QCPCI

Date: 12.2.2013

Exhibit number: 179

New South Wales
Supreme Court

CITATION :	**Director-General, Department of Community Services; Re Thomas [2009] NSWSC 217**
HEARING DATE(S) :	26 February 2009
JUDGMENT DATE :	31 March 2009
JURISDICTION :	Equity Division Expedition List
JUDGMENT OF :	Brereton J
DECISION :	Grant orders sought, with matter to remain under judicial review, and parties being granted liberty to apply on two days notice
CATCHWORDS :	FAMILY LAW AND CHILD WELFARE - Parens patriae - Scope of power - Where 15-year-old child has extensive history of serious self-harming, violent and anti-social behaviour – Where experts strongly support preventative confinement of child in secure accommodation to facilitate treatment plan – Where Director-General seeks order authorising indefinite involuntary detention of child in secure accommodation unit – Whether such order may be made in parens patriae jurisdiction – Relevance of child's human rights under Convention on Rights of the Child
LEGISLATION CITED :	(CTH) Family Law Act 1975 (CTH) Human Rights and Equal Opportunity Commission Act 1986 (CTH) Jurisdiction of Courts (Cross-vesting) Act 1987 (NSW) Children and Young Persons (Care and Protection) Act 1998 (NSW) Supreme Court Act 1970 (UK) Children Act 1989 CONVENTIONS: (European) Convention for the Protection of Human Rights and Fundamental Freedoms (United Nations) Convention on the Rights of the Child, Article 37
CATEGORY :	Principal judgment

CASES CITED :	A Local Authority v Ma, Sa, Na [2005] EWHC 2942 (Fam); [2007] 2 FCR 563, [2006] 1 FLR 867 B and B: Family Law Reform Act 1995 (1997) 21 Fam LR 676; (1997) FLC 92-755; (1997) 140 FLR 11 Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1 DoCS v Y [1999] NSWSC 644 Frances and Benny [2005] NSWSC 1207 Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112; [1985] 3 All ER 402 In Re K (A Child) (Secure Accommodation Order: Right to Liberty) [2001] 2 WLR 1141 K v Minister for Youth and Community Services [1982] 1 NSWLR 311 Mabo v Queensland [No.2] (1992) 175 CLR 1 Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh [1995] HCA 20; (1995) 183 CLR 273 Murray v Director Family Services (ACT) (1993) FLC 92-416 Re B (A Minor) (Wardship: Sterilisation) [1988] AC 199; [1987] 2 All ER 206 Re C [1997] 2 FLR 180 Re Christina (NSWSC, 2168/07, 5 April 2007) Re Eve [1986] 2 SCR 388 Re Frances and Benny [2005] NSWSC 1207 Re Nellie (NSWSC, 5150/08, 10 October 2008) Re R (a Minor) [1992] Fam 11; [1991] 3 WLR 592; [1991] 4 All ER 177 Re Victoria (2002) 29 Fam LR 157 Re W [1992] 3 WLR 758; [1992] 4 All ER 627 Re X [1975] 1 All ER 697 Secretary, Department Of Health And Community Services v JWB and SMB (Marion's Case) (1992) 175 CLR 218 Wellesley v Duke of Beaufort (1827) 2 Russ 1; 38 ER 236, 243 Wellesley v Wellesley (1828) 2 Bli N S 124; 4 ER 1078
PARTIES :	Director-General, Department of Community Services (first plaintiff) Minister for Community Services (second plaintiff) "Thomas" (first defendant)
FILE NUMBER(S) :	SC 1258/09
COUNSEL :	Dr A S Bell SC w Mr G W Moore (plaintiffs) Ms K M Reynolds (first defendant)
SOLICITORS :	I V Knight, Crown Solicitor (plaintiffs) Leonie Miller (first defendant)

IN THE SUPREME COURT

OF NEW SOUTH WALES
EQUITY DIVISION

BRERETON J

Tuesday, 31 March 2009

1258/09 Director-General, Department of Community Services; Re "Thomas"

JUDGMENT

1 **HIS HONOUR:** Thomas – not his real name – is a very troubled boy, almost sixteen years old, who, pursuant to orders made in the Children's Court on 30 July 2007, is, until he turns 18, in the shared parental responsibility of the second defendant (his maternal grandmother) and the Minister for Community Services. The evidence describes an escalating history of self-harm, particularly in recent months; and anti-social behaviour of a very serious character, including drug use, violence towards others – particularly his carers – and serious damage to property where he has been a resident or a patient. On 26 February 2009, on the application of the Director-General, after an expedited hearing that day, I made the following orders:

> 1 Pending further order, the Director-General of the Department of Community Services ("the Director-General") is authorised to:
>
> (a) accommodate the child "Thomas" ... at premises ...; and
>
> (b) to use whatever means as are reasonably necessary to ensure that Thomas remains at those premises.
>
> 2 Pending further order, the Director-General, using whatever assistance as may be necessary, is authorised to:
>
> (a) furnish such treatment to Thomas, including nursing care, as in her opinion is necessary;
>
> (b) administer medication and to sedate Thomas (in accordance with medical advice); and
>
> (c) use, as far as is necessary, reasonable force in doing either (a) or (b).
>
> 3 The parties be granted liberty to apply on two days' notice, such notice to specify the orders sought.
>
> 4 The Director-General file and serve by Monday 21 May 2009 a report concerning Thomas' progress, including:
>
> (a) contact with his maternal grandmother and other family members;
>
> (b) information as to his development and progress, including updated reports from health professionals;
>
> (c) information as to the progress of engaging Thomas with relevant service providers to address issues of aggression, violence and self-harming behaviour;
>
> (d) information as to his education;
>
> (e) information as to the frequency and type of incidents of self-harm and aggression; and
>
> (f) proposed future plans.

