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# ARTICLES

# THE LEGALITY OF PURELY CONTRACEPTIVE STERILIZATION*

*by* ROBERT P. KOURI**

PLAN



* The substance of this article has been drawn from a portion of the doctoral dissertation presented by the author to the Faculty of Graduate Studies of McGill University, entitled *Certain Legal Aspects of Modern Medicine*. This thesis is in the process of being revised for publication under the auspices of the McGill Center for Comparative Law.

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## INTRODUCTION

Although the words "contraceptive sterilization" at first glance appear somewhat pleonastic, the idea of sterilizing a person merely to avoid the conception of children has provoked legal, moral and religious controversies of surprising intensity. The simplest explanation likely devolves from the teachings of St. Paul and the early Christians, who equated sex with sin, a moral lapse redeemed only by marriage[1]. (The procreation of children would simply be a normal by-product of this type of activity). Due to the discovery of more effective methods of contraception[2], emphasis was eventually placed on the notion that any interference with the natural consequences of the sex act would render the whole activity sinful[3].

With the redefinition of the goals of marriage and with perhaps a liberal dose of religious cynicism thrown in, public pressures upon surgeons to perform sterilizations have increased astronomically, and may be presumed to have reached a point (in the public's mind at least), where sterilization is merely another form of surgery or an alternative method of contraception. Yet the law in many jurisdictions, just stumbles behind, with not one legislative word written about this type of procedure. Consequently, the medical profession feels somewhat buffeted not only by public opinion, as opposed to its own collective philosophy or morality, but also by an almost complete lack of formal legal guidance on the subject of sterilization.

This has given rise to a type of "strength through numbers" approach, in which arbitrary but uniform standards are applied to accept or refuse requests for sterilizations. As a result, one surgeon cannot be faulted (except in instances of surgical malpractice) for following guidelines accepted by a majority of his or her profession. The World Health Organization, for example, has advanced the "One Hundred Rule" which consists of an age/parity formula. Under this system, the age of a woman multiplied by the number of her living children must equal a hundred. Unless this "magic" figure is attained, a sterilization will be refused[4]. The Association of Obstetricians and

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1. E.g. 1 Corinthians 7:9

2. After all, Onan was struck down by God for practising . . . onanism, cf. Genesis 38:8–10. More recent studies confirm that onanism or *coitus interruptus* is quite a risky contraceptive procedure.

3. This position is still held by the Roman Catholic Church.

4. Michel PERREAULT, "Ce qu'il nous faut faire en planning des naissances au Québec" in (1974) I Planning des naissances au Québec 4.

Gynecologists of Quebec has also adopted this rule, but with the double modification that (a) ten points are added automatically to each total, (or in other words, the "magic" number is ninety), and (b) in certain cases where the one hundred points are not attained, the sterilization may still be performed provided that two outside consultants agree to the procedure[5].

The weaknesses inherent in any rule as arbitrary as the one just described, leap to mind: Firstly, how can anyone, especially persons with scientific backgrounds, justify the sterilization of a thirty-four year-old mother of three children while refusing a thirty-three year-old woman with a similar number of offspring, or indeed a thirty-five year-old woman with two children[6]?

Secondly, from a strictly legal point of view, how can any court, in the absence of a formal legal text so stating, fault the sterilization of one of the women described above without doing the same for the others[7].

Thirdly, aside from the possible medical indications which result from multiparity[8], why should this type of standard be applied to women seeking tubal ligations and not to men requesting vasectomies?

Finally, any decision which does not seriously consider the individual circumstances of each patient such as intelligence, psychological status, age, health, marital situation, etc... should not be dignified with the adjective "medical". In determining whether or not to sterilize, the physician should not act (or react) as a petty bureaucrat who simply and unquestioningly applies arbitrary norms handed down from above.

Yet, in many, and one could venture, in most circumstances, the requests for purely contraceptive sterilization are neither irrational nor frivolously made, especially where serious reasons exist for

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5. Letter dated the 22nd of February 1973, circulated by Dr. Jacques M. Gagnon, registrar of the Association of Obstetricians and Gynecologists of Quebec.

6. This, of course, presupposes that we are working under the W.H.O. hundred point system.

7. We presume that all the other factors such as intelligence, health, sanity etc... are relatively identical.

8. The opinion is often expressed that after eight pregnancies, the multipara should be offered sterilization on medical grounds, cf. F. E. BLACK, "Abortion and Sterilization", (1961) 33 Man. Bar News 33 at p. 35.

such an application. The examples which most readily come to mind include the inability to utilize "traditional" contraceptive measures, and the idea of having to have recourse to mechanical or chemical forms of contraception for decades after a desired family size has been reached[8a].

During the next several pages, we will discuss whether or not contraceptive sterilizations are in fact licit. Our survey will cover several common law (England, the Anglo-Canadian provinces, and the United States) and civil law (France, Province of Quebec) jurisdictions.

## (I) The legality of purely contraceptive sterilization in certain common law jurisdictions:

### (i) England

As in most other jurisdictions, the legality of purely contraceptive sterilization in England has remained, until fairly recently at least, the subject of heated controversy. Writing in 1953, one author mentioned that he had occasion to read during the preceding twenty-five years, several opinions on the subject by eminent jurists, which ranged from a categorical affirmation that sterilization, except for therapeutic purposes, was a felony punishable by life imprisonment, to an equally categorical statement that no offence was involved[9]. Although the preferable opinion, at least from a legal point of view, was to the effect that sterilization did not constitute mayhem[10], persistent doubts as to the applicability of the assault provisions of the *Offences Against the Person Act (1861)*[11] caused the medical profession generally to play for safety and avoid the issue. Public declarations such as that of the Departmental Committee on Sterilization in the United Kingdom, (The so-called *"Brock Report"* of

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8a. See for example E. EMANUEL, "Age x Parity $>$120", (1975) 112 C.M.A.J. 820 at p. 821.

9. Cecil BINNEY, "Legal Problems Raised by Modern Discoveries About Sex", (1953) 21 Medico-Legal Journal 90 at p. 94.

10. G.W. BARTHOLOMEW, "Legal Implications of Voluntary Sterilization Operations", (1959) 2 Melbourne U. L.R. 77 at p. 89. Of course, only the actual castration (as opposed to a vasectomy) of the male would constitute a main. As for women, the law of maim historically did not apply to them. Cf. G. WILLIAMS, *The Sanctity of Life and the Criminal Law,* N.Y., Alfred A. Knopf, 1957, p. 104.

11. 24-25 Vict., c. 100, sec. 18.

1934), which seriously questioned the legality of eugenic and contraceptive sterilization[12], merely served to reinforce these attitudes. This eventually became the official posture of the British Medical Association in 1949, after it was advised to this effect by an opinion emanating from counsel[13].

Up to this point, heavy reliance was placed upon the landmark case of *Rex v. Donovan*[14] involving the sexual flagellation of a consenting female victim, which appeared to deny the validity of a defence of consent in circumstances adjudged morally reprehensible *per se*[15]. The Court of Appeal case of *Bravery v. Bravery*[16] merely exacerbated the issue by specifically relating the validity of consent as exculpatory grounds to the problem of contraceptive sterilization. In his dissent to the *Bravery* decision, Denning L.J. permitted himself to express an *obiter* opinion on the criteria for lawful sterilization:

> "An ordinary surgical operation, which is done for the sake of a man's health, with his consent is, of course, perfectly lawful because there is just cause for it. If, however, there is no just cause or excuse for an operation it is unlawful even though the man consents to it... Likewise with a sterilization operation. When it is done with the man's consent for a just cause, it is quite lawful, as for instance, when it is done to prevent the transmission of an hereditary disease; but when it is done without just cause or excuse, it is unlawful, even though the man consents to it"[17].

As examples of situations where "just cause" would be lacking, Denning L.J. provided the following:

> "Take a case where a sterilization operation is done so as to enable a man to have the pleasure of sexual intercourse without shouldering the responsabilities attaching to it. The operation then is plainly injurious to the public interest. It is degrading to the man himself. It is injurious

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12. BARTHOLOMEW, (1959) 2 Melbourne U. L.R., *loc. cit.*, note 10, p. 78.
13. G. WILLIAMS, "Consent and Public Policy", (1962) Crim. L. Rev., 74 at p. 158.
14. (1934) 2 K. B. 498.
15. *Id.*, p. 507.
16. (1954) 3 All. E.R. 59. The fact-situation involved a divorce action by the wife against her husband on the grounds of cruelty arising from his having obtained a vasectomy without her approval.
17. *Id.*, pp. 67-68.

> to his wife and to any woman he may marry, to say nothing of the way it opens to licentiousness; and unlike contraceptives, it allows no room for a change of mind on either side"[18].

In the final analysis, the majority of the Court of Appeal (Evershed M.R.; Hodson L.J.) summarily dismissed this point of view with a comment to the effect that not only were the observations made by Denning L.J. analogizing prize-fights and sterilizations inappropriate, but also said majority was not prepared to hold that surgical sterilizations were injurious to the public interest[19]. Oddly enough, in spite of this rather emphatic disclaimer, Lord Justice Denning's dissent inserted a note of hesitancy into attitudes which were crystallizing in favor of contraceptive sterilization.

However, two-pronged attacks on Denning's comments soon appeared in legal articles and books; (no subsequent court having had the occasion to review this or a similar case involving sterilization). The first source of discontent addressed itself to the findings of the *Donovan* case[20], upon which Denning L.J. placed such great reliance. The main thrust would appear to be directed against the proposition in *Donovan* that any act likely to inflict bodily harm would constitute a *malum in se* unremedied by the victim's consent[21]. The *Donovan* court (Swift J.) also defined "bodily harm" as "... any hurt or injury calculated to interfere with the health or comfort of the prosecutor. Such hurt or injury need not be permanent, but must . . . be more than merely transient and trifling"[22]. Obviously, the furthest thing from the court's mind while making such sweeping generalizations was the idea that surgical operations could fall within the purview of the notion of "bodily harm"[23]. Although some feel that, as a matter of policy, the case was badly decided since people are usually the best judges of their own interest, and in consenting to a sadistic act, they should assume the inconve-

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18. *Id.*, p. 68.
19. *Id.*, p. 64.
20. (1934) 2 K.B. 498.
21. *Id.*, p. 507.
22. *Per* Swift J., *Id.*, at p. 509.
23. WILLIAMS, *The Sanctity of Life and the Criminal Law, op. cit.*, note 10, p. 106; WILLIAMS' "Consent and Public Policy", (1962) Crim. L.R. *loc. cit.*, note 13, at pp. 156-157; G.J. HUGHES, "Criminal Law – Defence of Consent – Test to be Applied", (1955) 33 C.B.R. 88 at p. 92; BARTHOLOMEW, (1959) 2 Melbourne U. L.R., *loc. cit.*, note 23 p. 93.

niences resulting therefrom[24], the more conventional point of view tends towards the theory that Justice Swift stumbled badly in attempting to set out public policy standards[25]. Instead of basing legality upon the degree of harm caused (as in *Donovan*), or indeed upon the pure question of consent, as Glanville Williams has so emphatically urged[26], we feel that the preferable solution would be to decide each case in light of the general principle that any gesture which is directly or indirectly adverse to the interests of society would be contrary to public policy. Accordingly, some acts would never be approved by the community (e.g. premeditated murder[27]), and yet others could be acceptable to society provided the "victim" consented thereto, (e.g. boxing matches, ritual circumcision, surgery)[28]. Consent therefore would appear to be pertinent as a means of defence only in cases where the community at large generally approves the type of act or gesture in question. Without such approval, "consent" could never suffice in its own right[29]. This type of approach would obviously eliminate much of the uncertainty inherent in the *Donovan* rule with regards to surgical procedures[30].

The second target of criticism in the *Bravery* case was the "just cause" standard laid down in the Denning dissent. After pointing out

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24. WILLIAMS, *The Sanctity of Life and the Criminal Law, ibid.*, p. 106.

25. G. HUGHES, "Two of Consent in the Criminal Law", (1963) 26 Mod. L.R. 233, at pp. 236-237; HUGHES, (1955) 33 C.B.R., *loc. cit.*, note 23, p. 92; D.W. MEYERS, *The Human Body and the law*, Chicago, Aldine Publishing Compagny, 1970, p. 15.

26. (1962) Crim. L.R., *loc. cit.*, note 10, p. 159; *The sanctity of Life and the Criminal Law, op. cit.*, note 10, p. 106.

27. Although many anti-abortion militants would debate this point.

28. HUGHES, (1955) 33 C.B.R., *loc. cit.* note 23, p. 92; MEYERS, *op. cit.*, note 25, p. 15.

29. P. SKEGG in "Medical Procedures and the Crime of Battery" (1974) Crim. L.R. 693, at p. 700 states: "In seeking to determine whether a procedure is injurious to the public interest, any consideration which supports the conclusion that there is a just cause or excuse for it remains applicable. But other considerations could also be taken into account. Perhaps the most important of these is the interest in individual liberty and self-determination... .

Although it is not inherent in the test itself, this approach might also enable a court to consider whether the public interest is best served by their deciding that the application of force amounted to the crime of battery, despite consent".

30. Naturally, our discussion always involves the criminal law since under tort law, the defendant could easily invoke the *volenti non fit injuria* defence or a plea of *ex turpi causa non oritur actio*. Cf. CLERK and LINDSELL, *On Torts*, 14th, ed. by A.L. ARMITAGE, London, Sweet and Maxwell, 1975, p. 360, no 676; John G. FLEMMING, *The Law of Torts*, 4th ed., Sydney, The Law Book Company Ltd. 1971, p. 80; SALMOND, *On Torts*, 16th ed., by R.F.V. HEUSTON, London, Sweet and Maxwell, 1970, p. 519.

the acceptability of therapeutic and eugenic sterilization, the learned justice faulted purely contraceptive sterilization due to the absence of "just cause", on the rather specious grounds that this type of operation leads to licentiousness and permits irresponsible sexual pleasure[31]. Could not a distinction be made between the serious, well thought-out decision of a mature person not to have children, and a measure of expediency which permits the libertine and prostitute to continue their activities unburdened by the hazards of pregnancy? Of course, public policy considerations could well militate against the latter, and according to some, would even place in doubt the legality of all purely contraceptive sterilizations[32]. Undoubtedly, in each of the above situations, there is irresponsability in the sense that sex is indulged in for its own sake, without the "normal" risk of parenthood. Yet, in actual fact, could one not delve deeper and perceive sterilization as a most proper precaution for persons who simply do not want children due to reasons of time, economics, age, or mere whim? It is the birthright of every child to be born to parents who positively desire the infant's presence.

