In re JANE.

(1989) FLC ¶92-007

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Family Court of Australia at Melbourne.

Judgment delivered 22 December 1988.

Appearances: Mr Bick of Counsel (instructed by the Victorian Government Solicitor) appeared on behalf of the Acting Public Advocate; Mr Meldrum Q.C. with Mr Ham (instructed by Abbott Tout Russell Kennedy) appeared on behalf of the parents.

Before: Nicholson C.J.

Full text of judgment below.

Nicholson C.J.: These proceedings were instituted on behalf of a girl whom I shall call Jane (not her real name) by B in his capacity as Acting Public Advocate of the State of Victoria. B's position as Acting Public Advocate is constituted pursuant to sec. 14 of the *Guardianship and Administration Board Act 1986* of the State of Victoria. Pursuant to sec. 16(1)(f) of that Act, the Public Advocate is empowered to represent the interests of persons under a disability in proceedings such as these.

B's application was that he be appointed as next friend of Jane for the purpose of these proceedings and that application (which was not opposed) was granted. He could also, had he chosen to do so, have notified proceedings on his own behalf as a person having an interest in the welfare of Jane pursuant to sec. 63(1)(c) of the *Family Law Act 1975*. He also sought, on Jane's behalf, an injunction restraining the respondents, being the parents of Jane, from permitting to be performed upon her, any hysterectomy operation or other operation calculated to sterilise her or her reproductive organs unless and until approved by this Court. Various other and consequential orders were sought which are not presently material.

On the second day of the hearing, counsel for the respondents sought and obtained leave to make a cross-application seeking the leave of the Court to sanction a hysterectomy operation for the purpose of performing a hysterectomy on Jane. It should, however, be stated that he did so only by way of preserving his client's position that his primary argument was that no such approval by the Court was necessary.

Subsequent to the hearing of this matter, I became aware that the Human Rights Commission of Australia had sought and obtained leave to intervene in similar proceedings heard in this Court in Sydney in which judgment has subsequently been delivered by *Cook* J. in a case entitled *In re a Teenager* (1989) FLC ¶92-006 on 15 November 1988.

In view of the comparative novelty of these application in Australia, and in view of the Human Rights Commission's intervention in the Sydney case, I thought it proper to invite it

to seek to intervene should it wish to do so in the present proceedings. The Commission did so and forwarded written submissions, copies of which were then forwarded to the parties. The applicant did not seek to respond to the same but the respondents have delivered written submissions in reply. I may say that I have found all submissions to have been of assistance.

The circumstances in which the applicant commenced these proceedings were that he was made aware by the Medical Registrar of the Hospital that the respondents proposed to have a hysterectomy operation performed on their daughter and had booked her in for that purpose. Following discussions between the Public Advocate and the representatives of the hospital, it was agreed that the hospital would not permit the operation to be performed without prior notice being given to the Public Advocate. The applicant was subsequently informed that it was intended to proceed with the operation on 14 September 1988 and this application then ensued. The parties subsequently agreed that the operation would not be performed pending the determination of this matter.

The girl, Jane, is now 17 years of age having been born on 18 October 1971. She lives at home with her parents and is the youngest of a family of six children, of whom a number still live at home. She has the normal physical characteristics of a girl of her age and is physically attractive, but has the mental age of a child of two and there are negligible prospects that she will improve beyond her present state. Physically, she suffers from a slight left motor impairment, epilepsy, which is controlled by medication, and recurrent urinary tract infections. She has little language and communication skills and needs assistance for nearly all the normal functions of living. She has in recent times attended a Special Developmental School. In a 1987 report prepared by her teacher, she was described as follows:

> ``Jane is an attractive young teenager who was operating at an extremely low level of understanding. Survival skills are almost non-existent. She needs constant prompting in regard to safety when in a community environment.
>
> Jane is a wanderer and has no directional awareness, she has to be watched continually to prevent her becoming lost or separated from a group. She is completely unaware of the danger of traffic.
>
> If lost, Jane would be unable to communicate with others. Jane has very limited communication skills, can say some single words to indicate needs, for example, drink, tea, cake, etc., but cannot express concepts such as hungry, tired, frightened, lost.
>
> Jane is very aware of pretty clothes and jewellery and will approach anyone at any time in any situation to touch whoever is wearing the garment/item she admires. Jane could be easily tempted to accompany any person who offered her sweets or a favourite food. She approaches both male and female, stranger or friend without discrimination.
>
> **Personal hygiene**
>
> Jane needs to be supervised continually during toileting. She does attempt to pull down her underwear, but does not always succeed to do this efficiently, often resulting in soiled underwear and/or soiling her outer clothing by not pulling it up sufficiently before

> sitting on the toilet. She does not use toilet paper proficiently and must be supervised when washing her hands.
>
> All other personal hygiene requirements must be supervised. Jane cannot bath/shower/dry herself independently and will not hold a toothbrush independently. She cannot blow or wipe her nose or brush/comb her hair. Jane appears to be completely unaware of the need for personal hygiene.
>
> In taking into account the need to constantly supervise Jane in all matters regarding personal hygiene, it is evident that hygiene during menstruation would also need to be coped with by Jane's care giver."

The principal of the Special Developmental School, in reference to the above report, thought that the assessment contained in it of Jane's skills and abilities continued to be accurate one year later.

Jane's mother gave evidence to the effect that despite her difficulties with toilet training, she reacts badly to rejection or to expressions of disgust which sometimes follow her soiling herself in public. She has no sense of modesty and occasionally explores her body and masturbates in public. She is strongly supported by her family for whom she represents a considerable burden, but I was particularly impressed by her mother's caring approach to her. She spends two to three weeks in respite accommodation on four or five occasions per year and her parents have placed her on a list for permanent accommodation in the respite community residential unit. As I understand it, they have done this to make provision for the time when they may no longer be able to care for her, but that they would not accept such a placement if it was to be made available in the immediate future.

She has not yet menstruated, but the evidence before me indicated that it is inevitable that she will do so, having developed normal secondary sexual characteristics and otherwise had a normal physical development. The evidence makes it clear that she will experience great difficulties in coping with menstruation. The fact that she has been unable to cope with toilet training, despite efforts both at home and in the respite institution and at the school, does not suggest that the situation will be any better when menstruation occurs. An added difficulty is that she is resentful of and resists attempts to clean her genital area.

She was described by Professor B, a consultant obstetrician and gynaecologist who gave evidence before me and whose evidence I accept, as an extremely sensitive child despite her intellectual disabilities, who would not react well to the sight of blood associated with menstruation. He thought that menstruation would render her more liable to urinary tract infection due to poor hygiene and he also thought that she would be unduly distressed by menstrual pain.

I am also satisfied that she would have overwhelming difficulties coping with pregnancy. It is apparent, given her mental state, physical attractiveness and tendency to wander, coupled with a developing sexual awareness, that she is at risk of sexual assault and unwanted pregnancy. Although she is not at risk at home, she would no doubt be at some risk at the institution which she attends and the risk will presumably increase as she gets older. She

clearly would have no understanding of the connection between the sexual act and pregnancy and would not understand pregnancy itself or the process of childbirth.

Professor B thought that a Caesarian section would be necessary in the event that a pregnancy was permitted to progress to that stage as she would be unable to cope with normal labour and he also thought that her epilepsy would be likely to be exacerbated by pregnancy. He considered that she would be quite unable to cope as a mother should she have a child. He thought that if she became pregnant an abortion would be highly desirable.

Professor B considered that a hysterectomy was the only appropriate solution to Jane's problems. He discounted a tubal ligation in that it would only prevent unwanted pregnancy and would not address the problems associated with menstruation and in fact may exacerbate them because of increased menstrual flow. He rejected the use of drugs, such as Depo Provera, as providing an unsatisfactory solution as its long term effects are unknown and it would be necessary in Jane's case to provide this medication until she was in her late 40s or 50s. He said that other forms of medication, such as oestrogens or progestogens had similar drawbacks.

So far as the operation of hysterectomy was concerned, Professor B thought that it could be performed with only mild discomfort to Jane and minimal risk. He said that girls of her age can be expected to be up on the day or day following such an operation and are usually discharged from hospital within a week or eight days after which no discomfort is expected. A minimal scar is left at the line of the public hair. The ovaries would not be removed so that her hormonal balance would remain unaffected. Professor B's view as to the desirability of a hysterectomy was supported by that of Dr R, a consultant obstetrician and gynaecologist from the Royal Women's Hospital who prepared a report at the request of the Public Advocate. He expressed the view that a hysterectomy was indicated and would be appropriate, safe and would offer Jane the best quality of life that could reasonably be expected.

Dr G, a psychiatrist, who also prepared a report at the request of the Public Advocate, after considering the possibility that appropriate behavioural programs might provide a solution to some of Jane's anticipated menstrual problems, strongly recommended against such programs. He commented:

> ``It is clear from the interview and from the documents, that Jane has made only minimal progress over a period of years. She is not really fully toilet trained and has a number of medical problems which would interfere with being able to learn behaviours relating to menstrual hygiene and would prevent her from, e.g. handling menstrual pads in a co-ordinated and effective fashion.
>
> It *might* be possible to teach her more appropriate social behaviours, but this would be an extremely slow and difficult process and that Jane herself could become distressed by the repetitive failures and `punishments' (however mild) which inevitably accompany such programs.

> One must also have sympathy for Jane's parents who are her effective care givers now, at an age, when they themselves would experience great problems in having to implement a new training program, no matter how much support they receive from professional staff.
>
> For all these reasons, then, I would strongly recommend against the introduction of any behavioural or similar program in this case."

