[1989] 2 All ER 545

# F v West Berkshire Health Authority and another (Mental Health Act Commission intervening)

HOUSE OF LORDS

LORD BRIDGE OF HARWICH, LORD BRANDON OF OAKBROOK, LORD GRIFFITHS, LORD GOFF OF CHIEVELEY AND LORD JAUNCEY OF TULLICHETTLE

27, 28 FEBRUARY 1, 2, 6, 7, 8, 9 MARCH, 4, 24 MAY 1989

James Munby QC for the Official Solicitor.
R F Nelson QC, Jean Ritchie and James Medd for F.
Adrian Whitfield QC, Robert Francis and Adrian Hopkins for the health authority.
Allan Levy as amicus curiae.
Duncan Ouseley for the commission.
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Their Lordships took time for consideration.

LORD BRIDGE OF HARWICH made the following announcement. My Lords, I understand that your Lordships all agree on the appropriate disposal of this appeal although not yet ready to state your reasons. In the circumstances it is obviously desirable that the appeal should now be determined for reasons to be given later. I accordingly propose that the appeal be dismissed but that there be substituted for the order and declaration made by Scott Baker J an order in the following terms. (1) It is declared that the operation of sterilisation proposed to be performed on the plaintiff being in the existing circumstances in her best interests can lawfully be performed on her despite her inability to consent to it. (2) It is ordered that in the event of a material change in the existing circumstances occurring before the said operation has been performed any party shall have liberty to apply for such further or other declaration or order as may be just.

24 May 1989. The following opinions were delivered.

LORD BRIDGE OF HARWICH.

My Lords, I have had the advantage of reading the speeches of my noble and learned friends Lord Brandon and Lord Goff. I concurred in the dismissal of the appeal, subject to a variation of the terms of the order made by Scott Baker J for the reasons given by them.

The appeal raised a number of difficult questions regarding both the jurisdiction and the procedure of the court in relation to the lawfulness of the sterilisation of an adult woman disabled by mental incapacity from giving her consent to the operation. These issues are fully examined by Lord Brandon and Lord Goff and I further agree, for the reasons they

give, with the following conclusions: (1) that no court now has jurisdiction either by statute or derived from the Crown as parens patriae to give or withhold consent to such an operation in the case of an adult as it would in wardship proceedings in the case of a minor; (2) that the court has jurisdiction to declare the lawfulness of such an operation proposed to be performed on the ground that it is in the circumstances in the best interests of the woman and that, although such a declaration is not necessary to establish the lawfulness of the operation, in practice the court's jurisdiction should be invoked whenever such an operation is proposed to be performed; (3) that for the future the procedure to be used when applying for a declaration of the kind in question should be regulated as proposed in the speech of my noble and learned friend Lord Brandon.

The issues canvassed in argument before your Lordships revealed the paucity of clearly defined principles in the common law which may be applied to determine the lawfulness of medical or surgical treatment given to a patient who for any reason, temporary or permanent, lacks the capacity to give or to communicate consent to that treatment. It seems to me to be axiomatic that treatment which is necessary to preserve the life, health or well-being of the patient may lawfully be given without consent. But, if a rigid criterion of necessity were to be applied to determine what is and what is not lawful in the treatment of the unconscious and the incompetent, many of those unfortunate enough to be deprived of the capacity to make or communicate rational decisions by accident, illness or unsoundness of mind might be deprived of treatment which it would be entirely beneficial for them to receive.

Moreover, it seems to me of first importance that the common law should be readily intelligible to and applicable by all those who undertake the care of persons lacking the capacity to consent to treatment. It would be intolerable for members of the medical, nursing and other professions devoted to the care of the sick that, in caring for those lacking the capacity to consent to treatment, they should be put in the dilemma that, if they administer the treatment which they believe to be in the patient's best interests, acting with due skill and care, they run the risk of being held guilty of trespass to the person, but, if they withhold that treatment, they may be in breach of a duty of care



owed to the patient. If those who undertake responsibility for the care of incompetent or unconscious patients administer curative or prophylactic treatment which they believe to be appropriate to the patient's existing condition of disease, injury or bodily malfunction or susceptibility to such a condition in the future, the lawfulness of that treatment should be judged by one standard, not two. It follows that if the professionals in question have acted with due skill and care, judged by the well-known test laid down in Bolam v Friern Hospital Management Committee [1957] 2 All ER 118, [1957] 1 WLR 582, they should be immune from liability in trespass, just as they are immune from liability in negligence. The special considerations which apply in the case of the sterilisation of a woman who is physically perfectly healthy or of an operation on an organ transplant donor arise only because such treatment cannot be considered either curative or prophylactic.

LORD BRANDON OF OAKBROOK.

My Lords, this appeal concerns the proposed sterilisation of an adult woman, F, who is disabled by mental incapacity from consenting to the operation. By an originating summons issued in the High Court, Family Division, on 20 June 1988, in which F by her mother and next friend was named as plaintiff and the West Berkshire Health Authority as defendant, F applied for (1) a declaration under RSC Ord 15, r 16 that to effect her sterilisation would not amount to an unlawful act by reason only of the absence of her consent or (2) the consent of the court under either its parens patriae or its inherent jurisdiction to her sterilisation. The application was heard by Scott Baker J in chambers with the assistance of counsel instructed by the Official Solicitor as amicus curiae. On 2 December 1988 the judge gave judgment in open court and by order of that date made the declaration sought under (1) above. Pursuant to a direction given by the Lord Chancellor under s 90(3)(b) of the Supreme Court Act 1981 the Official Solicitor, being of opinion that it was in F's interests that the case should be considered by the Court of Appeal, obtained the leave of that court to appeal against the decision of Scott Baker J. By order dated 3 February 1989 the Court of Appeal (Lord Donaldson MR, Neill and Butler-Sloss LJJ) dismissed the Official Solicitor's appeal and gave him leave to appeal to your Lordships' House. Subsequently, the House allowed an application by the Mental Health Act Commission for England and Wales for leave to intervene in the appeal and your Lordships had the benefit of additional argument by counsel for them at the hearing.

The material facts relating to F, which are not in dispute, are these. She was born on 13 January 1953, so that she is now 36. She suffers from serious mental disability, probably as a consequence of an acute infection of the respiratory tract which she had when she was about nine months old. She has been a voluntary in-patient at Borocourt Hospital (a mental hospital under the control of the health authority) since 1967, when she was 14. Her mental disability takes the form of an arrested or incomplete development of the mind. She has the verbal capacity of a child of two and the general mental capacity of a child of four to five. She is unable to express her views in words but can indicate what she likes or dislikes, for example people, food, clothes and matters of routine. She experiences emotions such as enjoyment, sadness and fear, but is prone to express them differently from others. She is liable to become aggressive. Her mother is her only relative and visits her regularly. There is a strong bond of affection between them. As a result of the treatment which F has received during her time in hospital she has made significant progress. She has become less aggressive and is allowed considerable freedom of movement about the hospital grounds, which are large. There is, however, no prospect of any development in her mental capacity.

The question of F being sterilised has arisen because of a relationship which she has formed with a male patient at the same hospital, P. This relationship is of a sexual nature and probably involves sexual intercourse, or something close to it, about twice a month. The relationship is entirely voluntary on F's part and it is likely that she obtains pleasure from it. There is no reason to believe that F has other than the ordinary fertility of a

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woman of her age. Because of her mental disability, however, she could not cope at all with pregnancy, labour or delivery, the meaning of which she would not understand. Nor could she care for a baby if she ever had one. In these circumstances it would, from a

psychiatric point of view, be disastrous for her to conceive a child. There is a serious objection to each of the ordinary methods of contraception. So far as varieties of the pill are concerned she would not be able to use them effectively and there is a risk of their causing damage to her physical health. So far as an interuterine device is concerned, there would be danger of infection arising, the symptoms of which she would not be able to describe so that remedial measures could not be taken in time.

In the light of the facts set out above Scott Baker J concluded that it would be in the best interests of F to have an operation for sterilisation by ligation of her fallopian tubes. The Court of Appeal unanimously affirmed that conclusion, and no challenge to its correctness was made on behalf of any party at the hearing of the appeal before your Lordships.

It might have been supposed that, with such complete agreement that it was in F's best interests that she should be sterilised, no difficulty about giving effect to that agreement would have arisen. Difficulty, however, has arisen because of doubts about three questions of law and legal procedure. The first question is whether it is necessary or desirable for the court to become involved in the matter at all. The second question is: if so, what jurisdiction does the court have to deal with the matter, and according to what principles should that jurisdiction be exercised? The third question is: assuming that the court has jurisdiction and is bound to exercise it in a particular manner, what procedure should be used for the invocation and subsequent exercise of that jurisdiction?

If F were a minor of say 17, instead of an adult of 36, and the same problem arose in relation to her, there would be no difficulty in answering these three questions. This is because your Lordships' House dealt authoritatively with a case involving the sterilisation of a girl just under 18, who suffered from mental disability closely comparable to F's, in Re B (a minor) (wardship: sterilisation) [1987] 2 All ER 206, [1988] AC 199. The answer to the first question would have been that, because of the seriousness of deciding whether the girl should be sterilised or not, the court, in the form of the High Court, Family Division, should be involved in the matter. The answer to the second question would be that the court could exercise its wardship jurisdiction, and, in doing so, would be bound to treat the welfare, or to use an expression with substantially the same meaning, the best interests of the minor, as the paramount consideration. The answer to the third question would be that the wardship jurisdiction of a court would be invoked by the issue by an interested party of an originating summons under RSC Ord 90, r 3, and the procedure then followed would be the ordinary procedure designed to bring all relevant expert and other evidence before the court so as to enable it to decide whether sterilisation was or was not in the best interests of the girl.

