Sterilization of the Mentally Retarded Adult: the Eve Case

A recent appellate decision from Prince Edward Island is an excellent example of the confusion that can result when a court is asked to consider novel issues in the protection of life area without adequate analysis of the legal context in which these issues arise. In *Re Eve*[1] Mrs. E. applied for an order that her mentally retarded, twenty-four-year-old daughter, Eve, be declared mentally incompetent pursuant to the provincial *Mental Health Act*,[2] that Mrs. E. be appointed the committee or guardian of Eve's person, and that Mrs. E. be authorized to consent to sterilization of Eve by means of a tubal ligation. The application was denied at first instance, and the result of the appeal from this decision is not clear.

Eve had not been represented by counsel at the application before the trial judge. She was represented at the appeal,[2a] but her counsel must have been puzzled as to the effect of the three rather different judgments that resulted. The conflict in the judgments and the confusion in the classification of the legal issues involved derive from a failure to distinguish the issues clearly and to appreciate their significance in relation to the order sought. These issues are:

1) Is purely contraceptive sterilization lawful?
2) If it is, is there any authority in statute or the common law which would allow substituted consent from a third party to such an operation on a retarded adult?

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[1] After delivering its judgment on 31 July 1980, the Court issued supplementary reasons on 9 January 1981: (1980, 1981) 115 D.L.R. (3d) 283 (P.E.I.S.C., *in banco*), *rev'g* (1979) 10 R.F.L. (2d) 317 (P.E.I.S.C.) *per* C.R. McQuaid J. [See "Afterword", *infra*.] The case is now on appeal to the Supreme Court of Canada.

On 11 August 1981 leave was given, pursuant to Rule 60 of the Rules of the Supreme Court of Canada, for the Consumer Advisory Committee of the Canadian Association for the Mentally Retarded to intervene as persons interested in the appeal. On 4 September 1981 leave was also given, pursuant to the same Rule, for The Public Trustee for the Province of Manitoba to intervene.

[2] R.S.P.E.I. 1974, c. M-9 (as am.).

[2a] On 10 January 1980 Chief Justice Nicholson appointed the Official Trustee to be guardian *ad litem* of the person of Eve and third party to the proceedings. Counsel for the Provincial Minister of Justice appeared at trial and on the appeal to assist the Court, but took no position on the ultimate disposition of the case.

3) Do the courts have jurisdiction to authorize such an operation on such a person?

Since most of the authorities cited in the trial court and in the appellate court refer to the situation of retarded minors, the following examination of these three questions will also consider the usefulness of this analogy.

I. The legality of the operation: the question of benefit and the standard of general medical approval

The legality of contraceptive sterilization should no longer be in doubt. Earlier concerns regarding the legality of the procedure have long since been shown to be without foundation. Ten years ago the Canadian Medical Protective Association felt it "should be left for decision by the individual doctor faced with the patient requesting the operation, to be decided just as he would decide about any other request for non-essential treatment."[3] Unfortunately, the earlier confusion has been inadvertently resurrected in the judgments of three Canadian courts which refer to section 45 of the *Criminal Code*,[4] a section which provides a defence to criminal responsibility for performing surgical operations. That section requires that there be a benefit, but, as a full analysis makes clear,[5] it deals only with the situation where the patient is not capable of consenting. It was intended to apply where there was a danger to life or limb and the physician or other person performing the operation has to act quickly. The requirement of a benefit is a safeguard which ensures that the physician will only perform an operation on a person incapable of giving consent in order to preserve life or limb. It is the seriousness of the threat which constitutes the operation a benefit.

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[3] *Sexual Sterilization for Non-Medical Reasons* (1970) 102 Can. Med. Assn J. 211: see also Starkman, *The Control of Life: Unexamined Law and the Life Worth Living* (1973) 11 Osgoode Hall L.J. 175, 177. With respect to a recommendation in the *Report of the Royal Commission on the Status of Women* (1970), the Hon. John Munro, then Minister of Labour, speaking for the Government of Canada, stated that "[t]he Minister of Justice would take the position that sterilization is a matter for medical discretion and that sterilization performed by a qualified medical practitioner at the request of his patient does not engage the criminal responsibility of the practitioner. Therefore, it is considered that no action is required to clarify the criminal law in respect of sterilization." See *Debates of the House of Commons*, First Session, Twenty-ninth Parliament (2 April 1973), 2817. See also Devlin, *Samples of Lawmaking* (1962), 94.

[4] R.S.C. 1970, c. C-34.

[5] See Starkman, *A Defence to Criminal Responsibility for Performing Surgical Operations: Section 45 of the Criminal Code* (1981) 26 McGill L.J. 1048.

The confusion which has been introduced by the courts on this question stems from two mistaken beliefs. One is that section 45 of the *Criminal Code* is not limited to situations where the patient is incapable of giving consent to an operation. The other, related one is that there must be some sort of benefit where consent is given. A third could be suggested, that is the assumption that the structure of the Code provides no general guidance on the question of sterilization of mentally retarded persons. In his judgment in *Morgentaler* v. *The Queen,* Laskin C.J.C., writing for the minority, was of the view that the application of section 45 also extends to situations where the patient is capable of giving consent.[6] This view was necessary for the minority opinion in *Morgentaler,* that section 45 afforded a defence to a charge of procuring an illegal abortion, a view rejected by Dickson J., writing for a majority of the Court. On the question of the application of the section, Dickson J. was only prepared to acknowledge that "[s]ection 45 may be available as an answer to a charge arising out of a surgical operation performed on an *unconscious* patient . . . ."[7] The minority view implies that operations done with consent are illegal unless the conditions (including a benefit) in section 45 are met, whereas the comment in this issue which explains section 45 demonstrates that as a general rule the *Criminal Code* assumes the legality of operations agreed to by patients which meet with the general approval of physicians.[8] The minority view in *Morgentaler* resurrects the old concern that purely contraceptive sterilization may not satisfy the requirement of a benefit.

