Sterilisation of the Apparently Incapable:

Emergency or Epidemic?

Frank Bates

LL.M. (Sheffield), Professor of Law, University of Newcastle (N.S.W.)

In an earlier article in this journal (Bates, 1988a), I concluded that the decision of the House of Lords in *Re B (a minor Wardship: Sterilisation)* (1987) 2 All E.R. 206, would not be the end of a judicial process dealing with the enforced sterilisation of apparently mentally incapable young women. This has proved to be totally correct and, unfortunately perhaps, has meant that the issues raised by *Re B* have come to be litigated in two recent cases in Australia. At the outset, it should be said that both of these cases, for various reasons, confirm the decision in *Re B* in that the sterilisation was ultimately authorised. At the same time, it must also be emphasised that the judgments in each case were detailed, canvassing many of the central policy issues which are bound to arise in such cases.

The first of these cases, *In re a Teenager* (1989) F.L.C. 92-006, a decision of Cook J. of the Family Court of Australia, attracted a not inconsiderable amount of media attention. This case concerned an application by a severely intellectually impaired teenage girl, through her next friend, to restrain her parents from permitting a planned hysterectomy on her from proceeding. The surrounding facts are not without interest: the operation had been organised by the child's parents and a date and time fixed. Shortly before the operation was to be carried out, the child's father mentioned it to a member of the staff of a government centre which had been established to assist in the care of the intellectually disabled. The father believed the discussion to have been confidential, although the member of staff strongly expressed an objection to both parents to the operation's taking place. In the event, the operation was postponed after the family doctor, who was to carry it out, was told by a solicitor employed by a government sponsored legal centre that the operation could not proceed without a court order. At the time of the hearing, the child was approaching the age of fifteen; she was severely intellectually disabled, having the mental abilities of a child of under three years of age, and it was unlikely that her mental capacity would improve significantly. At the same time, her general health and physical development were normal, and, although she had not yet begun to menstruate, that could occur at any time.

It was argued on behalf of the parents that the need for the operation centred upon the removal of factors stemming from the child's menstruation which were likely to affect her to a serious extent in her development and in the quality of her life. There appeared to be no doubt that the parents wished to prevent any physical or psychological damage to their daughter who, it was claimed, suffered from a phobic reaction to blood and who, in addition, seemed to be a most difficult patient to treat either by means of medication or injection. Both parents strongly argued that the proposed operation would prevent the necessity of time-consuming and repetitious programmes to enable the child to gain skills to cope with her menstruation. This, in turn, would free her to learn important social skills which would certainly improve her quality of life and provide an opportunity, so far as was possible, for her to lead a normal life. The parents also argued that they, better than anyone else, knew the child and that their views were supported by the family doctor. Hence, they strongly rejected the view that only a court could decide upon the need for the planned operation and, indeed, they resented the institution of court procedures by people they regarded as strangers. (I have, it must be said, continually objected to the use of this particular term as many of the parties so described were less of actual strangers to the children than the natural parents; Bates, 1981a). They claimed that decisions such as they had made fell upon the guardians of the child, that loving and thoughtful parents who had made such a decision as to the welfare of the child, ought not to be subject to interference with their clear duties and obligations. It must also be said that the judge, Cook J., emphasised (at 77, 195) that they were, ". . . intelligent and thoughtful but, above all, most loving and caring parents".

On the other hand, it was argued on behalf of the child, that every other reasonable and available alternative should be tried before the operation was carried out. Various witnesses called on behalf of the child argued that the operation was premature. Nonetheless, it was conceded that, although ultimately the child might have to undergo the operation, there were alternatives to the proposed hysterectomy. In that regard, the child's case was supported by the *Human Rights and Equal Opportunities Commission,* who had intervened in the case. This body submitted that there should be a total compliance by the court with a variety of international covenants, conventions and agreements to which Australia was signatory. Although that might be an attractive argument, it must be pointed out that substantial inroads had, quite some time ago, been made into it — in the decision of the English Court of Appeal in *Re D.J.M.S. (a minor)* (1977) 3 All E.R. (for comment, see Bates, 1978) as regards the alleged rights of parents to educate their children as they please.

Nonetheless, it was properly argued by the Commission that, although the Convention was not a part of Australian municipal law, it did have substantial weight. It was also contended that there was a need to permit the child to achieve a degree of self-satisfaction in the management of a bodily function and, therefore, the operation was not in the child's best interests. Again, it was argued that the child's welfare would best be served by a full and complete observance of the rights of the child as relevant to the case. The Commission relied heavily on the terms of the Convention and that, in instances such as the present, there was no room for parental decision and that only a court, such as the Family Court of Australia, could determine that the operation involved in the case was an appropriate treatment for the child.