2 The proceedings were adjourned for further mention on 28 May 2009. In the light of the exceptional nature of the orders made, I indicated that I would publish reasons at a later stage.

These are those reasons; in their preparation I have been greatly assisted by the helpful submissions of Mr A S Bell SC and Mr G Moore, who appeared for the Director-General, from which they extensively borrow.

Thomas' background and diagnosis

3 Thomas has a lengthy and impressive history of aggressive and disorderly behaviour, and has been diagnosed with various combinations of mild to moderate developmental delay (giving him an intellectual age of about six years), attention deficit hyperactivity disorder, oppositional defiant disorder, conduct disorder, receptive/expressive language disorder, articulation disorder, long-term marijuana abuse, complex trauma, major depression, and anxiety disorder. Since 2005, Thomas had been engaging in self-harm – inflicting pain and injury on himself, including attempts at suicide and expressing suicidal thoughts; in violence to others, including the use of weapons (such as a sharpened toothbrush); in damage to property; and in legal and illicit drug use (cigarettes and cannabis). He has mixed with – and at times has appeared to aspire to emulate – drug dealers. He has been detained in Cobham Detention Centre on five occasions – on 8 February 2007 (for assault), from 22 January to 31 January 2008 (assault), 28 March to 31 March 2008 (assault), 6 to 7 April 2008 (justice offences, such as absconding or failing to appear), and 12 to 13 April 2008 (justice offences).

4 Prior to the orders of the Children's Court, Thomas lived with his maternal grandmother and maternal step grandfather; the latter died in 2008, and the former is terminally ill with emphysema. It was the breakdown in Thomas' living arrangements with his maternal grandmother in mid-2007 – in her condition, she could (unsurprisingly) no longer cope with him – that led to the commencement of care proceedings in the Children's Court, which on 30 July 2007 made final orders placing Thomas in the shared parental responsibility of his maternal grandmother and the Minister for Community Services, until he attains 18 years of age.

5 Between 30 June 2007 and 3 September 2007, Thomas had six different residential placements, all of which broke down, largely by reason of the (understandable) inability of those entrusted with responsibility for his care to cope. On 3 September 2007, in response to the history of self-harm and the break down of his care arrangements, Thomas was placed with a community-based organisation known as Lifestyle Solutions, which provided a residential facility and one-on-one support, initially in a unit in which he was the only resident.

6 On 28 February 2008 Dr Megan Chambers, child psychiatrist, and Ms Deborah Cameron, psychologist of the Alternate Care Clinic, prepared a psychiatric and medical assessment in relation to Thomas. Their provisional diagnosis was attention deficit hyperactivity disorder, conduct disorder, mild developmental delay, receptive/expressive language disorder, articulation disorder, long-term marijuana abuse, complex trauma, major depression, and anxiety disorder.

7 In June 2008, Lifestyle Solutions' lease of the premises in which Thomas was accommodated was terminated, on account of damage to the premises caused by Thomas. Thomas was moved to another Lifestyle Solutions unit, where he again resided alone.

8 In July 2008, Thomas' step maternal grandfather – who had been an important figure in his life, and to whom Thomas had been very close – died. This appears to have had a significant impact on his behaviour and, in particular, his tendency to self-harm. Since mid-2008, he has displayed an increasing propensity for extreme risk-taking behaviour (including jumping from a roof and playing "chicken" with traffic), self-harm (including lacerating himself with glass, inserting foreign objects into his body, and overdosing on medications) – in recent times daily or more often – and aggression towards others and damage to property.

9 In or around September 2008, Thomas' carers, at the request of Lifestyle Solutions, prepared

an "Incident Report Analysis", which identified 23 incident reports in relation to Thomas during the period 1 August 2008 to 28 August 2008, of which 16 involved attempts at self-harm. A subsequent Incident Report Analysis, covering the period 29 August to 5 December 2008, identified a further 33 incident reports, 23 of which related to attempts at self-harm. At least two of those incidents involved Thomas being hospitalised: on 9 September 2008, he presented at Nepean Hospital Emergency Department for behavioural disturbance and self-mutilation; and on 27 November 2008, he again presented at Nepean Hospital Emergency Department for overdose and poisoning. The Incident Analysis Report for the period 29 August 2008 to 5 December 2008 recommended:

> Thomas requires accommodation support be provided in a secure (locked) facility which has restricted access to the community and wherein he is able to be supported by staff who are skilled and experienced in the provision of intensive support and safe physical intervention techniques.