The case of *Cataford* v. *Moreau*[9] in the Quebec Superior Court involved a claim for damages. Mrs. Cataford became pregnant and gave birth to an eleventh child after a tubal ligation by Dr Moreau, who gave assurances that she would have no more children. The judgment of Deschênes C.J. did not examine directly the judgment of the minority in *Morgentaler* because in the latter case the defence of section 45 had been declared by the majority to be unavailable in the circumstances. However, Deschênes C.J. in effect brought in the minority view by quoting the instructions of Hugessen A.C.J. to the jury in what is known as the first *Morgentaler* case.[10] In

[6] [1976] 1 S.C.R. 616, 642 *et seq.*

[7] *Ibid.,* 676 (emphasis added).

[8] *Supra,* note 5.

[9] [1978] C.S. 933, 7 C.C.L.T. 250 (hereinafter cited to C.S.).

[10] *Ibid.,* 936. The charge to the jury by Mr Justice Hugessen was delivered in French and was only reported in translation: *R.* v. *Morgentaler (No. 5)* (1973) 14 C.C.C. (2d) 459, 461 (Que. Q.B., Crown Side) (cited hereinafter to this translation).

that case Hugessen A.C.J. wrongly assumed that section 45 was applicable to the situation where the patient was capable of consenting, and that a benefit was therefore required. His contribution was to add that the word benefit required "that the physician himself make a judgment independent of that of the patient, and decide that the operation which the latter is asking for is really for her good."[11] In *Cataford,* Deschênes C.J. approved this interpretation and went on to make an independent judgment as to whether there was a benefit:

> Dans le présent cas, compte tenu de l'âge des parties, du nombre de leurs enfants, de leur situation économique et sociale, il fait peu de doute que toutes les autres circonstances de l'espèce, pour citer le langage de l'article 45 C.Cr., conduiraient à la conclusion que l'intervention a été pratiquée pour le bien de la demanderesse.[12]

It would seem to follow from this approach that, if the physician is not to risk criminal liability, operations must be shown to be beneficial before they are performed. This view is not accepted, either by the medical profession or the law. Age-parity formulae, in conjunction with socio-economic criteria, have traditionally been used by hospitals in considering applications for sterilizations, but they need not be. They have no foundation in law, and the attempt to import them into the law serves only to confuse the issue.

In *Re Eve,* C.R. McQuaid J., the judge at first instance, concluded that the legality of the operation in *Cataford* depended on it being voluntarily submitted to by the patient, with informed consent, and on it being found to be for the benefit of the patient having regard to his or her health, or otherwise justifiable within the socio-economic context.[13] Even so McQuaid J. said that he "would not interpret this decision [*Cataford*] as going so far as to say that purely contraceptive sterilization is necessarily legal, even with consent, in all circumstances."[14] Presumably this is because it might not be beneficial in all circumstances. Both McQuaid J. at trial and MacDonald J. in the appellate court were of the opinion that section 45 did not apply to the sterilization of retarded persons. This conclusion was correct, but not for the reason given by MacDonald J., that "this section is only intended to apply to cases where consent can be given by the person involved or in cases of emergency or necessity".[15] This conclusion enabled the judges to consider the

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[11] *Supra,* note 10, 461.
[12] *Supra,* note 9, 936.
[13] *Supra,* note 1, 324.
[14] *Ibid.*
[15] *Supra,* note 1, 305.

question of sterilization of retarded adults without the encumbrance of what must have appeared to them to be the rather nebulous guidance offered by section 45. However, the incorrect reasoning by which they reached this result left them without an authoritative and useful framework within which to consider the question at hand. That framework is implied by the presence of section 45 in the Code, and becomes clear once the structure and evolution of the Code are understood.

II. The assumptions in the Criminal Code

Although it is so obvious that it is generally overlooked, the common law defence in what is now section 45 was made explicit in the extremely concise English *Draft Code* of 1879, and subsequently in *The Criminal Code*, 1892,[16] only because it was thought to represent a very serious departure from the general common law right to self-determination, a right so fundamental that it was thought unnecessary to make it explicit in the *Draft Code*. This right is assumed in the *Draft Code* and in our *Criminal Code*. It was made explicit in article 204 of Stephen's *Digest*,[17] a work by the principal draftsman of the English *Draft Code* which preceded the *Draft Code* and which is, in the 1887 edition, along with the *Draft Code* and Burbidge's *A Digest of the Criminal Law of Canada*,[18] a source of our *Criminal Code*.[19] Articles 204 and 205 (the latter of which is the precursor of our section 45), together with their illustrations and Stephen's comments, are statements of the common law on these questions by a great authority. They make a number of matters clear and leave others unresolved. What is clear is that:

- There is a fundamental right to self-determination;
- A patient may consent to a surgical operation;
- Substituted consent may be given to a surgical operation upon a child in one's care who is too young to give consent;
- Where as a result of an accident or other occurrence a person is either unconscious or crazed and therefore incapable of giving consent to a surgical operation, it is not a crime to perform an operation on him to save life or limb, without his consent and in spite of his resistance.

What is not dealt with is whether:

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[16] S.C. 1892, c. 29.

[17] *A Digest of the Criminal Law* (1877).