For reasons which will become apparent later, no court or judge has now any jurisdiction with respect to the person of an adult under mental disability comparable with the wardship jurisdiction of the High Court with respect to the person of a minor in a similar condition. Because of this, no ready answers are available to the three questions referred to above in the case of such an adult, and a separate examination of each of them has to be made.

(1) The necessity or desirability of the court being involved

Part IV of the Mental Health Act 1983 contains provisions, which it is not necessary to

detail, imposing restrictions or conditions on the giving to mentally disordered persons of certain kinds of treatment for their mental disorder. The Act, however, does not contain any provisions relating to the giving of treatment to patients for any conditions other than their mental disorder. The result is that the lawfulness of giving any treatment of the latter kind depends not on statute but the common law.

At common law a doctor cannot lawfully operate on adult patients of sound mind, or

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give them any other treatment involving the application of physical force however small (which I shall refer to as 'other treatment'), without their consent. If a doctor were to operate on such patients, or give them other treatment, without their consent, he would commit the actionable tort of trespass to the person. There are, however, cases where adult patients cannot give or refuse their consent to an operation or other treatment. One case is where, as a result of an accident or otherwise, an adult patient is unconscious and an operation or other treatment cannot be safely delayed until he or she recovers consciousness. Another case is where a patient, though adult, cannot by reason of mental disability understand the nature or purpose of an operation or other treatment. The common law would be seriously defective if it failed to provide a solution to the problem created by such inability to consent. In my opinion, however, the common law does not fail. In my opinion, the solution to the problem which the common law provides is that a doctor can lawfully operate on, or give other treatment to, adult patients who are incapable, for one reason or another, of consenting to his doing so, provided that the operation or other treatment concerned is in the best interests of such patients. The operation or other treatment will be in their best interests if, but only if, it is carried out in order either to save their lives or to ensure improvement or prevent deterioration in their physical or mental health.

Different views have been put forward with regard to the principle which makes it lawful for a doctor to operate on or give other treatment to adult patients without their consent in the two cases to which I have referred above. The Court of Appeal in the present case regarded the matter as depending on the public interest. I would not disagree with that as a broad proposition, but I think that it is helpful to consider the principle in accordance with which the public interest leads to this result. In my opinion, the principle is that, when persons lack the capacity, for whatever reason, to take decisions about the performance of operations on them, or the giving of other medical treatment to them, it is necessary that some other person or persons, with the appropriate qualifications, should take such decisions for them. Otherwise they would be deprived of medical care which they need and to which they are entitled.

In many cases, however, it will not only be lawful for doctors, on the ground of necessity, to operate on or give other medical treatment to adult patients disabled from giving their consent: it will also be their common law duty to do so.

In the case of adult patients made unconscious by an accident or otherwise, they will normally be received into the casualty department of a hospital, which thereby undertakes the care of them. It will then be the duty of the doctors at that hospital to use their best endeavours to do, by way of either an operation or other treatment, that which

is in the best interests of such patients.

In the case of adult patients suffering from mental disability, they will normally, in accordance with the scheme of the Mental Health Act 1983, be either in the care of guardians, who will refer them to doctors for medical treatment, or of doctors at mental hospitals in which the patients either reside voluntarily or are detained compulsorily. It will then again be the duty of the doctors concerned to use their best endeavours to do, by way of either an operation or other treatment, that which is in the best interests of such patients.

The application of the principle which I have described means that the lawfulness of a doctor operating on, or giving other treatment to, an adult patient disabled from giving consent will depend not on any approval or sanction of a court but on the question whether the operation or other treatment is in the best interests of the patient concerned. That is, from a practical point of view, just as well, for, if every operation to be performed, or other treatment to be given, required the approval or sanction of the court, the whole process of medical care for such patients would grind to a halt.

That is not the end of the matter, however, for there remains a further question to be considered. That question is whether, in the case of an operation for the sterilisation of an adult woman of child-bearing age who is mentally disabled from giving or refusing



her consent to it, although involvement of the court is not strictly necessary as a matter of law, it is nevertheless highly desirable as a matter of good practice. In considering that question, it is necessary to have regard to the special features of such an operation. These features are: first, the operation will in most cases be irreversible second, by reason of the general irreversibility of the operation, the almost certain result of it will be to deprive the woman concerned of what is widely, and as I think rightly, regarded as one of the fundamental rights of a woman, namely the right to bear children; third, the deprivation of that right gives rise to moral and emotional considerations to which many people attach great importance; fourth, if the question whether the operation is in the best interests of the woman is left to be decided without the involvement of the court, there may be a greater risk of it being decided wrongly, or at least of it being thought to have been decided wrongly; fifth, if there is no involvement of the court, there is a risk of the operation being carried out for improper reasons or with improper motives; and, sixth, involvement of the court in the decision to operate, if that is the decision reached, should serve to protect the doctor or doctors who perform the operation, and any others who may be concerned in it, from subsequent adverse criticisms or claims.

Having regard to all these matters, I am clearly of the opinion that, although in the case of an operation of the kind under discussion involvement of the court is not strictly necessary as a matter of law, it is nevertheless highly desirable as a matter of good practice.

There may be cases of other special operations to which similar considerations would apply. I think it best, however, to leave such other cases to be examined as and when they arise.

(2) The jurisdiction of the court and the principles on which it should be exercised

In the course of the argument in this appeal your Lordships were invited to consider four kinds of jurisdiction by the exercise of which the court might become involved in the decision whether F should be sterilised or not. These were: first, the parens patriae jurisdiction; second, jurisdiction under Pt VII of the Mental Health Act 1983; third, a jurisdiction which the Court of Appeal considered could be exercised under appropriate amendments to RSC Ord 80; and, fourth, the jurisdiction to make declarations. I shall examine each of these in turn.

I consider first the parens patriae jurisdiction. This is an ancient prerogative jurisdiction of the Crown going back as far perhaps as the thirteenth century. Under it the Crown as parens patriae had both the power and the duty to protect the persons and property of those unable to do so for themselves, a category which included minors (formerly described as infants) and persons of unsound mind (formerly described as lunatics or idiots). While the history of that jurisdiction and the manner of its exercise from its inception until the present day is of the greatest interest, I do not consider that it would serve any useful purpose to recount it here. I say that because it was accepted by the Court of Appeal, and not challenged by any of the parties to the appeal before your Lordships, that the present situation with regard to the parens patriae jurisdiction as related to minors survives now in the form of the wardship jurisdiction of the High Court, Family Division. Second, so much of the parens patriae jurisdiction as related to persons of unsound mind no longer exists. It ceased to exist as a result of two events, both of which took place on 1 November 1960. The first event was the coming into force of the Mental Health Act 1959, s 1 of which provided:

> 'Subject to the transitional provisions contained in this Act, the Lunacy and Mental Treatment Acts, 1890 to 1930, and the Mental Deficiency Acts, 1913 to 1938, shall cease to have effect, and the following provisions of this Act shall have effect in lieu of those enactments with respect to the reception, care and treatment of mentally disordered patients, the management of their property, and other matters related thereto.'

The second event was the revocation by warrant under the sign manual of the last



warrant dated 10 April 1956, by which the jurisdiction of the Crown over the persons and property of those found to be of unsound mind by inquisition had been assigned to the Lord Chancellor and the judges of the High Court, Chancery Division.

The effect of s 1 of the 1959 Act, together with the warrant of revocation referred to above, was to sweep away the previous statutory and prerogative jursidiction in lunacy, leaving the law relating to persons of unsound mind to be governed solely, so far as statutory enactments are concerned, by the provisions of that Act. So far as matters not governed by those provisions are concerned, the common law relating to persons of unsound mind continued to apply. It follows that the parens patriae jurisdiction with respect to persons of unsound mind is not now available to be invoked in order to

involve the court or a judge in the decision about the sterilisation of F.

I consider, second, jurisdiction under Pt VII of the Mental Health Act 1983. That part of the Act has the heading 'Management of Property and Affairs of Patients' and comprises ss 93 to 113. The question which has to be considered is whether the expression 'the affairs of patients', as used in the heading and various sections of Pt VII, includes medical treatment such as an operation for sterilisation. In order to answer that question, it is necessary to examine the following sections in Pt VII which are mainly relevant to it:

> '93.—(1) The Lord Chancellor shall from time to time nominate one or more judges of the Supreme Court … to act for the purposes of this Part of this Act.
>
> (2) There shall continue to be an office of the Supreme Court, called the Court of Protection, for the protection and management, as provided by this Part of this Act, of the property and affairs of persons under disability …
>
> 95.—(1) The judge may, with respect to the property and affairs of a patient, do or secure the doing of all such things as appear necessary or expedient—(a) for the maintenance or other benefit of the patient, (b) for the maintenance or other benefit of members of the patient's family, (c) for making provision for other persons or purposes for whom or which the patient might be expected to provide if he were not mentally disordered, or (d) otherwise for administering the patient's affairs.
>
> (2) In the exercise of the powers conferred by this section regard shall be had first of all to the requirements of the patient, and the rules of law which restricted the enforcement by a creditor of rights against property under the control of the judge in lunacy shall apply to property under the control of the judge but, subject to the foregoing provisions of this subsection, the judge shall, in administering a patient's affairs, have regard to the interests of creditors and also to the desirability of making provision for obligations of the patient notwithstanding that they may not be legally enforceable.
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> 96. Without prejudice to the generality of section 95 above, the judge shall have power to make such orders and give such directions and authorities as he thinks fit for the purposes of that section and in particular may for those purposes make orders or give directions or authorities for—(a) the control … and management of any property of the patient; (b) the sale, exchange, charging or other disposition of or dealing with any property of the patient; (c) the acquisition of any property in the name or on behalf of the patient; (d) the settlement of any property of the patient, or the gift of any property of the patient to any such persons or for any such purposes as are mentioned in paragraphs (b) and (c) of section 95(1) above; (e) the execution for the patient of a will making any provision … which could be made by a will executed by the patient if he were not mentally disordered; (f) the carrying on by a suitable person of

