Remedy for the Reluctant Parent: Physician's Liability for the Post-Sterilization Conception and Birth of Unplanned Children

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NOTES

REMEDY FOR THE RELUCTANT PARENT:
PHYSICIANS' LIABILITY FOR THE POST-STERILIZATION
CONCEPTION AND BIRTH OF UNPLANNED CHILDREN*

With the rapid proliferation of simple, effective birth control techniques during the last decade, the concept of family planning has been increasingly popularized, and a large segment of American society now employs some method of contraception to avoid the birth of unplanned children. Although the birth control pill remains the most widely used contraceptive, a growing number of families have recently turned to surgical sexual sterilization.

Most contraceptive sterilizations are accomplished either by vasectomy of the male or tubal ligation of the female. Both of these relatively simple surgical procedures are now often performed on an outpatient basis under local anesthesia. Neither operation causes hormonal changes nor do they significantly affect sexual behavior. Given the difficulties experienced by many women with the pill and the intrauterine device, together with the high

*Editor's Note: This note received the Gertrude Brick Law Review Apprentice Prize for the best student note submitted in the spring 1974 quarter.
3. According to estimates developed in the 1970 National Fertility Study conducted by the Office of Population Research, 44% of all births to married women between 1966 and 1970 were unplanned; 15% were reported as never having been wanted. COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE, POPULATION AND THE AMERICAN FUTURE 97 (1972) [hereinafter cited as COMMISSION ON POPULATION GROWTH].
4. See A. Guttmacher, supra note 1, at 313.
5. Approximately 15% of white married couples between the ages of 20 and 39 have had sterilization operations. Thompson, Haverkamp & Drose, Sterilization of the Female, 70 ROCKY Mt. MEDICAL J. April 1973, at 29.
7. Vasectomy is a simple operative procedure that interrupts the vas deferens to prevent sperm from being ejaculated with other components of the semen. Hackett & Waterhouse, Vasectomy — Reviewed, 116 AM. J. OBSTETRICS & GYNECOLOGY 438, 443 (1975).
8. Tubal ligation surgically interrupts the Fallopian tubes so that eggs cannot enter the uterine cavity where fertilization takes place. Thompson, Haverkamp & Drose, supra note 5, at 431.
9. A. Guttmacher, supra note 1, at 333.
12. COMMISSION ON POPULATION GROWTH, supra note 3, at 100.
failure rates of other contraceptive methods, the current interest in voluntary sterilization is understandable.

Predictably, the increasing employment of such sterilization procedures has generated questions involving the legal ramifications of the physician's participation. There has been some concern that the sterilizing physician might be subject to criminal liability, but the current consensus of judicial and scholarly opinion is that the imposition of criminal sanctions is unlikely. Moreover, the consent of the patient would probably be allowed as an excuse in any event.

This note involves another area of present interest: the civil liability of physicians performing voluntary sterilization operations. Of course, such liability may arise from medical negligence involving issues indistinguishable from those encountered in any other medical or surgical procedure. When one who has undergone contraceptive sterilization thereafter becomes a party to the conception and birth of a normal child, however, novel questions of liability and damages may arise in the patient's suit for recovery.

Existence of a Cause of Action

In determining the possible liability of the physician in a case of post-sterilization conception, there are two preliminary questions: first, whether allowing an action by the patient contravenes public policy; and second, whether such an action may be supported as protecting a legally cognizable right in the patient.

Public Policy

Although a fundamental common law principle requires that an injured party be compensated for damages resulting from another's breach of duty, there are some instances in which compelling considerations of public policy have precluded recovery. It first appeared that the post-sterilization conception and birth of a child might be such an instance. In Shaheen v. Knight

18. Id.
19. No case has been found in which a person who consented to a sterilization operation brought suit against an attending physician prior to 1930. Miller & Dean, Liability of Physicians for Sterilization Operations, 16 A.B.A.J. 158, 160 (1930).
23. Id.
the plaintiff, who had undergone a vasectomy because he was financially unable to support additional children, sought to recover for the expense of educating and maintaining a child conceived and born after the operation. The court recognized the legitimacy of a contract for voluntary sterilization, but found that the plaintiff had suffered no legally recognizable damage in connection with his "blessed event": "We are of the opinion that to allow damages for the normal birth of a normal child is foreign to the universal public sentiment of the people. . . . [T]o allow such damages would be against public policy." 23

This conclusion has been rejected in several jurisdictions, including Florida's second appellate district, but the Shaheen perception of the public conscience continues to present a convincing argument to some courts. Affirming a summary judgment against the parents of a healthy child conceived after an unsuccessful tubal ligation, a Texas court recently found that allowing an action to recover the financial expenses of the care and maintenance of the child was precluded by public policy founded upon "recognition of the family's importance to our society." 24

Basing a decision entirely upon the court's perception of public opinion is a disconcerting judicial practice. Courts may properly declare and apply the public policy of the community only when it is the subject of a virtual unanimity of opinion. 25 While the Shaheen decision recognized this principle, the court's consistency in its application is debatable. After finding no public consensus against the practice of voluntary sterilization, the court nevertheless must necessarily have observed popular agreement that injuries resulting from the failure of sterilization to prevent childbirth are not worthy of legal redress. 26 The court's determination that the purpose of sterilization was condemned by the same public that found contraceptive sterilization itself unobjectionable is apparently inconsistent.