10 During the period 3 December 2008 to 16 December 2008, Thomas presented at Nepean Hospital on five further occasions, following attempts at self-harm. On 17 December 2008, Thomas – having been admitted to Nepean Hospital and sedated was, with the authority of the Director-General, transferred to Hall Ward (the adolescent mental health facility) at the Children's Hospital at Westmead, where he was given a general anaesthetic and had surgically removed from his left forearm a refill for a disposable biro pen, which he had deliberately inserted there. On 22 December 2008, he had another general anaesthetic, for the removal of a foreign body from his left leg. On 24 December, Thomas picked open one of the wounds from his previous surgery, and further surgery was required to re-close it. On 27 December, he required treatment for a wound to the forearm from previous surgery, that Thomas had again picked open. On 28 December, a piece of Lego was surgically removed from Thomas' left arm, where he had inserted it.

11 On 31 December 2008, Thomas extensively damaged two "seclusion rooms" at Hall Ward, and required restraint and medication to calm him, demonstrating strength that medical staff described as comparable to "the Incredible Hulk". Following this incident, he was excluded from Hall Ward and transferred to the adult facility at Cumberland hospital. On 15 January 2009, a magistrate made an order for Thomas to remain in hospital for a period of 2 weeks.

12 That period expired on 29 January 2009, and in the meantime, on 27 January, the Director-General instituted these proceedings and Grove J, sitting as Vacation Judge, made interim orders including a non-publication order, an order that the proceedings be heard in closed court, an order that Thomas be separately represented, and orders that until further order "leave be granted to the Director-General ... to detain the child ... at secure premises ... and to use reasonable force if necessary to so detain him", and "using whatever assistance the Director-General may deem appropriate, to take ... Thomas to the premises", and to furnish necessary treatment and nursing care, administer medication and sedate the child, using reasonable force if necessary, and to restrain the child in order to prevent him from injuring himself. (On 13 February, consistently with my reasons in *Re Jules* [2008] NSWSC 1193, [23]-[25], I vacated the order that the proceedings be heard in closed court, but the order that no publication that would identify or tend to identify the child occur, except for the proper conduct of the proceedings, remains in effect).

13 On 28 January, Thomas was discharged from Cumberland Hospital and transferred to the secure residential unit in which he is now located and in which the Department proposes that he remain. Construction of that unit, which is owned and managed by the Department, had been completed in mid January 2009. More recently, another troubled young person – whose case is also before this Court, with the pseudonym Nellie – has joined Thomas in the unit.

14 The unit is a secure residential facility. I had the benefit of a view of the premises. Thomas and Nellie were present. The premises are situated in a suburban street. The accommodation section adjoins an administration section. Thomas' bedroom is spartan, with only a mattress on the floor – but it must be while he remains predisposed to extract screws and nails from furniture to inflict self-harm. There is a large recreation room, with television, Wii, and other entertainments. There is a meals area, and a large courtyard, with a shaded area, allowing ample space for physical activity. There are two care staff with Thomas at all times, who are shadowed by two trained security guards. If restraint is required, it is the security guards who provide it. Although fenced, and secured, the premises did not have the feel of a gaol. By refraining from self-harm for the day, Thomas can earn an afternoon walk in the streets.

15 Thomas presents as an alternately truculent and cheerful, developmentally delayed, young person, who has difficulty in maintaining attention for more than a few moments. He is currently on a bond for a criminal offence, and there is some evidence that his behaviour improved in response to the bond and its conditions.

16 Since Thomas has been in the unit, between 28 January and 9 February 2009, major incidents have included:

· an attempt by Thomas to remove a cast from his leg that was in place to prevent him self-harming, and banging his head against a wall;
· throwing furniture and attempting to climb over the fence;

· damaging property (a door on 30 January, a door and door frame later on 30 January, a door again on 31 January, and again on 2 February, a door, side panels and locking mechanism on 3 February, chairs on 4 February, removed a bolt from a door on 5 February, and breaking a door on 6 February);

· self-harming (including banging his head against a door, hitting his head against windows, inserting a nail into his hand in the shower, inserting a rusty nail into a wound in his left arm, attempting to insert a second nail into a wound, attempting to insert a piece of glass into an old wound, inserting a piece of wood into a wound, and running his open wound over the picket point on the fence;

· attendance at hospital – on 1 February by ambulance for removal of a nail removed from a wound, on 2 February by ambulance with police assistance for removal of a nail from his left arm, on 4 February for removal of a piece of wood from the arm, but the object could not be removed that night and he returned to hospital on 5 February for the procedure under local anaesthetic, on 9 February for removal of a nail under general anaesthetic because it was deep and close to the bone. On 6 February he told staff that he wanted to die; he has told a medical practitioner that he feels better when he hurts himself.

