WHATEVER HAPPENED TO EVE?
A COMMENT

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This comment generally reviews the Supreme Court of Canada decision in *Re Eve*[1] and, in particular, examines the Court's conclusion with regard to its *parens patriae* jurisdiction. As the case involves a combination of important legal and social issues, it is worthy of careful scrutiny.

I. The Facts and Findings

A. At Trial

The subject of *Re Eve* was "Eve", a 24 year old mentally retarded woman. On July 14, 1979, Eve's mother made an application to the Supreme Court of Prince Edward Island, requesting that:

(a) Eve be declared a mentally incompetent person pursuant to the provisions of *The Mental Health Act* of Prince Edward Island;[2]

(b) She be appointed Committee of the estate of Eve, her daughter;

(c) She be authorized to consent to the sterilization of Eve by a tubal ligation operation.[3]

Eve was not represented at trial. Proceedings were conducted by the solicitor for Eve's mother, and there was an appearance by counsel for the Department of Justice of the Province of Prince Edward Island.

The application was denied. The learned trial Judge found that the Court may, under its *parens patriae* jurisdiction, choose to exercise its jurisdiction to intervene on behalf of a child or mentally incompetent person if and when it is necessary to do so in an appropriate case. It was found inappropriate to do so in this case because such intervention would permit the violation of Eve's right to the inviolability of her person against involuntary trespass since the surgical procedure required was solely for a contraceptive purpose.

B. On Appeal to the Supreme Court of Prince Edward Island in Banco

Eve's mother appealed on the ground that the learned trial Judge was in error in holding that the Court did not have the authority or the

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1. *Eve by her Guardian Ad Litem, Milton B. Fitzpatrick, Official Trustee* v. *Mrs. E.* (1986), [1986] 2 S.C.R. 388, 31 D.L.R. (4th) 1, 61 Nfld & P.E.I.R. 273 [hereinafter, *Eve*, cited to S.C.R.].

2. R.S.P.E.I. 1974, M-9, as amended.

3. *Re Eve* (14 June 1979), (S.C.P.E.I.) [unreported].

jurisdiction to authorize this contraceptive surgical procedure on a person who was mentally retarded. At this stage, likely because of the attention the case had received, the parties involved realized that Eve should be granted some independent representation. Therefore an application was made to appoint the Official Trustee to act as *guardian ad litem* for Eve in the proceedings, and to grant leave to the Official Trustee to become a party to the proceedings.

The Supreme Court of the Province of Prince Edward Island *in banco* overturned the decision of the learned trial Judge and ordered that Eve be appointed a ward of the Court, pursuant to its *parens patriae* jurisdiction, for the sole purpose of facilitating and authorizing her sterilization.[4]

The method of sterilization was reserved pending the receipt of further evidence. On what seemed to be very sketchy evidence provided by correspondence, the Court later ordered that a hysterectomy — and not a tubal ligation — be performed on Eve.

C. On Appeal to the Supreme Court of Canada

From this decision, Eve by her *guardian ad litem*, appealed to the Supreme Court of Canada. The matter was heard on June 4, 1985, and judgment was rendered on October 23, 1986. The appeal was allowed and the Court found that:

(a) There was no legislation authorizing the Court or Committee to consent to a non-therapeutic sterilization on behalf of Eve;

(b) The *parens patriae* jurisdiction of the Court, although its scope or sphere of operation is virtually unlimited, should *never* be used to authorize the non-therapeutic sterilization of a mentally incompetent woman.[5]

II. Observations

That this appeal was allowed is no surprise. There was well-established American precedent before the Court indicating that prior to the exercise of the Court's *parens patriae* jurisdiction in such a matter, the applicant must satisfy the evidentiary onus of proving the existence of certain specific criteria which establish that non-therapeutic sterilization is the only effective way of dealing with a woman's sexuality and fertility.[6] The applicant in this case, namely, Eve's mother, had not satisfied this onus insofar as she had failed to provide the Court with clear and convincing evidence that Eve:

(a) Was fertile;

(b) Would necessarily engage in sexual intercourse or be exposed to situations where sexual intercourse would be imposed upon her;

4. *Re Eve* (1981), 115 D.L.R. (3d) 283, 79 A.P.R. 359, 28 Nfld & P.E.I.R. 359 (S.C.P.E.I.).
5. *Supra*, note 1 [emphasis added].
6. See *Re Grady* N.J. 426 A. (2d) 467 (N.J.S.C. 1981).