> any profession, trade or business of the patient; (g) the dissolution of a partnership of which the patient is a member (h) the carrying out of any contract entered into by the patient; (i) the conduct of legal proceedings in the name of the patient or on his behalf; (j) the reimbursement out of the property of the patient … of money applied by any person either in payment of the patient's debts (whether legally enforceable or not) or for the maintenance or other benefit of the



> patient or members of his family … (k) the exercise of any power (including a power to consent) vested in the patient, whether beneficially, or as guardian or trustee, or otherwise … '

The expression 'the affairs of patients', taken by itself and without regard to the context in which it appears, is, in my view, capable of extending to medical treatment of patients other than treatment for their mental disorder. There is further an obvious attraction in construing that expression, as used in Pt VII of the 1983 Act, as having that extended meaning (the wider meaning), since there would then be a judicial authority, namely a judge nominated under s 93(1), who would have statutory power to authorise, or refuse to authorise, the sterilisation of an adult woman of unsound mind such as F. There are two passages in the sections of the Act set out above which, if they do not expressly support the wider meaning, are at least consistent with it. The first is the passage in s 95(1)(a) 'for the maintenance or other benefit of the patient'. The second is the passage in s 96(1)(k) 'the exercise of any power (including a power to consent) vested in the patient, whether beneficially, or as guardian or trustee, or otherwise'. It seems to me, however, that, when one examines the general tenor of Pt VII of the Act, and more particularly the context in which the two passages referred to above are to be found, the expression 'the affairs of patients' cannot properly be construed as having the wider meaning. It must rather be construed as including only business matters, legal transactions and other dealings of a similar kind.

I would, therefore, hold that Pt VII of the 1983 Act does not confer on a judge nominated under s 93(1) any jurisdiction to decide questions relating to the medical treatment of a patient, such as the question of F's sterilisation in the present case.

I consider, third, the jurisdiction relied on by the Court of Appeal. Lord Donaldson MR reached the conclusion that operations for the sterilisation of adult women, disabled by mental disorder from giving their consent, as of minors, were in a special category, and should not be performed without the approval of the court. He then turned to the question of the procedure to be used for seeking that approval and said:

> 'This at once raised the question of how the court should be consulted and what form its concurrence in the treatment of the patient should take. Thus far, apart from the instant case, there have been three occasions on which proposed abortion or sterilisation operations on adults who were incompetent to consent have been brought before the court (Re T (14 May 1987, unreported) per Latey J; Re X (1987) Times, 4 June per Reeve J and T v T [1988] 1 All ER 613, [1988] Fam 62 per Wood J). In each case those who proposed that the operation be carried out sought and obtained

a declaration that to do so would be lawful. For my part, I do not think that this is an appropriate procedure. A declaration changes nothing. All that the court is being asked to do is to declare that, had a course of action been taken without resort to the court, it would have been lawful anyway. In the context of the most sensitive and potentially controversial forms of treatment the public interest requires that the courts should give express approval before the treatment is carried out and thereby provide an independent and broad based "third opinion". In the case of wards of court, the performance of any such operation without first obtaining the approval of the court would in any event constitute a very grave contempt of court. In the case of other minors, the law will impose a very heavy burden of justification on those who carry out the treatment without first ensuring that the minors are made wards of court and the court's consent obtained. In the case of adults who are themselves incompetent to consent, the law will impose an equally heavy burden of justification if those who carry out the treatment do not first seek a determination of the lawfulness of the proposed treatment by enabling the court to approve or to disapprove. As this problem has only recently arisen, there is no specific procedure laid down for obtaining the court's approval. RSC Ord 80 is that which is concerned



with persons under a disability and there should be little difficulty in framing a new rule under that order prescribing such a procedure. We trust that this will receive urgent attention from the Lord Chancellor and the Supreme Court Rule Committee. In the course of argument we were told that the Official Solicitor knows of a small number of other cases in which it is considered necessary that such an operation be performed on an adult patient, but in which the outcome of this appeal has been awaited. Clearly it would not be right that those patients should have to await the formulation and enactment of a new procedural rule. Fortunately the court has inherent jurisdiction to regulate its own proceedings where the rules make no provision and, pending the appearance of a new rule or a practice direction by the President of the Family Division of the High Court, we will direct as follows. (1) Applications for the court's approval of medical or surgical treatment where such approval is required should be by way of originating summons issuing out of the Family Division of the High Court. (2) The applicant should normally be those responsible for the care of the patient or those intending to carry out the treatment, if it is approved. (3) The patient must always be a party and should normally be a respondent. In cases in which the patient is a respondent the patient's guardian ad litem should normally be the Official Solicitor. In any cases in which the Official Solicitor is not either the next friend or the guardian ad litem of the patient or an applicant he shall be a respondent. (4) With a view to protecting the patient's privacy, but subject always to the judge's discretion, the hearing will be in chambers, but the decision and the reasons for that decision will be given in open court. As the procedure adopted in this case accorded with what at the time was thought to be

appropriate and as the judge investigated the matter fully and reached a decision, the wisdom of which no one seeks to challenge, I would dismiss the appeal.'

Neill LJ said:

'There are, however, some operations where the intervention of a court is most desirable if not essential. In this category I would place operations for sterilisation and organ transplant operations where the incapacitated patient is to be the donor. The performance of these operations should be subject to outside scrutiny. The lawfulness of the operation will depend of course on the question whether it is necessary or not, but in my view it should become standard practice for the approval of the court to be obtained before an operation of this exceptional kind is carried out. Thus it is of the greatest importance to guard against any tendency for operations for sterilisation to be performed as a matter of convenience or merely to ease the burden of those who are responsible for looking after the patient. Each case needs to be looked at with especial care to ensure that the operation is indeed in the best interests of the patient. I consider that a special form of procedure should be provided so that the matter can be brought before the court in the simplest way possible. A claim for a declaration under RSC Ord 15, r 16 is not a satisfactory form of procedure because, if the claim were unopposed, as it often would be, the proceedings would be open to the technical objections that declarations are not in the ordinary way made by consent or where the defendant or respondent has asserted no contrary claim. Nevertheless, the purpose of the application to the court will be to satisfy the court that the operation which is to be performed will be necessary and lawful and the court's approval will be sought on this basis. If the court is so satisfied its decision will provide a safeguard for those who carry out the operation and an assurance to the public that the facts have been fully investigated in a court of law. If the court is not so satisfied, its approval will not be given and the operation will not go ahead. Of course, if there was any possibility that the operation was going to be proceeded with after approval had been withheld, which would be extremely unlikely, the court could grant an injunction. It may be that

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the most convenient method of prescribing the appropriate form of procedure will be by way of a new rule under RSC Ord 80, which is concerned with proceedings relating to those under a disability. I have had the advantage of reading in draft the judgment of Lord Donaldson MR. I agree with his proposals as to how the proceedings should be constituted and heard.'

Butler-Sloss LJ said:

'In my judgment, a decision as to sterilisation of a person under a disability ought not to be left entirely to the decision of the family and the

> medical profession alone. Public policy requires that there should be imposed the supervision of the courts in so important and delicate a decision. In the previous cases … and in the present appeal the mechanism has been by declaration under RSC Ord 15, r 16. I agree that this is not an appropriate procedure. A declaration cannot alter the existing position and the granting of it at first instance may have limited efficacy in any subsequent litigation. The court by a declaration alone cannot give approval. The reverse application, an injunction, is also limited in its usefulness and, other than the Official Solicitor if notified, there may be no one with an interest available to apply for it. There is at present no mechanism providing for the approval of the court in the present case. It does, however, exist in the sphere of property by RSC Ord 80 for persons under a disability and by analogy I see no reason in principle why a rule should not be framed to prescribe such a procedure. I respectfully agree with Lord Donaldson MR as to the procedure that he has set out in his judgment and the participation of the Official Solicitor. Such a procedure is needed in those operations coming within the special category which includes sterilisation, in the public interest, in order to demonstrate that the operation will or will not be lawful and to give or withhold the approval of the court.'

My Lords, as I understand the judgments of all three members of the Court of Appeal, they took the same view with regard to the involvement of the court in a case such as F as I expressed earlier, namely that, although such involvement is not strictly necessary as a matter of law, it is highly desirable as a matter of good practice. They went on, however, to say that the court's involvement should take the form of giving or refusing its approval to the sterilisation operation proposed. They further considered that the procedure to be used for the making and determination of an application for approval could conveniently be prescribed by a new rule under RSC Ord 80.

I recognise that such a form of proceeding, if it were open to be adopted, would provide an admirable solution to the procedural problem which arises. With respect to the Court of Appeal, however, I cannot see how or on what basis the High Court, or any court or judge, can have jurisdiction to approve or disapprove a proposed operation. If the old parens patriae jurisdiction were still available with respect to persons of unsound mind, as it is with respect to minors who are wards, and if its exercise could be conferred on the judges of the High Court, Family Division, in the same way as the wardship jurisdiction has been conferred on them, there would be no difficulty. For the reasons which I gave earlier, however, the parens patriae jurisdiction with respect to adults of unsound mind no longer exists, and if that jurisdiction, or something comparable with it, is to be recreated, then it must be for the legislature and not for the courts to do the recreating. Rules of court can only, as a matter of law, prescribe the practice and procedure to be followed by the court when it is exercising a jurisdiction which already exists. They cannot confer jurisdiction, and, if they purported to do so, they would be ultra vires.

In my opinion, therefore, a jurisdiction to approve or disapprove an operation, which the Court of Appeal considered to be available to the High Court, and appropriate to be exercised in the present case, does not exist.