Additionally, courts making policy decisions may rely upon outdated judicial pronouncements of public opinion that, although accurate when made, are not representative of the current conviction of the community. The Shaheen court cited a decision that antedated its deliberations by 110 years

22. Id. at 43.
23. Id. at 45-46; accord, Hays v. Hall, 477 S.W.2d 402 (Tex. App.), rev'd on other grounds, 488 S.W.2d 412 (Tex. 1972); Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964).
27. Id. at 127.
for the proposition that: "The great end of matrimony is not the comfort and convenience of the immediate parties . . . but the procreation of a progeny having a legal title to maintenance by the father . . .\"31

The assertion that recovery of expenses related to childbirth would be repugnant to a general belief that the principal purpose of marriage is procreation is hardly supportable today.25 The widespread use of contraceptive devices,26 state27 and federal28 government support and advancement of birth control, and the growing public awareness of the consequences of threatened overpopulation29 all evidence a contrary public consciousness.

Furthermore, there are several axioms of "social engineering"30 that support recovery. One is that losses, which must necessarily fall upon one party or another, should be borne by the individual best able to distribute the risk of loss through such mechanisms as fee adjustments and liability insurance.31 Another is that the threat of liability to one in control of a transaction or interaction with another furnishes a strong incentive for him to prevent the occurrence of potential harm.32 While such considerations are not controlling, they are nevertheless significant in mitigating against a denial of recovery upon public policy grounds.

Interest Protected

Aside from the policy debate concerning the propriety of such a course, strong legal arguments exist for judicially protecting the right of persons to prevent the birth of unplanned children. That such a right is included within a broader constitutional guarantee of personal privacy33 was first suggested in Griswold v. Connecticut,34 in which the United States Supreme Court found that a state statute outlawing voluntary birth control "would unjustifiably

33. See A. GUTTMACHER, supra note 1.
34. See, e.g., CAL. WELF. & INST. CODE §§14500-501 (West Supp. 1974); FLA. STAT. §§381.381 (1973) (directing the Dep't of Health & Rehabilitative Services to implement a comprehensive family planning program designed to include prescription for and provision of all medically recognized methods of contraception to citizens of childbearing age).
38. See generally Freezer, Capacity To Bear Loss as a Factor in the Decision of Certain Types of Tort Cases, 78 U. PA. L. REV. 805 (1930).
39. See W. PROSSER, supra note 20, §§ at 23.
40. It is said that this broad right of privacy embraces other areas, but it is presently established only in the area of procreative self-determinations. See Commentary, Pregnancy, Privacy, and the Constitution: The Court at the Crossroads, 25 U. FLA. L. REV. 779, 788 (1973).
41. 381 U.S. 479 (1965).
intrude on rights of marital privacy which are constitutionally protected.\textsuperscript{42} Although \textit{Griswold} tailored the scope of its holding to the facts of the case, dictum in \textit{Eisenstadt v. Baird}\textsuperscript{43} indicated that the guarantee of procreative self-determination is an individual right\textsuperscript{44} not limited to the context of a marital relationship.\textsuperscript{45}

Further uncertainty, engendered by the fragmentation of the \textit{Griswold} decision into four divergent opinions by the majority concerning the constitutional source of the right,\textsuperscript{46} was recently dispelled in \textit{Roe v. Wade}.\textsuperscript{47} There, the Court found that a Texas criminal abortion statute\textsuperscript{48} was unconstitutionally overbroad because it failed to distinguish abortions performed early in pregnancy from those performed later, and because it provided legal justification for abortion only when necessary to save the life of the mother.\textsuperscript{49} Basing the guarantee of privacy exclusively on the fourteenth amendment's concept of personal liberty, the Court found that this right includes a woman's decision to continue or to terminate her pregnancy.\textsuperscript{50}

\textit{Griswold}, \textit{Eisenstadt}, and \textit{Wade} appear to have firmly established the proposition that the constitutional guarantee of personal privacy encompasses a right of procreative self-determination.\textsuperscript{51} If a person has the constitutionally protected right to prevent potential pregnancy with contraceptive devices and to terminate existing pregnancy by surgical abortion, it would seem clear that the decision to prevent the same pregnancy by contraceptive sterilization is also within the established scope of that right. Although not unqualified,\textsuperscript{52} the right is fundamental,\textsuperscript{53} and it is unlikely that there exists a compelling state interest sufficient to subject the decision to sterilize to any significant legal restriction.

