

## CIVIL AND CRIMINAL LIABILITY OF PHYSICIANS FOR STERILIZATION OPERATIONS

By JUSTIN MILLER and GORDON DEAN

(From the March issue of the American Bar Association Journal).

In California, between 1910 and 1929, six thousand and fifty-five sterilization operations have been performed in public institutions.

About three thousand such operations have been performed in other States during the same period.

How many operations have been privately performed, it is impossible to state.

"The operations most frequently used for this purpose are that of vasectomy as applied to males and salpingectomy as applied to females. We are assured by members of the medical profession who have developed these techniques that, unlike castration and spaying, vasectomy and salpingectomy do not desexualize the individual or produce other physical or mental changes except such as may grow out of a realization that the child-producing function had been destroyed. The constitutionality of statutes providing for the sterilization of the unfit has been established in a number of states and by the Supreme Court of the United States. The courts have been more reluctant about conceding the constitutionality of statutes providing for the sterilization of criminals." (For a full discussion of the law involved in the preceding introductory paragraphs see, "The Law and Human Sterilization" by Otis H. Castle, 53 Reports of Am. Bar. Assn. 556).

"In most of the statutes which provide for the sterilization of the unfit in state institutions, there have been incorporated provisions, absolving from civil and criminal liability, those who perform such operations.

As yet, none of these provisions have been passed upon by courts of review. Presumably, in order to avoid liability, the provisions of the statutes must be strictly complied with."

"Ordinarily the purpose is therapeutic (A distinction between eugenic and therapeutic purposes is important under some of the sterilization statutes; Indiana Stats. 1927, Ch. 241, Sec. 6; Utah Stats. 1925, Ch. 82, Sec. 6; Mississippi Stats. 1928, Ch. 294, Sec. 6; Virginia Ann. Code 1924, Ch. 46b, Sec. 1095m, (P. 569). 'Medical' and 'therapeutic' are probably synonymous. See Williams v. Scudder, 102 Ohio State 305, 131 N. E. 481, 483; Gould Med. Dict. (2d ed) p. 1380.), rather than eugenic, nevertheless there are cases of voluntary private sterilizations where the purpose is to cut off a strain of defective germ-plasm, as in the case of a diagnosis of hereditary insanity or in case of the marriage of two persons each with a pronounced family history of cancer. We may safely assume, no doubt, that in some cases the purpose of the operation is merely to remove danger of pregnancy."

"An operation for sterilization would clearly result in criminal liability in many cases. Death resulting from such a cause, if no justification or excuse were present, would make the perpetrator guilty of a homicide, varying in degree according to the malice and intent in his mind at the time of the act."

"The usual considerations in determining liability for homicide would be pertinent here. Gross negligence, general criminal intent, the

fact of being engaged in the commission of another felony, might each be sufficient to supply the element of intent. (Gross Negligence. See note 61 L.R.A. 287, 289. See also *State v. Reynolds*, 42 Kan. 320, 22 Pac. 410, 16 Am. St. Rep. 483 (1889) and note; *State v. Hardister*, 38 Ark. 605, 42 Am. Rep. 5 (1882). *General Criminal Intent*. Clark and Marshall Crimes (3d ed) Sec. 243; *State v. Moore*, 25 Iowa 128, 95 Am. Dec. 776 (1868); *State v. Lodge*, 9 Houst (Del) 542, 33 Atl. 312 (1892). *Homicide in Commission of Felony*. I Hale P. C. 473; 21 Mich. L. Rev. 95. See Clark and Marshall Crimes (3d ed) 195, and cases collected in 63 L. R. A. 353. At present, Utah is the only state which makes an unlawful sterilization operation a felony; Utah Laws of 1925, Chap. 82, Sec. 7. In two states unlawful sterilization operations are misdemeanors; Iowa Stats. 1924. Code of Iowa 1927, Ch. 168 Sec. 3364. When originally passed in 1915 the section was 2600s (5). Kansas Stats. 1917, Chap. 299, Sec. 7. Revised Stats. 1923, Chap. 76, Sec. 177.) The main consideration would be that of causation, and death resulting.