As Cook J. (at 77, 198) pointed out, the question involved in the case was immensely complex. In particular, his Honour noted that, "This case, in its very inception in various Courts and in its presentation in particular to this Court has revealed an intensity and diversity of attitudes and beliefs as to the appropriateness of the planned operation. Among the lawyers, the doctors, the psychologists, the social workers, the teachers and the less qualified but no less interested other persons all involved in presenting this case to the Court, disputation reigns." Especially, his Honour was at pains to point out, all the witnesses had endeavoured to give the very best of their knowledge, experience and wisdom. This acknowledgement ought, in what is admittedly a particularly difficult case, to provide members of the professions involved with some heart, given some of the earlier remarks which have been made about them (see, for instance, *Epperson* v *Dampney* (1976) 10 A.L.R. 227).

Cook J. (at 77, 201-77, 206) outlined the various items of evidence which had been presented to the court. (It is, perhaps, not without interest that the judge, at 77, 203, found that the family doctor, who had agreed to carry out the operation, to have been the witness who most impressed him) and emphasised (at 77, 206) that the welfare of the child was to be regarded as the paramount consideration.

He then (at 77, 207) went on to discuss the role of the law and the effect of previous legal decisions: although his Honour regarded these cases as, deserving of, ". . . the highest consideration because of the eminence and status of the Courts and Judges issuing them, nevertheless they are not binding on this Court. Each of such cases has its own special facts, and principles of law to be extracted from them can only be applied with caution to this case." Nevertheless, Cook J. referred to *Re B* (above) and noted (at 77, 207) that, although there were a number of similarities between *B* and the Canadian case of *Re Eve* (see Bates, 1988a) he referred (at 77, 209) to the different contextual and statutory provisions which had given rise to the decisions.

At the same time, the Judge (at 77, 210) paid special attention to the decision of the British Columbia Court of Appeal in *Re K; K* v *Public Trustee* (1985) 4 W.W.R. 724. There were, indeed, significant points of similarity between the cases; notably in that it appeared (although there was dispute between some of the expert witnesses) that the child suffered a phobic reaction to the sight of blood. On the other hand, the child in *K* was significantly younger than the girl in *In re a Teenager.* In *K,* there was a strong repudiation of any emphasis on the rights of the retarded child by both Craig and Anderson JJ. A. Thus, Craig J.A. (at 736) took the view that emphasis of the trial judge

amounted to a ". . . significant error in his approach to this case — namely that he tended to focus on the rights of mentally handicapped people generally rather than on the best interests of *K*, although he appreciated that his sole concern should be the welfare of *K*." It is also quite clear that the issue of the reaction to blood played a considerable part in Craig J.A.'s opinion, especially as he noted (at 742) that it was agreed by all of the experts that a 'desensitising program' would be a long and difficult process.

Anderson J.A.'s approach was similar, but possessed quite distinct characteristics: first, he took the view (at 745) that the appropriate test was ". . . whether the anticipated benefits flowing from the operation are such that they exceed the harm or risk of harm to *K*. This test is a subjective one: namely, a consideration of all the relevant factors having regard only to the best interests of *K*." His Honour also noted (at 751) that the additional problems caused by the onset of menstruation in the child might have proved too much for the parents with the possible consequence that the child might have had to be placed in an institution, which was not a desirable course of action. Further (at 756), it appeared that as the child, in the words of Anderson J.A., ". . . could not comprehend the loss of her uterus or that menstrual function . . . she would not suffer any loss. As to 'gender identity, if she did not have the intellectual capacity to comprehend the menstrual function she could not be said to have suffered a loss of 'gender identity'." In *In re a Teenager,* Cook J. commented (at 77, 216) that the judgments in *K* were ". . . thoughtful and compassionate . . ." and also revealed ". . . a firm pragmatism and a close concentration on reality". Many readers might, however, be critical of the apparent repudiation of the notion of rights for handicapped people.

