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SUBSTITUTED CONSENT: FROM LUNATICS TO CORPSES

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This analysis traces the origins and evolution of the doctrine of surrogate or substituted judgment, especially its application to medical treatment, includ- ing non-therapeutic sterilisation, decisions regarding life and death choices, and more recently, removal of sperm or eggs from incompetent, dying or dead males and females. It argues that the doctrine, which has been acknowledged to be a legal fiction, has an effect of devolving legal and moral responsibility for life and death choices, as well as non-consensual, non-beneficial intrusive procedures, from the competent decision-makers to the incompetent patient. It focuses on the subjective nature of the substituted judgment standard; the problematic nature of evidence propounded to establish the putative choices of the incompetent person; lack of transparency relating to the conflict of interest in the process of substituted judgment decision-making; and the absence of voluntariness, which is an essential element of a valid consent.

INTRODUCTION

Consent involves a conscious acceptance, acquiescence or approval of what is planned, proposed or done by another. Generally (unless legally justified through the doctrine of necessity, or statutorily compelled), to be valid, transactions between competent adults are based on explicit or implied[1] voluntary consent between the parties. In a therapeutic relationship, a fully competent patient (first party) gives consent on her or his own behalf to the provider of the therapeutic service (second party). Where the patient does not have legal capacity, an authorised third party – usually a close relative,[2] a legal guardian, an agent with enduring powers of attorney,[3] or a judge acting under parens patriae jurisdiction – becomes the third party consenter for the first party.[4]

Nowadays, substituted or surrogate judgment whereby a third party acts "according to what the incompetent individual, if competent, would choose",[5] is one of the three major doctrines which provide the basis for health care decision-making in relation to legally incompetent adults. The other two theories are:

- best interests, whereby the decision-maker acts "so as to promote maximally the good (ie, wellbeing) of the incompetent individual"; and
- advance directive, whereby the decision-maker implements a valid advance directive, such as a "living will" or acts under enduring powers of attorney, that the individual had executed while competent.[6]

This analysis focuses on the doctrine of surrogate judgment, which was initially created in the context of property management for incompetent persons. Since the 1970s, the doctrine of surrogate judgment has been applied to medical treatment, including non-therapeutic sterilisation, decisions regarding life and death choices, and more recently, removal of sperm or eggs from incompetent,

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1 *O'Brien v Cunard SS Co* 28 NE 266 (1891); *Collins v Wilcock* [1984] 1 WLR 1172 (Robert Goff LJ).

2 See eg *Guardianship and Administration Act 1986* (Vic), s 37.

3 In Australia, persons appointed under the *Medical Treatment Act 1988* (Vic).

4 The institution of advance directives for future medical treatment is in part designed to circumvent this problem.

5 Buchanan A and Brock DW, *Deciding for Others; The Ethics of Surrogate Decision Making* (Cambridge University Press, Cambridge, 1989) p 10.

6 Buchanan and Brock, n 5, p 10.

dying or dead males and females. Though widely accepted, and often codified as part of advance directives legislation, this doctrine has also had its critics, both academic[7] and among the judiciary.[8] Most of the

relevant jurisprudence on substituted judgment as applied to medical treatment was developed in the United States. However, the issues under discussion are also relevant to Australia, particularly in relation to the harvesting of gametes from dying individuals or dead bodies, when such people, while competent and alive, did not explicitly and voluntarily consent to have their spermatozoa or embryos removed and cryopreserved for posthumous reproduction.

The substituted or surrogate judgment doctrine is a classic example of legal fiction. It is based on the third party embarking on an imaginary quest to identify the incompetent person's subjective choices by asking the question: what would such an individual wish or desire regarding the proposed course of action, had he or she been competent? In such an investigation, the third party decision-maker is cast as a mere agent or, more precisely, a medium through whom the incompetent party's wishes are revealed. The doctrine thus has an unarticulated effect of devolving legal and moral responsibility for the ultimate choice from the competent decision-maker to the incompetent patient.[9] This doctrinal shift in allocating personal responsibility is wrong. The author considers that, whether or not directed by statute, third-party decision-makers should take the full legal and moral

responsibility for the choices they make in relation to those who are the subjects of the decision. The notions of "substituted consent" and "substituted judgment" were already subject to trenchant criticism in the 1970s.[10] Although academic critics and judicial dissentients are yet to persuade the majority that the doctrines of substituted judgment and substituted consent are legally and morally problematic, it is worth reiterating the flaws that are intrinsic to these concepts.

SUBSTITUTED JUDGMENT – THE ORIGINS OF THE LEGAL DOCTRINE

In the Western legal tradition, at least since the time of Solon,[11] the law has enabled third parties to act to promote and protect the property interests and the wellbeing of incompetent persons. Roman law developed an institution of praetorial investigation[12] and appointment of a curator furiosi for persons who were found to be mad (unable to communicate) or mentally ill (Ulpian, D 27.10.6), and thus legally disabled from the conduct of affairs (Ulpian, D 50.17.5). The Roman curator's "concern and care" extended "over the health and well-being of the lunatic as well as [his or her] property" (Julian, D 27.10.7p), and the curator could be sued for mismanagement of the ward's property.[13]

In England, the final Chapters of *De Praerogativa Regis*, 17 Edward 2 (1324),[14] provided a statutory basis for royal jurisdiction by the Court of Chancery over "natural" idiots and incompetents.

[7] Rhoden N, "Litigating Life and Death" (1988) 102 Harv LR 375; Dresser R and Robertson JA, "Quality of Life and Nontreatment Decisions for Incompetent Patients: A Critique of the Orthodox Approach" (1989) 17 Law Med & Health Care 234.

[8] *Conservatorship of Valerie N* 40 Cal 3d 143; 707 P 2d 760 (1985), dissenting judgment of Bird CJ; *Re Christopher I* 106 Cal App 4th 533 (2003) (Fybel J) (Rylaarsdam APJ and Bedsworth J concurring).

[9] *Re Estate of Longeway* 133 Ill 2d 33 at 61 (1989) (Ward J in dissent).

[10] Kamisar Y, "A Life Not (or No Longer) Worth Living: Are We Deciding the Issue Without Facing It?", Mitchell Lecture delivered at the State University of New York at Buffalo, 10 November 1977, quoted in Note, "Due Process, Privacy & the Path of Progress" (1979) U Ill LF 469 at 518 fn 239, and cited by Ward J (in dissent) in *Re Estate of Longeway* 133 Ill 2d 33 at 60 (1989); Tribe L, *American Constitutional Law* (Foundation Press, Mineola, NY, 1978) pp 936-937; *Re Storar* 420 NE 2d 64 (1981).