[1989] 2 All ER 545 at 557

I turn, fourth and lastly, to the jurisdiction to make declarations. I do not think that it is right to describe this jurisdiction as being 'under RSC Ord 15, r 16'. The jurisdiction is part of the inherent jurisdiction of the High Court, and the rule does no more than say that there is no procedural objection to an action being brought for a declaration whether any other kind of relief is asked for or available or not.

There can, in my view, be no doubt that the High Court has jurisdiction, in a case like the present one, to make a declaration with regard to the lawfulness of an operation for sterilisation proposed to be carried out. As appears, however, from the passages in the judgments of the three members of the Court of Appeal which I set out earlier, they all concluded that procedure by way of declaration, though used in the present case and three previous cases similar to it, was not a satisfactory procedure to be adopted. Their grounds of objection were these. First, that a declaration changes nothing (Lord Donaldson MR and Butler-Sloss LJ). Second, that an application for a declaration might be unopposed and it was not the ordinary practice to grant declarations by consent or where there is no contrary claim (Neill LJ). Third, that the public interest requires that the court should give express approval to a proposed operation and a declaration does not have that effect (Lord Donaldson MR, Neill LJ and Butler-Sloss LJ). Fourth, that a declaration granted at first instance may have limited efficacy in any subsequent litigation (Butler-Sloss LJ).

With respect to all three members of the Court of Appeal, I do not consider that these objections are well founded. The first objection, that a declaration changes nothing, would be valid if the substantive law were that a proposed operation could not lawfully be performed without the prior approval of the court. As I indicated earlier, however, that is not, in my view the substantive law, nor did the Court of Appeal, as I understand the judgments, hold that it was. The substantive law is that a proposed operation is lawful if it is in the best interests of the patient, and unlawful if it is not. What is required from the court, therefore, is not an order giving approval to the operation, so as to make lawful that which would otherwise be unlawful. What is required from the court is rather an order which establishes by judicial process (the 'third opinion' so aptly referred to by Lord Donaldson MR) whether the proposed operation is in the best interests of the patient and therefore lawful, or not in the patient's best interests and therefore unlawful.

The second objection, that the application for a declaration might be unopposed and it is not the ordinary practice to grant declarations by consent or where there is no contrary claim, would only be valid in the absence of appropriate rules of procedure governing an application of the kind under discussion. The same objection could be raised against the procedure by way of application for approval of the proposed operation favoured by the Court of Appeal, in the absence of rules of procedure such as those propounded by Lord Donaldson MR and agreed to by Neill and Butler-Sloss LJJ. I accept, of course, that no such rules of procedure have so far been made. But, even without them, there would have to be a summons for directions, preferably before a judge, and he could be relied on to ensure that the application was not unopposed, and that all necessary evidence, both for and against the proposed operation, were adduced before the court at the hearing.

The third objection, that the public interest requires that the court should give express approval to a proposed operation and that a declaration does not have that effect, appears

to be largely semantic. By that I mean that, whichever of the two forms of procedure, if both were available, were to be used, the nature of the inquiry which would have to be made by the court, and of the reasoned decision which it would be obliged to give after carrying out that inquiry, would be substantially the same.

The fourth objection, that a declaration granted at first instance may have limited efficacy in any subsequent litigation, was not the subject matter of any argument before your Lordships. My provisional view is that, whatever procedure were to be used, only the parties to the proceedings and their privies would be bound by, or could rely on, the decision made. In practice, however, I think that that would be enough.

[1989] 2 All ER 545 at 558

For the reasons which I have given, I am of opinion that, having regard to the present limitations on the jurisdiction of the court, by which I mean its inability to exercise the parens patriae jurisdiction with respect to adults of unsound mind, the procedure by way of declaration is, in principle, an appropriate and satisfactory procedure to be used in a case of this kind.

(3) Procedure to be used when applying for a declaration

The Court of Appeal, as I indicated earlier, considered that the correct form of proceeding in a case of this kind was an application to the court for approval of the proposed operation. On that basis, as appears from a part of the judgment of Lord Donaldson MR which I quoted earlier, he formulated certain directions numbered (1) to (4) (with which both Neill and Butler-Sloss LJJ agreed) to govern such applications pending the making of appropriate amendments to RSC Ord 80 by the Supreme Court Rule Committee. On the basis of my conclusion that the correct form of proceeding is an application for a declaration, it seems to me that, subject to certain alterations in the wording of directions (1) and (2), those directions would be equally appropriate to the latter kind of proceeding. I would alter directions (1) and (2) so as to read:

> '(1) Applications for a declaration that a proposed operation on or medical treatment for a patient can lawfully be carried out despite the inability of such patient to consent thereto should be by way of originating summons issuing out of the Family Division of the High Court.
>
> (2) The applicant should normally be those responsible for the care of the patient or those intending to carry out the proposed operation or other treatment, if it is declared to be lawful.'

I would leave directions (3) and (4) as they are.

Counsel for the intervener, the Mental Health Act Commission for England and Wales, invited your Lordships to say that further and more detailed directions with regard to evidence and other matters should be added to directions (1) to (4) above. In my opinion there will, in cases of this kind, have to be a summons for directions heard by a judge, and it should be left to him to decide, on the hearing of such summons, whether any, and, if so what, further and more detailed directions should be given in the particular

case before him.

I consider also that further consideration needs to be given, first, to the precise terms in which a declaration should be granted and, second, to the question whether any order supplementary to the declaration should be made.

The form of order and declaration made by Scott Baker J in the present case was this:

> 'IT IS ORDERED AND DECLARED that under the Rules of the Supreme Court Order, 15, Rule 16 the sterilisation of the Plaintiff would not amount to an unlawful act by reason only of the absence of the Plaintiff's consent.'

In my view, three changes in the form of the order should be made. First, for the reasons which I gave earlier, I think that the reference to RSC Ord 15, r 16 is unnecessary and should be omitted. Second, I think that the declaration should be amplified in two ways: (a) to show the finding of fact on the foundation of which it is made; and (b) to make it clear that it is made on the basis of existing circumstances only. Third, I think that provision should be made for the possibility of a change in the existing circumstances occurring before the declaration is acted on. Taking account of these three matters I consider that the order should be in the following form, or something broadly similar to it: '(a) It is declared that the operation of sterilisation proposed to be performed on the plaintiff being in the existing circumstances in her best interests can lawfully be performed on her despite her inability to consent to it. (b) It is ordered that in the event of a material change in the existing circumstances occurring before the said operation



has been performed any party shall have liberty to apply for such further or other declaration or order as may be just.'

Your Lordships were referred by counsel in the course of the hearing of the appeal to the way in which the problem raised in this case has been dealt with in other countries, whose legal systems were originally derived, to a large extent at any rate, from the common law of England. These countries were the United States of America, Canada and Australia, and a large file of reported cases decided in them was made available, to some of which specific reference was made. My Lords, the material so supplied was of compelling interest, and it is right to express gratitude to those concerned for the industry displayed in making it available. In my view, however, the way in which the problem has been dealt with in those other countries does not in the end assist your Lordships to any great extent in the determination of this appeal. This is because it is clear that, under their legal systems, the parens patriae jurisdiction with respect to persons of unsound mind is still alive and available for exercise by their courts. It follows that those courts have powers to deal with the problem concerned which are, unfortunately as I think, denied to the courts here. In these circumstances I do not consider that it would serve any useful purpose to examine and analyse this extensive body of American, Canadian and Australian law, and I trust that my omission to do so will not be regarded as indicating disrespect of any kind toward the legal systems of those countries.

There is one further matter with which I think that it is necessary to deal. That is the standard which the court should apply in deciding whether a proposed operation is or is not in the best interests of the patient. With regard to this Scott Baker J said:

> 'I do not think they [the doctors] are liable in battery where they are acting in good faith and reasonably in the best interests of their patients. I doubt whether the test is very different from that for negligence.'

This was a reference to the test laid down in Bolam v Friern Hospital Management Committee [1957] 2 All ER 118, [1957] 1 WLR 582, namely that a doctor will not be negligent if he establishes that he acted in accordance with a practice accepted at the time by a responsible body of medical opinion skilled in the particular form of treatment in question.

All three members of the Court of Appeal considered that the Bolam test was insufficiently stringent for deciding whether an operation or other medical treatment was in a patient's best interests. Lord Donaldson MR said:

> 'Just as the law and the courts rightly pay great, but not decisive, regard to accepted professional wisdom in relation to the duty of care in the law of medical negligence (the Bolam test), so they equally would have regard to such wisdom in relation to decisions whether or not and how to treat incompetent patients in the context of the law of trespass to the person. However, both the medical profession and the courts have to keep the special status of such a patient in the forefront of their minds. The ability of the ordinary adult patient to exercise a free choice in deciding whether to accept or to refuse medical treatment and to choose between treatments is not to be dismissed as desirable but inessential. It is a crucial factor in relation to all medical treatment. If it is necessarily absent, whether temporarily in an emergency situation or permanently in a case of mental disability, other things being equal there must be greater caution in deciding whether to treat and, if so, how to treat, although I do not agree that this extends to limiting doctors to treatment on the necessity for which there are “no two views” (per Wood J in T v T [1988] 1 All ER 613 at 621, [1988] Fam 52 at 62). There will always or usually be a minority view and this approach, if strictly applied, would often rule out all treatment. On the other hand, the existence of a signifcant minority view would constitute a serious contra-indication.'