Nevertheless, it was inevitable that broader considerations were to be canvassed when Cook J. (at 77, 217) rhetorically asked, "But where indeed is a line to be drawn between those operations requiring Court consent and those which the Court will allow parents to consent to without interference? Is, for example, consent of the Court to be required for circumcision of a boy child or for cosmetic surgery to a child with malformed features? How far, indeed, is the Court to intrude into the family unit and by what set of values should a judge decide that he or she knows better than the parents what is best for their child?" Necessarily, this broad approach resulted in another consideration of the landmark decision of the House of Lords in *Gillick* v *West Norfolk and Wisbech Area Health Authority* (1985) 3 All E.R. 402. There is no need to rehearse the facts and judicial comments in *Gillick* as they have been widely discussed and publicised elsewhere (Eekelaar, 1986; De Cruz, 1987). How, then, did Cook J. regard the *Gillick* case, in which after all, the so-called rights of the mother did not prevail? In *In re a Teenager,* Cook J. paid particular attention to the dissenting judgment of Lord Templeman (at 77, 220). It must be reemphasised (Bates, 1986) that certain of Lord Templeman's remarks in the *Gillick* case have a slightly antedeluvial ring: thus, he stated (at 201), "I doubt whether a girl under the age of 16 is capable of a balanced judgement to embark on frequent, regular or casual sexual intercourse fortified by the illusion that medical science can protect her in mind and body and ignoring the danger of leaping from childhood to adulthood without the difficult formative transitional experiences of adolescence. A girl under 16 needs to practise but sex is not one of them." As Cook J. (at 77, 221) pointed out, the key issue in *Gillick* was whether the right of parents to veto or give consent to medical treatment was absolute. As His Honour also properly noted it was ultimately decided that it was not, although it should be re-emphasised that it was by a majority of three to two and had been successful before the Court of Appeal (Bates, 1988b; Montgomery 1988). On the other hand, the judge did note that, in the present case, ". . . there is no doubt whatsoever that the child will not ever be able to make any kind of decision about her own health and medical treatment which has any validity nor will she be able to give any form of informed consent to medical treatment. There is here no 'dwindling right' but rather a right and a duty for the utmost involvement by the child's parents in all decisions relating to her welfare." Although this is generally true, the argument still remains as to whether the parents or the court ought to make such crucial decisions as those involved in the instant case.

At that point, his Honour found himself on rather less certain ground. After having referred to a number of United States appellate decisions (*Meyer* v *Nebraska 262 U.S. 390 (1923); Pierce* v *Society of Sisters* 268 U.S. 510 (1925); *Alsager* v *Polk County* 406 F. Supp.10 (1975)) which he regarded as supportive of notions of family integrity, he turned his attention to two decisions of the High Court of Australia. It should, parenthetically, be said that these United States decisions are not likely to be especially helpful in this particular context, even though there might be many others to the same effect (Bates, 1983). Notions of parental right are far more entrenched there than in, say, England (Dingwall, Eekelaar and Murray, 1983) and even some advanced and proactive commentary seems to regard state intervention as being properly applicable only in very restricted circumstances (Goldstein, Freud and Solnit, 1979).

The two High Court cases were *Re Cook and Maxwell JJ; ex parte C and Another* (1985) F.L.C. 91-619 and *J* v *Lieschke and Others* (1987) 69 A.L.R. 647. Initially, it must be pointed out that neither case was truly relevant factually to the issue in *In re a Teenager: Re Cook and Maxwell* involved a constitutional issue and *J* concerned the procedures of Children's Courts in the state of New South Wales. In the first case, Brennan J. stated (80, 007) that "Nurture of the children born of the union of husband and wife is at the heart of the marriage relationship. The spouses have the primary authority in respect of the children born of the marriage and are primarily responsible for their nurture. The primacy of the spouses authority and obligations is both a hallmark of the relationship of marriage (recognised by sec. 61 of the Family Law Act 1975 (Cth)) and, at least in our society, the natural form of family organisation. Persons other than the parents are not entitled to impair parental authority or obligations except pursuant to a valid statute or under an order of a court of competent jurisdiction." Brennan J. continued (at 80, 008) by saying that "The relationship of a child with his or her natural parents, even if they are not married, is recognised and, to an extent, protected by equitable rules . . . That relationship, important for the parents and essential for the child, makes the child a member of the family of his or her parents." This is all very well, but the reality of the situation is altogether more complex. Thus, Dickey (1982), in a detailed contribution, has concluded that there is no precise notion of 'family' known to law. Dickey then expresses the hope that a precise notion of the word will evolve in the near future. To some, albeit limited, extent, Dickey's hope has been realised: in the case of *In the Marriage of Mehmet (No2)* (1987) F.L.C. 91-801, the Full Court of the Family Court of Australia decided that the word 'family', at least as used in s 79 (4)(c) of the *Family Law Act,* referred to the nuclear family and did not refer to husband and to the fiance of two daughters of the marriage. Even though it might legitimately be argued that the decision is only directly applicable to one section in one statute, *Mehmet* is of interest in that it does recognise the existence of the nuclear or conjugal family as a social group.