(c) Would suffer physical or mental trauma in giving birth.

The American precedent also indicated that prior to the exercise of a Court's *parens patriae* jurisdiction, the Court must be satisfied that the respondent was afforded procedural safeguards. At trial Eve was not afforded the protection of a *guardian ad litem;* nor was there independent evidence given by a doctor or psychologist regarding the proposed non-therapeutic sterilization.

It is submitted that any one of these evidentiary or procedural failures would have provided the Court with sufficient grounds to allow the appeal. However, the Court did not allow the appeal on any of those grounds, but rather chose to decide the matter on the basis of the *parens patriae* doctrine. Accordingly, the significance of this decision lies in its restriction of the concept of *parens patriae.*

It is helpful to examine in some detail the judgment of the Supreme Court of Canada delivered by The Honourable Mr. Justice La Forest. Mr. Justice La Forest took pains to review the history of *parens patriae.* He concluded that:

(a) The jurisdiction existed from the earliest times as the sovereign was always vested with the care of mentally incompetent persons. The jurisdiction was transferred to the Lord Chancellor in the 17th century and was later vested in the Provincial Superior Courts of Canada.

(b) The jurisdiction cannot be defined by its limits. The situations under which the jurisdiction can be exercised are legion, and the categories under which the jurisdiction can be exercised are never closed.

(c) The jurisdiction may be used to authorize the performance of a surgical operation that is necessary to the physical or mental health of a person.

(d) The jurisdiction must be exercised for the benefit of the person, not for anyone else.

These conclusions of law are not challengeable, being based on valid precedent. The learned Justice, in his judgment, then turned to consider the horrors of eugenic sterilization.

Eugenic theory, based upon Mendelian theories of heredity, developed from the premise that physical, mental and moral deficiencies have a genetic basis. Early in this century sterilization of many mentally retarded persons, or persons so labelled, was carried out pursuant to enabling legislation which was founded on this theory.

This history, although related in subject matter to the instant case, is not really relevant. There was neither any suggestion by the parties involved, nor any finding by the courts, that Eve's mother was pursuing this painful and expensive process because she thought Eve might give birth to a mentally retarded child. In fact, the horrors of eugenic sterilization were not touched upon by Eve's counsel in argument, but

were introduced by one of the intervenors, namely, The Canadian Association for the Mentally Retarded.

The learned Justice found that there was no evidence to indicate that failure to perform the operation would have a detrimental effect on Eve's physical or mental health. He quite rightly dismissed the argument that the operation should be performed in order to relieve Eve's mother of any anxiety that Eve might become pregnant.

At this point, one might have expected the learned Justice to review Eve's situation in detail, and to indicate that the exercise of the *parens patriae* jurisdiction to authorize a non-therapeutic sterilization was not appropriate in her case.

Instead, however, Mr. Justice La Forest used his historical and legal overview to gather steam for a giant legal leap. Springing over the walls of sound precedent, he made a finding that the *parens patriae* jurisdiction of the Court should *never* be used to authorize non-therapeutic sterilization.[7] "Never" means *never* for Eve, and *never* for anyone else in her situation. "Never" means that the *parens patriae* jurisdiction of the Court, which had always been regarded as unlimited, has been limited. To argue that there is a distinction between limiting a jurisdiction *per se*, and limiting its exercise, is mere sophistry.

In assessing this decision further, it is necessary to depart from strict legal analysis and consider its practical effects, which include the following: If a woman (let us call her Jane) who lacks the requisite legal capacity to give her own informed consent for a non-therapeutic sterilization, has a normal, healthy sex drive which she wishes to satisfy, and yet is unable to use alternative methods of birth control, she will remain fertile and likely become pregnant. Jane will probably not be able to understand the connection between intercourse and pregnancy, and, if she enjoys a reasonable degree of daily freedom, pregnancy will likely result. Furthermore, even if Jane does understand the connection between intercourse and pregnancy, this by no means precludes the latter from occurring given that many "normal" women experience unplanned pregnancies. Now if Jane is happy with her pregnancies, and would be permitted to keep her children, no problem arises. However, as she likely requires care and supervision herself, her hopes of providing independent care for her child or children are dim, and the prospect of bearing children and having them taken away may be very depressing for her. So, as a result of the Eve case, abstinence from sexual activity is the only choice for Jane. Or rather, the only *answer*, for Jane is a woman who obviously has been denied choice. The Court has closed its door in her face.

