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ANNOTATIONS AND ARTICLES/ANNOTATIONS ET ARTICLES

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(CASES REPORTED CONTINUED ON THE BACK COVER)

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Trying to Put the Genie Back in the Lamp: *U. (C.) (Next friend of) v. Alberta (Director of Child Welfare)*

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In the fairy tale Aladdin and the Magical Lamp, the young man Aladdin rubs an old lamp and releases a genie that grants him wishes. This story is a good metaphor for growing up. The moral of the story is that when we achieve maturity, we have the power to control our life and are expected to live with the results. We cannot be forced to return to the comfort and dependence of childhood. Once we grow up, society respects and upholds our decisions.

The Court of Appeal of Alberta in its recent decision in *U. (C.) (Next friend of) v. Alberta (Director of Child Welfare)*[1] might have found Aladdin's story of assistance before it refused to adopt the mature minor rule.[2]

In this disappointing and regressive judgment, Alberta's highest court turned back the clock on medical consent and flatly refused to accept the law as stated

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[1] *U. (C.) (Next friend of) v. Alberta (Director of Child Welfare)*, 2003 CarswellAlta 300, 34 R.F.L. (5th) 181 (Alta. C.A.), on appeal from 2000 CarswellAlta 967, [2001] 3 W.W.R. 575 (Alta. Q.B.).

[2] The mature minor rule is expressed in Rozovsky, *The Canadian Law of Consent to Treatment* (Butterworths: Toronto 1990) at page 55 as:

> ... when a child is capable of giving consent, the child is to be regarded as an adult for the purposes of treatment. This is sometimes referred to as the "mature minor" principle. Therefore, no other parties such as parents need be asked for their consent. Any disagreement between a parent and a child is irrelevant, since the child is capable of consenting to his or her own treatment.
>
> Even though a child is within the age which authorizes a children's aid society or some other social welfare agency to take the child away from the parents, the agency has no rights beyond those which the parents had. If the parents had no right to prevent or force treatment, because of the child's capability, the agency has no greater rights.

As a common-law rule it has been accepted as long ago as 1910: see *Booth v. Toronto General Hospital*, 1910 CarswellOnt 453, 17 O.W.R. 118 (Ont. Ex. Ct.).

by appeal courts of three other provinces and trial courts of at least three more.[3] Lawyers will be alarmed at the almost unlimited power accorded to the provincial legislature in child welfare matters.

C.U. was a 16½-year-old girl who consented to surgery for unusual menstrual bleeding.[4] The young woman was one of Jehovah's Witnesses and did not want blood transfusions. Although her mother was not of the same church, both parents supported their daughter in her medical decision. That C.U. was a mature minor was undisputed.

The Alberta *Child Welfare Act* defines a "child" as "a person under the age of 18 years."[5] The Director of Child Welfare apprehended C.U. and obtained an order

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[3]*Walker (Litigation Guardian of) v. Region 2 Hospital Corp.*, 4 R.F.L. (4th) 321, 1994 CarswellNB 24 (N.B. C.A.); *Kennett Estate v. Manitoba (Attorney General)*, 42 R.F.L. (4th) 27, 1998 CarswellMan 348 (Man. C.A.); *Van Mol (Guardian ad litem of) v. Ashmore*, 58 B.C.L.R. (3d) 305, 1999 CarswellBC 43 (B.C. C.A.); *Y. (A.), Re*, 111 Nfld. & P.E.I.R. 91, 1993 CarswellNfld 105 (Nfld. U.F.C.); *Children's Aid Society of Metropolitan Toronto v. K.*, 48 R.F.L. (2d) 164, 1985 CarswellOnt 318 (Ont. Fam. Ct.); *D. (T.T.), Re*, [1999] 6 W.W.R. 327, 1999 CarswellSask 160 (Sask. Q.B.). In *Y. (A.)* and *Children's Aid Society of Metropolitan Toronto v. K.*, the court respected the choices of the mature young person while still applying the child welfare legislation.

[4]*U. (C.)*, supra, footnote 1; the facts are from the reasons of Russell J.A. for the Court of Appeal.