An additional argument may also be found in the fact that contraception is no longer a legal issue, and if one can lawfully avoid procreation through mechanical or chemical means, why not through surgical methods[33] ? Lord Justice Denning gave an answer of sorts to this very question by noting that a sterilization, unlike contraceptives, does not allow any room for a subsequent change of heart. Some writers seized upon this argument to point out that reversal operations are achieving greater success rates each year[34]. However, this type of reply, although factually accurate, merely begs the question. In truth, the irreversibility issue is of secondary importance. Life can be difficult and we are often called upon to make unalterable decisions which we may eventually have occasion to lament. It is probably just as easy to regret having produced a child as it is to rue having given effect to the decision never to have one. Sane, capable adults who are duly advised of the consequences of any act must shoulder all liabilities which result therefrom.

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31. (1954) 3 All. E.R., *loc. cit.*, note 16, at p. 68.

32. WILLIAMS, (1962) Crim. L.R., *loc.. cit.*, note 13, at p. 158.

33. WILLIAMS, *The Sanctity of Life and the Criminal Law,op. cit.*, note 10, p. 107.

34. G. HUGHES, "Two Views of Consent in the Criminal Law", (1963) 26 Mod. L.R., *loc. cit.*, note 25, p. 238; BARTHOLOMEW, (1959) 2 Melbourne U. L.R., *loc. cit.*, note 10, p. 94.

Following the *Bravery* case, the situation remained legally ambiguous for physicians[35] until 1960, when the Medical Defence Union sought and received an updated opinion on the whole issue of sterilization. This opinion affirmed that provided an enlightened consent were obtained, sterilizations for any reason would be valid[36]. In light of this advice, the Secretary of the Medical Defence Union, Dr. Philip Addison, was to assert:

> "...We have no hesitation in advising members of the medical profession in Britain that sterilization carried out merely on the grounds of personal convenience, in other words as a convenient method of birth control, is a legitimate legal undertaking"[37].

In a publication of more recent date, the Deputy-Secretary of the Medical Protection Society, Dr. J. Leahy Taylor, was somewhat less categorical in his book, *The Doctor and Law*, which was clearly intended only as a pratical guide for physicians:

> "In the absence of a judicial decision, there can be no certainty, but it is thought that the operation would only be held to be unlawful if it were proved that there was some element of moral turpitude or damage to the public interest"[38].

Undoubtedly, in the absence of statute or jurisprudence addressing itself squarely to this issue, sweeping statements are somewhat hazardous. However, it seems clear from various circumstances, including the fact that the British National Health Service issues free birth control devices and drugs to all who ask, irrespective of age[39], that at least family planning is officially perceived as not being contrary to public policy. In addition, the total lack of jurisprudence condemning contraception by artificial means encourages

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35. WILLIAMS, *The Sanctity of Life and the Criminal Law, op. cit.*, note 10, p. 108.

36. (1960) 2 British Medical Journal 1516.

37. "Legal Aspects of Sterilization and Contraception", (1967) 35 Med. Leg. J., 164.

38. London, Pitman Medical & Scientific Publishing Co. Ltd., 1970, p. 81.

39. *The Pill Free to All in Britain*, The Montreal Star, Friday, 29th of March 1974, p. C-6, col. 5; P.T. O'NEILL, I. WATSON, "The Father and the Unborn Child", (1975) 38 Modern Law Review 174, reason along the same lines when they write (at p. 181): "Considering the fact that there is no conclusive statement on the legality of sterilisation, it is astonishing that the legislature should have produced the National Health (Family Planning) Amendment Act 1972, empowering Local Authorities to provide a vasectomy service, without having first made it clear that voluntary vasectomy is lawful. One can only assume that the legislature is confident that the judiciary is now certain that sterilisation is not unlawful". See also A.L. POLAK, "A Doctrinaire or a Rationalistic Approach", (1973) 3 Family Law, 86 at p. 87.

one in the belief that if the issue of sterilization arose, the courts would tend to view it favorably. Of course, the most questionable aspect involves the permanent effect of a sterilization as opposed to the temporary protection afforded by non-surgical contraceptive methods. It is submitted, nevertheless, that this line of logic avoids the basic issue – whether contraception is valid or not. If it is licit, then there is no reason why one should distinguish the methods utilized since the outcome is the same – the avoidance of conception.

In order for it to be performed lawfully, the patient must give an enlightened consent to the sterilization. In the absence of such consent, the patient could complain of assault or trespass[40]. Such being the case, it would be reasonable to assume that mental defectives cannot obtain sterilizations, even with the consent of their parents or guardians, unless that type of operation is to their benefit[41]. This would certainly occur where the indications for sterilization are therapeutic, although it is more difficult to visualize circumstances where eugenic or contraceptive sterilization would accrue to the patient's advantage[42]. Any future court debate would necessarily revolve around the notion of "benefit", which can be given either a narrow or an extensive definition. In the strictest sense, "benefit"

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40. ADDISON, (1967) 35 Med. Leg. J., *loc. cit.*, note 37, p. 164.

41. WILLIAMS, *The Sanctity of Life and the Criminal Law, op. cit.*, note 10, p. 111. In the recent case of *In re D (A minor)*, ((1976) 2 W.L.R. 279), the issue of sterilization of a minor on non-therapeutic grounds was the object of judicial scrutiny. The widowed mother of an eleven year-old girl suffering from Sotos syndrome, (an obscure affliction which can cause accelerated growth, epilepsy, behavior problems and mental retardation), sought to have the child sterilized, fearing the possibility of seduction and unwanted pregnancy. The family pediatrician was of the opinion that not only was there a real risk that D could give birth to an abnormal child, but also that because of her condition, D would not likely be able to cope with a family. In addition, her mother was sole support for D and her two sisters, living in a house without indoor plumbing. The plaintiff, an educational psychologist who was involved with the case, felt that the decision to sterilize was unwarranted by the facts. Thus, she applied to have D made a ward of the court, and to have the Official Solicitor appointed as her guardian *ad litem*. In a judgment, the facts of which clearly demonstrated that in this particular case, sterilization was contraindicated, Dame Rose Heilbron, J., manifested a reluctance to deal with the wider issues. As she stated: "The question of sterilization of a minor is one aspect of a sensitive and delicate area of controversy into which I do not propose to enter" (at p. 287). She did, however, put forward the following *dictum*: "The type of operation proposed is one which involves the deprivation of a basic human right, namely, the right of a woman to reproduce, and, therefore, it would be, if performed on a woman for non-therapeutic reasons and without her consent, a violation of such right". In his commentary on this decision ("Sterilization of a Minor", (1976) 6 Family Law 37), A.L. POLAK disagrees with this statement, preferring the view that self-propagation is a privilege rather than a right (*ibid.*, p. 40).

may be interpreted as an improvement of physical status (e.g. the removal of diseased ovaries), whereas, if given a larger signification, "benefit" could be viewed as an improvement in physical, mental or emotional status. In attributing this more liberal shading to the notion of "benefit", a purely contraceptive sterilization certainly would be legal, for example, in a situation where a moderately retarded[43] but very promiscuous female mental defective could otherwise function adequately in a somewhat protected environment. The danger involved is that the persons responsible for the care and supervision of the mentally deficient could unconsciously attempt to bend the idea of "benefit" to accomodate themselves rather than to ameliorate the situations of their patients. Thus, the director of a publicly-supported home for the mentally deficient would be tempted to sterilize the more sexually active of his charges rather than increase the number of supervisors. Here again, only a statutory or judicial definition of the term "benefit" as applicable to incapable persons, could afford us any certainty in this area[44]. Perhaps this scarcity of jurisprudence speaks well of the manner in which mental patients are treated in England.

### (ii) The Anglo-Canadian Provinces

In the absence of formal legislation or of jurisprudence indicative of the direction in which judicial sympathies lie[45], the legality of purely contraceptive sterilization depends in some measure, upon whether this type of surgery falls within the purview of sec. 45 of the

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42. WILLIAMS, *id.*

43. The levels of retardation include mild, moderate, severe and profound. A description of each category may be found in Charles W. MURDOCK, "Sterilization of the Retarded: A Problem or a Solution", (1974) 62 Cal. L.R. 917, at p. 928.

44. Under the *Mental Health Act 1959*, 7-8 El. II, c. 72, sec. 34 (I), the person or persons named guardians possess, subject to the regulations made by the minister, "...all such powers as would be exercisable by them or him in relation to the patient if they or he were the father of the patient and the patient were under the age of fourteen years".

    According to the regulations in question, (S. I, 1960, no 1241, reg. 6 (1)), "The guardian shall, so far as is practicable, make arrangements for the occupation, training or employment of the patient and for his recreation and general welfare and shall ensure that everything practicable is done for the promotion of his physical and mental health". It is obvious from these provisions that very little light is cast upon the particular problem under discussion.

45. In their article, "Parenthood and the Mentally Retarded", (1974) 24 U. of T. L.J. 117, Bernard GREEN and Rena PAUL state (at p. 121) that the only *Criminal Code* sections which could possibly apply to sterilization are 244 (assault) and 228 (causing bodily harm with intent). They conclude that these are only remote possibilities.

*Criminal Code*[46]. As it may be recalled, sec. 45 Cr. C. provides that no criminal liability attaches to a surgical act, provided *inter alia* that it is for the benefit of the patient and that it is reasonable to perform the operation according to the health of the person as well as to the circumstances of the case[47]. From our discussion of English Law, we are well aware of the contrasting interpretations and viewpoints which may surround the whole concept of "benefit"[48]. To date, Canadian attitudes have generally tended towards conservatism and, indeed, Meredith advocated a very narrow application of this notion when he wrote (in 1956):

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46. Provided that sterilizations for purely contraceptive purposes are not otherwise contrary to public policy.

47. The full text of sec. 45 Cr. C. reads as follows: "Everyone is protected from criminal responsability for performing a surgical operation upon any person for the benefit of that person if: (a) the operation is performed with reasonable care and skill and, (b) it is reasonable to perform the operation, having regard to the state of health of the person at the time of the operation is performed and to all the circumstances of the case".

48. As Jacques FORTIN states in an article written in collaboration with André JODOUIN and Adrian POPOVICI entitled "Sanctions et Réparation des atteintes au corps humain en droit québécois", (1975) 6 R.D.U.S. 150 at 180: "Il faut cependant préciser que le législateur n'a pas cru nécessaire de définir ce qu'il entend par ce bien du patient". Neither have the courts had occasion to analyse the "benefit" notion. According to J. FORTIN, *ibid.*, this is due to the fact that certain surgical operations, including voluntary sterilization, now enjoy widespread public acceptance. As a result: "On peut donc penser que les tribunaux n'interviendraient que dans des cas d'une extrême gravité. Il reste que la loi criminelle tient une épée de Damoclès suspendue au-dessus de la table d'opération" (Ibid.)

In the celebrated *Morgentaler* affair dealing with abortion, Associate Chief Justice Hugessen of the Court of Queen's Bench, was obliged to rule on the availability of the sec. 45 defence in light of the provisions of sec. 251 (4) Cr. C. After deciding that this defence could apply (*R. v. Morgentaler (No. 4)*, (1973) 14 C.C.C. 2d 455), HUGESSEN, A.C.J., elaborated upon the elements of sec. 45. Referring more particularly to the idea of "benefit" in his charge to the jury (*R. v. Morgentaler (No. 5)*, (1973) 14 C.C.C. 2d 459), the trial judge described the issue as follows: "Was the act performed for the good of the patient? Here, I tell you, as a question of law, ... that this concept of the patient's welfare does not depend on the latter's will alone. In other words, the simple fact that a patient asks one to perform some operation upon her does not mean necessarily that this operation is for her good. Nonetheless it is a fact which should certainly be taken into account. The law requires that the physician himself make a judgment independent of that of the patient, and decide that the operation which the latter is asking for is really for her good. His judgment, obviously, might be in error, without thereby making him guilty of a crime", (at p. 461). The Quebec Court of Appeal (*R. v. Morgentaler*, (1974) C.A. 129), and the Supreme Court of Canada *Morgentaler v. The Queen*, (1975) 20 C.C.C. 2d 449) both held that the sec. 45 Cr. C. defence was inapplicable without, however, discussing Mr. Justice Hugessen's statement quoted above.

> "But a needless operation causing injury to the patient, is obviously not for his "benefit", and, notwithstanding his consent to undergo it, may be the subject of a criminal charge. Included in this category are operations for the sterilization of a male or female, unless performed for the patient's health, or in virtue of a special statutory provision"[49].

Dr J.L. Fisher of the Canadian Medical Protective Association subsequently ratified this point of view in 1964, in the following terms:

> "This leaves no doubt. The benefit shall not be to the spouse, to a companion, to a pocket-book, to society as a whole, to an idea or theory, or to any other nebulous thing; it shall be "to that person! "[50].

There is also the difficulty in determining whether the "benefit" concept should be viewed subjectively or objectively, or in other terms, whether the operation can be beneficial only in the eyes of the patient, or else whether it must so be, not only in the eyes of the patient, but also in those of the average person in similar circumstances as the patient. Perhaps the two following hypothetical situations illustrate this conflict: On the one hand, we may encounter a young, upper middle-class socialite having no children and who desires sterilization merely to avoid putting her youthful figure through the rigors of pregnancy. On the other hand, the situation may involve a lower-class woman living in a cold-water flat with her five children, aged six and younger, and whose alcoholic husband is on welfare. One's first impulse is to seize upon the second fact-situation as being a more valid application of the notion of "benefit" in relation to the first, and our less fortunate woman probably *does* possess a more sympathetic case. It is submitted, however, that although the *Criminal Code* would seem to require an objective rather than subjective appreciation[51], the conflict is more imagined than real. As Glanville Williams once wrote: "Human beings are usually the best judges of their own interest...[52]. If this is indeed

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49. *Malpratice Liability of Doctors and Hospitals,* Toronto, The Carswell Company Ltd., 1956, p. 217. It would have been interesting to know Meredith's views on cosmetic surgery but regrettably, no opinion is expressed in this regard.