[11] For legal aspects of incompetency in ancient Greece, see Harrison ARW, *The Law of Athens* (Clarendon Press, Oxford, 1968) Vol 1, pp 80-81.

[12] Praetors were the high magistrates initially vested with civil jurisdiction. With time, their jurisdiction became specialised; eg praetor tutelarius had jurisdiction to appoint guardians (tutores and curatores dativi). See Berger A, *Encyclopedic Dictionary of Roman Law* (American Philosophical Society, Philadelphia, 1980) p 648.

[13] *The Digest of Justinian* (A Watson, transl) (University of Pennsylvania Press, Philadelphia, 1998).

[14] The 1324 text, which probably confirmed earlier statements on the king's rights as feudal lord: Mcglynn M, "Idiots, Lunatics and the Royal Prerogative in Early Tudor England" (2005) 26 *Journal of Legal History* 1 at 2.

The Court of Chancery[15] was empowered under the Crown's prerogative to make determinations on behalf of and for the benefit of persons found to be incompetent.[16] Initially, under property law and the law of status, persons found to be purus idiota (natural idiot – someone who had "no understanding" from birth),[17] were treated differently from those who were non compos mentis (not of sound mind). The latter included not only

> lunatics, but persons under frenzies; or who lose their intellects by disease; those that grow deaf, dumb,[18] and blind, not being born so; or such, in short, as are by any means rendered incapable of conducting their own affairs.[19]

The term "lunatic" referred to

> a Person Non Sane Memoriae; also defined to be one who is sometimes of good and sound Memory, and sometimes not. And he is Non compos Mentis so long as he hath not his Understanding.[20]

In other words, lunatics, though once competent, lost their memory or suffered severe impairment of their cognitive capacity either temporarily[21] or permanently.[22] Chapter 12 of the *De Praerogativa Regis*, 17 Edward 2 (1324) stipulated:

> [T]he King is to provide that Lands of Lunatics be safely preserved without Waste, and they and their Families maintained by the Profits: And the Residue shall be kept for their Use, and be delivered to them when they come to their right Mind.[23]

By the 16th century, the parens patriae jurisdiction based on the royal guardianship of those who were legally incompetent was explained in terms of the King's obligation to "protect their bodies, and preserve their inheritances".[24] The Lord Chancellors, who in early 15th century assumed the role of

[15] The jurisdiction of the Court of Chancery developed from dealing with the bills of complaint, petitions by those who, often for technical reasons, were unable to obtain a remedy under regular procedures of the writ system. The office of the Lord Chancellor goes back to the early 11th century, predating all other offices of state except the Crown: Fischer SF, "Playing Poohsticks with the British Constitution? The Blair Government's Proposal to Abolish the Lord Chancellor" (2005) 24 Penn St Int'l L Rev 257 at 266.

[16] In pursuance of the inquisition under the writ de idiota sua inquirenda.

[17] Sir Anthony Fitzherbert in *La Novel Natura Brevium* (1534), an authoritative guide book for law students, provided the following test for idiocy: "[T]he [one] who shall be said to be a sot and an idiot from his birth, is such a person who cannot account or number twenty pence, nor can tell who was his father or mother, nor how old he is etc, so as it may appear he hath no understanding of reason what shall be for his profit, or what for his loss; but if he hath such understanding, that he know and understand his letters, and read by teaching or information of another man, then it seemeth that he is not a sot or a natural idiot".
See Fitzherbert A, *The New Natura Brevium of the Most Reverend Judge Mr Anthony Fitzherbert Corrected & Revised* (9th ed, London, 1794) p 233, cited in Mcglynn, n 14 at 8.

[18] Historically, "dumb" meant stupid and mute (inarticulate).

[19] Blackstone W, *Commentaries on the Laws of England* (facsimile of the first edition of 1765-1769) Vol 1 (1765) Ch 8, noting that the appellation of non compos mentis goes back to Sir Edward Coke (*Beverley's Case* (1603) 76 ER 1118 at 1121). Under property law, the legal status of those non compos mentis was different from persons found to be purus idiota (those who had "no understanding" from birth).

[20] Jacob G, *The Common Law Common-Plac'd* (2nd ed, E and R Nutt and R Gosling, Savoy 1733) p 251 citing Lit, at 405, 406.

[21] If persons non compos mentis were able to prove before the Court of Chancery that they recovered sanity, their property was returned to them. However, if they became incompetent again, "the whole process would have to begin again with a new inquisition": Mcglynn, n 14 at 4.

[22] The modern definition of a legally incompetent person refers to someone who lacks capacity to understand, and is unable to make, or communicate, decisions based on choice: Appelbaum PS and Gutheil TG, *Clinical Handbook of Psychiatry and the Law* (2nd ed, Williams & Wilkins, Baltimore, 1991).

[23] Cited in Jacob, n 20, p 251.

[24] Mcglynn, n 14 at 20, citing (at 5) Fitzherbert, n 17, p 232; and Staunford W, *An Exposicion of the Kings Prerogatiue*, collected out of the great Abridgement of Iustice Fitzherbert, and other olde Writers of the Lawes of Englande, by the right Worshipfull Sir William Staunford Knight, lately one of the Iustices of the Queenes Maiesties Court of Comon Pleas (London, 1567). Staunford, referring to the King's obligations, wrote at f37 that "of such as cannot gouerne them selues nor order theire landes and tenementes hys grace (as a father) must take vppon hym to prouyde for them, that theye them selues and theire thinges maye bee preserued."

the "keeper of the King's conscience",[25] and who had the power to manage the property of those declared non compos mentis, were under legal and moral duty (the Chancellor acted upon "his conscience") to make decisions that furthered the economic and social welfare of such persons as individuals.[26] In its management of their assets, the Court of Chancery had to act for the incompetent person's "benefit". The presence of benefit was measured by an objective standard focused on the safe preservation of the incompetent person's property, the profits of which were to be used for her or his financial and physical wellbeing, and if appropriate, for the maintenance[27] of close family.[28]

Although the notion of the Lord Chancellor's own conscience as a determinant of legal matters was rather vague,[29] it clearly indicated that he was expected to take legal and moral responsibility for the judgment on the issue under consideration. However, in *Re Hinde; Ex parte Whitbread* (1816) 2 Meriv 99; 35 ER 878 the allocation of moral responsibility for decision-making in relation to incompetent persons changed. In this case, a niece of a wealthy "Lunatic", Mr Hinde, contested the apportionment of the allowance made by the Court of Chancery for his support and maintenance. She requested that a greater share of the allowance be paid out the profits of Mr Hinde's estate. While determining this case, Lord Chancellor Eldon (1800-1827), probably quite inadvertently and without calling it such, articulated the doctrine that would later be called "surrogate" or "substituted" judgment. He switched the decision-making standard from objective to

subjective and in the process devolved moral responsibility for the ultimate choice from the competent decision-maker to the incompetent subject of that choice.