In \textit{Wade} the Court decided that the legitimate state interest in preserving and protecting the health of the pregnant woman\textsuperscript{54} does not become compelling until mortality in abortion is no longer less than mortality in normal childbirth.\textsuperscript{55} Because the risk of death from tubal ligation compares favorably

\begin{itemize}
\item \textsuperscript{42} \textit{Id.} at 497.
\item \textsuperscript{43} 405 U.S. 438 (1972).
\item \textsuperscript{44} "If the right of privacy means anything, it is the right of the individual married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." \textit{Id.} at 453.
\item \textsuperscript{46} \textit{See} Emerson, \textit{Nine Justices in Search of a Doctrine}, 64 MICH. L. REV. 219 (1965).
\item \textsuperscript{47} 410 U.S. 113 (1973).
\item \textsuperscript{49} 410 U.S. at 164.
\item \textsuperscript{50} \textit{Id.} at 153.
\item \textsuperscript{51} \textit{See} note 40 \textit{supra}.
\item \textsuperscript{52} 410 U.S. at 154-55.
\item \textsuperscript{53} \textit{Id.} at 152, 155.
\item \textsuperscript{54} The second important and legitimate state interest recognized by the Court, that of protecting the "potential life" of a viable fetus, \textit{id.} at 162-63, does not pertain to instances of contraceptive sterilization.
\item \textsuperscript{55} \textit{Id.} at 163.
\end{itemize}
to the risk of death from pregnancy in childbirth, and because there is virtually no mortality risk in vasectomy, there would be no demonstrably compelling state interest in regulating the decision to employ contraceptive sterilization.

If the state may not infringe upon the right of procreative self-determination, then it follows that courts may not constitutionally denigrate the decision to undergo contraceptive sterilization by refusing on public policy grounds to impose civil liability on physicians by whose breach of duty the purpose of sterilization is defeated.

THEORIES OF RECOVERY

Assuming that recovery does not contravene any existing public policy, a number of legal avenues may be employed to establish a cause of action in the case of post-sterilization conception.

Professional Negligence

Professional negligence under tort law may be successful grounds for imposing civil liability upon the attending physician if he has failed to exercise ordinary care in applying that degree of knowledge and skill commonly possessed by medical men practicing in, the same or similar communities. Initially, a physician may fail to meet this standard during preoperative consultation by neglecting to give the patient sufficient information about the contemplated sterilization, thus preventing him from making a meaningful decision concerning whether to submit to the operation. For instance, in Florida the physician must inform his patient of any measurable risk of failure, and he must explain to the patient the available alternative methods of birth control. Without this information the patient's consent may be negated, thereby exposing the physician to liability for battery or professional negligence.
The physician's negligent performance of the sterilization operation is at once the most obvious cause of action and the most difficult to prove in the case of subsequent conception. Any evidence of negligent surgery is internally concealed. Furthermore, the patient is without the benefit of the doctrine of res ipsa loquitur because conception after sterilization is not an event that "ordinarily does not occur in the absence of someone's negligence." There exists a measurable chance of recanalization, a spontaneous regeneration of the vas deferens or the Fallopian tubes that restores fertility, and this may occur despite proper surgical skill and technique. Consequently, the mere failure of a sterilization operation to produce sterility has not been held by courts to establish surgical negligence.

Nevertheless, it is possible to prove operative negligence under certain circumstances. In Bishop v. Byrne it was alleged that one of the plaintiff's Fallopian tubes was found to be intact at the time of a Caesarean birth two years after defendant physician had performed a tubal ligation. In denying a motion for summary judgment, the court found that this allegation, if proved, was sufficient to establish defendant physician's negligence.

Professional negligence may also occur in the case of a vasectomy if the physician fails to perform adequate postoperative tests to verify the definite sterility of the patient, or if he fails to advise the patient of the necessity of employing other methods of contraception until tests are complete. In Ball v. Mudge, however, the plaintiff was unable to show that failure to make a postoperative semen analysis constituted professional negligence because he could present no evidence of a definite medical standard of practice in the community in that regard. The chance that this barrier might prevent future

