

2. Although the stat. says, *custodiam terrarum*, yet the King shall have as well the custody of the body, and of their goods and chattels, as of the lands and other hereditaments, and as well those which he has by purchase, as those which he has as heirs by the common law.

At 4 Co. Rep. p. 126 b, 76 E.R. 1125, he cites Fitzherbert's *Natura brevium* to the same effect. Theobald (*supra*, pp. 7-8, 362) appears to be quite right when he tells us that the Crown's prerogative "has never been limited by definition". The 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.

41. The famous custody battle waged by one Wellesley in the early nineteenth century sheds some light on the exercise of the king's *parens patriae* jurisdiction by the Lord Chancellor. Wellesley (considered an extremely dissolute and objectionable father due to his philandering ways and vulgar language, in spite of his "high" birth), waged a lengthy court battle to gain custody of his children following the death of his estranged wife who had entrusted the care of the children to members of her family. In *Wellesley v. Duke of Beaufort* (1827), 2 Russ. 1, 38 E.R. 236, Lord Eldon, then Lord Chancellor, in discussing the jurisdiction of the Court of Chancery, touched upon the King's *parens patriae* power at 2 Russ. 20, 38 E.R. 243. He there made it clear that "it belongs to the King as *parens patriae*, having the care of those who are not able to take care of themselves, and is founded on the obvious necessity that the law should place somewhere the care of individuals who cannot take care of themselves, particularly in

cases where it is clear that some care should be thrown round them". He then underlined that the jurisdiction has been exercised for the maintenance of children solely when there was property, not because of any rule of law, but for the practical reason that the court obviously had no means of acting unless there was property available.

42. The discussion on appeal to the House of Lords (*Wellesley v. Wellesley* (1828), 2 Bli. N.S. 124, 4 E.R. 1078) is also instructive. Far from limiting the jurisdiction to children, Lord Redesdale there adverted to the fact that the court's jurisdiction over children had been adopted from its jurisdiction over mental incompetents. He noted that "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"; 2 Bli. N.S. at p. 131, 4 E.R. at p. 1081. The jurisdiction, he said, extended "as far as is necessary for protection and education"; 2 Bli. at p. 136, 4 E.R. at p. 1083. It continues to this day, and even where there is legislation in the area, the courts will continue to use the *parens patriae* jurisdiction to deal with uncomtemplated situations where it appears necessary to do so for the protection of those who fall within its ambit; see *Beson v. Director of Child Welfare (Nfld.)*, [1982] 2 S.C.R. 716.

43. It was argued before us, however, that there was no precedent where the Lord Chancellor had exercised the *parens patriae* jurisdiction to order medical procedures of any kind. As to this, I would say that lack of precedent in earlier times is scarcely surprising having regard to the state of medical science at the time. Nonetheless, it seems clear from *Wellesley v. Wellesley*, *supra*, that the situations in which the courts can act where it is necessary to do so for the protection of mental incompetents and children have never been, and indeed cannot, be defined. I have already referred to the remarks of Lord Redesdale. To these may be added those of Lord Manners who, at Bli. pp. 142-43 and 1085, respectively, expressed the view that "It is... impossible to say what are the limits of that jurisdiction; every case must depend upon its own circumstances".

44. Reference may also be made to *Re X (a minor)*, [1975] 1 All E.R. 697, for a more contemporary description of the *parens patriae* jurisdiction. In that case, the plaintiff applied to Latey J. for an order making a fourteen year old girl who was psychologically fragile and high strung a ward of the court and for an injunction prohibiting the publication of a book revealing her father's private life which, it was felt, would be grossly damaging psychologically to her if she should read it. Latey J. issued the wardship order and the injunction requested. In speaking of his jurisdiction in the matter, he had this to say, at p. 699:

> On the first of the two questions already stated, it is argued for the defendants, first, that because the wardship jurisdiction has never been involved in any case remotely resembling this, the court, though theoretically having jurisdiction, should not entertain the application, but bar it in limine. I do not accept that contention. It is true that this jurisdiction has not been invoked in any such circumstances. I do not know whether they have arisen before or, if they have, whether anyone has thought of having recourse to this jurisdiction. But I can find nothing in the authorities to which I have been referred by counsel or in my own researches to suggest that there is any limitation in the theoretical scope of this jurisdiction; or, to put it another way, that the jurisdiction can only be invoked in the categories of cases in which it has hitherto been invoked, such as custody, care and control, protection of property, health problems, religious upbringing, and protection against harmful associations.

> That list is not exhaustive. On the contrary, the powers of the court in this particular jurisdiction have always been described as being of the widest nature. That the courts are available to protect children from injury whenever they properly can is no modern development.

(Emphasis added.)

Latey J. then cited a passage from *Chambers of Infancy* (1842), p. 20 that indicates that protection may be accorded against prospective as well as present harm. The passage states in part:

> And the Court will interfere not merely on the ground of an injury actually done, or attempted against the infant's person or property; but also if there be any likelihood of such an occurrence, or even an apprehension or suspicion of it.

45. The Court of Appeal disagreed with Latey J.'s exercise of discretion, essentially because he had failed to consider the public interest in the publication of the book, and accordingly reversed his order. The court, however, did not quarrel with his statement of the law. Thus Lord Denning, M.R., at p. 703 had this to say:

> No limit has ever been set to the jurisdiction. It has been said to extend as far as necessary for protection and education: see *Wellesley v Wellesley* by Lord Redesdale. The court has power to protect the ward from any interference with his or her welfare, direct or indirect.

Roskill L.J., also reinforced the broad ambit of the jurisdiction. He said, at p. 705:

> I would agree with counsel for the plaintiff that no limits to that jurisdiction have yet been drawn and it is not necessary to consider here what (if any) limits there are to that jurisdiction. The sole question is whether it should be exercised in this case. I would also agree with him that the mere fact that the courts have never stretched out their arms so far as is proposed in this case is in itself no reason for not stretching out those arms further than before when necessary in a suitable case.