50. "Legal Implications of Sterilization" (1964) 91 C.M.A.J., 1363, at p. 1365. From a letter of his published at (1970) 103 C.M.A.J. 1394, it would seem that Dr. FISHER did not change attitudes.

51. See the comments of HUGESSEN A.C.J. in *R. v. Morgentaler (No. 5)* loc. cit. quoted in note 48.

52. *The Sanctity of Life and the Criminal Law, op. cit.*, note 10, p. 106.

true, (and we have no reason to doubt it), then every sane, capable adult who seriously desires a surgical operation not otherwise prohibited by public policy considerations, normally draws gratification, mental tranquility or some other equivalent form of satisfaction from it. As a result, these subjective advantages derived from a sterilization, objectively improve the emotional outlook of the patient, or in other words, they confer a "benefit" upon the person in question. Naturally, on the other side of the coin, there is still the loss of the power to procreate. Nevertheless, if no imperative social considerations require the production of children, then there is no reason why society should place a thumb on one pan of the scales, rather than on the other, in order to promote a particular point of view. Each person must decide what is more beneficial to him or to her. We might also mention that, in the general context of matrimony, the idea of "benefit" should be viewed as applying to both consorts rather than to each one individually. Of course, this collective standard avails only in matters such as sex and reproduction, which directly appertain to the marriage relationship itself.

As for the civil law and the public policy considerations concerning purely contraceptive sterilization, only one case remotely bears on the subject. In the unreported Ontario decision of *Chivers and Chivers v. Weaver and McIntyre* ( unfortunately also undated)[53], a woman slated to undergo surgery for the removal of a diseased ovary, requested her own physician to render her sterile. During the surgery, the surgeon went ahead and ligated the remaining fallopian tube on the instructions of the family physician, who was assisting at the operation. Shortly thereafter, the husband and wife sued for assault, claiming that no specific consent had been granted to the ligation. Although the jury eventually found in favour of the physicians, this case is noteworthy in that at no time was there any suggestion by Kelly, J. that, notwithstanding consent, the operation was unlawfull. He merely tried to issue on the side question of consent.

In spite of the minor encouragement derived from the *Chivers* case as well as from legal articles which expressed favorable opinions in connection with the sterilization controversy[54], the Canadian Medi-

53. This case is described in "Comments Upon the Law Relating to Abortion and Sterilization", annexed to BLACK's article "Abortion and Sterilization", (1961) 33 Manitoba Bar News, *loc. cit.*, note 8, pp. 42-43. The *Murray v. McMurchy* decision ((1949) 2 D.L.R. 442 or I.W.W.R. 989 (B.C. Sup. Ct.)), which is often cited in regards to sterilization, involved a *therapeutic* tubal ligation.

54. E.g. BLACK, *id.*, p. 45.

cal Protective Association actively discouraged doctors from performing sterilizations except on therapeutic grounds[55] , even though it grudgingly admitted that the purely contraceptive operation was probably legal[56] . The rationale appears to have been one of avoiding a potential source of trouble, since readily available contraceptives could attain the same ends without destroying healthy tissue. It was also urged that if the reasons for requesting sterilization were non-medical, then they did not concern the doctor. Succinctly stated, the argument was one of "why get involved unnecessarily"; public policy did not seem at all in issue.

In 1970, after several queries on the subject of voluntary sterilization, the Canadian Medical Protective Association issued a revised opinion. The legal foundation upon which this still current opinion is based is that of custom – the fact that this type of surgery has become relatively common[57] . The opinion further states:

> "The Association's thinking has reached the point where it now feels the problem should be left for decision by the individual doctor faced with the patient requesting the operation, to be decided just as he would decide about any other request for non-essential treatment. One should start by realizing that under these particular circumstances, there is no medical indication for such an operation so that doctors should not use those words to themselves: they should think in terms of 'reasons' and then they should weigh their patients' reasons for wishing the operation to decide if they, the doctors, feel those reasons are valid"[58] .

In addition, a standard of sorts is provided for appreciating the validity of the "reasons" advanced:

> "If the doctor decides he can agree with the reasons for surgery, he should review those reasons to be sure they are such that he could expect agreement about them, or at worst not disagreement, by a majority of his confrères were they asked later in court for their opinion about his judgment. If his confrères agreed, a court probably would; if they did not, their evidence might persuade a court the doctor under scrutiny probably was wrong, or lax"[59] .

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55. "... Only for the preservation of the health or life of the individual concerned". Cf. FISHER, (1964) 91 C.M.A.J., *loc. cit.*, note 50, p. 1365.

56. *Id.*, p. 1364.

57. "Sexual Sterilization for Non-Medical Reasons", (1970) 102 C.M.A.J. 211.

58. *Ibid.*

59. *Ibid.*

The text then goes on to deal with the duty of the doctor to mention the efficacy of non-surgical contraceptive methods, and with the requirements of consent.

With all due respect to the C.M.P.A., there would appear to be some incongruities in its position. In effect, it asserts that said modified opinion in favor of purely contraceptive sterilization derives its legal basis from the idea of custom – or in other words, from the feeling that non-essential sterilization is no longer contrary to public policy. Further on, the Association encourages doctors to sterilize only for reasons which would be acceptable to the majority of the members of their profession, on the grounds that a court of law would follow the majority's lead in deciding on the validity of the decision to sterilize in a given situation. The error in reasoning reposes upon the fact that physicians may testify as experts only in the field of their expertise, i.e. medicine, and even here, a judge is not bound to adopt the opinions expressed by the experts (even though he would most likely rely heavily on their testimony, at least as regards technical subjects). In non-medical areas, (and this is precisely the situation encountered when dealing with purely contraceptive sterilization), a physician is no more qualified to pass upon the reasons advanced with the request for surgery, than is any other average person[60].

Thus, a judge would depend upon his own knowledge and experience in arriving at a decision. Paradoxically, the C.M.P.A., in its insistance upon the value of custom or public policy, appears to presume that public policy as viewed by the medical profession and "true" public policy are one and the same. The fallacy of this attitude is obvious. It cannot be denied, however, that in general, such an outlook plays for safety since the medical profession is not noted for being avant-gardist. The greatest inconvenience derives from the fact that some patients risk having their legitimate requests for sterilization refused, if the surgeon arbitrarily decides that the reasons advanced are insufficient.

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60. Dr. E. EMANUEL writes at (1975) 112 C.M.A.J. *loc. cit.*, note 8a, p. 820: "Physicians rightly resent the notion that they are mere technicians (though some are), but this does not mean that they have the right to impose their views on others. Life is infinitely various; how can we know what is best for someone else? Who can better know than the patient what size family she (with her husband) wants? Who are we to dictate from our superior economic position? Let us not forget, too, that most of us who are physicians in Canada are men, and we must watch especially that we do not use our privileged position to impose male domination over women who, in other areas, are working free from it".

Interestingly enough, a more acceptable alternative is suggested by Dr. Philip M. Alderman, a Vancouver physician who felt constrained to comment on the merits of the C.M.P.A. opinion. After pointing out the difficulties inherent in determining what *is* the consensus of the medical profession as regards "valid reasons", he goes on to state:

> "To date, I have been unable myself to formulate the indications for voluntary sterilization, other than the expressed desire to limit family size with certainty. Contraindications are more readily discernible, and those performing the operation may concern themselves with such factors as inappropriate motivation, unresolved psychosexual problems, hemorrhagic disease, and the withholding of the spouse's consent.
>
> Unquestionably it is the physician's duty to assure himself of the physical and mental health of persons requesting voluntary sterilization and to inform them fully of the risks and alternatives. Having done so, however, it is my opinion that the final decisions as to contraceptive method can legitimately be left to the intelligent patient"[61].

This statement has extraordinary merit for two reasons: Firstly, it is logical, legally speaking, and secondly, it respects the dignity of the patient. The legal logic is apparent since a purely contraceptive sterilization is either licit or else it is not. If it is legal, then the physician's duty is to refuse to act only in situations where this type of surgery is objectively inappropriate, as for instance in cases where the physical or mental status of the patient contraindicate the sterilization. The imposition of arbitrary standards such as an age/parity formula or any other similar measure will not modify, by one iota, the legal status of the operation.

The dignity of the patient is respected in that as a competent mature person, he or she is granted a type of right of medical self-determination. Just as the patient may refuse blood transfusions because of religious convictions[62], or seek death with dignity (i.e. the suspension of all extraordinary life-support measures[63]), it would seem equally reasonable for a patient to determine how and when contraception shall occur. In being given greater freedom of choice, the responsibility for any subsequent regrets arising out of such a decision will, of course, have to rest upon the patient.

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61. "Correspondence – Voluntary Sterilization", (1970) 103 C.M.A.J. 1391-1392.

62. See for example W. Glen HOW, "Religion, Medicine and Law", (1960) 3 C.B.J. 365.

63. This topic is discussed by Ian KENNEDY, in his article entitled "The Legal Effect of Requests by the Terminally Ill and Aged not to Receive Further Treatment From Doctors", (1976) Crim. L.R. 217 *et seq.*

Therefore, Dr. Alderman's statement (to the effect that in the absence of physical or mental contraindications, the decision to undergo sterilization should be left to the properly informed patient), is an accurate appreciation of the legal status of this type of operation in the Anglo-Canadian provinces[64] .

### (iii) The United States.

The majority of the American states have, through legislative enactment, opted expressly or implicitly in favor of sterilization without medical necessity[65]. Only the State of Utah[66] still has legislation on its books which is apparently hostile to voluntary sterilization. However, the Supreme Court of Utah in *Parker v. Rampton*[67], has seen fit to place a very limited interpretation upon the Utah statute, restricting its application only to institutionalized mental defectives[68] . In effect, the Court held that since the only legislative provisions governing sterilizations were placed in a eugenic sterilization statute dealing with institutionalized mental defectives, then the interdiction of all operations which destroy the procreative function, except in cases of medical necessity, would not apply to persons not institutionalized[69].

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64. See also BLACK, (1961) 33 Man. Bar News, *loc. cit.*, at p. 45, as well as B. GREEN and R. PAUL, "Parenthood and the Mentally Retarded". (1974) 24 U. of T.L.J., 117, who conclude at p. 121: "Doubts concerning the legality of sterilization have been raised, but they seem to be without substance – at least in relation to the sterilization of a normal adult". These authors also advance the opinion that because of the "unexpressed differences" between sterilization and other operations, the consent of the parents of a retardate, which normally would suffice for "ordinary" operations, may not remove all legal doubts surrounding sterilizations, *(ibid.*, pp. 122-123). This is why they recommend legislation which would function in the best interests of the patient *(ibid.*, p. 123).

    For discussions of the difficulties surrounding minority and consent, consult Richard GOSSE, "Consent to Medical Treatment: A Minor Digression", (1974) 9 U.B.C.L.R. 56, and Barbara TOMKINS, "Health Care for Minors: The Right to Consent", (1974-75) 40 Sask. L.R. 41.

65. For more information concerning legislation, one may consult the *Reporter on Human Reproduction and the Law,* edited by Charles P. Kindregan, editor-in-chief, Boston, Legal-Medical Studies Inc., 1971.

66. *Utah Code Ann.* 64-10-2 (1961).

67. (1972) 497 P. 2d. 848.

68. Indeed, the dissenting opinions in this case were limited exclusively to matters of procedure, *id.*, pp. 853-854.

69. The law in question reads as follows: "Except as authorized by this chapter, every person who performs, encourages, assists in or otherwise promotes the performance of any of the operations described in this chapter for the purpose of destroying the

As a result, there does not appear to be any legislative provision expressly denying the right for any non-institutionalized person from having recourse to sterilization as a purely contraceptive measure. This finding, as regards the legislative branch at least, would seem to render academic, any discussion involving the constitutionality of laws forbidding voluntary sterilization in light of the U.S. Supreme Court decision in *Griswold v. Connecticut*[70], which acknowledges and protects the right of marital privacy[71].

In the absence of express statutory guidance, the criminal liability of physicians for contraceptive sterilizations possibly may be incurred via the mayhem or the assault and battery laws, even though there have never been any reported prosecutions of this nature arising from these or similar circumstances.

Although mayhem in its original sense sought to punish all mutilations which rendered men less able to fight for the king[72], this common law crime was eventually given statutory form and evolved into the "malicious maiming" laws which we know today[73]. Whereas common law mayhem applied exclusively to men and sanctioned only injuries of a specific nature (i.e. injuries affecting the "fighting capabilities"), the modern maiming legislations now cover both sexes and most forms of disfigurements or mutilations[74]. Consequently, even though a surgical sterilization (other than castration) would

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power to procreate the human species, unless the same shall be a medical necessity, is guilty of a felony." In the *Parker* case, women seeking contraceptive sterilizations were told by their physicians that because of the uncertain legal applications of the above-quoted provision, the practitioners were hesitant to act until assured that it would be lawful to perform the surgery.

70. (1965) 381 U.S. 475.

71. E. SEGALL, "Surgical Sexual Sterilization", (1972) 8 Trial 57 at p. 59. The California Court of Appeal suggested the feasibility of this argument in *Jessin v. County of Shasta*, (1969) 274 Cal. App. 2d 739 (or 79 Cal. Rptr. 359 at p. 366), and in *Custodio v. Bauer*, (1967) 59 Cal. Rptr. 463 at p. 473.

72. L. BRAVENEC, "Voluntary Sterilization as a Crime: Applicability of Assault and Battery and of Mayhem", (1966) 6 J. of Family Law 94, at p. 117.

73. F.W. McKENZIE, "Contraceptive Sterilization: The Doctor, The Patient, and the United States Constitution", (1973) 25 U. of Fla. L.R. 327 at p. 329.

74. L. CHAMPLIN, M. WINSLOW, "Elective Sterilization", (1965) 113 U. of Pa L.R. 415 at p. 428. As for the applicability of maiming statutes to the protection of the reproductive organs of women, see *Kitchens v. State* (1888) 7 S.E. 209 (Ga.).

