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## PHYSICIANS AND SURGEONS-VOLUNTARY STERILIZATION- PUBLIC POLICY

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PHYSICIANS AND SURGEONS—VOLUNTARY STERILIZATION—PUBLIC POLICY—Plaintiff, advised by his physician that further pregnancy would endanger the life of his wife, submitted to an operation of vasectomy. Defendant physician informed him that the operation had been successful and that he could resume sexual relations with his wife without fear. The wife, however, became pregnant and plaintiff alleged that as a consequence he suffered mental agony and was put to great expense. He sued his physician on the theory of deceit in falsely representing to him that he was effectively sterilized. The lower court sustained a demurrer on the ground that the contract was contrary to public policy and that the law would leave the parties where they had placed themselves. *Held*, the demurrer was rightly sustained for want of any allegation of fraudulent intent. The court stated in a strong dictum, however, that the contract was not contrary to public policy and that the operation was entirely justifiable. *Christensen v. Thornby*, (Minn. 1934) 255 N. W. 620.

With the increasingly large number<sup>1</sup> of sterilization operations being performed every year under compulsory sterilization statutes, knowledge of the simplicity and efficacy of the operations of vasectomy and salpingectomy<sup>2</sup> is being rapidly disseminated. One important consequence of this is that instances of voluntary sterilization are becoming more frequent. The legislatures and the courts must face the problem whether it is sound public policy to permit this

<sup>1</sup> 12,145 of these operations have been performed under these statutes up to January 1, 1932. LANDMAN, HUMAN STERILIZATION, App. A (1932).

<sup>2</sup> Though other types of sterilization operations are performed, the operations of vasectomy for the male and salpingectomy for the female are the ones most commonly used because of their simplicity and effectiveness. Except where otherwise stated, these operations or others no more serious should be understood when the term "sterilization" is used herein. Vasectomy is no more serious than pulling a tooth, and salpingectomy no worse than the operation to remove the appendix from a patient in good health. GOSNEY AND POPENOE, STERILIZATION FOR HUMAN BETTERMENT 78 (1929). In California, out of 6,255 operations there have been but seven known failures and four deaths. *Ibid.*, c. 13. These operations do not desexualize the individual and often increase his sex feeling and improve his general condition. Shartel, "Sterilization of Mental Defectives," 24 MICH. L. REV. 1 at 15 (1925); Stith, "Sterilization of the Unfit," 32 LAW NOTES 108 (1928); Miller and Dean, "Liability of Physicians for Sterilization Operations," 16 A. B. A. J. 158 (1930); GOSNEY AND POPENOE, STERILIZATION FOR HUMAN BETTERMENT, c. XV (1929). For a detailed description of operations see LANDMAN, HUMAN STERILIZATION 207-218 (1932).

without restriction. The instant case seems to be the first actually to consider the question. Sterilization may be sought for one of three general purposes: (1) *For eugenic purposes.* There should be no doubt about the sound policy of allowing the operation in cases where the potential parent is afflicted with an hereditary disease or is mentally deficient. There have been 61 enactments in 29 states<sup>3</sup> declaring this policy and providing for voluntary and compulsory sterilization under such conditions. The question of sound policy is less clear where the potential parent is himself sound mentally and physically, but the purpose of the operation is to cut off a bad general heredity. But the growing realization that it is the carrier of defects rather than the defective himself who is the great danger to the race<sup>4</sup> should help to establish a policy of sterilization in such cases. (2) *For therapeutic purposes.* There can be no more doubt as to the legality of sterilization for the protection of the patient's own health than as to the legality of any other operation for the same purpose.<sup>5</sup> Sterilization of the husband for the protection of the life or health of the wife is more questionable, for it may be argued that the husband may later remarry. However, in view of the fact that the operation for the male is so much less expensive and burdensome than for the female, and that it is just as effective for the purpose, the instant case seems to reach a desirable result in upholding the legality of such an operation. A more doubtful therapeutic purpose is that of rejuvenation; vasectomy has been performed in quite a few cases as a restorer of youth.<sup>6</sup> Though for this purpose its efficacy may be doubted, in view of the fact that usually only old men would seek it there would seem to be no strong policy against allowing it here. (3) *General contraceptive purposes.* The legality of sterilization for such purposes from the viewpoint of public policy is more doubtful.<sup>7</sup> Three states have statutes making it a criminal offense to perform or assist in an operation for such purposes.<sup>8</sup> On the other hand, in four states provisions of this kind which were contained in old statutes have been omitted from the new.<sup>9</sup> At common law

<sup>3</sup> LANDMAN, HUMAN STERILIZATION 302, App. E. (1932). For a table of these laws with dates, references, etc., see chapter 3 and the Appendix. The constitutionality of sterilization laws properly framed for eugenic purposes was upheld by the United States Supreme Court in *Buck v. Bell*, 274 U. S. 200, 47 Sup. Ct. 584 (1927).

