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COMMENTS ON THE STERILIZATION OF MENTAL INCOMPETENTS IN CANADIAN CIVIL AND COMMON LAW

Robert P. Kouri and Margaret A. Somerville

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Article abstract

Le sujet étant d'actualité, les auteurs s'interrogent sur la légalité de la stérilisation non thérapeutique pratiquée sur des personnes incapables de consentir pour elles-mêmes. En droit pénal, ce genre d'opération semble licite pourvu qu'elle soit accomplie pour le bien du patient.

Le droit civil québécois admet en principe, la légalité des stérilisations purement contraceptives. À l'égard des incompétents majeurs et mineurs, ceux qui ont autorité sur les personnes protégées (v.g. curateurs, tuteurs, parents) peuvent consentir à une stérilisation, pourvu que l'intervention soit dans le meilleur intérêt de la personne sous leur charge.

En ce qui concerne le « common law » canadien, la stérilisation non thérapeutique n'est pas illégale en soi. Lorsqu'il s'agit de personnes incapables cependant, les auteurs expriment quelques réticences sur sa licéité. Ils favorisent l'adoption d'une législation formelle à ce sujet.

Dans la conclusion, les auteurs suggèrent quelques approches législatives pour réglementer la stérilisation des incapables.

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Commentaires

COMMENTS ON THE STERILIZATION OF MENTAL INCOMPETENTS IN CANADIAN CIVIL AND COMMON LAW*

par Robert P. Kouri**
Margaret A. Somerville***

Le sujet étant d'actualité, les auteurs s'interrogent sur la légalité de la stérilisation non thérapeutique pratiquée sur des personnes incapables de consentir pour elles-mêmes. En droit pénal, ce genre d'opération semble licite pourvu qu'elle soit accomplie pour le bien du patient.

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* Les auteurs se sont inspirés d'une communication présentée au 5ème Congrès Mondial de Droit Médical tenu à Gand, Belgique, du 19 au 24 août 1979.

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INTRODUCTION

The issue of sterilization of the mentally handicapped is not of recent origin. Aside from preventive or curative therapeutic indications, sterilization has long been practised upon incapable persons on mainly eugenic[1] and more recently on purely contraceptive grounds. In the latter case, the reasons invoked vary from not exposing potential offspring to the deprivational effects of being born to the mentally deficient, to allowing the latter to enjoy normal sexuality without the trauma of parenthood[2]. To these grounds has been added a new purpose in performing hysterectomies on women — to eliminate hygienic problems caused by an inability to adopt the usual sanitary measures necessitated by the menstrual cycle[3].

About a decade ago, the debate in Canadian law was whether a capable, consenting adult could validly request a non-therapeutic sterilization. If one judges from the theme of several recent conferences in the Province of Quebec[4], and the moratorium on the sterilization of minors under the age of sixteen in Ontario, the controversy now is to determine if this type of surgical intervention can properly be performed on the mentally ill or retarded. Even the Law Reform Commission of Canada felt the need to study the problem and has in fact just rendered public an in-depth report on its findings[5].

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1. For example, the Provinces of Alberta and British Columbia both had *Sexual Sterilization Acts.* (R.S.A. 1970, c. 341; R.S.B.C. 1960, c. 353); subsequently repealed by *The Sexual Sterilization Repeal Act,* S.A. 1972, c. 87 and *The Sexual Sterilization Act Repeal Act,* S.B.C. 1973, c. 79.
2. Denise ROBILLARD, "For Whose Benefit are Mentally Retarded People Being Sterilized?", (1979) 120 *C.M.A.J.* 1433, 1434.
3. See for example Denise ROBILLARD, "Faut-il stériliser les handicapés mentaux?", (1979) 120 *C.M.A.J.* 756; Ralph C. WRIGHT, "Hysterectomy: Past, Present and Future", (1969) 33 *J. of Obstetrics and Gynecology* 560; J.R. VAN NAGELL Jr., J.W. RODDICK Jr., "Vaginal Hysterectomy as a Sterilization Procedure", (1971) 111 *American J. of Obstetrics and Gynecology* 703; Clifford R. WHEELESS Jr., "Abdominal Hysterectomy for Surgical Sterilization in the Mentally Retarded: a Review of Parental Opinion", (1975) 122 *Am. J. Obstet. Gynecol.* 872.
4. For example this was one of the topics discussed at the Congrès de l'Aide Juridique held at Montreal the 18th of May 1978. In addition a symposium on this subject was organized by the Association des Médecins de Langue Française du Canada, in collaboration with the Association des Centres d'Accueil du Québec, the Centre for Bioethics of Montreal, the Law Reform Commission of Canada and the Pavillon du Parc, Aylmer, and held at Montreal the 30th of March 1979.
5. Law Reform Commission of Canada, *Sterilization* (*Working Paper 24*), Ottawa, Minister of Supply and Services Canada, 1979.

In this paper, our purpose is to determine if indeed, under Canadian Criminal, Civil and Common Law, a non-therapeutic sterilization may lawfully be performed on a mentally handicapped minor or adult. This is not just an academic exercise. In 1976, over three hundred incompetent minors, that is, persons under eighteen years of age, were sterilized in the Province of Ontario alone. We do not have statistics on the sterilization of incompetent adults, but we assume they would constitute a much larger group.

The difficulties inherent in any examination of the non-therapeutic sterilization of mental incompetents involve two, relatively distinct questions, namely the legality *per se* of operations intended solely to avoid procreation, and, of course, the requirements of consent.

A.- Non-therapeutic sterilization and the Criminal Code

From a criminal law point of view, some uncertainty has existed as to the licitness of non-therapeutic surgical sterilizations in general. In this connection, the *Criminal Code*[6] provisions which could apply to sterilization include sec. 244 dealing with assault, and sec. 228, which covers the intentional causing of bodily harm[7]. Apart from the relevancy of the victim's consent in the Criminal law context, a defence based on the broad provisions of sec. 45 Cr. C. has traditionally been used in the case of both consensual and non-consensual[8] surgery[9]. Under the terms of sec. 45 Cr. C.:

> "Everyone is protected from criminal responsibility for performing a surgical operation upon any person for the benefit of that person if (a) the operation is performed with reasonable care and skill and (b) it is reasonable to perform the operation, having regard to the

6. R.S.C. 1970, c. 34 as amended.
7. Bernard GREEN, Rena PAUL, "Parenthood and the Mentally Retarded", (1974) 24 *U.* of *T.L.J.* 117, 121.
8. The word non-consensual is to be understood here as limited to situations where the patient is unable to consent. It does not extend to situations where the patient is capable of consent but either his consent is not sought or he refuses consent.
9. J.-G. CASTEL, "Nature and Effects of Consent with Respect to the Right to Life and the Right to Physical and Mental Integrity in the Medical Field: Criminal and Private Law Aspects", (1978) 16 *Alberta L.R.* 293, 314.

   For a view to the contrary, that is that *Article 45* only applies to non-consensual surgery, see M.A. SOMERVILLE, "Medical Interventions and the Criminal Law: Lawful or Excusable Wounding?", to be published McGill Law Journal, June 1980.

state of health of the person at the time of the operation is performed and to all the circumstances of the case".

The keystone of this defence rests upon the connotation one places on the notion of "benefit" to the patient. Unfortunately, our legislators did not deem it necessary to provide a legal definition of this rather imprecise expression[10]. Although there were never any doubts raised as to the validity of therapeutic sterilizations in which the immediate goal was a direct physical or mental benefit to the patient[11], certain hesitations existed as to the validity of interventions, where the benefit sought was primarily of a moral nature[12].

Oddly enough, the recent Quebec civil action of *Cataford* v. *Moreau*[13], claiming damages for the birth of an eleventh child after a purely contraceptive sterilization, afforded Deschênes C.J., the

10. Jacques FORTIN, André JODOUIN, Adrian POPOVICI, "Sanctions et réparations des atteintes au corps humain en droit québécois", (1975) 6 *R.D.U.S.* 150, 180; also published in vol. XXVI, *Travaux de l'Association Henri Capitant,* 303, 328. Since completion of this paper, the Supreme Court of P.E.I. (Family Division) rendered judgment in *Re E,* ((1970) 10 R.F.L. (2d) 317) on an application of a mother of an adult retardate to be authorized to consent to a tubal ligation for purely contraceptive reasons. The court felt that it did not have the jurisdiction nor the capacity to authorize "sterilization for the sake of sterilization" (at p. 329).