75. P. TIERNEY, "Voluntary Sterilization, A Necessary Alternative? ", (1970) 4 Family L.Q. 373, at p. 377; BRAVENEC,, *loc. cit.*, note 72, p. 119. In an extensive analysis of the meaning of these words, Bravenec encounters some difficulty with the term "disable" since surgical sterilizations certainly "disable" or end procreation: "Under a functional definition of disabling, sterilization would be considered to

never constitute mayhem, the broader provisions of the maiming statutes could easily pertain to this type of operation, especially when the redeeming feature of medical necessity is absent.

Legal writers suggest several reasons why the maiming provisions should not apply to voluntary surgery: Firstly, as regards the nature of the operation itself, many express the opinion that the cutting of the vas deferens or of the fallopian tubes does not signify a "disabling", nor are "members" of the human body involved[75] . Secondly, it is seriously questioned whether the required malicious intent is present, especially in a medical context and in accordance with the patient's informed consent[76] . Malice has been viewed as the intent to injure another without justification, or with the intent to perform an illegal act[77] , and in the patient-physician relationship, said intent normally would be absent. Caution must still be exercised, since, in many cases, the statutory requirements for malice would be satisfied simply by the specific intent to perform the act in question[78] . In the latter hypothesis, before acquitting a physician, it would be necessary for courts to make a determination as to the legality of sterilization *per se,* that is to say, an acquittal would rest upon the finding that contraceptive sterilization is not *a priori* a reprehensible act[79] . A third approach concerning the non-applicability of the "maiming" laws, devolves from the somewhat innovative argument to the effect that since the rational basis of these laws has altered considerably, then the consent of the "victim" should constitute a valid defence[80] . Originally, the sovereign's interests were safeguarded by the sanctions surrounding mayhem, whereas now, a strong analogy may be made between the interests protected by laws prohibiting assault and battery, and those secured by edicts which forbid disablement and disfigurement. According to one writer, consent should be a complete defence unless its disallowance is dic-

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disable the patient, because it terminates one of the many functions of the genital organs... . On the other hand, under a purposeful definition of disabling, there would be no disabling by sterilization if the procreative function were unnecessary or undesirable. A principal problem in following this definition would be in developing a test of, or desirability of, such function".

76. TIERNEY, *id.*, p. 377.

77. *People v. Bryan,* (1961) 12 Cal. Rptr. 361 at p. 364 (Bray J.).

78. CHAMPLIN, WINSLOW, (1965) 113 U. of Pa. L.R., *loc. cit.*, note 74, p. 429.

79. Provided of course that the maiming statutes *do* in fact apply.

80. BRAVENEC, (1966) 6 J. of Family L., *loc. cit.*, note 72, p. 121.

tated by reasons of public policy[81]. As interesting as this notion may be, the present state of the law rejects the possibility that consent will form a valid defence to mayhem, precisely because now, one of the goals of the maiming statutes is to protect the individual from himself[82]. In addition, the traditional obligation of fighting for the king has been transformed into a broader, more modern concept of duty towards society, (not necessarily limited only to military service). The fact of being eligible for public service, and of not being a public charge due to a criminally-inflicted injury, are interests to be protected by law. Accordingly, the North Carolina Supreme Court, in *State v. Bass*[83], was able to convict of mayhem a physician who deadened a patient's fingers in order for said patient to cut them off and collect insurance money.

Jurisprudence on the subject of sterilization and its relationship to mayhem (or maiming) is quite rare, obviously because it does not appear to be seriously argued that this type of crime is committed during the performance of a sterilization. For instance, the *Christensen v. Thornby*[84] decision simply affirmed that sterilization did not constitute mayhem[85]. In *Jessin v. County of Shasta*[86], the Attorney-general's viewpoint that sterilization was a mayhem, was rejected by the California Court of Appeal on the grounds that a voluntary vasectomy in no manner implied malice[87], nor would it prevent the patient from fighting for the "king".

Another aspect of the criminal law, which could conceivably raise some doubts as to the legality of purely contraceptive sterilization, is that of assault and battery. Normally, consent would form an effective defence to this type of accusation, unless of course, the

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81. *Id.*, p. 122.

82. Ronald ANDERSON, *Wharton's Criminal Law and Procedure*, Rochester N.Y., The Lawer's Co-Operative Publishing Co., 1957, vol. 1, p. 728, no 268.

83. (1961) 120 S.E. 2d 580.

84. (1934) 255 N.W. 620 (Supreme Court, Minn.).

85. *Id.*, p. 622 (Loring J.).

86. (1969) 274 Cal. App. 2d. 737; 79 Cal. Rptr. 359.

87. *Id.*, p. 365 (Regan A.J.) It is interesting to see the courts of a republic decide whether a crime was committed in light of the interests of a non-existent sovereign. In all due honesty, it should be stated that Justice Regan was merely quoting from the *Christensen v. Thornby* case.

consent itself were adjudged contrary to public policy[88] . Needless to say, a determination of public policy in this area is the key difficulty, since no breaches of the peace, nor violations of other laws, nor serious bodily injury (aside from sterility) result from the surgery[89] . If a consensus on the state of the law in this particular field were asked of modern legal writers, they would undoubtedly subscribe to the following statement, which fairly reflects contemporary attitudes:

> "Considering all of the . . . indications of state policy on voluntary sterilization, including personal freedom, the various interests of the state, the critical morality of jurisprudential circles, the divided critical morality of religious groups, the diffuse state of generally accepted morality, and the dubious effect on promiscuity, disallowing the excuse of consent in assault and battery is not required by public policy. At the most, public policy might call for the establishment of procedural safeguards which would help guarantee that a rational decision would be made to sterilization by a patient"[90].

The courts generally have refused to interfere with the decision by a competent adult to obtain a sterilization. Aside from the fairly old (1938) case of *Foy Productions v. Graves*[91], in which a distribution licence for a film promoting sterilization as a means of contraception was withheld on the grounds of immorality and public policy considerations[92], recent jurisprudence has adopted a more liberal stance. Today, there is virtual unanimity of judicial opinion as regards the legality of elective sterilization, which is now considered a matter of individual conscience[93].

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88. McKENZIE, (1973) 25 U. of Fla. L.R., *loc. cit.*, note 73, p. 331; TIERNEY, (1970) 4 Fam. L.Q., *loc. cit.*, note 75, p. 378; CHAMPLIN, WINSLOW, (1965) 113 U. of Pa. L.R., *loc. cit.*, note 74, p. 429.

89. BRAVENEC, (1966) 6 J. of Fam. L., *loc. cit.*, note 72, p. 98.

90. *Id.*, pp. 116-117.

91. (1938) 3 N.Y.S. 2d. 573 (N.Y. Supreme Ct., Appellate Div.)

92. "Tomorrow's Children 'publicizes and elucidates sterilization as a means to prevent the conception of children, that it is a form of birth control, contraception without penalty, and that it is 'an immoral means to a desirable end'... The content of the picture is devoted to an illegal pratice, which is, as a matter of common knowledge, immoral, and reprehensible according to the standards of a very large part of the citizenry of the state" (per McNamee J.), *id.*, at p. 577.

93. Cf. *Custodio v. Bauer*, (1967) 59 Cal. Rptr. 463 at p. 473 (C.A.); see also *Shaheen v. Knight*, (1957) 11 Pa. Dist. & Co. R., 2d. 41 (C.P. Lycoming) quoted in MEYERS, *The Human Body and the Law, op. cit.*, note 25, pp. 5-7; *Christensen v. Thornby*, (1934) 255 N.W. 620 (Minn.); *Jessin v. County of Shasta*, (1969) 79 Cal. Rptr. 359 at p. 366; *Jackson v. Anderson*, (1970) 230 S. 2d. 503 (Fla. C.A.).

Turning to the civil liability aspects, can a physician performing a vasectomy or a tubal ligation, successfully be sued on the grounds of civil assault, by the capable, consenting patient? Several hypotheses may exist, the most likely of which holds that since sterilization is not considered contrary to public policy, any consent given in pursuance thereof would effectively bar any action for trepass to the person. A more remote possibility which could occur if sterilization were ever held to be criminal, would be a tort action for assault and battery. In such an eventuality, what effect would the consent of the patient have on the efficacy of his or her recourse? Unfortunately, the success of the action would depend upon the jurisdiction in which matters were pursued, since some courts have held that the acquiescense of the victim to the injury complained of, would bar recovery under the *volenti non fit injuria* or *ex turpi causa non oritur actio* rules. In denying recovery, the courts would, in effect, be refusing judicial aid to persons participating in illegal acts[94] . In yet some other instances, the courts have held that in matters of life or health, public policy would not countenance any agreement in furtherance of an illegal transaction. Therefore, the consent of the patient would be null and void, thus effectively eliminating the possibility for the defendant to invoke consent[95] . Of all these alternatives, the first hypothesis suggested above would appear to be gaining in popularity in the United States, and has in fact been adopted in the *Restatement of the Law of Torts*[96] . Nevertheless, in matters of sterilization, this whole question remains fairly conjectural since public policy appears solidly entrenched in favor of this means of contraception.

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94. This reasoning has been invoked quite often in the older "abortion" cases, i.e. actions by the victims against their abortionists: *Hunter v. Wheate* (1923) 289 F. 604 (D.C.); *Herman v. Turner et al*, (1925) 232 P. 864 (Kan.); *Goldnamer v. O'Brien*, (1896) 33 S.W. 831 (Ky.); *Nash v. Meyer*, (1934) 31 P. 2d 273 (Idaho); *Joy v. Brown*, (1953) 252 P. 2d 889 (Kan.); *Henrie v. Griffiths*, (1964) 395 P. 2d 809 (Okla.); *Sayadoff v. Warda*, (1954) 271 Cal. Rptr. 2d 140 (Cal.); *Szadiwicz v. Cantor*, (1926) 154 N.E. 251 (Mass.); *Miller v. Bennett*, (1949) 56 S.E. 2d 217 (Va.); *Andrews v. Coulter*, (1931) 1 P. 2d 320 (Wash.); *Bowlan v. Lunsford*, (1936) 54 P. 2d 666 (Okla.); *Castranova v. Murawsky*, (1954) 120 N.E. 2d 871 (Ill.).

95. *Milliken v. Heddesheimer*, (1924) 144 N.W. 264 (Ohio); *Hancock v. Hullett*, (1919) 82 S. 522 (Ala.); *Gaines v. Wolcott*, (1969) 169 S.E. 2d 165 (Ga.); *Rickey v. Darline*, (1958) 331 P. 2d 281 (Kan.).

96. St. Paul Minn., American Law Institute Publishers, 1939, vol. IV, p. 486, no 892.

In spite of the favorable attitudes manifested by the courts and the law in general towards purely contraceptive sterilization, patients with surgeons willing to operate may still be thwarted by hospital regulations and sterilization committees operating under age/parity restrictions or similar controls of equally dubious merit[97]. In the event of a refusal on an arbitrary non-medical basis, can a patient contest the validity of this type of decision on constitutional grounds?

In the area of the right of privacy, particularly with regards to sex and matrimony, the U.S. Supreme Court has recognized and has gradually expanded this concept. In the *Skinner v. State of Oklahoma* case[98], which set aside the *Oklahoma Habitual Criminal Sterilization Act,* Douglas J. affirmed:

> "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race"[99].

Subsequently, the landmark *Griswold v. Connecticut*[100] decision formally acknowledged the existence of a right of matrimonial privacy. This action arose out of a complaint against the executive director and the medical director of the Planned Parenthood League of Connecticut for violations of the Connecticut anti-contraceptive statute. It had been established, however, that the accused had provided birth control counseling and contraceptive devices only to married couples. In delivering the opinion of the court, which held the statute in question unconstitutional, Mr. Justice Douglas concluded that the right of marital privacy originated in the penumbras of the guarantees found in the *Bill of Rights.* In protecting this right of privacy, Douglas J. added:

> "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship"[101].

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97. For instance, the American College of Obstetricians and Gynecologists has recommended that ratios of five children with a maternal age of twenty-five, four at thirty years of age and three children at thirty-five as socio-economic indications for surgery, cf. P. FORBES, "Voluntary Sterilization of Women as a Right", (1969) 18 DePaul L.R. 560 at p. 563.

98. (1942) 62 S. Ct. 1110.

99. *Ibid.*, p. 1110.

100. (1965) 381 U.S. 479 or 86 S. Ct. 1678.

101. *Id.*, p. 1682

A concurring opinion of Mr. Justice Goldberg reasoned that the Constitution protected all fundamental rights and not necessarily only those enumerated in specific terms in the *Bill of Rights.* He argued that legal authority for the existence of unenumerated rights reposed upon the Ninth Amendment, which he felt had not been subjected to much scrutiny by the court. In his estimation, the only manner in which the proponents of the anti-contraceptive law could have overcome the presumption of unconstitutionality deriving from the clear violations of a fundamental right, would have been for the government to have a compelling, subordinating state interest. To the dissenters (Black, Stewart JJ.) who asserted that while the law in question was "uncommonly silly"[102], but not unconstitutional since the marital right of privacy was not specifically mentioned in the *Constitution,* Goldberg J. replied:

> "While it may shock some of my brethren that the court today holds that the Constitution protects the right of marital privacy, in my view it is far more shocking to believe that the personal liberty guaranteed by the Constitution does not include protection against such totalitarian limitation of family size, which is at complete variance with our constitutional concepts. Yet, if upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then, by the same reasoning, a law requiring compulsory birth control also would seem to be valid. In my view however, both types of law would unjustifiably intrude upon rights of marital privacy which are constitutionally protected. . ."[103].

The case of *Eisenstadt v. Baird*[104], which likewise dealt with an anti-contraceptive law (Massachusetts), provided an opportunity for the Supreme Court to enlarge upon the right of marital privacy. The court observed that ". . . whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike"[105]. In addition:

> "It is true in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and a heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual,

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102. *Id.*, p. 1705.

103. *Id.*, p. 1688.

104. (1972) 405 U.S. 438 or 92 S. Ct. 1029.