He apparently made these comments in light of reports from Ms D, a psychologist with the Office of the Intellectually Disabled, that behavioural programs might produce some minimal progress in the areas of toilet and menstrual training and in light of an equivocal report from another psychiatrist, Dr K. These reports were also made before me.

Another psychiatrist who examined Jane on behalf of the respondents and who swore an affidavit in these proceedings, Dr L, also recommended a hysterectomy and concluded his report as follows:

> ``In my view hysterectomy offers Jane the retention, both hormonally and psychologically of her sexual identity and a possible sexual life if that ever becomes appropriate. At the same time, it eliminates her exposure to unwanted pregnancy or to potentially complex contraceptive treatments with which she would be unable to co-operate and freedom from at least one area of hygiene."

Counsel for the applicant did not seek to have Dr L, or any other witnesses for the respondents, other than Professor B attend for cross-examination but availed himself of the opportunity presented by the fact that the respondent mother was called by counsel for the respondents to ask one question of her which was whether her husband supported her in the application, to which she replied in the affirmative.

Counsel for the applicant made it clear that so far as the Public Advocate was concerned, the respondents were beyond criticism as parents and care givers for Jane, as were the rest of the family and the Public Advocate accepted that they had given Jane long and devoted attention and care and that everything that they have hitherto done for the girl, has been entirely appropriate. He, nevertheless, submitted that a hysterectomy was inappropriate in this case.

Before dealing with the applicant's submissions and those of the Commission, it is, I think, necessary to say something about the Court's jurisdiction. All parties agreed that the Court did have jurisdiction, but they were less certain about the source of it. Counsel for the applicant submitted that the Court's powers derived in part from the *Family Law Act* and in part from the *parens patriae* jurisdiction of the Supreme Court which he said this Court could avail itself of by reason of the *Jurisdiction of Courts (Cross-vesting) Act 1987* of the State of Victoria. He did not concede, however, that the referral of power to be found in the *Commonwealth Powers (Family Law — Children) Act 1986* of the State of Victoria and the consequential amendments to the *Family Law Act*, had the effect of conferring the Supreme Court's *parens patriae* jurisdiction upon this Court, although he said that the reference may have enabled the Commonwealth to confer that power upon the Court had it chosen to do so. That Act refers to the Parliament of the Commonwealth, to the extent to which they are not otherwise included in the legislative powers of the Parliament of the

Commonwealth, the maintenance of children and the payment of expenses in relation to children or child bearing and the *custody and guardianship* of and access to children.

So far as Victoria is concerned, sec. 60E and 60F of the *Family Law Act* apply the relevant provisions of that Act to all children. Sections 63 and 64 confer jurisdiction on the Family Court of Australia in relation to inter alia, all matters relating to the custody, guardianship and welfare of a child and sec. 63A would appear to make that jurisdiction exclusive.

Because of what he perceived to be his need to rely upon the cross-vesting provisions, counsel for the applicant applied for an Order that the requirements of O. 31A of the Rules of this Court in relation to proceedings involving cross-vesting law, be dispensed with. Counsel for the respondents, joined in this application and I made Orders accordingly. For present purposes, it is, I think, unnecessary for me to decide this interesting question since, whatever the source of power, it is clear that the Court can exercise the *parens patriae* jurisdiction of the Supreme Court in this case, together with any other powers which may be conferred upon it by the *Family Law Act*. I may say, however, that I think the better view is that such powers have in fact been conferred by the reference and the amendments to the *Family Law Act*.

I note that *Cook* J. in the case of *In re a Teenager* suggested that the principles to be applied in proceedings of this nature under the *Family Law Act* differ from those applicable under the *parens patriae* jurisdiction.

In *Re B* (1987) 2 W.L.R. 1213 Lord *Hailsham* said at p. 1214:

> ``There is no doubt that in the exercise of its wardship jurisdiction the first and paramount consideration is the well being, welfare or interests (each expression occasionally used, but each, for this purpose, synonymous) of the human being concerned, that is the ward herself or himself. In this case, I believe it to be the only consideration involved."

Section 60D provides:

> ``In proceedings under this Part in relation to a child, the court shall regard the welfare of the child as the paramount consideration."

There is no doubt that in so far as the Court is exercising jurisdiction under the *Family Law Act*, these proceedings are governed by sec. 60D and accordingly I can detect no difference in the principles to be applied. Like Lord *Hailsham*, I regard the child's welfare in this case to be the only relevant consideration and I do not regard other issues such as parental rights to be relevant.

It may be, as *Cook* J. said, that sec. 60F(2), 63E(1), (2) and (3) and 63F(1) of the *Family Law Act* do effect changes to the law relating to the custody and guardianship of children going beyond the common law, but they do not, in my opinion, affect the exercise by the Court of jurisdiction in matters of this nature. In proceedings such as this, the Court is not concerned with competing claims for custody or guardianship, but rather with the broader question as to whether it is in the interests of and for the welfare of the child that a surgical procedure of the type under consideration should be performed. In this case a second question arises, namely,

whether parents have the power to give consent to seek a procedure, or whether this is a matter solely within the province of the Court.

Similarly, in proceedings of this nature, I am unable to attach any significance, as *Cook* J. did, to the provisions of sec. 43 of the *Family Law Act* as in any way affecting the principles contained in sec. 60D. In my opinion, sec. 43(b) does no more than express in statutory form matters to which the courts have always had regard in a general sense, but which in no way affect the binding requirement of sec. 60D that the child's welfare is the paramount consideration. So far as sec. 43(c) is concerned, it may be that this has some relevance to the question as to whether the Court's consent is required, but I do not think that it otherwise adds to or qualifies the mandatory requirement of sec. 60D.

The injunction sought by the applicant seeks that the Court interfere to prevent the respondents from consenting to the hysterectomy being performed. The injunction sought may not of itself achieve the result sought by the applicant if it be the law, as the applicant argues, that the parents cannot consent to this procedure. For the same reason, the refusal of the injunction may not of itself have the effect of enabling the procedure to be carried out. I treat the two applications before me, however, as involving me determining whether the welfare of the child requires the performance of the procedure. I do not think it helpful to consider the matter in terms of which party bears the onus of proof in this case, but having regard to the gravity of the step proposed, it is, I think, appropriate that the state of satisfaction required before I find that the welfare of the child requires the performance of the procedure, must be something more than a mere tipping of the balance in favour of the proposal. If I am so satisfied, it follows that I would refuse the application for the injunction. It also follows that in such circumstances I then must determine the question as to whether it is necessary for the approval of the Court to be given having regard to the respondents' argument that the Court's consent is unnecessary. If I resolve that the procedure is for the welfare of the child and that the Court's consent is required, I would grant the respondents' application.

The question as to whether a court should intervene to prevent operations of this type upon mentally retarded persons has been considered in a number of cases in the United Kingdom, Canada and the United States and no doubt elsewhere. So far as I am aware, the only Australian decision is that of *In re a Teenager* of *Cook* J. to which I have already referred. It is clear that courts have a power to intervene in the exercise of their *parens patriae* jurisdiction and have frequently done so, both to approve or disapprove of the carrying out of procedures of this nature. Although the overriding principle to be applied in matters of this nature is whether the proposed operation is for the welfare of the child, it is, I think, helpful for this purpose, to give some consideration to the question of the rights recognised by the common law or by international humanitarian law in so far as it is appropriate, which might be said to be affected by such a decision.

First, it may, I think, be said to be accepted that the common law recognises a fundamental principle that every person's body is inviolate, but it is also obvious that such a wide principle must be subject to exceptions. In *Collins* v. *Wilcock* (1984) 3 All E.R. 374 at pp. 377-378, Robert *Goff* L.J. put the matter this way:

> ``The fundamental principal, plain and incontestable, is that every person's body is inviolate. It has long been established that any touching of another person, however slight, may amount to a battery. So *Holt* C.J. held in 1704 that: `The least touching of another in anger is a battery'. See *Cole* v. *Turner* (1704) 6 Mod. Rep. 149 90; E.R. 958. The breadth of the principle reflects the fundamental nature of the interests so protected; as Blackstone wrote in his *Commentaries*:
>
> > `The law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred and no other having a right to meddle with it, in any the slightest manner' (see 3 V1, Com 120).

The effect is that everybody is protected, not only against physical injury, but against any form of physical molestation. But so widely drawn a principle, must inevitably be subject to exceptions. For example, children may be subjected to reasonable punishment; people may be subjected to the lawful exercise of the power of arrest; and reasonable force may be used in self defence or for the prevention of crime. But, apart from these special instances where the control or constraint is lawful, a broader exception has been created to allow for the exigencies of every day life. Generally speaking, consent is a defence to battery; and most of the physical contacts of ordinary life are not actionable because they are impliedly consented to by all who move in society and so expose themselves to the risk of bodily contact. So nobody can complain of the jostling which is inevitable from his presence in, for example, a supermarket, an underground station or a busy street; nor can a person who attends a party complain if his hand is seized in friendship or even if his back is (within reason) slapped. (See *Tuberville* v. *Savage* (1669) 1 Mod. Rep. 3 86; E.R. 684.) Although such cases are regarded as examples of implied consent, it is more common nowadays to treat them as falling within a general exception embracing all physical contact which is generally acceptable in the ordinary conduct of daily life. We observe that, although in the past it has sometimes been stated that a battery is only committed where the action is `angry or revengeful, or rude or insolent' (see 1 Hawk PC c62 s2). We think that nowadays it is more realistic and, indeed, more accurate, to state the broad underlying principle, subject to the broad exception."