11. See for example, W.C.J. MEREDITH, *Malpractice Liability of Doctors and Hospitals,* Toronto, The Carswell Co. Ltd., 1956, p. 217: "But a *needless operation* causing injury to the patient is obviously not for his 'benefit' and, notwithstanding his consent to undergo it, may be the subject of a criminal charge. Included in this category are operations for the sterilization of a male or female, unless performed for the patient's health, or in virtue of a special statutory provision".

    See also J.L FISHER, "Legal Implications of Sterilization", (1964) *C.M.A.J.* 1363, 1365 and his further comments at (1970) 103 *C.M.A.J.* 1394.

12. See Robert P. KOURI, "The Legality of Purely Contraceptive Sterilization", (1976) 7 *R.D.U.S.* 1, 13-18; J-G. CASTEL, *loc. cit.,* note 6, 399. In *R.* v. *Morgentaler (no. 5),* (1973) 14 C.C.C. (2d) 459, 461; HUGESSEN, A.C.J. in his charge to the jury, described the notion of 'benefit' in the following terms: "Was the act performed for the good of the patient? Here, I tell you, as a question of law,... that this concept of the patient's welfare does not depend on the latter's will alone. In other words, the simple fact that a patient asks one to perform some operation upon her does not mean necessarily that this operation is for her good. Nonetheless, it is a fact which should certainly be taken into account. The law requires that the physician himself make a judgment independent of that of the patient, and decide that the operation which the latter is asking for is really for her good. His judgment, obviously, might be in error, without thereby making him guilty of a crime". The Supreme Court of Canada merely held the sec. 45 Cr. C. defence inapplicable to a charge of illegal abortion, without commenting on this statement.

13. (1978) C.S. 933. Also reported at (1979) 7 C.C.L.T. 341 with comment by S. RODGERS-MAGNET.

opportunity to express the opinion that non-medical considerations could be taken into account in determining whether or not the operation was for the benefit of the patient within the terms of Sec. 45 Cr. C.[14]. Although not binding, it would be open to the criminal courts to follow this lead.

It should be emphasized however that *Cataford* v. *Moreau*[15] concerned the non-therapeutic sterilization of a competent and consenting adult. Even though Sec. 45 does not mention or require the consent of the patient, it is interesting to speculate if it would likewise apply to a non-therapeutic intervention involving a person incapable of consent. Since, according to the *Cataford* decision, benefit is interpreted more widely than mere therapeutic advantage, a similar interpretation would probably be adopted for a person incapable of consenting[16].

The accuracy of this point of view may be questioned only if one were to hold that the sufficiency of non-therapeutic benefit within Sec. 45 presupposes personal consent. One argument in support of such an analysis is that the requirement of legally recognized benefit is not ignored but is *prima facie* presumed when acquiescence is present[17]. The corollary is that when personal consent is not present, this presumption does not operate and hence, arguably, one is then required to positively demonstrate therapeutic benefit before an intervention is legal.

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14. "Dans le présent cas, compte tenu de l'âge des parties, du nombre de leurs enfants, de leur situation économique et sociale, il fait peu de doute que 'toutes les autres circonstances de l'espèce' pour citer le langage de l'art. 45 C. Cr., conduirait à la conclusion que l'intervention a été pratiquée 'pour le bien' de la demanderesse", *id.*, 936.

15. Cited *loc. cit.*, note 13.

16. One must be careful to distinguish benefit to the person, which is the criterion in *Section 45*, from benefit to others which may be a motivation in sterilizing a mentally incompetent person. The latter benefits include easier custodial care and saving embarrassment to the parents. This embarrassment may be particularly acute in relation to pregnancy in the mentally incompetent woman, as there is a tendency to think of the mentally incompetent as children in whom pregnancy is socially unacceptable.

17. B. STARKMAN, "Preliminary Study on Control of Life", unpublished paper presented to the Law Reform Commission of Canada, 1974, suggests that Section 45 of the *Criminal Code* does not mention consent because it only applies where the person is incapable of consent. "When the person can consent, then his decision-making process... is the sole criterion of benefit". (p. 5) That is benefit is normally presumed where there is consent. This analysis is founded on an interpretation of Stephens Digest (J.E. STEPHENS, *A Digest of the Criminal Law*, 1st & 4th eds, MacMillan and Co., London 1877, 1887) on which the Canadian *Criminal Code* (*loc. cit.*, note 6) was based to a large extent.

Traditionally at Common Law, therapeutic benefit and consent were cumulative requirements for the legality of a medical intervention[18]. But in the area of sterilization (as in that of live donor organ transplants) it is suggested they are being used as alternative requirements. In other words, the presence of one or the other (all other conditions precedent for legality having been fulfilled), will legitimize the intervention, provided of course the intervention is not, in itself, judged to be contrary to public policy[19]. This is to take a somewhat extreme view of where the development of the notion of what constitutes therapeutic benefit has led. It, in effect, eliminates therapeutic benefit as a prerequisite, instead of following the course which can be charted from some American case law. In the U.S.A., physical benefit was initially required. This led eventually to acceptance of psychological therapeutic benefit, before settling on the notion of the operation being in "the best interests" of the person[20]. While recognizing consent as protecting both the values of autonomy (or self-determination) and inviolability, it gives predominance to the former value where there is a conflict[21].

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18. See G. DWORKIN, "Law Relating to Organ Transplantation in England", (1970) 33 *Modern Law Review* 353.

19. On one view, what is occurring is a change in public policy to the effect that some non-therapeutic medical interventions are being recognized as legal in themselves and permissible provided they are carried out with the consent of the person involved. In one sense this is to amalgamate the separate requirements that there be consent to a medical intervention and that the intervention itself not be contrary to public policy, as consent is being used as a factor to determine whether the intervention is contrary to public policy.

20. See *Bonner* v. *Moran*, 139 A.L.R. 1366; 126 F. (2d) 121 (1941). *Hart* v. *Brown*, 289 A (2d) 386 (Conn. 1972). *Nathan* v. *Farinelli*, Unreported Eq. No. 74-87, Mass. July 3, 1976. *Strunk* v. *Strunk*, 445 S.W. (2d) 145 (Ky. 1969).

21. The situation in which such a conflict exists would be when a person consents to a medical intervention, but the law denies the legality of carrying this out on the basis that the principle of inviolability requires therapeutic benefit to be present if the intervention is not to contravene the dictates of this principle. Not to carry out an intervention for such a reason is to give predominance to inviolability over autonomy. But to carry it out, on one view, recognizes the supremacy of autonomy. (It is not necessarily a full recognition of such supremacy because there are two views as to the nature of the inviolability principle, an absolute and a relative one. If one takes an absolute approach to the right of inviolability, that is that it may be asserted or waived for whatever purpose the right-holder chooses, it is arguable that the right has been waived in circumstances such as those presented here and therefore there is no conflict of inviolability with autonomy. If, however, a relative view is taken and this includes a proposition that the right may not be waived for non-therapeutic purposes, then the principle is in conflict with autonomy when consent to a non-therapeutic intervention is given.) In situations where a person gives consent and this is respected, or refuses consent and this is respected,

The problem we are concerned with in this paper, is that where the sterilization operation is non-therapeutic and personal consent is impossible, can the intervention be considered licit? Should one postulate that the sterilization operation itself is neither legal nor illegal but "neutral", and that it is legal with personal consent but illegal without it? According to this hypothesis, therefore, consent is not just operating as one more factor determining the legality of an otherwise lawful medical intervention, rather it characterizes the intervention itself as legal or illegal. Pursuant to such reasoning the operation would be unlawful absent personal consent[22].

Hence, under this approach, non-therapeutic sterilization of mental incompetents would have to be considered prohibited unless it were specifically authorized by way of amendment to the Criminal Code.

Assuming now, for the purposes of discussion, that non-therapeutic sterilization of mental incompetents does not constitute an offence under the *Criminal Code* of Canada, we will examine the private law, first in the Civil Law of Quebec and then in some selected Canadian Common Law provinces, in order to see what this allows with respect to the sterilization of mentally incompetent adults and children.