<sup>4</sup> GOSNEY AND POPENOE, STERILIZATION FOR HUMAN BETTERMENT 127 (1929).

<sup>5</sup> In the states that have statutes imposing criminal liability upon one who performs or assists in an unauthorized operation an exception is made where the operation is for medical necessity. Even abortion is always legal to save life. 2 HERZOG, MEDICAL JURISPRUDENCE, sec. 1023, p. 711 (1931).

<sup>6</sup> GOSNEY AND POPENOE, STERILIZATION FOR HUMAN BETTERMENT 88-89 (1929).

<sup>7</sup> HERZOG, in his MEDICAL JURISPRUDENCE [Vol. 2, sec. 1024, p. 712 (1931)], states that he believes sterilization for social and economic reasons would probably be unlawful in every state in the union. The legality of such an operation in England is even more questionable: "the sovereign is entitled to rely on his subjects to ensure their continuance. . . ." "The Right of Sterilization," 73 SOL. J. 258 (1929). The operation is undoubtedly as illegal as an abortion. 74 SOL. J. 601 (1930).

<sup>8</sup> Utah Rev. Stat. 1933, tit. 89-0-12; Montana Rev. Code, 1923-1927, sec. 1455.8; Kansas Rev. Stat. (1923), c. 76, sec. 155.

<sup>9</sup> *Viz.*, Indiana, Connecticut, Michigan, Iowa. LANDMAN, HUMAN STERILIZATION, App. E. (1932).

criminal liability, if any, would be based upon the theory that the operation amounted to mayhem or maiming.<sup>10</sup> This would clearly apply to castration,<sup>11</sup> but hardly to the simple vasectomy which frequently improves the health of the patient and makes him more able "to fight for his king."<sup>12</sup> The argument that the sterilized person will be sexually promiscuous<sup>13</sup> and therefore a more probable carrier of disease appears purely theoretical.<sup>14</sup> However, the general arguments of policy, social, economic, and religious,<sup>15</sup> directed against birth control apply here with great force due to the permanency of this method of contraception.<sup>16</sup> Against these must be weighed all the arguments in favor of birth control in general. It is impossible to say definitely which view of policy the courts will take here, but the trend seems to be toward a more liberal view on the whole subject of birth control.<sup>17</sup>

J. S. W.

<sup>10</sup> HERZOG, *MEDICAL JURISPRUDENCE*, sec. 1025 n. (1931); Miller and Dean, "Liability of Physicians for Sterilization Operations," 16 A. B. A. J. 158 (1930).

<sup>11</sup> LANDMAN, *HUMAN STERILIZATION* 252 (1932); Miller and Dean, "Liability of Physicians for Sterilization Operations," 16 A. B. A. J. 158 at 159 (1930).

<sup>12</sup> Miller and Dean, "Liability of Physicians for Sterilization Operations," 16 A. B. A. J. 158 (1930); Stith, "Sterilization of the Unfit," 32 *LAW NOTES* 108 (1928); Shartel, "Sterilization of Mental Defectives," 24 *MICH. L. REV.* 1 at 15 (1925); see *supra*, note 2.

<sup>13</sup> Ryan, "Unprotected Natural Rights," 11 *CONST'L REV.* 223 at 225 (1927); Ruddy, "Compulsory Sterilization: An Unwarranted Extension of the Powers of Government," 3 *NOTRE DAME LAWYER* 1 at 5 (1927).

<sup>14</sup> *GOSNEY AND POPENOE, STERILIZATION FOR HUMAN BETTERMENT*, pp. xv, 40 (1929).

<sup>15</sup> "No Catholic is justified in promoting either the enactment or the execution of sterilization laws." Murray, "Eugenic Legislation and the Lawyer," 8 *NOTRE DAME LAWYER* 327 at 336 (1933).

<sup>16</sup> The operations are theoretically reversible, but only a twenty-five per cent success has been had in practice of reversing them. *GOSNEY AND POPENOE, STERILIZATION FOR HUMAN BETTERMENT* 78 (1929).

<sup>17</sup> See opinion of Justice Hand in *Slee v. Comm'r of Internal Revenue*, 42 F. (2d) 184 (1930).