In *Wilson* v. *Pringle* (1987) 2 Q.B. 237 at p. 252, the Court of Appeal after referring with approval to this passage in Robert *Goff* L.J.'s judgment, said that it provided a solution to the old problem of what legal rule allowed a casualty surgeon to perform an urgent operation on an unconscious patient who cannot consent in circumstances where there was no next of kin available to do it for him. The Court said:

> ``Hitherto, it has been customary to say in such cases that consent is to be applied for what would otherwise be a battery on the unconscious body. It is better simply to say that the surgeon's action is acceptable in the ordinary conduct of everyday life and not a battery."

In *T* v. *T* (1988) 1 All E.R. 614, which was a sterilisation case, *Wood* J. referred to the statement appearing in some authorities that a touching must be hostile to be a battery and said:

> ``The incision made by the surgeon's scalpel need not be and probably is most unlikely to be hostile, but unless a defence or justification is established, it must, in my judgment, fall within the definition of a trespass to the person.
>
> Thus, in the present case I must face the fact that the operative procedures proposed are, prima facie, acts of trespass. It would be wholly unrealistic on the facts of this case, to think in terms of any implied consent."

Accordingly, the law appears to be that any surgical operation other than one falling within the exception referred to in *Wilson v. Pringle* is a trespass and probably a battery if performed without consent. However, at common law at least, the right to bodily inviolability can be waived either by consent of the person concerned, or in the case of persons unable to consent, if a procedure having a therapeutic aim is undertaken, consent can usually be given by a parent or guardian. Where as here, the procedure has an arguably non-therapeutic purpose, the legal position is less clear. I shall deal with this question subsequently.

It appears that in England the courts have also recognised a right to reproduce. In *Re D (a Minor)* (1976) Fam. L.R. 185; (1976) 1 All E.R. 326, *Heilbron* J. said at p. 332 (All E.R.):

> ``The type of operation proposed is one which involves the deprivation of 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."

Although her Honour did not cite authority for this proposition, it appears to have been accepted by the House of Lords in *Re B* and by the Supreme Court of Canada in *Re Eve* (1986) 25 S.C.R. 388. In the former case, the passage cited from the judgment of *Heilbron* J. was expressly approved in the Court of Appeal and by Lord *Hailsham* at p. 213, Lord *Bridge* at p. 214, Lord*Templeman* at p. 215 and Lord *Oliver* at p. 219.

This view, has been the subject of some criticism. See, for example, the article ``Sterilisation & The Courts", Grubb & Pearl 46 *Cambridge Law Journal* 439 at pp. 446-448. The learned authors point out that such a ``right" does not appear to have been explicitly recognised in international humanitarian law and suggest that the right concerned in cases such as this, is not a right to reproduce as such, but rather an aspect of the right to determine what is done with one's own body.

In the case of *Re Grady N.J.* 426A 2(d) 467, *Pashman* J. in giving the principal judgment of the Supreme Court of New Jersey said:

> ``Sterilisation may be said to destroy an important part of a person's social and biological identity — the ability to reproduce. It affects not only the health and welfare of the individual, but the well being of all society. Any legal discussion of sterilisation, must begin with an acknowledgement that the right to procreate is fundamental to the very existence and survival of the race. *Skinner* v. *Oklahoma* 316 U.S. 535 at p. 541. This right is a basic liberty of which the individual is forever deprived through unwanted sterilisation."

His Honour went on to say that in the U.S.A., at least, there is also a constitutional right to be sterilised as part of a right to control one's own body, citing cases such as *Griswold* v. *Connecticut* 381 U.S. 79, *Eisenstadt* v. *Baird* 405 U.S. 438 and other more recent cases. His Honour pointed out that although the U.S. Supreme Court had not as yet specifically recognised such a right, it has been recognised by a number of state appellate courts in the U.S.A. His Honour continued:

> ``Having recognised that both a right to be sterilised and a right to procreate exist, we face the problem as in *Quinlan* 355A 2(d) 647, that L is not competent to exercise either of her constitutional rights. What is at stake is not simply a right to obtain contraception or to attempt procreation, implied in both these complementary liberties, is a right to make a meaningful choice between them."

I find the analysis of *Pashman* J. to be a useful one for present purposes. It involves a clear recognition of the right to procreate or reproduce as being a basic human right recognised by the common law. In view of the fact that such a right appears to have been recognised by superior appellate courts in the United Kingdom, Canada and the United States, I am confident that such a right would also be recognised as forming part of the common law of Australia.

I also consider, however, that in Australian law as in U.S. law, there is no reason to suggest that there is not a right to refuse to procreate, i.e. a right to contraception whether by chemical means or sterilisation. Such a right appears to have been recognised in England. In *Thake* v. *Morris* (1984) 2 All E.R. 513, Peter *Pain* J. in considering whether public policy prevented the recovery of damages in contract for a negligently performed vasectomy, said:

``In approaching this problem I firmly put sentiment on one side. A healthy baby is so lovely a creature, that I can well understand the reaction of one who asks: how could its birth possibly give rise to an action for damages? But every baby has a belly to be filled and a body to be clothed. The law relating to damages is concerned with reparation in money terms and this is what is needed for the maintenance of a baby.

I have to have regard to the policy of the state as it expresses itself in legislation and in social provision. I must consider this in light of modern developments. By 1975 family planning was generally practised. Abortion had been legalised over a wide field. Vasectomy was one of the methods of family planning which was not only legal, but was available under the National Health Service. It seems to me to follow from this, that it was generally recognised that the birth of a healthy baby is not always a blessing. It is a blessing when the baby is to be born to the happy family life which we would all like a baby to have. Many people hold that that end can be best achieved by restricting natural fertility.

The policy of the state, as I see it, is to provide the widest freedom of choice. It makes available to the public the means of planning their families or planning to have no family. If plans go awry, it provides for the possibility of abortion. But there is no pressure on couples either to have children or not to have children, or to have only a limited number of children. Even the one parent family, whether that exists through choice or through misfortune, is given substantial assistance."

Although this decision was in part reversed on appeal ((1986) 1 All E.R. 497) no criticism was directed at this part of his Honour's reasoning.

I think that by and large, similar considerations apply in Australia. It is true, that abortion has not been the subject of legislation in Australia, as it has been in England, but the broadening of the common law in this area, has produced a not dissimilar result.
See *Re* v. *Davidson* (1969) V.L.R. 667. It is now clear, I think, that the minority view expressed by *Denning* L.J. in *Bravery* v.*Bravery* (1954) 1 W.L.R. 1169 does not reflect the modern law.

I consider that the rights in question may be better characterised as liberties to reproduce or not reproduce as the case may be. If characterised as rights *simpliciter*, it is difficult to see how a sterilisation operation carried out for non-therapeutic purposes (using the expression ``therapeutic'' as connoting the treatment of some disease or malfunction) could ever be lawful. If characterised as liberties, then the question of the lawful justification for such operations becomes clearer. If a person is capable of exercising a liberty, they may lawfully do so either by procreating or using methods of contraception, including sterilisation. If a person is incapable of choice, then consent may be given on their behalf. I shall turn subsequently to the question of whose consent is required, namely the parent or guardian or the Court.

I turn now to consider whether, as contended by the Human Rights Commission, the girl has additional rights under international humanitarian law if and in so far as the same forms part of the domestic law of Australia. The Human Rights and Equal Opportunity Commission contends that she has those rights and that they will be infringed if the operation proceeds.

The Commission is established, pursuant to the *Human Rights and Equal Opportunity Commission Act 1986*. Its functions are set out in sec. 11 of that Act and include inquiry into any act or practice which may be inconsistent with or contrary to any human right. Section 11(1)(o) provides:

> ``where the Commission considers it appropriate to do so, with the leave of the court hearing the proceedings and subject to any conditions imposed by the court, to intervene in proceedings that involve human rights issues;''

The Schedule to the Act sets out, inter alia, the International Covenant on Civil and Political Rights and certain declarations of the General Assembly of the United Nations, including the Declaration on the Rights of the Child, the Declaration on the Rights of Mentally Retarded Persons and the Declaration on the Rights of Disabled Persons.

The Commission contends that the following portions of those instruments are relevant to this case:

(a) International Covenant on Civil and Political Rights, Art. 7

``No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.''

(b) Declaration of the Rights of the Child

``Whereas the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth...

Now therefore,

The General Assembly

Proclaims this Declaration... and calls upon parents, upon men and women as individuals, and upon voluntary organizations, local authorities and national Governments to recognise these rights and strive for their observance by legislative and other measures progressively taken in accordance with the following principles:

Principle 1

The child shall enjoy all the rights set forth in this Declaration. Every child, without any exception whatsoever, shall be entitled to these rights, without distinction or discrimination on account of race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or other status, whether of himself or of his family.

Principle 2

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally spiritually and socially in a healthy and normal manner...

Principle 4

... [The child] shall be entitled to grow and develop in health...

Principle 5

The child who is physically, mentally or social handicapped shall be given the special treatment, education and care required by his particular condition.

Principle 6

The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents...

Principle 7

The child is entitled to receive education... He shall be given an education which will... enable him, on the basis of equal opportunity, to develop his abilities...

The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents."

(c) Declaration on the Rights of Mentally Retarded Persons (Sch. 4)

``**The General Assembly,**

...

Bearing in mind the necessity of assisting mentally retarded persons to develop their abilities in various fields of activities and of promoting their integration as far as possible in normal life,...

Proclaims this Declaration... and calls for national and international action to ensure that it will be used as a common basis and frame of reference for the protection of these rights;

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

2. The mentally retarded person has a right to proper medical care and physical therapy and to such education, training, rehabilitation and guidance as will enable him to develop his ability and maximum potential.

...

4. Whenever possible, the mentally retarded person should live with his own family or with foster parents and participate in different forms of community life. The family with which he lives should receive assistance. If care in an institution becomes necessary, it should be provided in surroundings and other circumstances as close as possible to those of normal life.

...