Sir John Pennycuick at p. 706 agreed:

> ...the courts, when exercising the parental power of the Crown, have, at any rate in legal theory, an unrestricted jurisdiction to do whatever is considered necessary for the welfare of a ward. It is, however, obvious that far-reaching limitations in principle on the exercise of this jurisdiction must exist. The jurisdiction is habitually exercised within those limitations.

At page 707 he added:

> Latey J's statement of the law is I think correct, but he does not lay sufficient emphasis on the limitations with which the courts should exercise this jurisdiction.

46. I will be observed from the remarks of Sir John Pennycuick, as well as the words emphasized in Latey J.'s judgment, that the theoretically unlimited nature of the jurisdiction, to which I have also previously referred, has to do with its scope. It must, of

course, be used in accordance with its informing principles, a matter about which I shall have more to say.

47. In recent years, the English courts have extended the jurisdiction to cases involving medical procedures. In *Re S. v. McC(orse. S.) and M*;*W v. W.*, [1972] A.C. 24, the House of Lords, relying in part on its protective jurisdiction over infants, approved of a blood test being taken of a husband and his wife and a child with a view to determining the paternity of the child.

48. The court's jurisdiction to sanction the nontherapeutic sterilization of a mentally handicapped person arose before Heilbron J. of the Family Division of the English High Court of Justice in *Re D (a minor)*, [1976] 1 All E.R. 326, a case that bears a considerable resemblance to the present. D, a girl, was born with a condition known as Sotos Syndrome, the symptoms of which include accelerated growth during infancy, epilepsy, clumsiness, and unusual facial appearance, behavioural problems including aggressiveness, and some impairment of mental functions that could result in dull intelligence or more serious mental retardation. D displayed these various symptoms, although she was not as seriously retarded as some children similarly afflicted. She possessed a dull normal intelligence. She was sent to an appropriate school but did not do well partly because of behavioural problems. When she was ten, however, she was sent to a school specializing in children with learning difficulties and associated behavioural problems. She then showed marked improvement in her academic skills, social competence and behaviour.

49. D lived with her widowed mother, Mrs. B., who was fifty-one, and two sisters. The family lived in extraordinarily difficult circumstances in a grossly overcrowded house with no inside toilet. The mother was described as a very hard-working woman who kept the house spotless and impressed everyone with her sincerity and common sense.

50. It was common ground that D had sufficient intelligence to marry in due course. Her mother, however, was convinced that she would always remain substantially handicapped and unable to maintain herself or care for any children she might have. Accordingly, when D was a child, her parents had decided that she should be sterilized, and when she reached puberty at ten, Mrs. B.'s concern increased; she worried that D might be seduced and give birth to an abnormal child. She consulted a doctor, who took the view that there was a real risk that she might indeed give birth to an abnormal child. He agreed that D should be sterilized and arrangements were made for the purpose. When other doctors questioned the purposes of the operation, however, a wardship application was made to the court with a view to preventing it from being carried out.

51. Heilbron J. refused to sanction the operation. After reviewing the nature of the wardship jurisdiction arising out of the sovereign's obligation as *parens patriae*, she observed, at p. 332:

> It is apparent from the recent decision of the Court of Appeal in *Re X (a minor)* that the jurisdiction to do what is considered necessary for the protection of an infant is to be exercised carefully and within limits, but the court has, from time to time over the years, extended the sphere in the exercise of this jurisdiction.

> The type of operation proposed is one which involves the deprivation of a basic human right, namely the right of a woman to reproduce, and therefore it would, if performed on a woman for non-therapeutic reasons and without her consent, be a violation of such right. Both Dr. Gordon and Miss Duncan seem to have had in mind the possibility of seeking the child's views and her consent, for they asked that this handicapped child of 11 should be consulted in the matter. One would have thought that they must have known that any answer she might have given, or any purported consent, would have been valueless.

(Emphasis added.)

At page 333, she added:

> This operation could, if necessary, be delayed or prevented if the child were to remain a ward of court, and as Lord Eldon LC, so vividly expressed it in *Wellesley*'s case: "It has always been the principle of this Court, not to risk the incurring of damage to children which it cannot repair, but rather to prevent the damage being done."
>
> I think that is the very type of case where this court should `throw some care around this child', and I propose to continue her wardship which, in my judgment, is appropriate in this case.

(Emphasis added.)

Later, at pp. 334-35, she expressed agreement with the consulting doctors' opinion that sterilization for therapeutic purposes was not entirely within a doctor's clinical judgment:

> Their opinion was that a decision to sterilise a child was not entirely within a doctor's clinical judgment, save only when sterilisation was the treatment of choice for some disease, as, for instance, when in order to treat a child and to ensure her direct physical well-being, it might be necessary to perform a hysterectomy to remove a malignant uterus. Whilst the side effect of such an operation would be to sterilise, the operation would be performed solely for therapeutic purposes. I entirely accept their opinions. I cannot believe, and the evidence does not warrant the view, that a decision to carry out an operation of this nature performed for nontherapeutic purposes on a minor, can be held to be within the doctor's sole clinical judgment.

(Emphasis added.)

52. Since that time, there have been several cases where the English courts have given permission to perform medical operations under the *parens patriae* jurisdiction. In *In re P (a Minor)* (1981), 80 L.G.R. 301, local authorities invoked the court's wardship jurisdiction to permit an abortion on a fifteen year old girl who had previously given birth and was caring for the first child in facilities provided by the authority. The evidence indicated that the girl was taking good care of the first child but could not cope with a second, and that the girl consented to the operation. Butler-Sloss J. authorized the abortion, despite her father's objection, on the ground that it was in the girl's best interest.

