

## The Eve Decision — A Common Law Perspective

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Résumé de l'article

Par l'arrêt *Eve*, la Cour suprême du Canada a précisé le droit à deux égards au moins. Premièrement, les curateurs ne pourront dorénavant permettre des stérilisations contraceptives involontaires que si la loi provinciale visée le prévoit expressément et clairement. Dans l'affaire *Eve*, la loi de l'Île-du-Prince-Édouard ne le faisait pas. Deuxièmement, même si elle a un champ illimité et s'étend aux cas où une intervention médicale est en jeu, la juridiction *parens patriae* des tribunaux ne peut servir de fondement pour autoriser des stérilisations non thérapeutiques. En excluant l'application des pouvoirs de *parens patriae* et en soulignant que les juges ne sont pas vraiment à même de s'occuper adéquatement de ce type d'affaires, la Cour suprême a peut-être incité le législateur à agir dans ce domaine. L'auteur indique que les lois qui pourraient être ainsi édictées devraient sans doute prévoir l'accès des malades mentaux à la stérilisation contraceptive, ainsi que certaines *garanties* pour protéger ceux qui ne peuvent consentir à la stérilisation dans l'intérêt des tiers.

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## The Eve Decision — A Common Law Perspective

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### ABSTRACT

*By its decision in the Eve case, the Supreme Court of Canada clarified and settled the law in at least two important respects. From now on, provincial statutes can only be used to authorize guardians to permit involuntary contraceptive sterilizations if their wording clearly and explicitly so provides. The Prince Edward Island statute in question did not do so. Secondly, though the Court's parens patriae jurisdiction is of unlimited scope and does extend to cases involving medical procedures, it cannot serve as the basis for authorizing non-therapeutic sterilizations. By ruling out the applicability of parens patriae, and by insisting that judges are not able to deal adequately with such cases, the Supreme Court may have strengthened the case for new legislation in this area. The writer argues that such legislation should provide for access to contraceptive sterilization for the mentally disabled, and the needed safeguards to protect those unable to consent or refuse from the imposition of sterilization in the interests of parties other than themselves.*

### RÉSUMÉ

*Par l'arrêt Eve, la Cour suprême du Canada a précisé le droit à deux égards au moins. Premièrement, les curateurs ne pourront dorénavant permettre des stérilisations contraceptives involontaires que si la loi provinciale visée le prévoit expressément et clairement. Dans l'affaire Eve, la loi de l'Île-du-Prince-Édouard ne le faisait pas. Deuxièmement, même si elle a un champ illimité et s'étend aux cas où une intervention médicale est en jeu, la juridiction parens patriae des tribunaux ne peut servir de fondement pour autoriser des stérilisations non thérapeutiques. En excluant l'application des pouvoirs de parens patriae et en soulignant que les juges ne sont pas vraiment à même de s'occuper adéquatement de ce type d'affaires, la Cour suprême a peut-être incité le législateur à agir dans ce domaine. L'auteur indique que les lois qui pourraient être ainsi édictées devraient sans doute prévoir l'accès des malades mentaux à la stérilisation contraceptive, ainsi que certaines garanties pour protéger ceux qui ne peuvent consentir à la stérilisation dans l'intérêt des tiers.*

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### **I. THE FACTS, THE TRIAL COURT AND COURT OF APPEAL**

At the time of the application to the trial court (the Supreme Court of Prince Edward Island), Eve was 24 years old, and suffered from what was described as "extreme expressive aphasia", that is, a condition in which the patient cannot communicate outwardly thoughts or concepts which she may or may not have perceived. It was established, at least to the satisfaction of the court, that Eve was mildly to moderately retarded. She did however have some learning skills, and was described as a pleasant affectionate person.

During the week Eve attended a school for retarded adults in another town. From Monday to Friday she lived with relatives, and returned to her mother's house for the weekends. Eve's mother was worried about two things, both of which motivated her application to the court that she be authorized to consent to Eve's sterilization :

- (i) The emotional effect on Eve of a possible pregnancy and subsequent birth. At her school she had become friendly with a male student, one also mentally disabled, but less so than Eve. It should however be added that the school authorities had talked to that student and were confident that any danger of pregnancy at least from that source was precluded.
- (ii) Secondly, Eve's mother was worried about the burden on herself should Eve become pregnant and bear a child. She maintained that Eve would not be able to cope with a mother's duties, and she the mother would have to take over those responsibilities. She did not feel able to cope with such duties should they come to pass. She was a widow and approaching 60 years old.

Eve's mother therefore applied to the Supreme Court of P.E.I. for three remedies. Eve was not represented by counsel at the hearing of the application. The three remedies requested were :

- (i) that Eve be declared mentally incompetent in accordance with the provisions of the province's *Mental Health Act*;
- (ii) that Eve's mother be appointed as the committee (guardian) of the person of Eve;
- (iii) that the court authorize Eve's mother to consent to the sterilization of Eve by means of a tubal ligation.