6. The mentally retarded person has a right to protection from exploitation, abuse and degrading treatment...

7. Whenever mentally retarded persons are unable, because of the severity of their handicap, to exercise all their rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedure used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and to the right of appeal to higher authorities."

(d) Declaration on the Rights of Disabled Persons (Sch. 5)

``**The General Assembly**

...

Bearing in mind the necessity... of assisting disabled persons to develop their abilities in the most varied fields of activities and of promoting their integration as far as possible in normal life,

...

Proclaims this Declaration... and calls for national and international action to ensure that it will be used as a common basis and frame of reference for the protection of these rights:

1. The term `disabled person' means any person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of deficiency, either congenital or not, in his or her physical or mental capabilities.

2. Disabled persons shall enjoy all the rights set forth in this Declaration. These rights shall be granted to all disabled persons without any exception whatsoever and without distinction or discrimination on the basis of race, colour, sex, language, religion, political or other opinions, national or social origin, state of wealth, birth or any other situation applying either to the disabled person himself or herself or to his or her family.

3. Disabled persons have the inherent right to respect for their human dignity. Disabled persons, whatever the origin, nature and seriousness of their handicaps and disabilities, have the same fundamental rights as their fellow-citizens of the same age, which implies first and foremost the right to enjoy a decent life, as normal and full as possible.

4. Disabled persons have the same civil and political rights as other human beings; paragraph 7 of the Declaration on the Rights of Mentally Retarded Persons applies to any possible limitation or suppression of those rights for mentally disabled persons.

5. Disabled persons are entitled to the measures designed to enable them to become as self-reliant as possible.

6. Disabled persons have the right to medical, psychological and functional treatment, including prosthetic and orthopaedic appliances, to medical and social rehabilitation, education, vocational training and rehabilitation, aid, counselling, placement services and other services which will enable them to develop their capabilities and skills to the maximum and will hasten the process of their social integration or reintegration.

...

10. Disabled persons shall be protected against all exploitation, all regulations and all treatment of a discriminatory, abusive or degrading nature.

> 11. Disabled persons shall be able to avail themselves of qualified legal aid when such aid proves indispensable for the protection of their persons and property..."

The Commission concedes that the Act itself does not give any of the instruments set out in the Schedule the force of law.

However, it submits that Australian courts will treat customary international law as incorporated into the domestic law of Australia so far as it is not inconsistent with any applicable statute law or with any binding precedent. In support of this proposition, it cites *Buvot* v. *Barbut (1736)* as approved by Lord *Mansfield* C.J. in *Triquet* v. *Bath* (1764) (3) Burr. 1478 at p. 1481: 97 E.R. 936 at p. 938; *Trendtex Trading Corporation* v. *Central Bank of Nigeria* (1977) 1 QB 529 per Lord Denning M.R. at pp. 553-554; *Chung Chi Cheung* v. *R.* (1939) A.C. 160 at pp. 167-168; *Chow Hung Ching* v. *R.* 77 C.L.R. 449 at pp. 477-479 per *Latham* C.J.; pp. 462-465 per *Starke* J.; pp. 470-471 per *Dixon* J.; *Polites* v. *The Commonwealth* (1945) 70 C.L.R. 60 per *Williams* J. at pp. 80-81.

The Commission further submits that in order to ascertain the nature of customary international law, the courts will have regard to international treaties and conventions, authoritative texts, the Charter of the United Nations, Declarations of the General Assembly and other international developments which show that a particular subject has become a legal subject of international concern. In support of this propositional, it cites *Polites v. The Commonwealth* and *Koowarta* v. *Bjelke-Petersen* (1982) 153 C.L.R. 168 at pp. 218-221 per *Stephen* J. and pp. 234-235 per *Mason* J. In further support of this submission, it relies upon sec. 11(1)(o) of the Act to which I have already referred and says that this involves an implied recognition of the rights conferred by the instruments set out in the Schedule to the Act on the basis, so the Commission says, that it is unlikely that the Parliament would have given the Commission an intervener function unless the rights referred to in the Schedules of the Act were capable of being applied by a court on existing legal principles.

I am extremely doubtful as to whether these propositions represent the law in Australia.

In *Jago v. The District Court of N.S.W. & Ors* (New South Wales Court of Appeal, unreported, delivered 10 May 1988) *Samuels* J.A. discussed the status of international covenants and declarations including the International Covenant on Civil and Political Rights to which Australia, with certain reservations and declarations, is a party. His Honour pointed out that accession to a treaty or international covenant or declaration does not incorporate the instrument into domestic law in the absence of express stipulation and cited *R.* v. *Secretary of State for the Home Department & Anor Ex Parte Bhajan Singh* (1976) 1 Q.B. 198 at p. 207 and *R.* v. *Chief Immigration Officer Heathrow Airport & Anor Ex Parte Salamat Bidi* (1976) 1 W.L.R. 979 and*Sezdirmezoglu and Anor* v. *Acting Minister for Immigration and Ethnic Affairs (No. 2)* (1983-84) 51 A.L.R. 575 at p. 577. His Honour discussed the statement of *Scarman* L.J. in *R. v. Secretary of State for the Home Department Ex Parte Phansopkar* (1976) Q.B. 606 at p. 626 to the effect that it was the duty of, inter alia, the courts in interpreting and applying the law to have regard to the European Convention on Human Rights and referred to subsequent criticisms of that statement contained in the

judgments of *Roskill* L.J. and Lord *Denning* in *Ex Parte Bidi* at pp. 985-986 and 984-985 respectively. His Honour concluded:

> ``Certainly, if the problem offers a solution of choice, there being no clear rule of common law, or a statutory ambiguity, I appreciate that consideration of an international convention may be of assistance. It would be more apt in the case of ambiguity, although in either case it would be necessary to bear in mind not only the difficulties mentioned by Lord *Denning*, but the effect of discrepancies in legal culture. In most cases I would regard the normative traditions of the common law as a surer foundation for development."

Kirby P. adopted a somewhat broader view. After citing English authority including *Ex Parte Phansopkar*, he said:

``The position in Australia is complicated by reason of the Federal Constitution. The precise relationship of Australian domestic law to international law remains to be settled in the future, cf. *Chow Hung Ching* (1949) 77 C.L.R. 449 at pp. 462, 471, 477. See also *Polites v. The Commonwealth* (1945) 70 C.L.R. 60 at p. 81 and *Kioa* v. *Minister for Immigration and Ethnic Affairs* (1984) 55 A.L.R. 669 at p. 680. Note: see Anderson & G.C. Rowe `Human Rights in Australia: National and International Perspectives' (1986) 24 *Archiv Des Volkerrechts* 5683. None the less, I regard it to be at least as relevant to search for the common law of Australia applicable in this State with the guidance of a relevant instrument of international law to which this country has recently subscribed as by reference to disputable antiquarian research concerning the procedures which may or may not have been adopted by the itinerant justices in eyre in parts of England in the reign of King Henry II.

Our laws and our liberties have been inherited in large part from England. If an English or imperial statute still operates in this State, we must give effect to it to the extent provided by the *Imperial Acts Application Act 1969*, especially sec. 6, Sch. 2, Pt I. But where the inherited common law is uncertain Australian Judges, after the *Australia Act* (1986) at least, do well to look for more reliable and more sources for the statement and development of the common law. One such reference point may be an international treaty which Australia has ratified and which now states international law."

In this context, it is of interest to note the comments of the learned authors of the article referred to by *Kirby* P. at p. 80 in relation to the question of the incorporation of rules of public international law into the municipal law, so far as it is not inconsistent with rules enacted by statutes or finally declared by the courts. The learned authors say:

> ``Application of this doctrine immediately raises problems. First, what are the principles sought to be thus incorporated? Most international human rights law is treaty based, and therefore referrable to specific words. But they are not usually precise, or necessarily tailored to local conditions: precision and adaptation may need to be effected locally by the appropriate organ. To the extent that human rights derive from customary law, or from treaties which become to some extent customary, there is an even greater lack of authoritative definition. There is no international court with hierarchical authority to pronounce human rights law for the use of Australian Courts. The International Court of

> Justice can decide according to international conventions, international custom, general principles of law recognised by civilised nations and judicial decisions and teachings of publicists, yet also (with the agreement of the parties) simply *ex aequo et bono*. Although comparisons might be drawn between these terms and the method of the common law, the ambit of these terms indicates a lesser degree of definition and a lesser observance of a hierarchical curial authority than exists in and appear necessary to the working of the common law."

The learned authors go on to point out that other difficulties are that international law is primarily framed in terms of state conduct and that the status of an international principle once municipally incorporated, is not easy to determine. They comment:

> ``As an international principle, it is not subject to the doctrine of *stare decisis*. If at the municipal level, it is subject to the normal common law principles, including those of *stare decisis* (and the consequently limited and awkward processes of amendment) it presumably cannot continue directly to receive modifications from the international sphere."

The learned authors point out that the Australian position is that one is left with a number of judicial statements which taken together are inconclusive.

I do not think that the annexure of the relevant covenants as Schedules to the *Human Rights and Equal Opportunity Commission Act* takes the matter any further. The Commission seeks to draw some comfort from this fact, together with the intervener role which the Act gives to the Commission. However, as *Samuels* J.A. pointed out in *Jago's case*, such instruments are not to be regarded as incorporated into domestic law in the absence of express stipulation. If there ever was an opportunity to expressly incorporate these instruments into domestic law, it was presented by the *Human Rights and Equal Opportunity Commission Act* and the Parliament chose not to do so. Accordingly, I can see no basis for drawing the inference relied upon by the Commission — see also *Kioa* v. *West* (1985) 159 C.L.R. 550 per *Gibbs* C.J. at p. 570, *Wilson* J. at p. 604 and *Brennan* J. at p. 630.