Lord Eldon (at 102; 879) emphasised that, in administering the property of a person who is non compos mentis, the court "in making the allowance, has nothing to consider but the situation of the Lunatic himself, always looking to the probability of his recovery, and never regarding the interest of the next of kin". Nevertheless (at 102; 879, emphasis added),

> in cases where the estate is considerable, and the persons who will probably be entitled to it hereafter are otherwise unprovided for, *the Court looking at what the Lunatic himself would do, if he were in a capacity to act*, will make some provision out of the estate for those persons.

The Chancellor (at 103; 879) concluded his judgment with the following newly created rule:

> [T]he Court will not refuse to do, for the benefit of the Lunatic, that which it is probable the Lunatic would have done.

Thus, to quote Harmon,[30] who discussed the legal fiction created by the rule in *Re Hinde; Ex parte Whitbread*, Lord Eldon abandoned his position of judicial objectivity and entered the mind of the lunatic in order to ascertain the latter's donative intentions:

> Once inside [the lunatic's mind], the Chancellor had to look around and discover what the lunatic himself probably would have done. Once the probable desires of the lunatic were discovered, the Chancellor had to carry them out.

Allocating moneys out of Mr Hinde's estate to collateral relatives could hardly be characterised as conferring a "benefit" on him,[31] in the sense of maximising his personal welfare. However, it seems

[25] The title probably stemmed from the fact that, in the medieval period, Chancellors were always clerics, and had the power to "coerce parties to do whatever conscience required": Baker JH, *An Introduction to English Legal History* (Butterworths, London, 1979) p 88. However, the body of principles developed in the Court of Chancery became, by the 18th century, a strictly enforced system of equity law.

[26] For further discussion, see Mcglynn, n 14 at 2-3.

[27] Unless they expressed their wishes before becoming non compos mentis, regained memory and cognitive capacity, the views of incompetent persons were, at least officially, not taken into consideration.

[28] The notion of family for the purpose of administration of an incompetent person's assets was strictly limited to the closest relatives (spouses, parents and children).

[29] Baker, n 25, p 93, cites John Selden's remark from *Table Talk* (F Pollock ed, 1927, p 43) that "if the measure of equity was the chancellor's own conscience, one might as well make the standard measure of one foot the chancellor's foot".

[30] Harmon L, "Falling off the Vine: Legal Fictions and the Doctrine of Substituted Judgment" (1990) 100 Yale LJ 1 at 22.

[31] The term "benefit" was adopted by the Middle English from Old French bienfait, meaning "good deed" (from Latin benefactum, from benefacere, to do a service).

that Lord Eldon interpreted "benefit" in terms of safeguarding what would have been the emotional and dignitary interests of lunatics, if they were competent. For, giving as an example impecunious siblings of a lunatic who is the elder son and heir to the family fortune, the Chancellor (at 102; 879) thus formulated the criterion to guide the court in determining the notional intention of someone non compos mentis to make allowances for others from the profits of his assets:

> [I]t would naturally be more agreeable to the Lunatic, and more to his advantage, that they [the siblings] should receive an education and maintenance suitable to his condition, that than they should be sent into the world to disgrace him as beggars.

In other words, the court was to speculate what would be the incompetent person's dignitary considerations and moral responsibilities if he or she were competent. In doing so, the Chancellor appeared to act in conformity with the hypothetical subjective dictates of the lunatic's conscience rather than his own.

Admittedly, in 1816, the objective legal test of what a reasonable person would have done in the particular circumstances of the case was yet to be articulated.[32] Moreover, the reasonable person's test was a common law and not an equitable doctrine. Consequently, it is understandable why in the 19th century and since, the English Court of Chancery, and courts in other common law countries,[33] have made surrogate judgments about management and distribution of property and income on the basis of a metaphorical search for binding intentions within the hypothetical sound mind and conscience of someone who is non compos mentis.[34] Moreover, benefits and detriments resulting from the administration of property can be readily measured and, if necessary, challenged. The situation is quite different when an equitable rule designed for the law of property is "migrated" and applied to the law of medical treatment.

SUBSTITUTED CONSENT JURISPRUDENCE

In the wake of the *Supreme Court of Judicature Act 1873*, 36 & 37 Vict, c 66 (Eng) and the *Supreme Court of Judicature Act 1875*, 38 & 39 Vict, c 77 (Eng), which fused the equity and the common law systems, and was adopted in the majority of common law jurisdictions, the Lord Chancellor ceased to function as the "King's conscience". Possibly due to the exponential upsurge in codification of the common law relating to legal competence, the theory that judicial discretion regarding the best interests of those who are legally incompetent should be governed primarily by the dictates of the decision-maker's conscience came to be regarded as outmoded by the final quarter of the 20th century. Former principles were succeeded by a new theory of personal autonomy, and its legal iterations in the form of personal self-determination and informed consent.[35] These two concepts became the preferred rhetorical devices for the law's implementation of the incompetent person's notional subjective desires and choices.

According to the philosophical notion of autonomy,[36] every individual has the legal right to personal self-determination. In bioethics, the terms "autonomy" and "respect for autonomy" are associated with several ideas, such as privacy, voluntariness, choosing freely, and accepting responsibility for one's choices.[37] The legal doctrine, as it pertains to the medical context, is, however,
narrower: it vests in each competent individual the right to personal self-determination, that is, the

[32] *Blyth v Birmingham Waterworks* (1856) 11 Exch 781 at 782 (Baron Alderson).
[33] *Re Hinde; Ex parte Whitbread* (1816) 2 Meriv 99; 35 ER 878 was adopted in the United States in *Matter of Willoughby, a Lunatic* 11 Paige 257 (1844).
[34] See Annotation, "Power of Court or Guardian to Make Noncharitable Gifts or Allowances Out of Funds of Incompetent Ward" (1969) 24 *American Law Reports* 3d 863, which lists cases in which the American courts have made or authorised the making of allowances out of the incompetent's estate for the support of brothers and sisters, nieces and nephews, cousins, uncles and aunts, and to persons not related by applying the doctrine of "substitution of judgment". See also Harmon, n 30.
[35] The notion of "informed consent" as an expression of the right competent persons have to make informed choices regarding their own bodies was introduced into common law in *Canterbury v Spence* 464 F 2d 772 (1972).
[36] From Greek autos (self) and nomos (rule).
[37] Beauchamp A, "The Four-Principles' Approach" in Gillon R (ed), *Principles of Health Care Ethics* (John Wiley & Sons, Chichester, 1994) p 6.

right to non-interference with the choices one makes of what to do with one's body.[38] In the 1970s the common law courts adopted a theory that the principle of autonomy required incompetent adults to have the same rights to self-determination as those who are competent.[39] Consequently, through the doctrine of surrogate judgment, incompetent persons were bestowed with the right (whatever it may mean in reality) of consent and refusal in relation to all kinds of medical treatment not only when there exists explicit and documented evidence of their wishes, but also in the absence of such proof.