[18] (1890).

[19] See the speech by Sir John Thompson, Minister of Justice, *Debates of the House of Commons* [,] *Dominion of Canada*, Second Session, Seventh Parliament (12 April 1892), 1311 *et seq.*

— Substituted consent may be given to a surgical operation upon a retarded adult in one's care where that adult is not capable of giving consent.

At this point, it is only fair to state that there is no evidence that in the evolution of the Code any consideration was given to the possibility of drawing a distinction between operations with therapeutic and with non-therapeutic aims. The reason for this omission is simple: the operations which we now identify as clearly or arguably non-therapeutic (*e.g.*, purely contraceptive sterilization, removal of organs for transplant, cosmetic surgery where there is no disfigurement) are comparatively recent developments. For example, male sterilization by vasectomy was not done until nearly the end of the nineteenth century. While no doubt operations were generally assumed to have a therapeutic aim, this was not a condition of their legality. The only concern expressed was that they should not be performed without consent or, where the patient was unconscious or raving, unless there was a threat to life or limb. As the above distinction was not made, it is not a criterion used by our criminal law, and it is therefore not correct to suggest that the aim of an operation (therapeutic or non-therapeutic) is relevant to identifying the persons who may validly consent to it.[20] Of course, provinces can by statute prevent classes of persons from giving effective consent to particular operations, such as minors who wish to donate organs for transplant; but this would not preclude a successful defence of valid consent by, for example, a capable minor where a person is charged with an offence under the *Criminal Code* requiring the absence of consent.[21] It is the Code's assumption of the legality of operations agreed to by patients which meet with the general approval of physicians and which are not expressly prohibited by law, that has permitted our criminal law to keep pace with new medical developments. By this standard the operations referred to above are lawful; what is in question is whether they can be performed on persons who lack capacity to consent.

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[20] This suggestion is made in Somerville, *Medical Interventions and the Criminal Law: Lawful or Excusable Wounding* (1980) 26 McGill L.J. 82, 92. The point of this article is not clear: it appears to be largely speculation on different interpretations of s. 45 of the *Criminal Code*. A systematic exposition of s. 45 based on authority is to be found in Starkman, *Preliminary Study on Law and the Control of Life* (an unpublished manuscript, prepared for the Law Reform Commission of Canada in 1974): see also Starkman, *supra*, note 5.

[21] See Starkman, *supra*, note 3, 179.

III. Substituted consent: the background and the standard of general medical approval again

Stephen's statement in his *Digest* that consent may be given to a surgical operation upon a child in one's care who is too young to give a consent is one of the few references to the operation of substituted consent in the criminal law.[22] This principle is part of our criminal law because the Code expressly preserves common law defences. However, it was not mentioned in the *Draft Code* and is omitted from the *Criminal Code*. Possibly, like the principle of self-determination, it was thought too self-evident to need expressing. There is no reason to believe that article 205 of the *Digest* and, subsequently, section 45 of the *Criminal Code* were intended to apply to retarded persons except under circumstances applicable to persons generally, that is, where an accident or some other occurrence renders the patient either unconscious or crazed. This seems clear from the illustrations to article 205 and from the fact that no reference is made in the article to substituted consent. Nor is there any reason to believe that the statement regarding substituted consent where a child is too young to give consent was intended to apply to retarded adults whose mental age is the equivalent of a child's.

If the background to our criminal law provides no express guidance on the question of substituted consent to operations on retarded persons, can it help us at all with the problem? That our Code assumes a physician-approval standard rather than a benefit standard as a condition of the legality of operations should alert us to further implications for the question with which we are concerned. In 1970 the Canadian Medical Protective Association acknowledged that there was no medical indication for purely contraceptive sterilization, "so that doctors should not use those words to themselves: they should think in terms of 'reasons' and then they should weigh their patient's reasons for wishing the operation to decide if they, the doctors, feel those reasons are valid."[23] This advice is implicit recognition that traditional notions of appropriate circumstances for surgical intervention are not conditions precedent to the legality of the operation.

The Canadian Medical Protective Association was aware that the operation had already gained the general approval of physicians, and was concerned to see that it was not being performed on demand, without physicians weighing the patients' reasons for their

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[22] *Supra*, note 17, art. 204.
[23] *Supra*, note 3, 211.

request and deciding whether they are valid. No criteria for validity are provided, but some physicians and hospitals have used age-parity formulae, in conjunction with psychological and socio-economic criteria. However, despite approval of contraceptive sterilization, there would appear to be no general approval by physicians for the performance of this operation on retarded persons. The status of the subject of the operation as a retarded person raises additional questions to be considered by physicians in the process of gaining general approval. It seems clear that such approval would be an important factor in the process of making a legal determination as to whether substituted consent could be valid in these cases. As we shall see, on the basis of this lack of approval, legislation may be needed to clarify the status of this and some other modern operations on persons incapable of giving consent.[23a]

There are a number of operations currently being performed that are of doubtful legality from the point of view of the criminal law. Examples are purely contraceptive sterilization of mentally retarded persons who are not capable of giving consent, and experimentation on, as well as the taking of skin and bone marrow for transplant from, very young children. Some physicians approve of these procedures being done. Of these operations, only contraceptive sterilization on those under sixteen has been expressly prohibited by the civil law. This was done by a regulation under *The Public Hospitals Act* of Ontario[24] after it was revealed that an unusually large number of sterilizations had been performed in Ontario on persons under sixteen years of age (sixteen is the age of consent to medical care). At the same time Ontario appointed an Interministerial Committee on Medical Consent to consider this and other related questions, and the Committee prepared a "Draft Act"[25] which contained safeguards for minors and mentally incompetent adults from whom replaceable tissue such as skin and bone marrow may currently be taken without any protection from

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[23a] Even if there were general approval by physicians, whether substituted consent could be valid in these cases remains a question of law, which might be answered in the negative for reasons of public policy. This should be compared with situations not involving substituted consent, where general physician approval has been the standard of legality for operations, in the absence of express legislative prohibitions. In practice, physicians have not been prosecuted for performing operations that have not yet gained general medical approval, and this is consistent with Stephen's comment on articles 204 and 205 in his *Digest*.