In addition, Brennan J.'s statements in *Re Cook and Maxwell* seem to imply a universally proper application of the parental rights of which he speaks. This is now, we know, very far from the truth and so well appreciated as not to need documentation. Brennan J. appeared to reiterate that in *J* (at 654) when he said that "As a parent holds his or her authority over a child primarily for the benefit of the child, parental authority is to be regarded more as a trust than as a power, but that is not to say that parental duty and authority are burdens of which parents can be relieved against their wishes and without their being heard when it is practicable to hear them. The natural parental right to discharge parental duties and to exercise parental authority cannot be taken away without giving the parents an opportunity to be heard where it is practicable to do so." His Honour seemed to place great reliance on an earlier decision of Hughes J. of the Ontario Supreme Court in *Forsyth* v *The Children's Aid Society* (1962) 35 D.L.R. (2d) 690. This was a typical case of the period; parents, who were members of the Jehovah's Witnesses sect, refused to consent to a blood transfusion being given to their newly born son. An order was made at the hospital a few hours after the birth, the child was declared a 'neglected child' under the terms of relevant legislation and the operation was carried out, the child being returned to the parents some ten days later. The order in favour of the Society was ultimately quashed on the grounds that the parents had not been afforded an opportunity for an adequate hearing. With respect to Brennan J. it is submitted that reliance on this case at all is rather strange, for various reasons: first, it was Canadian, second, it was decided twenty years ago and, third, it was a decision at first instance. The time frame and geography is of some importance as the law which pertained in Ontario in 1962 bears no relation to that existing in Australia at the present time (Dix, Errington, Nicholson and Powe, 1988) at least in the states where the cases discussed took place. Finally, it was admitted by Hughes J. (at 693) that the child had been returned to his parents in good physical health owing, his Honour considered (at 693), *to the operation's having taken place* (author's italics). In other words, it is highly unlikely that the case would be decided in the same way, statute or not, in Australia today.

Cook J. then referred (at 77, 222) to the views which had been expressed by Deane J. in *J*; Deane J. was, perhaps, rather more guarded than Brennan J. had been and he did refer (at 658) to some of the literature which urges a greater role for the state (Dingwall, Eekelaar and Murray, 1983)

as well as that which sought to defend family autonomy (Goldstein, Freud and Solnit, 1979). Thus, he stated that, "Regardless, however, of whether the rationale of the prima facie rights and authority of the parents is expressed in terms of a trust for the benefit of the child, in terms of the right of both parents and child to the integrity of family life or in terms of the natural instincts and functions of an adult human being, those rights and authority have been properly recognised as fundamental . . . They have deep roots in the common law. In the absence of an unmistakable legislative intent to the contrary, they cannot properly be modified or extinguished by the exercise of administrative or judicial powers otherwise than in accordance with the basic requirements of natural justice."

After having cited these *dicta* with approval, Cook J. (at 77, 223), then expressed the reservation that parental rights should not be erected into ". . . some kind of fetish". It was, at this juncture, perhaps inevitably, that his Honour referred to s 43(b) of the *Family Law Act* which requires courts when making adjudications under the Act to have regard to ". . . the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society particularly while it is responsible for the care and education of dependent children". This provision does not seem to have caused as much difficulty as it might (Bates, 1981b) when the structure of the section as a whole and the questionable anthropological statements contained in it are taken into account. According to Cook J., the application of s 43(b) to the instant case involved two central issues: first, it gave rise to a consideration of the rights and duties between parents and children and as to how loving and caring parents could best be assisted in their efforts to act and to make decisions in the best interests of their children. Second, it involved the matter of unwarranted or undue interference in, or invasion of, the family's operations as a unit by outsiders, *including the Court* (author's italics).

With respect to Cook J., this last is a most extraordinary statement: the existence of abuse of children and women within the operation of the family as a unit are only too well documented. One of the functions of 'outsiders' such as social welfare agencies and workers, the courts and concerned lawyers is surely the protection of potentially and actually exploited people. In addition, the Court and its agencies ought to be able to exercise a preventive function. The aspect of protection was almost certainly appreciated by his Honour when he stated that, "Perhaps a special emphasis on the protective side exists where one or more of the children in that unit are mentally handicapped." At the same time, and this was a point strongly made by Fogarty J. of the Family Court of Australia in *In the Marriage of Sampson* (1977) F.L.C. 90-253 at 76, 358, it seems to this writer to be most unfortunate that a court should in Fogarty J.'s own words, seek to be involved ". . . in an abrogation of its proper duty and function". It must, of course, be emphasised that in *In re a Teenager,* there was no question of the parents having acted in anything but a caring and responsible manner.