105. *Per* Brennan J., *id.*, at p. 1038.

> 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[106].

The abortion decisions of *Roe v. Wade*[107] and *Doe v. Bolton*[108], elucidated the extent to which the right of personal privacy would hold sway over other considerations. *Roe* declared that the right of personal privacy included the abortion decision[109] up to the point at which a compelling state interest would then have to predominate. The Court placed this interface at the end of the first trimester of pregnancy, since up to this moment, the maternal mortality rate was lower in undergoing an abortion than in childbirth[110]. As for *Doe,* one of its principal contributions was to strike out the necessity of a hospital abortion committee due to its being too restrictive of the patient's rights and needs which would be sufficiently delineated, medically speaking, by her personal physician[111].

So matters stand: It is now firmly established that there exists a constitutionally protected right of privacy, both in favor of the married couple as well as in favor of individuals, which extends to the right of contraception in all its forms. Although it may be argued that surgical sterilization is more drastic than the simple contraceptive measures involved in *Griswold* and in *Eisenstadt*, there can be no controverting the fact that, morally at least, it is a less reprehensible step than abortion which is also, to a certain extent, a constitutionally protected element of the right of privacy.

In summary, therefore, it would appear safe to say that a sterilization performed for purely contraceptive purposes is a licit procedure in all the American States. Moreover, hospitals benefiting from state or federal funding cannot refuse to permit this type of operation on arbitrary grounds, without falling afoul of the constitutional protections[112]. Naturally, the most stringent requirement for

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106. *Ibid.*, p. 1038.

107. (1973) 93 S. Ct. 705.

108. (1973) 93 S. Ct. 739.

109. (1973) 93 S. Ct. *loc. cit.*, note 107, p. 727.

110. *Id.*, p. 732.

111. (1973) 93 S. Ct., *loc. cit.*, note 108, p. 750.

112. See for example W.D. MYERS, "A Constitutional Evaluation of Statutory and Administrative Impediments to Voluntary Sterilization", (1975) 14 J. of Family L. 67 at p. 82.

avoiding legal difficulty is the obtainment of an enlightened consent from the same, capable patient[112a].

Would this requirement of consent imply *a priori* the deprivation of insane, retarded or other incapable persons (including minors), of the advantages of sterilization in those particular cases where such a measure is clearly indicated[113] ? The reactions of different courts towards this issue have varied: In *Smith v. Seibly*[114] , the Supreme Court of Washington held that the consent given by a married minor, eighteen years of age, requesting a vasectomy due to his myasthenia gravis, was perfectly legal. The minor, who sued his surgeon for assault and battery claiming that his consent was invalid, saw the court treat him as an adult and his action rejected[115] .

As for the mentally deficient, there has been a noticeable tendency on the part of the court to become more reticent in

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112a. As regards married persons, the consent of the spouse would not appear to be necessary: In the recent case of *Murray v. Vandevander et al*, (1974) 522 P. 2d 302, the Court of Appeals of Oklahoma affirmed that a husband could not recover damages from a surgeon and a hospital for a loss of consortium occasioned by the sterilization of his wife without said husband's consent. It should be noted that this matter dealt with sterility obtained through a hysterectomy, i.e. a therapeutic sterilization. Nevertheless, the following statement (*per* Box, P.J.) would seem general enough to cover non-therapeutic operations: "We have found no authority which holds that the husband has a right to a child-bearing wife as an incident to their marriage.We are neither prepared to create a right in a husband to have a fertile wife nor to allow recovery for damage to such a right. We find that the right of a person who is capable of competent consent to control his own body is paramount" (at p. 304).

In *Ponter v. Ponter*, (1975) 342 A 2d 574, the Superior Court of New Jersey (*per* Gruccio, J.S.C.) decided that a married woman had the constitutional right to obtain a purely contraceptive sterilization without her husband's consent. In this case, the wife, who already had three children born during the period of cohabitation with her husband, was expecting a fourth child fathered by someone other than her husband. She was to be sterilized at her own request within a day subsequent to the delivery of her child, but the doctors would not perform the operation without her husband's approval. At the time, plaintiff and her husband were living separate and apart, and she was unable to procure his consent.

113. We wish to avoid the implication so freely espoused by eugenicists that sterilization is always and automatically to the advantage of the mentally disturbed or deficient. Quite the contrary, until proven otherwise, the presumption should be to the opposite effect.

114. (1967) 431 P. 2d 719.

115. *Id.*, at p. 723 (Shorett, J.): "A married minor, 18 years of age, who has successfully completed high school and is the head of his own family, who earns his own living and maintains his own home, is emancipated for the purposes of giving a full disclosure of the ramifications, implications and probable consequences of the surgery has been made by the doctor in terms which are fully comprehensible to the minor".

approving this type of operation without express legislative authorization. Originally, the opinion was widely held that the Probate Court (or its equivalent) could grant permission for an incompetent to be sterilized under its plenary powers at law and in equity, unless these powers were specifically abridged by statute[116]. This, in effect, was the rationale supplied by Judge H. Gary in the case of *In Re Simpson*[117], involving a feeble-minded (I.Q. of 36), physically attractive, young woman of eighteen who was sexually promiscuous, and who had already given birth to one illegitimate child. On the request of the girl's mother, sterilization was ordered for several reasons, including the lack of public facilities to receive her for care, the possibility that her offspring would be mentally deficient, the fact that more illegitimate children would put added strains on the welfare department, and finally that the operation would be to the "advantage" of the patient[118].

In quite similar circumstances, the Texas Court of Appeals refused to authorize the sterilization of a thirty-four year-old woman with a mental age of six, requested by her elderly parents, who had to care for their daughter as well as her two illegitimate children[119]. According to the Court's reasoning, an incompetent's rights could not be denied or adversely affected without due process, which would imply, in this case, the necessity of statutory authority in order to approve such an operation. No such statute in fact existed. The Court also refused to recognize the existence of equitable powers vested in the Probate Court which would allow a sterilization to be performed, merely because the parties involved felt it were for the best.

In *Holmes v. Powers*[120], the Kentucky Court of Appeals likewise refused to grant declaratory relief to a county health officer and the medical society concerning the legality of sterilization of a thirty-five year-old retarded female with two illegitimate children, one of whom was also retarded. According to Palmer, J.:

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116. Naturally, we are speaking of those jurisdictions in which there exist no compulsory sterilization laws.

117. (1962) 180 N.E. 2d 206 (Ohio).

118. *Id.*, at p. 208, Gary J. states: "To deny Nora Ann such an operation would be to condemn her to a lifetime of frustration and drudgery, as she continued to bring children into the world for whom she is not capable, either physically or mentally, of providing proper care".

119. *Frazier v. Levi*, (1969) 440 S.W. 2d 393.

120. (1969) 439 S.W. 2d 579.

> "If, as is alleged and proved, the appellee is in fact mentally incompetent, she does not have legal capacity to consent to anything. Nor, at her age, does the law give her parents any control of her person or property. It may be (though we do not decide) that a legally constituted committee could exercise such a choice..."[121].

The matter of *Wade v. Bethesda Hospital et al*[122] is extraordinary in that one of the defendants, Holland Gary, was a Probate Court judge[123]. In the present case, the plaintiff, a feeble-minded, female minor, who was sterilized following a court order issued by Judge Gary, sued not only the Judge but also the hospital where the surgery was performed, the surgeon of record, as well as the other persons (such as a caseworker, the matron of the state home, the executive-secretary of the Children Services Board and the Board's psychologist), who were involved in the decision to sterilize. To plaintiff's action, (which alleged violation of her constitutional rights, assault and battery, and violation of her civil rights), defendants presented a motion to dismiss based on immunity since the sterilization was performed under court order. The defendant, Gary, claimed judicial immunity because he was acting in his official capacity as Probate Judge. In rejecting the motion, the District Court (Kinneary, C.J.) held that Gary had acted in the absence of all jurisdiction and therefore, would not benefit from immunity. As for the immunity sought by the physicians and the hospital, the court held that on principle, only those acting pursuant to an explicit court order would be immune. In the present case, however, Gary did not directly order any of the defendants to sterilize the plaintiff[124], his judgment merely instructing that the plaintiff submit to sterilization.

For the time being, the legal atmosphere seems to be quite hostile towards the sterilization of incompetents in the absence of specific enabling legislation[125]. As for the powers of the court to

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121. *Id.*, p. 580.

122. (1973) 356 F. Supp. 380 (U.S. Dist. Ct. Ohio).

123. Of *In re Simpson* fame, *loc, cit.*, note 117.

124. *Loc. cit.*, note 122, p. 383.

125. As the Supreme Court of Missouri (per Henley J.) decided in the case of *In the Interest of M.K.R.*, (1974) 515 S.W. 2d 467 dealing with the sterilization of a minor: "...[We] are faced with a request for sanction by the state of what no doubt is a routine operation which would irreversibly deny to a human being a fundamental right, the right to bear or beget a child. Jurisdiction of the juvenile court to exercise the awesome power of denying that right may not be inferred from the general language of the sections of the code to which we have referred. Such jurisdiction may be conferred only by specific statute.

order sterilization without such legislation, it would appear, at best, to be a risky proposition if performed on so-called socio-economic grounds, even though circumstances such as those encountered in the *Frazier v. Levi* case may indicate that a contraceptive sterilization is the best possible solution in an awkward situation. By the same token, it should be considered irresponsible to withhold from the mentally deficient sterilization on non-therapeutic indications if, in fact, these indications outweigh the inconveniences which would result from the violation of the patient's physical integrity. Just as it is unacceptable that the mentally deficient be deprived of the power to procreate on the fairly whimsical grounds of personal inconvenience for the rest of the family, or for the authorities of the institution in which the patient is placed, it is equally wrong to post impregnable legal barriers for the preservation of the faculty of reproduction. The deciding factor, undoubtedly, should be whether or not a sterilization would enure to the advantage of the patient according to the circumstances of each particular case. Moreover, in order to ensure that the patient's interests are properly served, it would be desirable that a disinterested third party, aside from the judge, be mandated to protect the patient from a rubber-stamp sterilization order. For obvious reasons, a court-appointed attorney or equivalent would be a preferable guardian *ad litem* than, for example, the patient's family, whose interests could conceivably be in conflict with those of the candidate for surgery[125a].

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Whatever might be the merits of permanently depriving this child of this right, the juvenile court may not do so without statutory authority - authority which provides guidelines and adequate legal safeguards determined by the people's elected representatives to be necessary after full consideration of the constitutional rights of the individual and the general welfare of the people". (At pp. 470-471).

In the California case of *Kemp v. Kemp*, (1974) 118 Cal. Rptr. 64, the Court of Appeal approved the findings in the Wade case *loc. cit.*, and stated that California probate courts did not have jurisdiction to order a guardian of an incompetent person to consent to a sterilization.

The Indiana Court of Appeals applied both the *M.K.R.* and the *Kemp* decisions *(supra)* in the matter of *A.L. v. G.R.H.*, (1975) 325 N.E. 2d 501, in which the mother of a retarded boy fifteen years of age, requested sterilization. The boy was retarded as a result of an accident and was showing definite improvement (having gained 20 I.Q. points within the two years preceding the trial). His mother was worried by the boy's increasing interest in girls. In refusing the declaratory judgment approving a sterilization, the Court went so far as to state that . . . "the common law does not invest parents with such power over their children even though they sincerely believe the child's adulthood would benefit therefrom", (at p. 502).

125a. For example, in the 1974 case of *In re Doe*, reported in the (1974-75) *Reporter on Human Reproduction and the Law*, p. III-C-5, a fourteen year-old retarded girl with an I.Q. of fifty, and with other severe problems, was to be sterilized at the request of her parents pursuant to a court order issued by Hoester, J. of the Circuit Court of St. Louis, Mo. The parents, the child and the Juvenile Officer of St. Louis were all represented by separate counsel. The Supreme Court of Missouri *(In the Interest of M.K.R. supra* note 124) reversed this decision on the grounds that the Juvenile Division of the Circuit Court lacked jurisdiction.

Ideally, a comprehensive set of laws to deal with this particular problem would remove many of the ambiguities involved in sterilization[126]. It would also be highly desirable that any such legislation avoid the excesses and exaggerations endemic to the more militant branches of the eugenics movement. The emphasis would not be on saving mankind but on protecting the patient.

## (II) The legality of purely contraceptive sterilization in certain civilian jurisdictions:

### (i) France.

With a total absence of legislation on the subject, French jurists have adopted attitudes inimical to purely contraceptive sterilization. Naturally, the decision of the *Cour de Cassation* in the matter of *"Les stérilisateurs de Bordeaux"* [127] played no small part in reinforcing the point of view that any mutilation of the human body which did not serve a therapeutic purpose would be illicit. This 1937 case involved an unlicensed practitioner and his two temporary assistants (a plumber and a dyer), who sterilized about fifteen anarchically-inclined Spanish laborers in order to advance the cause of birth control. The supreme court confirmed the condemnations of the principal actors, found guilty of the crime of *coups et blessures volontaires,* and refused to accept a defence of *volenti non fit injuria* since:

> "...[Les] prévenus ne pouvaient invoquer le consentement des opérés comme exclusif de toute responsabilité pénale, ceux-ci n'ayant pu donner le droit de violer, sur leurs personnes, les règles régissant l'ordre public; ..." [128].

Moreover, the Court affirmed that:

> "...[Les] blessures faites volontairement ne constituent ni crime ni délit, lorsqu'elles ont été commandées, soit par la nécessité actuelle de la légitime défense de soi-même ou d'autrui; que hors ces cas et ceux où la

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126. For a discussion of sterilization with regards to statutes which "emancipate upon marriage", those which "emancipate for treatment of pregnancy", comprehensive statutes and "mature minor" laws, see L.J. DUNN Jr., "The Availability of Abortion, Sterilization, and Other Medical Treatment for Minor Patients", (1975) 44 U.M.K.C. Law Rev. I, at p. 12

127. Cass. crim. 1 juillet 1937; S. 1938. I. 193, Note R. TORTAT.

128. *Ibid.*, p. 193.