I think that the better view of the law is that whilst it may be open to have regard to such instruments as an aid to determining what the common law is in the event of doubt about, for example, the existence of a particular right, they are not by their terms incorporated into Australian domestic law. It is, nevertheless, permissible and, I believe, useful to have regard to them in considering the exercise of discretion.

I am, accordingly, quite unable to agree with the Commission's proposition that in applying sec. 60D of the *Family Law Act*, a court is bound to apply the various provisions of these instruments in so far as they are not inconsistent with it. In fact, there are inconsistencies as is apparent on examination of the relevant provisions. For example, Principle 6 of the Declaration of the Rights of the Child states that:

> ``Except in exceptional circumstances, a child of tender years should not be separated from his mother."

The High Court has determined that there is no preferred position of the mother. See *Gronow* v. *Gronow* 144 C.L.R. 513. See also *Raby* v. *Raby* (1976) FLC ¶90-104.

The Commission in support of its submission sought to rely upon sec. 43(c) of the *Family Law Act*, which requires the Court to have regard, inter alia, to ``the need to protect the rights of children''. In my opinion, however, this cannot qualify the Court's primary obligation to regard the child's welfare as paramount nor incorporate the relevant international instruments and accordingly this submission takes the matter no further. It is obvious that a court will in considering whether a particular course is in the best interests of a child have regard to the rights of the child, but these cannot be said to override the Court's primary duty under sec. 60D.

I turn now to consider the differing approaches adopted by the courts to the question of surgical procedures of this nature. There is a significant divergence of opinion between the courts of the United Kingdom and Canada as to the proper approach to be taken. In *Re Eve* (1986) 25 S.C.R. 388, the Supreme Court of Canada allowed an appeal from the Court of Appeal of Prince Edward Island permitting the sterilisation of a 24-year-old mentally retarded woman. The woman in question was significantly handicapped, albeit, it would appear, not quite as severely as Jane. The Judge at first instance had refused the application finding that she, like other individuals was entitled to the inviolability of her person which was a right that superseded her right to be protected from pregnancy. He concluded that neither the Court nor the parents had the authority or the jurisdiction to authorise a surgical procedure on a mentally retarded person, the purpose of which was solely contraceptive and not therapeutic.

The judgment of *La Forest* J. in the Supreme Court of Canada, with whom the other members of the Court concurred, contains, a most useful summary of the history of the *parens patriae*jurisdiction and of developments in the United Kingdom and the United States, as well as Canada, up to the time that the case was decided in 1986. His Honour expressed the test as to the exercise of discretion as being to do what was necessary for the protection of the person concerned (p. 427).

After discussing the serious nature of the operation and the various views expressed in Working Paper 24 of 1977 by the Law Reform Commission of Canada, *La Forest* J. concluded:

> ``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 difficulty she would have in fulfilling her duties as a parent. As well, we 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."

His Honour, correctly in my view, discounted the purpose of relieving the mother of Eve of anxiety or difficulty. He also discounted the question of difficulties with menstruation as

being likely to be less troublesome than urinary and faecal control and the argument that there would be difficulties with delivery. I do not believe that these matters can be so readily discounted in this case at least. His Honour concluded:

> ``The grave intrusion on a person's rights and the certain physical damage that ensues from non-therapeutic sterilisation 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 authorised for non-therapeutic purposes under the *parens patriae* jurisdiction."

In the case of *Re B*, the House of Lords took an entirely different approach. In that case, the girl in question was aged 17 years, but her ability to understand speech was that of a six-year-old and her ability to express herself that of a two-year-old. Like Jane, she was beginning to show signs of sexual awareness. The evidence was, as in this case, that she could not be placed on any effective contraceptive regime, was not capable of knowing the causal connection between intercourse and childbirth, the nature of pregnancy or what was involved in delivery. In that case there was also evidence that a Caesarian section was contraindicated, owing to the likelihood of her opening her post operative wounds. There was no evidence before me in this case as to anticipated difficulties with post-operative wounds. Apart from this, the fact situation bears considerable similarities and indeed Jane's state of retardation might be thought to be slightly worse than that of the girl in *Re B*.

The House of Lords upheld the decision of the trial Judge and the Court of Appeal approving the operation, which in that case was a tubal ligation.

In doing so, the decision of the Canadian Supreme Court in *Re Eve* was considered and discussed and also the earlier decision of *Heilbron* J. in *Re D (a Minor)* (1976) Fam. L.R. 185 in which her Honour declined to sanction an operation which involved the deprivation of a girl's right to reproduce in circumstances where the evidence indicated that she was of an intellectual capacity to marry and would in the future be able to make her own choice as to the bearing of children.

In discussing the conclusion which I have quoted from the judgment of *La Forest* J. in *Re Eve*, Lord *Hailsham* said at p. 1216:

> ``But whilst I find the Court's history of the *parens patriae* jurisdiction of the Crown, at pp. 14-21, extremely helpful, I find, with great respect, their conclusion at p. 32, that the procedure of sterilisation should never be authorised for non-therapeutic purposes, totally unconvincing and in startling contradiction to the welfare principle which should be the first and paramount consideration in wardship cases. Moreover, for the purposes of the present Appeal, I find the distinction they purport to draw between therapeutic and non-therapeutic purposes of this operation in relation to the facts of the present case above as totally meaningless, and if meaningful, quite irrelevant to the correct application of the welfare principle. To talk of the `basic right' to reproduce of an individual who is not capable of knowing the causal connection between intercourse and childbirth, the nature

> of pregnancy, what is involved in delivery, unable to form maternal instincts or to care for a child, appears to me wholly to part company with reality."

Similar views were expressed by Lord *Bridge* at p. 1217 and Lord *Oliver* at p. 1223.

I respectfully agree with the views expressed by the learned Law Lords. These views have been the subject of critical comment upon the basis that the mere fact that a person is unable to appreciate the significance of a particular right does not entitle anyone to deprive him of that right. Such criticisms, I believe, involve a basic misunderstanding as to what the learned Law Lords were saying. They were not saying, as was said in the Canadian case of *Re K: K* v. *Public Trustee* (1985) 4 W.W.R. 724, that the rights in question ceased to exist. As I understand it, what was being said was that in addressing the overall question of the infant's welfare, the fact of the existence of such a right in the particular case was of less significance from the point of view of the infant's welfare than it would have been if there was some appreciation of it by the infant. Each case must be considered on its own facts and it is obvious that this right would and should assume greater significance in cases such as *Re D or Stump* v. *Sparkman* (1978) 435 U.S. 349 than in cases such as *Re B* or the present case.

I would add that I consider that the Supreme Court of Canada expressed the test to be applied much too narrowly in suggesting that what the Court's task was, was to do what was necessary for the *protection* of the person concerned. The concept of welfare raises much broader issues than protection although it includes it. Although the right to reproduce and the right to bodily inviolability are important, and indeed, vital matters to which a court must pay regard, the fact is that persons of both sexes who are capable of consent, frequently do consent to sterilisation operations and, in my opinion, it may well be discriminatory if persons who are and always will be incapable of consent, are to be precluded from sterilisation if it can be established that it is for their welfare for such a procedure to be undertaken.

Although as *La Forest* J. pointed out in *Re Eve*, some U.S. decisions and indeed some state legislation are influenced by or involved now discredited eugenic theories, I consider that the decision of the Supreme Court of New Jersey in *Re Grady* throws useful light upon the correct approach to the present problem. In that case, *Pashman* J., who delivered the majority judgment, propounded the following standards as a guide to courts considering cases of this sort.

> 1. That it was ultimately the duty of the Court rather than the parents to determine the need for sterilisation. (I shall return to this aspect subsequently.)
>
> 2. That in every case where application is made for authorisation to sterilise an allegedly incompetent person, the Court should appoint an independent guardian *ad litem* as soon as possible to represent the ward and should receive independent medical and psychological evaluations by qualified professionals.
>
> 3. The trial Judge must find that the individual lacks capacity to make a decision about sterilisation and that the incapacity is not likely to change in the foreseeable future.

4. The trial court must be persuaded by clear and convincing proof that sterilisation is in the incompetent person's best interests. To determine those interests, the Court should consider at least the following factors:

> (a) The possibility that the incompetent person can in fact become pregnant.
>
> (b) The possibility that the incompetent person will experience trauma or psychological damage if she becomes pregnant or gives birth and conversely the possibility of trauma or psychological damage from the sterilisation operation.
>
> (c) The likelihood that the individual will voluntarily engage in sexual activity or be exposed to situations where sexual intercourse is imposed upon her.
>
> (d) The inability of the incompetent person to understand reproduction or contraception and the likely permanence of that inability.
>
> (e) The feasibility and medical advisability of less drastic means of contraception, both at the present time and under foreseeable future circumstances.
>
> (f) The advisability of sterilisation at the time of the application rather than in the future.
>
> (g) The ability of the incompetent person to care for a child or the possibility that the incompetent may at some future date be able to marry and with a spouse care for a child.
>
> (h) Evidence that scientific or medical advances may occur within the foreseeable future which will make possible either improvement of the individual's condition or alternative and less drastic sterilisation procedures.
>
> (j) A demonstration that the proponents of sterilisation are seeking it in good faith and that their primary concern is for the best interests of the incompetent person rather than their own or the public's convenience.

His Honour pointed out that these factors should each be given appropriate weight as the particular circumstances dictate and that the list is not meant to be exclusive, the ultimate criterion being the best interests of the incompetent person.

His Honour concluded at p. 486:

> ``The potential for abuse in sterilisation of mentally impaired persons allows the exercise of substituted consent only when rigid procedural and substantive criteria are satisfied. By applying the standards we have developed, courts will be able to protect the human rights of people least able to protect themselves.