"In similar manner such an operation might result in liability for mayhem or maiming. This would be clearly true in case of castration because the effect of the operation is to change the entire physical character of the individual. (Castration: *Bouvier Law Dict.* 1 Hawk P. C. 107; *Bishop Crim. Law.* (9th ed.) Sec. 1001.)"

"In cases both of homicide and mayhem, even the consent of the person castrated would not serve to excuse the physician, for it is clearly established that consent of the injured person in this type of case does not operate to prevent criminal liability. (See *People v. Clough*, 17 Wendell 351, 31 Am. Dec. 303 (1837)

for a full discussion, and *Rex v. Wright*, 1 East P. C. 396, Co. Litt. 127a. In abortion cases where death results, the homicide is not justifiable. *State v. Magnell*, 3 Penn. (Del) 307, 51 Al. 606 (1901); *State v. Moore*, 25 Iowa 128, 95 Am. Dec. 776 (1868). The same is true where death is the result of a duel. *Regina v. Barronet*, Dears C. C. 51.)"

"An interesting subject of inquiry is opened up when we attempt to apply these principles of law to the modern sterilization operations of vasectomy and salpingectomy. As has been pointed out already they are entirely different from the cruel and despoiling operations known to the common law. It is true that in at least one recent case the use of the modern operations was condemned as constituting cruel and unusual punishment. (*Hendricks v. Mickle*, 262 Fed. 677, D. C. D. Nev. 1918; *Davis v. Berry*, 216 Fed. 413, D. C. S. D. Iowa 1914. See also dissenting opinion in *Smith v. Command* 231 Mich. 409, 204 N. W. 140, 142 (1925).)"

"In recent years a few of the states which have adopted sterilization statutes have incorporated therein two types of prohibitory provisions with regard to the performance of non-therapeutic private operations of sterilization.

"First, the statutes of Indiana, (*Indiana Stats.* 1927, Ch. 241, Sec. 6), Utah (*Utah Stats.* 1925, Ch. 82, Sec. 6) Mississippi (*Mississippi Stats.* 1928, Ch. 294, Sec. 6) and Virginia (*Virginia Ann. Code* 1924, Ch. 46b, Sec. 1095m, (p. 569.), make the following provision for therapeutic operations of sterilization:

"Nothing in this act shall be construed so as to prevent the medical or surgical treatment for sound therapeutic reasons of any person in this state, by a physician or surgeon licensed in this state which treat-

ment may incidentally involve the nullification or destruction of the reproductive functions.'

"The Indiana statute makes a further qualification, 'provided that such treatment shall be that which is recognized as legal and approved after due process of law.'

"It will be noted that this type of provision does not make such operation a criminal offense, and no punishment is provided. It is probably at most a provision designed to avoid civil liability except where the operation is non-therapeutic, or possibly even where the physician is unlicensed, or the operation 'primarily' (as distinguished from 'incidentally') involves the nullification or destruction of the reproductive functions. If the operation did contain any of the above impliedly prohibited circumstances, an attorney might well hesitate to advise a physician that he might safely perform the operation in a state which had such a statute. Especially would this be true in Indiana. (Indiana is one of the states in which consent to an abortion is not a bar to civil recovery against the physician by the patient.

*Martin v. Hardesty*, 163 N. W. 610, (Ind. 1928), but see *Courtney v. Clinton* 18 Ind. App. 620, 48 N. E. 799 (1897).

"Second, in three states, Iowa (Iowa Stats. 1924. Code of Iowa 1927. Ch. 168. Sec. 3364. When originally passed in 1915 the section was 2600s (5), Kansas, (Kansas Stats. 1917, Chap. 299, Sec. 7. Revised Stats. 1923, Chap. 76, Sec. 177), and Utah, (Utah Laws of 1925, Chap. 82, Sec. 7.) a direct penal provision is found:

'Except as authorized by this act' (the act refers to the sterilization of the unfit in state institutions,) 'every person who shall perform, encourage, assist in, or otherwise promote the performance of either of

the operations' (vasectomy and salpingectomy) 'for the purpose of destroying the powers of procreation, unless performance of such operation is a medical necessity, shall be guilty of a misdemeanor.'

"Utah is the only state which incorporates in its acts both of the above provisions."