17 Thomas has been found in possession of various objects that could be used to self-harm – nails, a 3 inch piece of wood, a sharp piece of plastic, a screw and glass. Most of these he obtains with some ingenuity from furniture or fixtures in the premises and cleverly conceals. He has assaulted staff, including by kicking security guards, attempting to punch carers and throwing a chair at them, attempting to kick staff and throw chairs, kicking punching and spitting at security staff, and attacking carers at the hospital, necessitating intervention by hospital security personnel. At times, Thomas' leg and/or arm have had to be placed in a cast, in order to prevent self-harm. He removed one of these casts. These incidents typically lead to Thomas being physically restrained by the security guards, and being administered sedative "PRN" medication.

18 There were a series of further serious incidents between 12 and 19 February 2009. However, in the week or so before the hearing, there had been signs of progress, with a reduction in the incidence of episodes of attempts at self-harm and aggression.

The treatment plan

19 In the light of this history, there is strong support in the expert evidence for a plan for Thomas' care, which includes elements of detention, restraint and medication. Thus, Dr Jean Starling (Department Head, Child and Adolescent Psychiatrist, The Children's Hospital at Westmead) and Marie Pinter (Complex Case Clinician and Forensic Psychologist, The Children's Hospital at Westmead) recommend that he be kept long term in a secure and safe environment, other than a mental health unit, with weekly therapeutic interventions:

> To date, [Thomas] has had no long-standing psychological intervention of any type due to his resistance to therapy and chronic anxiety. His high levels of avoidance continue to interfere with the therapeutic process, in particular rapport building between client and therapist. ... This poses the importance of firstly, keeping [Thomas] secure and safe long term in an environment other than a mental health unit and secondly having weekly therapeutic interventions within his own environment where Thomas can partake in more than one or two brief sessions. ...
> ... With a secure, safe and predictable home environment and an empathic therapeutic approach it is anticipated that [Thomas] will slowly reduce his high self-harming and aggressive behaviours whilst increasing his participation in therapeutic treatment. ...

20 Dr Gary Flynn (Director of Psychiatry Early Intervention Services, Sydney South West Area Health Service) expresses the view that he needs a safe, controlled environment:

> As far as future management is concerned, it seems that a safe controlled environment with intensive and consistent behavioural management programs offer the greatest chance of positive environment. I suspect some time is required before [Thomas] feels safe in his new environment which will be necessary before progress from behavioural interventions are likely.

21 Dr Megan Chambers (Child and Adolescent Psychiatrist) says that the capacity to keep Thomas safe can be increased by the ability to detain him securely as necessary, and this would create a more stable basis for rationalisation of medications and implementation of therapy:

> Thomas' level of violence and self-harm are dangerous to himself and others, and also make it impossible to treat him adequately in an uncontained situation. ...
> It has been not possible to restore Thomas to a safe level of functioning within existing resources for helping him. He needs to be kept safe, have occupation and a varied programme, have time to develop relationships with people interested in him, and have a predictable home and routine, and contacts with his grandmother. His medication and diagnostic issues need to be able to be clarified and reviewed. If he is not kept safe, none of these can happen.
> ....
>
> Attempts to treat Thomas have been based on the need to keep him

> safe, to treat (by medication) mood, anxiety, impulsivity, arousal and aggression, and to offer Thomas safe relationships and predictable behavioural consequences and opportunities to gain skills. The hope is that by predictable care, and behavioural rewards his arousal and aggression and anxiety would improve in the long term, decreasing his need for containment and medication.
> Attempts to review medications have also been difficult during hospitalisations. Thomas in hospital becomes aroused, bored, and becomes involved with other disturbed young people. This tends to lead to an increase in aggression, assaultive and self-harm behaviour and an increased used [sic] of medications (largely major tranquillisers).
> Behaviour management designed to promote prosocial behaviour and decrease antisocial behaviour has also been difficult, because of frequent disruptions and the inability to contain Thomas safely.
> ...
> It is proposed that increasing the capacity to keep Thomas safe, by the ability to detain him securely as necessary, would create a more stable, less crisis-ridden period in which medications can be rationalized, and other treatments (counselling, behavioural rewards and consequences, stable positive relationships and opportunities for skill acquisition) can be given a chance to take effect.

The jurisdiction invoked: *parens patriae*

22 The present application is brought in the court's *parens patriae* jurisdiction. (NSW) *Children and Young Persons (Care and Protection) Act* 1998 ("the Care Act"), s 247, provides that nothing in that Act limits the jurisdiction of the Supreme Court which, by s 23 of the (NSW) *Supreme Court Act* 1970, has "all jurisdiction which may be necessary for the administration of justice in NSW", one aspect of which is the '*parens patriae*' or welfare jurisdiction. In *Re Frances and Benny* [2005] NSWSC 1207, Young CJ in Eq (as his Honour then was) said of that jurisdiction (at [17]):

> The *parens patriae* jurisdiction derives from the royal prerogative and although its origins probably go back to the time of Edward III, in more recent centuries the Chancery Division in England and the Equity Court in New South Wales have been responsible for exercising the Queen's power to do good to all her subjects, particularly to those who are children or otherwise incapable of looking after themselves. In exercising that jurisdiction the court's concern is predominantly for the welfare of the person involved. It is not a jurisdiction that is bogged down at all with any technicalities. It is a quite separate jurisdiction to the supervisory jurisdiction that is committed to this court by way of prerogative orders under which this court supervises inferior courts and tribunals to make sure that they do justice and right to all people before them.