The trial judge focused on the third of these requests, seeing no particular problem with the first two, and concluding from the evidence that Eve was not capable of informed consent. He obviously believed that Eve's mother was genuinely concerned about Eve. But he nevertheless concluded that the court could not in the exercise of its *parens patriae* jurisdiction authorize what in this case would have been a purely contraceptive sterilization, and that in the absence of unequivocal statutory authority, parents or others could not give a valid consent to contraceptive sterilization. The trial judge held in part the following :

The Eves of this world, regardless of how retarded, are, nevertheless, persons with rights which the courts must preserve and protect. One of these rights is the inviolability of their persons from involuntary trespass. This right supersedes that referred to... as the right to be protected from pregnancy. While the preservation of this right might well, and even predictably, result in no little inconvenience and expense, and indeed, even hardship to others, the Court must, regardless of its own natural sympathy to those others, ensure that the law have the care of those who are not able to care for themselves, and ensure the preservation of the higher right...<sup>1</sup>

An appeal was then launched (to the Supreme Court of P.E.I. *in banco*), an order was made appointing a guardian *ad litem* for Eve (the Official Trustee), and the trial decision was reversed, though the court differed on the evidence.<sup>2</sup> The Court of Appeal was unanimous in concluding that the court does have in proper circumstances the authority and jurisdiction to authorize the sterilization of a mentally incompetent person for non-therapeutic reasons, in view of its *parens patriae* powers.

The Court of Appeal rendered its final judgment in the form of an *addendum* (January 9, 1981) some six months after its original reasons for judgment (July 31, 1980). In its final judgment the court :

- (i) made Eve a ward of the court pursuant to the *parens patriae* jurisdiction, for the sole purpose of facilitating and authorizing the sterilization;
- (ii) authorized the sterilization of Eve by a competent medical practitioner;

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1. *Re Eve*, reported *sub. nom. Re E*, (1979) 10 R.F.L. (2d) 317 (P.E.I.S.C.).

2. *Re Eve* (1980, 1981) 115 D.L.R. (3d) 283 (P.E.I.S.C., *in banco*).

- (iii) reserved its approval of the method of sterilization to be followed pending further submissions.

A hysterectomy was later authorized.

Mr. Justice MacDonald dissented on the evidence. He agreed with the majority that in principle the court could order in exceptional circumstances the non-therapeutic sterilization of a mentally incompetent person, and warned against any rigid ruling out of the possibility that justifiable cases may come forward in the future. But any such applications must pass a number of tests which he proposed. The evidence did not persuade him that those tests could be met in the case of Eve. In his view, the operation on Eve should be classified as only a "possible social convenience" for Eve, not clearly enough necessary for her welfare.

Mr. Justice MacDonald was also in the minority in doubting the applicability of the province's *Mental Health Act*.

## II. THE SUPREME COURT OF CANADA

Eve's guardian *ad litem* was granted leave to appeal that decision to the Supreme Court of Canada, which Court in October 1986 allowed the appeal and restored the decision of the trial judge.<sup>3</sup>

The ruling and reasons of Mr. Justice La Forest were as follows :

The grave intrusion on a person's rights and the certain physical damage that ensues from non-therapeutic sterilization without consent, when compared to the highly questionable advantages that can result from it, have persuaded me that it can never safely be determined that such a procedure is for the benefit of that person. Accordingly, the procedure should never be authorized for non-therapeutic purposes under the *parens patriae* jurisdiction.<sup>4</sup>

Not surprisingly, this decision was received and continues to be received by some with varying degrees of disappointment, and by others with applause and enthusiasm. An extreme example in the former category was that of a physician who writes a regular column for the *Globe & Mail*. He wrote in part :

October 23, 1986 was another day of infamy in Canadian history. The do-gooders of this country cheered the unanimous ruling... Every parent in this country should be outraged by this decision. This judgment is... a senseless and callous decree.<sup>5</sup>

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3. *Eve v. Mrs. E. et al.*, [1986] 2 S.C.R. 388.

4. *Id.*, p. 431.

5. W. GIFFORD-JONES, M.D., "A Plea to Protect Parents from the Supreme Court", *Globe and Mail*, December 2, 1986, p. A-2.

On the other side was for example Gordon Fairweather, the Chief Commissioner of the Canadian Human Rights Commission, who wrote in part :

I am an unreconstructed and unrepentant do-gooder who cheered the unanimous decision of the Supreme Court of Canada...<sup>6</sup>

In the brief time available to me I will not attempt to address all the many interesting and important common law issues which this decision explicitly raises, or which arise as a result of it. I will confine myself to several key points, focusing especially on those which we were all asked to address by Madame Justice L'Heureux-Dubé.