L should have the opportunity to lead a life as rewarding as her condition will permit. Courts should cautiously but resolutely help her achieve the fullness of that opportunity. If she can

have a richer and more active life, only if the risk of pregnancy is permanently eliminated, then sterilisation may be in her best interests. Upon a clear and convincing demonstration, it should not be denied to her."

I consider that the approach of the Court in *Re Grady*, is in accordance with that of the House of Lords in *Re B* and I think that it is to be preferred to the approach adopted by the Supreme Court of Canada in *Re Eve*. I further think that the criteria suggested by *Pashman* J. are most useful for the purpose of considering applications of this nature.

I turn now to the submissions of the Public Advocate on the issue as to whether it is in the child's interests that the operation be performed. Counsel for the Public Advocate opposed the respondent's proposal to consent to the operation on a number of grounds. First, he said that there was no evidence of fertility or the likelihood of fertility and, accordingly, he suggested that any operative treatment was premature.

Secondly, he said that in so far as the operation was said to be necessary to avoid menstrual difficulties, this was a factor which related more to the child's care givers than to the child herself.

Thirdly, he said that pregnancy of itself would present more of a problem to the care givers than to the girl herself and that her sterilisation would not protect her from unwanted sexual assault, but only from the consequences of sexual interference.

He conceded, however, that the added burdens associated with menstrual hygiene problems and the possibility of, or the fact of, pregnancy, might affect the family's continued ability to care for the child.

Fourthly, he said that hysterectomy was a radical and serious surgical procedure and that other and lesser alternatives, such as drug treatment had not been properly assessed before taking the decision for a hysterectomy. He conceded that on the evidence there was no real prospect of bringing about a significant improvement in this girl's disabilities by behavioural training.

As to the first submission, the medical evidence was clear that the girl will menstruate in due course. This being so, I can see no purpose in subjecting her to, what for her will be, a frightening and unnecessary experience simply to dispel any faint doubts.

As to the submission that the avoidance of menstrual difficulties was a matter only for the child's care givers and not the child herself, the evidence is again clear that the child is affected by expressions of disgust or rejection in the event of soiling herself in public and the evidence is also clear that lack of menstrual hygiene will involve some exacerbation of the chronic urinary infections from which she suffers. I agree that in considering the question of the child's welfare I am unable to take into account the difficulties that may ensue for her care givers, per se. On the other hand, it is clearly very much in her interests that she remain in the care of her family rather than that of an institution, and it is, I think, at least arguable that any step which eases the family burden which she presents, has the indirect benefit of increasing the likelihood that she will be retained within the family circle and not institutionalised.

As to the third matter raised by the applicant, it is true that hysterectomy will not protect Jane from unwanted sexual assault, but will certainly protect her from any pregnancy which results from such an event. I am quite unable to accept that pregnancy would be a problem for the care givers rather than for Jane. Common sense suggests that from Jane's point of view, pregnancy would be a disaster. She would be faced with bewildering and uncomfortable physiological changes, which she would not understand, followed by trauma associated either with childbirth, Caesarian section or abortion. She could have no maternal relationship with any child that was born. In all the circumstances, I regard it as offending common sense to suggest that her welfare would not be detrimentally affected by a pregnancy.

As to the applicants' final argument which was also adopted by the Human Rights Commission, it is clear on the evidence before me that a program of training in relation to menstrual hygiene would be of no benefit to Jane. Further, it is also clear that the lesser alternatives such as tubal ligation and pharmacological treatment have been assessed by all doctors who have been consulted in relation to the matter and that medical opinion is strongly in favour of hysterectomy as the appropriate course to be undertaken.

I turn now to the submissions of the Human Rights and Equal Opportunities Commission. Although I have rejected the Commission's submission that the various Declarations and the Covenant form part of domestic law, it is, I think, helpful to deal with the Commission's submissions based upon those instruments as a means of testing the exercise of my discretion.

The Commission says that, prima facie, the proposed procedure violates the rights of Jane because it involves:

(a) the invasion of her bodily integrity;

(b) intervention to change what would otherwise be her normal physical development;

(c) prevention of her menstruation which would (probably) occur in the normal course of her growth and development;

(d) serious risks to her health, including the immediate and post-operative risks attendant on the surgery, and the immediate and possible longer term risks of the general anaesthetic;

(e) discriminatory treatment in that it is not contested that this surgical procedure would never be used in the absence of disease on a normal girl of the same age as Jane;

(f) discriminatory treatment to the extent that an hysterectomy would not be considered appropriate in the case of most severely retarded girls of Jane's age, at least until less invasive methods such as special training techniques or pharmacological control have been tried;

(g) depriving Jane of the opportunity for special treatment of education, which would enable her to develop whatever ability she may have to manage her menstruation;

> (h) depriving Jane of her right to benefit from measures such as special training programs and techniques which would enable her to become as self-reliant as possible in the management of her natural bodily functions.

As to (a), I consider that freedom from invasion of bodily integrity is a common law right as hereinbefore appears subject to exceptions which include surgical operations performed with appropriate consent. The actual invasion here is no greater than that involved in any other surgical procedure. Once it is determined that it is for the child's welfare or benefit, I can see no distinction under this head between this and any other surgical procedure for her welfare such as an appendectomy in that both involve an invasion of bodily integrity. Given the irreversible nature of the procedure and the interference with her normal development that is involved, however, other human rights issues are raised which I shall deal with subsequently. I am not satisfied, however, that once it is determined that the procedure is for her benefit, this particular right is violated, per se.

As to (b) and (c), the intervention obviously does alter her normal physical development leading to menstruation and the fact that menstruation would occur in the normal course of her growth and development. Prima facie, therefore, it would appear that the procedure does involve an interference with these rights. However, in the present case, given the nature of the proposed interference, the question must be asked as to what value the right of normal physical development of the type prevented will be to this girl. It is obvious that the procedure is intended to prevent such part of her normal physical development as will enable her to menstruate and consequently to bear children. It thus also involves interference with her right to reproduce or, perhaps more aptly, her liberty to choose to reproduce. On the other hand, if such procedure is not undertaken, she will be subject to the risk of unwanted pregnancy with the consequential unacceptable effects upon her to which I have referred and the difficulties associated with menstruation. In *Re B* Lord *Bridge* said at p. 1217 in a passage which I respectfully adopt in relation to the present case:

> ``In *Re D (a Minor) (Wardship Sterilisation)* (1976) Fam. L.R. 185, *Heilbron* J. correctly described the right of a woman to reproduce as a basic human right. The Canadian Supreme Court in *Re Eve* refer equally aptly to `the great privilege of giving birth'. The sad fact in the instant case is that the mental and physical handicaps under which the ward suffers effectively render her incapable of ever exercising that right or enjoying that privilege. It is clear beyond argument that for her pregnancy would be an unmitigated disaster."

I can do no more than echo his Lordship's words in the instant case and would add that on the evidence before me, menstruation as such would not only add nothing to this girl's quality of life, but would significantly diminish it.

As to (d), the evidence of Professor B, which I accept, does not support the proposition that the operation involves serious risks to her health.

As to (e), it must be conceded that this operation would not, in the absence of disease, be performed on a normal girl, such as Jane. The Commission, therefore, argues that the operation is discriminatory because of the intellectual retardation of this girl. In my opinion,

it does not necessarily follow that to permit such an operation in this case does amount to discrimination. It could be said that it may well be discriminatory to take the view espoused by the Commission and, indeed, by the Supreme Court of Canada that because a person is incapable of consenting, they are precluded from benefiting from treatment which is in reality for their welfare. In the present case, it is unnecessary for me to finally decide this question, because once I have decided as I have, that this procedure is for the welfare and benefit of the girl, this supersedes the considerations raised by the Commission.

As to (f), I do not accept the proposition that the proposed procedure is discriminatory as between this and other retarded girls. I have accepted the evidence before me that less invasive methods are inappropriate, and accordingly no question of discrimination arises.

Similar considerations apply to (g) and (h). I accept the evidence of Dr G that in this case, such training would not be appropriate and would not be for the benefit of the child supported as it is by the other medical evidence.

The Commission submitted that if I concluded that any human rights of Jane would be violated, then the onus lay on the respondents to satisfy the Court to the *Briginshaw* standard that each of the requirements of the Declaration on the Rights of Mentally Retarded Persons Art. 2 and the Declaration on the Rights of Disabled Persons Art. 4 have been satisfied and further as required by the Declaration of Mentally Retarded Persons Art. 1, that there is no feasible alternative which would be less invasive of her rights and that even if so satisified, the Court would still have discretion whether or not to permit the operation to proceed at this time.

Accordingly, the Commission submits that the respondents would have to show in the case of each human right of the infant, which is prima facie threatened by the proposed operation, that:

> (a) Jane is positively unable, because of the severity of her handicap, to exercise that right in a meaningful way, or that it is necessary to restrict or deny that right;
>
> (b) the procedure proposed here, including the manner in which the decision to perform the operation is made, contained proper legal safeguards against every form of abuse;
>
> (c) that the procedure proposed is based on an evaluation by qualified experts.

For reasons already stated, I do not agree that as a matter of law, it does lie upon the respondents to establish these matters. However, even if I am wrong about this, I am satisfied that in the present case, any rights of Jane which are infringed are rights which she is unable to exercise in a meaningful way and/or that it is necessary to restrict or deny such rights. I am further satisfied that the procedure proposed here, including the manner in which the decision to perform the operation is made, contains proper legal safeguards against every form of abuse. The matter has been fully tested before me in Court and my decision is subject to appeal. My decision in the matter has been based upon an evaluation by qualified experts and I have accepted their evidence that it is appropriate that the operation should proceed. The

operation will be carried out under appropriate conditions in a major Melbourne public hospital and I am satisfied that no abuse can or will occur.

