

**MALPRACTICE—VOLUNTARY STERILIZATION—PUBLIC POLICY  
DOES NOT RENDER PHYSICIAN IMMUNE FROM LIABILITY FOR  
CHILD'S UPBRINGING SUBSEQUENT TO UNSUCCESSFUL STERILI-  
ZATION. *Custodio v. Bauer* (Cal. App. 1967).**

In November 1963, upon medical advice that the birth of future children would be injurious to her health, Mrs. Custodio—together with her husband—contracted with three physicians, who agreed to perform a sterilization operation. A year following the operation, the Custodios, who had relied on the doctors' opinion that they could resume sexual relations, found themselves faced with the prospect of the birth of another child. On January 20, 1965, Mr. and Mrs. Custodio brought an action against the physicians. The complaint alleged negligent malpractice on the part of the defendants in their performance of the unsuccessful operation, breach of the contract to sterilize, and misrepresentation. The plaintiffs sought damages for: (1) the medical expenses incurred and those to be incurred in the prenatal and postnatal care of Mrs. Custodio; (2) the pain and suffering endured by the plaintiffs upon discovering the pregnancy; (3) the possible aggravation of an existing kidney and bladder condition which prompted the operation; (4) the expenses to be expected in the rearing of the child until the attainment of legal majority; and (5) punitive damages incident to the allegations of defendants' fraud and deceit. However, despite the allegations and the prayer for relief, the trial court sustained a general demurrer on the grounds that the plaintiffs had failed to state a cause of action. On appeal to the District Court of Appeal, *held*, reversed: Negligence on the part of physicians can be the proximate cause of pregnancy; the erroneous opinion of physicians in their professional capacity is actionable at law as misrepresentation; and damages in contract can be established upon the showing of a breach of warranty of operational success. Furthermore, in addition to the expenses in delivering a child, the cost involved in a child's upbringing represents legally cognizable damages. *Custodio v. Bauer*, 251 Adv. Cal. App. 308, 59 Cal. Rptr. 463 (1967), *rehearing denied*, 251 Adv. Cal. App. 331, 59 Cal. Rptr. 478, *hearing denied*, 67 Adv. Cal. 3 (Minutes).

The history of judicial authority dealing with a physician's civil liability for an unsuccessful sterilization operation is meager. Before 1930 there appears to be no single case reported in which a patient, who had consented to sterilization, sued his or her doctor.<sup>1</sup> Subse-

---

<sup>1</sup> 16 A.B.A.J. 158, 160 (1930).

quent to that date, the few cases reported have not been uniform either in the theory of the cause of action, or in the damages sought by the particular plaintiff; moreover, with one exception, the public policy questions have not been discussed with regard to recognizing the financial burden of the child's upbringing as damages cognizable at law.

In the first case known to have been reported, *Christensen v. Thornby*,<sup>2</sup> the plaintiff-husband consented to a sterilization operation on the advice of his wife's doctor, who had warned that a future pregnancy would result in injury to her. The operation was unsuccessful and, thereafter, the plaintiff's wife became pregnant and gave birth to a normal, healthy child. The complaint in *Christensen* sounded in deceit, and recovery was sought for mental anguish, as well as for the expenses incurred before and after the birth of the child. Reviewing the case on appeal—from an order sustaining a demurrer—the Supreme Court of Minnesota held that, although a contract to perform a sterilization operation was not contrary to public policy when based on medical necessity, the plaintiff did not state a cause of action in deceit and did not allege a breach of contract or negligent malpractice. With respect to the damages sought by the plaintiff, the court ruled that recovery for the expenses incurred was not within the contemplation of the parties at the time of the operation: the purpose of the operation was medical necessity, not avoidance of the costs attendant to the birth of the child.<sup>3</sup>

In the 1957 decision of *Shabean v. Knight*,<sup>4</sup> a landmark in the area of ineffective sterilization, the court held that a contract to sterilize a man is not against public policy, and that, while a guarantee of cure is not to be implied in every contract for medical services, there was a sufficient basis in the pleadings to establish a warranty because of the allegation that the defendant had promised to make the plaintiff permanently sterile. The court, however, dismissed the complaint, deciding that the plaintiff had suffered no cognizable damages. The holding was based in terms of public policy: to allow damages for the birth of a child was deemed contrary to the mores of society.<sup>5</sup>

The initial recognition that damages are awardable came in *West*

---

<sup>2</sup> 192 Minn. 123, 255 N.W. 620 (1934).

<sup>3</sup> *Id.* at 126, 255 N.W. at 622.