B.- Non-therapeutic sterilization and the Civil Law of Quebec

Despite the fact that from a civil law point of view, the legality of therapeutic sterilization was never placed in doubt[23], the situation was not always as evident with regards to purely contraceptive or non-therapeutic sterilization[24]. Recent doctrine for the most part tended to favor the validity of this type of intervention when performed on consenting capable adults[25], but until confirmation by

whether an absolute or relative doctrine of inviolability is used there will be no conflict between the principles of autonomy and inviolability. Where the person refuses consent and this is overridden because a relative doctrine of inviolability is used (that is that the right is given to protect life and health and can be only exercised for this purpose), neither inviolability nor autonomy are respected.

22. For a full discussion of the possible analyses, see M.A. SOMERVILLE, *loc. cit.*, note 9.

23. See *Caron* v. *Gagnon*, (1930) 68 C.S. 155; *E.* v. *M.*, (1937) 77 C.S. 298.

24. R.P. KOURI, *loc. cit.*, note 12, 37 *et seq.*

25. See for example, J.-G. CASTEL, *loc. cit.*, note 9, 338; S. MONGEAU, "La vasectomie: évolution récente", (1972) 7 *Le Médecin du Québec*, 44, 46. *Contra* A. MAYRAND, *L'inviolabilité de la personne humaine*, Wainwright Lectures, McGill University, Montréal, Wilson & Lafleur Ltée, 1975, p. 19, no 11. Art. 19 C.C.

the courts, these opinions remained speculative. Fortunately, the case of *Cataford* v. *Moreau*[26] just alluded to, provided the opportunity for an unequivocal statement of principle by Deschênes C.J. In it he affirmed:

"... [La] Cour n'éprouve pas d'hésitation à conclure que, s'il fut déjà une époque où la stérilisation volontaire pouvait insulter à l'ordre public et aux bonnes moeurs, cette époque — pour le mieux ou pour le pire — est révolue et la loi civile du Québec ne s'oppose pas à la conclusion d'un contrat en semblable matière"[27].

In general therefore, there no longer appears to be any objection towards purely contraceptive sterilization — this type of operation is not illegal *per se*. Can we say as much when it comes down to sterilizing the mentally deficient adult or child?

Unfortunately, this second aspect of our inquiry cannot be dealt with so expeditiously due to the fact that any consent given to a sterilization is, of necessity, one which is provided on behalf of another person who is incapable of asserting his own rights. The dangers inherent in this type of situation are obvious because the victims of a hasty or ill-conceived decision are not the persons who actually furnish consent. It is somewhat easier to tend towards complacency when one's own corporeal integrity is not involved.

We will examine in turn the situation of the adult mental incompetent, followed by that of the defective minor; emphasizing in each case the legal considerations involved when consent is given by a third party.

1- Mentally incompetent adults

Without risk of contradiction, it may be stated that positive law has failed to keep pace with modern psychiatry[28]. The text of art. 325 C.C. clearly demonstrates this:

"A person of full age, or an emancipated minor who is in an habitual state of imbecility, in-	Le majeur ou le mineur émancipé qui est dans un état habituel d'imbécillité, démence ou

provides that "The human person is inviolable. No one may cause harm to the person of another without his consent or without being authorized by law to do so". In addition, the consent given must not be contrary to public order and good morals, cf. arts 13, 984 C.C.

26. *Supra*, note 13.

27. *Id.*, 938.

28. J. PANET-RAYMOND, "Causes de l'interdiction et médecine moderne", (1941) 1 *R. du B.* 33.

sanity or madness, must be interdicted, even though he has lucid intervals.	fureur, doit être interdit, même lorsque cet état présente des intervalles lucides".

These fairly pejorative terms which were so easily borrowed from the French Civil Code by our own codifiers in 1866, obviously do not conform to contemporary scientific knowledge which, needless to say, is far more sophisticated and nuanced[29]. These textual lacunae have been overcome, or at least neutralized to some extent, by the doctrinal and jurisprudential interpretation that any individual mentally incapable of directing his own affairs may be interdicted without regard to the clinical nature of his psychological illness or deficiency[30].

Before proposing any concrete solutions to the questions raised in contemplating the sterilization of the interdicted mentally handicapped, it is necessary to examine certain aspects of curatorship which are highly pertinent to this discussion. According to art. 343 C.C.:

"The curator to a person interdicted for imbecility, insanity or madness has over such person and his property all the powers of a tutor over the person and property of a minor; and he is bound towards him in the same manner as the tutor is towards his pupil.	Le curateur à l'interdit pour imbécillité, démence ou fureur, a sur la personne et les biens de cet interdit tous les pouvoirs du tuteur sur la personne et les biens du mineur; il est tenu à son égard à toutes les obligations du tuteur envers son pupille".

The legal incapacity of the mentally deficient results from their need for protection and it is essentially with a view to their best interests that interdiction can be judicially declared[31]. Since a person struck with this type of interdiction is not allowed to exercise personally certain of his or her rights, the rules governing interdiction are thus considered of public order, and must be strictly observed[32]. To ensure the protection of the interdict's interests, the curator must represent rather than assist the person under his care[33]. In other terms, the curator acts on behalf of the interdict without the active participation of the latter.

29. Louis BAUDOIN, *Aspects généraux du droit privé dans la Province de Québec*, Paris, Librairie Dalloz, 1967, p. 517.

30. L.-P. SIROIS, *Tutelles et curatelles*, Québec, Imprimerie de l'Action Sociale Ltée, 1911, p. 392, no 504; J. PINEAU, *La Famille*, Montréal, P.U.M., 1972, p. 236, no 290.

31. L.-P. SIROIS, *id.*, 388 no 498; J. PINEAU, *id.*, 198, no 221.

32. L.-P. SIROIS, *id.*, 389, no 499.

33. J. PINEAU, *op. cit.*, note 19, 199, no 222.

There is little doubt that in medical matters of a therapeutic nature at least, the sole consent of the curator will suffice to justify infringements upon the right of inviolability of the interdict. Yet, can this point of view still prevail when the goal of a surgical intervention is no longer therapeutic, as is precisely the case when a sterilization is proposed on purely contraceptive or eugenic grounds?

We believe the solution lies not in the distinction between therapeutic and non-therapeutic treatment but rather on the basic principle that the curator must protect the person under his control and may act only in the interdict's best interests[34]. According to Mr. Justice Albert Mayrand of the Quebec Court of Appeal:

> "Les personnes appelées à prendre une décision à la place du malade doivent évaluer les dangers et les chances de succès avec autant de prudence que si elles agissaient pour elles-mêmes. Elles doivent donc se garder d'une audace excessive inspirée par le désir de se dégager, d'une façon ou d'une autre et le plus rapidement possible, de leurs responsabilités envers le malade"[35].

In a word, the legality of a non-therapeutic operation will depend solely on the determination whether the sterilization will serve the best interests of the interdict.

For many, the mutilating nature of the operation, and the fact that a healthy function is being destroyed, constitute strong arguments against the legality of this type of intervention — especially since the patient (or victim according to one's perspective), is not in a position to consent on his own behalf. One may add that in refusing to sterilize the mentally incompetent, the threat of a malpractice suit is avoided.

It is not inconceivable that in most cases, the sterilization would indeed be more advantageous or convenient for the family or for persons operating institutions for the mentally handicapped and would not be in the best interests of the patient. In these circumstances, the operation would certainly be considered an unlawful violation of the patient's bodily integrity. In the words of the French jurist, André Decocq:

> "... [Dès] lors que le contrat envisagé a pour cause la satisfaction de l'intérêt d'un tiers, et qu'il doive en résulter une atteinte de quelque

34. Of course, it is far easier to justify a therapeutic intervention as being in the patient's best interests.

35. *Op. cit.*, note 14, 51, no 42.

gravité à l'intégrité physique de l'incapable, le représentant légal de celui-ci n'est pas qualifié pour y consentir"[36].

On the other hand, in those perhaps infrequent cases in which an objective evaluation of the circumstances by all interested parties (e.g. members of the family, physicians, psychologists, social workers, etc.), leads to the conclusion that a sterilization would be clearly to the advantage of the subject, then why would one wish to deprive the patient of this benefit?