69. W. Prosser, supra note 20, at 214; cf. Hine v. Fox, 89 So. 2d 13 (Fla. 1956).
70. The incidence of failure for vasectomy is estimated at less than 1%, which is slightly better than that for tubal ligation. Davis, supra note 57, at 509-10.
72. See Lane v. Cohen, 201 So. 2d 804 (3d D.C.A. Fla. 1967); Ball v. Mudge, 64 Wash. 2d 247, 249, 391 P.2d 201, 203 (1964).
74. Id. at 463-64. Even in this situation, the plaintiff may encounter the barrier of the unwillingness of members of the medical profession to testify against one another. See Seidelson, Medical Malpractice Cases and the Reluctant Expert, 16 CATH. U.L. REV. 158 (1966).
76. In Hackworth v. Hart, 474 S.W.2d 377, 380 (Ky. 1971), an expert medical witness testified that giving at least three tests was standard procedure.
77. The vas tubes above the point of vasectomy contain an amount of sperm that is reduced by each succeeding ejaculation until the tubes are empty, before which time the patient remains fertile. Davis, supra note 57, at 511.
78. 64 Wash. 2d 247, 391 P.2d 201 (1964).
79. It appears that the court followed the narrow "same locality" standard even though Washington recognized the more liberal "similar localities" rule, Hoover v. Goss, 2 Wash. 2d 237, 97 P.2d 689 (1940), which is also applied in Florida. Bourgeois v. Dade County, 99 So. 2d 575, 577 (Fla. 1956).
recoveries is substantially diminished in light of increasing medical familiarity with the operation\textsuperscript{80} and the expanding judicial inclination to apply more liberal standards in determining acceptable medical practice.\textsuperscript{81}

In the event that a physician advises his patient that sexual intercourse is safe immediately following vasectomy during the period in which postoperative tests should be conducted, an action in negligent misrepresentation might also arise.\textsuperscript{82} When a statement is made by a physician with knowledge that his patient will rely upon it,\textsuperscript{83} he is under a duty to exercise the degree of skill and competence required by the medical standard in ensuring that his representations are true.\textsuperscript{84} It is unlikely, however, that an action in deceit or fraudulent misrepresentation will lie in such a case because the element of fraudulent intent is generally absent.\textsuperscript{85}

\textit{Breach of a Contract To Sterilize}

In addition to actions in negligence against the attending physician, pregnancy subsequent to a sterilization operation may give rise to a claim based upon breach of contract. Contracts for the achievement of certain medical results are generally not implied,\textsuperscript{86} and a physician is not an insurer of the success of his treatment.\textsuperscript{87} Nevertheless, a physician and his patient are free to make an express contract for a particular result, in which case he may be liable for a breach of contract if he does not succeed.\textsuperscript{88}

Thus, if a physician informs his patient that a proposed operation will result in certain sterilization without qualifying his assurance by disclosing the risk of failure through spontaneous recanalization, a court may find that an express warranty of success has been created, and that the patient is entitled to recover for its breach in the event of a subsequent pregnancy.\textsuperscript{89} Because these

\textsuperscript{80} See Dees, Vasectomy: Problems of Follow Up, 66 PROCEEDINGS ROYAL SOC. MEDICINE 52 (1973).

\textsuperscript{81} See, e.g., Bourgeois v. Dade County, 99 So. 2d 575 (Fla. 1956); Pederson v. Dumouchel, 72 Wash. 2d 73, 431 P.2d 973 (1967).


\textsuperscript{83} A patient is particularly justified in relying upon the representations of a physician, since the latter holds himself out as an expert. W. PROSSER, supra note 20, §109, at 727. But see Hays v. Hall, 477 S.W.2d 402 (Tex. App.), rev'd on other grounds, 488 S.W.2d 412 (Tex. 1972), where plaintiff's reliance upon defendant physician's representation that the plaintiff was sterile was held to be unreasonable when the plaintiff knew that he had impregnated his wife after the sterilization operation but prior to the semen analysis upon which the physician's opinion was based.

\textsuperscript{84} Young v. Metropolitan Dade County, 201 So. 2d 594 (3d D.C.A. Fla. 1967); cf. Watson v. Jones, 41 Fla. 241, 25 So. 678 (1899).


\textsuperscript{86} Hill v. Boughton, 146 Fla. 505, 1 So. 2d 610 (1941); Adkins v. Hume, 107 So. 2d 253 (2d D.C.A. Fla. 1958).

\textsuperscript{87} Lane v. Cohen, 201 So. 2d 804 (3d D.C.A. Fla. 1967).


circumstances could also give rise to a right of action in negligence, the plaintiff might phrase his pleadings differently, depending on the applicable statutes of limitations and the relative burdens of proof in tort and contract.

To recover in contract for an unwanted pregnancy and childbirth after sterilization, a plaintiff must establish three elements. First, he must show that a contract with a warranty of successful sterilization existed. If the contract is reduced to writing, the plaintiff need only introduce the instrument into evidence, but few physicians who have been so precise as to provide a prepared contract would be so injudicious as to omit a clause disclaiming any warranty of result.

If the contract is oral, the plaintiff may encounter several difficulties. While the burden of presenting substantial evidence of the existence of a contract may be easily satisfied by the plaintiff's own testimony, carrying the ultimate burden of persuading the factfinder of its existence in the face of the physician's denial will be more difficult. Furthermore, if the warranty of sterility is made after the agreement to operate has been reached, it must be supported by independent consideration in order to be binding. Finally, it is possible that the court might construe any oral guarantee of success to be merely words of reassurance, uttered for their therapeutic effect on the patient.