53. More recently still, the English Court of Appeal had to consider the poignantly sad case of *Re B (a minor)* (1982), 3 F.L.R. 117. A baby girl was born suffering from Down's Syndrome (mongolism). She also had an intestinal blockage from which she would die within a very short time unless it was operated on. If she had the operation there was a considerable risk that she would suffer from heart trouble and die within two or three months. Even if the operation was successful she would only have a life expectancy of from twenty to thirty years, during which time she would be very handicapped, both mentally and physically. Her parents took the view that the kindest thing in the interests of the child was for her not to have the operation. Nonetheless, the court, on a wardship application by a local authority, authorized the operation. Though it expressed sympathy for the parents in the agonizing decision to which they had come, it emphasized the protective quality of its jurisdiction, as the following statement by Lord Templeman, at pp. 122-23 indicates: "The evidence in this case only goes to show that if the operation takes place and is successful then the child may live the normal span of a mongoloid child with the handicaps and defects and life of a mongol child, and it is not for this court to say that life of that description ought to be extinguished."

54. Turning now to Canada, the *parens patriae* jurisdiction has on several occasions been exercised to authorize the giving of a blood transfusion to save a child's life over its parents' religious objection. More germane for present purposes is the recent case of *Re K and Public Trustee* (1985), 19 D.L.R. (4th) 255, where the Court of Appeal of British Columbia ordered that a hysterectomy be performed on a seriously retarded child on the ground that the operation was therapeutic. The most serious factor considered by the court was the child's alleged phobic aversion to blood, which it was feared would seriously affect her when her menstrual period began. It should be observed, and the fact was underscored by the judges in that case, that *Re K and Public Trustee* raised a quite different issue from that in the present case. As Anderson J.A. put it at p. 275: "I say now, as forcefully as I can, this case cannot and must not be regarded as a precedent to be followed in cases involving sterilization of mentally disabled persons for contraceptive purposes."

55. I now turn to the American experience to which all parties referred.

<u>The American Experience</u>

56. The American experience in this area cannot be understood without reference to the interest in the eugenic sterilization of the mentally incompetent manifested in that country early in this century. Eugenics theory, founded upon the rearticulation of the Mendelian theories of inheritance, developed from the premise that physical, mental and even moral deficiencies have a genetic basis. In the early part of this century, many social reformers advocated eugenic sterilization as a panacea for most of the troubles that had been created by "misfits" in society. This general attitude, coupled with the evolution of surgical sterilization techniques, provoked the widespread adoption of enabling legislation. In time, over thirty states en- acted statutes providing for the compulsory sterilization of the mentally retarded; see Sherlock and Sherlock, "Sterilizing the Retarded: Constitutional, Statutory and Policy Alternatives," 60 *N.C.L.Rev.* 943 (1982), at p. 944.

57. The constitutionality of such statutes arose before the United States Supreme Court in the landmark case of *Buck v. Bell*, 274 U.S. 200 (1927). Carrie Buck, a mildly

retarded woman, was the daughter of a similarly afflicted woman and had herself given birth to an allegedly retarded child. A majority of the court sanctioned her sterilization despite claims that such a course violated substantive and procedural due process as well as the equal protection rights of the handicapped. The case constituted the high water mark of eugenic theory, as the strong judgment of Holmes J. attests. He sets the tone at p. 207:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. ... Three generations of imbeciles are enough.

58. During the 1930s researchers and biologists began to denounce the sweeping generalizations concerning heredity in relation to mental and physical disorders. By 1937 both the American Neurological Association and the American Medical Association had criticized the overwhelming emphasis on heredity as a cause of mental retardation, mental illness, pauperism, epilepsy and other disabilities; see Burgdorf, Jr. and Burgdorf, "The Wicked Witch is Almost Dead: *Buck v. Bell* and the Sterilization of Handicapped Persons," 50 *Temp. L.Q.* 995 (1977), at p. 1007. Today, the assumptions made in *Buck v. Bell* are widely discredited; see McIvor, "Equitable Jurisdiction to Order Sterilizations," 57 *Wash. L.R.* 373 (1982), at p. 375; Lachance, "In re *Grady:* The Mentally Retarded Individual's Right to Choose Sterilization," 6 *Am.J.L. & Med.* 559 (1981), at pp. 569-70.

59. Scientific exposure of the fallacious reasoning of the eugenicists led to a waning of the initial enthusiasm for laws requiring eugenic sterilization. Along with a growing legal recognition of the fundamental character of the right to procreate, this was sufficient to trigger a reappraisal of the courts' position. Courts became extremely reluctant to order the sterilization of mentally handicapped persons in the absence of specific statutory authority; see Ross, "Sterilization of the Developmentally Disabled: Shedding Some Myth-Conceptions," 9 *Fla. St. U.L. Rev.* 599 (1981). Their *rationale* was that "the awesome power to deprive a human being of his or her fundamental right to bear or beget offspring must be founded on the explicit authorization of the Legislature ..."; *Guardianship of Tulley* App., 146 Cal.Rptr. 266 (1978), at p. 270.

60. Not surprisingly, this argument has been strongly asserted by some of the parties to the present appeal. Thus, counsel for the Canadian Mental Health Association contended that the weight of authority in the United States is to the effect that there is no inherent jurisdiction in state courts, either by way of the *parens patriae* doctrine or otherwise, to order the sterilization of persons found to be mentally incompetent. For this proposition, he cited *Hudson v. Hudson*, 373 So.2d 310 (Ala. 1979) at pp. 311-12; *Matter of Guardianship of Eberhardy*, 294 N.W.2d 540 (Wis. 1980); Norris, "Recent Developments--Courts--Scope of Authority--Sterilization of Mental Incompetents," 44 *Tenn. L. Rev.* 879 (1977).