In consenting on behalf of the interdict, can the curator act alone or must he first consult the family council and obtain the authorization of a Judge of the Superior Court, as is usually the case in patrimonial matters?[37] In one unreported judgment, *In re D*[38] the family council had "authorized" the curator to procure a tubal ligation for the adult female retardate in his care. This decision was then homologated by the court[39]. With all due deference, we feel that this approach to the problem is of questionable legality since the curator, except in cases where the law expressly states the contrary, is empowered to act autonomously[40]. Thus, the law as it presently stands, would allow a curator to consent alone to the non-therapeutic sterilization of the person whom he represents.

There exists in Quebec law a second category of mentally deficient persons whose incapacities are not as great as those who require curators, and who are thus able to function with the assistance of judicial advisors[41]. The judicial advisor's role is to aid the person of "weak intellect" only with regards to patrimonial

36. *Essai d'une théorie générale des droits sur la personne,* Paris, L.G.D.J., 1960, p. 232, no 349.

37. See generally, Bartha KNOPPERS, "Les notions d'autorisation et de consentement dans le contrat médical", (1978) 19 *C. de D.* 893.

38. District of Drummond, no 451-TC dated the 20th of September 1973, A. DUBÉ, J.

39. "Le curateur est autorisé à prendre les mesures requises afin que sa pupille Nicole, puisse subir une ligature des trompes".

40. J. PINEAU, *op. cit.,* note 19, 215, no. 251 and 217, no. 253; L.-P. SIROIS, *op. cit.,* note 19, 123, no. 171: "Notre code a parfaitement défini les attributions du tuteur, du conseil de famille et du juge, et nous concluons... que, hors les cas où le code exige l'intervention du juge sur avis du conseil de famille, le juge ne peut pas intervenir pour imposer des conditions ou des restrictions à l'action du tuteur" (at p. 125). Under art. 343 C.c., this statement with regards to tutors applies also to curators.

41. Art. 349 C.C.: "A judicial advisor is given to those who, without being absolutely insane or prodigal, are nevertheless of weak intellect, or so inclined to prodigality as to give reason to fear that they will dissipate their property or seriously impair their fortune".

acts[42]. He has no powers over the physical person of the semi-interdict[43]. Consequently, if it is determined in each particular case that the person to whom a judicial advisor is appointed, has sufficient understanding to provide an enlightened consent to a sterilization, his sole permission will suffice. On the other hand, if he lacks adequate discernment to fully appreciate the nature and consequences of the proposed surgery, it cannot be lawfully performed on the basis of that person's consent.

By the same token, these considerations will apply to a third group of mental defectives composed of those suffering from *de facto* incapacity due to illness or retarded intellectual development, and who do not enjoy the protections afforded by legal representation or assistance. The efficacy of any authorization provided by them will, of necessity, depend upon the extent to which their handicap will permit a valid consent to be given.

To round out our survey, there remains still a fourth category of persons who, by reason of mental incompetence, do not have the free enjoyment of their rights — we refer to uninterdicted mental patients who are hospitalized. When a psychiatric clinical examination indicates that the patient is not capable of administering his property[44], the Public Curator becomes curator *ex officio* to said patient unless the latter has already been provided with a private tutor or curator[45]. For all intents and purposes, the powers of the Public Curator are similar to those of "ordinary" curators appointed to interdicted persons. Indeed, sec. 7 of the *Public Curatorship Act* provides in part that:

> "The public curator shall have over the person and property of the patient, or if a curator to the person is appointed, over the property only, the powers and obligations of a tutor, but he

> Le curateur public a sur la personne et sur les biens du malade, ou, si un curateur à la personne est nommé, seulement sur les biens, les pouvoirs et obligations d'un tuteur; toutefois, il n'a pas

42. Art. 351 C.C. See also Roger NERSON, *Les droits extrapatrimoniaux,* Paris, L.G.D.J. 1939, p. 464, no. 206.

43. J. PINEAU, *op. cit.,* note 30, 245, no. 311.

44. *Mental Patients Protection Act* (*Loi sur la Protection du malade mental*), L.R.Q. 1977, c. P-41.

45. *Public Curatorship Act* (*Loi sur la Curatelle Publique*), L.R.Q. 1977, c. C-80, sec. 6. It is reported that the Public Curator has jurisdiction over approximately 9,000 — 10,000 patients at any given time, cf. Brian HILL, "Civil Rights of the Psychiatric Patient in Quebec", (1977) 12 *R.J.T.* 503, 513; D. ROBILLARD, *loc. cit.,* note 2, 1446.

shall not have custody of the person.	la garde de la personne"[46].

We have in fact communicated with the Public Curator of Quebec, Mtre Rémi Lussier, in order to ascertain whether the problem of sterilization was often brought to his attention. He stated that he was indeed frequently importuned to approve non-therapeutic sterilizations of mental patients under his authority. To date, however, he has always refused to lend his consent, basing his reluctance on art. 20 C.C. and the notion of inviolability of the human person. In his words:

> "... [P]rocéder à une stérilisation uniquement parce qu'une personne est atteinte de troubles mentaux constitue une mutilation, car cette personne n'en tire aucun bénéfice physique et mental..."[47].

It is unfortunate that the Public Curator has seen fit to presume in absolute terms that a sterilization performed on a mental defective must always be to his detriment. While understanding that a government official whose role is to protect mental patients and their property, would manifest some reluctance to becoming embroiled in controversy, we maintain that the principles previously outlined with regards to private curators, would apply *mutatis mutandis* to the Public Curator. If he is able to conclude that a sterilizing operation is in the best interests of the person involved, then he has the authority to furnish consent without further formality.

2- Mentally incompetent minors

The conflicts to which we have just alluded with regards to adult mental deficients are somewhat exacerbated when we superpose the additional complication of minority.

As a means of introducing unambiguous rules in connection with minority consent to medical treatment, the Quebec National Assembly adopted what is now sec. 42 of the *Public Health Protection Act*[48], which provides as follows.

"An establishment or a physician may provide the care and	Un établissement ou un médecin peut fournir les soins requis

46. As it may be recalled, according to art. 343 C.C., an "ordinary" curator's powers are similar to those of a tutor.

47. Letter to Robert Kouri from Me R. Lussier, dated the 9th of March 1979.

48. The French title is *Loi sur la protection de la santé publique*, L.R.Q. 1977, c. P-35 adopted the 21st of December 1972 and came into force the 28th of February 1973 by proclamation of the Lt.-Gov. in Council, cf. G.O.Q. 1973, part 2, vol. 105, p. 503.

treatment required by the state of health of a minor fourteen years of age or older with his consent without being required to obtain the consent of the person having parental authority; the establishment or the physician must however inform the person having parental authority in the case where the minor is sheltered for more than twelve hours, or of extended treatment.

Where a minor is under fourteen years of age, the consent of the person having paternal authority must be obtained; however, if that consent cannot be obtained or where refusal by the person having parental authority is not justified in the child's best interest, a judge of the Superior Court may authorize the care or treatment.

par l'état de santé d'un mineur âgé de quatorze ans ou plus, avec le consentement de celui-ci, sans qu'il soit nécessaire d'obtenir le consentement du titulaire de l'autorité parentale; l'établissement ou le médecin doit toutefois avertir le titulaire de l'autorité parentale en cas d'hébergement pendant plus de douze heures ou de traitements prolongés.

Lorsqu'un mineur est âgé de moins de quatorze ans, le consentement du titulaire de l'autorité paternelle doit être obtenu; toutefois, en cas d'impossibilité d'obtenir ce consentement ou lorsque le refus du titulaire de l'autorité parentale n'est pas justifié par le meilleur intérêt de l'enfant, un juge de la Cour supérieure peut autoriser les soins ou traitements"[49].