In this case, I am satisfied that the advantages of the proposed procedure from the point of view of Jane's welfare, far outweigh other considerations. I have excluded from my considerations the possible effects on her care givers. I consider, as did the House of Lords in *Re B* that operations of this nature must only be sanctioned as a last resort. I also consider that the criteria established by the Supreme Court of New Jersey in *Re Grady* are satisfied in the present case. I consider that in her case, it would be an act of cruelty to leave her in a position where she may be liable to exercise her right to reproduce. I think that this operation can only improve her quality of life and I accordingly propose to refuse the injunction sought by the applicant.

I now turn to the difficult question as to whether the parents, as distinct from the Court, can give a lawful and effective consent to a hysterectomy in circumstances such as arise in the present case.

Counsel for the respondents argued that they could do so because he said that the Court, in the exercise of its *parens patriae* jurisdiction, simply stood in the place of the parents and it followed that if the Court could consent to such an operation being performed on one of its wards, so could the parents consent to the operation on one of their children who was a non-ward.

This does not appear to be correct as a matter of law. In *Hewer* v. *Bryant* (1969) 3 All E.R. 578 at pp. 584-585, *Sachs* L.J. said in a passage which I adopt:

``This strict personal power of a parent or guardian physically to control infants, which is one of the rights conferred by custody in its wider meaning, is something different to that power over an infant's liberty up to the age of 21 which has come to be exercised by the courts on behalf of the Crown as *parens patriae*... It is true that in the second half of the last century, that power was so unquestionably used in aid of the wishes of the father that it was referred to as if its resultant exercise was a right of the father... In truth, any powers exercised by way of physical control in the later years of infancy, were not the father's personal powers but the more extensive ones of the Crown."

The *parens patriae* jurisdiction of the Court is one of great antiquity. I am content, for this purpose, to adopt the historical account of it set out by *La Forest* J. in *Re Eve* at pp. 407-409. The salient features that emerge are that it was a jurisdiction transferred from the Crown through the Court of Wards and Liveries eventually to the Court of Chancery. It originally involved the care of persons of unsound mind, but was later extended to cover all infants. It is a distinct jurisdiction from the wardship jurisdiction and wardship was used by Chancery merely as a device by which the Court exercised its *parens patriae* jurisdiction.

The current *parens patriae* jurisdiction of this Court derives from sec. 85(2) of the *Constitution Act 1985* of the State of Victoria which confers upon the Supreme Court of Victoria the powers of the Court of Chancery as at the time of the passage of Act No. 502 of that State in 1875.

In turn, this Court exercises that jurisdiction either pursuant to the *Commonwealth Powers (Family Law — Children) Act 1986* in conjunction with the *Family Law Act* or the *Jurisdiction of Courts (Cross-vesting Act) 1987* of the State of Victoria.

Further, it appears that the *parens patriae* power can be exercised independent of wardship although the latter has commonly been used by the courts as a device to enable the power to be exercised. In *Re E (an infant)* (1956) Ch. 23, *Roxburgh* J. took the view that the *parens patriae* jurisdiction could not be invoked until after an infant became a ward of the Court. The better view appears to be to the contrary, see *Director General of Social Welfare* v. *J* (1976) V.R. 89. Although this decision was reversed by the High Court, see *Johnson* v. *Director-General of Social Welfare* 135 C.L.R. 92, this part of the Court's judgment was not questioned — see also *Re L* (1968) 1 All E.R. 20 per Lord *Denning* M.R. This view is also more consistent with the historical origin of the jurisdiction being for the protection of persons of unsound mind.

The fact that the jurisdiction exists independently of wardship is important for present purposes because if it were otherwise, it would be difficult to maintain that a court's consent was necessary in order to perform an operation on a non-ward.

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

I note that in *In re a Teenager* (1989) FLC ¶92-006 *Cook* J. would be prepared to trust the ethics of the medical profession not to engage in improper unethical conduct. With respect to his Honour and to the vast majority of that profession, I am unable to accept this proposition. Like all professions, the medical profession has members who are not prepared to live up to its professional standards of ethics and experience teaches that the identity of such medical practitioners becomes known to those who require their assistance and their services are availed of. Further, it is also possible that members of that profession may form sincere but misguided views about the appropriate steps to be taken.

In this regard, the case of *Re D* might be thought to exemplify the problems that can ensue. In that case, the child was 11 years of age. She suffered from a condition known as Sotos Syndrome, the symptoms of which included accelerated growth during infancy, epilepsy, generalised clumsiness and unusual facial appearance and some impairment of mental function. The child suffered these signs and symptoms, but had shown improvement at a special school, academically, socially and behaviourably. She had an IQ of 80 which was in the dull, normal range and the understanding of a child of 9½ years. There was evidence that she was likely to continue to improve. It was common ground that she would have sufficient intellectual capacity to marry in due course. One would have thought, and the learned Judge so found, that sterilisation was unthinkable in such a case. Nevertheless, the parents and their medical advisers sincerely believed that the operation was warranted and would have carried it out had they not been restrained by order of the Court.

Likewise, in *Re B* (1981) 1 W.L.R. 1421, obviously sincere parents had taken a decision not to seek medical treatment for a Downs Syndrome child in circumstances where surgical intervention could save the child's life. The Court in the exercise of its *parens patriae* jurisdiction, overruled their decision.

The Connecticut case of *Hart* v. *Brown* (1972) 289 A 2d 386, is a case in point. In that case, the Court upheld the parent's decision to permit a healthy identical twin to donate a kidney to his sibling. In doing so, however, it did not uphold the parent's autonomy to take such a decision. Although the actual decision to permit the operation has been criticised, it is authority for the proposition that a court's consent is necessary before such procedures can be carried out on infants.

The problems associated with leaving these decisions to parents and their medical advisers are, of course, accentuated where as in this case, the child is intellectually retarded to the extent that she has no appreciation of what is proposed. In the case of *In re a Teenager, Cook* J., in deciding that decisions of this nature were a matter for the parents and not a court, placed considerable reliance on *Re K: K v. Public Trustee* (1985) 4 W.W.R. 724, which was a decision of the Court of Appeal of British Columbia. That case involved the performance of an hysterectomy on a severely mentally handicapped child of 10½ years of age. The Court of Appeal reversed a decision of the trial Judge refusing to permit the operation. In so far as the Court found that the trial Judge focused on the rights of mentally handicapped people generally, rather than on the best interests of the child in question, I have no difficulty with its decision, nor with the ultimate finding that the operation was for the benefit of the child. I confess to having great difficulty, however, with *Anderson* J.A.'s finding (with which *Aikins* J.A. concurred) that the case was not a sterilisation case. This appears to have been based upon the proposition that once the medical evidence was accepted that the child would never have the intellectual capacity to appreciate the loss of her uterus or the menstrual function, then no right of the child was impinged and the procedure became a simple medical procedure, justified by medical evidence as to the child's phobic reaction to the sight of blood. It followed therefore that the operation stood in no different light to any other. It seems to me, with respect, that the child's rights were not removed by her lack of appreciation of them, although this factor was properly a matter for the Court to consider in determining whether the procedure was for the welfare of the child.

I also have difficulty in accepting the Court's rejection of the *Briginshaw* test as to reasonable satisfaction for approving such an operation and its view that wise and caring parents should have the right to make the decision with regard to their child and that generally they are in a better position than a court is to make such a decision. These propositions seem to me to fly in the face of the paramountcy of the welfare of the child principle. Naturally, the views of the parents should be taken into account by the Court and given appropriate weight, but this does not absolve the Court from its primary duty.

Finally, before leaving this case I must express my respectful disagreement with the view expressed by *Anderson* J.A. that the rights of children might well be prejudiced by the need to apply to the court for leave to carry out procedures of this kind. Although some of the inconveniences referred to by his Honour which are set out at [p. 77,214, (1989) FLC ¶92-006] of the judgment of*Cook* J., may occur, it is my opinion that the rights of such children

are much more likely to be detrimentally affected by a ruling that the Court's permission is not required when procedures of this kind are contemplated than otherwise. Not all parents are wise and caring and not all medical practitioners are ethical and reasonable.

In my opinion, although I do not differ from his ultimate finding, *Cook* J. in *In re a Teenager* laid undue emphasis upon the rights of parents in a case in which he was required to regard the child's welfare as paramount. He quoted extensively from and relied upon the House of Lords' decision in *Gillick* v. *West Norfolk & Wisbech Area Health Authority & Anor* (1986) 1 Fam. L.R. (Eng.) 224. I consider that judgment to be of peripheral relevance to this case, its only significance being the fact that it sets limits upon the efficacy of parental consent, viz-a-viz the rights of the child. It was not a wardship case, nor did it involve consideration of the Court's *parens patriae* power and their Lordships' speeches must be read with this fact in mind.

Similarly, I do not regard the cases of *Re Cook and Maxwell* JJ.; *Ex parte C & Anor* (1985) FLC ¶91-619 and *J* v. *Lieschke* 69 A.L.R. 647, particularly helpful in the present context.

The remarks quoted by *Cook* J. from the judgment of *Brennan* J. in the former case, were made in the context of a case involving the constitutionality of Commonwealth laws, and in any event, the passage quoted from his Honour's judgment, in no sense suggests that parental rights are in any way absolute.

The second case involved the question of a natural parent's right to be heard in proceedings instituted under the New South Wales *Child Welfare Act* and *Brennan* J.'s remarks must be read in that context. Certainly, it was not suggested in the present case and I would not accept that parents in proceedings of this kind have no right to be heard, but this does not mean that they have the right to consent to operative procedures of this kind as *Cook* J. found.