61. The proposition thus advanced would, I think, have been unassailable until a few years ago. Since 1978, however, the tide has changed significantly. The precipitating event appears to have been the decision of the Supreme Court of the United States in *Stump v. Sparkman*, 435 U.S. 349 (1978). The question at issue there was whether an Indiana judge, who had ordered the sterilization of a "somewhat" retarded child on her mother's petition, was immune from liability in a suit subsequently brought by the incompetent. On obtaining court approval, the mother had had the procedure performed without the knowledge of her daughter who had been led to believe she was undergoing an appendectomy. The daughter discovered her deprivation when she subsequently married and attempted to have children. The Supreme Court held that the judge was immune from liability on the basis of an Indiana statute which conferred upon the Indiana circuit court original jurisdiction "in all cases at law and in equity whatsoever".

62. Though the precise precedential value of the case has been the subject of considerable judicial and scholarly debate, *Stump v. Sparkman*appears nonetheless to have had a catalytic effect. Since that decision, the vast majority of state courts before which the question has been raised have held that they have equitable authority, in the absence of statute, to order sterilization of the mentally retarded; see *Matter of Guardianship of Eberhardy*, 307 N.W.2d 881 (Wis. 1981), at p. 887; *In re Grady*, 426 A.2d 467 (N.J. 1981), at p. 479; *Matter of C.D.M.*, 627 P.2d 607 (Alaska 1981), at p. 612; *Matter of A.W.*, 637 P.2d 366 (Colo. 1981), at p. 374; *Matter of Terwilliger*, 450 A.2d 1376 (Pa. 1982), at pp. 1380-81; *Wentzel v. Montgomery General Hospital, Inc.*, 447 A.2d 1244 (Md. 1982), at p. 1263; *Matter of Moe*, 432 N.E.2d 712 (Mass. 1982), at p. 718; *P.S. by Harbin v. W.S.*, 452 N.E.2d 969 (Ind. 1983), at p. 976; cf. *Hudson v. Hudson*,*supra*. Thus as McIvor, *supra*, at p. 379 concludes, despite *Sparkman v. Stump*'s weakness as a precedent, it "provides a de facto point of departure for the emerging rule recognizing equitable jurisdiction to authorize the nonconsensual sterilization of mentally retarded persons".

63. The rationale on which state courts have acted in recent years is conveniently summarized in a passage from a pre-*Sparkman* case. In*Matter of Sallmaier*, 378 N.Y.S.2d 989 (1976), the court, basing itself on expert testimony concerning the likelihood of a psychotic reaction to pregnancy, other evidence of psychological and hygienic difficulties, and the patient's proclivity for sexual encounters with men, authorized the sterilization of a severely retarded adult woman. The court had this to say, at p. 991:

> The jurisdiction of the court in this proceeding arises not by statute, but from the common law jurisdiction of the Supreme Court to act as*parens patriae* with respect to incompetents. (*Moore v. Flagg*, 137 App.Div. 338, 122 N.Y.S. 174; *Matter of Weberlist*, 79 Misc.2d 753, 360 N.Y.S.2d 783.) The rationale of *parens patriae*, as was stated by the court in *Matter of Weberlist*, *supra*, p. 756, 360 N.Y.S.2d p. 786, is "that the State must intervene in order to protect an individual who is not able to make decisions in his own best interest. The decision to exercise the power of *parens patriae* must reflect the welfare of society, as a whole, but mainly it must balance the individual's right to be free from interference against the individual's need to be treated, if treatment would in fact be in his best interest."

I should perhaps add that subsequent to *Sallmaier*, another New York court expressly refused to authorize sterilization in the absence of legislative guidelines; *Application of A.D.*, 394 N.Y.S.2d 139 (1977).

64. While many state courts have, in recent cases, been prepared to recognize an inherent power in courts of general jurisdiction to authorize sterilization of mentally incompetent persons, they differ on the standard of review. Two distinct approaches have emerged: the "best interests" approach and the "substituted judgment" approach.

65. In five of the nine states in which equitable jurisdiction to authorize the non-consensual sterilization of a mentally incompetent person is recognized, that jurisdiction is based on the inherent equitable power of the courts to act in the best interests of the mentally incompetent person; *P.S. by Harbin v. W.S.*, *supra*, (Ind.); *Matter of Terwilliger*, *supra*, (Pa.); *In re Penny N.*, 414 A.2d 541 (N.H. 1980); *Matter of C.D.M.*, *supra*, (Alaska); *In re Eberhardy*, *supra*, (Wis.) The test necessarily leads to uncertainties; see *Matter of Guardianship of Hayes*, 608 P.2d 635 (Wash. 1980), at p. 637, and in an effort to minimize abuses, American courts have developed guidelines to assist in determining whether the best interests of the affected person would be furthered through sterilization. MacDonald J. proposed a series of similar guidelines in the present case; see (1981), 115 D.L.R. (3d) 283, at pp. 307-09.

66. How far American courts would go in allowing sterilization for purely contraceptive purposes is difficult to say with certainty, since the above decisions were at the appeal level where the question was whether courts could exercise jurisdiction. Yet the guidelines put forward in those cases suggest that the courts would have considerable latitude. The facts in *Hayes*, *supra*, where the appeal court remanded the case to the applications judge, are revealing. They are thus stated at p. 637:

> Edith Hayes is severely mentally retarded as a result of a birth defect. Now 16 years old, she functions at the level of a four to five year old. Her physical development, though, has been commensurate with her age. She is thus capable of conceiving and bearing children, while being unable at present to understand her own reproductive functions or exercise independent judgment in her relationship with males. Her mother and doctors believe she is sexually active and quite likely to become pregnant. Her parents are understandably concerned that Edith is engaging in these sexual activities. Furthermore, her parents and doctors feel the long term effects of conventional birth control methods are potentially harmful, and that sterilization is the most desirable method to ensure that Edith does not conceive an unwanted child.
>
> Edith's parents are sensitive to her special needs and concerned about her physical and emotional health, both now and in the future. They have sought appropriate medical care and education for her, and provided her with responsible and adequate supervision. During the year or so that Edith has been capable of becoming pregnant, though, they have become frustrated, depressed and emotionally drained by the stress of seeking an effective and safe method of contraception. They believe it is impossible to supervise her activities closely enough to prevent her from becoming involved in sexual relations. Thus, with the consent of Edith's father, Sharon Hayes petitioned for an order appointing her guardian and authorizing a sterilization procedure for Edith.