Neil LJ said:

[1989] 2 All ER 545 at 560

> 'I have therefore come to the conclusion that, if the operation is necessary and the proper safeguards are observed, the performance of a serious operation, including an operation for sterilisation, on a person who by reason of a lack of mental capacity is unable to give his or her consent is not a trespass to the person or otherwise unlawful. It therefore becomes necessary to consider what is meant by “a necessary operation“. In seeking to define the circumstances in which an operation can properly be

> carried out Scott Baker J said: “I do not think they are liable in battery where they are acting in good faith and reasonably in the best interests of their patients. I doubt whether the test is very different from that for negligence.” With respect, I do not consider that this test is sufficiently stringent. A doctor may defeat a claim in negligence if he establishes that he acted in accordance with a practice accepted at the time as proper by a responsible body of medical opinion skilled in the particular form of treatment in question. This is the test laid down in Bolam v Friern Hospital Management Committee. But to say that it is not negligent to carry out a particular form of treatment does not mean that that treatment is necessary. I would define necessary in this context as that which the general body of medical opinion in the particular specialty would consider to be in the best interests of the patient in order to maintain the health and to secure the well-being of the patient. One cannot expect unanimity but it should be possible to say of an operation which is necessary in the relevant sense that it would be unreasonable in the opinion of most experts in the field not to make the operation available to the patient. One must consider the alternatives to an operation and the dangers or disadvantages to which the patient may be exposed if no action is taken. The question becomes: what action does the patient's health and welfare require?'

Butler-Sloss LJ agreed with Neill LJ.

With respect to the Court of Appeal, I do not agree that the Bolam test is inapplicable to cases of performing operations on, or giving other treatment to, adults incompetent to give consent. In order that the performance of such operations on, and the giving of such other treatment to, such adults should be lawful, they must be in their best interests. If doctors were to be required, in deciding whether an operation or other treatment was in the best interests of adults incompetent to give consent, to apply some test more stringent than the Bolam test, the result would be that that such adults would, in some circumstances at least, be deprived of the benefit of medical treatment which adults competent to give consent would enjoy. In my opinion it would be wrong for the law, in its concern to protect such adults, to produce such a result.

For the reasons which I have given I would dismiss the appeal, subject to varying the order of Scott Baker J by substituting for the declaration made by him the amplified declaration and further order which I formulated earlier.

LORD GRIFFITHS.

My Lords, the argument in this appeal has ranged far and wide in search of a measure to protect those who cannot protect themselves from the insult of an unnecessary sterilisation. Every judge who has considered the problem has recognised that there should be some control mechanism imposed on those who have the care of infants or mentally incompetent women of child bearing age to prevent or at least inhibit them from sterilising the women without approval of the High Court. I am, I should make it clear, speaking now and hereafter of an operation for sterilisation which is proposed not for the treatment of diseased organs but an operation on a woman with healthy

reproductive organs in order to avoid the risk of pregnancy. The reasons for the anxiety about sterilisation which it is proposed should be carried out for other than purely medical reasons, such as the removal of the ovaries to prevent the spread of cancer, are readily understandable and are shared throughout the common law world.

We have been taken through many authorities in the United States, Australia and Canada which stress the danger that sterilisation may be proposed in circumstances which are not truly in the best interests of the woman but for the convenience of those

[1989] 2 All ER 545 at 561

who are charged with her care. In the United States and Australia the solution has been to declare that, in the case of a woman who either because of infancy or mental incompetence cannot give her consent, the operation may not be performed without the consent of the court. In Canada the Supreme Court has taken an even more extreme stance and declared that sterilisation is unlawful unless performed for therapeutic reasons, which I understand to be as a life-saving measure or for the prevention of the spread of disease: see Re Eve (1986) 31 DLR (4th) 1. This extreme position was rejected by this House in Re B (a minor) (wardship: sterilisation) [1987] 2 All ER 206, [1988] AC 199, which recognised that an operation might be in the best interests of a woman even though carried out in order to protect her from the trauma of a pregnancy which she could not understand and with which she could not cope. Nevertheless Lord Templeman stressed that such an operation should not be undertaken without the approval of a High Court judge of the Family Division. In this country Re D (a minor) (wardship: sterilisation) [1976] 1 All ER 326, [1976] Fam 185 stands as a stark warning of the danger of leaving the decision to sterilise in the hands of those having the immediate care of the woman, even when they genuinely believe that they are acting in her best interests.

I have had the advantage of reading the speeches of my noble and learned friends Lord Brandon and Lord Goff and there is much therein with which I agree. I agree that those charged with the care of the mentally incompetent are protected from any criminal or tortious action based on lack of consent. Whether one arrives at this conclusion by applying a principle of 'necessity' as do Lord Brandon and Lord Goff or by saying that it is in the public interest as did Neill LJ in the Court of Appeal, appear to me to be inextricably interrelated conceptual justifications for the humane development of the common law. Why is it necessary that the mentally incompetent should be given treatment to which they lack the capacity to consent? The answer must surely be because it is in the public interest that it should be so.

In a civilised society the mentally incompetent must be provided with medical and nursing care and those who look after them must do their best for them. Stated in legal terms the doctor who undertakes responsibility for the treatment of a mental patient who is incapable of giving consent to treatment must give the treatment that he considers to be in the best interests of his patient, and the standard of care required of the doctor will be that laid down in Bolam v Friern Hospital Management Committee [1957] 2 All ER 118, [1957] 1 WLR 582. The doctor will however be subject to the specific statutory constraints on treatment for mental disorder provided by Pt IV of the Mental Health Act 1983. Certain radical treatments such as surgical destruction of brain tissue cannot be performed without the consent of the patient and if the patient is incapable of giving

consent the operation cannot be performed, however necessary it may be considered by the doctors. Other less radical treatment can only be given with the consent of the patient or, if the patient will not or cannot consent, on the authority of a second medical opinion. There are however no statutory provisions that deal with sterilisation.

I agree with Lord Brandon's analysis of the provisions of the Mental Health Act 1983 and, in particular, that in its context the expression 'the affairs of patients' in Pt VII cannot be construed as including medical treatment and thus providing a substitute for the parens patriae jurisdiction previously vested in the Lord Chancellor and the judges of the High Court, Chancery Division, which was removed by warrant under sign manual dated 1 November 1960, contemporaneously with the passing of the Mental Health Act 1959.

Finally, I agree that an action for a declaration is available as a mechanism by which a proposed sterilisation may be investigated to ensure that it is in the woman's best interests.

But I cannot agree that it is satisfactory to leave this grave decision with all its social implications in the hands of those having the care of the patient with only the expectation that they will have the wisdom to obtain a declaration of lawfulness before the operation is performed. In my view the law ought to be that they must obtain the approval of the

[1989] 2 All ER 545 at 562

court before they sterilise a woman incapable of giving consent and that it is unlawful to sterilise without that consent. I believe that it is open to your Lordships to develop a common law rule to this effect. Although the general rule is that the individual is the master of his own fate the judges through the common law have, in the public interest, imposed certain constraints on the harm that people may consent to being inflicted on their own bodies. Thus, although boxing is a legal sport, a bare knuckle prize fight in which more grievous injury may be inflicted is unlawful (see R v Coney (1882) 8 QBD 534), and so is fighting which may result in actual bodily harm (see Re A-G's Reference (No 6 of 1980) [1981] 2 All ER 1057, [1981] QB 715). So also is it unlawful to consent to the infliction of serious injury on the body in the course of the practice of sexual perversion (see R v Donovan [1934] 2 KB 498, [1934] All ER Rep 207). Suicide was unlawful at common law until Parliament intervened by the Suicide Act 1961.

The common law has, in the public interest, been developed to forbid the infliction of injury on those who are fully capable of consenting to it. The time has now come for a further development to forbid, again in the public interest, the sterilisation of a woman with healthy reproductive organs who, either through mental incompetence or youth, is incapable of giving her fully informed consent unless such an operation has been inquired into and sanctioned by the High Court. Such a common law rule would provide a more effective protection than the exercise of parens patriae jurisdiction which is dependent on some interested party coming forward to invoke the jurisdiction of the court. The parens patriae jurisdiction is in any event now only available in the case of minors through their being made wards of court. I would myself declare that on grounds of public interest an operation to sterilise a woman incapable of giving consent on grounds of either age or mental incapacity is unlawful if performed without the consent

of the High Court. I fully recognise that in so doing I would be making new law. However, the need for such a development has been identified in a number of recent cases and in the absence of any parliamentary response to the problem it is my view that the judges can and should accept responsibility to recognise the need and to adapt the common law to meet it. If such a development did not meet with public approval it would always be open to Parliament to reverse it or to alter it by perhaps substituting for the opinion of the High Court judge the second opinion of another doctor as urged by counsel for the Mental Health Act Commission.

As I know that your Lordships consider that it is not open to you to follow the course I would take I must content myself by accepting, but as second best, the procedure by way of declaration proposed by Lord Brandon and agree to the dismissal of this appeal.

LORD GOFF OF CHIEVELEY.

My Lords, the question in this case is concerned with the lawfulness of a proposed operation of sterilisation on the plaintiff, F, a woman of 36 years of age, who by reason of her mental incapacity is disabled from giving her consent to the operation. It is well established that, as a general rule, the performance of a medical operation on a person without his or her consent is unlawful, as constituting both the crime of battery and the tort of trespass to the person. Furthermore, before Scott Baker J and the Court of Appeal, it was common ground between the parties that there was no power in the court to give consent on behalf of F to the proposed operation of sterilisation, or to dispense with the need for such consent. This was because it was common ground that the parens patriae jurisdiction in respect of persons suffering from mental incapacity, formerly vested in the courts by royal warrant under the sign manual, had ceased to be so vested by revocation of the last warrant on 1 November 1960, and further that there was no statutory provision which could be invoked in its place. Before your Lordships, having regard to the importance of the matter, both those propositions were nevertheless subjected to close scrutiny, and counsel for the Official Solicitor deployed, with great ability, such arguments as can be advanced that the parens patriae jurisdiction is still vested in the courts as a matter of common law, and that the necessary statutory jurisdiction is to be found in Pt VII of the Mental Health Act 1983, and in



particular in ss 93, 95 and 96 of that Act. However, with the assistance of counsel, I for my part have become satisfied that the concessions made below on these points were rightly made. On both points I find myself to be respectfully in agreement with the opinion expressed by my noble and learned friend Lord Brandon, and I do not think it necessary for me to add anything.