23 Austin J reviewed the history of the *parens patriae* jurisdiction in *DoCS v Y* [1999] NSWSC 644. His Honour referred (at [85]) to the jurisdiction with respect to wards of court which:

> ... derives from the historical jurisdiction of the English Court of Chancery, and is part of the *parens patriae* jurisdiction. Lord Eldon LC explained the jurisdiction in *Wellesley v Duke of Beaufort* (1827) 2 Russ 1, 20 [38 ER 236, 243] thus: '[I]t belongs to the King, as *parens*

> *patriae* having the care of those who are not able to take care of themselves, and is founded on the obvious necessity that the law place somewhere the care of individuals who cannot take care of themselves, particularly in cases where it is clear that some care should be thrown round them.' (On appeal, sub nom *Wellesley v Wellesley* (1828) 2 Bli NS 124 [4 ER 1078]; see also *Re Eve* [1986] 2 SCR 407; 31 DLR (4th) 14.)

24 His Honour observed that, while the original function of wardship was more limited (focusing on protecting the property of a minor), the jurisdiction had expanded to one concerned with the protection and welfare of children more generally, and that the effect of making a child or young person a ward of Court is that the Court's consent is required for all important steps in the child's life, and the Court's power supersedes the rights and powers of the parents or other guardians. His Honour referred to the decision of Helsham CJ in Eq in *K v Minister for Youth and Community Services* [1982] 1 NSWLR 311, in which the then Chief Judge had pointed out that the "inherent *parens patriae* jurisdiction with respect to children was not confined to wardship, and the Court could make orders about the custody and care of children without first declaring them to be wards of court", and (at 323):

> In its role as *parens patriae* [the Court] has always had power to interfere with the actions of guardians where necessary to protect the welfare of wards. This is, of course, a power not restricted to wards nor arising because of wardship. It is a power of the Sovereign to protect persons who from their legal disability stand in need of protection ...

25 Albeit in a dissenting judgment, Brennan J in *Secretary, Department Of Health And Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 described the jurisdiction and its historical origins (at 279-80):

> That jurisdiction was originally vested by the royal prerogative in the English Court of Chancery (*Fountain v. Alexander* (1982) 150 CLR, per Mason J. at p 633; and see Lowe and White, *Wards of Court*, 2nd ed. (1986), par.1-2) and is vested in courts whose jurisdiction is defined by reference to the jurisdiction of that Court ... The nature of the jurisdiction was stated by Lord Esher M.R. in *R. v. Gyngall* (1893) 2 QB 232, at p 241:
>
> > The Court is placed in a position by reason of the prerogative of the Crown to act as supreme parent of children, and must exercise that jurisdiction in the manner in which a wise, affectionate, and careful parent would act for the welfare of the child.

26 His Honour described the *parens patriae* jurisdiction as having become "essentially protective" in nature, adding that "protective orders may be made either by the machinery of wardship or by ad hoc orders which leave the guardianship and custody of the child otherwise unaffected."

27 One aspect of the jurisdiction – which was the point of *Marion's Case* – is the authorisation of acts and decisions in respect of children which fall outside the scope of parental decision making powers and therefore lies outside the scope of the powers, rights and duties of a parent or guardian. This is distinct from the exercise by the court of parental responsibility where the parents cannot or will not appropriately do so [cf *Re Jules,* [15]-[19]]. In *Marion's Case*, a majority of the High Court held that a decision to sterilize a minor with intellectual disability (not for therapeutic reasons) was one which fell outside the ordinary powers, rights and duties of

a parent, so that Court authorisation for it was required. The proceedings were brought under the (CTH) *Family Law Act* 1975, but the 'welfare' power of the Family Court is analogous to the *parens patriae* jurisdiction. Although Brennan J was of the view that the *parens patriae* power did not extend to authorising a 'non-therapeutic' sterilization – preferring the narrower approach of the Supreme Court of Canada in *Re Eve* [1986] 2 SCR 388, to the wider one taken by the House of Lords in *In Re B (A Minor) (Wardship: Sterilisation)* [1988] AC 199, [1987] 2 All ER 206 – the majority of the High Court, favouring the wider view, authorised the procedure.

28 In the present proceedings, the Director-General seeks permission to detain Thomas indefinitely in a secure unit, and to restrain and medicate him as the circumstances may require. There is no statutory provision that authorises, or provides for, the detention of a child as an ongoing "non-temporary" aspect of his or her treatment and protection (s 158 of the *Care Act*, while authorising detention for some purposes, permits it only on a temporary basis). The present application is made on the premise that the proposed arrangements – in particular, insofar as it is proposed to confine Thomas in secure accommodation indefinitely – involve acts or procedures beyond the ordinary scope of parental power, so as to require the sanction of the Court as *parens patriae*. I agree that the indefinite confinement of a 15-year-old child in secure premises that he cannot leave of his own volition is beyond the ordinary scope of parental responsibility, and requires the sanction of the Court. While it can be accepted that parents have authority to interfere or restrict the liberty of their children to some extent, I cannot think it extends to the indefinite confinement of a 15-year-old. However, for the reasons that follow, I am satisfied that, within its wide *parens patriae* jurisdiction – under which the powers of the Court are more extensive than those of parents – the Court may authorise such confinement.