> loi les autorise *à raison d'une utilité par elle reconnue,* les crimes et les délits de cette nature doivent, suivant les circonstances déterminées par les articles 309 et s. C. Pén., donner lieu à condamnation contre les auteurs et complices; ..." [129].

This was perhaps an unfortunate test of the sterilization question since several circumstances tended to militate against the acquittal of the accused: The most obvious was the fact that the "surgeon" and his accomplices were not trained physicians, and the performance of the operations in a borrowed bedroom instead of a hospital or clinic did much to accentuate the sordidness of the whole transaction. A second, more subtle factor against the accused was the great preoccupation of the French nation with its birth-rate, especially after the First World War had bled the country white and had almost wiped out an entire generation of young men [130].

Nevertheless, the rule stands today that for a surgical intervention to be legal, it must not be contrary to public order, and the consent of the patient, except possibly in cases of emergency, must be obtained.

The determination as to what type of surgery would not be in conflict whith the requirements of public order has never been made by the courts, except of course for the vague formula suggested by the *Cour de Cassation* that an operation would be authorized by law only when performed in pursuance of a useful purpose. To French jurists, this was interpreted as implying that only interventions serving a therapeutic goal would be valid [131]. According to Jean Savatier, the reasoning behind this principle was based on the fact that a physician's immunity to prosecution depended not upon the patient's consent, but essentially upon the therapeutic objective of the medical act in question [132]. Only this type of treatment would authorize a violation of the physical integrity of each person, which is

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129. *Ibid.*, (emphasis added).

130. G. HUGHES, "Two Views of Consent in the Criminal Law", *loc. cit.*, note 25, p. 243.

131. L.MALHERBE, *Médecine et droit moderne*, Paris, Masson et Cie, 1969, p. 236; R. MERGER, "Problèmes juridiques de la stérilisation féminine en fonctions de ses aspects médicaux et sociaux", J.C.P. 1963, D. 1770; A. DECOCQ, *Essai d'une théorie générale des droits sur la personne*, Paris, Librairie Générale de Droit et de Jurisprudence, 1960, pp. 306-307, no 442; J. SAVATIER, "Stérilisation chirurgicale de la femme: aspects juridiques", (1964) Juin, Cahiers Laënnec, 54, at pp. 59 et *seq.*

132. Likewise, an unqualified person performing a therapeutic act would not be *de facto* liable to the patient. Of course, this in no way disposes of any legal liability resulting from the illegal pratice of medicine, cf. J. SAVATIER, *ibid.*, p. 59.

protected by law, not only in the interest of the individual concerned but also in the interest of the state[133]. Consequently, one would arrive at the inevitable conclusion that:

> "Cela permet de condamner certaines stérilisations préventives qui seraient pratiquées, à des fins exclusivement anticonceptionnelles, sur une femme pour qui une maternité éventuelle, ne présenterait aucun risque particulier. Le désir de l'intéressée de mener une vie sexuelle sans frein, et d'éviter la gêne et les risques d'échec des autres procédés anticonceptionnels, ne peut suffire à justifier le médecin de pratiquer une opération qui mutile ou modifie ses organes. Cette utilisation de techniques médicales à des fins non médicales n'est pas couvertes par l'immunité habituelle des médecins pour les actes par lesquels ils portent atteinte à l'intégrité physique de leurs patients"[134].

The imperiousness of the therapeutic goal has suffered attenuation through the rise in popularity of cosmetic surgery which, until fairly recently at least, was considered contrary to public order [135]. However, as the *Cour d'appel de Lyon* decided in 1936, a moral (i.e. psychological) need could serve as an indication for surgery, provided that the surgical risk was proportional to the advantage sought [136]. In spite of this progress, the greatest obstacles to the acceptance of purely contraceptive sterilization in France lies in the fact that jurists are unable or unwilling to accept the idea that the risks inherent in contraceptive surgery are proportional to the so-called moral advantages sought. In addition, the idea of destroying an otherwise normal function is also quite repugnant to them. The pervasiveness of this attitude is illustrated by the fact that the French medical profession, through a declaration of the *Conseil National de l'Ordre*, issued the 30th of April 1955, and subsequently reaffirmed in 1964, stated categorically that: "La stérilisation préventive à but uniquement anti-conceptionnel est rigoureusement interdite" [137].

Yet, the second element generally required for the validity of a surgical intervention i.e. the consent of the patient, can play an

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133. *Id.*, p. 60.

134. *Ibid.*

135. R. DIERKENS, *Les droits sur le corps et le cadavre de l'homme*, Paris, Masson et Cie, 1966, p. 54 no 67.

136. Lyon, 27 mai 1936; D. 1936. 465 French jurisprudence has subsequently confirmed this rule: e.g. Paris, 13 jan. 1959, J.C.P. 1959. III42: Paris, 20 juin 1960, G.P. 1960. 2. 169. See also R. SAVATIER, J. SAVATIER, J.M. AUBY, H. PEQUIGNOT, *Traité de droit médical*, Paris, Librairies Techniques, 1956, pp. 248-249, no 274.

137. Quoted by J. SAVATIER, *loc. cit.*, note 131, p. 61.

important role in determining the surgeon's liability. Since all indications today point to the illicit nature of contraceptive sterilization, both from a penal as well as a civil law point of view[138], it can be argued that a consenting patient is not a "victim" in the truest sense of that term. In the eyes of the *droit pénal*, this type of reasoning is of no avail since the higher interest which the state possesses in repressing anti-social conduct, cannot be disposed of by a private agreement between the participants in a wrongful act. This point has been uncompromisingly affirmed by the *Cour de Cassation* in its 1937 sterilization decision, and does not appear to be seriously questioned in doctrine. The solution is not as simple however, in the case of a private law recourse, since some authors maintain that French civil law basically abhors giving any legal effect to an agreement which is violative of public order or good morals:

> "Intenter une action en domages-intérêts pour inexécution d'un contrat nul c'est donner effet au contrat; c'est le prendre en considération pour constater qu'il n'a pas été exécuté. *A fortiori* aucune action en responsabilité n'est ouverte – sans recours à l'adage '*nemo auditur*' – pour réparer le préjudice subi par suite de la conclusion d'un contrat immoral (J. Saiget, *Le Contrat immoral*, thèse, Paris 1939, p.369). D'autant que le demandeur aujourd'hui mécontent, signait avec satisfaction et en toute liberté quelque temps auparavant, ce contrat, '*volenti non fit injuria*', '*qui mavult, vult*' "[139].

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138. See for example the national report of M. le prof. J.ROBERT entitled "Corps Humain et Liberté individuelle" presented during the Journées Belges de l'Association Henri Capitant (1er – 6 septembre 1975) at p. 9 of the mimeographed text.
(These reports are in the process of being printed). For discussions of the licitness of purely contraceptive sterilizations in Franco-Belgian law, consult: M.–T.. MEULDERS–KLEIN, "Considérations juridiques sur la stérilisation chirurgicale", (1967) Annales de la Faculté de Droit de Louvain 3, at p. 29; X. RYCKMANS, R. MEERT-VAN DE PUT, *Les Droits et les obligations des médecins*, 2e éd., Bruxelles, Maison Ferdinand Larcier, S.A., 1971, t. 2, pp. 71-72, no 671.

139. Philippe LE TOURNEAU, *Règle "Nemo Auditur"* in *Jurisclasseur civil* arts 1101-1155 under arts 1131-1133, Paris Editions Techniques, fasc. 10 bis, p. 16, nos 72 and 74. See also art.1131 C.c.f.; J. SAVATIER, *loc. cit.*, note 131, p. 61. Philipe LE TOURNEAU, in his thesis, which is also entitled *La Règle "nemo auditur..."*, Paris, L.G.D.J., 1970, implied that the maxim which would apply to situations such as voluntary sterilization, would be *in pari causa turpitudinis...*, or in other words, when both parties to an illicit act or transaction are equally culpable, then both will be deprived of any right of action (pp. 202-203, no 188). He also brought out however, that French jurisprudence appears to judge professionals more severely than laymen, with the result that there would exist a presumption of fault against them (*ibid.*, pp. 226-227, no 212). Therefore, in the case of "unequal turpitudes", the more guilty party would not be able to invoke the *in pari causa...* rule. In the circumstances usally surrounding voluntary sterilizations, one may wonder whether this idea of the physician always knowing best, and thus having to accept the greater blame in

According to this view, if a woman, (or man for that matter), who obtained sterilization, decided to seek damages due to the illegal nature of the contract which rendered it void, her voluntary participation in the transaction could possibly bar her from seeking reparation although it would not affect the claim for damages of a spouse who had not concurred in the agreement[140].

Proponents of a second point of view argue that if both parties voluntarily participate in a illegal act, then the consent of the victim cannot attenuate the illicit nature of the transaction. As the Mazeauds once wrote:

> "S'il est établi qu'il y a faute de la part d'un chirurgien à entreprendre une opération..., le consentement donné par le patient ne peut pas supprimer le caractère fautif de l'acte; et ce caractère demeure, même s'il y a plus que 'consentement', plus qu' 'acceptation' des risques: si c'est la victime qui a sollicité l'intervention, quelles que soient les supplications qu'elle ait pu adresser[141].

Since each participant concurs in causing the harm, it is reasonable that responsibility for the resultant damages should be

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arriving at the decision to sterilize has a basis in reality. Indeed, wouldn't the preferable approach be to place both parties on an equal footing, and if perchance the patient chose badly, to have him suffer the consequences of his voluntary act, provided of course he arrived at his decision after having been properly advised by the physician?

140. J. SAVATIER, *ibid.*, p. 61; Cass. Crim. 6 juin 1952, D. 1954.494.

141. H. & L. MAZEAUD, J. MAZEAUD, *Traité théorique et pratique de la responsabilité civile*, 6e éd., Paris, Editions Montchrestien, t. II, pp. 601-602, no 1493; MEULDERS-KLEIN, *loc. cit.*, note 138, pp. 30-31. In the 27 juin 1913 decision of the *Cour d'appel de Lyon* (D. 1914. 2. 73 note Lalou) involving non-therapeutic experimentation, an old woman of limited means and sagging breasts, was incited by her husband to allow a surgeon to test a new surgical technique destined to restore a woman's bust to its original youthful appearance. The intention was to operate on one breast and then present the patient at a future medical convention as living "before and after" proof. Apparently, the forces of gravity had the final word since the "test" breast hung lower than ever. The court admitted the woman's claim for damages, stating:

> "Attendu que l'on doit considérer comme illicite et contraire aux bonnes moeurs une convention qui avait uniquement pour objets ces pratiques de vivisection sur une femme âgée et besogneuse; qu'une telle convention ne pourrait être admise comme compatible avec la dignité humaine, alors que, par l'appât d'un gain des plus minimes, l'appelante se déterminait à trafiquer de son corps et à le faire servir à des expériences inutiles pour elle, sinon dangereuses qui n'étaient entreprises qu'en vue des profits que leur auteur escomptait".
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> See also R. NERSON, *Les droits extrapatrimoniaux,* Paris, L.G.D.J. 1939, pp. 414-416.

shared [142]. Consequently, both the consenting patient and the surgeon performing a sterilization should assume the financial burden of compensating any loss.

Of these two hypotheses, which solution is preferable? The first has the undoubted merit of preventing a person willingly involved in an act of questionable legality from receiving some indemnification for his efforts. Consequently, there is no incentive for the "victim" of a sterilization to bring the matter before the civil courts. On the other hand, the second opinion has the advantage of encouraging recourse to the civil jurisdiction; thus rendering the declaration that an act is illegal, more than an exercise in futility. Another benefit, of course, is to have both parties to an improper venture assume a share of the damages suffered, proportional to their respective faults. In this manner, justice is served in that no participant would be able to escape the consequences of his deeds. Because of these considerations, we are inclined to favor the second thesis.

Present legal attitudes towards sterilization, which are based on the highly flexible and ever-changing notion of public order, will undoubtedly become more tolerant as persistent demands for this type of surgery increase in number. Already, France has reversed its violently anti-contraception posture and has taken firm steps in the opposite direction. For instance, in 1967, the provisions off the *Code de la santé publique*, prohibiting the sale and advertising of contraceptive were greatly modified [143]. In 1973, the *Conseil supérieur de l'information sexuelle* was created for the purpose of providing information about birth control [144], and in 1974, family planning

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142. MAZEAUD & MAZEAUD, *id.* pp. 605-606, no 1496; R. SAVATIER, *Jurisclasseur responsabilité civile,* Paris, Editions Techniques, vol. IV, XXXb, p. 15, no 90; RYCKMANS & MEERT-VAN DE PUT, *op. cit.*, note 138, t. 2, p. 75, no 672. See also the note of H. DESBOIS to the Seine 16 mai 1935 decision (D. 1936. 2. 9), especially at p. 12, MEULDERS-KLEIN, *id.*, p. 32, also acknowledges that there is a *partage de responsabilité,* but she makes the following statement: "Le consentement du patient peut, bien entendu, constituer lui-même une faute grave, plus particulièrement dans le cas d'une stérilisation uniquement destinée à assurer le confort égoïste d'un couple. C'est là le cas extrême, où la responsabilité du médecin subsiste, certes sur le plan pénal, elle sera même la plus lourde – mais où elle peut être considérée sur le plan civil, comme non exclue, mais comme compensée par la faute du demandeur. Il y aurait donc un partage de responsabilité tel que, les deux fautes s'équilibrant exactement, le demandeur n'obtiendrait aucune réparation, ce qui est d'ailleurs parfaitement logique". Unlike that writer, we feel that when faults are of equivalent gravity, there is, instead of compensation, an equal division of the damages suffered, cf. MAZEAUD & MAZEAUD, *id.*, p. 625, no 1512.

143. Loi no 67-1176 du 28 déc. 1967.

144. Loi no 73-639 du 11 juillet 1973.

centers were authorized to distribute contraceptive products to minors without parental consent [145]. Most important of all, France introduced in 1975, abortion on demand during the first ten weeks of pregnancy [146]. Before these changes were made, the French position towards contraceptive sterilization was logical since not only were non-therapeutic surgical interventions viewed with a jaundiced eye, the whole subject of contraception (other than by abstinence), as well as propaganda advocating birth control were subject to legal sanction [147]. Now that birth control and abortion have gained acceptance in France, it is quite forseeable that one of the most efficient techniques of contraception, i.e. sterilization, will likewise no longer be considered in violation of the standards of common morality [148].