It follows that, as was recognised in the courts below, if the operation on F is to be justified, it can only be justified on the applicable principles of common law. The argument of counsel revealed the startling fact that there is no English authority on the question whether as a matter of common law (and if so in what circumstances) medical treatment can lawfully be given to a person who is disabled by mental incapacity from consenting to it. Indeed, the matter goes further, for a comparable problem can arise in relation to persons of sound mind who are, for example, rendered unconscious in an

accident or rendered speechless by a catastrophic stroke. All such persons may require medical treatment and, in some cases, surgical operations. All may require nursing care. In the case of mentally disordered persons, they may require care of a more basic kind, dressing, feeding and so on, to assist them in their daily life, as well as routine treatment by doctors and dentists. It follows that, in my opinion, it is not possible to consider in isolation the lawfulness of the proposed operation of sterilisation in the present case. It is necessary first to ascertain the applicable common law principles and then to consider the question of sterilisation against the background of those principles.

Counsel for the Official Solicitor advanced the extreme argument that, in the absence of a parens patriae or statutory jurisdiction, no such treatment or care of the kind I have described can lawfully be given to a mentally disordered person who is unable to consent to it. This is indeed a startling proposition, which must also exclude treatment or care to persons rendered unconscious or unable to speak by accident or illness. For centuries, treatment and care must have been given to such persons, without any suggestion that it was unlawful to do so. I find it very difficult to believe that the common law is so deficient as to be incapable of providing for so obvious a need. Even so, it is necessary to examine the point as a matter of principle.

I start with the fundamental principle, now long established, that every person's body is inviolate. As to this, I do not wish to depart from what I myself said in the judgment of the Divisional Court in Collins v Wilcock [1984] 3 All ER 374, [1984] 1 WLR 1172, and in particular from the statement that the effect of this principle is that everybody is protected not only against physical injury but against any form of physical molestation (see [1984] 3 All ER 374 at 378, [1984] 1 WLR 1172 at 1177).

Of course, as a general rule physical interference with another person's body is lawful if he consents to it; though in certain limited circumstances the public interest may require that his consent is not capable of rendering the act lawful. There are also specific cases where physical interference without consent may not be unlawful: chastisement of children, lawful arrest, self-defence, the prevention of crime and so on. As I pointed out in Collins v Wilcock [1984] 3 All ER 374 at 378, [1984] 1 WLR 1172 at 1177, a broader exception has been created to allow for the exigencies of everyday life: jostling in a street or some other crowded place, social contact at parties and such like. This exception has been said to be founded on implied consent, since those who go about in public places, or go to parties, may be taken to have impliedly consented to bodily contact of this kind. Today this rationalisation can be regarded as artificial; and, in particular, it is difficult to impute consent to those who, by reason of their youth or mental disorder, are unable to give their consent. For this reason, I consider it more appropriate to regard such cases as falling within a general exception embracing all physical contact which is generally acceptable in the ordinary conduct of everyday life.

In the old days it used to be said that, for a touching of another's person to amount to a battery, it had to be a touching 'in anger' (see Cole v Turner (1704) Holt KB 108, 90 ER 958 per Holt CJ); and it has recently been said that the touching must be 'hostile' to have that effect (see Wilson v Pringle [1986] 2 All ER 440 at 447, [1987] QB 237 at 253). I



respectfully doubt whether that is correct. A prank that gets out of hand, an over-friendly

slap on the back, surgical treatment by a surgeon who mistakenly thinks that the patient has consented to it, all these things may transcend the bounds of lawfulness, without being characterised as hostile. Indeed, the suggested qualification is difficult to reconcile with the principle that any touching of another's body is, in the absence of lawful excuse, capable of amounting to a battery and a trespass. Furthermore, in the case of medical treatment, we have to bear well in mind the libertarian principle of self-determination which, to adopt the words of Cardozo J (in Schloendorff v Society of New York Hospital 211 NY 125 at 126), recognises that—

> 'Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault … '

This principle has been reiterated in more recent years by Lord Reid in S v S, W v Official Solicitor [1970] 3 All ER 107 at 111, [1972] AC 24 at 43.

It is against this background that I turn to consider the question whether, and if so when, medical treatment or care of a mentally disordered person who is, by reason of his incapacity, incapable of giving his consent can be regarded as lawful. As is recognised in Cardozo J's statement of principle, and elsewhere (see eg Sidaway v Bethlem Royal Hospital Governors [1985] 1 All ER 643 at 649, [1985] AC 871 at 882 per Lord Scarman), some relaxation of the law is required to accommodate persons of unsound mind. In Wilson v Pringle the Court of Appeal considered that treatment or care of such persons may be regarded as lawful, as falling within the exception relating to physical contact which is generally acceptable in the ordinary conduct of everyday life. Again, I am with respect unable to agree. That exception is concerned with the ordinary events of everyday life, jostling in public places and such like, and affects all persons, whether or not they are capable of giving their consent. Medical treatment, even treatment for minor ailments, does not fall within that category of events. The general rule is that consent is necessary to render such treatment lawful. If such treatment administered without consent is not to be unlawful, it has to be justified on some other principle.

On what principle can medical treatment be justified when given without consent? We are searching for a principle on which, in limited circumstances, recognition may be given to a need, in the interests of the patient, that treatment should be given to him in circumstances where he is (temporarily or permanently) disabled from consenting to it. It is this criterion of a need which points to the principle of necessity as providing justification.

That there exists in the common law a principle of necessity which may justify action which would otherwise be unlawful is not in doubt. But historically the principle has been seen to be restricted to two groups of cases, which have been called cases of public necessity and cases of private necessity. The former occurred when a man interfered with another man's property in the public interest, for example (in the days before we could dial 999 for the fire brigade) the destruction of another man's house to prevent the spread of a catastrophic fire, as indeed occurred in the Great Fire of London in 1666. The latter cases occurred when a man interfered with another's property to save his own person or property from imminent danger, for example when he entered on his neighbour's land without his consent in order to prevent the spread of fire onto his own

land.

There is, however, a third group of cases, which is also properly described as founded on the principle of necessity and which is more pertinent to the resolution of the problem in the present case. These cases are concerned with action taken as a matter of necessity to assist another person without his consent. To give a simple example, a man who seizes another and forcibly drags him from the path of an oncoming vehicle, thereby saving him from injury or even death, commits no wrong. But there are many emanations of this principle, to be found scattered through the books. These are concerned not only with the preservation of the life or health of the assisted person, but also with the

[1989] 2 All ER 545 at 565

preservation of his property (sometimes an animal, sometimes an ordinary chattel) and even to certain conduct on his behalf in the administration of his affairs. Where there is a pre-existing relationship between the parties, the intervener is usually said to act as an agent of necessity on behalf of the principal in whose interests he acts, and his action can often, with not too much artificiality, be referred to the pre-existing relationship between them. Whether the intervener may be entitled either to reimbursement or to remuneration raises separate questions which are not relevant to the present case.

We are concerned here with action taken to preserve the life, health or well-being of another who is unable to consent to it. Such action is sometimes said to be justified as arising from an emergency; in Prosser and Keeton Torts (5th edn, 1984) p 117 the action is said to be privileged by the emergency. Doubtless, in the case of a person of sound mind, there will ordinarily have to be an emergency before such action taken without consent can be lawful; for otherwise there would be an opportunity to communicate with the assisted person and to seek his consent. But this is not always so; and indeed the historical origins of the principle of necessity do not point to emergency as such as providing the criterion of lawful intervention without consent. The old Roman doctrine of negotiorum gestio presupposed not so much an emergency as a prolonged absence of the dominus from home as justifying intervention by the gestor to administer his affairs. The most ancient group of cases in the common law, concerned with action taken by the master of a ship in distant parts in the interests of the shipowner, likewise found its origin in the difficulty of communication with the owner over a prolonged period of time, a difficulty overcome today by modern means of communication. In those cases, it was said that there had to be an emergency before the master could act as agent of necessity; though the emergency could well be of some duration. But, when a person is rendered incapable of communication either permanently or over a considerable period of time (through illness or accident or mental disorder), it would be an unusual use of language to describe the case as one of 'permanent emergency', if indeed such a state of affairs can properly be said to exist. In truth, the relevance of an emergency is that it may give rise to a necessity to act in the interests of the assisted person without first obtaining his consent. Emergency is however not the criterion or even a prerequisite; it is simply a frequent origin of the necessity which impels intervention. The principle is one of necessity, not of emergency.

We can derive some guidance as to the nature of the principle of necessity from the cases on agency of necessity in mercantile law. When reading those cases, however, we have to bear in mind that it was there considered that (since there was a pre-existing

relationship between the parties) there was a duty on the part of the agent to act on his principal's behalf in an emergency. From these cases it appears that the principle of necessity connotes that circumstances have arisen in which there is a necessity for the agent to act on his principal's behalf at a time when it is in practice not possible for him to obtain his principal's instructions so to do. In such cases, it has been said that the agent must act bona fide in the interests of his principal (see Prager v Blatspiel Stamp & Heacock Ltd [1924] 1 KB 566 at 572, [1924] All ER Rep 524 at 528 per McCardie J). A broader statement of the principle is to be found in the advice of the Privy Council delivered by Sir Montague Smith in Australasian Steam Navigation Co v Morse (1872) LR 4 PC 222 at 230, in which he said:

> '… when by the force of circumstances a man has the duty cast upon him of taking some action for another, and under that obligation, adopts the course which, to the judgment of a wise and prudent man, is apparently the best for the interest of the persons for whom he acts in a given emergency, it may properly be said of the course so taken, that it was, in a mercantile sense, necessary to take it.'