<sup>4</sup> 11 Pa. D & C.2d 41 (C.P. 1957).

<sup>5</sup> *Id.* at 45.

*v. Underwood*.<sup>6</sup> In that case, although the injury sustained was not the unexpected birth of a child but the suffering of severe pain as a result of improper operations and medical treatment, the court held that whether a doctor is negligent in failing to sterilize a plaintiff and whether this is the proximate cause of injury are questions to be decided by a jury. Should a plaintiff be successful on these two issues, the court said, he or she ought to be entitled to recover for all mental and physical suffering, together with any other damages proximately resulting from such negligence. Later in *Bishop v. Byrne*,<sup>7</sup> the *West* thesis of recovery was extended to the situation where a negligently performed sterilization results in the unexpected birth of a child. Plaintiffs, upon proper proof of their allegations for damages, could, it was held, recover for the expenses incurred in birth of a child and for the anguish experienced by a wife during pregnancy.<sup>8</sup>

The damages awardable in actions sounding in contract and those sounding in negligence have also been distinguished. In a contract action, it has been determined that damages are restricted to hospital expenses and do not include the pain and suffering of the plaintiff.<sup>9</sup>

As the case history well illustrates, and as the court's opinion in *Custodio v. Bauer* clearly recognizes,<sup>10</sup> the critical issue in the area of ineffective sterilization is whether damages are in fact recoverable. Without doubt the direction of the law is not unvarying, consequently, against this background, the *Custodio* case appears to be of

---

<sup>6</sup> 132 N.J.L. 325, 40 A.2d 610 (Ct. Err. & App. 1945).

<sup>7</sup> 265 F. Supp. 460 (S.D.W. Va. 1967).

<sup>8</sup> *Id.* at 463.

In *Ball v. Mudge*, 64 Wash. 2d 247, 391 P.2d 201 (1964), the questions of negligent malpractice, proximate cause and alleged damages for pain and suffering of the plaintiffs, as well as expenses incident to the unexpected child's upbringing, were submitted to the jury, which found for the defendant-physician. On appeal, the Supreme Court of Washington affirmed the finding by the trier of fact; however, the court carefully avoided the policy questions raised by *Shabean* by indicating that its decision should not be interpreted as a determination of the issues as a matter of law. *Ball v. Mudge*, *supra* at 247, 391 P.2d at 203.

<sup>9</sup> *Doerr v. Villate*, 74 Ill. App. 2d 332, 336-37, 220 N.E.2d 767, 769 (1966).

In *Milde v. Leigh*, 75 N.D. 418, 28 N.W.2d 530 (1947), the husband sought damages for loss of consortium and for the expenses incurred for medical treatment and care of his wife who had become pregnant following a sterilization operation. On appeal, the court, holding that plaintiff's claim was barred by the statute of limitations, noted that, when the wife is a victim of a tort, two causes of action arise: a cause of action in the wife for physical injury, pain, suffering and loss of earnings; and a cause of action in the husband for the loss of the wife's services and society, as well as for expenses incurred for medical treatment. *Id.* at 427-29, 28 N.W.2d at 536.

<sup>10</sup> 251 Adv. Cal. App. at 323, 59 Cal. Rptr. at 473.

major significance, since it provides for a cause of action sounding in contract, negligence and misrepresentation, and further holds that the expenses involved in the upbringing of the child are damages compensable at law.

In its analysis of the plaintiffs' theory as to the breach of contract, the *Custodio* court, although recognizing that a doctor does not always guarantee the success of his treatment, adjudged that a physician may be liable for a breach of warranty where there is an express contract.<sup>11</sup> Hence, the plaintiffs' allegation, regarding their purpose in undergoing the operation and the promise by the doctor to sterilize Mrs. Custodio, was sufficient to withstand the general demurrer, notwithstanding that the trial court must rule on the special demurrer to ascertain the terms of the agreement.<sup>12</sup>

Moreover, since negligence may be pleaded generally, the court in *Custodio* opined that the plaintiffs' tripartite statement of a breach of tort duty was properly set forth in that it (1) alleged the want of the ordinary, reasonable and prudent care required of an average member of the medical profession; (2) averred that the defendants were careless, following the operation, in failing to inform the patient of the need to practice contraception and thereby avoid the results of an unsuccessful operation; and (3) contended that the defendants were remiss in failing to inform Mrs. Custodio of the alternative surgical procedures that would best accomplish sterilization.<sup>13</sup>

With respect to the averment of deceit and negligent misrepresentation by the defendants, the court noted that a cause of action was supported by the allegation of the false or careless statements concerning the safe resumption of marital intercourse, and the plaintiffs' consequent justifiable reliance.<sup>14</sup>

Proceeding to the defendants' contention that the damages prayed for were not proximately caused by any breach of duty on the part of the defendants, the court observed that the resumption of marital relations by the plaintiffs was foreseeable.<sup>15</sup> The defendants were thus not relieved of liability by an intervening act, the possible conse-

---

<sup>11</sup> *Id.* at 320, 59 Cal. Rptr. at 471; See Miller, *The Contractual Liability of Physicians and Surgeons*, 1953 WASH. U.L.Q. 413, 416.