[24] R.S.O. 1970, c. 378, O. Reg. 986/78, cont'd indefinitely by O. Reg. 241/80.

[25] See *Options on Medical Consent — Part 2* (December, 1979), 1-18.

The Human Tissue Gift Act, 1971.[26] The "Draft Act" would also have brought all cases of substituted consent to medical experimentation that carries either a risk of serious harm or a significant risk of harm to the subject under formal provincial committee review. In other words, the Interministerial Committee urged the provincial government to act in these areas of doubtful legality where, in the absence of either general medical approval or public scrutiny, individual physicians continue to act. Not all these practices would have been covered by the "Draft Act". Most experimentation would not have been reviewed by the provincial committee. The "Draft Act" did not become a government bill, and it is understood that there was criticism of the "Draft Act" 's criteria for sterilization of the mentally incompetent. This criticism may have reflected the feeling that in fact there may be no appropriate criteria. This certainly seems true in connection with minors. With adults it would seem to depend on whether the analogy with the reasons advanced by a capable adult requesting that the operation be performed on him or herself is a reasonable one. Of course, the analogy may only be valid where the reasons resemble those that might be given by a capable adult, and in that event it may be that the retarded person has sufficient understanding to give his own valid consent.

Occasionally the medical profession itself takes the initiative to clarify the legal status of an operation. An example is the Human Tissue Gift Acts in the common law provinces,[27] where recognition was sought through the enactment of provincial legislation for the medically-approved practice of taking organs from living donors for transplant. At the same time, there was agreement on a prohibition against all minors' donations of non-regenerative tissue, regardless of the competence of the would-be donors. There is good reason to believe that even before the enactment of this legislation these operations, like contraceptive sterilization, were not illegal, and that if an adult makes such a gift outside the Acts, the taking of the organ does not automatically invite criminal liability for assault.[28] Unlike the uncertain case of contraceptive sterilization,

[26] S.O. 1971, c. 83: see also Starkman, *Consent and the Human Tissue Gift Acts: a Rationale for Change* (1980) 1 Health Law in Canada 5.

[27] See *Human Tissue Gift Act*, R.S.B.C. 1979, c. 187; *The Human Tissue Act, 1971*, S.N. 1971, No. 66 (as am.); *Human Tissue Gift Act*, R.S.N.S. 1979, c. H-25; *The Human Tissue Gift Act, 1971*, S.O. 1971, c. 83; *Human Tissue Gift Act*, R.S.P.E.I. 1974, c. H-14; *The Human Tissue Gift Act*, R.S.S. 1978, c. H-15. See also *Human Tissue Gift Ordinance*, O.Y.T. 1980, c. 14.

[28] See Starkman, "Human Organ and Blood Donations: Criminal Law Structure re the Decision-Making Process" in Canadian Hospital Association, *Papers from the 1979 Second National Conference on Health and the Law* (1980), 99, 101.

the Acts' restriction of the ability to give valid consents to adults who are mentally competent to consent probably precludes the possibility of substituted consent to organ donations from living mentally incompetent persons as well as from living minors, though under certain circumstances those acting on these invalid consents are protected. The Acts in effect permit physicians to weigh their adult patient's reasons for wishing to donate an organ, since there are no medical indications for the removal of an organ for transplant. The other surgical operations described above, when performed on retarded persons who are not capable of giving consent, remain of doubtful legality and are open to challenge in the courts, a process which has already begun with the results we are seeing. This analysis stresses the great weight traditionally given by the law to general medical approval. What must be equally evident by this point is the onus on the medical profession to articulate with some precision what it approves and the criteria of that approval, in order that the law may develop with medical science and technology. This is not an easy task; but it is an indispensable one, just as this apparently interminable explanation is indispensable to an understanding and appreciation of the issues in the *Eve* case.

IV. The decisions in the Eve case

Examination of the third issue raised at the beginning of this comment, whether the courts have jurisdiction to authorize a purely contraceptive sterilization operation on a retarded adult, also provides a reprise of the confusion surrounding the Court's consideration of the other issues. MacDonald J. was of the opinion that the appeal before him was on this issue alone.[29] He pointed out that the trial judge did not in his order declare Eve mentally incompetent pursuant to the *Mental Health Act* of the province, and did not appoint a committee for her.[30] MacDonald J. found that there had been no appeal on the failure to include these declarations in the order, and since the only matter addressed by counsel on the appeal was the jurisdiction issue, he was of the opinion that the specific question of whether Mrs. E. should be authorized to consent to sterilization on Eve should not be dealt with by the Court. He considered that the novelty of the application, the issue of interference with rights over one's body, and the fact that Eve was not represented on the original application in the trial court were additional reasons why the specific question of sterilization should

[29] *Supra*, note 1, 297.
[30] *Ibid.*

not be dealt with before Eve's counsel had "every opportunity to make whatever representation he wishes to make on her behalf, including the calling of further evidence if desired."[31] The other two judges did not agree. They considered that the substance of Mrs. E.'s application was a request for clarification from the Court on whether she could give a valid consent to sterilization under the circumstances, and they authorized sterilization or hysterectomy despite the omissions in the order of the trial judge. Campbell J. thought that these omissions could easily be rectified, provided Mrs. E. took the necessary steps to have herself appointed as committee for Eve.[32] Large J. granted an order declaring Eve a mental incompetent and appointed Mrs. E. committee of the person and estate of Eve.[33] Counsel in this case might well be excused for any uncertainty he might have entertained as to the actual order of the appellate Court, in view of the differing judgments. What is perhaps more important at this point is that the reasons given for the orders authorizing sterilization or hysterectomy be examined in order to eliminate, as far as possible, confusion in future cases of this kind.