Why did the Supreme Court of Canada make this sweeping generalization about its *parens patriae* jurisdiction? The words of Mr. Justice La Forest justifying this position are worthy of note:

> The Court undoubtedly has the right and duty to protect those who are unable to take care of themselves, and in doing so it has a wide discretion to do what it considers to be in their best inter-

7. *Eve, supra*, note 1 at 431.

> ests. But this function must not, in my view, be transformed so as to create a duty obliging the Court, *at the behest of a third party* to make a choice between the two alleged constitutional rights — the right to procreate or not to procreate — simply because the individual is unable to make that choice. All the more so since, in the case of non-therapeutic sterilization as we saw, the choice is one the courts cannot safely exercise.[8]

"At the behest of a third party" is a very interesting phrase. The learned Justice well knows that the rules of procedure dictate that this type of application must be brought by a third party on behalf of a person who lacks legal capacity. Yet he chooses the term "behest," instead of the more accurate word "application." "Behest" is defined in Webster's dictionary as "an authoritative order" or "an urgent prompting." Does the use of this word bespeak the concern that the Court will somehow be made to dance to the tune of the eugenic waltz?

Or did the Court fear that it would be saddled with a job that it would not want? Certainly a court of law hearing evidence for and against a proposed sterilization is a forum well-suited to deliver an informed judgment to serve the best interests of an individual. Yet the learned Justice states:

> Judges are generally ill informed about many of the factors relevant to a wise decision in this difficult area. They generally know little of mental illness, of techniques of contraception or their efficacy. And, however well presented a case may be, it can only partially inform. If sterilization of the mentally incompetent is to be adopted as desirable for general social purposes, the legislature is the appropriate body to do so. It is in a position to inform itself and it is attuned to the feelings of the public in making policy in this sensitive area. The actions of the legislature will then of course be subject to the scrutiny of the courts under the *Canadian Charter of Rights and Freedoms* and otherwise.[9]

This suggestion is the final irony. Mr. Justice La Forest, earlier in his judgment, had reviewed eugenic theory and even reproduced the disgusting quotation from the landmark case *Buck* v. *Bell* which ended with "three generations of imbeciles are enough."[10] He demonstrates concern that any decision authorizing sterilization might be likened to a rekindling of eugenic theory.

Why, then, would the learned Justice suggest that the legislature is the appropriate body to deal with this issue? If Mr. Justice La Forest thought that a court could not, after hearing evidence about an individual, inform itself sufficiently to make a decision to serve her best interests, how could he possibly think that the legislature could serve individual interests?

It is interesting to note that after voicing a critical awareness of the mentality that supported eugenic sterilization Mr. Justice La Forest would

8. *Ibid.* note 1 at 437 [emphasis added].

9. *Ibid.* at 432.

10. 274 U.S. 200 (1927).

make the following speculation which chillingly evokes that very mentality:

> If sterilization of the mentally incompetent is to be adopted as desirable for general social purposes then the legislature is the appropriate body to do so.[11]

Furthermore, the learned Justice, who expressed concern about courts hearing applications at the "behest" of a third party, suggests that the legislature consider "the feelings of the public in this area." Who is the public here? It is obviously not persons who would be affected by this legislation, since persons lacking legal capacity to consent to surgical procedures for themselves would hardly be drafting letters to their MLAs. With respect, this referral to the legislature is one that could be described in the vernacular as "passing the buck."

III. Other Jurisdictions

The case of *Re Eve* received judicial comment in the recent English case of *Re B.*[12] In this case, "B" — a girl aged 17 — had a mental age of 5 or 6. An appeal was launched by the Official Solicitor acting as *guardian ad litem* for an order making her a ward of the Court, and for authority to consent, on her behalf, to a sterilization operation. "B" showed signs of sexual awareness exemplified by provocative approaches to male caregivers. Evidence was adduced to show that:

(a) She could not be placed on any effective contraceptive regime;

(b) She was incapable of knowing the causal connection between intercourse and childbirth;

(c) She would panic and require heavy sedation during a normal delivery which carried a risk of injury to the child; and,

(d) She was unable to give her own informed consent to a sterilization operation.

The Court, in exercising its *parens patriae* jurisdiction, indicated that its primary and paramount concern was "B's" welfare and best interests. As well, it found that,

(a) The appeal had nothing to do with eugenic theory or any attempt to lighten the burden which may fall on those who cared for "B";

(b) It was in "B's" best interests to undergo a sterilization operation; and,

(c) The Court, exercising its *parens patriae* jurisdiction, was the only body empowered to authorize such a drastic step as sterilization after a full and informed investigation.