Thus individuals whose wishes are not documented can nevertheless be deemed to have directed abatement of life-sustaining treatment,[40] harvesting of organs to benefit a third party,[41] harvesting of sperm and eggs,[42] non-therapeutic sterilisation,[43] and experimental drug trials.[44] This right of self-determination is conferred on persons who were once competent, those who are temporarily incompetent, those who were never competent, and the dead.

In *Does v District of Columbia* 374 F Supp 2d 107 (2005)[45] the United States District Judge Henry H Kennedy Jr noted (at [114] n 8) that substituted judgment is "the *process* (the inquiry into the patient's wishes)", whereas substituted consent is "the *result* (the approval of a surgical procedure upon making such an inquiry)". Given the speculative nature of both the process and the result, it is not surprising that the terms "substituted" or "surrogate" judgment and "substituted" or "surrogate" or "inferred" consent have been used interchangeably.

MAJOR LEGAL AND ETHICAL PROBLEMS INHERENT IN THE SUBSTITUTED JUDGMENT DOCTRINE

Over the years, the following aspects of the substituted judgment doctrine have been identified as problematic:

- the subjective nature of the substituted judgment standard;
- the nature of evidence propounded to establish the putative choices of the incompetent person;
- the lack of transparency relating to the conflict of interest in the process of substituted judgment decision-making; and

[38] *Schloendorff v Society of New York Hospital* 105 NE 92 at 93 (1914). For an in-depth discussion, see Mendelson D, "Historical Evolution and Modern Implications of Concepts of Consent to, and Refusal of, Medical Treatment in the Law of Trespass" (1996) 17 *Journal of Legal Medicine* 1.
[39] *Superintendent of Belchertown State School v Saikewicz* 373 Mass 728; 370 NE 2d 417 at 745, 752-753, 757-758; 370 NE 2d at 427, 431, 434 (1977).
[40] *Re Quinlan* 70 NJ 10; 355 A 2d 647 (1976), writ of certiorari denied *Garger v New Jersey* 429 US 922; 97 S Ct 319 (1976).
[41] For example, in *Strunk v Strunk* 445 SW 2d 145 (1969), the majority in the Kentucky Court of Appeals relied inter alia on the doctrine of substituted judgment, when it authorised the removal of one of the kidneys of the 27-year-old incompetent for the purpose of donation to his 28-year-old fully competent brother. See also Cheyette C, "Organ Harvests from the Legally Incompetent: An Argument against Compelled Altruism" (2000) 41 Boston College L Rev 465; Gregory LK, "Propriety of Surgically Invading Incompetent or Minor for Benefit of Third Party" (1992) 4 *American Law Reports* 5th 1000.
[42] Strong C, "Ethical and Legal Aspects of Sperm Retrieval After Death or Persistent Vegetative State" (1999) 27 *Journal of Law, Medicine & Ethics* 347; White GB, "Commentary: Legal and Ethical Aspects of Sperm Retrieval" (1999) 27 *Journal of Law, Medicine & Ethics* 359 (response to article by Carson Strong in the same issue); Soules MR, "Commentary: Posthumous Harvesting of Gametes – A Physician's Perspective" (1999) 27 *Journal of Law, Medicine & Ethics* 362 (response to article by Carson Strong in the same issue); *MAW v Western Sydney Area Health Service* (2000) 49 NSWLR 231; initially *Y v Austin Health* (2005) 13 VR 363; [2005] VSC 427.
[43] For example "substituted consent" legislation was enacted in the District of Columbia: *Mentally Retarded Citizens Substituted Consent for Health Care Decisions & Emergency Care Definition Temporary Amendment Act of 1998*, DC Act 12-588, § 3(a), 46 DC Reg 1115 (1998), which authorises the Mental Retardation and Developmental Disabilities Administration Administrator "to grant, refuse, or withdraw consent on behalf of a customer with respect to the provision of any health care service, treatment, or procedure; provided, that two licensed physicians have certified". See *Re Estate of Gillis* 849 A 2d 1015 (2004).
[44] Kim YH, Appelbaum PS, Jeste DV et al, "Proxy and Surrogate Consent in Geriatric Neuropsychiatric Research: Update and Recommendations" (2004) 161 *American Journal of Psychiatry* 797.
[45] In this case, the court granted the preliminary injunction to mentally retarded adult women who received services from defendant, government agency, on the ground that, to the extent that the agency failed to consult and take into account the women patients' subjective desires regarding medical treatment, it violated the women's due process and liberty interests under the United States *Constitution*.

- the absence of voluntariness, which is an essential element of valid consent.

Although the problems listed above have not changed since Lord Eldon articulated this doctrine in *Ex parte Whitbread*, the extended application of substituted consent has made them pernicious.
Each of them is briefly discussed in turn.

The subjective nature of the substituted judgment standard

As noted above, historically, the standard governing third-party decision-making for incompetent persons was objective: the court, or a legally appointed guardian, had to act for the incompetent person's "benefit". This doctrine, known as the best interests standard, was developed by the courts of equity in the context of determining fiduciary obligations. It focuses exclusively upon the incompetent ward and her or his best interests, other interests – including the family, community and wider socioeconomic concerns – being always subordinate to those of the incompetent person.

Of course, no legal test is perfect, and Brennan J (as he then was) in *Secretary, Department of Health and Community Services (NT) v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 at 271 pointed out in dissent:

> [I]n the absence of legal rules or a hierarchy of values, the best interests approach depends upon the value system of the decision-maker. Absent any rule or guideline, that approach simply creates an unexaminable discretion in the repository of the power.

Nevertheless, in its pure form, the best interests standard is in harmony with the principles of medical deontology and the Kantian practical imperative to "act so that you treat humanity, whether in your own person or in that of another, always as an end, never as a means only".[46] Under the objective test of best interests, the response to the question whether the wellbeing of an incompetent person will be maximised if he dies due to the abatement of treatment, if she is sterilised for non-therapeutic reasons, or subjected to harvesting of gametes without prior consent, will often be negative or, at best, equivocal.

In contrast, the standard for substituted judgment is subjective to the incompetent individual.

Moreover, the law of personal self-determination, as it developed in the 1990s, includes the right to make irrational choices that others may not judge to be in the individual's best interests providing the person has the necessary ability to make the decision.[47] Presumably, the third party who in the process of substituted judgment "inquires" into the incompetent's undocumented wishes can validly "find" that, if competent, the latter's choice would have been irrational and against her or his best interests. This means that choices, which are legally impermissible under the best interests standard, may acquire legal force under the standard for substituted judgment.