V. The Chancery jurisdiction and the wardship analogy

The most useful approach is to examine the assertions made to justify these orders. Principal among these is that the Court has authority to sanction sterilization of a retarded adult by virtue of its Chancery jurisdiction and by analogy to wardship jurisdiction over minors. As Holdsworth points out, the Crown had the prerogative of wardship of the lands and person of those of unsound mind: later there was an express delegation of the Crown's powers and duties over those of unsound mind to the Chancellor himself:

> By virtue of this express delegation the Chancellor appoints the committee for the lunatic, and is under the duty of seeing that the committee duly administers the lunatic's property. This jurisdiction had nothing whatever to do with the jurisdiction exercised by him as the judge of the court of Chancery.
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> > "Unsoundness of mind gives the court of Chancery no jurisdiction whatever. It is not like infancy in that respect. The court of Chancery is by law the guardian of infants whom it makes its wards. The court of Chancery is not the curator either of the person or the estate of a person *non compos mentis*, whom it does not, and cannot make its ward ... . It can no more take upon itself the management or disposition of a lunatic's property, than it can the management or disposition of the property of a person abroad, or

[31] *Ibid.*: see pp. 296-300 generally.
[32] *Ibid.*, 320.
[33] *Ibid.*, 294.

> confined to his bed by illness. The court can only exercise such equitable jurisdiction as it could under the same circumstances have exercised at the suit of the person himself, if of sound mind."
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> It was through the control exercised by the Chancellor, as the delegate of the crown, over the lunatic's committee, that the rules as to the management of the property of lunatics have grown up. The underlying principle of these rules is the interest of the lunatic.[34]

In the *Eve* case Campbell J. acknowledged that the Court's jurisdiction over minors and the mentally handicapped was rarely resorted to in matters affecting the person, as distinct from the property, of incompetents.[35] He also acknowledged that minors and persons declared mentally incompetent are two quite distinguishable groups.[36] Nevertheless, he claimed to find authority for his order consenting to the sterilization of Eve in English cases involving the wardship jurisdiction over minors. In one of those cases, *Re X (a Minor)* Lord Denning M.R. observed that "[t]he jurisdiction of the court in regard to wards of the court is derived from the Court of Chancery."[37] But as we have already seen, the court's jurisdiction over those of unsound mind is of different origin. In Upper Canada, this origin was expressly recognized in a statute enacted to ensure that the Court of Chancery would have the same power and authority as the Lord Chancellor in England over the care and custody of lunatics, idiots and persons of unsound mind.[38] Thus the Prince Edward Island Supreme Court's jurisdiction in this regard has nothing whatever to do with any jurisdiction it may have over minors. It seems clear that the appellate court's discussion of the English wardship cases was for the purpose of justifying its purported jurisdiction to make an order consenting to sterilization. Yet an order of this nature was refused by Madam Justice Heilbron in *Re D (a Minor)*,[39] a case involving an eleven-year-old girl which is the only reported English case in which such an order was sought. In light of the result in *Re D (a Minor)*, Large J. found it necessary to distinguish the latter case from the case before him;[40] but it seems clear that the English case is in fact

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[34] *A History of English Law*, 7th ed. (rev. 1956), Vol. 1, 475-6 (footnote omitted), citing *Beall* v. *Smith* (1873) L.R. 9 Ch. 85, 92 *per* James L.J.

[35] *Supra*, note 1, 312.

[36] *Ibid.*, 316-7.

[37] [1975] Fam. 47, 57, [1975] 1 All E.R. 697, 703 (C.A.).

[38] 9 Vict., c. 10: its purpose was explained by Kellock J. in *Wright* v. *Wright* [1951] S.C.R. 728, 737-8. I am indebted for this reference to Weir, "Mental Incompetency Applications" in [1963] Special Lectures of the Law Society of Upper Canada 13, 15.

[39] [1976] Fam. 185, [1976] 1 All E.R. 326.

[40] *Supra*, note 1, 292-3.

helpful not as authority for any disposition of the *Eve* case but as a warning against ordering sterilization on the advice of so-called experts. In fact, these English cases merely confirm that the English court, as the inheritor of the Crown's obligation as *parens patriae*, will exercise its wardship jurisdiction in the best interests of the minor. This result is not at all helpful for the analysis of the *Eve* case, particularly since there seems to be no doubt that the Prince Edward Island Supreme Court has inherited the Crown's *parens patriae* obligation and authority over those of unsound mind.[40a] The English cases do emphasize that the *parens patriae* jurisdiction is concerned with matters relating to the person of the subject, for example, surgical operations, as well as with matters relating to the subject's property, and as Campbell J. was concerned to find authority for the Court's jurisdiction over matters related to the person of Eve, he may have considered that the wardship analogy permitted such a conclusion.[41]