The most positive aspect of this problem may be found in the fact that purely contraceptive sterilizations are felt to be in opposition only with the notion of public order. The absence of prohibitory legislation makes a modernization of the law much more simple in light of the fact that legislators are notoriously tardy in grasping the trends of public attitudes. If the occasion arose, the courts would likely decide the issue according to contemporary standards of public order. In the interim, jurists are justifiably cautious in their attitudes towards this type of surgery.

### (ii) Province of Quebec

Is purely contraceptive sterilization legal in the Province of Quebec? As may be recalled from our examination of the criminal law aspects of sterilization in the Anglo-Canadian provinces, there have never been, nor is there much likelihood of a licensed physician being prosecuted for causing bodily harm with intent (sec. 228 Cr. C.) following such an operation, provided naturally that the requirement of consent has been respected. If such a prosecution ever did arise, we have already stated that sec. 45 Cr. C. would probably furnish an adequate defence [149]. Of course, the essential difficulty

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145. Loi no 74-1026 du 4 déc. 1974.

146. Loi no 75-17 du 17 janv. 1975 *Relative à l'interruption volontaire de la grossesse.*

147. French law still prohibits birth control propaganda and commercial advertisements may only be made in professional publications, cf. Loi no 74-1026 du 4 déc. 1974, *loc. cit.*, art. 3.

148. Cf. J. ROBERT, *loc. cit.*, note 138, p.9.

149. *Supra*, p. 12 *et seq.*

would be in interpreting the phrase "for the benefit of that person", which said sec. 45 Cr. C. sets out as an essential element. Obviously, the removal of the capacity to procreate does not physically improve a person's health in most cases. However, as we have previously opined, it is submitted that the notion of "benefit" would be broad enough to include psychological contentment or peace of mind.

To determine the legality of purely contraceptive sterilization from a civil law point of view, two aspects must be considered [150] : To begin with, art. 19 C.C. provides that:

> "The human body is inviolable.
>
> No one can cause harm to the person of another without his consent or without being authorized by law to do so".

Ostensibly, this article constitutes formal recognition of the intangibility of the human body, with the repercussion that only in cases where permission is obtained from the patient or his representatives, or where the state orders a violation of a person's integrity for the welfare of the community (under authority of law of course) [151] , can a physician violate this integrity. Thus, at first glance, an enlightened consent by the patient would cover this objection.

There remains, however, a second element of the civil law which must be respected, i.e. that the agreement entered into not be contrary to the laws governing public order and good morals [152] . Now the question may be asked, would a purely contraceptive sterilization based on socio-economic indications, or even on the simple request of the patient, be considered a violation of public order and good morals? Clearly, this is a value judgment which has yet to be tested by our courts. Mr. Justice Albert Mayrand certainly feels this to be the case [153] , on the grounds that any harm *(atteinte)* arising

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150. It should be mentioned that there is no Quebec legislation dealing directly with the issue of sterilization.

151. Cf. *Public Health Protection Act*, S.Q. 1972, c. 42, secs 8-24. For additional information on this subject, see our articles entitled "The Patient's Duty to Co-operate", (1972) 3 *R.D.U.S.* 43, and "Blood Transfusions, Jehovah's Witnesses and the Rule of Inviolability of the Human Body", (1974) 5 *R.D.U.S.* 156, and the references therein cited.

152. Cf. art 13 C.C. See also F. HELEINE, "Le dogme de l'intangibilité du corps humain et ses atteintes normalisées dans le droit des obligations du Québec contemporain", (1976) 36 R. du B. 2 at pp. 33-34.

153. A. MAYRAND, *L'inviolabilité de la personne humaine*, Wainwright Lectures, McGill University, Montreal, Wilson & Lafleur Ltée, 1975, p. 19, no II.

out of the operation must be appreciated in light of the advantages to be gained[154]. In the hypothesis of an operation destined to eliminate what he terms, "...la responsabilité normale de la paternité ou de la maternité...", Mayrand appears to doubt that surgically-induced sterility is worth the sacrifice involved[155]. We, on the other hand, prefer the opinion that contraceptive sterilization is not contrary to public order and good morals.

The notions of public order and good morals are in a constant state of flux as the attitudes of society evolve. As a result, we can understand why, for example, a judgment rendered at the turn of the century, (which held Balzac's *La Comédie Humaine* contrary to good morals), is looked upon today as legal folklore[156]. Yet, objections to the validity of purely contraceptive sterilizations would arise from two sources, which include persons worried about Quebec's low birth-rate and "cultural-suicide"[157], and, of course, the Catholic Church. The answer to the first group lies in the fact that the easiest way to increase a birth-rate while respecting personal liberty would be to encourage people to have children (through economic incentives or through propaganda), rather than in discouraging contraception. Indeed, if this were the real issue, then not only would sterilization be contrary to public order and good morals, but also all contraceptive methods from the pill to the I.U.D., would fall under this ban.

As for the objections of the Church, reaffirmed by the encyclical *Humanae Vitae* of the 29th of July 1968, we feel that this is a question of conscience between each Catholic and the Church, which must not intrude into the sphere of secular law, especially in view of our pluralistic society. This point of view is far from new. In an 1890 case which also dealt with books of questionable moral value, (Victor Hugo's *Notre Dame de Paris*, *Les Misérables* and *Le Pape*, which were

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154. *Id.*, p. 18 no 10.

155. *Id.*, p. 19 no 11.

156. *Sutherland v. Gariépy*, (1904) II Rev. de Jur. 314 at p. 319 (S.C.) ( DeLorimier, J.).

157. According to an article which appeared in the *Montreal Star* entitled "Quebec A World Leader in Decreasing Birth Rate" (Thursday, Oct. 25, 1973, p. B-6), Dr. Corbett McDonald, professor of epidemiology at McGill University, told a conference on world population that during the 1960's, Quebec's birth-rate dropped by 43%, compared to 26% for the whole of Canada and the U.S.A., and a world average of 6%. In 1974, Quebec's birth-rate has leveled off at 14.2 births per thousand population, *(Le taux de natalité le plus faible au Canada*, in *La Tribune*, Friday, the 2nd of July 1976, at p. 9).

placed on the *Index librorum prohibitorum*), Mr. Justice Davidson refused to release a Catholic bookseller from a promise to purchase the above works despite the latter's objection that the contract was based on an illicit consideration [158]. In delivering his decision, Davidson, J. reasoned as follows:

> "Let the fact be granted, can [the defendant's beliefs] affect a civil contract? To say yes would be to lay down the principle that the *Congrégation de l'Index,* or the ecclesiastical authority of any other church, would have the power, as between the members of its own communion, to interpret, qualify or even annul contracts. As between members of different religions, these courts might become battle-grounds for the theologians... What, I take it, courts have to deal with in the maintenance of contracts is not the conscience of the individual, but the great public conscience which quickens and gives life to the body of the civil law, whose interpreters we are. Now, a contract with an unlawful consideration has no effect, and (C. C. 990) 'the consideration is unlawful when it is contrary to good morals or public order'. The clear duty of a court is to give universal application to this article of our Code – that is to so interpret it as that the interpretation will not vary because of the persons concerned, but be broad enough to cover all contracts of like classes, no matter who the contracting parties may be" [159].

The above considerations notwithstanding, it is interesting to note that according to a survey conducted by Princeton University in 1970 among Roman Catholics in the United States, 68% of all couples were using methods of contraception forbidden by their faith [160]. In addition, in 1972, there were 38,905 legal abortions in Canada, of which 2,912 were performed in Quebec. Of these, 1,000 were done at the Montreal General Hospital, about 600 at the Jewish General and over 400 at the Catherine Booth [161]. The point which is interesting is that the patients at these English-speaking hospitals fairly reflected the demographic

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158. *Taché v. Dérome et al*, (1890) 35 L.C.J. 180 (S.C.).

159. *Id.*, p. 181.

160. Cf. "Majority of Catholics Practice Church – Banned Birth Control", in the *Montreal Gazette*, Thursday, 4 January 1973 p. 24. The authors of the survey, Doctors C.E. Westoff and L. Bumpass, also predicted that by 1980, the figure would reach 90%. Although these statistics apply to the United States, there is no reason to doubt that similar reactions are occurring in Quebec. Certainly, our birth-rate bears this out.

161. "M.G.H. Swamped with Abortion Requests", in the *Montreal Star*, Tuesday, 12 March 1974, p. B-3. In 1973, the total figure reached 3141 abortions or 3.7 for every 100 live births. Cf. *Abortion: An emotional Issue Rejoined*, in *Time*, 14 April 1975, vol. 105, no 15, p. 7.

composition of Quebec society, i.e. a large majority of them were French-speaking and presumably, for the most part, Catholic [162]. One should add to this the estimated 20,000 abortions per year obtained in the United States or through illegal abortion clinics in Quebec [163].

Of course, a definition of what is, or what is not violative of public order and good morals cannot be arrived at by public opinion polls or through statistical analyses of public reactions, and on this basis alone, we cannot issue more than an "educated" opinion as to the validity of purely contraceptive sterilization. When we consider, however, that under the *Act Respecting Health Services and Social Services* [164], regulations provide a procedure for requesting sterilization [165], and that the Quebec Health Insurance Board will defray the costs of this type of operation [166], then it is unlikely that the courts would declare illicit, a form of surgery looked upon with a certain amount of magnanimity by the administration.

The Quebec College of Physicians (as it was then known), established a committee to look into the question of sterilization. The committee's report, endorsed by the College the 24th of February 1971, included a policy statement fairly similar in attitude to that of the Canadian Medical Protective Association [167]:

> "Le Collège rappelle aux médecins que si une stérilisation chirurgicale est pratiquée, elle doit l'être au même titre que toute autre procédure chirurgicale et ne doit être pratiquée que dans le meilleur intérêt du

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162. We dislike using broad generalizations but, in this case, our conclusion appears accurate, cf. testimony of Dr. Peter Gillett, a staff specialist (obstetrics and gynecology) of the Montreal General Hospital before Hugessen J., in the *Morgentaler* abortion trial, as reported in the *Montreal Star*, Wednesday, 22 May 1974, p. A-1.

163. Cf. "Attitudes Promote Illegal Abortions", in the *Montreal Star*, Wednesday, 9 February 1972, p. 21.

164. S.Q. 1971, c. 48 (sanctioned the 24th of December 1971).

165. Art. 3.2.3.3.: "Toute personne désirant se soumettre à une intervention chirurgicale stérilisante doit en faire la demande par écrit sur une formule prévue à cette fin". Cf. *Gazette officielle du Québec* of the 25th of November, 1972, vol. 104, no 47, p. 10575.

166. Cf. Directive no 49 issued the 1st on July 1971 by the Q.H.I.B.: "Tous les actes posés dans un but de planification familiale sont reconnus comme services assurés. La vasectomie et la ligature des trompes sont des services assurés", quoted by S. MONGEAU, "La vasectomie: évolution récente", (1972) 7 *Le Médecin du Québec* 44, at p. 46.

167. The C.M.P.A. position is described at (1970) 102 C.M.A.J. 211, in a article entitled, "Sexual Sterilization for Non-Medical Reasons", *loc. cit.*, note 57.

> patient... La décision de pratiquer une telle procédure appartient au médecin qui doit juger chaque cas en particulier, après avoir donné au patient, et à son conjoint lorsque c'est possible, des explications sur la nature et les conséquences de l'intervention" [168].

In the main, we agree with this statement as representing a reasonable description of the status of the law on the subject of sterilization. We are more hesitant when it comes down to the question as to upon whom the sterilization decision rests. Of course, a physician (emergency situations excepted)[169] cannot be forced to accept patients that are not desired, nor must he perform surgery which is morally, philosophically or professionally repugnant to him. This does not imply that the decision to operate is his alone. On the contrary, we feel that if no medical or psychological contra-indications are present, then the decision should be left to the patient. In these circumstances, any patients later regretting their decisions will be obliged, as mature people, to accept the consequences of their acts. Perhaps it would be preferable to say that if a surgeon does not otherwise object to performing sterilizing operations, then the decision to go through with it must rest upon the informed, capable adult [170]. As we have mentioned previously,

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168. Quoted by MONGEAU, *loc. cit.*, note 166 p. 46.

169. Cf. *Public Health Protection Act, loc. cit.*, note 151, art. "An establishment or a physician shall see that care or treatment is provided to every person in danger of death; if the person is a minor, the consent of the person having paternal authority shall not be required".

170. With regards to the capacity of married persons to unilaterally consent to a purely contraceptive sterilization, it should be noted that according to amendments *(An Act to Amend the Act Respecting Health Services and Social Services*, S.Q. 1974, c. 41, sec. 57) to the *Act Respecting Health Services and Social Services, loc. cit.*, sec. 114 now provides that: "The consent of the consort shall not be required for the furnishing of services in an establishment". In addition, art. 177 C.C. states: "The legal capacity of each of the consorts is not diminished by marriage. Only their powers can be limited by the matrimonial regime".

As for the non-therapeutic sterilization of minors and incapable persons, certain nuances should be made: The *infans* (a child thirteen years-old or less) does not have the capacity to consent to medical treatment, and only the person having paternal authority or a judge of the Superior Court may do so for him *(Public Health Protection Act* S.Q. 1972, c. 42 sec. 36. For a general study of the problem of consent and minority, see P.-A. CREPEAU, "Le consentement du mineur en matière de soins médicaux ou chirurgicaux selon le droit civil canadien", (1974) 52 C.B.R. 247 *et seq.*). However, these persons may act only in the child's best interests, which implies that the medical treatments must be necessitated by the state of health of the child, (MAYRAND, op. cit., note 153, p. 57, no 47). As a result, it is difficult, if not impossible to imagine circumstances in which a voluntary sterilization would be indicated.

The *adolescens*, (a child of fourteen or more), who, by special legislation *(Public Health Protection Act, ibid.)*, appears to enjoy full capacity to consent to

we feel it is preferable to avoid arbitrary and discriminatory rules such as those based upon age and parity, which have no probatory force before the courts.