This law, for purposes of health care, divides minors according to age into two distinct and admittedly arbitrary categories — the *infans* and the *adolescens*[50]. With regards to both classes of children, a careful reading of the statute leads to the inevitable conclusion that it can have very little bearing on the problem under discussion. The section in question allows either the parents or a judge of the Superior Court to consent to medical acts on behalf of the *infans* so long as they function in the child's best interests. This would imply that for a child thirteen or less, the

49. Section 43 of this act allows treatment to be given to minors without parental consent when the child is in danger of death. For a detailed legislative history and exegetical examination of these aspects of the *Public Health Protection Act*, see P.-A. CREPEAU's article entitled "Le consentement du mineur en matière de soins et traitements médicaux ou chirurgicaux selon le droit civil canadien", (1974) 52 *C.B.R.* 247.

50. CREPEAU, *ibid.* As is apparent from the text of sec. 42 of the Act, the demarcation point is the age of fourteen. It should be noted that under Quebec law, the emancipated minor (arts. 314, 316 C.C.) is no longer subject to parental authority (art. 243 C.C.) and thus enjoys full capacity with regards to his person, cf. J. PINEAU, *op. cit.*, note 30, 230, no. 279. Therefore, the mentally deficient emancipated minor should be treated according to the rules applicable to incapable adults.

medical treatments would have to be necessitated by his state of health[51]. As a result, it is quite difficult to imagine circumstances in which a non-therapeutic sterilization would be indicated. In the case of *adolescens,* who at first glance, appear to enjoy full capacity to consent to medical treatment, they may in fact consent only when their state of health so requires. This, therefore, would suggest that: "Les interventions chirurgicales pour rendre stérile un mineur de quatorze ans dont la santé n'est pas mise en cause ne tombent pas sous la protection de l'art. 42..."[52]. Suffice it to add that the *adolescens* suffering from mental retardation or illness would be unable to validly consent on his own behalf in any event.

In default of legislation dealing with the specific problem at hand[53], one has to rely on the general principles of *droit commun* governing the efficacy of minority consent. In this connection, two contradictory theses have been advanced[54]: On the one hand it has been argued that the prerogatives of parental authority, which also impose the concomitant duty on parents to see to their child's welfare, requires that their consent be obtained. On the other hand, there have been suggestions that not only is the minor who possesses sufficient discernment, able to contract for himself as long as he does not thereby suffer lesion[55], he may also exercise alone the rights relating to his inviolability because of their extrapatrimonial nature.

Of course, with mentally deficient minors, this dilemma becomes moot due to the lack of capacity of the patient. Thus, the issue comes down to the simple question — can the person(s) exercising parental authority over a child consent to an operation destined merely to prevent procreation?[56]

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51. A. MAYRAND, *op. cit.,* note 25, 57, no. 47.

52. *Id.,* 66, no. 52.

53. Art. 20 C.C., which provides for the alienation of parts of the body for purposes of transplantation and deals also with experimentation, is also unrelated to our discussion. See generally W.F. BOWKER, "Experimentation on Humans and Gifts of Tissue: arts 20-23 of the Civil Code", (1973) 19 *McGill L.J.* 161 *et seq.*

54. Described in CREPEAU's article, *loc. cit.,* note 49, 252.

55. Art. 1002 C.C.

56. It should be mentioned that paternal authority has been replaced by parental authority under the terms of *An Act to Amend the Civil Code,* L.Q. 1977, c. 72, which came into effect the 17th of November 1977. Under the new article 244 of the Code, the father and mother exercise parental authority together. By exception when one parent performs alone any act of authority concerning their child, he or she is, with regards to third persons in good faith, deemed to be acting with the

The essence of the *Civil Code* provisions on minority, as well as of other legislations relating to minors, is to grant preeminence to the notion of the child's best interests in the exercise of parental authority[57]. The main difficulty in the application of this principle resides in the fact that present law fails to provide a comprehensive definition of this "interests" concept[58]. Nevertheless, it would seem reasonable to infer that in certain circumstances, a non-therapeutic intervention could inure to the mentally handicapped minor's benefit. In these instances, the sole consent of the persons vested with parental authority would suffice.

From this overview of Quebec law, it appears to be as inaccurate to affirm that the mentally deficient can be sterilized on demand, as it is to state that except for purely therapeutic reasons, they can never be sterilized. In this, as in many other areas of law, the best interests of the incapable person, and not the convenience of his entourage, must remain the fundamental criterion.

C.- Non-therapeutic sterilization in Common Law Canada

As in the Criminal Law and the Civil Law, the two fundamental issues to be faced are the legality of the sterilization operation and

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consent of the other parent (art. 245c C.C.). For a more complete description of these changes to the Code, see Ethel GROFFIER-ATALA, "De la puissance paternelle à l'autorité parentale", (1977) 8 *R.G.D.* 223. In the event that the parents are deceased, are declared incapable or have legally forfeited their rights of authority (art. 245e C.C.), their powers devolve to the tutor, cf. J. PINEAU, *op. cit.*, note 30, 215, no. 251.

57. See for example art. 245d C.c. and secs. 3,5, and 6 of the *Youth Protection Act* (*Loi sur la protection de la jeunesse*), L.Q. 1977, c. 20. For a more general discussion, see E. GROFFIER-ATALA's article, *id.*, 224-226; Edith DELEURY, Michèle RIVET, Jean-Marc NEAULT, "De la puissance paternelle à l'autorité parentale: une institution en voie de trouver sa vraie finalité", (1974) 15 *C. de D.* 779, 825 *et seq.*; and Monique OUELLETTE-LAUZON, "Notion de l'intérêt de l'enfant", (1974) 9 *R.J.T.* 367.

58. M. OUELLETTE-LAUZON, *id.*, at p. 368: "La notion d'intérêt de l'enfant est aussi bien ou aussi peu définie que celle du bon père de famille; l'enfant aujourd'hui devenu le bon père de famille de demain existe semble-t-il, de sa naissance à sa mort dans un certain flottement juridique...". In the *Draft Civil Code* prepared by the Civil Code Revision Office of Quebec, art. 25 in Book One on Persons will eventually remedy this situation: "In every decision concerning a child, whether that decision is made by his parents, by the persons acting in their stead, by those entrusted with his custody or by judicial authority, the child's interest must be the determining factor. Consideration is given in particular to the child's age, sex, religion, language, character and family surroundings, and the other circumstances in which he lives".

the requirement of consent.

As to the legality of the operation, assuming again, for the purpose of discussing the private law, that the criminal law does not prohibit non-therapeutic sterilization, it is clear that therapeutic sterilization is not *per se* illegal. The question is whether eugenic or contraceptive sterilization is legal. Although there is some dicta in English case law to the effect that any non-therapeutic sterilization was contrary to public policy[59], this policy (at least as far as the Common Law Provinces of Canada are concerned) must be regarded as having changed in content, as the operation is carried out relatively frequently in hospitals supported by Government funds and by doctors who not only are not prosecuted, but are paid for the procedure by the Government. But does this legality depend on the person being able to give personal "informed" consent to the operation? In other words, is the non-therapeutic sterilization of those unable to consent for themselves legal according to private law in the Common Law provinces?

1. Mentally incompetent adults

It is not necessarily true that a mentally incompetent person[60] is unable to give a valid consent to a medical intervention.[61] Consent requires capacity, voluntariness and information and these elements must be examined individually in relation to each mentally incompetent person.

There are two forms of incapacity, factual and legal. Factual incapacity for the purposes of the present discussion means the person is unable to understand either the nature of the procedure or the consequences of giving or withholding consent.[62] In such cases personal consent is impossible. Legal incapacity exists when the person has been committed, that is declared legally incompetent by

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59. *Bravery* v. *Bravery,* [1954] 3 All E.R. 59, per Denning L.J. at pp. 67-8.

60. The term "mentally incompetent person" is used here to refer both to persons who are mentally ill, where this affects their competency, and to the mentally retarded. In the former case, particularly, the degree of competency may vary from time to time.

61. The Federal Law Reform Commission of Canada's Working Paper on *Sterilization: Implications for Mentally Retarded and Mentally Ill Persons, loc. cit.,* note 5, emphasize this point in its Recommendations.

62. See the definition of " 'mentally competent'... having the ability to understand the subject matter in respect of which consent is requested and able to appreciate the consequences of giving or withholding consent..." in *The Mental Health Act,* R.S.O. 1970, c. 269 as amended by 1978 c. 50, section 1 (fa).

a court of competent jurisdiction.[63] It is possible for a person to have intervals of factual capacity while subject to a commitment order and the question is whether the person can give a valid consent at such times.[64] One argument for saying that he cannot (or at least that the consent would be inoperative as soon as there was no longer factual capacity) is that consent, or consenting, is a continuing process and not just an event, and it necessarily includes the right and ability to be able to withdraw the consent, that is to refuse the treatment, at any time. As such an ability is lost with the loss of factual capacity, the consent becomes ineffective at that time even if it were previously operative.

