

STERILIZATION FOR 'JUST CAUSE' OR FOR 'THE SAKE OF THE PATIENT'S HEALTH'

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Re-reading my paper 'Legal Implications of Voluntary Sterilization Operations'¹ I find that I may have been guilty of misrepresenting Lord Denning's opinion in *Bravery v. Bravery*.² In that case his Lordship stated:³

An ordinary surgical operation, which is done for the sake of a man's health, with his consent, is, of course, perfectly lawful because there is just cause for it.

and I implied, in interpreting this passage, that his Lordship meant that the only 'just cause' for a surgical operation was that it was performed for the sake of a man's health. It seems more reasonable to suggest that what Lord Denning really meant was that an operation which was done for the sake of a man's health was merely an example of an operation for which there was 'just cause'. Thus the criterion for determining the legality of a surgical operation is not that it is done for the sake of the patient's health but simply that there is just cause or excuse for it. This interpretation is supported by a later passage in which, in discussing sterilization operations, his Lordship stated:⁴

When it is done with the man's consent for a just cause, it is lawful, as, for instance, when it is done to prevent the transmission of an hereditary disease.

Avoidance of the transmission of an hereditary disease cannot be regarded as necessary for the sake of a man's health, but may be regarded as another illustration of what Lord Denning regarded as a 'just cause'.

Whether there is much substance in the distinction, in this context, between that for which there is 'just cause' and that which is done 'for the sake of a man's health' will depend, of course, upon the interpretation to be placed on the two concepts. The concept of a man's health may be narrowly or broadly conceived. It may be regarded as merely 'the absence of disease or infirmity' or it may be defined, as in the Constitution of the World Health Organisation,⁵ as 'a state of complete physical, mental and social well-being'.

If the latter view is taken then the difference between that which is

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¹ (1959) ² *M.U.L.R.* 77. ² [1954] ³ All E.R. 59. ³ *Ibid.* 67. ⁴ *Ibid.*

⁵ This passage occurs in the Preamble to the Constitution which expressly states that health is *not* 'merely the absence of disease or infirmity'.

necessary for the sake of a man's health and that for which there is just cause becomes fairly narrow—if it does not disappear altogether—whereas if health is regarded as being merely the absence of disease or infirmity the difference becomes more significant. Thus in the case of therapeutic abortion, cases which can be justified under the terms of the decision in *R. v. Bourne*⁶—those where the abortion is necessary for the preservation of the life of the mother or to avert serious injury to her physical or mental health—form a much narrower class than those in which it could be argued that there was 'just cause' for terminating pregnancy. This is a problem which becomes acute, of course, in those cases in which it is desired to terminate pregnancy on psychological grounds.

The distinction is also relevant in the case of sterilization operations. Sheares⁷ has shown that the mortality rate for a woman having her eighth child is three times that of a woman having her first child and he advocates sterilization of the grande multipara on this ground. It could not be said that sterilization in such a case was necessary for the sake of the woman's health, in the restricted sense of that term—there is nothing the matter with the woman's health at the time the operation is performed—but it could certainly be argued that 'just cause' existed for the sterilization of such persons, particularly since Lord Denning himself regarded the avoidance of the transmission of an hereditary disease as an example of a just cause. Alternatively, of course, if the wider concept of health is employed, it could be argued that such operations were in fact necessary for the health of the woman as conducive to her 'complete physical, mental and social well-being'.

Whether there is a difference between that which is necessary for the sake of health and that for which there is just cause, and if so just what the difference is, may be arguable, but the fact remains that the wording I used in my article gives a misleading impression of Lord Denning's view, and it is that impression which I wish to clear up here, although I would submit that neither 'just cause' nor any concept of what is necessary for health can be regarded as a criterion of the legality of surgical operations on the grounds which I set out in my paper.

⁶ [1939] 1 K.B. 687.

⁷ 'Sterilization of Women by Intra-Uterine Electro-Cautery of the Uterine Cornu' (1958) LXV *Journal of Obstetrics and Gynaecology of the British Empire* 419; see also the results of Yerushalmy (1940) 55 *Public Health Report, Washington* 1195.

COMMENTS

AUSTRALIAN FIXED TRUSTS PROPRIETARY LTD AND OTHERS v. CLYDE INDUSTRIES LTD AND OTHERS¹

*Companies—Alteration of articles—Fraud on minority shareholders—
Unit trusts—Voting powers*

In 1956 it was proposed that the articles of association of Clyde Industries Limited, a public company incorporated in New South Wales, should be altered by inserting a provision that if any member of the company held ordinary shares as a trustee for holders of units or sub-units² that member would not be able to cast a vote upon a poll unless he had received the direction of a majority of all the holders of the units or sub-units as to the particular manner in which that vote was to be cast and that he was to vote then only in accordance with the particular direction given to him. The chairman of any meeting at which a poll was demanded was to allow a period of at least twelve days within which the trustee could obtain the directions. The directors could require such evidence as they might deem proper in the circumstances to ensure that the provisions of the article had been duly complied with by the trustee. A resolution of the directors that the member had not complied with the article was to be conclusive and binding upon all members of the company and the directors were not to be bound to give reasons for their decision. The article was not to affect the right of any member to

¹ (1959) 59 S.R. (N.S.W.) 33. Supreme Court of New South Wales (in Equity); McLelland J.

² Basically a unit trust is an arrangement whereby property is held on trust for investors. It is set up by a deed regulating the rights, powers and duties of the parties to the arrangement. For a precedent of a fixed or flexible unit trust deed see (1956) 20 *Conveyancer (N.S.)* 765. The parties are usually the manager, the trustee and the investors, the last being known as unit holders. The manager purchases property and vests the title to it in the trustee who, at the outset, holds on trust for the manager. Sometimes the property is an estate in land or a mortgage thereof but most unit trusts are in respect of a portfolio of shares. The beneficial interest is divided into a large number of units which are sold by the manager to investors. Share-unit trusts are of two kinds, fixed and flexible. In the fixed unit trust the portfolio is fixed and not, except in special circumstances, subject to variation. The first portfolio of investments in a fixed unit trust is described as a unit and the beneficial interest is divided into sub-units which the manager sells to investors. A fixed unit trust deed will usually provide for the constitution of additional units matching the first portfolio which will be vested in the trustee and divided into the same number of sub-units. In the flexible unit trust the manager and the trustee have power under the deed to vary the nature and proportions of the shares comprising the trust fund. Unlike the fixed trust the portfolio in a flexible trust cannot be divided into rigidly constituted units but the beneficial interest in the trust fund whatever its constitution from time to time is divided into parts described as units. In both land-unit trusts and share-unit trusts the sale of units (or sub-units) is at a price fixed on the market value plus a service charge to cover the expense of the manager, a profit for the manager and the remuneration of the trustee. The manager agrees to buy back from any unit holder desiring to sell. These units may be re-sold by the manager. The trust deed will usually provide that the trust is to come to an end at a fixed date and one of several modes of dissolution will operate: the property may be realized and the proceeds distributed amongst the unit holders, the trust may be converted into an investment company or, if the property admits of division *in specie*, it may be so divided between unit holders.