67. As noted, these facts indicate that the courts of the United States, in acting under the best interests test have a very wide discretion.

68. The second approach, the substituted judgment test, raises *Charter* implications about which I shall have more to say later. This test was first applied in the context of the sterilization of a mentally incompetent by the New Jersey Supreme Court in *In re Grady*, *supra*. In affirming a lower court's grant of the petition of the parents to sterilize their adult daughter, a victim of Down's Syndrome, the court based its decision on an analysis of the daughter's rights. It began by recognizing that any court-authorized sterilization potentially violates the right to procreate, which it described as "fundamental to the very existence and survival of the race". However, the court went on to distinguish the situation before it from both voluntary and compulsory sterilization on the ground that the individual there had not expressed a desire to be sterilized or not to be sterilized, but was simply incapable of indicating her will either way. It then reviewed the U.S. Supreme Court decisions dealing with privacy and contraception and concluded that they supported a broad personal right to control contraception which included an affirmative constitutional right to voluntary sterilization. Given that there was also a right to be free from non-consensual bodily invasions, the individual was free to choose which of those two rights to exercise.

69. The *Grady* court held that in order for this choice to be meaningful, mental incompetence should not be permitted to prevent an individual from exercising it. The court, relying on the famous case of *Matter of Quinlan*, 355 A.2d 647 (N.J. 1976), recognized judicial power to make that choice in instances where limited mental capacity has rendered a person's own right to choose meaningless. The Supreme Courts of Massachusetts and Colorado later adopted this approach in *Moe*, *supra* and *A.W.*, *supra*, respectively.

70. The primary purpose of the substituted judgment test is to attempt to determine what decision the mental incompetent would make, if she were reviewing her situation as a competent person, but taking account of her mental incapacity as one factor in her decision. It allows the court to consider a number of factors bearing directly upon the condition of the mental incompetent. Thus the court may consider such issues as the values of the incompetent, any religious beliefs held by her, and her societal views as expressed by her family. In essence, an attempt is made to determine the actual interests and preferences of the mental incompetent. This, it is thought, recognizes her moral dignity and right to free choice. Since the incompetent cannot exercise that choice herself, the court does so on her behalf. The fact that a mental incompetent is, either because of age or mental disability, unable to provide any aid to the court in its decision does not preclude the use of the substituted judgment test.

71. The respondent submitted that this test should be adopted in this country. As in the case of the best interests test, various guidelines have been developed by the courts in the United States to ensure the proper use of this test.

Summary and Disposition

72. In the foregoing discussion, I have attempted to set forth the legal background relevant to the question whether a court may, or in this case, ought to authorize consent to non-therapeutic sterilization. Before going on, it may be useful to summarize my

views on the *parens patriae*jurisdiction. From the earliest time, the sovereign, as *parens patriae*, was vested with the care of the mentally incompetent. This right and duty, as Lord Eldon noted in *Wellesley v. Duke of Beaufort*, *supra* at 2 Russ., at p. 20, 38 E.R., at p. 243 is founded on the obvious necessity that the law should place somewhere the care of persons who are not able to take care of themselves. In early England, the *parens patriae*jurisdiction was confined to mental incompetents, but its *rationale* is obviously applicable to children and, following the transfer of that jurisdiction to the Lord Chancellor in the seventeenth century, he extended it to children under wardship, and it is in this context that the bulk of the modern cases on the subject arise. The *parens patriae* jurisdiction was later vested in the provincial superior courts of this country, and in particular, those of Prince Edward Island.

73. The *parens patriae* jurisdiction is, as I have said, founded on necessity, namely the need to act for the protection of those who cannot care for themselves. The courts have frequently stated that it is to be exercised in the "best interest" of the protected person, or again, for his or her "benefit" or "welfare".

74. The situations under which it can be exercised are legion; the jurisdiction cannot be defined in that sense. As Lord MacDermott put it in *J.v. C.*, [1970] A.C. 668, at p. 703, the authorities are not consistent and there are many twists and turns, but they have inexorably "moved towards a broader discretion, under the impact of changing social conditions and the weight of opinion ...." In other words, the categories under which the jurisdiction can be exercised are never closed. Thus I agree with Latey J. in *Re X*, *supra*, at p. 699, that the jurisdiction is of a very broad nature, and that it can be invoked in such matters as custody, protection of property, health problems, religious upbringing and protection against harmful associations. This list, as he notes, is not exhaustive.

75. What is more, as the passage from *Chambers* cited by Latey J. underlines, a court may act not only on the ground that injury to person or property has occurred, but also on the ground that such injury is apprehended. I might add that the jurisdiction is a carefully guarded one. The courts will not readily assume that it has been removed by legislation where a necessity arises to protect a person who cannot protect himself.

76. I have no doubt that the jurisdiction may be used to authorize the performance of a surgical operation that is necessary to the health of a person, as indeed it already has been in Great Britain and this country. And by health, I mean mental as well as physical health. In the United States, the courts have used the *parens patriae* jurisdiction on behalf of a mentally incompetent to authorize chemotherapy and amputation, and I have little doubt that in a proper case our courts should do the same. Many of these instances are related in *Strunk v. Strunk*, 445 S.W.2d 145 (Ky. 1969), where the court went to the length of permitting a kidney transplant between brothers. Whether the courts in this country should go that far, or as in *Quinlan*, permit the removal of life-sustaining equipment, I leave to later disposition.