[5]*Child Welfare Act*, R.S.A. 2000, c. C-8, s.1(1)(d). Other provinces have similar age thresholds in child protection legislation, but unlike Alberta, all but Nova Scotia provide separate legislative recognition that capable minors have capacity to consent to treatment: e.g., British Columbia: *Infants Act*, R.S.B.C. 1996, c. 233, s. 17(2), "an infant may consent to health care"; Saskatchewan: *The Health Care Directives and Substitute Health Care Decision Makers Act*, S.S. 1997, c. H-0.001, s. 3, "Any person 16 years of age or more who has the capacity to make a health care decision may make a directive"; Manitoba: *The Health Care Directives Act*, S.M. 1992, c. 33, C.C.S.M. c. H-27, s. 4(2), "In the absence of evidence to the contrary, it shall be presumed ... a person who is 16 years of age or more has the capacity to make health care decisions"; Ontario: *Health Care Consent Act, 1996*, S.O. 1996, c. 2, Sch. A s. 4(2), "A person is presumed to be capable with respect to treatment"; Quebec: *Civil Code of Québec*, S.Q. 1991, c. 64, art. 14, "A minor 14 years of age or over, however, may give his consent alone to care"; New Brunswick: *Medical Consent of Minors Act*,, S.N.B. 1976, c. M-6.1, s. 3(1), "The law respecting consent to medical treatment of persons who have attained the age of majority applies, in all respects, to minors who have attained the age of 16 years"; Prince Edward Island: *Consent to Treatment and Health Care Directives Act*, R.S.P.E.I. 1999, c. C-17.2, s. 3(1), "Every person is presumed to be capable of ... giving or refusing consent to treatment"; Newfoundland and Labrador: *Advance Health Care Directives Act*, S.N. 1995, c. A0-4,1, s. 7, "a person who is 16 years of age or older is competent to make health care decisions".

in provincial court forcing her to submit to blood transfusions against her wishes and those of both her parents.

The treating physician testified C.U. "appeared composed and that her vital signs had improved since her admission to hospital" and that "a transfusion would be required in 20% of such cases, but would be given only if necessary to save the appellant's life." The trial judge made a treatment order without reasons.

Unfortunately, the trial court's proceedings were not recorded, due to technical problems, and the judge destroyed his notes. On appeal to the Superior Court, affidavit evidence as to the trial proceedings was relied upon. Affidavits from a psychiatrist (indicating that C.U. had capacity to consent) and a gynecologist regarding the need for blood transfusions were admitted but not read.

The Superior Court judge recognized the mature minor rule as a common-law right, but ruled that the *Child Welfare Act* is a complete code and overrules a child's or parent's right to medical consent. He also ruled the Act consistent with the *Canadian Charter of Rights and Freedoms* and if not, saved under the s. 1. limitation clause. C.U. appealed.

The issue was whether the mature minor doctrine estops either the Alberta legislature or judicial *parens patriae*[6] power from overriding a mature minor's capacity. In practical terms, does the state or court have the power to reject the medical treatment choices of a mature minor?

The Courts of Appeal of New Brunswick, Manitoba and British Columbia have said no, joined by the Superior Courts of Newfoundland, Saskatchewan and Ontario.[7] On February 26, 2003 the Alberta Court of Appeal rendered its decision. It is the first appellate court to take a contrary view.

The decision creates uncertainty in the crucial field of medical consent across Canada. Justice Russell, for the rest of the court, missed a golden opportunity to settle this vital area of the law by a confused discussion of pertinent legal principles.

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[6]The scope and development of the doctrine of *parens patriae* was exhaustively set out by LaForest J. in *Eve, Re*, 13 C.P.C. (2d) 6, (sub nom. *E. v. Eve)* [1986] 2 S.C.R. 388, 1986 CarswellPEI 37/22 (S.C.C.), who summarized the jurisdiction as being "founded on necessity, namely the need to act for the protection of those who cannot care for themselves" (at 426 S.C.R.).

Courts should not extend this power to those who, like mature minors, are by definition able to care for themselves.

[7]Supra, footnote 3.

The court sidestepped the important *Charter* rights at issue. Because the appellant chose not to move to strike the offending portions of the Act under s. 52 of the *Charter*, the court said, she lost her right to request s. 24 relief.

