

# **Sterilization, Mental Disability, and re Eve: Affirmative Discrimination?**

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Gerald ROBERTSON\*

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\* Faculty of Law, University of Alberta, Edmonton, Alberta.

## I. INTRODUCTION

A myriad of issues arise in the context of health care discrimination and mentally disabled persons. Challenges under the *Canadian Charter of Rights and Freedoms* have already been made to the constitutional validity of civil commitment under mental health legislation,<sup>1</sup> of substitute consent to psychiatric treatment on behalf of mentally incompetent patients,<sup>2</sup> and of compulsory care orders under the *Alberta Dependent Adults Act*.<sup>3</sup> However, this Paper will focus on one specific issue — sterilization — and in particular, the decision of the Supreme Court of Canada in *Eve v. Mrs. E*.<sup>4</sup> There are a number of reasons for this choice of topic. First, in the two years since the decision in *Eve* was rendered, it has been the subject of considerable criticism by academics, the judiciary, and the media. To use a somewhat extreme example, a columnist in the *Toronto Globe & Mail* described the decision as "senseless and callous", adding that "[e]very parent in this country should be outraged by this decision".<sup>5</sup>

The issue is also topical in view of the recent Report of the Alberta Law Reform Institute<sup>6</sup> which recommends that legislation be introduced to empower the courts, in limited circumstances and subject to strict procedural and substantive safeguards, to authorize the sterilization of a person who is mentally incapable of consenting to the operation. The purpose of this Paper is not to analyze or comment in detail on the Institute's Report; however, it will be apparent from what follows that I believe the position adopted by the Institute to be fundamentally wrong.

In considering discrimination, there are two other important reasons for focusing on sterilization and the *Eve* decision. First, *Eve* provides an excellent example of a theme central to health care discrimination and the mentally disabled, namely, the delicate balance between denial and provision of health care. Each may constitute discrimination; they are, in effect, two sides of the same coin. To deny someone access to health care, or to make access more difficult, because of that person's mental disability, may constitute discrimination. But very often the means which the law employs to correct this can themselves be discriminatory. The debate over the right to refuse psychiatric treatment illustrates this point. So too does the

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1. See e.g. *Thwaites v. Health Sciences Centre Psychiatric Facility*, [1988] 3 W.W.R. 217 (Man. C.A.); *Bobbie v. Health Sciences Centre*, [1989] 2 W.W.R. 153 (Man. Q.B.); *Dayday v. MacEwan* (1987), 62 O.R. (2d) 588 (Dist. Ct.); *Azhar v. Anderson* (28 June 1985), No. 609/85, 33 A.C.W.S. (2d) 521 (Ont. Dist. Ct.); *Re Jenkins* (1986), 59 Nfld. & P.E.I.R. 62 (P.E.I.S.C.); *Lemay v. Kilby* (1988), 1 B.C.D. Civ. 2668 (S.C.).
  2. See e.g. *Howlett v. Karunaratne* (1988), 64 O.R. (2d) 418 (Dist. Ct.).
  3. R.S.A. 1980, c. D-32, ss. 10.1-10.8 [en. 1980, c. 6(Supp), s. 10]. See *Re Dennis* (1987), 78 A.R. 81 (Surr. Ct.).
  4. [1986] 2 S.C.R. 388.
  5. Dr. Gifford-Jones, *The [Toronto] Globe & Mail* (2 December 1986) A-2.
  6. *Competence and Human Reproduction* (Report #52, 1989). The Report was preceded by a Report for Discussion, *Sterilization Decisions: Minors and Mentally Incompetent Adults* (Report for Discussion #6, 1988).

recent decision in *Re F*.<sup>7</sup> where the House of Lords held that, where a patient is mentally incapable of consenting to medical treatment, the treatment may be given without consent or court authorization, so long as the treatment is "reasonable" in the circumstances, with the question of what is reasonable being determined by the traditional negligence standard of the reasonable medical practitioner in similar circumstances.