"In those states which have penal provisions regulating liability for performance of such operations without therapeutic or medical justification, liability is determined thereby. Where the state has nothing but a mayhem statute which follows the common law concept, it is very doubtful if the modern operations for sterilization could be classed as criminal. Where the statute speaks in terms of 'rendering useless' a member or organ of a human being, there is possibility of a decision either denying or establishing liability. In any event malice seems to be an element essential to criminal liability in such a case."

As to civil liability the authors differentiate between cases where the plaintiff has consented to the operation and those where the operation has been performed without or against the plaintiff's consent.

They state that although some cases are on record involving operations which incidentally resulted in sterility, no case has been found in which a person who has consented to a sterilization operation has brought suit against a physician.

The authors draw an analogy between illegal sterilization operations and illegal abortions.

"Appellate courts of this country have considered nine cases of abortions where suit was brought by or for one who had consented to the operation. In four of the jurisdictions, Federal, (*Hunter v. Wheate*, 289 Fed. 604 (C. A. D. C. 1923), Kentucky, (*Goldnamer v. O'Brien* 98

Ky. 569, 36 L. R. A. 715, 33 S. W. 831, 56 Am. St. Rep. 378 (1896). This case is approved in Bigelow on Torts, p. 41), Massachusetts, (*Waclaw Scadificz v. Cantor*, 154 N. E. 251 (Mass. 1926), and New York. (*Larocque v. Conheim*, 42 Misc. 613, 87 N. Y. S. 625 (1904), no recovery was allowed, on the principle that an illegal transaction cannot be made the basis of an action by one who is a party thereto. In five of the jurisdictions, Alabama, (*Hancock v. Hullett*, 203 Ala. 272, 82 So. 552 (1919), Indiana, (*Martin v. Hardesty*, 163 N. W. 610, (Ind. 1928), but see *Courtney v. Clinton* 18 Ind. App. 620, 48 N. E. 799 (1897), Maine, (*Lembo v. Donnell*, 116 Me. 505, 101 Atl. 469 (1917), Ohio, (*Milliken v. Heddesheimer*, 144 N. E. 264. (Ohio, 1926). and Wisconsin, (*Miller v. Bayer*, 94 Wis. 123, 68 N. W. 869 (1896) recovery was allowed on the theory that 'because of the state's interest, neither party has a right to make any agreement to sacrifice his life or suffer injury to his person, and any such agreement is void.'

"In those states in which there is no penal provision prohibiting a sterilization operation by the modern methods, the general rule of tort law would seem to apply and the consent of the party to submit to the operation should be a complete shield against civil liability on the part of the operating physician, provided the operation was performed without negligence."

If a physician performs an operation different from the one consented to, plaintiff can recover (*Cuthriel v. Protestant Hospital*, an

unreported Ohio case, cited in the notes to *Kinkaid on Torts*, Sec. 375).

Where an operation is performed upon a person without the patient's consent, express or implied, it is unlawful (*Mohr v. Williams*, 95 Minn. 261, 104. N. W. 12, 111 Am. St. Rep. 462, 1 L. R. A. (NS) 439 (1905) and note. See also note 26 A. L. R. 1036; 2 Cal. L. Rev. 312; and *Rolater v. Strain*, 39 Okla. 572, 137 Pac. 196, (1914).

If the person operated upon is incapable of giving legal consent, the physician is of course liable.

It has been held that if the wife gives consent, the husband's consent is either not necessary or is implied.

Where a sterilization operation is performed on a minor without the consent of the parent, except the factual situation presents a clear case of emergency (*Moss v. Rishworth* 191 S. W. 843 (Tex. 1917), affirmed 222 S. W. 225 (1920). See *Browning v. Hoffman*, 90 W. Va. 568, 111 S. E. 492 (1922) *Luka v. Lowrie*, 170 Mich. 122, 136 N. W. 1106, 41 L. R. A. (NS) 290 (1912) at 135), the physician is liable.

Where before marriage, a wife is sterilized by a private operation and does not disclose the fact to her husband before marriage, annulment should be granted on the ground of fraud, (*Turner v. Avery*, 92 N. J. Eq. 473, 113 Atl. 710 (1921).

The article contains quite a number of case references not mentioned in this excerpt and the reader is referred to the original article for further material on the question.