This remarkable conclusion will no doubt surprise the trial lawyers in criminal cases who regularly bring motions to exclude evidence or assert rights in the course of hearings. In such cases, without notice, they rely upon the broad power of s. 24 without challenging the governing statute under s. 52. After all, most *Charter* relief is obtained by "reading down" under s. 24 rather than pursuing the notice and evidential challenges that are required to strike a statute under s. 52.

The narrow approach of the court avoided the opportunity to resolve the important constitutional matters in play. This type of issue usually comes before the courts in urgent circumstances.[8] It is regrettable that a court, when finally presented with the opportunity to give sober second thought to such fundamental rights, took a technical way out.

On the substantive issue the court accepted that the trial judge "implicitly found that C.U. was a mature minor." As a matter of law, the court accepted that "no one disputes that a mature minor can provide informed consent nor that a parent cannot overrule such consent."

The court, in *obiter*, speculated on whether the right to consent incorporates the right to refuse. It left that issue for another day.[9]

Instead of considering the consequences flowing from finding C.U. was a mature minor, the court ruled that the *Child Welfare Act* is a complete code. The Act, the court found, "does not grant an exception with respect to mature minors." All any court needs to do if the minor is mature, "is to take [his or her] opinion into consideration."

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[8]The court itself observed when rejecting a mootness argument by the Director that "it is doubtful whether a court could be provided with timely or adequate submissions on such a complex matter in a situation involving inordinate stress and urgency". It is difficult to understand why the court did not feel the same reasoning applied, *a fortiori*, to the constitutional issues.

[9]Whether informed consent incorporates informed refusal has been dealt with by a number of courts. While it may appear a startling proposition that a court would allow a mature minor to accept a treatment but not to refuse it, this position has been argued in several cases. It was given short shrift. "The doctrine of informed consent also obviously encompasses the right to refuse medical treatment" (*Malette v. Shulman*, 2 C.C.L.T. (2d) 1, 1990 CarswellOnt 642, 72 O.R. (2d) 417 (Ont. C.A.), at p. 424 O.R., adopted by Hoyt C.J.N.B. in *Walker* (supra, footnote 3) at 335).

Therefore, the court decided, "a mature minor's wishes respecting medical treatment will not be dispositive of the issue, but rather one factor to be considered in determination of their best interests".

Inconsistently, the court accepted C.U.'s position that judicial power under *parens patriae* was limited by the common-law mature minor rule. This position enabled the court to accept, and distinguish, the appeal courts of British Columbia and New Brunswick.[10] Following this reasoning, any legislative gap that was to be filled by judicial exercise of *parens patriae* is limited by the mature minor rule.

Because, the court said, its jurisdiction over C.U. flows not from *parens patriae* but legislative authority, the mature minor rule is meaningless.

In support of this position, the court gave examples of other legislative overrides of a minor's rights, such as capacity to marry, driver's permits and ineligibility to vote.

This reasoning is flawed.

First, the right to determine what is done with one's body is constitutionally and morally different from the right to drive a car. Voting, marriage, and driving are elective incidents of citizenship a minor does not need in order to enjoy a peaceful life and pursue his or her goals. Medical treatment is a necessary violation of one's body that, absent consent, is battery. The inviolability of the person is the most concrete of human freedoms and goes to the core of the very purpose of our constitution: protecting the individual from the state. We do not force a minor to drive a car, vote or marry. The very examples cited by Justice Russell are things the law does not allow the minor to do. How can we force him or her, if found capable, to submit to medical treatment?

Second, the legislature did not, in the *Child Welfare Act*, expressly oust the mature minor rule. The court addressed this issue by assembling definitions and reviewing the scheme of the Act. The court's reasoning begs the question: if it is obvious that the mature minor rule is ousted, why does the Act not do so clearly? Then any such a specific legislative provision would be subject to a s. 52 challenge.[11]

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[10] *Van Mol*, supra, footnote 3 and *Walker*, supra, footnote 3.

[11] LaForest, J. in *Eve* observed that violating personal autonomy in the analogous case of mental incompetents would then allow "the scrutiny of the courts under the *Canadian Charter of Rights and Freedoms* and otherwise." (supra, footnote 6, at 432 S.C.R.).