Nonetheless, the judge did comment that, in considering an application such as the present, which was ". . . ostensibly an action by the child against her parents in respect of her welfare, the rights and duties of her parents towards her require careful examination." But, he continued (at 77,224), it was not legitimate to contend that only a court could make a decision such was required in the case at hand. "There must", Cook J. stated, "be some clear and obvious factors, over and above those usually attendant on such operative treatment, before any form of interference by the Court at the behest of the Child or any other person, is justified. To hold otherwise would bring about serious damage to the role and functions of parents caring for children in a family situation. One could only predicate, as already mentioned, a marked resentment and a marked weakening of confidence in the discharging of the role of parents if they who would be compelled to implement or resist Court proceedings in respect of decisions which are so intimate, so private and so dependent upon a very close knowledge and understanding of a child". The judge then went on to consider the import of ss 20A and 20B of the New South Wales *Children (Care and Protection) Act* 1987, a detailed analysis of which is beyond the broad scope of this article, and concluded that those provisions did not justify any finding that a curial authorisation was necessary to justify a hysterectomy in the present circumstances.

It appears to this writer that *In re a Teenager* is an unhappy decision, even though the ultimate adjudication is not one with which he would seek to disagree. If, for no other reason, the phobic reactions to blood demonstrated by the minor would seem to justify the decision to permit the operation. Conversely, as it is hoped the foregoing discussion has revealed, the processes by which that decision was arrived at cannot properly be described as satisfactory: Cook J.'s judgment contains elements which are internally and externally contradictory, his Honour's selection of precedent is, to say the least, eclectic and his analysis of the relative rights of the parent and child is selective and slight.

However, if *In re a Teenager* stirred up mud at the bottom of already murky waters, the decision of Nicholson C.J. in *In re Jane* (1989) F.L.C. 92-007 added something in the nature of sump oil to the miasma. The facts of *Jane* were not much dissimilar from those in *In re a Teenager;* it involved an application by the Acting Public Advocate of Victoria that he be appointed as 'next friend' for Jane (which was not her real name). The applicant sought an injunction to restrain the child's parents from permitting a hysterectomy, or similar operation, being carried out on her without the approval of the Family Court. In addition, the Human Rights Commission of Australia was an intervener in the case. The child in question was aged 17, but had a mental age of two. There was a negligible prospect that she would ever improve, although she had the normal physical characteristics for a girl of her age (indeed was described by Nicholson C.J., at 77, 238, as "physically attractive"), though, at the same time, she had few communication skills and required assistance with effectively all physical functions. At the time of the hearing, Jane had not menstruated, but medical evidence indicated that it was inevitable that she would do so. There was expert evidence given by an obstetrician that the child would experience great difficulty with in coping with menstruation and insuperable difficulties in dealing with pregnancy. In addition, she would have neither any comprehension of the connection between the sexual act and pregnancy, nor the process of childbirth. Thus, should the child become pregnant, an abortion would be a highly desirable course of action. This witness was also of the view that, after having considered alternative procedures, a hysterectomy was the only course of action appropriate to Jane's problems. Similarly, a psychiatrist gave evidence that it would be very difficult to teach her a behavioral programme to cope with menstruation. In the event, Nicholson C.J. took the view that it was in accord with the child's welfare for the operation to be carried out.

Like *In re a Teenager, In re Jane* gave rise to a long and detailed judgment which, although the ultimate decision was the same, the processes by which that decision was reached were significantly different. Indeed, Nicholson C.J. (at 77, 242) was distinctly critical of the approach adopted by Cook J. in *In re a Teenager* (above). First, the Chief Justice was critical of Cook J.'s utilisation of s 43(b) of the *Family Law Act* which, he said, did no more than express in statutory form matters to which the courts always had had regard in a general sense. In particular, the provision in no wise affected the requirement contained in s 60D of the Act that the welfare of the child should be the paramount consideration.

