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Sterilisation of the mentally handicapped

The decision of Mr Justice Wood granting a declaration in respect of the termination of pregnancy and sterilisation of a mentally handicapped woman ([1987] *The Independent*, 14 July) is in two respects unsound in law. First, a court has no power to grant a declaration that a doctor will not be liable for trespass if he operates on a patient without either her consent or the consent of a person legally authorised to give consent in respect of that patient. A judicial declaration can be made only in respect of a legal right, and no such right is known to the law. The judge has purported to create such a right solely by use of the declaration jurisdiction, which is plainly impermissible. Secondly, the judge is mistaken in relying on the statement in *Halsbury* that the *parens patriae* jurisdiction in respect of mentally disordered persons is now entirely governed by statute. The jurisdiction, being based on the common law, is, unlike a jurisdiction conferred by statute, capable of extension to meet new needs. As Lord Denning said in *Re S* [1965] 1 WLR 483, 488 the High Court 'exercises the power of the Crown as *parens patriae* and its jurisdiction is not to be taken away without express words'. There are no express statutory words that take away what must be surely treated as a power under this expansive jurisdiction to give or withhold consent to medical treatment of adults who are mentally incapable of consenting for themselves or authorising others to consent for them. It is submitted that what the judge ought to have done was give this consent.

{*The Law Society's Gazette,* 26 August 1987.} LSG5 1987.002