The second reason for examining the *Eve* decision in the context of discrimination is that it illustrates what I shall call "affirmative discrimination". This differs from the familiar concept of affirmative action (sometimes referred to as "reverse discrimination") in which, in order to ameliorate the conditions of a disadvantaged group, it is justifiable to discriminate against those who are not members of the group.<sup>8</sup> By "affirmative discrimination" I mean that in order to ameliorate the conditions of a disadvantaged group, it is justifiable to discriminate against some members *of the group itself*. In my view, the Supreme Court's decision in *Eve* is a courageous one, and even assuming (as its critics suggest) it is discriminatory, I believe that this can be justified on the basis of affirmative discrimination.

## II. THE DECISION IN *EVE*

The *Eve* case<sup>9</sup> involved a 24 year old woman whom the trial judge referred to by the pseudonym "Eve".<sup>10</sup> Eve was described as at least mildly to moderately mentally retarded. She attended a training school during weekdays, where she met and developed a close friendship with a male student. Eve's mother, a widow in her late 50s, feared that this relationship might lead to Eve becoming pregnant, which she felt would be emotionally traumatic for her daughter. She therefore applied to the Supreme Court of Prince Edward Island for, amongst other things, an order authorizing her to consent to a sterilization operation on her daughter.

At first instance the order was refused, but on appeal to the P.E.I. Supreme Court, *in banco*, a majority reversed the lower court's decision and authorized the sterilization operation.<sup>11</sup> However, in the subsequent appeal to the Supreme Court of Canada, the Court refused to authorize the operation. In a unanimous opinion written by Justice La Forest, the

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7. [1989] 2 W.L.R. 1025 (H.L.).

8. See e.g. s. 15(2) of the *Charter*.

9. For articles discussing the *Eve* decision see, M.A. Bolton, "Whatever Happened to Eve" (1988) 17 Man. L. J. 219; B.M. Dickens, "Case Comment: Eve v. E." (1987) 2 Can. Fam. L. Q. 103; E.W. Keyserlingk, "The Eve Decision — A Common Law Perspective" (1987) 18 R.G.D. 657; G. Sharpe, "Casenote: Eve v. Mrs. E" (1987) 7 Health L. Can. 90; M.A. Shone, "Mental Health — Sterilization of Mentally Retarded Persons" (1987) 66 Can. Bar Rev. 635.

10. As one commentator has noted, the trial judge's choice of the pseudonym "Eve" is not without significance — see Bolton, *supra* note 9 at 226.

11. (1980), 115 D.L.R. (3d) 283 (P.E.I.S.C. *in banco*). For a discussion of the P.E.I. Supreme Court's decision, see B. Starkman, "Sterilization of the Mentally Retarded Adult: The Eve Case" (1981) 26 McGill L.J. 931; W.F. Bowker, "Minors and Mental Incompetents : Consent to Experimentation, Gifts of Tissue and Sterilization" (1981) 26 McGill L.J. 951.

Court held that non-therapeutic sterilization of a mentally incompetent person should *never* be authorized under a court's *parens patriae* jurisdiction. In the words of Justice La Forest:<sup>12</sup>

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

The Court did not discuss in any detail the meaning of "therapeutic" sterilization.<sup>13</sup> However, although the term is open to a wide range of interpretations,<sup>14</sup> it is implicit in the judgment of Justice La Forest that the Court had in mind a very narrow interpretation.<sup>15</sup> As a result, the decision in *Eve* probably marks the end of sterilization of mentally disabled persons, except in rare circumstances where the operation is necessary in dealing with a serious medical condition.<sup>16</sup>

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12. *Supra* note 4 at 431.

13. For this reason it has been suggested (in my view, incorrectly) that *Eve* may turn out to be a "meek authority" which is confined to its own facts — see D. Marshall, "The *Eve* Decision : It May Turn Out to be a Meek Authority Indeed" (1987) 136 *Can. Med. Ass'n J.* 650. See also K.M. Norrie, "Sterilisation of the Mentally Disabled in English and Canadian Law" (1989) 38 *Int'l & Comp. L.Q.* 387.

14. See e.g. B.M. Dickens, "Reproduction Law and Medical Consent" (1985) 35 *U.T.L.J.* 255 at 265-266; B.M. Dickens, "Retardation and Sterilization" (1982) 5 *Int'l J.L. & Psy.* 295 at 297-298.