Third, the cases the court referred to but distinguished as confined to *parens patriae* did involve legislation.[12] Mature minor cases in other provinces deal with legislation, not just *parens patriae*.[13]

Finally, the court's reasoning would place the provincial legislature not only above judicial *parens patriae* power, but also federal jurisdiction to protect civil liberties. That the provinces have no constitutional competence to do so was long ago put to rest.[14] In effect, by denying any opportunity to raise *Charter* issues, and then deferring to the legislature, the court put provincial power ahead of all other considerations, including s. 7 rights.

This tyrannical power will no doubt come as a surprise to the Supreme Court and legal scholars, who recognize *parens patriae* as the historical power of the Sovereign to act — whether by judicial power under a "gap" principle or through legislation — when vulnerable persons require protection. It is a shield for those who cannot protect themselves. It was not intended to be, and has never been, a sword to be used against the vulnerable person.

Taking the Alberta Court of Appeal's decision to its logical conclusion, the legislature of Alberta granted absolute power to the Director of Child Welfare over any person under the age of 18, without any common law, federal or constitutional safeguards.

No one questions the capacity of a competent adult patient to make his or her own informed medical decisions, regardless of whether others think the choice right or wrong.[15]

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[12]In *Walker* (supra, footnote 3) the court considered application of, among other statutes, the New Brunswick *Family Services Act* as well as the *Medical Consent of Minors Act*, and while *Van Mol* (supra, footnote 3) was a tort action, the court concluded neither the "parent or guardian" would have any right to override the consent of a mature minor, relying on *Walker*. *Eve* (supra, footnote 6), the Supreme Court's seminal decision on *parens patriae*, was a case dealing with the application of the Prince Edward Island *Mental Health Act*.

[13]See cases in footnote 3.

[14]*Saumur v. Quebec (City)*, [1953] 2 S.C.R. 299, 1953 CarswellQue 41 (S.C.C.) at 329 S.C.R.: the "inviolability of the person [is an] original freedom [sanctions against which lie] ... within the exclusive jurisdiction of the Dominion".

[15]*Malette v. Shulman*, supra, footnote 9: "The right of a person to control his or her own body is a concept that has long been recognized at common law. The tort of battery has traditionally protected the interest in bodily security from unwanted physical interference. Basically, any intentional nonconsensual touching which is harmful or offensive to a person's reasonable sense of dignity is actionable. Of course, a person may choose to waive this protection and consent to the intentional invasion of this interest, in which case an action for battery will not be maintainable. No special exceptions are made for medical

On the other hand, no one questions the incapacity of the incompetent adult or a non-mature minor to make medical treatment decisions, or the interest of the state in protecting vulnerable members of society from themselves or others (including parents although presumed to act in their child's best interests).[16]

Between these two extremes, statutory and common-law rules have developed. The statutory age of majority is a benchmark for legal capacity. Different juris-

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care, other than in emergency situations, and the general rules governing actions for battery are applicable to the doctor-patient relationship. Thus, as a matter of common law, a medical intervention in which a doctor touches the body of a patient would constitute a battery if the patient did not consent to the intervention. Patients have the decisive role in the medical decision-making process. Their right of self-determination is recognized and protected by the law. As Justice Cardozo proclaimed in his classic statement: 'Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages'." (citations omitted)

[16]Justice LaForest, in *B. (R.) v. Children's Aid Society of Metropolitan Toronto* (1994), 9 R.F.L. (4th) 157, 1995 CarswellOnt 105/515 (S.C.C.) recognized the important parental/family liberty interests engaged at paragraph 83:

> On that basis, I would have thought it plain that the right to nurture a child, to care for its development, and to make decisions for it in fundamental matters such as medical care, are part of the liberty interest of a parent. As observed by Dickson J. in *R. v. Big M Drug Mart Ltd.*, supra, the *Charter* was not enacted in a vacuum or absent a historical context. The common law has long recognized that parents are in the best position to take care of their children and make all the decisions necessary to ensure their well-being. In *Hepton v. Maat*, [1957] S.C.R. 606, our Court stated (at p. 607): "The view of the child's welfare conceives it to lie, first, within the warmth and security of the home provided by his parents." This recognition was based on the presumption that parents act in the best interest of their child. The Court did add, however, that "when through a failure, with or without parental fault, to furnish that protection, that welfare is threatened, the community, represented by the Sovereign, is, on the broadest social and national grounds, justified in displacing the parents and assuming their duties" (pp. 607-8). Although the philosophy underlying state intervention has changed over time, most contemporary statutes dealing with child protection matters, and in particular the Ontario Act, while focusing on the best interest of the child, favour minimal intervention. In recent years, courts have expressed some reluctance to interfere with parental rights, and state intervention has been tolerated only when necessity was demonstrated. This only serves to confirm that the parental interest in bringing up, nurturing and caring for a child, including medical care and moral upbringing, is an individual interest of fundamental importance to our society.