### 1. Voluntary contraceptive sterilization in common law Canada

It is worth noting by way of preliminary that in the common law provinces, sterilization, including contraceptive sterilization, is uniformly acknowledged today to be within the law for consenting adults of sound mind.<sup>7</sup>

The conditions are the usual ones applying to any medical treatment — the adult must be of sound mind, and give an informed consent, and the physician must meet the standard of care required of him. There is no requirement in the law for spousal consent. Nor is there any need to justify the sterilization in those cases on the grounds of providing a "benefit" to the patient.<sup>8</sup>

That right is even confirmed by statute in some instances, for example in Ontario<sup>9</sup> and in Prince Edward Island.<sup>10</sup>

Whereas the Canadian Medical Protective Association once adopted a conservative position on the matter, already in 1970 it decided

6. R.G.L. FAIRWEATHER, Letter to the Editor, "Do-gooder Tackles MD on Retarded Case", *Globe and Mail*, December 10, 1986, p. A-7.

7. See for example, B. DICKENS, *Medico-Legal Aspects of Family Law*, Butterworths, Toronto, 1979, 28-29; E. PICARD, *Liability of Doctors and Hospitals*, (2<sup>nd</sup> ed.) Carswell Legal Publications, Toronto, 1984, 132-134; R. KOURI and M. SOMERVILLE, "Comments on the Sterilization of Mental Incompetents in Canadian Civil and Common Law", (1980) *R.D.U.S.*, 599. It should be recalled that the majority judges of the Court of Appeal clearly disassociated themselves from the *obiter dictum* of Denning, L.J. in the 1954 decision in *Bravery v. Bravery*, [1954] 3 All E.R. 59 per Denning, L.J. at 67-8. In that *obiter*, Denning said that purely contraceptive sterilization, for instance to have sexual intercourse "without shouldering the responsibility attending to it, is, plainly injurious to the public interest. It is degrading to the man himself..."

8. See B. STARKMAN, "Sterilization of the Mentally Retarded Adult : The Eve Case", (1981) 26 *McGill Law Journal*, 931 at 936.

9. *Family Law Reform Act*, R.S.O. 1980, c. 152, s. 65(2).

10. *Family Law Reform Act*, S.P.E.I., 1978, c. 6, s. 60.

that even though requests for sterilizations present physicians with problems,

The problems should be left for decision by individual doctors faced with the patient requesting the operation, to be decided just as he would decide about any other request for non-essential treatment.<sup>11</sup>

## 2. No statutory jurisdiction

The first question addressed by Mr. Justice La Forest was whether Prince Edward Island statutes, in particular the *Mental Health Act*<sup>12</sup> and the *Hospital Management Regulations* (adopted pursuant to s. 16 of the *Hospitals Act*<sup>13</sup>) empower a committee (guardian) to authorize a non-therapeutic sterilization.

This issue does not get us to the heart of the matter; I will deal with it only briefly, and for two reasons. First of all, the Court of Appeal itself appears to have abandoned in the addendum to its original judgment the claim it made earlier, namely that the *Mental Health Act* provides sufficient statutory authority for the court to appoint a committee (guardian) with power to act for Eve in this matter. In the addendum to the judgment (delivered some six months after its decision), the Court of Appeal ignored the statutory procedure for determining mental incompetency, and simply made Eve a ward of the court for the one purpose of authorizing the sterilization.

Secondly, Mr. Justice La Forest himself stated that the question of statutory authority was only a "preliminary skirmish", "une escarmouche préliminaire". He goes on to say (p. 406) that the real issue is whether the court, in the exercise of its *parens patriae* power can authorize the sterilization in question. To that matter I will turn in a moment.

But before doing so, some brief remarks should be directed to this matter of statutory authority. Mr. Justice La Forest concluded that the provisions of the *Mental Health Act* apply to persons in need of guardianship who also possess *property*. One of its provisions, s. 30A(2) does empower the court to appoint a committee of the *person*, and not just of the *estate* of a person in need of guardianship. It may *impliedly* empower the court to authorize *medical treatment*, but not *all* medical

11. "Sexual Sterilization for Non-Medical Reasons", (1970) 102 C.M.A.J., 211.

12. *Mental Health Act*, R.S.P.E.I., 1974, c. M-9, as amended by S.P.E.I., 1974, c. 65, ss. 2(n), 30A(1), (2), 30B, 30L.

13. *Hospitals Act*, "Hospital Management Regulations", R.S.P.E.I., c. H-11, s. 48.

procedures. The proposed sterilization is not for any medical condition Eve has — it is non-therapeutic. Mr. Justice La Forest concludes :

... it would take much stronger language to persuade me that they empower a committee to authorize the sterilization of an individual for non-therapeutic purposes.<sup>14</sup>

Another statute was also relied upon before the Supreme Court of Canada, the *Hospitals Act*, and its *Hospital Management Regulations*. But Mr. Justice La Forest insists that they in no manner authorize the performance of an operation. Their purposes are quite other.