15. See in particular the Court's description (at 434) of *Re K.*, [1985] 3 *W.W.R.* 204 (B.C.S.C.), rev'd [1985] 4 *W.W.R.* 724 (C.A.), leave to appeal refused [1985] 4 *W.W.R.* 757 (S.C.C.) as "at best dangerously close to the limits of the permissible." For a discussion of the *Re K.* decision see, C.A. Polowich Finch-Noyes, "Sterilization of the Mentally Retarded Minor: The *Re K.* Case" (1986) 5 *Can. J. Fam. L.* 277.

16. See in particular *Eve*, *supra* note 4 at 434.

### III. CRITICISM OF THE DECISION

#### A. Academic

It would be wrong to suggest that reaction to *Eve* has been uniformly negative. Indeed, a number of individuals and groups have expressed enthusiastic support for the decision.<sup>17</sup> On balance, however, the reaction has been severely critical. For example, one commentary notes that:<sup>18</sup>

*This decision will prove to be a millstone for clinicians, parents, those carrying institutional responsibility for the care of mentally retarded persons, and, perhaps, for mentally retarded persons themselves. Of course, the latter may never fully comprehend why they are being restrained from being with the persons to whom they are attracted and whom they would want to love. The decision will also serve as a lodestone for continuing discussions in Canada about what should be done when what is judged by many to be ethically justifiable has been declared to be illegal.*

In a similar vein, *Eve* has been criticized as having "done a disservice to mentally incompetent persons and their caregivers",<sup>19</sup> and as being "no victory for mentally retarded persons, and certainly no victory for women".<sup>20</sup>

Those who have spoken out against the decision in *Eve* regard it as discriminatory. Sterilization is the leading means of birth control chosen by Canadian women aged between 18 and 49.<sup>21</sup> The effect of the Supreme Court's decision, according to its critics, is that mentally incompetent persons are now denied access to this particular form of health care and thus are discriminated against on grounds of their mental disability. This was the main reason underlying the Alberta Law Reform Institute's recent recommendation that legislation be introduced to enable courts to authorize non-therapeutic sterilization of mentally incompetent persons.<sup>22</sup>

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17. See e.g. (Nov. 1986) Can. H.R. Advoc. at 7; (1987) 2:1 *Entourage*, at 26-31.

18. D.J. Roy & J.R. Williams, "Canada : Conflict as well as Consensus" (1987) 17:3 *Hastings Cent. Rep.* 32 at 32.

19. Shone, *supra* note 9 at 646.

20. Bolton, *supra* note 9 at 226.

21. Shone, *supra* note 9 at 635.

22. *Supra* note 6.

## B. Judicial

The decision in *Eve* has also been criticized by a number of courts in other jurisdictions, most notably the House of Lords in *Re B*.<sup>23</sup> In that case, the House of Lords authorized the sterilization of a 17 year old mentally handicapped girl. Referring to the Supreme Court's conclusion that non-therapeutic sterilization without consent should *never* be authorized, Lord Hailsham described it as "totally unconvincing and in startling contradiction to the welfare principle which should be the first and paramount consideration in wardship cases".<sup>24</sup> Likewise, Lord Bridge referred to the Supreme Court's conclusion as a "sweeping generalisation" which was "entirely unhelpful".<sup>25</sup> Lord Hailsham also considered the therapeutic/non-therapeutic distinction to be "totally meaningless, and, if meaningful, quite irrelevant to the correct application of the welfare principle",<sup>26</sup> while Lord Bridge referred to the distinction as "arid semantic debate".<sup>27</sup> These criticisms were recently echoed by the Australian Family Court in *Re Jane*.<sup>28</sup>

It is ironic that, while Canadian academic writing has been critical of the *Eve* decision, and supportive of the House of Lords' decision in *Re B*., in England the reverse has generally been true. For example, one English writer commented that the decision in *Eve* "compares favourably with the sterile logic of the House of Lords",<sup>29</sup> and another expressed the view that:<sup>30</sup>

*It is difficult not to be impressed by both the scholarship and humanity of La Forest J.'s judgment. By contrast the Lords' speeches [in Re B.] are shoddy and their compassion unconvincing. I believe the Lords' reasoning was wrong and its conclusion dubious.*<sup>31</sup>

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23. [1988] A.C. 199 (H.L.).

24. *Ibid.* at 203.

25. *Ibid.* at 205.

26. *Ibid.* at 204.

27. *Ibid.* at 205.