Secondly, voluntariness requires the decision to undergo a treatment to be one of free choice. In the absence of such free choice, the consent is said to be defective due to the presence of coercion, duress or undue influence. The two major factors which are likely to

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63. For example, under the Alberta *Dependent Adults Act*, S.A. 1976, c. 63.

It is debatable whether in some instances involuntary commitment pursuant to statutory provisions, such as contained in the Ontario *Mental Health Act*, cited *ibid.*, where court intervention is not required, have the effect of making the person subject to them legally incompetent. The better view is that they do not and the question is then simply one of the presence or absence of factual capacity in order to determine the person's capacity to consent.

64. It is a difficult question whether the effect of a commitment order is to completely divest the then legally incompetent person of his power of consent. Some contracts entered by such a person may be valid (see G.H. TREITEL, "The Law of Contract", 4th ed., Stevens & Sons; London, 1975, p. 395 et seq.) and such a person is able to be held liable in tort (see, by analogy, *Morris* v. *Marsden*, [1952] 1 All E.R. 925 (Q.B.). Although the defendant in that case was not subject to a commitment order, the reasoning on which his liability was based indicates this probably would not have altered the decision.) We suggest that if the incompetent can be considered as having sufficient capacity to attract tort liability, he can be considered as possibly having sufficient capacity to consent for the purposes of determining the tort or criminal liability of another who has "touched" him. Whether this consent is present will be a question of fact in the circumstances. Further as the right to one's bodily integrity is the most personal of all rights, to the extent that a person is capable of exercising that right he should be allowed to do so personally (See P.A. CREPEAU, *loc. cit.*, note 49.)

The availability of such an approach would be subject to the proviso that the commitment order did not expressly vest the power to consent to health care in the guardian, as for instance, may occur under the *Dependent Adults Act* of Alberta (*loc. cit.*, note 63, at section 9(1) (h)). By implication, although even then not necessarily, such an order probably divests the incompetent person of the power of consent. One further difference between establishing the validity of consent of a person subject to a commitment order and one who is not, is that the normal presumption of sanity will be reversed. This means that the person alleging that the committed person consented in a lucid interval must prove that lucidity. (See Halsbury's Laws of England, 3rd ed., 1960, vol. 29, p. 419 at Nos. 819-820.)

give rise to such an impediment to the mentally incompetent person's consent are the effects of institutionalization and the pressure to conform in order to be accepted by the rest of society.[65]

The requirement for information does not differ for a normal or mentally incompetent person. It means that there must be adequate disclosure to the patient of the risks and benefits of having and not having the procedure and that he must at least apparently understand those consequences.[66] To the extent that actual understanding of this information is required, it may be more difficult to achieve with a mentally incompetent patient.

Assuming then that the above criteria are not able to be fulfilled and therefore the person is unable to consent for himself, may another consent on his behalf? First we would like to change the terminology often used in this area, and to avoid the phrase "proxy consent". It is we think misleading. It is quite a different matter and different principles are involved when the "consent" relates to another rather than oneself, and this difference must always be apparent. To avoid confusion and transmission of principles appropriate in one instance but not the other, one should refer to giving permission or authorization to intervene on the person of another, in this case the incompetent, rather than to consent.[67]

As already mentioned, two of the values which consent protects are autonomy and inviolability. The mentally incompetent person, by definition where he is legally committed, lacks the ability to exercise his autonomy. Hence unlike the situation with the competent adult, where this value may predominate over that of inviolability[68], respect for the inviolability of mentally incompetent persons is always the determinative principle when making decisions involving them.

In general, this respect has been traditionally interpreted in law as requiring that a medical intervention on a mentally incompetent

65. See generally E. GOFFMAN, "Asylums, Essays on the Social Situation of Mental Patients and Other Inmates", Aldine, Chicago, 1961.

66. See M.A. SOMERVILLE, *Consent to Medical Care,* Study Paper Prepared for the Law Reform Commission of Canada, Protection of Life Series, 1979.

67. This approach is based on the Recommendations of the United States National Commission for the Protection of Human Subjects of Biomedical Research. See *Report and Recommendations Research Involving Children,* DHEW Publication No. (05) 77-0004 U.S. Government Printing Office, Washington D.C., 1977.

68. See *supra,* p. 605.

person be for his therapeutic benefit. Any extension beyond this would need specific enabling legislation.

Such legislation, dealing specifically with the sterilization of mentally incompetent persons, has in fact existed in the past in two Common Law Provinces of Canada — Alberta[69] and British Columbia.[70] The *Sexual Sterilization Act* of Alberta, which was repealed in 1972,[71] was the more extensive. It provided for sterilization of psychotics,[72] mental defectives,[73] epileptics,[74] neurosyphilityics[75] and those suffering from "mental deterioration"[76] or Huntington's chorea.[77] The decision to sterilize, which was taken by an appointed Board of four persons two of whom were medical practitioners,[78] was required to be unanimous. In the case of "mentally defective persons" there was no requirement for either consent of, or veto by, the mentally defective person, or his guardian.[79] There was a provision allowing the medical superintendant of a mental hospital to cause a person to be examined by the Board prior to discharge from the hospital[80] in order to see whether he should be sterilized. The Act also provided immunity from civil action for all persons acting pursuant to the Act, from such medical superintendants, to surgeons carrying out sterilizations and members of the Board.[81]

There has been some relatively recent research done on how this eugenic statute was applied in practice.[82] The results show clear

69. *Loc. cit.*, note 1.

70. *Ibid.*

71. *Ibid.*

72. *Loc cit.*, note 1, at s. 5.

73. *Id.*, section 2 (d) " 'mentally defective person' means a person in whom there is a condition of arrested or incomplete development of mind existing before the age of eighteen years, whether arising from inherent causes or induced by disease or injury".

74. *Id.*, s. 7.

75. *Ibid.*

76. *Ibid.*

77. *Id.*, s. 8.

78. *Id.*, s. 3 (2).

79. *Id.*, s. 6.

80. *Id.*, s. 4.

81. *Id.*, s. 9.

82. T. CHRISTIAN, "*The Mentally Ill and Human Rights in Alberta: A Study of the Alberta Sexual Sterilization Act*", 1974, Unpublished paper.

discrimination. Persons presented to and approved for sterilization by the Board occupied socially vulnerable positions.[83] They tended to be female, young, inexperienced, unemployed and dependent or employed in low-status jobs. They were residents of small towns rather than cities, members of ethnic minorities and single, rather than married. Eastern-Europeans, Indian and Métis people were sterilized in disproportionate numbers to their racial incidence in the population of the Province. For instance Indian and Métis constitued 3.4 per cent of the Albertan population but 25.7 per cent of persons sterilized.

Apart from such specific legislation one must consider the power of a guardian to consent to non-therapeutic sterilization of his ward under mental incompetency legislation.

The *Mental Incompetency Act* of Ontario allows a Court to "appoint a committee of the [mentally incompetent] person or of the estate of the person or both"[84] where the person "requires care, supervision and control for his protection and the protection of his property".[85] Apart from this provision, there is no further elaboration of the committee's powers over the person of the mental incompetent, the Act concentrating instead on those relating to his estate.[86] Thus the guardian's powers over the person of his ward in relation to the latter's health care would be restricted to the traditional one of consenting only to medical interventions intended to be of therapeutic benefit.

The other relevant Ontario Act is the recently amended *Mental Health Act*.[87] This deals essentially with the provision of involuntary psychiatric treatment for persons dangerous to themselves or others, or showing a lack of competence to care for themselves.[88] The Mental Healt Act could apply to persons also falling within the terms of the *Mental Incompetency Act*. As the latter is more stringent in its requirements for commitment and more general in scope, we suggest it should be the governing legislation where both Acts appear to be applicable.