Justice LaForest at page 381 also adverted to the case of a mature minor who could assert his or her own religious beliefs in rejecting a medical treatment but "the child must be old enough to entertain some religious beliefs in order to do so".

dictions allow drinking at 18 or of 21 years of age. The "rule of sevens"[17] is a judicial fiction that infancy lasts until 7, with increased capacity between 7 and 14 and rebuttable adult capacity from 14 to 21 until chronological adulthood is achieved. The criminal law recognizes *doli incapax*[18] and incorporates common-law defenses.[19] The common law developed exceptions for emancipated minors[20] who were married, independent or, for example, joined the military in wartime.

Ironically, the best of behavioral science has empirically established what the common-law presumed for centuries. Maturity (or what lawyers label capacity) in a remarkably consistent series of independent research studies and reviews of those studies is a continuum that ends at about age 14.

A Royal Commission in Ontario, adopting the research of Weithorn, concluded:

> In general, minors aged 14 were found to demonstrate a level of competency equivalent to that of adults, according to four standards of competency (evidence of choice, reasonable outcome, rational reasons, and understanding) ...
>
> The findings of this research do not lend support to policies which deny adolescents the right of self-determination in treatment situations on the basis of a presumption of incapacity to provide informed consent. The ages of 18 or 21 as the "cutoffs" below which individuals are presumed to be incompetent to make determinations about their own welfare do not reflect the psychological capacities of most adolescents.[21]

This research challenges the paternalism of judges who would substitute their capacity, and hence their values, for those of an otherwise capable young person like C.U. Rightly, many courts have refused to do so.

In *Walker* the New Brunswick Court of Appeal (sitting *en banc*) ruled that a 15-year-old young man had the capacity to consent to treatment. Once he had such capacity, "there is no room for a court to exercise its *parens patriae* jurisdiction"

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[17]*The Queen v. Smith* (1845), 1 Cox C.C. 260; see Rozovsky, supra, footnote 2, page 4.

[18]*Black's Law Dictionary* (5th) page 433; see also "age of consent", "age of reason" and "age of majority" at page 6.

[19]*Criminal Code*, R.S.C. 1985, c. C-46, s. 8(3).

[20]*Booth*, supra, footnote 2; (although there is a difference in law between an emancipated minor and a mature minor, *quaere* if the factors emancipating a minor would also be determinative of the factual finding as to being a mature minor); see also *Johnston v. Wellesley Hospital* (1970), [1971] 2 O.R. 103 (Ont. H.C.); see also Barbara Landau, *Children's Rights in the Practice of Family Law* (Carswell: Toronto 1986) at page 114

[21]*Enquiry on Mental Competency, Final Report* (Toronto: York University, 1990) chaired by Professor David N. Weisstub, at 147, and quoting Lois A. Weithorn & Susan E. Campbell, "The Competency of Children and Adolescents to Make Informed Treatment Decisions" (1982) 53 Child Development 1589 at 1595, 1596.

and the state "cannot overrule the treatment decision of a competent patient." The court refused to conclude that either the *Medical Consent of Minors Act* or the *Family Services Act* ousted the common-law mature minor rule. In fact, the court found that the former codified the common-law rule (with a variation).[22]

The British Columbia Court of Appeal in *Van Mol*, relying on *Walker*, found a 16-year-old mature minor had "the same capacity as any person of full age and capacity and was entitled to be treated in the same way any person of full age and capacity should have been treated."[23]

In *Kennett*, the Court of Appeal for Manitoba agreed that the provincial child welfare act did not replace "the common law authority of a physician to act upon the directions of a minor who the physician believes is capable of making health care decisions."[24]

Trial courts across Canada have reached the same conclusion in grappling with these issues as they arise.[25]

Where trial judges do not expressly adopt the mature minor rule, they achieve the same result by accepting as determinative the choices of the mature young person under the provisions of child welfare legislation requiring that the child's wishes be considered. In effect, they "read down" the statute in recognition of the minor's capacity.[26]

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[22]*Walker*, supra, footnote 3

[23]*Van Mol*, supra, footnote 3.