28. (1988) 85 A.L.R. 409 at 428 (Aust. Fam. Ct.). See also *Re a Teenager* [1989] F.L.C. 92-006 (Aust. Fam. Ct.); *Re Elizabeth* [1989] F.L.C. 92-023 (Aust. Fam. Ct.).

29. A. Bainham, "Handicapped Girls and Judicial Parents" (1987) 103 L.Q. Rev. 334 at 339.

30. M.D. Freeman, "Sterilising the Mentally Handicapped", in M.D. Freeman, ed., *Medicine, Ethics and the Law* (London: Stevens, 1988) 55 at 67. The same author described the Court of Appeal decision in *Re B*. as "Nazi-like" — see *ibid.* at 55.

31. For another extremely critical commentary on *Re B*., see R. Lee & D. Morgan, "Sterilisation and Mental Handicap: Sapping the Strength of the State?" (1988) 15 J.L. & Soc'y 229.

#### IV. IS THE DECISION DISCRIMINATORY?

For the purposes of this Paper I shall assume that the decision in *Eve* is indeed discriminatory and that it results in some mentally disabled persons being denied access to sterilization where the operation would be in their best interests (for example, by enabling them to lead a less sheltered and supervised existence and to engage in sexual relationships without risk of pregnancy). In my opinion, however, it is by no means clear that this is indeed the case. In particular, the claim that for some mentally disabled people sterilization is the only answer if they are to lead a less sheltered and less supervised existence is far from compelling. For example, Lee and Morgan emphasize that there is a danger that sterilization is seen as the answer simply because it is available. Referring to "Jeanette", the subject of the application in *Re B.*,<sup>32</sup> they state:<sup>33</sup>

*If we could envisage a society in which sterilisation was not such a straightforward economic option, or not a technical possibility, it would still be necessary to provide for Jeanette. This would require a Jeanette who was better cared for, better educated about her own sexuality, and better trained in retaining and exercising control over her own life each day. It would also require a society of adult men who were similarly educated about the responsibilities which their sexuality imposed on them, and the limitations which that demands.*

Likewise, Freeman states that:<sup>34</sup>

*The danger with decisions like that in Jeanette is that it is so much easier to avert the supposed danger by sterilising than to put time, effort, and commitment into education, training, counselling and assistance of the mentally handicapped. Their sexual needs and sexual rights can easily be steamrollered in the name of convenience.*

Moreover, as Dickens has pointed out,<sup>35</sup> the claim that mentally incompetent persons are denied access to a form of birth control most frequently chosen by the rest of the population must be treated with some caution. To a large extent it is based on a false premise; it assumes that the two groups are similarly situated, when they are clearly not. People who choose sterilization are usually older and already have children. This is very different from the typical case of sterilization of the mentally disabled. To make a meaningful comparison, one should ask whether sterilization is commonly chosen by people in their teens or early twenties who have no children.

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32. *Supra* note 23.

33. *Supra* note 31 at 239-240.

34. *Supra* note 30 at 69-70.

35. Dickens, *supra* note 14 at 270.

However, even assuming that the decision in *Eve* is discriminatory, I believe that it can be justified on the basis of affirmative discrimination.

## V. AFFIRMATIVE DISCRIMINATION

### A. Sterilization in its Social Context

In assessing the decision in *Eve*, it is essential that involuntary non-therapeutic sterilization be considered in its proper social and historical context. Sterilization of the mentally handicapped in the 1980s cannot and should not be divorced from sterilization of the mentally handicapped in the 1930s and beyond. We cannot and should not forget that upwards of 60,000 people in the United States,<sup>36</sup> and several thousands in Alberta and British Columbia,<sup>37</sup> were sterilized pursuant to eugenic sterilization legislation. For mentally disabled people, sterilization is not simply another form of health care or another form of birth control. Its significance lies in the fact that in the past — the recent past — it has been used as a weapon against the mentally handicapped and other disadvantaged groups. I would suggest that sterilization has become a powerful symbol of how mentally handicapped have been viewed and treated by our society. As Justice La Forest said in *Eve*, "our social history clouds our vision and encourages many to perceive the mentally handicapped as somewhat less than human."<sup>38</sup>

Those who have criticized the *Eve* decision have underestimated the true significance of that social history. On the one hand they accept that eugenic sterilization is a "shameful blot on our past",<sup>39</sup> yet they criticize *Eve* as being an overreaction to that history.<sup>40</sup> They suggest that the abuses of the past can be avoided by a framework of substantive and procedural safeguards which ensure that non-therapeutic sterilization of a mentally incompetent person is authorized only where it is clearly in that person's best interests.