I am also unable to gain any assistance from sec. 43(b) or 60F of the *Family Law Act* in determining this question. I can see nothing in the terms of either section which has the effect of elevating the parental rights at the expense of the rights of the child.

I agree with his Honour, however, that the existence or otherwise, of State legislation limiting the right of persons to conduct operative procedures of this sort, is of no assistance in determining the issues in this case. I note that the relevant New South Wales legislation had not been proclaimed at the time of his Honour's judgment. In Victoria, the relevant legislation is the *Guardianship and Administration Board Act 1986*. Section 37(1) of that Act prohibits the carrying out of major medical procedures on a represented person (i.e. a person in respect of whom a guardian has been appointed) without the consent of the Board set up under the Act. The operation of the Act is, however, for this purpose confined to adults. Counsel for the Public Advocate, indicated that in the case of children, the Public Advocate took the view that the Court stood in a similar position to that of the Board and that it would be somewhat incongruous if the consent of the Board was required in relation to an operation of this kind upon an intellectually handicapped adult, but the consent of the Court was not required in the case of an intellectually handicapped child. Whilst this may well be so, it is apparent that the

passage of an Act in Victoria in 1986 gives no guidance as to the extent and nature of the ancient *parens patriae* jurisdiction of the Court or the interpretation of the *Family Law Act*.

No doubt because of the Court's wide use of its wardship jurisdiction in conjunction with the *parens patriae* jurisdiction, there are comparatively few authorities which address the question of whether a court's consent is necessary to perform surgical procedures of some and what type. Most medical procedures are obviously capable of being consented to by parents and, indeed, it is proper that this should be so. In practice, it has usually been only when some third party has intervened and invoked the Court's wardship jurisdiction that the Court was required to deal with these matters. Once that jurisdiction is invoked, there is no question that it is the Court's consent that is required and not the parents' and therefore most authorities do not deal with this question.

In the present case, however, no wardship application has been made and therefore the issue arises squarely for consideration.

In *Re B*, (1987) 2 W.L.R. 1213, Lord *Templeman* expressed the firm view that sterilisation of a girl under 18 should only be carried out with the leave of a High Court Judge and that a doctor performing a sterilisation operation, with the consent of the parents might still be liable in criminal, civil or professional proceedings (W.L.R. 1218). He appeared to base this view upon the fact that the operation involved an interference with a girl's fundamental right to bear a child.

Support for such a proposition, although expressed in different terms is to be found in *Re Eve*. Although I have found myself unable to follow that case in so far as it is authority for the proposition that non-therapeutic sterilisation can never be authorised by the Court, it is nevertheless persuasive authority for the view that there are some medical procedures which require the consent of the Court before they can be performed on a person incapable of consenting to the same.

Further, if, as appears, the ancient purpose of the *parens patriae* power was to protect the intellectually disabled and such protection was later extended to all infants, and assuming that it is a jurisdiction independent of the wardship jurisdiction and broader and of a different nature than that of a parent in relation to a child, this would appear to provide a sound legal basis for the proposition that a court's consent should be obtained in relation to the performance of certain medical procedures on children or intellectually retarded persons.

Support for this view is also to be found in the decision of the Supreme Court of New Jersey in *Re Grady*. In that case, *Pashman* J. said at p. 482:

> ``First, it is ultimately the duty of the Court rather than the parents to determine the need for sterilisation. It is true, that the custody, care and nurture of the child resides first in the parents. *Prince* v. *Massachusetts* 321 U.S. 158. But the constitutional right of reproductive autonomy is a right personal to the individual. *Eisenstadt v. Baird (supra)*. While the parents may advise a child and participate in his decision, that decision belongs to the child not to his parents. *Bellotti* v. *Baird* 443 U.S. 662; *Planned*

Parenthood of Missouri v. Danforth (supra). The Supreme Court of Washington correctly observed that:

> `Unlike the situation of a normal and necessary medical procedure, in the question of sterilisation the interests of the parents of a retarded person cannot be presumed to be identical to those of a child. In *Re Hayes (supra)* 608 P 2(d) at 640'."

In the same case, at p. 475, *Pashman* J. made the point that sterilisation of incompetents, especially the mentally impaired, has been subject to abuse in the past.

This also seems to be the situation in Australia. The Victorian Report of the Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons (The Cocks Committee) in its Report of December 1982, indicated that it had received a number of reports of unnecessary sterilisation operations being performed on developmentally disabled people (p. 62). It also noted similar expressions of concern to be found in the Bright Report, the Report of the Anti-Discrimination Board in New South Wales and the Royal Commission on Human Relationships.

Pashman J. commented at p. 475:

> ``Since the sterilisation decision involves a variety of factors well suited to rational development in judicial proceedings, a court can take cognizance of these factors and reach a fair decision of what is in the incompetent's best interest. Our courts routinely make such decisions in adoption and child custody cases... although we do not equate sterilisation of incompetents with adoption or child custody, we think it sufficiently analogous to warrant close supervision by our courts. All three affect important aspects of an individual's personal and family life, and all three entail serious and permanent consequences. Independent judicial decision-making is the best way to protect the rights and interests of the incompetent and to avoid abuses of the decision to sterilise.
>
> Our discussion thus far leads to the following conclusion. The right to choose among procreation, sterilisation and other methods of contraception, is an important privacy right of all individuals. Our courts must preserve that right. Where an incompetent person lacks the mental capacity to make that choice, a court should ensure the exercise of that right on behalf of the incompetent in a manner that reflects his or her best interests."

I think that these views have much force. In cases of this nature the care givers, usually being the parents, cannot be expected to view the matter dispassionately or impartially because they themselves are so intimately involved with the problems presented to them by reason of their care of the child in question. I think that such serious decisions require the approval of a court, in this case the Family Court, the judges of which are well equipped to deal with problems of this nature.

Once the view is taken that certain operative procedures performed upon minors or intellectually retarded persons require a court's consent, the difficulty emerges of defining the circumstances in which such consent is required. In *Re D, Heilbron* J. described the proposed operation as non-therapeutic and in *Re Eve* the Court adopted such a test. The distinction

between therapeutic and non-therapeutic procedures was strongly criticised as a test by the House of Lords in *Re B*, but as I understand it the criticism was directed at the use of such a test in determining the extent of the *parens patriae* jurisdiction of the Court. This would appear to emerge from the speech of Lord *Oliver* at p. 1223 (W.L.R.) when his Lordship said:

> ``Something was sought to be made of the description of the operation for which authority was sought in *Re D* as non-therapeutic — using the word therapeutic as connoting the treatment of some malfunction or disease. The description was no doubt, apt enough in that case, but I do not, for my part, find the distinction between therapeutic and non-therapeutic measures helpful in the context of the instant case, for it seems to be entirely immaterial whether measures undertaken for the protection against future and foreseeable injury, are properly described as therapeutic. The primary and paramount question is only whether they are for the welfare and benefit of this particular young woman situate, as she is situate in this case."

It accordingly, does not follow that such a test is of no value in determining which procedures might require a court's consent. A problem may emerge in disentangling therapeutic from non-therapeutic procedures are defined, as Lord *Oliver* did, as connoting the treatment of some malfunction or disease, because there may be mixed aims associated with a particular procedure. Indeed, in the instant case, counsel for the respondents argued that the operation did have therapeutic aims, namely, the prevention of difficulties associated with menstruation and the reduction in the likelihood of urinary infections associated therewith. I think that this difficulty can be overcome, however, by asking whether the principle or a major aim of the procedure has a non-therapeutic purpose. In the present case, this is clearly so. If it does have as a principal or major aim a non-therapeutic purpose, then the Court's consent should be obtained.

Another difficulty may be that some non-therapeutic procedures are generally accepted and are performed as a matter of routine for religious or social purposes. In this category would fall male circumcision (although arguably, it may also have a therapeutic purpose). Similarly, some cosmetic surgery may well be regarded as non-therapeutic.

Nevertheless, it seems to me that the law at least establishes that parental consent is insufficient where a medical procedure involves interference with a basic human right such as a person's right to procreate, unless it is clear that the interference is occasioned by some medical condition which requires such treatment. There may well be other rights which parents cannot interfere with such as, for example, the right to life but it is unnecessary for present purposes for me to consider the difficult questions that may arise in this area.

I am satisfied for the reasons already given, that it is in Jane's best interests and welfare that this procedure should be permitted and I accordingly propose to grant the parent's application.

In conclusion, I think it appropriate to say something about the role of the Public Advocate in this matter. I think that the Public Advocate acted both responsibly and properly in making an application to the Court. If the approach had been by the parents, I would have sought that the child's interests be represented and in the absence of an official such as the Public Advocate,

to undertake this role, it would probably be appropriate to make an order for separate representation of the child pursuant to the *Family Law Act*.

I consider that it is vital that before procedures of this type are sanctioned by the Court, it should have the benefit of an independent presentation from some disinterested third party on behalf of the child. In the present case, I have been greatly assisted by the submissions and evidence placed before me by the Public Advocate and by the submissions of the Human Rights Commission.

Counsel for the Public Advocate also requested that I give leave pursuant to sec. 121(9)(d) of the *Family Law Act* to permit in any publication of reports of the proceedings, the Public Advocate to be identified so that members of the public will be informed of the role or potential role of the Public Advocate in proceedings such as these. I regard this as a proper request and I propose to permit such publication and also, so far as such leave is necessary, publication of the pseudonym of Jane, which I have given to the girl, the subject of this application. Otherwise, however the provisions of the section will continue to apply.

The orders of the Court will be:

1. That the Application for an Injunction be dismissed.

2. That the Court sanction a hysterectomy operation being performed on the girl known as Jane.