The next substantive issue which was raised by Nicholson C.J. was the inviolability of a person's body. Relying on the decision of the Divisional Court in England in *Collins* v *Wilcock* (1984) 3 All E.R. 374, the Chief Judge (at 77, 243) came to the broad conclusion that "The effect is that everybody is protected, not only against physical injury, but against any form of physical molestation. But so widely drawn a principle, must inevitably be subject to exceptions. For example, children may be subjected to reasonable punishment; people may be subjected to the lawful exercise of the power of arrest; and reasonable force may be used in self defence or for the prevention of crime. But, apart from these special instances where the control or constraint is lawful, a broader exception has been created to allow for the exigencies of everyday life". Although this observation may generally be correct, it should be pointed out that *Collins* v *Wilcock* was a criminal case dealing with the exercise of police powers. Further, Nicholson C.J. referred to another English case, the decision of the Court of Appeal in *Wilson* v *Pringle* (1987) Q.B. 237, which involved a fairly ordinary instance of battery, and *obiter* the question had arisen as to what legal rule permitted a casualty surgeon to perform an emergency operation on a patient who was not in any position to provide consent. Croom-Johnson L.J. (at 252) said that, "Hitherto, it has been customary to say in such cases that consent is to be applied for what would otherwise be a battery on the unconscious body. It is better simply to say that the surgeon's action is acceptable in the ordinary conduct of everyday life and not a battery". It will be apparent that this is an extremely widely drawn statement which contains necessarily inherent problems: words such as 'acceptable' and 'ordinary' are almost certain, in such a contentious area as that discussed in the present article, to give rise to difficulties of interpretation and application. To whom must particular conduct be acceptable? Thus, for instance, if a religious group which was implacably opposed to any form of surgical interference with reproductive systems made vociferous objection, how much notice ought courts to take of that opposition, especially if that attitude were to be expressed in their ". . . ordinary conduct of everyday life . . ."? *Acceptable* is clearly not the

same as *reasonable,* so that an objective test is not necessarily implied.

It followded (at 77, 244) that where, as in the instant case, the procedure is arguably non-therapeutic, the situation is less clear. It could, of course, have been quite properly argued that in *In re a Teenager* (above) at any rate that the procedure was, in fact, therapeutic given the phobic reaction to blood demonstrated by the girl in that case. In turn, Nicholson C.J. suggested that English courts had recognised an apparent right to reproduce (see *Re D* (1976) 1 All E.R. 326), although contrary comment was noted (Grubb and Pearl, 1987) which sought to explain the position as being an aspect of a right to determine what is done with one's own body.

Nicholson C.J. continued by referring to various authorities from the United States *(Re Grady* 426 A 2d 467 (1981)), England *(Thake* v *Morris* (1984) 2 All E.R. 513) and came to (at 77, 245) a broad second conclusion that ". . . the rights in question may be better characterised as liberties to reproduce or not reproduce as the case may be. If characterised as rights *simpliciter,* it is difficult to see how a sterilisation operation carried out for non-therapeutic purposes (using the expression 'therapeutic' as connoting the treatment of some disease or malfunction) could ever be lawful. If characterised as liberties, then the question of the lawful justification for such operations becomes clearer. If a person is capable of exercising a liberty, they may lawfully do so either by procreating or using methods of contraception, including sterilisation. If a person is incapable of choice, then consent may be given on their behalf." The question, of course, then became the agency (parent or court) which could give consent on the person's behalf.

Before answering that major question, the Chief Judge then turned his attention to the submissions made on behalf of the Human Rights Commission of Australia and ultimately (at 77, 250) concluded that the various conventions and documents referred to by the Commission could not override the Court's primary duty to regard the welfare of the child as a paramount consideration as set out in s 60D of the *Family Law Act.* Indeed, his Honour properly pointed out that obvious inconsistencies with established Australian law existed: thus, in Principle 6 of the *Declaration of the Rights of the Child* it is stated that, "Except in exceptional circumstances, a child of tender years should not be separated from his mother." The presumption in favour of the mother in custody disputes has been roundly rejected by the High Court of Australia in *Gronow* v *Gronow* (1979) 144 C.L.R. 513, especially in the judgment of Stephen J. The Chief Judge likewise rejected a submission on behalf of the Commission that s 43(c), which provides that courts must have regard to ". . . the need to protect the rights of children and promote their welfare . . ." when making adjudications under the Act overrode s 60D. Thus, Nicholson C.J., in two separate instances, has been critical of the utilisation of s 43 in seeking to overturn more specific provisions of the Act. Although one, perhaps, might not go so far as the late Hutley J.A. formerly of the New South Wales Court of Appeal who, in the important case of *Seidler* v *Schallhofer* (1982) s N.S.W.:.R. 80 at 100 regarded s 43 as representing ". . . propaganda contradicted by the substantial provisions of the Act . . .", the provision seems now to be obfuscatory rather than illuminating.