That approach ignores the powerful symbol which sterilization of mentally disabled people represents. This is not simply a case of ensuring that past abuses do not occur again. We must accept that these abuses were so significant, so horrific, and so recent, that they are

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36. See P.A. Lombardo, "Three Generations, No Imbeciles: New Light on Buck v. Bell" (1985) 60 N.Y.U.L. Rev. 30; E.S. Scott, "Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy" [1986] Duke L.J. 806.

37. See Law Reform Commission of Canada, *Sterilization* (Working Paper #24, 1979) at 27-29, 42-45; K.G. McWhirter & J. Weijer, "The Alberta Sterilization Act: A Genetic Critique" (1969) 19 U.T.L.J. 424; B.M. Dickens, "Eugenic Recognition in Canadian Law" (1975) 13 Osgoode Hall L.J. 547; R.P. Kouri & M.A. Somerville, "Comments on the Sterilization of Mental Incompetents in Canadian Civil and Common Law" (1980) 10 R.D.U.S. 599 at 619-620; Bowker, *supra* note 11 at 974-975.

38. *Supra* note 4 at 427.

39. Alberta Law Reform Institute Report for Discussion, *supra* note 6 at 30.

40. See e.g. Shone, *supra* note 9 at 645. Bolton, *supra* note 9 at 223, refers to Justice La Forest having decided to "dance to the tune of the eugenic waltz".



inextricably linked to the very word "sterilization". The abuses may have been in the past, but their legacy lives on. Sterilization has become a symbol of a particular attitude towards mentally disabled people: that they are less deserving, less productive — less human — than the rest of society. In my view the decision in *Eve* is a courageous attempt to reverse that attitude.

Hence the term "affirmative discrimination". Even if the decision in *Eve* does discriminate against some mentally disabled individuals by denying them access to sterilization where this would be in their best interests, this result is justifiable in order to ameliorate the condition of mentally disabled people as a whole. In the interests of the group as a whole, it is preferable that the law be seen to put an end to non-therapeutic sterilization of the mentally disabled.

This view may be open to the criticism that it treats mentally disabled people as a homogeneous class rather than as individuals.<sup>41</sup> There is no doubt that the "class approach" underlies many of the most blatant examples of statutory discrimination against mentally disabled people. Electoral disqualification<sup>42</sup> and restrictions on marriage<sup>43</sup> are two of the most obvious examples. However, in the context of non-therapeutic sterilization, I believe it is justifiable to consider (and protect) the collective interest of mentally disabled people. All mentally disabled people have an interest in the demise of procedures, such as involuntary non-therapeutic sterilization, which symbolize the discrimination which they have endured in the past and which they continue to endure. All mentally disabled people stand to benefit from a change in society's attitude towards the handicapped; in my opinion, the rejection in *Eve* of non-therapeutic sterilization represents an important step towards that change of attitude.

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41. See e.g. Bolton, *supra* note 9 at 226; Kouri & Somerville, *supra* note 37 at 627; A. C. Irvine, "Balancing the Right of the Mentally Retarded to Obtain a Therapeutic Sterilization Against the Potential for Abuse" (1988) 12 L. & Psy. Rev. 95 at 97.

42. *The Canada Elections Act*, R.S.C. 1985, c. E-2, s. 51(f) [formerly R.S.C. 1970, c. 14 (1st Supp.), s. 14(4)(f)] provides that "every person who is restrained of his liberty of movement or deprived of the management of his property by reason of mental disease" is disqualified from voting in a federal election. This provision was struck down as being contrary to s. 3 of the *Canadian Charter of Rights and Freedoms* in *Canadian Disability Rights Council v. Canada* (17 October 1988) Order # T-1787-88, 12 A.C.W.S. (3d) 112 (Fed.Ct. T.D.).

43. See G.B. Robertson, *Mental Disability and the Law in Canada* (Toronto: Carswell, 1987) at 214-221.