Strictly speaking, English,[48] Australian,[49] Canadian[50] and New Zealand[51] common law courts (in contrast with statutory enactments) have not adopted the "substituted" or "surrogate" consent doctrine. However, the doctrine has exerted a profound influence in these countries on the way the legislature and some judges interpret the best interests standard. For example, Butler-Sloss LJ in the Court of

[46] Kant E, *The Foundations of the Metaphysics of Morals* (1785) in IV *The Philosophy of Immanuel Kant* (trans Beck) (University of Chicago Press, Chicago, 1949) p 87.
[47] *Airedale NHS Trust v Bland* [1993] AC 789 at 863-864 (Lord Goff); at 857 (Lord Keith); at 826-827 (Lord Hoffmann). The case involved withdrawal of medically administered nutrition and hydration from a patient in a persistent vegetative state. See also *Re MB (Adult: Medical Treatment)* [1997] 2 FLR 426 at 432; *Pretty v United Kingdom* (2002) 35 EHRR 1; and *Re B (Consent to Treatment: Capacity) v An NHS Hospital Trust* [2002] 2 All ER 449; [2002] EWHC 429 (Fam).
[48] *Re F* [1990] 2 AC 1; *Airedale NHS Trust v Bland* [1993] AC 789 at 817 (Butler-Sloss LJ in the Court of Appeal); at 872 (Lord Goff of Chieveley in the House of Lords).
[49] *Secretary, Department of Health and Community Services (NT) v JWB and SMB (Marion's Case)* (1992) 175 CLR 218.
[50] *Re Eve* (1986) 31 DLR (4th) 1 at 34.
[51] *Auckland Area Health Board v Attorney-General* [1993] 1 NZLR 235.

Appeal in *Airedale NHS Trust v Bland* [1993] AC 789[52] noted (at 817) that, in determining the objective best interests of the patient, "his views, personality, how others including his family saw him before his accident will form part of that assessment, although that evidence has a subjective element". There is a very fine balance between endeavouring to maximally benefit the incompetent person by strictly focusing on the actual advancement of her or his wellbeing, and an approach that is governed by such extraneous considerations as the interpretation by third parties of the individual's views and family values. As much was acknowledged by Hoffmann LJ (as he then was) in *Airedale v Bland*, when he commented (at 833) that the best interests of the incompetent patient include, inter alia:

> having respect paid to what seems most likely to have been his own views on the subject. To this extent I think that what the American courts have called "substituted judgment" may be subsumed within the English concept of best interests.

His Lordship stated that the assessment of a patient's best interests should comprise the following considerations (at 845):

> (i) If the patient has, while mentally competent, expressed unequivocal refusal or consent to the course of action proposed, the best interests of the patient are served by respecting the patient's wishes. (ii) If there is no or no clear evidence of the patient's actual wishes, but there is satisfactory evidence of what the patient would have wanted in the prevailing circumstances, his best interests will generally accord with what he would have wanted. (iii) If it is impracticable to determine the patient's best interests by either of the foregoing tests, the decision-maker must decide what are the patient's objective best interests in all the circumstances, taking into account evidence of any religious or other relevant belief that the patient may have had before becoming incompetent.

Hoffmann LJ added (at 851) that under the best interests test,

> where it is not possible to know the patient's wishes, the decision-maker rather than the patient has to act reasonably to decide what is, in an objective sense, in the patient's best interests [for] [i]t does not advance the analysis to attempt to guess at the patient's wishes, when none have been expressed.

Despite the injunction against making presumptions without sufficient information regarding the incompetent patient's wishes, Lord Hoffmann's second consideration (where "there is no or no clear evidence of the patient's actual wishes") comes very close to the concept of substituted judgment. No

definition is provided of what constitutes "satisfactory evidence" of the patient's wishes, even though "his best interests will generally accord with what he would have wanted".

The nature of evidence propounded to establish these choices

How much weight should be placed on past statements of those who were once competent? How far into the now-incompetent person's past should the law delve? What is the probative value of such statements? Cooper J, delivering the opinion of the Court of Appeal of Kentucky in *Woods v Commonwealth* 142 SW 3d 24 at 41 (2004), observed that the substituted judgment inquiry into statements of preference once made by now-incompetent patients does not provide for the eventuality that they may have changed their mind in the interim.[53] To stress this point, his Honour (at 41) quipped: "I don't want to live to be 100, but ask me again when I'm 99."

Indeed, apprehension about the virtual irrevocability[54] and the underlying ambiguity[55] of directions for withholding of life-saving or life-sustaining treatment made in anticipation of some

[52] Anthony David Bland, at the age of 17, sustained a severe crushed chest injury which caused catastrophic and irreversible damage to the higher functions of his brain. At the age of 21 he was diagnosed as being in a PVS. The question before the courts was whether his life-supports through a nasogastric tube could be lawfully withdrawn.
[53] Cooper J referred to Strasser M, "Incompetents and the Right to Die: In Search of Consistent Meaningful Standards" (1994-95) 83 Kentucky LJ 733 at 747.
[54] But see *HE v A Hospital NHS Trust* [2003] 2 FLR 408 at 422, in which Munby J held that the advance directive did not survive the adult patient's decision to abandon being a Jehovah's Witness and revert to Islam.
[55] *W Healthcare NHS Trust v H* [2005] 1 WLR 834. For a discussion see Willmott L, White B and Howard M, "Refusing Advance Refusals: Advance Directives and Life-sustaining Medical Treatment" (2006) 30 MULR 7.

future incapacitating condition contribute to the unpopularity of "living wills".[56] To overcome these concerns in Queensland, the *Powers of Attorney Act 1998* (Qld), s 103(1), specifically protects medical practitioners (and by default their patients), who do not comply with an advance health directive, which is uncertain or inconsistent with good medical practice, or where circumstances, including advances in medical science, have made the terms of the direction inappropriate. In Victoria, adult patients of sound mind can execute a refusal of treatment certificate[57] directing doctors, in the event of loss of capacity, to withhold or withdraw a specific or a general medical treatment for a particular "current condition". However, these instruments, too, are rarely implemented.[58]

Numerous jurisdictions have enacted statutory provisions whereby adults of sound mind can appoint an agent (or an alternate agent) with the enduring power of attorney to refuse medical treatment, including life-saving treatment and continuing administration of life support systems, after they become incompetent.[59] As a general rule, decision-making standards for such agents (or legally appointed guardians) include a reference to "reasonable grounds for believing that the incompetent person, if competent, would consider that the medical treatment is unwarranted",[60] thus incorporating the substituted judgment doctrine.