In the ultimate event, Nicholson C.J. specifically adopted the approach of the House of Lords in *Re B* (above) in contradistinction to that of the Supreme Court of Canada in *Re Eve* (1986) 31 D.L.R. (4th)1 (Bates, 1988a) and adopted that course in the light of *Re Grady* (above) where Pashman J., who delivered the majority judgment, had emphasised that it was ultimately the duty of the Court, rather than the parents, to determine the need for sterilisation. Pashman J. had concluded (at 486) that, "The potential for abuse in sterilisation of mentally impaired persons allows the exercise of substituted consent only when rigid procedural and substantive criteria are satisfied. By applying the standards we have developed, courts will be able to protect the human rights of people least able to protect themselves . . . Courts should cautiously but resolutely help her achieve the fullness of that opportunity. If she can have a richer and more active life, only if the risk of pregnancy is permanently eliminated, then sterilisation may be in her best interests. Upon a clear and convincing demonstration, it should not be denied to her." There are, inevitably, issues pertaining to the Australian situation which are to be found in that *dictum.* First, the standard of *clear and convincing* evidence is not known to Australian law (Bates, 1979) as it is a standard intermediate to the traditional criminal and civil standards of, respectively, *beyond reasonable doubt* and *preponderance of probabilities* and has emphatically been rejected by the House of Lords (see *Dingwall* v *J. Wharton (Shipping) Ltd* (1961) 2 Lloyds Rep 213 at 216). Second, and more generally, it will have been apparent that no two cases will be precisely the same; hence, it may also be that too rigid standards could operate against the very values which Pashman J. expounded and which, in turn, were adopted by Nicholson C.J.

The Chief Judge (at 77, 253) also rejected a number of submissions which had been made on behalf of the Public Advocate. In particular, he disagreed with the argument that avoidance of the child's menstrual difficulties was a matter solely for the child's caregivers and herself. I find it extremely difficult to see any logic, sense or compassion in this submission at all, as the welfare of the child must surely be considered in the light of her global situation and, ultimately, as Nicholson C.J. properly pointed out, ". . . it is clearly very much in her interests that she remain in the care of her family rather than that of an institution, and it is, I think, at least arguable that any step which eases the family burden which she presents, has the indirect benefit of increasing the likelihood that she will be retained within the family circle and not institutionalised." His Honour likewise acknowledged that the projected hysterectomy would not protect the child from the risk of sexual assault, but was unable to accept that any resulting pregnancy would be a problem for the child's caregivers rather than for the child herself. As Nicholson C.J. himself described the matters, "Common sense suggests that from Jane's point of view, pregnancy would be a disaster. She would be faced with bewildering and uncomfortable physiological changes, which she would not understand, followed by trauma associated either with childbirth, Caesarian section or abortion. She could have no maternal relationship with any child that was born. In all the circumstances, I regard it as offending common sense to suggest that her welfare would not be detrimentally affected by a pregnancy." Once again, this seems to be a sensible, informed and humane remark, especially in view of his Honour's related finding that any training programme in menstrual hygiene would be of no benefit to the child. Nicholson C.J. (at 77, 254) likewise rejected collateral submissions made on behalf of the Human Rights Commission and, in so doing, specifically noted that ". . . it would appear that the procedure does involve an interference with these rights. However, in the present case, given the nature of the proposed interference, the question must be asked as to what value the right of normal physical development of the type prevented will be to this girl. It is obvious that the procedure is intended to prevent such part of her normal physical development as will enable her to menstruate and consequently to bear children. It thus also involves interference with her right to reproduce or, perhaps more aptly, her liberty to choose to reproduce. On the other hand, if such procedure is not undertaken, she will be subject to the risk of unwanted pregnancy with the consequential unacceptable effects upon her to which I have referred and the difficulties associated with menstruation." This was a view which accorded with that which had been expressed by Lord Bridge in *Re B* (above).

On the specific issue of whether the parent's or court's consent to the operation was required, Nicholson C.J. commented (at 77, 256) that, "The consequences of finding that the Court's consent is unnecessary are far-reaching both for parents and for children. For example, such a principle might be used to justify parental consent to the surgical removal of a girl's clitoris for religious or quasi-cultural reasons, or the sterilisation of a perfectly healthy girl for misguided, albeit sincere, reasons." The Chief Justice was especially critical (at 77, 257) of the views which had been expressed by Cook J. in *In re a Teenager* (above) that courts should be prepared to trust the ethics of the medical profession in the matter. "Like all professions", he said, "the medical profession has members who are not prepared to live up to its professional standards of ethics and experience teaches that the identity of such medical practitioners becomes known to those who require their assistance and their services are availed of. Further, it is also possible that members of that profession may form sincere but misguided views about the appropriate steps to be taken." These comments are, unfortunately, too true although, it must be said, that last observation may also be applicable to judges!

Further, Nicholson C.J. was critical of *Re K,* on which it will be remembered Cook J. had laid great emphasis (above). The Chief Justice could not accept the central proposition that the child's rights could disappear if she was not aware of them. In addition, he strongly disagreed with the view inherent in both *Re K* and *In re a Teenager* that the rights of children would be more detrimentally affected by a court, rather than a parental, decision. "Not all parents", he said (at 77, 258), "are wise and caring and not all medical practitioners are ethical and reasonable."