The second element that the plaintiff must establish in order to recover is that the terms of the contract were breached. In the case of a tubal ligation, medical evidence of the plaintiff's subsequent pregnancy would be conclusive. On the other hand, vasectomizing a husband does not guarantee his exclusive sexual access to his wife, and her subsequent pregnancy is not itself irrefutable evidence that an alleged warranty of sterility has been breached. Any de-

90. See Manning v. Serrano, 97 So. 2d 688 (Fla. 1957); Doerr v. Villate, 74 Ill. App. 2d 332, 220 N.E.2d 767 (1966); Note, Sterilization and Family Planning—The Physician's Liability, 56 GEO. L.J. 976, 989-90 (1968). But see FLA. STAT. §95.11(6) (1973), amending FLA. STAT. §§95.11(6) (1971), providing that actions to recover damages for injuries arising from any medical treatment or surgical operation must be brought within two years after the cause of action has accrued, which occurs when the plaintiff discovers, or through use of reasonable care should have discovered, the injury. See also Larsson v. Cedars of Lebanon Hosp., 97 Cal. App. 2d 704, 218 P.2d 604 (Dist. Ct. App. 1950); Fradley v. Dade County, 187 So. 2d 47 (3d D.C.A. Fla. 1966).

91. See text accompanying notes 68-72 supra.

92. While the proof in contract may often be easier, this advantage can be obtained only at some cost, since allowable damages for a breach of contract do not include the patient's pain and suffering as in negligent malpractice actions. Dunahoo v. Bess, 146 Fla. 182, 200 So. 541 (1941).

93. Sagall, Surgical Sexual Sterilization, 8 TRIAL 57, 60 (1972).

94. See generally Hackett & Waterhouse, supra note 7, at 446; Note, supra note 15, at 349.


98. Note, supra note 17, at 434.
defense based upon a theory of adultery, however, would encounter the procedural obstacles of the presumption that the child of a married woman is legitimate99 and the common law rule that neither spouse may testify to non-intercourse so as to circumstantially show the illegitimacy of a child born in wedlock.100 Moreover, any evidence relevant to such a defense would normally be particularly within the control of the plaintiff.

Finally, in order to recover for breach of a contract to sterilize, the patient must show that his claimed elements of recovery are legally cognizable as damages, particularly if one of these is for the uncomplicated birth of a normal child. This indispensable element of proof has consistently been the most difficult for the plaintiff to establish, whether his claim was grounded in contract or in tort.

DETERMINATION OF DAMAGES

Even though a plaintiff may be able to establish breach of an express warranty of permanent sterility or a breach of duty amounting to professional negligence, the cases suggest a reluctance on the part of some courts to permit recovery of damages.

Contract

In Christensen v. Thornby104 the vasectomized plaintiff sought to recover on a warranty of sterilization for anxiety and the expenses incident to the birth of a subsequently conceived child. The court found that the purpose of the operation was to save plaintiff’s wife from the hazards incident to childbirth, and that because the wife had survived, the injuries complained of were too remote to support recovery.102 The court appears to have relied upon the traditional rule103 that consequential damages arising from a breach of contract are limited to those injuries that the defendant had reason to foresee as the probable result of breach at the time he made his promise.104 Thus, the case does not stand for the proposition that there may be no recovery for consequential damages when the action is grounded in tort.105

Nor is Christensen authority for denying a recovery on the contract of the expenses of birth or even the expenses associated with rearing the child when the purpose of the operation is to limit the size of the family. Under such circumstances the physician might naturally foresee these injuries as the probable result of a breach of the contract. Furthermore, some courts have rejected the

101. 192 Minn. 123, 255 N.W. 620 (1934).
102. Id. at 126, 255 N.W. at 622.
strictures of contract law when dealing with contracts for a particular medical result, allowing recovery of damages commonly associated only with actions in tort.106

Tort

While contract damages attempt to place the plaintiff in the position he would have occupied had the contract been fulfilled,107 the purpose of compensation in tort is to restore the plaintiff to the position in which he would have been if the wrong had not been committed.108 Thus, in an action grounded in professional negligence, recovery may be had for "any loss or damage proximately resulting from such negligence."109

Many of the elements of damage arising from a physician's negligence in connection with a sterilization operation are those commonly recovered in malpractice actions. Medical expenses incurred by the sterilized patient would be recoverable,110 including the expenses resulting from the pregnancy111 and the cost of a second sterilization operation.112 Damages have also been allowed for the pain and suffering of pregnancy and childbirth.113 Further, the husband's right to recover for loss of consortium—the services, society, and companionship of his wife of which he is deprived during her pregnancy—has been generally recognized by the cases.114 Even if a husband has suffered some mental worry or anxiety as a result of the circumstances of his wife's pregnancy, however, courts have refused to allow damages either on the grounds that one may not recover for mental suffering unaccompanied by any physical injury,115 or because the defendant could not reasonably anticipate any harm