83. *Ibid.*

84. *The Mental Incompetency Act*, R.S.O. 1970, c. 271 (as amended by S.O. 1978), c. 50, s. 12 (1) (a).

85. *Id.*, s. 1 (e).

86. *Id.*, s. 13.

87. Cited *supra*, note 62.

88. *Id.*, s. 8 (1).

To the extent that sterilization of a mentally incompetent person could be considered "psychiatric treatment"[89] it may be covered by the provisions of s.31a(2) of the *Mental Health Act:*

> Psychiatric treatment shall not be given to an involuntary patient without the consent of the patient or, where the patient has not reached the age of majority or is not mentally competent, the consent of the nearest relative of the patient except under the authority of an order of a regional review board made on the application of the officer in charge.

In other words, if sterilization were considered "psychiatric treatment", it could be carried out non-consensually, provided the incompetent person had been involuntary committed. However, such an interpretation or application of this provision, we believe, would be very unlikely.

It is interesting to contrast the approach taken under *The Dependant Adults Act*[90] of Alberta. This provides for the appointment of plenary or partial guardian of the person[91] of a mental incompetent over eighteen years of age as well as for trustees of his estate.[92] The plenary guardian, and the partial guardian if given the power, has "the power and authority... to consent to any health care that is in the best interests of the dependent adult".[93] " '[H]ealth care' includes any examination, diagnosis, procedure or treatment undertaken to prevent any disease or ailment,[94]... any procedure undertaken for the purpose of preventing pregnancy...[95] [and] any medical, surgical, obstetrical [sic.] or dental treatment..."[96] These provisions are clearly broad enough to include contraceptive and probably eugenic sterilization.[97] Thus, provided the guardian has

89. One could argue, for example, that sterilizing a mentally incompetent woman in order to prevent psychiatric trauma to her during childbirth was psychiatric treatment.

90. *Loc. cit.*, note 56.

91. *Id.*, s. 6.

92. *Id.*, s. 25.

93. *Id.*, s. 9 (1) (h).

94. *Id.*, s. 1 (h) (i).

95. *Id.*, s. 1 (h) (ii).

96. *Id.*, s. 1 (h) (iv).

97. Thus non-therapeutic sterilization of mentally incompetent adults has been permitted in Alberta under two different legislative enactments based on quite different principles. The rationale of the *Sexual Sterilization Act* (*loc. cit.*, note 1) was protection of the community at the expense of the individual if there were conflict between them. In contrast, the dominant principle underlying *The Depen-*

the power to consent to his ward's "health care" and such a procedure is "in the best interests of the dependent adult" the guardian's consent to it will be valid for all legal purposes.

Similarly to Ontario, Alberta also has a *Mental Health Act* which provides for "formal [involuntary] admission"[98] and treatment[99] which is not defined. There is close correlation between this Act and the *Dependant Adults Act*[100] which was passed subsequently and which amends the former Act to some extent.[101] One could argue from this correlation that there is an implied legislative intention that where a matter is expressly provided for in one Act, as sterilization is in the *Dependent Adults Act,* it cannot be carried out under an implied power arising from the other Act.

Each of the Alberta Acts gives a right of appeal to persons subject to either a guardianship order or a formal admission certificate. But this appeal is only as to the validity of the order or certificate itself and does not lie with respect to procedures carried out pursuant to the authorization of a guardian exercising his powers under such an order or certificate. Under the *Dependent Adults Act* the appeal is to a court[102] whereas *The Mental Health Act* provides for appeal to a review panel[103] and then to the Supreme Court of Alberta.[104] Such a review panel is to be "composed of (a) a psychiatrist, (b) a therapist or a physician, (c) a solicitor who shall be chairman, and (d) a person representative of the general public".[105]

With respect to the power of a court to authorize sterilization of a mentally incompetent person, apart from specific statutory provision to this effect, such power would have to be argued as flowing from one of three sources: the "parens patriae" power, the inherent power of the state to care for its citizens, which may be expressly or impliedly delegated to a court; the substituted

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dent Adults Act (*loc. cit.,* note 63) is protection, and acting in the best interest, of the incompetent person. Hence the same procedure may be permitted, but for quite different reasons.

98. *The Mental Health Act,* S.A. 1972, c. 188, s. 29.

99. *Id.,* s. 30.

100. *Loc. cit.,* note 63.

101. See *id.,* 'Division 2. Transitional and Consequential', s. 68 et seq.

102. *Id.,* ss. 15 & 16.

103. *The Mental Health Act, loc. cit.,* note 98, s. 38.

104. *Id.,* s. 46.

105. *Id.,* s. 19 (2).

judgment power, the power of a court to "stand in the shoes" of the incompetent and make the decision for him on the basis of what he would choose were he able to do so;[106] or some inherent power derived from the court's general jurisdiction over incompetents.[107] In deciding on whether it has jurisdiction to authorize sterilization, the factors influencing the court could be a possible threat of civil liability,[108] sensitivity to the rights of the incompetent, or unwillingness to usurp the legislative function.[109] In the latter case the court will deny its authority to authorize the operation and may call for legislative action. If the court does intervene, it may, by way of judicial law making, try to establish guidelines for when sterilization should be allowed or prohibited. This is now most unlikely to occur in Canada as the call in Ontario for a report on sterilization of mentally incompetent children and the Working Paper of the Law Reform Commission of Canada are probably indicative of a trend towards asking the legislative branch to decide on the matter. However, if it were considered to be "too hot" politically, such a legislative decision could still be avoided by Parliament's failing to act and leaving the matter to be decided on the basis of individual cases by the courts.[110]

2. Mentally incompetent minors

The first legally significant difference which may exist between mentally incompetent minors and adults is that mental incompetency legislation may expressly provide that it does not apply to minors. For instance the *Dependent Adults Act*[111] of Alberta only governs persons over the age of eighteen years.[112] Where this is the case, or where even though a commitment order is available none has been sought in relation to a mentally incompetent child, the

106. There is only one clear example of this power being used to authorize a non-therapeutic medical intervention on the person of an incompetent — see *Strunk* v. *Strunk, loc. cit.*, note 20, an American case involving live donor organ transplantation.

107. See C.N. NORRIS, "Courts — Scope of Authority — Sterilization of Mental Incompetents", (1977) 44 *Tennessee L.R.* 879, 882 et seq.

Blackstone says the King had the duty to act as "the general guardian of all infants, idiots and lunatics", W. BLACKSTONE, "Commentaries", Vol. 3, *47.

108. See for example, *Stump* v. *Sparkman,* 46 U.S. Law Week 4253 (1978) (U.S.S.C.).

109. See C.N. NORRIS, *loc. cit.*, note 107 at fn. 53 and p. 888.

110. To some extent this phenomenon has occurred in relation to regulation of abortion. See for example, *Roe* v. *Wade*, 410 U.S. 113 (1973) (U.S.S.C.).

111. *Loc. cit.*, note 63.

112. *Id.*, s. 2 (1).

parents' natural legal guardianship which arises with respect to every child, (but which on modern views gradually abates as the child matures[113]), is prolonged to the age of majority.

Where the parents' guardianship is one arising under statute, the same considerations would apply as with mentally incompetent adults in determining the powers that this carries. However, where, natural guardianship is involved, although the question is similar to that asked with respect to statutory guardianship (i.e. what is the power of the parent-guardians to consent to a non-therapeutic intervention on their child) the answer may not be analogous. This is the case because one cannot derive express or implied powers of the parent-guardian from statutory enactments, where the guardianship does not have such a legislative source.

As far as authorization, in general, of medical interventions on children is concerned, one can leave aside the question of a child's power to consent, as sterilization of a child capable of giving such a consent would never be justified.[114] The problem then involves incompetent children and validation of such interventions on them. Where the aim is therapeutic, there is no doubt that the parent has the power, and even the duty,[115] to authorize the intervention, to "consent" to it. On the other hand, the parent has no power to authorize a non-therapeutic intervention.[116] This probably means that the intervention is required to be for the therapeutic benefit of the child and it is not enough if it is merely in his "best interests".[117]

113. See *Hewer* v. *Bryant*, [1969] 3 All E.R. 578 (C.A.).

114. Although note that the draft Uniform Act prepared by the Conference of Commissioners on Uniform Law (Uniform Law Conference of Canada, Medical Consent of Minors Act, Draft 22, September 1974) would allow a minor of sixteen years of age or more, or on certain conditions a minor under this age, to consent to "medical treatment" which includes "any procedure undertaken for the purpose of preventing pregnancy" (section 1 (d)). There is no reason to suggest that this does not contemplate the power of a minor to consent to surgical sterilization. (See E. PICARD, "Recent Developments in Medical Law", (1977) 1 *Legal Medical Quarterly* (3) 201 at pp. 206-7.)