VI. Parens patriae and the modern statutes

Parens patriae has been defined as "the state's sovereign power of guardianship over persons under disability, such as minors and incompetent persons".[42] Specific legislation dealing with matters historically within this prerogative has been passed in England and in Canada. Thus provincial Child Welfare Acts[43] may provide for Crown wardship as well as children's aid society wardship; and Mental Incompetency Acts[44] may provide a court process for the formal determination of mental incompetency or mental infirmity. While the remaining scope of the courts' *parens patriae* jurisdiction may not be entirely clear, it reasonably can be said to extend to a supervisory jurisdiction in these matters, where such jurisdiction is not expressly given by statute. For the purpose of the *Eve* case, it is irrelevant whether the old

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[40a] See the *Chancery Jurisdiction Transfer Act*, S.P.E.I. 1974, c. 65, s. 9(1). This Act transferred, *inter alia*, the *parens patriae* jurisdiction vested in the Court of Chancery under the *Chancery Act*, R.S.P.E.I. 1951, c. 21, s. 3 to the Supreme Court of Prince Edward Island. See note 44, *infra*.

[41] *Ibid.*, 316-20.

[42] *Black's Law Dictionary*, 4th ed. (rev. 1968), 1269.

[43] *The Child Welfare Act*, R.S.M. 1970, c. C-80 (as am.); *Child Welfare Act*, R.S.O. 1970, c. 64 (as am.); *Children's Protection Act*, R.S.P.E.I. 1974, c. C-7 (as am.).

[44] See, *e.g.*, *Patients Property Act*, R.S.B.C. 1979, c. 313; *The Mental Health Act*, R.S.M. 1970, c. M-110; *The Mental Incompetency Act*, R.S.O. 1970, c. 271; *Mental Health Act*, R.S.P.E.I. 1974, c. M-9 (as am. by *Chancery Jurisdiction Transfer Act*, S.P.E.I. 1974, c. 65, s. 5.)

wardship jurisdiction over minors exists in Prince Edward Island, as Eve was not a minor. The majority of the appellate court held that the *Mental Health Act* of the province contained statutory provisions for the appointment by the court of a committee of the person of Eve.[45] MacDonald J. thought that the applicable provisions of the Act were intended only to apply to persons in need of guardianship if they were possessed of real and personal property; and that while being declared incompetent under the Act meant that the individual was unable to manage his property, it did not necessarily mean that he was incapable of giving valid consent.[46] There are no convincing reasons to impose such a limitation on the court's jurisdiction. However, MacDonald J.'s observation points out the need to consider that what may be involved is mental infirmity rather than mental incompetency, and this possibility is also recognized in provincial mental incompetency statutes. For example, *The Mental Incompetency Act* of Ontario makes provision for management and administration of the estate of a person who is "not declared to be mentally incompetent, but who is proved to the satisfaction of the court to be, through mental infirmity arising from disease, age or other cause, or by reason of habitual drunkenness or the use of drugs, incapable of managing his affairs."[47] Under this Act persons can be appointed by the court to exercise any of the powers of a committee of the estate as the court might direct, and these persons are "subject to the jurisdiction and authority of the court as if they were the committees of the estate of a mentally incompetent person so declared."[48] The statutory recognition of a court-approved alternative to a declaration of mental incompetency was the culmination of attempts by the courts to deal with difficult situations where the subject could not be declared mentally incompetent, yet was clearly mentally infirm.[49] This long-standing problem sheds some light on the question of

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[45] *Supra*, note 1, 294 *per* Large J., 316 *per* Campbell J.

[46] *Ibid.*, 299-300.

[47] R.S.O. 1970, c. 271, s. 39(1).

[48] S. 39(4).

[49] See, *e.g.*, the reference to the Court of Chancery protecting adults who have not been found to be lunatics, on the principles on which the Court protected improvident persons, in *Sherwood* v. *Sanderson* (1815) 19 Ves. Jun. 280, 288-9, 34 E.R. 521, 524 *per* Eldon L.C. (cited by Holdsworth, *supra*, note 13, 474, n. 2). See also *Bird* v. *Lefebvre* (1792) 4 Bro. C.C. 100, 29 E.R. 798 (Ch.), in which interest from a fund in Court belonging to the plaintiff was ordered paid to his wife "for the maintenance of himself and his family, he being in a state of mind, which though not amounting to lunacy, was of too great imbecility, in consequence of a paralytic stroke, to do legal acts."

whether the court has jurisdiction to authorize sterilization of a retarded adult.

VII. The standard for capacity

The judicial decisions show that it was often difficult to obtain the equivalent of what would now be a declaration of mental incompetency. There were other procedures for taking care of the individuals involved and their property. However, the important point is that for the most part mentally infirm people remained potentially capable of giving valid consent to surgical procedures. What had to be determined was their ability to understand the nature of the procedure and to appreciate the likely consequences. This approach is illustrated by one of the leading cases on the question of capacity to make a will, where it was confirmed that provided the testator knew the nature and effect of a will, understood the extent of the property of which he was disposing, appreciated the claims of relatives and others to which he ought to give effect, and was able to balance these claims against his property, he had testamentary capacity — even where he had at former times been of unsound mind, had been confined in a lunatic asylum, and after being discharged from the asyluin, remained subject to certain fixed delusions. A statement by Chief Justice Cockburn in this connection shows the attitude of the courts:

> It may be here not unimportant to advert to the law relating to unsoundness of mind arising from another cause — namely, from want of intelligence occasioned by defective organization, or by supervening physical infirmity or the decay of advancing age, as distinguished from mental derangement, such defect of intelligence being equally a cause of incapacity. In these cases it is admitted on all hands that though the mental power may be reduced below the ordinary standard, yet if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains.[50]