29 The breadth of the jurisdiction has often been emphasised; indeed it has been said that it is without limitation, although to be exercised with caution. In *Marion's Case*, Mason CJ, Dawson, Toohey and Gaudron JJ – having referred to *Wellesley v Duke of Beaufort* (1827) 2 Russ 1, 20 [38 ER 236, 243], (on appeal *Wellesley v Wellesley* (1828) 2 Bli N S 124; [4 ER 1078]) – said that the power was more extensive than that of parents (at 258-9):

> Lord Redesdale went on to say (ibid., at p 136 (p 1083 of ER)) that the jurisdiction extended "as far as is necessary for protection and education".
> To the same effect were the comments of Lord Manners who stated (ibid., at p 142 (p 1085 of ER)) that "(i)t is ... impossible to say what are the limits of that jurisdiction". The more contemporary descriptions of the *parens patriae* jurisdiction over infants invariably accept that in theory there is no limitation upon the jurisdiction (See *In re X (A Minor)* (1975) 2 WLR 335, at pp 339-340, 342, 345, 345-346; (1975) 1 All ER 697, at pp 699-700, 703, 705, 706). That is not to deny that the jurisdiction must be exercised in accordance with principle. However, as appears from the authorities discussed earlier, the jurisdiction has been exercised in modern times so as to permit medical operations on infants which result in sterilisation.
> No doubt the jurisdiction over infants is for the most part supervisory in the sense that the courts are supervising the exercise of care and control of infants by parents and guardians. However, to say this is not to assert that the jurisdiction is essentially supervisory or that the courts are merely supervising or reviewing parental or guardian care and control. As already explained, the *parens patriae* jurisdiction springs from the direct responsibility of the Crown for those who cannot look after themselves; it includes infants as well as those of unsound mind. So the courts can exercise jurisdiction in cases where parents have no power to consent to an operation, as well as cases in which they have

> the power (The breadth of the wardship jurisdiction of the English courts was emphasised in *In re R (A Minor)* ([1991] 3 WLR 592; [1992] Fam 11;)).

30 In *DoCS v Y,* Austin J – with reference to *Marion's case* – observed (at [90]) that "contemporary descriptions of the *parens patriae* jurisdiction over children accept that in theory there is no limitation on the jurisdiction". In the English case of *Re X* [1975] 1 All ER 697, Latey J said that "the jurisdiction is of a very broad nature, and ... can be invoked in such matters as custody, protection of property, health problems, religious upbringing and protection against harmful associations".

31 *Re R (a Minor)* [1992] Fam 11; [1991] 3 WLR 592 (CA); [1991] 4 All ER 177 concerned a fact situation not unlike the present. The High Court in England had been asked to exercise its wardship jurisdiction in respect of a 15-year-old girl with mental health issues who was manifesting disturbed behaviours and had threatened to kill herself, had attacked her father with a hammer and caused considerable property damage. The local authority obtained an order to place her in an adolescent psychiatric unit. While she consented to sedation from time to time, she did not consent to the administration of anti-psychotic drugs. The local authority applied to the court for leave to administer medication to her, including anti-psychotic drugs, whether or not she consented. The Court of Appeal held that in exercising its wardship jurisdiction, the High Court could consent to medical treatment of a minor ward, even where the minor was competent to consent (in the sense of "Gillick-competent": see *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112; [1985] 3 All ER 402 and *Marion's case*, 238). Donaldson MR, referring to the judgment of Lord Scarman in *Gillick*, said (at [1992] Fam 11, 24) that Lord Scarman could not "have been intending to say that the parental right to consent terminates with the achievement by the child of 'Gillick competence'", and that *Gillick* was not authority for the proposition that a "Gillick competent" child could refuse treatment: "Such a child can consent, but if he or she declines to do so or refuses, consent can be given by someone else who has parental rights or responsibilities". Donaldson MR considered the nature of the court's wardship jurisdiction, again pointing out that it was not limited to the ordinary powers of parents, being derived from the duties of the Crown to protect its subjects, particularly children [Fam 11, 25]:

> In considering the wardship jurisdiction of the court, no assistance is to be derived from *Gillick*'s case, where this simply was not in issue. Nor, I think, is any assistance to be derived from considering whether it is theoretically limitless if the exercise of such a jurisdiction in a particular way and in particular circumstances would be contrary to established practice. It is, however, clear that the practical jurisdiction of the court is wider than that of parents. The court can, for example, forbid the publication of information about the ward or the ward's family circumstances. It is also clear that this jurisdiction is not derivative from the parents' rights and responsibilities, but derives from, or is, the delegated performance of the duties of the Crown to protect its subjects and particularly children who are the generations of the future: see *In Re C. (A Minor) (Wardship: Medical Treatment) (No. 2)* [1990] Fam. 39, 46.
> Whilst it is no doubt true to say, as Lord Upjohn did say in *J. v. C.* [1970] A.C. 668, 723A, that the function of the court is to "act as the judicial reasonable parent," all that, in context, he was saying was that the court should exercise its jurisdiction in the interests of the children "reflecting and adopting the changing views, as the years go by, of reasonable men and women, the parents of children, on the proper treatment and methods of bringing up children." This is very far from

> saying that the wardship jurisdiction is derived from, or in any way limited by, that of the parents.