In a sense, these statements overlap. But from them can be derived the basic requirements, applicable in these cases of necessity, that, to fall within the principle, not only (1) must there be a necessity to act when it is not practicable to communicate with the assisted

[1989] 2 All ER 545 at 566

person, but also (2) the action taken must be such as a reasonable person would in all the circumstances take, acting in the best interests of the assisted person.

On this statement of principle, I wish to observe that officious intervention cannot be justified by the principle of necessity. So intervention cannot be justified when another more appropriate person is available and willing to act; nor can it be justified when it is contrary to the known wishes of the assisted person, to the extent that he is capable of rationally forming such a wish. On the second limb of the principle, the introduction of the standard of a reasonable man should not in the present context be regarded as materially different from that of Sir Montague Smith's 'wise and prudent man', because a reasonable man would, in the time available to him, proceed with wisdom and prudence before taking action in relation to another man's person or property without his consent. I shall have more to say on this point later. Subject to that, I hesitate at present to indulge in any greater refinement of the principle, being well aware of many problems which may arise in its application, problems which it is not necessary, for present purposes, to examine. But as a general rule, if the above criteria are fulfilled, interference with the assisted person's person or property (as the case may be) will not be unlawful. Take the example of a railway accident, in which injured passengers are trapped in the wreckage. It is this principle which may render lawful the actions of other citizens, railway staff, passengers or outsiders, who rush to give aid and comfort to the victims: the surgeon who amputates the limb of an unconscious passenger to free him from the wreckage the ambulance man who conveys him to hospital; the doctors and nurses who treat him and care for him while he is still unconscious. Take the example of an elderly person who suffers a stroke which renders him incapable of speech or movement. It is by virtue of this principle that the doctor who treats him, the nurse who cares for him, even the

relative or friend or neighbour who comes in to look after him will commit no wrong when he or she touches his body.

The two examples I have given illustrate, in the one case, an emergency and, in the other, a permanent or semi-permanent state of affairs. Another example of the latter kind is that of a mentally disordered person who is disabled from giving consent. I can see no good reason why the principle of necessity should not be applicable in his case as it is in the case of the victim of a stroke. Furthermore, in the case of a mentally disordered person, as in the case of a stroke victim, the permanent state of affairs calls for a wider range of care than may be requisite in an emergency which arises from accidental injury. When the state of affairs is permanent, or semi-permanent, action properly taken to preserve the life, health or well-being of the assisted person may well transcend such measures as surgical operation or substantial medical treatment and may extend to include such humdrum matters as routine medical or dental treatment, even simple care such as dressing and undressing and putting to bed.

The distinction I have drawn between cases of emergency and cases where the state of affairs is (more or less) permanent is relevant in another respect. We are here concerned with medical treatment, and I limit myself to cases of that kind. Where, for example, a surgeon performs an operation without his consent on a patient temporarily rendered unconscious in an accident, he should do no more than is reasonably required, in the best interests of the patient, before he recovers consciousness. I can see no practical difficulty arising from this requirement, which derives from the fact that the patient is expected before long to regain consciousness and can then be consulted about longer term measures. The point has however arisen in a more acute form where a surgeon, in the course of an operation, discovers some other condition which, in his opinion, requires operative treatment for which he has not received the patient's consent. In what circumstances he should operate forthwith, and in what circumstances he should postpone the further treatment until he has received the patient's consent, is a difficult matter which has troubled the Canadian courts (see Marshall v Curry [1933] 3 DLR 260 and Murray v McMurchy [1949] 2 DLR 442), but which it is not necessary for your Lordships to consider in the present case.

[1989] 2 All ER 545 at 567

But where the state of affairs is permanent or semi-permanent, as may be so in the case of a mentally disordered person, there is no point in waiting to obtain the patient's consent. The need to care for him is obvious; and the doctor must then act in the best interests of his patient, just as if he had received his patient's consent so to do. Were this not so, much useful treatment and care could, in theory at least, be denied to the unfortunate. It follows that, on this point, I am unable to accept the view expressed by Neill LJ in the Court of Appeal, that the treatment must be shown to have been necessary. Moreover, in such a case, as my noble and learned friend Lord Brandon has pointed out, a doctor who has assumed responsbility for the care of a patient may not only be treated as having the patient's consent to act, but also be under a duty so to act. I find myself to be respectfully in agreement with Lord Donaldson MR when he said:

> 'I see nothing incongruous in doctors and others who have a caring responsibility being required, when acting in relation to an adult who is incompetent, to excercise a right of choice in exactly the same way as

> would the court or reasonable parents in relation to a child, making due allowance, of course, for the fact that the patient is not a child, and I am satisfied that that is what the law does in fact require.'

In these circumstances, it is natural to treat the deemed authority and the duty as interrelated. But I feel bound to express my opinion that, in principle, the lawfulness of the doctor's action is, at least in its origin, to be found in the principle of necessity. This can perhaps be seen most clearly in cases where there is no continuing relationship between doctor and patient. The 'doctor in the house' who volunteers to assist a lady in the audience who, overcome by the drama or by the heat in the theatre, has fainted away is impelled to act by no greater duty than that imposed by his own Hippocratic oath. Furthermore, intervention can be justified in the case of a non-professional, as well as a professional, man or woman who has no pre-existing relationship with the assisted person, as in the case of a stranger who rushes to assist an injured man after an accident. In my opinion, it is the necessity itself which provides the justification for the intervention.

I have said that the doctor has to act in the best interests of the assisted person. In the case of routine treatment of mentally disordered persons, there should be little difficulty in applying this principle. In the case of more serious treatment, I recognise that its application may create problems for the medical profession; however, in making decisions about treatment, the doctor must act in accordance with a responsible and competent body of relevant professional opinion, on the principles set down in Bolam v Friern Hospital Management Committee [1957] 2 All ER 118, [1957] 1 WLR 582. No doubt, in practice, a decision may involve others besides the doctor. It must surely be good practice to consult relatives and others who are concerned with the care of the patient. Sometimes, of course, consultation with a specialist or specialists will be required; and in others, especially where the decision involves more than a purely medical opinion, an inter-disciplinary team will in practice participate in the decision. It is very difficult, and would be unwise, for a court to do more than to stress that, for those who are involved in these important and sometimes difficult decisions, the overriding consideration is that they should act in the best interests of the person who suffers from the misfortune of being prevented by incapacity from deciding for himself what should be done to his own body in his own best interests.

In the present case, your Lordships have to consider whether the foregoing principles apply in the case of a proposed operation of sterilisation on an adult woman of unsound mind, or whether sterilisation is (perhaps with one or two other cases) to be placed in a separate category to which special principles apply. Again, counsel for the Official Solicitor assisted your Lordships by deploying the argument that, in the absence of any parens patriae jurisdiction, sterilisation of an adult woman of unsound mind, who by reason of her mental incapacity is unable to consent, can never be lawful. He founded his submission on a right of reproductive autonomy or right to control one's own



reproduction, which necessarily involves the right not to be sterilised involuntarily, on the fact that sterilisation involves irreversible interference with the patient's most important organs, on the fact that it involves interference with organs which are functioning normally, on the fact that sterilisation is a topic on which medical views are

often not unanimous and on the undesirability, in the case of a mentally disordered patient, of imposing a 'rational' solution on an incompetent patient. Having considered these submissions with care, I am of the opinion that neither singly nor as a whole do they justify the conclusion for which counsel for the Official Solicitor contended. Even so, while accepting that the principles which I have stated are applicable in the case of sterilisation, the matters relied on by counsel provide powerful support for the conclusion that the application of those principles in such a case calls for special care. There are other reasons which support that conclusion. It appears, for example, from reported cases in the United States that there is a fear that those responsible for mental patients might (perhaps unwittingly) seek to have them sterilised as a matter of administrative convenience. Furthermore, the English case of Re D (a minor) (wardship: sterilisation) [1976] 1 All ER 326, [1976] Fam 185 provides a vivid illustration of the fact that a highly qualified medical practitioner, supported by a caring mother, may consider it right to sterilise a mentally retarded girl in circumstances which prove, on examination, not to require such an operation in the best interests of the girl. Matters such as these, coupled with the fundamental nature of the patient's organs with which it is proposed irreversibly to interfere, have prompted courts in the United States and in Australia to pronounce that, in the case of a person lacking the capacity to consent, such an operation should only be permitted with the consent of the court. Such decisions have of course been made by courts which have vested in them the parens patriae jurisdiction, and so have power, in the exercise of such jurisdiction, to impose such a condition. They are not directly applicable in this country, where that jurisdiction has been revoked; for that reason alone I do not propose to cite passages from the American and Australian cases although, like my noble and learned friend Lord Brandon, I have read the judgments with great respect and found them to be of compelling interest. I refer in particular to Re Grady (1981) 85 NJ 235 in the United States and, in Australia, to the very full and impressive consideration of the matter by Nicholson CJ in Re Jane (22 December 1988, unreported), who in particular stressed the importance of independent representation by some disinterested third party on behalf of the patient (there a minor).