Ultimately, Nicholson C.J. concluded (at 77, 260) that ". . . the law at least establishes that parental consent is insufficient where a medical procedure involves interference with a basic human right such as a person's right to procreate, unless it is clear that the interference is occasioned by some medical condition which requires such treatment. There may well be other rights which parents cannot

interfere with such as, for example, the right to life but it is unnecessary for present purposes for me to consider the difficult questions that may arise in this area." Hence, the application for an injunction seeking to prevent the operation should be dismissed and the operation sanctioned.

The dilemma which faces Australian students of family law, in whatever sphere they operate, will be only too apparent: although the decisions which were reached in each case were eventually the same, the processes by which they were reached were almost totally dissimilar. It should also be said that neither process is wholly satisfactory and the unsatisfactory nature of each does bear some similarity. Thus, a rather selective use of authority from jurisdictions outside Australia is apparent both in *In re a Teenager* and *In re Jane* and the reasons why one prior decision was selected for analysis rather than another is not readily clear.

At the same time, both judgments are detailed and represent determined attempts to get to grips with what are, obviously basal issues. Much, hence, will depend on any commentator's initial standpoint and, therefore, to this writer who is an avowed interventionist (Bates, 1984), Nicholson C.J.'s approach is to be commended. It is rewarding to see a senior judicial view which directly expresses a realisation that the family conceals a wide variety of dangerous and vicious circumstances of whom most of the victims will be women and children (see, for example, Campbell, 1988). It is also reassuring that the Chief Judge of the Family Court has a proper scepticism regarding the operation of s 43. Finally, and as I wrote in the earlier article (Bates, 1988a), it is to be hoped that these decisions will give rise to substantial and fundamental discussion so that their implications, and those of the cases which preceded them, are correctly and generally appreciated. In the earlier article, I wrote (above) that *Re B* would not be the end of the matter and the breadth and depth of the issues which were considered *Teenager* and *Jane* has borne that out. It should also be remembered that the last three major reported decisions in Anglo-Australian case law have all authorised sterilisation operations. One must ask oneself whether these decisions represent a proper response to an emergency or a return to the epidemic epitomised by *Buck* v *Bell* 274 U.S. 200 (1927).

REFERENCES

Bates, F., "Sterilising the Apparently Incapable: Further Thoughts and Developments", (1988a) 12(4), *Australian Child and Family Welfare,* 3.

Bates, F., "Custody Disputes Between Parents and Non-Parents: Recent Developments in Canada and Australia", (1981a), 11, *Manitoba Law Journal,* 303.

Bates, F., "Parent and Child — State Intervention — A New Development", (1978), 56, *Canadian Bar Review,* 516.

Eekelaar, J.M., "The Emergence of Children's Rights", (1986), 6, *Oxford Journal of Legal Studies,* 161.

De Cruz, S.P., "Parents, Doctors and Children: The Gillick Case and Beyond", (1987), *Journal of Social Welfare Law,* 93.

Bates, F., "Children as Property: Hindsight and Foresight", (1988b), 13(2), *Australian Child and Family Welfare,* 3.

Montgomery, J., 'Children as Property", (1988), 51, *Modern Law Review,* 323.

Bates, F., "The Developing Responsibility of Social Workers: Recent Hints from the U.S.", (1983), 8, *Legal Service Bulletin,* 224.

Dingwall, R., Eekelaar, J., and Murray, T., *The Protection of Children: State Intervention and Family Life,* (Blackwell, 1983).

Goldstein, J., Freud, A., and Solnit, A.J., *Before the Best Interests of the Child,* (Free Press, 1979).

Dickey, A., "The Notion of 'Family in Law' " (1982), 14, *University of Western Australia Law Review.*

Dix, A., Errington, M., and Powe, R., *Law for the Medical Profession,* (Butterworth, 1988).

Bates, F., "Principle and the Family Law Act: The Uses and Abuses of Section 43", (1981b), 50, *Australian Law Journal,* 181.

Grubb, A., and Pearl, D., "Sterilisation and the Courts", (1987), *Cambridge Law Journal,* 439.

Bates, F., "Strength or Intensity? Some Reflections on the Modern Standard of Proof in Civil Cases", (1979), 27, *Chitty's Law Journal,* 335.

Bates, F., "The Role of the Law in the Resolution of Family Problems", (1984), 58, *Australian Law Journal,* 448.

Campbell, B., *Unofficial Secrets,* (Virago, 1988).