32 Staughton LJ also accepted that the powers of a wardship judge were wider than those of a parent (at [1992] Fam 11, 28-29):

> I conclude that the powers of a wardship judge do indeed include power to consent to medical treatment when the ward has not been asked or has declined. If that means that the wardship judge has wider powers than a natural parent (on the extent of which I have declined to express an opinion), it seems to me to be warranted by the authorities to which I have referred.
> Then there is the converse case in wardship, where the ward consents but the court is minded either not to consent or positively to forbid treatment. Does the judge in such a case have an overriding power, which the natural parent of a competent child under the age of 16 does not have by reason of the *Gillick* decision? If so, there would again be a problem for doctors, who may have to ask if the child is a ward. But the trend of the cases seems to show that, if the treatment would constitute an important step in the child's life, the court does have that power.

33 Farquharson LJ agreed with the other members of the Court.

34 The jurisdiction is founded on the need to act for the protection of those who cannot care for themselves. Although it has been most frequently invoked in the context of medical treatment, the *parens patriae* power is not limited to therapeutic treatment; thus, for example, a court has protected a child from an unsuitable arranged marriage [*A Local Authority v Ma, Sa, Na* [2005] EWHC 2942 (Fam); [2007] 2 FCR 563; [2006] 1 FLR 867]. Orders interfering with personal integrity and liberty have been made sufficiently often now that it must be accepted that the jurisdiction permits them. In *Re W* [1992] 3 WLR 758; [1992] 4 All ER 627 the Court of Appeal upheld a court order for treatment for a young person with anorexia nervosa, holding that her wishes, while relevant, were not conclusive. *Re C* [1997] 2 FLR 180 also involved a young woman with anorexia nervosa, who was ordered by the Court to remain at a clinic for treatment until discharged by her doctor or further order – and the court's order provided for the use of reasonable force, if necessary, to detain her. *Marion's Case*, as has been mentioned, resulted in the authorisation of the permanent procedure of hysterectomy, a serious invasion of personal integrity. In *DoCS v Y,* Austin J made orders to the effect that the child be returned to the Children's Hospital without her consent, to resume a course of treatment for anorexia nervosa, and authorising the hospital staff to detain her, using reasonable force if necessary. Orders substantially similar to those proposed in the present case have been made by this Court in *Re Christina* (2168/07, 5 April 2007) and *Re Nellie* (5150/08, 10 October 2008).

35 Nonetheless, great caution is required in the exercise of the jurisdiction and, generally, the greater the interference with the liberty of the object of the exercise of the jurisdiction, the greater the caution required in its exercise. In *Marion's Case*, Brennan J's dissent (at 280), while acknowledging that the jurisdiction was "extremely broad", emphasised that it was exercised cautiously, and that there must be "some clear justification for a court's intervention to set aside the primary parental responsibility for attending to the welfare of the child." The exceptional nature of the power was referred to also in *Re Victoria* (2002) 29 Fam LR 157 (Palmer J), and in *Frances and Benny* [2005] NSWSC 1207, [18], in which Young CJ in Eq (as his Honour then was) said "the *parens patriae* jurisdiction is only to be exercised in exceptional cases".

36 My initial reservations about the orders sought reflected our system of law's hostility to depriving a person of liberty, except in connection with a criminal prosecution or conviction. Children, no less than adults, have a fundamental human right not to be deprived of their liberty unlawfully or arbitrarily. Article 37 of the United Nations *Convention on the Rights of the Child (CROC)* provides relevantly as follows:

> *Article 37*
>
> States Parties shall ensure that:
>
> ...
>
> (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
>
> (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
>
> (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

37 Australia is a signatory to *CROC*, and although this does not incorporate the Convention into our domestic law, it has relevance to decisions made in respect of children by administrative and judicial decision-makers. In my view, a Court exercising the *parens patriae* power should take into account, as a relevant consideration, the provisions of *CROC*, as must the Family Court when exercising its welfare jurisdiction (and this Court when exercising that jurisdiction pursuant to the (CTH) *Jurisdiction of Courts (Cross-vesting) Act* 1987) – although, just like the child's wishes in *Re W*, the child's rights under *CROC*, while relevant, are not conclusive. This is so for several reasons:

> · First, Australia's ratification of *CROC* creates a legitimate expectation that decisions will be made having regard to the principles espoused in *CROC* [*Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh* [1995] HCA 20; (1995) 183 CLR 273; *B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676; (1997) FLC ¶92-755]; (1997) 140 FLR 11;
> · Secondly, the existence of a treaty obligation alone (that is, without legislation implementing it locally) allows a court to take such a treaty into account in the development of the common law [*Mabo v Queensland [No.2]* (1992) 175 CLR 1, 42; *B and B* (1997) FLC ¶92-755, 84, 223];
>
> · Thirdly, where a convention has been ratified by Australia but has not been the subject of any legislative incorporation into domestic law, its terms may be resorted to in order to help resolve an ambiguity in domestic legislation [*Murray v Director*