He concludes :

I rather doubt that the Act empowers the making of regulations affecting the right of the individual, particularly a basic right involving an individual's physical integrity. For in the absence of clear words, statutes are of course not to be read as depriving the individual of so basic a right.<sup>15</sup>

That insistence upon the requirement that statutes specify in *clear and strong* language any provision of authority to authorize non-therapeutic sterilization, clarifies a contentious issue. It has long been unclear whether mental health acts and related statutes and regulations which provide for guardians who can authorize "medical treatment" in the best interests of the incompetent, includes *non-therapeutic* sterilization as well.

Generally speaking it has been thought unlikely that those statutes in the various common law provinces permit a substitute to authorize a non-therapeutic medical procedure on another.<sup>16</sup> It was doubtful, but uncertain, as to whether the best interests test to be applied by a guardian could justify for example contraceptive sterilization. It would seem that the answer is now clear. Unless clear and explicit authority for guardians to authorize non-therapeutic procedures is spelled out in those statutes, they can only be read as if they do *not* provide guardians with that authority.

Only the province of Alberta has a statute authorizing a guardian to consent to a procedure for preventing pregnancy to be performed on a dependent adult. The statute in question is the *Dependent*

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14. *Eve v. Mrs. E.*, *supra*, note 3, at 403.

15. *Id.*, p. 406.

16. See for example E. LIBERMAN, "Mental Competency and Medical Treatment in Ontario", (1985) 6:2 *Health Law in Canada*, 32, 34. See also, R. KOURI and M. SOMERVILLE, "Comments on the Sterilization of Mental Incompetents in Canadian Civil and Common Law", (1980) 10 *R.D.U.S.* 599. They suggest (p. 621) that, to the extent that sterilization of a mentally incompetent person could be considered psychiatric treatment, it may be covered by the provisions of s. 31A(2) of Ontario's *Mental Health Act*. But they acknowledge that such an interpretation would be unlikely.



*Adults Act*.<sup>17</sup> The "health care" which the guardian may authorize includes among other things, "any procedure taken for the purpose of preventing pregnancy".<sup>18</sup> The usual condition is also specified in that Act, namely that it be in the *best interests* of that dependent adult. Some of course would argue that it never is in the best interests of a mentally retarded adult to undergo contraceptive sterilization. But the legislator would seem to have assumed by the wording of that provision, that at least some cases would indeed pass the best interests test.

On the other hand, it should be noted that even the *Alberta Dependent Adults Act* may not necessarily include sterilization within the scope and definition of "health care" and "any procedure taken for the purpose of preventing pregnancy." As one commentator has noted :

When the *Dependent Adults Act* was introduced, the responsible Minister stated it was not the intention to cover sterilization. The definition of health care includes contraception, but quite apart from the Minister's disclaimer, it would be odd to find that a legislature which repealed the *Sexual Sterilization Act* out of solicitude for the fundamental right to procreate, had by a sidewind conferred on the guardian of a dependent adult the power to authorize sterilization in the name of contraception.<sup>19</sup>

### 3. The *parens patriae* jurisdiction of the court

Having found no authority in the Prince Edward Island statutes, Mr. Justice La Forest then turned to the only other possible source for the authorization of a non-therapeutic sterilization — the *parens patriae* jurisdiction of the court. That inquiry takes us to the heart and essence of the *Eve* decision. In fact, almost half of the judgment is devoted to a detailed analysis of that doctrine, and its applicability to the issue before the court.

In view of space constraints, I will attempt to list in summary form the substance of the analysis of *parens patriae* presented by Mr. Justice La Forest.

- (i) Despite a degree of vagueness in its origins, as regards the mentally retarded person, "the *parens patriae* jurisdiction was never limited solely to the management and care of the *estate* but also to the *person* of a mentally retarded or defective person". (p. 409)
- (ii) Its purpose is essentially *protective* in nature (p. 408), and a court may act on the basis of its *parens patriae* jurisdiction not

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17. *Dependent Adults Act*, R.S.A. 1980, c. D-32.

18. *Ibid.*, s. 1(h)(ii).

19. W.F. BOWKER, "Minors and Mental Incompetents : Consent to Experimentation, Gifts of Tissue and Sterilization", (1981) 26 *McGill Law Journal*, 951, at 975.