107. Hodges v. Fries, 34 Fla. 63, 15 So. 682 (1894).
to the husband and so owed him no duty of care.\textsuperscript{116}

The wife's lost wages also have been held to be a collectable item of damages.\textsuperscript{117} There may be some argument that there can be no recovery for that portion of the damages that could have been avoided had she continued her employment until it became medically inadvisable, and had she returned to work as soon as she was physically able.\textsuperscript{118} Under the doctrine of avoidable consequences, however, a plaintiff has a duty to do only what a reasonably prudent person acting under the existing facts and circumstances would do to prevent aggravation of her injuries.\textsuperscript{119} Because the mental and physical strains of pregnancy are particularly subjective,\textsuperscript{120} it would be difficult to convince a finder of fact that a plaintiff's personal decision to stop working was unreasonable under the circumstances.\textsuperscript{121}

Dicta in several recent decisions\textsuperscript{122} have suggested that if other children are deprived of some portion of the "society, comfort, care, protection and support"\textsuperscript{123} of the mother that they would have received had the unplanned child not been born, then this loss should be compensable. If so, the recovery would be without precedent.\textsuperscript{124} Only one decision,\textsuperscript{125} subsequently reversed, has found a legally recognizable right in a child to proper parental care. The denial of recovery in a situation involving so obvious an injury is manifestly unjust,\textsuperscript{126} and possible support for a recovery by the child can be drawn from recent cases that depart from longstanding common law precedent to find a right on the part of a wife to the services of her husband similar to the husband's right to consortium.\textsuperscript{127} Nevertheless, the clear weight of authority is against treating the siblings' loss as a recoverable item of damages.\textsuperscript{128}

In summary, the courts have generally allowed recovery in this area for

\textsuperscript{116} Cf. Christensen v. Thornby, 192 Minn. 123, 126, 255 N.W. 620, 622 (1934). See generally W. Prosser, supra note 20, \S 54, at 333.


\textsuperscript{118} Most physicians believe there is no harm in women continuing to work until about six weeks before the baby is due, returning to work six weeks after birth. R. Mitchell & T. Klein, Nine Months To Go 69 (1969).

\textsuperscript{119} See Ballard & Ballard v. Pelais, 73 So. 2d 840, 841 (Fla. 1954).

\textsuperscript{120} See R. Mitchell & T. Klein, supra note 118, at 72.


\textsuperscript{124} See W. Prosser, supra note 20, \S 125, at 896.

\textsuperscript{125} Scruggs v. Meredith, 134 F. Supp. 868 (D. Hawaii 1955), rev'd, 244 F.2d 604 (9th Cir. 1957).

\textsuperscript{126} See 42 Cornell L.Q. 115 (1956).

\textsuperscript{127} See, e.g., Gates v. Foley, 247 So. 2d 40 (Fla. 1971); Dini v. Naiditch, 20 Ill. 2d 405, 170 N.E.2d 811 (1960).

what might be considered typical malpractice damages: medical expenses, pain and suffering, husband's loss of consortium, and lost wages. The one case expressly denying recovery on these items was an action in contract that was subject to legal limitations on recovery not present in tort.

Offset for Incidental Benefits

Although the appellate court in Ball v. Mudge\(^{129}\) refused to reverse a verdict and judgment for the defendant on the grounds that a jury could have reasonably found that the expenses incidental to the birth of a child conceived after plaintiff's vasectomy were “far outweighed by the blessing of a cherished child, albeit an unwanted child at the time of conception and birth,”\(^{129}\) the court did not expressly preclude recovery of such damages in similar actions. The tenor of that decision was, however, indicative of the position taken by some courts when confronted with a suit for recovery of a more controversial item of damages: the expenses of maintaining, supporting, and educating a child whose conception and birth have followed an attempted sterilization operation.

Shaheen v. Knight\(^{131}\) held that the benefits derived by the plaintiff from the birth — “the fun, joy and affection which plaintiff Shaheen will have in the rearing and educating of this . . . child”\(^{132}\) — outweighed the expenses thereby incurred as a matter of law, a finding that had the effect of completely negating liability. A recent Texas case\(^{133}\) made a classic statement of the rationale that underlies such a decision:

Who can place a price tag on a child's smile or the parental pride in a child's achievement? Even if we consider only the economic point of view, a child is some security for the parents' old age. Rather than attempt to value these intangible benefits, our courts have simply determined that public sentiment recognizes that these benefits to the parents outweigh their economic loss in rearing and educating a healthy, normal child.\(^{134}\)

These cases fail to recognize that for people who resort to sterilization to prevent the birth of children, the values of having a child may not always outweigh the financial and personal considerations motivating their initial action. This weakness was recognized by a Florida court,\(^{135}\) which rejected a similar rationale by observing that “the fallacy in appellee's argument is clear: he suggests as vitiating liability a fact which mitigates damages.”\(^{136}\)