In summary, we consider that, as in all other cases involving corporeal integrity, the decision to undergo sterilization is properly left to the patient as long as no other broader interests such as those of society are involved. It is a natural reflex of jurists of this province to seek some guidance on this and other equally controversial issues, from the legal literature and jurisprudence of other jurisdictions. Perhaps this merely compounds our difficulties due to the fact that our soul belongs to Rome, our Civil law owes much to France, our Criminal law is of Anglo-Saxon origin, and our morals are American.

## CONCLUSION

The subject of purely contraceptive sterilization is still somewhat controversial, but remains a licit form of birth control in the United States, Canada and England. Only in France is there substantial resistance to the idea of admitting the legality of non-therapeutic sterilization. Nevertheless, the recent substantial liberali-

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medical treatment, may act only when his state of health so requires, (MAYRAND, *id.*, p. 66, no 52). Therefore, this would suggest that, "Les interventions chirurgicales pour rendre stérile un mineur de quatorze ans dont la santé n'est pas mise en cause ne tombent pas sous la protection de l'art. 36 . . .", (MAYRAND *ibid.*).

Since an emancipated minor is no longer subject to paternal authority (art. 243 C.C.), therefore he enjoys full capacity with regards to his physical person (J. PINEAU, *La Famille*, Montreal, P.U.M., 1972, p. 230, no 279).

The situation of adults interdicted for imbecility, insanity or madness (art. 325 C.C.), is somewhat more ambigous. Although their curators have the same powers over their persons as tutors have over minors, and they must act in the best interest of their charges, (MAYRAND, *id.*, p. 50, no 42), the circumstances can be quite dissimilar to those surrounding minority. For example, one may chance upon marriages involving persons interdicted for imbecility, insanity or madness, (these marriages being only relatively null, cf. P.B. MIGNAULT, *Le droit civil canadien*, Montreal, C. Théoret, Editeur, 1895, t. I, p. 346), for whom the birth of a child would be a disaster. In any event, there can arise situations in which a sexual sterilization truly would be in the best interests of the interdict. Therefore, we feel it would be just as inaccurate to affirm that one may never sterilize an interdict, as it would be to say that interdicts should always be sterilized as a matter of course, as many eugenicists would have us believe. We agree wholeheartedly with Mayrand that: "Les personnes appelées à prendre une décision à la place du malade... doivent se garder d'une audace excessive inspirée par le désir de se dégager, d'une façon ou d'une autre et le plus rapidement possible, de leurs responsabilités envers le malade". (*Id.*, p. 51, no 42). The same considerations would apply to the Public Curator (*Public Curatorship Act.*, S.Q. 1971, c. 81, sec. 7).

zation of abortion and contraception laws in that country tolls the death-knell of legal opinions inimical to voluntary sterilizations.

There remains one aspect of sterilization which, strictly speaking, does not fall within the purview of this paper but which, due to the novel nature of the problems raised, warrants comment – we refer of course to malpractice liability. As a general rule, surgeons undertaking to perform sterilization are not bound to ensure that sterility ensues, unless through express agreement, they are willing to guarantee the results of their operations (which rarely occurs). In other words, surgeons generally contract to operate in a competent, reasonable fashion, or as civilians would put it, are bound to *obligations de moyens* rather than *obligations de résultat.* What then would be the result, if, through negligence or want of skill, the operation did not succeed in producing sterility, and a healthy, normal baby was eventually put into the world? Would the courts be willing to grant damages for an event which, under ordinary circumstances, is regarded as a great blessing by most parents [171] ?

It is only in the United States that this precise issue has had occasion to be tried [172] , and the reactions of the American courts are quite illuminating. Initially there was a general repugnance to award damages for the birth of a normal baby. In *Christensen v. Thornby* [173] , the first reported case to deal with the subject, the court refused to grant compensation to a man who underwent a vasectomy because of his wife's inability to withstand the strain of childbirth:

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171. In the Province of Quebec, the closest analogy which can be made with the problem of "unwanted" birth is that of seduction. The courts will award moderate damages for the moral prejudice caused (*atteinte à l'honneur et à la réputation*), but will concentrate primarily on compensating patrimonial losses such as loss of salary and medical expenses. As for the actual expense of raising a child, it will be assumed by the seducer under the form of an alimentary allowance, (for a more general discussion of these and related matters, see J.L. BAUDOUIN, *La responsabilité civile délictuelle,* Montréal, P.U.M., 1973, pp. 124-125, nos 161-165). Of course, when an "unwanted" birth occurs during marriage, the husband of the mother is the biological father of the child and he would be liable to support said child in any case. That is why our comparison with seduction offers little guidance.

172. In the case of *Cataford v. Dr. Moreau*, still pending before the Superior Court of Montreal (A. Monet, J.) the parents of a chilborn after the supposed sterilization of the wife (who already had ten children), have sued for $25,000 damages arising out of the "undesired" birth, cf. L. LEVINSON, "M.D. Sued For 'Undesired' Birth", *The Gazette*, Tuesday, January 20, 1976, p. 1.

173. (1934) 255 N.W. 620 (Minn. Sup. Ct.)

> "The purpose of the operation was to save the wife from the hazards to her life which were incident to childbirth. It was not the alleged purpose to save the expense incident to pregnancy and delivery. The wife has survived. Instead of losing his wife, the plaintiff has been blessed with the fatherhood of another child. The exprenses alleged are incident to the bearing of a child, and their avoidance is remote from the avowed purpose of the operation. As well might the plaintiff charge defendant with the cost of nurture and education of the child during its minority" [174].

The indications for the operation were therapeutic and, therefore, when the risks feared did not materialize, no damages had been suffered. A subsequent case, *Shaheen v. Knight* [175], arrived at a similar conclusion even though the husband in that matter underwent a vasectomy for purely contraceptive reasons. Damages were refused because to allow them would have been "...foreign to the universal public sentiment of the people..." [176].

The California case of *Custodio v. Bauer* [177] eventually established a break-through for those holding the opinion that the birth of a child should be compensable in damages [178]. The Court reasoned that had the wife died, or have been crippled by childbirth, the husband, (and the wife herself in the second hypothesis), would have been entitled to damages, but:

> "Where the mother survives without casualty there is still some loss. She must spread her society, comfort, care, protection and support over

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174. *Id.*, p. 622 (Loring J.)

175. (1957) 11 Pa. Dist. and Co. R. 2d 41 (C.P. Lycoming) reported in MEYERS, *op. cit.*, note 25, pp. 5-6.

176. *Id.*, p. 45. The court went on to say: "In our opinion, to allow such damages would be against public policy" (at p. 46).

177. (1967) 59 Cal. Rptr. 463 (Court of Appeal).

178. Other cases prior to *Custodio* were involved with the issue of unsuccessful sterilization and pregnancies but none actually dealt squarely with the question presently under discussion, e.g. *Doerr v. Villante*, (1966) 220 N.E. 2d 767 (Appellate Court Ill.) and *Vilord v. Jenkins*, (1969) 226 S. 2d 245 (Fla. Dist. C.A.) dealing with questions of limitations; *Ball v. Mudge*, (1964) 391 P. 2d 201 (Wash. Supreme Ct.) and *Lane v. Cohen*, (1967) 201 S. 2d 804 (Fla. Dist. Ct.), medical negligence not proved; *Tosh v. Tosh*, (1963) 29 Cal. Rptr. 613 (Dist. Ct. of Appeal), legitimacy of the child; *Bishop v. Byrne*, (1967) 265 F. Sup. 460 (W. Va.), question of damages other than for support etc... of the child.

> a larger group. If this change in the family status can be measured economically it should be as compensable as the former losses"[179].

The difficulties inherent in attempting to balance the advantages derived from the birth of a child, with the inconveniences which undoubtedly result therefrom, were examined in detail by the Michigan Court of Appeals in *Troppi v. Scarf* [180]. By error, the defendant, a druggist, incorrectly filled a prescription by substituting for an oral contraceptive, Norinyl, a mild tranquilizer called Nardil [181]. The Court refused to find as a matter of law that the birth of a child conferred an overriding benefit. Instead, it felt that the benefits derived from the unplanned child should be weighed against all the elements of the claimed damages – the so-called "benefits rule" [182].

The Superior Court of Delaware in *Coleman v. Garrison*[183] went even further in its interpretation of the "benefits rule":

> "The rationale that benefits occurring from the birth of a child neutralize the cost of his maintenance is also suspect. Analytically, plaintiffs seek compensation for the expenses necessary for support despite their love and affection for the child... . However, conceding that the rewards of a child are in point, it cannot be said as a matter of law that a healthy child always confers a benefit greater than the expense of his birth and support. *Troppi supra*. Otherwise, all married couples would

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179. (1967) 59 Cal. Rptr. *loc. cit.*, note 177, p. 476 (per Simms, A.J.). He went on to state: "On the present state of the record it cannot be ascertained to what extent plaintiffs, if they establish a breach of duty by defendants, are entitled to damages. It is clear that if successful on the issue of liability, they have established a right to more than nominal damages" (at p. 477). See also *Jackson v. Anderson*, (1970) 230 S. 2d 503 (Fla. C.A.).

180. (1971) 187 N.W. 2d 511.

181. It is submitted that had this prescription been for a male contraceptive pill, there would have been no action since a tranquilizer would probably have served just as effectively.

182. (1971) 187 N.W. 2d, *loc. cit.*, note 180, p. 518 (per Levin P.J.). See also *Betancourt v. Gaylor*, (1975) 344 A. 2d 336 (Superior Court of New Jersey), in which Loftus, J.C.C., stated: "The loss is the financial expense which plaintiffs sought to obviate by submitting to surgery. The benefit is whatever benefit a jury may reasonably conclude has accrued to plaintiffs as a result of the newborn child. These are relatively tangible and measurable factors for a jury to consider separate from each other..." (at p. 339).

183. (1971) 281 A. 2d 616.

> choose to have children... . The jury should be allowed to weigh the benefit against the economic burden because the advantage which a child brings his parents mitigates the damage of his support" [184] .

As matters presently stand in the United States, it may be affirmed that in principle, compensation for "wrongful life" will be awarded unless the defence can prove that under the "benefits rule", the advantages of having the child adequately compensate the expense and the troubles involved [185] .

Logically speaking, there is no reason why a claim of this nature should not be acceptable, since the birth of a child is a readily foreseeable consequence of a negligently performed sterilization. Moreover, it does not necessarily follow that the birth of a child is a boon no matter what the circumstances, otherwise society would in fact owe a debt of gratitude to every rapist or seducer whose efforts produced a child. In other terms:

> "The doctor whose negligence brings about such an undesired birth should not be allowed to say 'I did you a favor', secure in the

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184. *Id.*, p. 618 per Messick J. confirmed *sub nom. Wilmington Medical Center Inc. v. Coleman*, (1973) 298 A. 2d 320 (Supreme Ct. Delaware).

185. The Texas Court of Appeal, in two instances, has refused to grant compensation; cf. *Hays v. Hall*, (1972) 477 S.W. 2d 402; *Terrell v. Garcia*, (1973) 496 S.W. 2d 124. In the latter case, Barrow C.J. states (at p. 128): "Nevertheless, as recognized in *Hays* and *Troppi*, the satisfaction, joy and companionship which normal parents have in rearing a child make such economic loss worthwhile. These intangible benefits, while impossible to value in dollars and cents are undoubtedly the thing that make life worthwhile. 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".

In the State of New York, the courts at first refused to grant damages for wrongful birth. In *Stewart v. Long Island College Hospital*, (1970) 313 N.Y.S, 2d 502, conf. by (1972) 332 N.Y.S. 2d 640 (N.Y. Court of Appeals), the court refused to allow damages for the birth of a defective child, (the mother having contracted rubella during pregnancy). The child sued the hospital for not having aborted the mother, thus terminating the plaintiff's life; while the parents sought compensation for physical pain and mental anguish. It was held that both the child and the parents had raised causes of action not previously known to the law, and only the legislative branch could remedy this lacuna. It was also held that it would be impossible to evaluate the damages suffered. In addition, public policy at the time, declared the proposed abortion as an illegal one. More recently, in the matter of *Cox v. Stretton*, (1974) 352 N.Y.S. 2d 834, the Supreme Court of New York distinguished the Stewart case, by stating that abortion is no longer against public policy (pp. 841-842). Thus, the plaintiff-parents, to whom a normal child was born following a purely contraceptive tubal ligation, would now be able to sue for damages resulting from "wrongful life".

knowledge that the courts will give to this claim the effect of an irrebuttable presumption" [186].

In closing this discussion of sterilization, we believe that contraception is the right of every person, married or single, and that it is the birthright of every child to be born wanted [187]. We also feel that the method of contraception chosen, whether of a temporary or a permanent nature, should be left to the sole discretion of the individual, advised and guided by persons, such as physicians and public health nurses, who are versed in matters of birth control. Finally, we affirm that the decision to have recourse to contraception is a matter best left to the individual and his conscience.

At the present juncture, the state has no possible justification in compelling fertility, either by express statutory enactment or by the implied threat of sanctions on grounds of public policy [188]. Quite the contrary, we are on the point of being overwhelmed by a population explosion which has begun to stretch our resources to the limit [189]. Indeed, it is feared that unless mankind seriously undertakes to initiate and encourage contraception on a broad scale without further delay, our generation may well live to see the re-introduction of compulsory sterilization.

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186. Dissenting opinion of Cadena J. in *Terrell v. Gracia, id.*, at p. 131.

187. J. STEPAN, E.H. KELLOGG, "The World's Laws on Contraceptives", (1974) 22 The American Journal of Comparative Law 615 at p. 625. The authors point out that the *U.N. Conference on Human Rights* at Teheran in 1968, unanimously affirmed that it is the right of couples to decide on the number and spacing of their children (Resolution XVIII). In August 1974, the *U.N. World Population Conference* at Bucharest approved the World Plan of Action which seeks to implement these principles.

188. MEYERS, *op. cit.*, note 75, p. 24.

189. W. FRIEDMAN, "Interference With Human Life: Some Jurisprudential Reflections", (1970) 70 Col. L.R. 1058 at p. 1063.