[24]*Kennett*, supra, footnote 3.

[25]*D. (T.T.)*, supra, footnote 3: once a finding of mature minor is made, the "Minister's consent is no longer required, the same way that the parent's consent would no longer be required"; *Children's Aid Society of Metropolitan Toronto v. H. (S.)*, [1996] O.J. No. 2578.: "It is agreed by all respondents that, if the finding was made that T.H. was a mature minor, she would have the right to refuse treatment."

[26]*Y. (A.)*: supra, footnote 3: "I think he is mature enough to express a cogent view, and he has expressed it to me, and I am satisfied that he is a mature, young adult. I am also satisfied that it is proper under the Act, and in law generally, for me to take into consideration his wishes, and I do so. His wishes are, that blood products not be administered, and I am satisfied also, that if these wishes are countermanded in some fashion by the Director under an order of this Court, that his best interests would be manifestly, and in a very real sense adversely affected."; *Children's Aid Society of Metropolitan Toronto v. K.*, supra, footnote 3: "Given the intelligence, state of mind and position taken by L.D.K. all of which were known to this hospital, she ought to have been consulted before being transfused. She was not. I must find that she has been discriminated against on the basis of her religion and her age pursuant to subsection 15(1). In these circumstances, upon being given a blood transfusion, her right to the security of her person pursuant to Section 7 was infringed. As a result, even if she could be said to be a child in need of protection,

If *U. (C.)* is a troubling decision for children's rights and family lawyers, it is a potential nightmare for health law practitioners. It upsets principles of medical consent widely accepted and applied in practice. The medical community has adapted to the law in this area. Rozovsky points out how the mature minor rule works in medical practice:

> In fact, it does place the onus on them to get to know their patient — just as it does in the adult treatment context. Practical criteria can be developed and applied in a consistent case-by-case approach which will alleviate these concerns.[27]

Now that the Alberta Court of Appeal has called the application of the mature minor rule into question, physicians must look to the Supreme Court to settle the law. Mitchell, writing in the Ontario Medical Review, recognized "the issue has yet to be decided by the Supreme Court of Canada."[28]

Given the inconsistent and sometimes curious conclusions of the court in *U. (C.)* it is to be hoped that the Supreme Court will do just that.

In one version of the Aladdin story, he consults another genie — the genie of the ring — for help to find the princess. "That is not in my power", said the genie, "I am only the slave of the ring; you must ask the slave of the lamp."

Like the genie of the ring, the Supreme Court, when it inevitably deals with this issue, should realize the law also limits its power. Once a person is mature, their capacity to decide medical treatment is recognized. It cannot be ignored just because someone disagrees with the decision.

Judges may be personally troubled with the consequences of respecting the medical choices of mature minors. Parents know this frustration. It is difficult to stand aside and let grown children make their own way. Parents can disagree with their children's choices. But they recognize that with maturity comes responsibility. Wise judges should too.

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the application must be dismissed pursuant to subsection 24(1) of the Charter. Dismissal is a remedy which I consider appropriate and just in the circumstances. There is no question that this court has that jurisdiction. In granting such relief, I take into consideration the interests of the community, the interests of justice and most importantly, the interests of L.D.K. ... L.D.K. is a beautiful, extremely intelligent, articulate, courteous, sensitive and most importantly, a courageous person. She has wisdom and maturity well beyond her years ... I believe that L.D.K. should be given the opportunity to fight this disease with dignity and peace of mind. That can only be achieved by acceptance of the plan put forward by her and her parents."

[27]Rozovsky, supra, footnote 2 at page 5.

[28]Sack Goldblatt Mitchell, "Minors and the Right to Refuse Treatment", Ontario Medical Review (September 1994) at 95.