This position was first suggested in Custodio v. Bauer.\(^{137}\) Plaintiff had

\(^{129}\) 64 Wash. 2d 247, 391 P.2d 201 (1964).
\(^{130}\) Id. at 250, 391 P.2d at 204.
\(^{132}\) Id. at 45-46.
\(^{134}\) Id. at 128.
\(^{136}\) Id. at 503.
undergone a tubal ligation to avoid aggravation of a then existing bladder and kidney condition and to improve her emotional and nervous condition. When she later became pregnant, she brought actions in both tort and contract against the operating physicians. Among other damages, plaintiff sought to recover for the expenses of rearing the unplanned child. When the defendants imposed a defense based upon the Shaheen rationale, the court applied the benefit rule expressed in the Restatement of Torts:

Where the defendant’s tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred upon the plaintiff a special benefit, to the interest which was harmed, the value of the benefit conferred is considered in mitigation of damages, where this is equitable.138

Identifying “the interest which was harmed” by the unplanned birth as that interest, which the sterilization operation was intended to protect, the court allowed an offset to the extent that the failure of the sterilization operation and the ensuing pregnancy benefited either the emotional and nervous makeup of the plaintiff or her other medical conditions.139

While the Custodio application of the benefit rule is as contemplated by the Restatement,140 it has been criticized as being too narrow to be applied literally in this area.141 For instance, if the sterilization were motivated by economic necessity, only economic benefits from the child would mitigate recovery. While it is true that juries in wrongful death actions have consistently found the economic value of a child’s services to be substantial,142 it is generally recognized that these evaluations are largely illusory.143 As there is no apparent reason to extend this fiction into another area, the offset allowed for the economic benefits from an unplanned child would be nominal, allowing the parents full recovery of their consequential economic damages in virtually every case. If the overriding benefit approach of Shaheen is unfair to the parents in some cases, the qualified benefit rule of Custodio is equally unfair to the defendant physician in others.

Both positions have been rejected in favor of a more flexible approach in two subsequent decisions.144 Troppi v. Scarf145 was an action by parents of an unplanned child against a pharmacist who had negligently filled their prescription for birth control pills with tranquilizers. Although the facts are distinguishable from those in the sterilization cases, the issues involved in

138. Restatement of Torts §920, at 616 (1939) (emphasis added).
140. See generally Restatement of Torts §920, comment b at 617 (1972).
142. See W. PROSSER, supra note 20, §127, at 909.
determining damages are the same. After quoting the Restatement rule, the court went on to say:

Since pregnancy and its attendant anxiety, incapacity, pain and suffering are inextricably related to child bearing, we do not think it would be sound to attempt to separate those segments of damage from the economic costs of an unplanned child in applying the "same interest" rule. Accordingly, the benefits of the unplanned child may be weighed against all the elements of claimed damage.146

This more flexible standard allows the trier of fact to make a total evaluation of all factors that aggravate or attenuate the impact of the unplanned child upon the parents. Among the circumstances that the trier must consider in determining the extent to which the birth of a particular child represents a benefit to his parents are family size, family income, age of the parents, and marital status.147

**Purpose of Sterilization**

Of primary importance in evaluating the injuries sustained by the parents is the purpose for which the sterilization was intended. In the case of a therapeutic sterilization — one designed solely to protect the physical or psychological well-being of the mother148 — the normal pregnancy and uneventful birth of a child that leaves the mother unimpaired149 would almost inevitably be construed as conferring a greater benefit upon the parents than the injury resulting from the temporary anxieties and discomforts of pregnancy.150 Similarly, the failure of sterilizations intended to prevent the birth of retarded or deformed children will likely cause no lasting injury if a normal child is born.151 Conversely, if an abnormal child is born under such circumstances,152 the continuing parental anxiety in addition to the cost of special care and attention that handicapped children often require may lead the finder of fact to a determination that substantial damage has resulted.

Sterilization is often economically motivated: low income families may be unable to support additional children,153 and higher income families may wish

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146. *Id.* at 55, 187 N.W.2d at 518.
147. *Id.* at 57, 187 N.W.2d at 519.
150. See Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964).
to sustain their present economic status.\textsuperscript{154} Under either traditional tort or contract formula,\textsuperscript{166} the parents' damages are determined by the amount that will enable them to maintain their previous standard of living while fulfilling their legal obligation to support the additional child.\textsuperscript{156} It has been suggested that the damages should rather be measured by that amount that is normally spent in rearing the average child because it seems inequitable to allow a larger recovery to a wealthy parent than to a poor one.\textsuperscript{157} It is also inequitable, however, to require the negligent physician to place the parents in a better position than they originally occupied. Furthermore, the suggestion meets with the conceptual legal obstacles that the cause of action is not in the child\textsuperscript{168} but in the parents,\textsuperscript{159} and that damages are allowed not to compensate the child, but to "replenish the family exchequer so that the new arrival will not deprive the other members of the family of what was planned as their just share of the family income."\textsuperscript{156}