Agents with enduring powers of attorney and legal guardians appointed to make treatment decisions tend to be close relatives or friends of the incompetent person. In the case of agents, in particular, there is a presumption that the donors of the power, while competent, would have discussed their wishes and preferences with the donee-agents.[61] Nonetheless, when no validly executed instruments documenting the views and wishes of the now unconscious patient are available, third parties making decisions under the substituted judgment doctrine invariably rely on hearsay.[62] Recollections of past conversations, scattered remarks and comments would be considered in any other circumstances to be unreliable and inadmissible as hearsay. The issue of the kind and nature of admissible evidence relating to the prior wishes of the now-incompetent person was discussed in *Cruzan v Director, Missouri Department of Health* 497 US 261 (1990). Nancy Cruzan was diagnosed with a persistent vegetative state as a result of a motor car crash, and her family argued that her life-supports should be withdrawn. The Supreme Court of the United States determined that clear and convincing evidence of the incompetent person's desire to have life-sustaining

treatment withdrawn must be presented by the surrogate decision-maker. Rehnquist CJ, joined by White, O'Connor, Scalia and Kennedy JJ, affirmed the decision of the Supreme Court of Missouri in *Cruzan v Harmon* 760 SW

[56] In the United States, see Hanson LC and Rodgman E, "The Use of Living Wills at the End of Life. A National Study" (1996) 156 *Archives of Internal Medicine* 9; Teno JM, Licks S, Lynn J et al, "Do Advance Directives Provide Instructions That Direct Care? SUPPORT Investigators' Study to Understand Prognoses and Preferences for Outcomes and Risks of Treatment" (1997) 45 *Journal of American Geriatric Society* 508; Fagerlin A and Schneider CE, "Enough: The Failure of the Living Will" (2004) 34(2) *Hastings Center Report* 30; Michalowski S, "Advance Refusals of Life-sustaining Medical Treatment: The Relativity of an Absolute Right" (2005) 68 Mod L Rev 958.
[57] The *Medical Treatment Act 1988* (Vic) is a typical example of such legislation. For discussion see Mendelson D, "Medico-legal Aspects of the 'Right to Die' Legislation in Australia" (1993) 19 MULR 112.
[58] Taylor DMcD, Ugoni AM, Cameron PA et al, "Advance Directives and Emergency Department Patients: Ownership Rates and Perceptions of Use" (2003) 33 *Internal Medicine Journal* 586. A cross-sectional survey of emergency department patients in Victoria found that out of 403 patients surveyed, only 32 patients (7.9%) owned an advance directive of any kind. See also Brown M, "The Law and Practice Associated with Advance Directives in Canada and Australia: Similarities, Differences and Debates" (2003) 11 JLM 59; Blackmer J & Ross L, "Awareness and Use of Advance Directives in the Spinal Cord Injured Population" (2004) 40 *Spinal Cord* 581.
[59] In Australia: *Medical Treatment Act 1988* (Vic), s 5B; guardians appointed under the *Guardianship and Administration Board Act 1986* (Vic) are granted the same powers to refuse medical treatment on behalf of the represented persons as agents appointed under an enduring power of attorney; *Guardianship Act 1987* (NSW), Pt 2, ss 5-6N; *Powers of Attorney Act 1998* (Qld), Pt III, s 35; *Guardianship and Administration Act 1995* (Tas), Pt 5; *Guardianship and Administration Act 1990* (WA), Pt 9, s 119.
[60] *Medical Treatment Act 1988* (Vic), s 5B(2)(b).
[61] For an in-depth discussion see Mendelson D, "Historical Evolution and Modern Implications of Concepts of Consent to, and Refusal of, Medical Treatment in the Law of Trespass" (1996) 17 *Journal of Legal Medicine* 1; McLean S (ed), *Medical Law and Ethics: The International Library of Essays in Law and Legal Theory* (Ashgate Publishing, Aldershot, 2002) pp 111-183.
[62] *Re Conroy* 98 NJ 321; 486 A 2d 1209 (1985).

2d 408 at 424 (1988), 426 that Nancy Cruzan's statements to her friend regarding her desire to live or die under certain conditions were "unreliable for the purpose of determining her intent", and thus insufficient to support the third party's claim to exercise substituted judgment on her behalf.[63] However, such hearsay statements have been accepted in subsequent cases. In general, given the hearsay nature of the propounded evidence, even "clear and convincing" standard of proof is not much less fictitious than the doctrine.

How does one provide substituted consent in relation to persons who have never been competent?

In *Woods v Commonwealth* 142 SW 3d 24 (2004), Mr Woods, at the age of 54, suffered a cardiopulmonary arrest which resulted in cessation of all his normal brain functions. Before then, he was mildly retarded, and had a judicially appointed legal guardian. It was accepted that he "probably never had the capacity to decide whether he would have wanted life-supporting measures discontinued if he ever required such measures".[64] The question before the court was the nature of the standard that Mr Woods' guardian should apply while deciding whether to agree to a withdrawal of all life-sustaining treatment, except for artificially administered nutrition and hydration until his ward's death.[65] The majority, without specifying the standard, held (at 51) that a surrogate could provide consent to withhold or withdraw life-prolonging treatment from a patient who was permanently unconscious or in a persistent vegetative state without prior judicial approval, so long as all interested parties agreed.

This approach represents the reality of treatment decisions for the vast majority of incompetent patients. Medical personnel together with third parties tend to make decisions which are clinically reasonable and ethically sound. Whether or not they correspond with decisions the patients would have made had they been competent is strictly moot. Then why should we avoid taking responsibility for our decisions and choices by hiding behind the fiction of "substituted judgment" or "substituted consent"?

Conflict of interest and substituted judgment

In *Re Estate of Longeway* 133 Ill 2d 33 (1989), which concerned abatement of life-sustaining treatment for an incompetent patient, Ward J in dissent (at 64) observed that although surrogates – including family, guardians or judges – notionally place themselves in the position of the incompetent person, in reality they

use their own subjective standards and personal value systems when judging the incompetent person's quality of life, wishes and desires. One may add that in a situation where there is a conflict of interests, the competent decision-maker may well – consciously or unconsciously – disregard such conflict when deciding that the incompetent person would have wished to consent or to refuse a particular treatment, including life-saving treatment. Lord Eldon recognised this problem when he expressed misgivings in *Ex parte Whitbread* (at 101-102; 878) about the reliance by the Court of Chancery on the advice of lunatics' family in the matters of property administration:

> It has, however, become too much the practice that, instead of such persons [relatives] confining themselves to the duty of assisting the Court with their advice and management, there is a constant struggle among them to reduce the amount of the allowance made for the Lunatic, and thereby enlarge the fund which, it is probable, may one day devolve upon themselves.