- just on the ground that injury *has* occurred, but also when such injury is *apprehended*. (p. 426)
- (iii) The *scope* of the *parens patriae* jurisdiction is *unlimited* extending as far as is necessary for protection, including as yet “uncontemplated situations where it appears necessary for the protection of those who fall within its ambit”. (p. 411)
  - (iv) The *parens patriae* jurisdiction extends to cases involving *medical procedures*; in some cases grounding the permission of courts to *perform* a therapeutic life-saving medical operation against the wishes of parents, e.g. *Re B*<sup>20</sup> (p. 415); in others grounding the *refusal* of a court to authorize sterilization despite the request for it by parents, e.g. *Re D*<sup>21</sup> (pp. 413–415).
  - (v) It can be used to authorize surgical operations deemed necessary for either the *mental* health or *physical* health of a person. (p. 427)
  - (vi) Provincial Superior Courts in Canada have the same *parens patriae* jurisdiction as was vested in the Lord Chancellor in England and exercised by the Court of Chancery there (p. 409), and the courts do not need to resort to statutes like the *Mental Health Act* to exercise that jurisdiction, whether over children or adults. (p. 408)
  - (vii) Though the scope of the *parens patriae* jurisdiction is unlimited, the *discretion to exercise it* is limited. It is based on necessity, not convenience. It involves acting for the patient’s “best interests”, “benefit”, or “welfare” (p. 426). Among the factors arguing for great caution in using it in the context of requests for sterilization are these :
    - the values involved are highly sensitive and misconceptions or prejudices about the mentally retarded still abound. (p. 427)
    - sterilization removes the “privilege of giving birth”. (p. 427)
    - for all practical purposes it is irreversible. (p. 427)
    - hysterectomy in particular is the most intrusive procedure; in effect it is major surgery. (p. 427)
    - sterilization is not usually performed for purposes of medical treatment, for people whose health is in danger.
    - sterilization can do serious psychological harm to the mentally handicapped person. (p. 429)

Mr. Justice La Forest also rejects as a trend to be followed, what he characterizes as the unjustifiable extension of the *parens patriae*

20. *Re B (a minor)*, (1982) 3 F.L.R. 117.

21. *Re D (a minor)*, [1976] 1 All E.R. 326.

jurisdiction assumed by some American courts ruling on sterilization in recent years. He takes issue with two approaches in particular.

One involves the application of *best interest guidelines* which in his view provide too much latitude and discretion to the courts. They stray too far he says from what could be termed "necessity", what is necessary for the person's protection. As well, they are :

Not a sufficiently precise or workable tool to permit the *parens patriae* power to be used in situations like the present.<sup>22</sup>

His real point is that tests which may be adequate in some situations, are not in these cases, given the serious consequences of being wrong. Surgical sterilization is after all *irreversible*, and there is therefore no opportunity for second thoughts and the revision of a previous decision.

He also rejects *substituted judgment*, which he described as follows :

The primary purpose of the substituted judgment is to attempt to determine what decision the mental incompetent would make, if she was reviewing her situation as a competent person, but taking account of her mental incapacity as one factor in her decision. It allows the court to consider a number of factors bearing directly upon the condition of the mental incompetent. Thus the court may consider such issues as the values of the incompetent, any religious beliefs held by her, and her societal views as expressed by her family.<sup>23</sup>

Mr. Justice La Forest categorically rejects that approach.

It may be a matter of debate whether a court should have the power to make the decision if that person lacks the mental capacity to do so. But it is obviously fiction to suggest that a decision so made is that of the mental incompetent, however much the court may try to put itself in her place. What the incompetent would do if she or he could make the choice is simply a matter of speculation.<sup>24</sup>

Somewhat surprisingly, what appears *not* to have been noted by the Court is that the test was really designed only for *previously competent persons*, not for never competent persons, those who never were able to express wishes or values. That was, for example, the case with Karen Quinlan. She had expressed a wish before becoming comatose, regarding her future treatment should she be unable to express her treatment choice at that time.

Mr. Justice La Forest is quite correct to conclude that it would be "mere speculation" for the court to base a decision upon the values, interests and preferences of a person who never was competent. But it

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22. *Eve v. Mrs. E.*, *supra*, note 3, at 432.

23. *Id.*, p. 425.

24. *Id.*, p. 435.

would seem to be considerably less speculative in cases where a *no longer competent person* once did have and express preferences and values directly or indirectly relevant to the matter at issue.

#### 4. The ruling itself

Against that general analysis of the meaning and scope of the *parens patriae* jurisdiction, and its application to contraceptive sterilization, Mr. Justice La Forest then ruled on the specifics of the *Eve* case and appeal.

The ruling contains four major elements :

(i) The first has to do with whether the evidence establishes that not doing the sterilization would harm Eve. His answer is emphatically, no, the evidence does not establish that.

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.<sup>25</sup>

As for any possible trauma resulting from a possible birth, he concludes that it has not been proven that mentally handicapped persons experience greater stress from giving birth than do those not so handicapped. As to the matter of fitness to parent, many mentally handicapped persons can be loving and caring parents. He acknowledges that many may have "difficulty in coping", but he classifies such a difficulty as, "a social problem, and one, moreover, that is not limited to incompetents".

He adds :

Above all, it is not an issue that comes within the limited powers of the courts, under the *parens patriae* jurisdiction... Indeed, there are human rights considerations that should make a court extremely hesitant about attempting to solve a social problem like this by this means.<sup>26</sup>

As for hygienic problems, he agreed with the observation that persons requiring help in menstruation are likely to need it for urinary and fecal control as well, problems more troublesome for personal hygiene. As well, a hysterectomy for purposes of managing menstruation is "clearly excessive" in his words. (p. 430)

(ii) The second major element of the ruling is its absolute rejection of the *parens patriae* jurisdiction as the authority for involuntary non-therapeutic sterilization. That rejection is based upon several related factors — the fact that such sterilizations involve intruding on a person's rights, certain physical damage, and "highly questionable" advantages.