It is true that the purpose for determining testamentary capacity is different from the purpose for determining capacity to consent to a surgical procedure. The importance of the former is related solely to the validity of an attempted transmission of wealth, and not to the justification for what might otherwise be an assault. However, if a rational will was considered to be a better disposition than any that could be made by the law itself, so a rational consent by the subject was considered to be a better consent than any that

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[50] *Banks* v. *Goodfellow* (1870) L.R. 5 Q.B. 549, 566. See also Starkman, *The Control of Life and the Mentally Retarded: Protection of Rights for Community Living* (paper presented at the Third World Congress on Medical Law, University of Ghent, Belgium, 20 August 1973).

could be made by a third party. The fact is that there are very few reported cases dealing with the capacity of mentally infirm persons to consent to surgical procedures. Situations involving the transmission of wealth by will have attracted more litigation. But there is no reason to believe that the basic test of understanding and appreciation does not apply in both instances, with variations depending on the nature of the transaction under consideration by the subject. This means that careful inquiry must be made of a retarded adult's understanding of the proposed procedure and his appreciation of its likely effects. If it is true that a high percentage of retarded adults are able to meet this test, then the search for a valid consent ends with the subject, and the remaining problem is one of making sure that the consent obtained is free from duress.

In the *Eve* case MacDonald J. stated that, despite considerable evidence that Eve was incompetent, he had serious concerns as to whether a proper assessment of Eve had been made.[51] In light of the principles described above, MacDonald J.'s rejection of the subjective test of incapacity applied by a psychiatrist who testified in the case (to the effect that if Eve were his daughter he would approve of the operation), and his concern for the degree of certainty a court must have of a person's inability to give an informed consent before it intervenes to speak for that person, seem to point to the need to distinguish between tests for mental incompetency and tests for determining whether a mentally infirm person can give a valid consent to a particular surgical procedure.

VIII. The court as medical consultant

Judicial willingness over the years to accept that subjects often could not be found mentally incompetent, even though they were clearly infirm of mind, was apparently not brought to the attention of the appellate court in the *Eve* case as an acceptable precedent. Its approach was to seek to declare Eve mentally incompetent and to appoint a committee whom it authorized to approve the proposed sterilization or hysterectomy. Did the Court have jurisdiction to authorize such operations? Apart from statute, such jurisdiction could only be based on *parens patriae* or the principles on which

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[51] *Supra*, note 1, 300.

It should be noted that medical testimony at the trial was to the effect that Eve had undergone extensive psychological testing fifteen years earlier, but that extensive testing had not been repeated. The appellate factum of the Provincial Minister of Justice stated that Eve suffers from extreme expressive aphasia, a non-inheritable condition in which the afflicted person is unable to communicate outwardly thoughts or concepts which they might perceive.

Chancery protected the mentally infirm. The Court based its claim to the necessary jurisdiction on *parens patriae*. As discussed earlier, it appears that there is in fact no authority in either of these sources for the Court's claim to jurisdiction to authorize the operations.[51a] The committee of a person declared mentally incompetent, like the parent or guardian of a minor, can act only in accordance with the law and, as we have already seen, the legality of the operation in the circumstances depends on the factors already discussed. If the Court or committee had the power to circumvent the process of general physician approval, which is an important factor in determining the validity of substituted consent, their decisions could conflict with general medical practice and thus depart from the basis of the *Criminal Code*'s defence to criminal responsibility for performing surgical operations. General medical practice is almost certainly the basis for the defence to civil liability as well. The Court in *Eve* sought to take the place of Parliament and the provincial legislature in granting an order for the authorization of an operation in circumstances which do not have the general approval of physicians, and which are of considerable concern to Canadian physicians and others.[52] The performance of a hysterectomy under these circumstances gives particular cause for concern. Both the Law Reform Commission of Canada and Ontario's Interministerial Committee on Medical Consent have examined this area and it seems apparent that legislation will be required to provide for review of some current practices. The problem is that thus far physicians cannot agree on basic criteria for such operations and, as a result, those responsible for the preparation of legislation are unable to develop a comprehensive statutory approach to the problem. The absence of legislation does not mean, as Campbell J. stated it did, that "the Courts are left to wallow in a judicial vacuum."[53] It means that the suggested list of criteria for sterilization

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[51a] For a recent decision in the United States to this effect, see *Eberhardy* v. *Circuit Court of Wood County* 294 N.W. 2d 540 (Ct Apps Wisc. 1980) (petition to Wisconsin Supreme Court for review granted 10 September 1980, 300 N.W. 2d 77: see also, *contra, In re Grady* 426 A. 2d 467, 480 (N.J. 1981), wherein the Court acknowledged that "the weight of authority is against us".)

[52] A paper entitled "The Dependent Adults Act", which was circulated publicly in Alberta by the provincial Department of Health and Social Development before the enactment of *The Dependent Adults Act* by S.A. 1976, c. 63, contained a note (at p. 16) that "medical treatment must be in the best interests of the dependent adult as an individual, not the best interests of society. This is not a provision to give effect to consents to experimental surgery, or involuntary sterilization."

[53] *Supra,* note 1, 315.

of a retarded person considered by the Court in *Eve* was only and merely that, a suggested list, not one concluded after consultation with and approval by the medical profession and after due consideration by Parliament and the provincial legislature.