There are no reasons to suppose that such considerations are excluded from substituted judgment decisions made by the family, particularly in relation to withdrawal or withholding of medical treatment, and harvesting of sperm or eggs from incompetent, dying or dead males and females.

63 In Australia, see on this issue, *Gardner; Re BWV* (2003) 7 VR 487; [2003] VSC 173 at [19], [20].
64 *Woods v Commonwealth* 142 SW 3d 24 at 52 (2004) (Wintersheimer J in dissent).
65 The question involved the applicability of the Kentucky *Living Will Directive Act*, KRS 311.621 to KRS 311.643. It allowed the Commonwealth of Kentucky, as a guardian, to authorise the withdrawal of life-sustaining medical treatment from a lifelong incompetent ward of the State.

Lack of voluntariness

Legal concerns relating to the issue of free and voluntary consent (or refusal) of medical interventions under the substituted consent doctrine were articulated in 1975, when Price and Burt,66 in their seminal article on the non-therapeutic sterilisation of persons who were never competent,67 noted:

> This type of consent [substituted consent] is really nothing short of an extended conceit on the proposition of voluntariness. By characterizing the transaction as "consensual" rather than "compulsory," third-party consent allows the truly involuntary to be declared voluntary, thus bypassing constitutional, ethical, and moral questions, and avoiding the violation of taboos. Third-party consent is a miraculous creation of the law-adroit, flexible, and useful in covering the unseemly reality of conflict with the patina of cooperation.

More recently, the issue of consent in relation to adults without legal capacity has arisen in Australia (and elsewhere) when relatives apply to the court for an order to remove and store spermatozoa and body tissue from their husbands or children68 who either had suffered severe and irreversible brain damage,69 or had died.70 In *Re Gray* [2001] 2 Qd R 35; (2001) 117 A Crim R 22, Chesterman J pointed out that harvesting sperm from an incompetent patient who is still alive as against a corpse poses somewhat different ethical and legal issues.71 Nonetheless, in both cases, absence of documented evidence that the individual, if competent or alive, would have agreed to such procedure for the purpose of posthumous conception means that authorising such procedures involves substituted consent.

Thus far in Australia, in several jurisdictions cases relating to gamete harvest without documented consent have been determined by a single judge of the relevant Supreme Court or a tribunal. In a number of cases, the courts have reached diametrically opposed conclusions on very similar, or even identical,72 facts. As a general rule, the granting or refusal of an order for removal and storage of sperm depends on whether the court employs the standard of best interests of the incompetent, dying or deceased individual, or the substituted judgment based on finding the supposed wishes of that person as articulated by his family. Although such requests are yet to come before the courts, it is now also possible to harvest ovaries and preserve eggs of an incompetent or dead woman for posthumous conception. The arguments presented below are essentially relevant to both males and females.

In one of the early cases, *MAW v Western Sydney Area Health Service* (2000) 49 NSWLR 231, the wife requested the court to order removal of her husband's sperm and body tissue after he was rendered comatose following a vehicular collision. The couple were married for seven years and had no children.

O'Keefe J (at [17]) did not find evidence that before the accident the husband consented to the removal of semen from his body in such circumstances. His Honour adopted the best interest standard, and determined (at [22]) that the taking of semen from the husband was neither "necessary for the patient in any relevant health sense" nor therapeutic. Consequently, the parens patriae

66 Price ME and Burt RA, "Sterilization, State Action, and the Concept of Consent" (1975) 1 Law & Psychology Rev 57 at 58 (footnotes omitted); see also *Conservatorship of Valerie N* (1985) 40 Cal 3d 143 at 175; 707 P 2d 760 at 782 (Bird CJ in dissent).
67 At the time when Price and Burt were writing, compulsory sterilisation had been codified in 29 American States since 1907: *Indiana Acts* Ch 215 (1907). The law relating to sterilisation has changed since then.
68 In *Fields v Attorney-General (Vic)* [2004] VSC 547, Coldrey J granted an application by the parents for an order for the removal of spermatozoa and associated tissue from a young man who died as a result of a car accident.
69 *MAW v Western Sydney Area Health Service* (2000) 49 NSWLR 231; initially *Y v Austin Health* (2005) 13 VR 363; [2005] VSC 427.
70 For example, *Re Gray* [2001] 2 Qd R 35; (2001) 117 A Crim R 22; *Y v Austin Health* (2005) 13 VR 363; [2005] VSC 427; *Re Denman* [2004] 2 Qd R 595; [2004] QSC 70.
71 A dead body is nullius in rebus (owned by no one), and unless legally authorised, no one is entitled to interfere with it: *Doodeward v Spence* (1908) 6 CLR 406; *Dobson v North Tyneside Health Authority* [1997] 1 WLR 596. The *Criminal Code* (Qld), s 236, provides: "Any person who, without lawful justification or excuse, … (b) improperly or indecently interferes with, or offers any indignity to, any dead human body … is guilty of a misdemeanour …" See also the *Criminal Code* (NT), s 140(b), which makes it an offence to improperly or indecently interfere with or offer any indignity to any dead human body.
72 *AB v Attorney-General (Vic)* (unreported, 13 July 1998, Gillard J); *AB v Attorney-General (Vic)* [2005] VSC 180 (Hargrave J).

jurisdiction, in which "the paramount consideration is the promotion of the health or welfare of the subject of the exercise of the jurisdiction" (at [31], [41]), did not extend to enabling the court to consent, on behalf of the comatose and dying man, to a non-therapeutic surgical procedure such as removal of the spermatozoa.[73]

In *Re Gray* [2001] 2 Qd R 35(2001) 117 A Crim R 22, the couple lived together for some 14 years, and had one child when the husband died suddenly in 2000 at the age of 37. The wife, who was 41 years old at the time, applied for a court order to allow surgical removal of a section of testicle and extraction of semen. Although while alive, the husband apparently discussed with the applicant the possibility of having another child, the possibility of her impregnation by semen taken after his death was not addressed. Chesterman J refused to grant the order, and (at [11]) agreed with the following passage from O'Keefe J's judgment:

> [O]perative procedures that are not necessary to preserve the life or ensure improvement or prevent deterioration in the physical or mental health or wellbeing of an incapable person are not able to be consented to by the Court under its parens patriae jurisdiction.[74]

Chesterman J (at [11]) commented that it is impossible to invoke parens patriae jurisdiction "in the case of a body from which life has departed".