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25. *Id.*, p. 429.

26. *Id.*, p. 430.

All of which lead Mr. Justice La Forest to conclude that "it can never be safely determined that such a procedure is for the benefit of that person".<sup>27</sup>

It should be noted at this point that he does *not* rule out a role for legislation. I will come back to that aspect later in this paper.

He goes on to add that :

It is difficult to imagine a case in which non-therapeutic sterilization could possibly be of benefit to the person on behalf of whom a court purports to act, let alone one in which that procedure is necessary in his or her best interest.<sup>28</sup>

Equally influential upon his decision was the irreversibility factor, and the inability to correct a wrong decision in this case.

(iii) The third major element in the ruling was the assertion that judges are simply not able to adequately deal with these cases.

Judges are generally ill-informed about many of the factors relevant to a wise decision in this difficult area. They generally know little of mental illness, of techniques of contraception or their efficacy. And however well presented a case may be, it can only partially inform.<sup>29</sup>

It should be noted that Mr. Justice La Forest does not indicate exactly what makes judges in this matter less well informed and less capable of being informed than on the many complex medical matters which they are routinely requested to resolve. The differences are not immediately evident to this commentator.<sup>30</sup>

(iv) The fourth element of the ruling has to do with the alleged anxiety of Eve's mother, both because Eve might become pregnant, and because she may become responsible for Eve's child if she has one. That had been alleged as one of the grounds in the request for the sterilization of Eve. The Supreme Court of Canada's ruling emphatically dismisses any such argument.

One may sympathize with Mrs. E. ... it is easy to understand the natural feelings of a parent's heart. But the *parens patriae* jurisdiction cannot be used for her benefit. Its exercise is confined to doing what is necessary for the benefit and protection of persons under disability like Eve.<sup>31</sup>

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27. *Id.*, p. 431.

28. *Ibid.*

29. *Id.*, p. 432.

30. In what follows, Mr. Justice La Forest does seem to be saying that one such difference may be the unsettled or unknown nature of public feelings on this matter, a determination best made by the legislature. But in the paragraph quoted, the alleged areas of ignorance referred to have to do with knowledge of mental illness, as well as contraceptive methods and their effectiveness.

31. *Eve v. Mrs. E.*, *supra*, note 3, at 429.

## 5. The avenues remaining in view of *Eve*

At least two very unambiguous and definitive conclusions were promulgated in this judgment. One to the effect that *provincial statutes* can only be used to authorize guardians to permit involuntary contraceptive sterilization *if* their wording clearly and explicitly so provides. The P.E.I. statutes in question did not do so. The second definitive ruling is to the effect that the court's *parens patriae* jurisdiction cannot serve as the basis for authorizing non-therapeutic sterilizations.

What scope, if any, now remains for the mentally handicapped to have access to sterilization? Three routes appear to remain open to them in this regard.

### (i) *Therapeutic sterilization, both voluntary and involuntary*

Sterilization for therapeutic reasons remains available to the mentally handicapped as much as to anyone else. That was never at issue in the *Eve* decision. Therapeutic sterilization has been defined as any procedure carried out for the purpose of ameliorating, remedying, or lessening the effect of disease, illness, disability or disorder of the genito-urinary system.<sup>32</sup>

In some cases the mentally handicapped person will not be competent to give consent, in which case it will be involuntary therapeutic sterilization authorized by others. But, though the *Eve* decision did not dwell on this fact, it is increasingly and rightly acknowledged that very many mentally disabled persons, including many of those found to be legally incompetent for some purposes, can nevertheless understand the nature and consequences of a sterilization procedure. If they do so understand, and are under no coercion or duress, they should have the same options to consent to or refuse sterilization for bona fide health reasons as other persons.

Therapeutic sterilization for the mentally handicapped, because it falls within the scope of *medical treatment*, clearly falls within the scope of what can be authorized under a court's *parens patriae* jurisdiction.

What remains somewhat unclear even in the light of the Supreme Court decision, is the exact scope of the word "therapeutic" here. Mr. Justice La Forest himself acknowledges that the line between therapeutic and non-therapeutic is not always evident, and he therefore

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32. Law Reform Commission of Canada, *Sterilization, Implications for Mentally Retarded and Mentally Ill Persons*, Ottawa, 1979, 115.

urges great caution and warns against what he calls, "marginal justifications". (p. 434)

He acknowledged that a necessary intervention for the treatment of health, could include both *mental* and *physical* health. (p. 426) He also indicated that sterilization may in some cases be necessary as an "adjunct" to the treatment of a serious illness (p. 434), though he emphasized that subterfuge in this matter is to be rejected.