77. Though the scope or sphere of operation of the *parens patriae* jurisdiction may be unlimited, it by no means follows that the discretion to exercise it is unlimited. It must be exercised in accordance with its underlying principle. Simply put, the discretion is to do what is necessary for the protection of the person for whose benefit it is exercised; see the passages from the reasons of Sir John Pennycuick in *Re X*, at pp. 706-07, and Heilbron J. in *Re D*, at p. 332, cited earlier. The discretion is to be exercised for the

benefit of that person, not for that of others. It is a discretion, too, that must at all times be exercised with great caution, a caution that must be redoubled as the seriousness of the matter increases. This is particularly so in cases where a court might be tempted to act because failure to do so would risk imposing an obviously heavy burden on some other individual.

78. There are other reasons for approaching an application for sterilization of a mentally incompetent person with the utmost caution. To begin with, the decision involves values in an area where our social history clouds our vision and encourages many to perceive the mentally handicapped as somewhat less than human. This attitude has been aided and abetted by now discredited eugenic theories whose influence was felt in this country as well as the United States. Two provinces, Alberta and British Columbia, once had statutes providing for the sterilization of mental defectives; *The Sexual Sterilization Act*, R.S.A. 1970, c. 341, repealed by S.A. 1972, c. 87; *Sexual Sterilization Act*, R.S.B.C. 1960, c. 353, s. 5(1), repealed by S.B.C. 1973, c. 79.

79. Moreover, the implications of sterilization are always serious. As we have been reminded, it removes from a person the great privilege of giving birth, and is for practical purpose irreversible. If achieved by means of a hysterectomy, the procedure approved by the Appeal Division, it is not only irreversible; it is major surgery. Here, it is well to recall Lord Eldon's admonition in *Wellesley*'s case, *supra*, at 2 Russ. p. 18, 38 E.R. p. 242, that "it has always been the principle of this Court, not to risk the incurring of damage to children which it cannot repair, but rather to prevent the damage being done". Though this comment was addressed to children, who were the subject matter of the application, it aptly describes the attitude that should always be present in exercising a right on behalf of a person who is unable to do so.

80. Another factor merits attention. Unlike most surgical procedures, sterilization is not one that is ordinarily performed for the purpose of medical treatment. The Law Reform Commission of Canada tells us this in *Sterilization*, Working Paper 24 (1979), a publication to which I shall frequently refer as providing a convenient summary of much of the work in the field. It says at p. 3:

> Sterilization as a medical procedure is distinct, because except in rare cases, if the operation is not performed, the *physical* health of the person involved is not in danger, necessity or emergency not normally being factors in the decision to undertake the procedure. In addition to its being elective it is for all intents and purposes irreversible.

As well, there is considerable evidence that non-consensual sterilization has a significant negative psychological impact on the mentally handicapped; see *Sterilization*, *supra*, at pp. 49-52. The Commission has this to say at p. 50:

> It has been found that, like anyone else, the mentally handicapped have individually varying reactions to sterilization. Sex and parenthood hold the same significance for them as for other people and their misconceptions and misunderstandings are also similar. Rosen maintains that the removal of an individual's procreative powers is a matter of major importance and that no amount of *reforming zeal* can remove the significance of sterilization and its effect on the individual psyche.

> In a study by Sabagh and Edgerton, it was found that sterilized mentally retarded persons tend to perceive sterilization as a symbol of*reduced* or *degraded* status. Their attempts to *pass for normal* were hindered by negative self perceptions and resulted in withdrawal and isolation rather than striving to conform ....
>
> The psychological impact of sterilization is likely to be particularly damaging in cases where it is a result of coercion and when the mentally handicapped have had no children.

81. In the present case, there is no evidence to indicate that failure to perform the operation would have any detrimental effect on Eve's physical or mental health. The purposes of the operation, as far as Eve's welfare is concerned, are to protect her from possible trauma in giving birth and from the assumed difficulties she would have in fulfilling her duties as a parent. As well, one must assume from the fact that hysterectomy was ordered, that the operation was intended to relieve her of the hygienic tasks associated with menstruation. Another purpose is to relieve Mrs. E. of the anxiety that Eve might become pregnant, and give birth to a child, the responsibility for whom would probably fall on Mrs. E.

82. I shall dispose of the latter purpose first. One may sympathize with Mrs. E. To use Heilbron J.'s phrase, it is easy to understand the natural feelings of a parent's heart. But the *parens patriae* jurisdiction cannot be used for her benefit. Its exercise is confined to doing what is necessary for the benefit and protection of persons under disability like Eve. And a court, as I previously mentioned, must exercise great caution to avoid being misled by this all too human mixture of emotions and motives. So we are left to consider whether the purposes underlying the operation are necessarily for Eve's benefit and protection.

83. The justifications advanced are the ones commonly proposed in support of non-therapeutic sterilization (see *Sterilization*, *passim*). Many are demonstrably weak. The Commission dismisses the argument about the trauma of birth by observing at p. 60:

> For this argument to be held valid would require that it could be demonstrated that the stress of delivery was greater in the case of mentally handicapped persons than it is for others. Considering the generally known wide range of post-partum response would likely render this a difficult case to prove.

84. The argument relating to fitness as a parent involves many value-loaded questions. Studies conclude that mentally incompetent parents show as much fondness and concern for their children as other people; see *Sterilization*, *supra*, p. 33 et seq., 63-64. Many, it is true, may have difficulty in coping, particularly with the financial burdens involved. But this issue does not relate to the benefit of the incompetent; it is a social problem, and one, moreover, that is not limited to incompetents. Above all it is not an issue that comes within the limited powers of the courts, under the *parens patriae* jurisdiction, to do what is necessary for the benefit of persons who are unable to care for themselves. Indeed, there are human rights considerations that should make a court extremely hesitant about attempting to solve a social problem like this by this means. It is worth noting that in dealing with such issues, provincial sterilization boards have revealed serious differences in their attitudes as between men and women, the poor and the rich, and people of different ethnic backgrounds; see *Sterilization*, *supra*, at p. 44.

85. As far as the hygienic problems are concerned, the following view of the Law Reform Commission (at p. 34) is obviously sound:

> ... if a person requires a great deal of assistance in managing their own menstruation, they are also likely to require assistance with urinary and fecal control, problems which are much more troublesome in terms of personal hygiene.