Family Services, ACT (1993) FLC ¶92-416, 81,255-256; *B and B*, 84,224], and in a case of ambiguity, a court should favour a construction of a statute which accords with Australia's obligations under an international treaty [*Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 38; *B and B*, 84, 223]. While this is not directly relevant here, it illustrates the potential for *CROC* to exert indirect influence on the general law;

· Fourthly, in the exercise of a discretion, regard may be had to an international obligation or agreement which has been ratified by Australia, though not otherwise incorporated into domestic law – unless the domestic law prohibits it [*Murray v Director Family Services, ACT* (1993) FLC ¶92-416, 81,255-256; *B and B*, 84,224]. This is directly relevant to discretionary decision-making in the *parens patriae* jurisdiction;

· Fifthly, insofar as the *parens patriae* jurisdiction overlaps the welfare jurisdiction of the Family Court of Australia, it is material that *Family Law Act*, s 43(c), provides that the court, in the exercise of its jurisdiction, must have regard to the need to protect the *rights of children* and to promote their welfare [*B and B*, 84,226 [10.7]]. In *B and B*, the court rejected the Attorney-General's submission that s 43 could not be interpreted as applying to *CROC*, and thought it difficult to see how *CROC* could be considered not to be relevant [*B and B*, 84,226 [10.9-10.13]]. Indeed, *CROC* is entitled to special significance because it is almost an universally accepted human rights instrument, and is a declared instrument appearing in the schedule to the (CTH) *Human Rights and Equal Opportunity Commission Act* 1986, and thus has much greater weight than an ordinary bi-lateral or multi-lateral treaty not directed at such ends [*B and B*, 84,227 [10.14 – 10.19]].

38 In concluding that the orders sought, notwithstanding that they involve a serious impingement upon personal liberty, are within the *parens patriae* power, and ought be made notwithstanding that they involve deprivation of liberty, I have been much assisted by the judgment of the Court of Appeal of England and Wales (Butler-Sloss P, Thorpe and Judge LJJ), in *In Re K (A Child) (Secure Accommodation Order: Right to Liberty)* [2001] 2 WLR 1141, which held that while the purpose of a "secure accommodation order" under (UK) *Children Act* 1989, s 25 was to restrict the child's liberty, and notwithstanding that such restriction was a "deprivation of liberty" within the *Convention for the Protection of Human Rights and Fundamental Freedoms*, nonetheless it was not incompatible with the Convention, as it was within an exception which authorised detention of a minor by lawful order "for the purpose of educational supervision". As the child remained a serious risk to others and at risk himself from others, the criteria for the order were fulfilled, and the order was extended. Thorpe LJ said that the order did not breach the child's human rights, as *the deprivation of liberty was a necessary consequence of an exercise of parental responsibility for the protection and promotion of his welfare*. Thus, *Re K* illustrates that deprivation of a child's liberty for "protective" purposes (as distinct from following conviction of an offence) may be justified, and even necessitated, by the protection and promotion of the child's welfare, and in those circumstances will not contravene the child's human rights. Since the protection and promotion of the child's welfare lies at the heart of the *parens patriae* jurisdiction, I would hold that the jurisdiction extends to authorise the orders sought in this case.

Conclusion

39 The orders sought are radical. They involve a very serious interference with Thomas' liberty. I freely acknowledge that, when first presented, I approached the application with scepticism.

40 However, being satisfied that they are within power, I am also satisfied that they are necessary. Indeed, in the interests of Thomas' welfare, I can see no practical alternative to them. As I have recorded, there is strong professional support for such a regime. Other arrangements for his care and accommodation have failed, and there is no realistic prospect that they would succeed now. Thomas' separate representative does not suggest otherwise. Thomas can no longer be accommodated in his former situation, and "temporary" admission to various hospitals has only proved to be a source of anxiety coupled with great physical damage. If he is not kept under close supervision in secure accommodation, he would continue to engage in self-harm, potentially with fatal effects. And he would continue to associate with drug dealers and engage in further anti-social and illegal behaviour, leading to further criminal offences and prosecution, and in due course incarceration. Moreover, at least in the days immediately preceding the hearing, there appeared to have been some reduction in the incidence of self-harming and aggressive behaviour, providing some basis for thinking that the programme is proving beneficial. Under the proposed regime, he will have not only supervision, but ongoing therapy.

41 The necessity for detention is closely connected with Thomas' treatment, which depends on there being a stable permanent environment. The duration of his detention is dictated by the circumstance that the treatment plan will require time to take effect. All accept that the plan, and its various elements, is neither permanent nor immutable. The arrangements remain subject to review, both by expert doctors and carers and by the Court, and the Court can and will continue to monitor the position on a regular basis.

42 Thomas is separately represented in the proceedings, and his separate representative did not oppose the orders sought.

43 Accordingly, I made the orders set out above.

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