Since the rate of success in attempted reversals of surgical sterilization is now only about thirty per cent,\textsuperscript{152} it is not likely to be presently employed as a method of temporary contraception by those who plan eventually to have children. Current experimentation with occlusive plugs and control valves nevertheless indicates that temporary sterilization may soon become a recognized alternative to other nonpermanent methods of birth control.\textsuperscript{162} In that event, the failure of the sterilization would merely accelerate the birth of a child who was unplanned only in the sense of being untimely.\textsuperscript{163} Since the injuries resulting from such a birth would not usually be of an ongoing nature, as when the sterilization is designed for permanent purposes, the damages allowable would be considerably less than in other cases.

**Difficulty in Determining Damages**

Although it may now be recognized that the birth of a child is not so universally held to be a blessing that it must be considered to be beneficial as

\begin{itemize}
  \item [155] See text accompanying notes 107-108 supra.
  \item [157] See Note, supra note 90, at 995.
  \item [158] Courts have universally held that there exists no right in a child to compensation for injuries caused by his birth. See, e.g., Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1962), cert. denied, 379 U.S. 945 (1964) (suit by child against father for having caused him to be born out of wedlock); Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967) (suit by deformed child against physician for negligence in failing to inform parents of the possibility of a deformed child after mother contracted German measles, thus permitting parents to seek abortion); Pinkey v. Pinkey, 198 So. 2d 52 (1st D.C.A. Fla. 1967) (suit by child against father for having caused her to be born a bastard).
  \item [162] Davis, supra note 57, at 512.
  \item [163] Sheppard, supra note 121, at 262-67, discusses the possible ramifications of a plaintiff mother's unwed status.
\end{itemize}
a matter of law, some courts have refused to allow recovery in this area by raising the discredited\textsuperscript{164} specter of the difficulty in determining damages.\textsuperscript{165} The weakness of this position is exposed by the dissenting opinion in Terrell v. Garcia,\textsuperscript{166} which observed that evaluations very similar to those required to determine the relative monetary values of the benefits and injuries\textsuperscript{167} accompanying the birth of an unplanned child are constantly made in actions for the wrongful death of children\textsuperscript{168} and in alienation of affection suits.\textsuperscript{169}

The wrongful death analogy, however, can be argued to defeat recovery as well. The measure of damages in actions for the wrongful death of children is the converse of that used in the unplanned birth cases: in the former, the parent's damages for the loss of the enjoyment, affection, and services of the child are reduced by the cost of the child's support.\textsuperscript{170} The consistency with which juries find that the cost of support is more than offset by the loss to the parent\textsuperscript{171} can be construed as supporting the position that a living child is a net benefit to his parents as a matter of law.\textsuperscript{172} Nevertheless, the law should not draw support from what may well be jury abuse\textsuperscript{173} in one area to allow a negligent defendant to escape liability in another.

**CONCLUSION**

There is little reason for refusing to allow a recovery by the reluctant parent in cases of post-sterilization conception and birth. The simple expediences of providing a complete preoperative consultation including disclosing the risk of recanalization, and of administering adequate postoperative tests whereby a physician may protect himself from all but operative negligence do not seem particularly burdensome. Furthermore, recovery is supported by the general benefit flowing from a legal position that fosters care on the part of physicians by holding them responsible for breaches of duty that result in personal or pecuniary injuries to patients who have placed their faith in the knowledge and skill of the physician.

With the current widespread employment of birth control devices, it is

\textsuperscript{164} See W. Prosser, supra note 20, §52, at 512.


\textsuperscript{166} 496 S.W.2d 124 (Tex. App. 1973).

\textsuperscript{167} Calculating the cost of rearing children is not the sort of task that lends itself to certainty. Expert estimates range from $5,617 to $34,464. See Dileo, Directions and Dimensions of Population Policy in the United States: Alternatives for Legal Reform, 46 Tul. L. Rev. 184, 227 n.191 (1971); Fuchsberg, Damages in Infants' Death Cases, 9 Trial Law. Q. 63 (1973).

\textsuperscript{168} This is especially true in jurisdictions that allow recovery for bereavement, mental anguish, loss of companionship, and society. See Meeks v. Johnston, 85 Fla. 248, 95 So. 670 (1923); Fla. Stat. §768.21(4) (1973).

\textsuperscript{169} 496 S.W.2d at 129.

\textsuperscript{170} See W. Prosser, supra note 20, §127, at 908; cf. Lithgow v. Hamilton, 69 So. 2d 776 (Fla. 1954).

\textsuperscript{171} W. Prosser, supra note 20, §127, at 908.

\textsuperscript{172} Terrell v. Garcia, 496 S.W.2d 124, 127 (Tex. App. 1973).

\textsuperscript{173} Cases cited note 143 supra.