Apart from this, the drastic measure of subjecting a person to a hysterectomy for this purpose is clearly excessive.

86. The grave intrusion on a person's rights and the certain physical damage that ensues from non-therapeutic sterilization without consent, when compared to the highly questionable advantages that can result from it, have persuaded me that it can never safely be determined that such a procedure is for the benefit of that person. Accordingly, the procedure should never be authorized for non-therapeutic purposes under the *parens patriae* jurisdiction.

87. To begin with, it is difficult to imagine a case in which non-therapeutic sterilization could possibly be of benefit to the person on behalf of whom a court purports to act, let alone one in which that procedure is necessary in his or her best interest. And how are we to weigh the best interests of a person in this troublesome area, keeping in mind that an error is irreversible? Unlike other cases involving the use of the *parens patriae* jurisdiction, an error cannot be corrected by the subsequent exercise of judicial discretion. That being so, one need only recall Lord Eldon's remark, *supra*, that "it has always been the principle of this Court, not to risk damage to children which it cannot repair" to conclude that non-therapeutic sterilization may not be authorized in the exercise of the *parens patriae* jurisdiction. McQuaid J. was, therefore, right in concluding that he had no authority or jurisdiction to grant the application.

88. Nature or the advances of science may, at least in a measure, free Eve of the incapacity from which she suffers. Such a possibility should give the courts pause in extending their power to care for individuals to such irreversible action as we are called upon to take here. The irreversible and serious intrusion on the basic rights of the individual is simply too great to allow a court to act on the basis of possible advantages which, from the standpoint of the individual, are highly debatable. Judges are generally ill-informed about many of the factors relevant to a wise decision in this difficult area. They generally know little of mental illness, of techniques of contraception or their efficacy. And, however well presented a case may be, it can only partially inform. If sterilization of the mentally incompetent is to be adopted as desirable for general social purposes, the legislature is the appropriate body to do so. It is in a position to inform itself and it is attuned to the feelings of the public in making policy in this sensitive area. The actions of the legislature will then, of course, be subject to the scrutiny of the courts under the *Canadian Charter of Rights and Freedoms* and otherwise.

89. Many of the factors I have referred to as showing that the best interests test is simply not a sufficiently precise or workable tool to permit the *parens patriae* power to be used in situations like the present are referred to in *Matter of Guardianship of Eberhardy*, *supra*. Speaking for the court in that case, Heffernan J. had this to say, at p. 894:

Under the present state of the law, the only guideline available to circuit courts faced with this problem appears to be the "best interests" of the person to be sterilized. This is a test that has been used for a number of years in this jurisdiction and elsewhere in the determination of the custody of children and their placement--in some circumstances placement in a controlled environment ... No one who has dealt with this standard has expressed complete satisfaction with it. It is not an objective test, and it is not intended to be. The substantial workability of the test rests upon the informed fact-finding and the wise exercise of discretion by trial courts engendered by long experience with the standard. Importantly, however, most determinations made in the best interests of a child or of an incompetent person are not irreversible; and although a wrong decision may be damaging indeed, there is an opportunity for a certain amount of empiricism in the correction of errors of discretion. Errors of judgment or revisions of decisions by courts and social workers can, in part at least, be rectified when new facts or second thoughts prevail. And, of course, alleged errors of discretion in exercising the "best interest" standard are subject to appellate review. Sterilization as it is now understood by medical science is, however, substantially irreversible.

90. Heffernan J. also alluded to the limited capacity of judges to deal adequately with a problem that has such general social overtones in the following passage, at p. 895:

What these facts demonstrate is that courts, even by taking judicial notice of medical treatises, know very little of the techniques or efficacy of contraceptive methods or of thwarting the ability to procreate by methods short of sterilization. While courts are always dependent upon the opinions of expert witnesses, it would appear that the exercise of judicial discretion unguided by well thought-out policy determinations reflecting the interest of society, as well as of the person to be sterilized, are hazardous indeed. Moreover, all seriously mentally retarded persons may not *ipso facto* be incapable of giving birth without serious trauma, and some may be good parents. Also, there has been a discernible and laudable tendency to "mainstream" the developmentally disabled and retarded. A properly thought out public policy on sterilization or alternative contraceptive methods could well facilitate the entry of these persons into a more nearly normal relationship with society. But again this is a problem that ought to be addressed by the legislature on the basis of fact-finding and the opinions of experts.

91. The foregoing, of course, leaves out of consideration therapeutic sterilization and where the line is to be drawn between therapeutic and non-therapeutic sterilization. On this issue, I simply repeat that the utmost caution must be exercised commensurate with the seriousness of the procedure. Marginal justifications must be weighed against what is in every case a grave intrusion on the physical and mental integrity of the person.

92. It will be apparent that my views closely conform to those expressed by Heilbron J. in *Re D*, *supra*. She was speaking of an infant, but her remarks are equally applicable to an adult. The importance of maintaining the physical integrity of a human being ranks high in our scale of values, particularly as it affects the privilege of giving life. I cannot agree that a court can deprive a woman of that privilege for purely social or other non-therapeutic purposes without her consent. The fact that others may suffer inconvenience or hardship from failure to do so cannot be taken into account. The

Crown's *parens patriae* jurisdiction exists for the benefit of those who cannot help themselves, not to relieve those who may have the burden of caring for them.

93. I should perhaps add, as Heilbron J. does, that sterilization may, on occasion, be necessary as an adjunct to treatment of a serious malady, but I would underline that this, of course, does not allow for subterfuge or for treatment of some marginal medical problem. Heilbron J. was referring, as I am, to cases where such treatment is necessary in dealing with a serious condition. The recent British Columbia case of *Re K*,*supra*, is at best dangerously close to the limits of the permissible.