11. *Eve, supra*, note 1 at 432.

12. *Re B.* (1987), [1987] 2 W.L.R. 1213, 2 All E.R. 206 (H.L.) [hereinafter cited to W.L.R.].

It is interesting to note two of the several references made in this case to *Re Eve.* In commenting on Mr. Justice La Forest's statement that sterilization should never be authorized for non-therapeutic purposes under the *parens patriae* jurisdiction, Lord Bridge of Harwich stated:

> This sweeping generalization seems to me, with respect, to be entirely unhelpful. To say that the Court can never authorize sterilization of a ward as being in her best interests would be patently wrong. To say that it can only do so if the operation is "therapeutic" as opposed to "non-therapeutic" is to divert attention from the true issue, which is whether the operation is in the ward's best interest, and remove it to an area of arid semantic debate as to where the line is to be drawn between "therapeutic" and "non-therapeutic" treatment.[13]

In reviewing the same statement, Lord Hailsham of St. Marylebone, L.C., observed:

> But whilst I find the Court's history of the *parens patriae* jurisdiction of the Crown at pages 14 to 21 extremely helpful, I find, with great respect, their conclusion, at page 32, that the procedure of sterilisation should *never* be authorized for non-therapeutic purposes totally unconvincing and in startling contradiction to the welfare principle which should be the first and paramount consideration in wardship cases. Moreover, for the purposes of the present appeal I find the distinction they purport to draw between "therapeutic" and "non-therapeutic" purposes of this operation in relation to the facts of the present case above as totally meaningless, and if meaningful, quite irrelevant to the correct application of the welfare principle. To talk of the "basic right" to reproduce of an individual who is not capable of knowing the causal connection between intercourse and child birth, the nature of pregnancy, what is involved in delivery, unable to form maternal instincts or to care for a child appears to me wholly to part company with reality.[14]

It is indeed refreshing to read this decision of the House of Lords, which does not allow past horrors to blur its vision in reaching a decision to serve the best interests of its ward. In piercing the semantic balloon that has arisen over the debate of therapeutic versus non-therapeutic, this Court demonstrated an understanding that best interests can include a person's emotional, social, economic and psychological needs, the fulfillment of which is crucial to promoting quality of life.

IV. Conclusion

This case demonstrates the law's difficulty in dealing with issues such as sexuality and the right to reproduce. Religion and morality inevitably

13. *Ibid.* at 1217.

14. *Ibid.* at 1216.

affect decisions in this area, because religion and morality have, in the past, been the dictators of conscience and action for people dealing with these issues. The very fact that the learned trial judge chose the pseudonym "Eve" for the woman who was the subject of this application is noteworthy. In a country dominated by the Judeo-Christian religion Eve is not a neutral name. Eve was the first woman on earth and the one to fall from Grace after giving way to temptation and tasting the forbidden fruit. Why did the Judge not call her Elizabeth or Jane?

As so aptly pointed out by the House of Lords in the case of *Re B.*,[15] the Supreme Court of Canada's assertion that the procedure of sterilization should never be authorized for non-therapeutic purposes is totally unconvincing and in startling contradiction to the welfare principle which should be the first and paramount consideration in wardship cases. What did motivate the Court to make this sweeping generalization? Was it an extreme over-reaction to the past horrors of eugenics? Was it a convenient way to relieve the Court from hearing cases which it would not want to hear? Or was it a value judgment that a woman's right to procreate, (whether she wants children or not), is worth more than her right to experience her sexuality without the threat of pregnancy?

Whatever the reasoning behind this decision, the result is not uplifting. "Eve" came to the Court with a very personal conundrum, and she waited seven years, four months, and nine days, for the wheels of justice to finally grind to a halt. When at last her fate was decided, it was not on the basis of evidence about her personal needs, but on a general policy consideration.

Once again mentally retarded people have been treated not as individuals, but as a class. Certainly if one were to choose between "let's sterilize them all" and "let's not sterilize any of them," the latter would be preferable. Yet do not such persons, who have so many special needs and challenges, deserve individualized attention on this intensely personal issue? The Supreme Court of Canada said no.

This decision has been hailed as a victory by the Canadian Association for the Mentally Retarded and other groups interested in the welfare of mentally retarded persons. With respect, it is submitted that this decision, which may conveniently reinforce the tenets of some religious and/or pro-life groups, is no victory for mentally retarded persons, and certainly no victory for women.

15. *Supra* note 12.