Although the parens patriae jurisdiction in the case of adults of unsound mind is no longer vested in courts in this country, the approach adopted by the courts in the United States and in Australia provides, in my opinion, strong support for the view that, as a matter of practice, the operation of sterlisation should not be performed on an adult person who lacks the capacity to consent to it without first obtaining the opinion of the court that the operation is, in the circumstances, in the best interests of the person concerned, by seeking a declaration that the operation is lawful. (I shall return later in this speech to the appropriateness of the declaratory remedy in cases such as these.) In my opinion, that guidance should be sought in order to obtain an independent, objective and authoritative view on the lawfulness of the procedure in the particular circumstances of the relevant case, after a hearing at which it can be ensured that there is independent representation on behalf of the person on whom it is proposed to perform the operation. This approach is consistent with the opinion expressed by Lord Templeman in Re B (a minor (wardship: sterilisation) [1987] 2 All ER 206 at 214–215, [1988] AC 199 at 205–206 that, in the case of a girl who is still a minor, sterilisation should not be performed on her unless she has first been made a ward of court and the court has, in the exercise of its wardship jurisdiction, given its authority to such a step. He said:

> 'No one has suggested a more satisfactory tribunal or a more satisfactory method of reaching a decision which vitally concerns an individual but

> also involves principles of law, ethics and medical practice.'

[1989] 2 All ER 545 at 569

I recognise that the requirement of a hearing before a court is regarded by some as capable of deterring certain medical practitioners from advocating the procedure of sterilisation; but I trust and hope that it may come to be understood that court procedures of this kind, conducted sensitively and humanely by judges of the Family Division, so far as possible and where appropriate in the privacy of chambers, are not to be feared by responsible practitioners.

It was urged before your Lordships by counsel for the Mental Health Act Commission (the commission having been given leave to intervene in the proceedings) that a court vested with the reponsibility of making a decision in such a case, having first ensured that an independent second opinion has been obtained from an appropriate consultant of the appropriate speciality, should not, if that second opinion supports the proposal that sterilisation should take place, exercise any independent judgment but should simply follow the opinion so expressed. For my part, I do not think that it is possible or desirable for a court so to exercise its jurisdiction. In all proceedings where expert opinions are expressed, those opinions are listened to with great respect; but, in the end, the validity of the opinion has to be weighed and judged by the court. This applies as much in cases where the opinion involves a question of judgment as it does in those where it is expressed on a purely scientific matter. For a court automatically to accept an expert opinion, simply because it is concurred in by another appropriate expert, would be a denial of the function of the court. Furthermore, the proposal of the commission is impossible to reconcile with the American and Australian authorities which stress the need for a court decision after a hearing which involves separate representation on behalf of the person on whom it is proposed to perform the operation. Having said this, I do not feel that the commission need fear that the opinions of the experts will in any way be discounted. On the contrary, they will be heard with the greatest respect; and, as the present case shows, there is a high degree of likelihood that they will be accepted.

I turn finally to the question of the procedure adopted in the present case, in which a declaration is sought. The relief claimed by the plaintiff in these proceedings is a declaration that to effect a sterilisation will not amount to an unlawful act by reason only of the absence of the plaintiff's consent. Scott Baker J granted the declaration as asked. The Court of Appeal dismissed the appeal and affirmed the order of Scott Baker J. Even so, all members of the Court of Appeal expressed the opinion that procedure by way of declaration was not appropriate in a case such as this. Lord Donaldson MR said:

> 'For my part, I do not think that this is an appropriate procedure. A declaration changes nothing. All that the court is being asked to do is to declare that, had a course of action been taken without resort to the court, it would have been lawful anyway. In the context of the most sensitive and potentially controversial forms of treatment the public interest requires that the courts should give express approval before the treatment is carried out and thereby provide an independent and broad based "third opinion".'

He then proceeded, with the concurrence of the other members of the court, to make

directions in respect of applications for the court's approval of medical or surgical treatment, pending the appearance of a new rule of the Supreme Court (to be added to RSC Ord 80) or a practice direction of the President of the Family Division.

With all respect to the Master of the Rolls, in the absence of any parens patriae jurisdiction vested in the High Court I know of no jurisdictional basis on which any such rule of the Supreme Court or practice direction, still less directions such as he proposed, could be founded. The course of action proposed by the Master of the Rolls presupposes the existence of a jurisdiction under which approval by the High Court is required before the relevant medical or surgical treatment is performed. There is at present no such jurisdiction; and the jurisdiction of the High Court cannot be expanded by a rule of the Supreme Court or practice direction or other direction. The present position is that the



lawfulness of medical or surgical treatment cannot, in the case of adults, depend on the approval of the High Court. In my opinion, the course of action proposed by the Master of the Rolls would be ultra vires.

However, I do not altogether share the misgivings expressed by him (and shared by his other colleagues in the Court of Appeal) about the procedure for declaratory relief. First of all, I can see no procedural objection to the declaration granted by the judge, either as a matter of jurisdiction or as a matter of exercise of the discretion conferred by the relevant rule of the Supreme Court, Ord 15, r 16. Rule 16 provides:

> 'No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.'

In Guaranty Trust Co of New York v Hannay & Co [1915] 2 KB 536, [1914–15] All ER Rep 24, a leading case in which an unsuccessful attack was mounted on the vires of the then Ord 25, r 5 (the predecessor of the present rule), forthright statements were made by both Pickford and Bankes LJJ as to the breadth of the jurisdiction conferred by the rule. Pickford LJ said ([1915] 2 KB 536 at 562, [1914–15] All ER Rep 24 at 35):

> 'I think therefore that the effect of the rule is to give a general power to make a declaration whether there be a cause of action or not, and at the instance of any party who is interested in the subject-matter of the declaration.'

And Bankes LJ said ([1915] 2 KB 536 at 572, [1914–15] All ER Rep 24 at 39):

> 'It is essential, however, that a person who seeks to take advantage of the rule must be claiming relief. What is meant by this word relief ? When once it is established, as I think it is established, that relief is not confined to relief in respect of a cause of action it seems to follow that the word itself must be given its fullest meaning. There is, however, one limitation which must always be attached to it, that is to say, the relief claimed must be something which it would not be unlawful or unconstitutional or

> inequitable for the Court to grant or contrary to the accepted principles upon which the Court exercises its jurisdiction. Subject to this limitation I see nothing to fetter the discretion of the Court in exercising a jurisdiction under the rule to grant relief, and having regard to general business convenience and the importance of adapting the machinery of the Courts to the needs of suitors I think the rule should receive as liberal a construction as possible.'

There are of course some limits which have been established to the exercise of the discretion under the rules. In Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd [1921] 2 AC 438 at 448, [1921] All ER Rep 329 at 332 Lord Dunedin said with reference to the ancient Scottish action of declarator:

> 'The rules that have been elucidated by a long course of decisions in the Scottish courts may be summarized thus: The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought.'

Subsequently, in Vine v National Dock Labour Board [1956] 3 All ER 939 at 943–944, [1957] AC 488 at 500, Viscount Kilmuir LC found this Scottish approach to be helpful and indeed there is authority in the English cases that a declaration will not be granted where the question under consideration is not a real question, nor where the person seeking the declaration has no real interest in it, nor where the declaration is sought without proper argument, eg in default of defence or on admissions or by consent. In the present case, however, none of these objections exists. Here the declaration sought does indeed raise a real question; it is far from being hypothetical or academic. The

[1989] 2 All ER 545 at 571

plaintiff has a proper interest in the outcome, so that it can properly be said that she is seeking relief in the broad sense described by Bankes LJ. The matter has been fully argued in court, through the intervention of the Official Solicitor, and indeed with the benefit of assistance from an amicus curiae. I wish to add that no question arises in the present case regarding future rights: the declaration asked relates to the plaintiff's position as matters stand at present. In all the circumstances, I can see no procedural difficulty in the way of granting a declaration in the present case. In truth, the objection of the members of the Court of Appeal to the declaratory remedy was that it was not so appropriate as the exercise by the court of the parens patriae jurisdiction, had that still been available, by which the court would have considered whether or not to grant approval to the proposed treatment. This is a justifiable comment, in that (statute apart) only the exercise of the parens patriae jurisdiction can ensure, as a matter of law, that the approval of the court is sought before the proposed treatment is given. If, however, it became the invariable practice of the medical profession not to sterilise an adult woman who is incapacitated from giving her consent unless a declaration that the proposed course of action is lawful is first sought from the court, I can see little, if any, practical difference between seeking the court's approval under the parens patriae jurisdiction and seeking a declaration as to the lawfulness of the operation.

I am satisfied that, for the reasons so clearly expressed by the judge, he was right to grant the declarations sought by the plaintiff in the present case. I would therefore dismiss the appeal. My noble and learned friend Lord Brandon has proposed that certain alterations should be made to the declaration made by the judge. I for my part understand that the declaration was made on the basis of existing circumstances; but I am very content that this should be made clear in the order, and that express provision should be made for a liberty to apply, as proposed by my noble and learned friend.

LORD JAUNCEY OF TULLICHETTLE.

My Lords, the difficult questions raised in this appeal have been fully examined in the speeches of my noble and learned friends Lord Brandon and Lord Goff and I entirely agree with their conclusions as to the manner in which this appeal should be disposed of and with their reasons for such disposal.

My Lords, I should like only to reiterate the importance of not erecting such legal barriers against the provision of medical treatment for incompetents that they are deprived of treatment which competent persons could reasonably expect to receive in similar circumstances. The law must not convert incompetents into second class citizens for the purposes of health care.

There are four stages in the treatment of a patient, whether competent or incompetent. The first is to diagnose the relevant condition. The second is to determine whether the condition merits treatment. The third is to determine what the merited treatment should be. The fourth is to carry out the chosen form of merited treatment. In the case of a long-term incompetent, convenience to those charged with his care should never be a justification for the decision to treat. However, if such persons take the decision in relation to the second and third stages (supra) solely in his best interests and if their approach to and execution of all four stages is such as would be adopted by a responsible body of medical opinion skilled in the particular field of diagnosis and treatment concerned, they will have done all that is required of them and their actings will not be subject to challenge as being unlawful.

Appeal dismissed.
Solicitors: Official Solicitor; Leighs (for F); Turner Kenneth Brown, agents for Clarks, Reading (for the health authority); Treasury Solicitor.
Mary Rose Plummer Barrister.
[1989] 2 All ER 545 at 572