In contrast, Habersberger J in *Y v Austin Health* (2005) 13 VR 363; [2005] VSC 427, adopting a substituted judgment approach,[75] granted permission to remove sperm and associated tissue from the body of the deceased husband, where the childless couple were together for 14 years, including seven years of marriage. The application to remove sperm was made while the husband was still alive though incompetent, and it was acknowledged (at [8]) that he was neither aware of the wife's application nor had consented to any of the orders sought by her. Habersberger J considered (at [68]) "that the balance of convenience clearly required that the application be granted. If it was refused, then the plaintiff could never become pregnant by the deceased."[76]

Habersberger J (at [69]) was critical of O'Keefe J's reasoning,[77] and instead relied on the judgment of Gillard J in *AB v Attorney-General (Vic)* (unreported, 13 July 1998), where AB, the widow of a man who was killed in a motor vehicle collision on 12 July 1998, requested removal of sperm from his body. The couple had no children (they were together for a total of 12 and a half years, including eight years and two months of marriage). Gillard J granted an order for removal and storage of sperm and associated tissue from the body of the deceased husband, on condition that such sperm not be used for any purpose without an order of the Supreme Court of Victoria.

Seven years later, in *AB v Attorney-General (Vic)* [2005] VSC 180, AB asked the Supreme Court of Victoria for a declaration that Victorian law did not prohibit the use of the sperm from her deceased husband, together with her ovum, to form outside of her body an embryo and to transfer that embryo to her body in an attempt to become pregnant (IVF). Hargrave J determined that at the time the sperm was harvested from the deceased man's body, AB was his widow not his wife (as required by the legislation). Since the husband, while alive, did not consent to the proposed IVF procedure, it was unlawful under the *Infertility Treatment Act 1995* (Vic), s 12(3), to use an embryo formed with such

[73] O'Keefe J's approach in *MAW v Western Sydney Area Health Service* (2000) 49 NSWLR 231 was followed by Chesterman J in *Re Gray* [2001] 2 Qd R 35; (2001) 117 A Crim R 22 at [11]; *Baker v Queensland* [2003] QSC 2; and by Hargrave J in *AB v Attorney-General (Vic)* [2005] VSC 180.
[74] In *MAW v Western Sydney Area Health Service* (2000) 49 NSWLR 231 at [40].
[75] Habersberger J followed Atkinson J in *Re Denman* [2004] 2 Qd R 595; [2004] QSC 70, and Coldrey J in *Fields v Attorney-General (Vic)* [2004] VSC 547. Coldrey J determined on the balance of convenience that an application by a deceased man's parents to harvest sperm from his body should be granted. In *Fields*, the couple apparently "were attending the Reproductive Biology Unit of the Royal Women's Hospital in an endeavour to conceive a child" (at [3]).
[76] In a postscript, Habersberger J (at [70]) wrote that tests on the spermatozoa and associated tissue removed from the husband's body had revealed that conception would not be possible.
[77] Habersberger J was also critical of Chesterman J in *Re Gray* [2001] 2 Qd R 35; (2001) 117 A Crim R 22.

sperm.[78] His Honour also found (at [106], [121], [122]) that Gillard J (and by implication Habersberger J) should not have made the initial order for the removal of sperm, because it was contrary to the *Human Tissue Act 1982* (Vic), s 44(1). In relation to the common law, citing O'Keefe and Chesterman JJ respectively, Hargrave J concluded (at [129]):

> [T]he parens patriae jurisdiction did not extend to enabling the court to consent, on behalf of the comatose and dying man, to the removal of semen from his body. This was because the procedure of removing his semen could not be said to be for his welfare or protection.

Relying on the fact that unlike Victoria, the Australian Capital Territory and New South Wales do not prohibit women undergoing IVF treatment to use the sperm of a deceased man without his prior consent, AB applied to the Infertility Treatment Authority in Victoria for permission to export the sperm to the Australian Capital Territory. The application was refused on the ground that the sperm would be used in that jurisdiction for a purpose which was prohibited in Victoria. She then applied to the Victorian Civil and Administrative Tribunal (VCAT) for a review of the Authority's refusal.[79] On 20 December 2005, in *YZ v Infertility Treatment Authority* [2005] VCAT 2655 Stuart Morris P granted AB (renamed YZ) permission to transport her deceased husband's frozen sperm from Victoria to New South Wales for IVF treatment. Morris P noted (at [1]) that the VCAT proceedings concerned "the scope, nature and exercise of a discretion to permit the sperm to be taken to another State of Australia to enable its use" rather than the question of the legality of the proposed conduct, which was determined by Hargrave J in the Supreme Court. Notwithstanding, his Honour exercised substituted judgment when he stated (at [13]) that, based on the widow's and the family's 2005 oral testimony before the Tribunal, the deceased (named XZ) "had clearly expressed an intention to have a child or children with YZ in the near future. I find that this was part of his life plan." In other words, in permitting the widow to export the sperm to be used for the begetting through the IVF procedure of an orphan child some eight years or more after his death, the judge was merely fulfilling the wishes of the deceased.

In the AB/YZ case it was the widow who applied for permission to extract the sperm and use it for insemination of her own ovum. In a recent case in Israel[80] concerning a young soldier who was shot dead by a Palestinian sniper in 2002, and whose sperm was extracted and frozen after his death, the Tel Aviv District Family Court, under the doctrine of substituted judgment, allowed parents to use the sperm to inseminate a woman he had never met. The parents successfully argued that "although their son did not leave a written will, he had on many occasions expressed a wish to become a father". While there may be policy reasons for enabling family lines to continue via extraction of sperm after death and using it for insemination of persons unknown to the deceased, this issue should be explicitly discussed rather than obfuscated by the fiction of substituted consent.

CONCLUSION

A decision made by a third party for an incompetent person is never equivalent to a decision by a competent individual. The law should acknowledge that, for as Ward J put it in *Re Estate of Longeway* 133 Ill 2d 33 at 62 (1989), there are "inherent differences between choices made by individuals who are competent and choices made for individuals who are not".
Since we cannot read the incompetent person's thoughts, memories and emotions, we cannot in reality "substitute" our decision-making process and our judgment for those of an incompetent person.

[78] The *Infertility Treatment Act 1995* (Vic), s 12(3), provides: "an embryo must not be used in a treatment procedure to be carried out on a woman, if the sperm used to form the embryo is not the sperm of the [living] husband of that woman, unless –- (a) before the embryo is formed, the man who produced the sperm consented to the use of the sperm to form an embryo to be used in the kind of procedure proposed; or (ii) that man has consented to the use of the embryo in the kind of procedure proposed."
[79] Pursuant to the *Infertility Treatment Act 1995* (Vic), s 149.
[80] Greenberg J, "In Life a Soldier, in Death a Father? Parents of Israeli Killed in Gaza Strip Win Right to Inseminate Woman He Never Knew", *Chicago Tribune* (IL), 29 Jan 2007, Item 2W62W6267245607.

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We can, and do, impose our will and judgment on such people, and we should be held legally and morally responsible for the choices that we make about whether and how to treat those who are incompetent.

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