115. There is provision in Ontario for example under *An Act to Revise The Child Welfare Act* S.O. 1978, c. 85 (proclaimed 15 June 1979, except for s. 20), for a court to provide consent to necessary medical treatment where the parent refuses to do so (sections 19 (1) (ix) and 30).

116. See, for example, G. DWORKIN, *loc. cit.*, note 18, p. 360.

117. Some incompetent organ donor transplant cases in the United States include holdings which are contrary to such a rule, for example, *Hart* v. *Brown*, cited *supra*, note 20, *Strunk* v. *Strunk*, *loc. cit.*, note 20. It may be however that the existence of a rule prohibiting non-therapeutic interventions except on the basis of personal consent precipitated an application to a court for approval of these operations

One strong reason for not allowing the parents to consent, or at least not making their consent solely determinative in authorizing a sterilization operation, is that despite their love for their child and the most honest of intentions, they could be faced with a conflict of interest. The most obvious example is that they almost certainly want to avoid being responsible for the care of any off spring born to their child.

The alternative to relying on parental consent would be authorization by a court. The possible legal bases for this are the same as those mentioned in regard to incompetent adults,[118] and would include the court's inherent wardship jurisdiction[119] and, in addition, any express or implied powers arising under youth protection legislation.[120] It would be most unlikely however that a court would find that it had authority to authorize a non-therapeutic sterilization under this type of legislation although it could clearly permit therapeutic interventions as being within "proper medical, surgical or other recognized remedial care or treatment necessary for the child's health or well-being..."[121]

Thus, non-therapeutic sterilization of a mentally incompetent child is at present illegal in Common Law Canada, which is what the advisors to the Ontario Government stated in relation to the law of their Province[121a].

CONCLUSION

Of the many alternatives open to the legislatures, one possible approach would be to prohibit the non-therapeutic sterilization[122] of

where personal consent could not be obtained. It is then possible to argue that it was the court's authorization which validated the intervention rather than the parent's consent. However approval of the parent's consent was specifically stated as basis of legitimation of the operation on the child organ donor, in *Nathan* v. *Farinelli*, *loc. cit.*, note 20.

118. See *supra*, pp. 21-22.

119. See *In re D* (A Minor) (Fam. D.), [1976] 2 W.L.R. 279, especially at pp. 286-7.

120. See *An Act to Revise the Child Welfare Act*, of Ontario, *loc. cit.*, note 115, at sections 19 (1) (ix) and 30.

121. *Id.*, s. 19 (1) (ix).

121a. "Options on Medical Consent", A discussion paper prepared by the Ontario Interministerial Committee on Medical Consent, Ontario, 1979, p. 9.

122. The Law Reform Commission of Canada's (*loc. cit.*, note 5) proposed definition of *therapeutic sterilization* is "... 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,..." and of *non-therapeutic*

all mentally incompetent persons, or of those under a certain age. However a blanket presumption either for or against such sterilization may not be just. Proceeding by presumption is cheaper and easier than individual determination, but it is unacceptable when fundamental rights including the right to reproduce[123] are ignored.[124] On the other hand, there may be some right, if not a fundamental one, to enjoy human sexuality free of the burdens of pregnancy or parenthood in some circumstances.

Thus a decision-making system must be devised which allows a determination to be made on an individual basis. The controls governing such a system may be either substantive or procedural or both. The substantive rules, we suggest, will include respect for the rights of the mental incompetent and a rebuttable presumption against the appropriateness of sterilization where the person is unable to give personal consent or is under the age of majority[125]. Further, an incompetent's capacity to veto sterilization should be recognized more readily than his capacity to consent to it. Where such a refusal is present, it can probably only be overridden with therapeutic justification. Where there is neither consent nor refusal, the sterilization will have to be proven to be in the best interests of the incompetent person before it can be carried out. In order to fulfil this criterion, the intervention must be clearly indicated, that is the incompetent person must be sexually active and in all probability fertile. Moreover, sterilization must be the least restrictive alternative available; in other words less drastic measures, such as other types of contraception, must be inappropriate or contraindicated.

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sterilization "... a safe and effective procedure resulting in sterilization when there is no disease, illness, disability, or disorder requiring treatment but the surgery is performed,... for:

1. the control of menstruation for hygienic purposes;
2. the prevention of pregnancy in a female; and
3. prevention of ability to impregnate by a male."

123. See *In re D., loc. cit.*, note 119, p. 286.

124. See *Stanley* v. *Illinois*, 405 U.S. 657 (1972).

125. This is to take the approach that the burden of proof rests on the person claiming that the sterilization operation is a benefit, to prove that this is so. Such an onus is consistent with the traditional burden in proving the legality of any medical intervention. It has been suggested, however, that the burden of proof should be reversed to the effect that the person claiming that denial of sterilization is a benefit must prove this. See T. THOMPSON, "The Behavioural Perspective", The Hastings Center Report 8 (3), 29, (1978) at p. 30.

Procedural safeguards will include a requirement for a hearing where there is any reason to doubt the patient's competency. Such doubt will be present if the person's capacity to consent is questioned, or when the request for sterilization has emanated from a third party, or, where the person himself requests sterilization, there is any indication he may have been subject to coercion or undue influence.[126]

Where the person is designated incompetent, or is not of the age of majority, we suggest that one of the following procedures could be adopted. One approach is to pass legislation which provides that the sterilization would have to be approved by a multi-disciplinary committee, the members of which could include a physician, a psychiatrist, a mental health social worker, a clergyman, two representatives of the general public, one of whom should be a woman, and possibly a lawyer. Where the proceedings are instituted by someone other than the incompetent's curator or guardian, the curator or guardian should be given due notice of the hearing and should have a right to appear before the committee. There is also much to be said for having the committee interview the incompetent himself. The decision of the committee may be appealed to a court.

The committee should be required to keep minutes of its proceedings and some form of anonymous case reports should be available. In this way substantive principles which may guide future decisions could be developed.

A second, possibly less complex, procedure would be to simply require judicial authorization of the sterilization. In this connection, we would recommend that the incompetent person be represented before the court by an independent counsel acting as a guardian *ad litem*.

A third alternative would be to require both procedures, that is approval by a committee and ratification of its decision by a court.

In this difficult and sensitive area, there is consensus on the problems but not on the answers. We believe that the fundamental principle guiding any action must be to treat mentally incompetent persons as individuals with varying needs and capabilities and that all decisions, and all decision-making processes, must be aimed at giving each person the fullest opportunity to develop his potential. The enabling and protective functions of the law, both of which are concurrently applicable in regulating sterilization of the mentally incompetent, must be properly balanced. Furthermore, the law must start from a presumption that the mentally incompetent

126. Law Reform Commission of Canada, *loc. cit.*, note 5.

person is entitled not only to its full protection but also to all the rights that other members of the community freely enjoy. There must then be adequate justification for the abrogation of any of these rights.

The scheme which we have suggested is an effort to implement rules and procedures which will balance the paternalistic but humanistic goals of 'parens patriae' with every person's right to freedom, which includes the "right to be let alone"[127] and the right to one's bodily integrity.

Finally from a purely selfish perspective we should keep in mind that "accepting sterilization's philosophical justification and social utility can have many far reaching implications for the expansion of governmental powers and controls over the citizen of the therapeutic state".[128]

127. T. McI. COOLEY, "Torts", 2 ed. 1888, 29 S.D.; WARREN and L.D. BRANDEIS, "The Right to Privacy", (1890) 4 *Harv. L. Rev.* 193.

128. Cited by M. Rioux in a preliminary paper on "The Sterilization of Mental Incompetents", prepared for the Law Reform Commission of Canada, quoting N.N. KITTRIE, *The Right to Be Different*, John Hopkins Press, Baltimore, 1971.