What the *Eve* case has shown is that there is a great deal of work to be done before laws dealing with questions such as this can be developed which will recognize the need to protect the integrity of the person as well as the need to make available to incompetent and infirm persons any surgical procedures that may be advisable. While the courts have historically found ways of acting where the subjects could not be found mentally incompetent, the court is not an appropriate forum for settling medical practice. The increasing tendency in the United States to refer these matters to the courts has seen those courts embark on a course of *ad hoc* decision-making which in turn only encourages more frequent recourse to the courts by hospitals and physicians who seek protection for their decisions.

Conclusion

This comment has shown that our law and its evolution do provide some guidance both for judges and lawmakers. When Campbell J. asks rhetorically whether we can refuse the mentally retarded their substituted right to choose, we are in a position to reply that

— they may be capable of choosing for themselves;
— if someone else must give consent, there may be a conflict between what that person finds convenient and what is advisable for the subject;
— the validity of someone else's consent is uncertain as long as the legality of the performance of the procedure under such circumstances remains uncertain.

Our reply points to the need for better articulation of these issues by physicians and careful consideration by the legislatures. In the meantime, it should be remembered that the question why the operation should be performed on retarded adults when most non-retarded adults do not request it has not yet been satisfactorily answered. One might also ask why retarded minors have been sterilized when physicians would not perform the operation on non-retarded minors who are irresponsible or promiscuous. In the background is an all-too-recent experience with involuntary sterilization,[55] an experience which enjoins us to approach these current concerns

[55] For a brief account of this experience, see Starkman, *supra*, note 2.
[54] *Ibid.*, 319.

with great care. The testimony of experts played a major role in the enactment of provincial involuntary sterilization statutes (now repealed), ostensibly for eugenic purposes. If legislators accept the necessity of a careful evaluation of expert testimony, a point insisted upon by MacDonald J. in his judgment,[56] they will be better prepared to deal with these issues than were their predecessors in Alberta and British Columbia who were responsible for the earlier statutes dealing with this surgical operation.

Afterword

After I had written this comment, I received a copy of an addendum to notes of judgment which was issued by the appellate Court on 9 January 1981 in response to the application of counsel to the Court for clarification and further direction. The addendum stated that the judges were unanimously of the opinion that the Court has jurisdiction to authorize the sterilization of a mentally incompetent person for non-therapeutic reasons, that this jurisdiction originates from the *parens patriae* jurisdiction over individuals who are unable to look after themselves, and that it gives the Court authority to make the individual a ward of the Court.[57]

The majority of the Court thought there was sufficient evidence before the trial judge to warrant the sterilization of Eve, and ordered that she be made a ward of the Court pursuant to the *parens patriae* jurisdiction for the sole purpose of facilitating and authorizing her sterilization. They then authorized her sterilization by a competent medical practitioner, and reserved their approval of the method of sterilization to be followed pending further submissions of counsel as to the medically preferred surgical procedure. Finally, the Court adjourned the application in order to allow counsel time in which to make further representations.[57a]

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[56] *Supra,* note 1, 285 *et seq., passim.*

[57] *Ibid.,* 321.

[57a] On 22 January 1981 Large J. ordered that "a duly qualified and competent medical practitioner be authorized to perform a hysterectomy operation" on Eve after the expiration of the time for appeal to the Supreme Court of Canada from the order. The order was made after hearing counsel for the parties as to the appropriate method of sterilization, and after reading the affidavit of the applicant dated 16 December 1980. The affidavit stated that three physicians had been consulted and had recommended hysterectomy rather than tubal ligation. Their opinions were attached to the affidavit and reveal to some extent the process of decision making in these matters. Two of the physicians had given evidence for the applicant at the trial. One, a general practitioner, stated simply that a hysterectomy would look after

The matters dealt with in the addendum have been examined in the course of the comment. The major departure in the addendum is the majority's abandonment of the *Mental Health Act*'s statutory procedure for the appointment of a committee in favour of making Eve a ward of the court for the sole purpose of having her sterilized. The majority had already attempted to justify their finding of jurisdiction to authorize sterilization by reference to the old wardship jurisdiction over minors, and they subsequently appear to have decided that the statutory procedure for determining mental incompetency or mental infirmity could be ignored altogether. The addendum has made the decision in *Eve* even less supportable.

With respect, the facts and the law are that:

1) retarded adults are not children;
2) the old wardship jurisdiction pursuant to *parens patriae*, which has been largely superseded by Child Welfare Acts, applied to children, not adults;
3) the *parens patriae* jurisdiction over persons of unsound mind is limited to supervisory jurisdiction over the committee appointed under the *Mental Health Act;* and
4) there is no authority in either common law or statute for any jurisdiction in the Court to make the order set out in the addendum.

These points would seem adequate grounds for appeal in view of section 41 of the *Supreme Court Act*.[58]

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Eve's painful periods and the concern about conception. The second, a psychiatrist, based his recommendation on the advantage in managing Eve's personal hygiene and the modest advantage in preventing disorders of the uterus, especially cancer. The third physician was a specialist in obstetrics and gynecology who was consulted on the matter by the general practioner. The specialist mentioned Eve's long menstrual cycle and painful periods, but added that she was receiving contraceptive medications which had produced a regular cycle without problems. He also mentioned consulting with the psychiatrist and reading his notes regarding the need for Eve's mother to help manage Eve's personal hygiene, and thought that "this aspect has been improved by the contraceptive pill". He then concluded that "considering all things", including the painful periods, he was inclined to agree with the psychiatrist that Eve would be better off with a hysterectomy.

[58] R.S.C. 1970, c. S-19. Leave to appeal to the Supreme Court of Canada was granted by the Prince Edward Island Supreme Court on 29 May 1981. Notice of appeal was filed on 18 June 1981.

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