94. The foregoing remarks dispose of the arguments based on the traditional view of the *parens patriae* jurisdiction as exercised in this country. Counsel for the respondent strongly contended, however, that the Court should adopt the substituted judgment test recently developed by a number of state courts in the United States. That test, he submitted, is to be preferred to the best interests test because it places a higher value on the individuality of the mentally incompetent person. It affords that person the same right, he contended, as a competent person to choose whether to procreate or not.

95. There is an obvious logical lapse in this argument. I do not doubt that a person has a right to decide to be sterilized. That is his or her free choice. But choice presupposes that a person has the mental competence to make it. It may be a matter of debate whether a court should have the power to make the decision if that person lacks the mental capacity to do so. But it is obviously fiction to suggest that a decision so made is that of the mental incompetent, however much the court may try to put itself in her place. What the incompetent would do if she or he could make the choice is simply a matter of speculation. The sophistry embodied in the argument favouring substituted judgment has been fully revealed in *Eberhardy*, *supra*, at p. 893 where in discussing *Grady*, *supra*, the court stated:

> The fault we find in the New Jersey case is the *ratio decidendi* of first concluding, correctly we believe, that the right to sterilization is a personal choice, but then equating a decision made by others with the choice of the person to be sterilized. It clearly is not a personal choice, and no amount of legal legerdemain can make it so.
>
> ...
>
> We conclude that the question is not choice because it is sophistry to refer to it as such, but rather the question is whether there is a method by which others, acting in behalf of the person's best interests and in the interests, such as they may be, of the state, can exercise the decision. Any governmentally sanctioned (or ordered) procedure to sterilize a person who is incapable of giving consent must be denominated for what it is, that is, the state's intrusion into the determination of whether or not a person who makes no choice shall be allowed to procreate.

96. Counsel for the respondent's argument in favour of a substituted judgment test was made essentially on a common law basis. However, he also argued that there is what he called a fundamental right to free procreative choice. Not only, he asserted, is there a fundamental right to bear children; there is as well a fundamental right to choose not to have children and to implement that choice by means of contraception. Starting from the American courts' approach to the due process clause in the United States Constitution, he

appears to base this argument on s. 7 of the *Charter*. But assuming for the moment that liberty as used in s. 7 protects rights of this kind (a matter I refrain from entering into), counsel's contention seems to me to go beyond the kind of protection s. 7 was intended to afford. All s. 7 does is to give a remedy to protect individuals against laws or other state action that deprive them of liberty. It has no application here.

97. Another *Charter* related argument must be considered. In response to the appellant's argument that a court-ordered sterilization of a mentally incompetent person, by depriving that person of the right to procreate, would constitute an infringement of that person's rights to liberty and security of the person under s. 7 of the *Canadian Charter of Rights and Freedoms*, counsel for the respondent countered by relying on that person's right to equality under s. 15(1) of the *Charter*, saying "that the most appropriate method of ensuring the mentally incompetent their right to equal protection under s. 15(1) is to provide the mentally incompetent with a means to obtain non-therapeutic sterilizations, which adequately protects their interests through appropriate judicial safeguards". A somewhat more explicit argument along the same lines was made by counsel for the Public Trustee of Manitoba. His position was stated as follows:

> It is submitted that in the case of a mentally incompetent adult, denial of the right to have his or her case presented by a guardian *ad litem* to a Court possessing jurisdiction to give or refuse substituted consent to a non-therapeutic procedure such as sterilization, would be tantamount to a denial to that person of equal protection and equal benefit of the law. Such a denial would constitute discrimination on the basis of mental disability, which discrimination is prohibited by Section 15 of *The Canadian Charter of Rights and Freedoms*.

98. Section 15 of the *Charter* was not in force when these proceedings commenced but, this aside, these arguments appear flawed. They raise in different form an issue already dealt with, i.e., that the decision made by a court on an application to consent to the sterilization of an incompetent is somehow that of the incompetent. More troubling is that the issue is, of course, not raised by the incompetent, but by a third party.

99. The court undoubtedly has the right and duty to protect those who are unable to take care of themselves, and in doing so it has a wide discretion to do what it considers to be in their best interests. But this function must not, in my view, be transformed so as to create a duty obliging the court, at the behest of a third party, to make a choice between the two alleged constitutional rights--the right to procreate or not to procreate--simply because the individual is unable to make that choice. All the more so since, in the case of non-therapeutic sterilization as we saw, the choice is one the courts cannot safely exercise.

Other Issues

100. In light of the conclusions I have reached, it is unnecessary for me to deal with the *Charter* issues raised by the appellant and some of the interveners. It is equally unnecessary to comment at length on some of the subsidiary issues such as the burden of proof required to warrant an order of sterilization and the precautions that judges should, in the interests of justice, take in dealing with applications for such orders. These do not arise because of the view I have taken of the approach the courts should adopt in dealing with applications for non-therapeutic sterilization. Since these issues may arise in cases

involving applications for sterilization for therapeutic purposes, however, I will venture a few words about them. Since, barring emergency situations, a surgical procedure without consent ordinarily constitutes battery, it will be obvious that the onus of proving the need for the procedure is on those who seek to have it performed. And that burden, though a civil one, must be commensurate with the seriousness of the measure proposed. In conducting these procedures, it is obvious that a court must proceed with extreme caution; otherwise as MacDonald J. noted, it would open the way for abuse of the mentally incompetent. In particular, in any such proceedings, it is essential that the mentally incompetent have independent representation.

Conclusion

101. I would allow the appeal and restore the decision of the judge who heard the application.

Appeal allowed.

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Solicitors for the intervener Canadian Mental Health Association: Gowling & Henderson, Ottawa.

Solicitors for the intervener the Consumer Advisory Committee of the Canadian Association for the Mentally Retarded: Vickers & Palmer, Victoria.

Solicitor for the intervener The Public Trustee of Manitoba: The Public Trustee of Manitoba, Winnipeg.

Solicitor for the intervener Attorney General of Canada: Roger Tassé, Ottawa.