The *Eve* judgment would consider sterilization to be therapeutic and therefore legitimate only when it is necessary in the treatment of a serious illness. But it is worthy of note that the *Eve* ruling includes within the scope of a serious condition justifying involuntary sterilization that of a child's phobic aversion to blood. That was the issue in the recent B.C. Court of Appeal decision in *Re K and Public Trustee*.<sup>33</sup> It involved a court-ordered hysterectomy performed on a seriously retarded 10 year old girl, on the ground that the child had a phobic aversion to blood, which it was feared would seriously affect her when her menstrual period began.

Mr. Justice La Forest was clearly not enthusiastic about the decision, characterizing it as "at best dangerously close to the permissible". (p. 434) But however grudgingly, he does in effect appear to include that scenario and outcome within the scope of therapeutic and legitimate sterilization.

He reiterated the warning of Mr. Justice Anderson in the *Re K* decision, to the effect that that case should not be seen as a precedent to be followed in other cases which involve the issue of contraceptive sterilization for the mentally disabled. (p. 418)

Nevertheless, it is difficult to identify any *significant* differences between on the one hand a request for sterilization on the grounds of a phobic aversion to blood (as in *Re K*), and on the other hand a request on the grounds of the emotional effects of pregnancy and birth (as alleged in *Eve*). An obvious difference was that in the former case the testimony as to the dangers persuaded the court, in the *Eve* case it did not. But what if the evidence of emotional danger to Eve had been much stronger and much more persuasive? It is at least within the bounds of the possible that in that eventuality the sterilization of Eve could have been characterized as therapeutic.

That may verge on being idle speculation, and is perhaps without foundation. I bring the point up only to illustrate my earlier observation that the line between therapeutic and non-therapeutic is not hard and fast, and probably never can be.

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33. *Re K and Public Trustee*, (1985) 19 D.L.R. (4<sup>th</sup>) 255.

(ii) *Voluntary non-therapeutic sterilization*

The Supreme Court decision in *Eve* also leaves open to mentally handicapped persons *capable of consent* the choice of contraceptive sterilization.

It is now widely acknowledged by those who know, live and work with the mentally disabled, that many of them would be capable of understanding the nature and consequences of a sterilization procedure. Many have in other words the capacity to consent. As to their right to request contraceptive sterilization, there are no grounds whatever for denying it. Obviously the usual additional grounds would apply as well — no serious medical counter-indications, and the assurance that there is no coercion or duress. As well, one should not of course proceed without resolving any doubts which may exist regarding that mentally disabled person's capacity to understand the nature and consequences of the procedure. I will come back to that point in more detail below.

The principle to be applied here was expressed by Mr. Justice La Forest as follows :

I do not doubt that a person has a right to decide to be sterilized. That is his or her free choice.<sup>34</sup>

The following statement by one who works closely with the mentally handicapped is enlightening in this regard :

Professionals assume people with a mental handicap are incapable of consent. There is enough information to fill this room that proves that people with mild to moderate mental retardation are perfectly capable of understanding a great deal of what is said to them provided the explanation is given properly and clearly by persons who understand them. ... So it seems to me that Eve could well have given consent or non-consent and that she was capable, probably of understanding the issues. But neither the judges nor anyone else involved seemed to have given her the opportunity to consider the issue for herself.<sup>35</sup>

(iii) *The legislative route for involuntary non-therapeutic sterilization*

A remaining consideration is whether there is an alternative route for those determined to be *factually* mentally incompetent to nevertheless be provided with non-therapeutic or contraceptive sterilization when warranted in their best interests.

34. *Eve v. Mrs. E.*, *supra*, note 3, at 435.

35. Peter MITTLER, in M. RIOUX and K. YARMOL, "The Right to Control One's Own Body : A Look at the *Eve* Decision", (1987) 2:1 *Entourage*, 28.



Given the *Eve* ruling, and assuming as many do, that those with mental handicaps who are factually incompetent ought to have the same right to contraceptive sterilization as others, there is only one route open, that of legislation. In my humble opinion, that is the road we should have taken long ago, even before *Eve*, both to protect mentally disabled persons from having sterilization *imposed* on them, and to provide them with *access* to contraceptive sterilization when it is for their benefit.

At the moment, only one province, that of Alberta, *may* have legislation sufficiently explicit to pass the "clear and explicit" test established by the Supreme Court in *Eve*. But as I shall suggest below, if legislation should be enacted, it must provide procedures, safeguards and mechanisms not presently provided for in any legislation, including Alberta's *Dependent Adults Act*.<sup>36</sup>

Not only does the legislative route remain *open* for this purpose. More than that, both the *effect* of the decision in that it effectively closed other pathways, and some of the *arguments* in the decision arguably make the case for legislation stronger than ever. Assuming, that is, that one feels the mentally disabled who are also factually incompetent *ought* to have access to non-therapeutic sterilization.

After pointing to the inappropriateness of judges dealing with this issue, Mr. Justice La Forest went on to say.

If sterilization of the mentally incompetent is to be adopted as desirable for general social purposes, the legislature is the appropriate body to do so. It is in a position to inform itself and it is attuned to the feelings of the public in making policy in this sensitive area. The actions of the legislature will then, of course, be subject to the scrutiny of the courts under the *Canadian Charter of Rights and Freedoms* and otherwise.<sup>37</sup>

One wonders in passing what was intended by the phrase "general social purposes" as the suggested motivation for legislative action. It has a rather ominous "social engineering" or "eugenic" flavour to it. In the context of the whole judgment, however, one presumes what was meant was that the social purposes justifying involuntary non-therapeutic sterilization should be restricted to serving the interests of the individual involved, and not the interests of the state or any other party.

Mr. Justice La Forest was not the first to point to the advantages and need for carefully considered public policy and legislation

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36. *Supra*, note 17.

37. *Eve v. Mrs. E.*, *supra*, note 3, at 432.

within this area. For example, he himself quotes approvingly (p. 433) from an earlier American decision which concluded in part :

A properly thought out public policy on sterilization or alternative contraceptive methods could well facilitate the entry of these persons into a more nearly normal relationship with society. But again this is a problem that ought to be addressed by the legislature on the basis of fact-finding and the opinions of experts.<sup>38</sup>

If we are to go down that legislative path, I would suggest that enabling legislation must put in place some basic safeguards and procedures based upon a clearly articulated philosophy that mentally disabled persons have the *same rights* as other citizens, that very often they have the *same ability* as others to understand and consent, and that sometimes they need and deserve both *mechanisms and procedures* to ensure both the protection and the expression of their rights in this area.

A comprehensive study and series of recommendations as to legal guidelines in this area were proposed some years ago (1979) by the Law Reform Commission of Canada.<sup>39</sup> Some of those analyses and proposals were referred to in the various *Eve* judgments, including that of the Supreme Court. Having been a part of the team which produced that working paper, I confess that I remain an unrepentant supporter of those now ancient proposals. Allow me in brief summary form to select from that working paper some of the elements and criteria which in my view should be supported by any eventual legislation regulating this matter.

Two related matters must be addressed, one having to do with *determining competence*, the other with the criteria by which to *make the decision* for or against sterilization, and the particular mechanism for doing so.

#### (a) *Determining competence*

A judicial hearing should be initiated to ascertain whether an individual has the capacity to consent if any one of the following circumstances prevail :

- (i) the presumption of an individual's capacity to consent is questioned;
- (ii) the request for sterilization has emanated or can be presumed to have emanated from a third party;

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38. *Id.*, at 433, quoting from *Eberhardy, Matter of*, 307 N.W. 2d 881 (Wis. 1981), 895.

39. *Supra*, note 32.

- (iii) there is any indication that the individual requesting his or her own sterilization is especially susceptible to coercion or undue influence to consent to such treatment.

Furthermore, that individual should be *represented* at such a hearing by a person who can act as an independent advocate on behalf of that individual.

*(b) The decision for or against sterilization*

Where there is no valid consent, non-therapeutic sterilization should not be permitted except with legal authorization by a board established for that purpose.

- (i) persons appearing before the board should be represented by an independent advocate;
- (ii) the board should be composed of a multidisciplinary team qualified to evaluate the medical, social, and psychological benefits of sterilization to that individual, and determine whether there is a compelling interest justifying the sterilization.

The board should ensure that the following minimum tests or criteria are met before authorizing a sterilization procedure :

- (i) The individual is probably fertile, and there is evidence to that effect;
- (ii) The individual is both of child bearing age and sexually active, and other forms of contraception have proved unworkable under the particular circumstances of each case or are inapplicable so that pregnancy is a likely consequence;
- (iii) There is more compelling evidence than age or mental handicap alone that childbirth itself or child-bearing itself will probably have a psychologically damaging effect on the individual;
- (iv) The sterilization will not in itself cause physical or psychological damage which will be greater than the beneficial effects to the individual, based on a comprehensive evaluation;
- (v) The views of the individual have been taken into account in the determination regarding whether or not to sterilize.

In my view, if these minimum criteria formed the basis of any eventual legislation in this matter, it would pass with high marks the test referred to by Mr. Justice La Forest, namely that any such legislation must be subject to the scrutiny of the courts in the light of the *Canadian Charter of Rights and Freedoms*. If such tests or criteria were mandatory, the two major preoccupations of the *Charter* would arguably be respected. On the one hand their continued access to contraceptive sterilization, when needed and justified, would be provided for. To deny them that

access, a right available to all other persons, would be a form of discrimination and a denial of equality. On the other hand, such safeguards would provide needed protection from the ever-present danger that their other basic rights, especially that of inviolability, could be compromised in the interests of others.