<sup>12</sup> 251 Adv. Cal. App. at 320, 59 Cal. Rptr. at 471.

<sup>13</sup> *Id.* at 317-18 & nn.5, 6 & 7, 59 Cal. Rptr. at 469-70 & nn.5, 6 & 7.

<sup>14</sup> *Id.* at 319, 59 Cal. Rptr. at 470.

<sup>15</sup> *Id.* at 321-22, 59 Cal. Rptr. at 472.

quences of which sterilization was intended to eliminate. However, it was noted that the trier of fact must decide whether the defendants' negligence or the natural regeneration of the fallopian tubes was solely or concurrently the proximate cause of the injuries allegedly suffered by the plaintiffs.<sup>16</sup>

While the legal issues previously discussed were significant in determining the sufficiency of the Custodios' cause of action, the question as to their alleging damages cognizable at law was crucial, since a cause of action in tort, contract, or deceit is not complete unless the plaintiff has suffered some wrong which a court of law deems worthy of redress.

In evaluating the merit of plaintiffs' allegations, the *Custodio* court held that at the very least the plaintiffs should be able to obtain compensation for the cost of the operation.<sup>17</sup> Furthermore, in noting that the complaint was filed before the birth of the child,<sup>18</sup> and by relying on *West v. Underwood*,<sup>19</sup> the court stated that recovery could be obtained upon proving either emotional suffering as a result of the unexpected pregnancy, or anxiety due to the possible aggravation of the expectant mother's kidney and bladder condition. Similarly, had Mrs. Custodio been injured by the pregnancy and/or the child birth, this circumstance would be compensable if the injuries had been foreseeable at the time the operation was performed. Moreover, if the experience of expecting another child were to lessen Mrs. Custodio's ability to perform the duties of a wife and mother, this could also be compensated by pecuniary damages.<sup>20</sup> Even if she had not been injured by the birth of another child, the court recognized that the addition of another dependent might require her to give less attention and care to the other members of the family, thereby giving rise

---

<sup>16</sup> *Id.* at 322, 59 Cal. Rptr. at 472.

The court noted *Ball v. Mudge*, 64 Wash. 2d at 249-50, 391 P.2d at 203-04 (1964), although the reason for the citation is not clear. The Washington State Supreme Court held that the finding by the trier of fact, that the defendant-physician was not the proximate cause of the damages allegedly suffered by the plaintiff, was justified in view of the conflicting testimony as to whether post-operative checks following a vasectomy were standard medical practice, and testimony that "a process known as recanalization, while rare, sometimes occurs after the operation and such cannot be prevented by the surgeon." *Ball v. Mudge*, *supra* at 249, 391 P.2d at 204. The *Custodio* court apparently draws an analogy to the instant case with respect to whether the natural regeneration of the fallopian tubes was the sole proximate cause of the damages alleged.

<sup>17</sup> 251 Adv. Cal. App. at 327, 59 Cal. Rptr. at 475.

<sup>18</sup> *Id.* at 327-28, 59 Cal. Rptr. at 476.

<sup>19</sup> 132 N.J.L. 325, 40 A.2d 610 (Ct. Err. & App. 1945).

<sup>20</sup> 251 Adv. Cal. App. at 328, 59 Cal. Rptr. at 476.

to damages upon a showing that this could be measured in economic terms.<sup>21</sup> On the other hand, if Mrs. Custodio had died in childbirth and her death had been proximately caused by circumstances foreseeable when the operation was undertaken, her husband and children would have had an action for wrongful death.<sup>22</sup>

Following its discussion of the compensability of the hypothetical injuries incident to birth, the court considered whether recovery for the upbringing of the child was palatable. Since the *Shaheen* case appeared in 1957, there has been speculation as to whether courts in future decisions will recognize this circumstance as representing a basis for awarding damages.<sup>23</sup> The argument against allowing recovery was presented in *Shaheen*, where the court declared that a contract to perform a sterilization operation was not against public policy, irrespective of whether the patient's motivation in undergoing the operation was medical or financial. In support of this contention the court said:

It is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it that a court may constitute itself the voice of the community in declaring such policy void . . . . "There must be a . . . universal public sentiment deeply integrated in the customs and beliefs of the people and in their convictions of what is just and right . . . ."<sup>24</sup>

However, the *Shaheen* court denied damages, apparently employing the same definition of public policy by which it declared valid the contract between the patient and physician. The reasoning of *Shaheen* lies in the neutralizing effect that the joy of raising a child has on the expense incurred therein. However, it has been pointed out that married couples, who undergo sterilization for financial reasons, do not share the *Shaheen* court's value judgment.<sup>25</sup>

If the basis of public policy is the consensus of society, and if in society there is ingrained the concept of family planning, the acceptability of sterilization for financial reasons is, in those jurisdictions

---

<sup>21</sup> *Id.* at 328-29, 59 Cal. Rptr. at 476.

<sup>22</sup> *Id.* at 328, 59 Cal. Rptr. at 476.

The court noted that, if the pregnancy benefited Mrs. Custodio's emotional state, this circumstance would mitigate damages. *Id.*

<sup>23</sup> See Note, *Elective Sterilization*, 113 U. Pa. L. REV. 415, 433-36 (1965); 19 U. PITT. L. REV. 802-05 (1958); 9 UTAH L. REV. 808 (1965).

<sup>24</sup> *Shaheen v. Knight*, 11 Pa. D. & C.2d at 43 (C.P. 1957).

<sup>25</sup> Note, *Elective Sterilization*, *supra* note 23, at 435 & n.79.

where it is not illegal,<sup>26</sup> clearly an expression of favorable public sentiment. Indeed, using as a criterion the definition of public policy outlined in *Shabean*, is it reasonable to argue that there is a "virtual unanimity of opinion" against awarding damages which arise out of a medical operation apparently sanctioned by public policy? There is a certain illogic in the rationale of the *Shabean* holding: a contract designed to achieve a certain result is not contrary to public policy, whereas recovery of damages arising out of a breach of that contract is opposed to this standard, even when the plaintiff is saddled with the exact economic burden which he sought to avoid by entering into the agreement.<sup>27</sup>

Although in *Custodio v. Bauer*<sup>28</sup> the plaintiffs admitted undergoing the operation for medical reasons, the California court still questioned the logic of denying damages, as was done in *Christensen*, where the motivation of the plaintiffs was also medical rather than financial.<sup>29</sup> It also has been suggested that recovering damages for the financial burden of the unwanted or unexpected child should be denied because of the possibility of the unfavorable emotional reaction this would have on the child himself.<sup>30</sup> While this argument does not appear in the case law, it was noted by the court in *Custodio*<sup>31</sup> and is based on the idea that the paramount interest of the public is the emotional well-being of the child—a well-being that transcends financial considerations.<sup>32</sup> An analogy is drawn in this argument to the situation in which the law restrains a husband or wife from testifying to the illegitimacy of his or her child so as to save the child from suffering the stigma of bastardy.<sup>33</sup> The situation of the unexpected child, conceived following a sterilization operation, is

---

<sup>26</sup> Statutes in a few jurisdictions do not permit elective sterilization for reasons other than medical necessity. *E.g.*, CONN. GEN. STAT. REV. § 53-33 (1958).

<sup>27</sup> Note, *Elective Sterilization*, *supra* note 23, at 435, (it is suggested here that courts should allow recovery at least for the expense of the delivery of the child).

<sup>28</sup> 251 Adv. Cal. App. at 312-13, 59 Cal. Rptr. at 466.

<sup>29</sup> *Id.* at 329, 59 Cal. Rptr. at 477 (where the court notes criticism of the refusal of earlier cases to allow recovery for the consequences of the unsuccessful operation that were clearly foreseeable). See Note, *Elective Sterilization*, *supra* note 23, at 435-36; 19 U. PITT. L. REV. at 804-05. Both these articles suggest a distinction between the holdings of *Christensen* and *Shabean*. The holding of the former case was defended upon the grounds that the contemplated damages did not include the financial expenses involved in the birth of the unexpected child, where the plaintiffs agreed to the operation for medical reasons. In the latter case the court's decision was criticized for denying damages where the plaintiffs underwent the operation for financial reasons.

<sup>30</sup> 9 UTAH L. REV. 808, 811-12 (1965).

<sup>31</sup> 251 Adv. Cal. App. at 329-30, 59 Cal. Rptr. at 477.

<sup>32</sup> 9 UTAH L. REV. 808, 811-12 & n.22 (1965).

<sup>33</sup> *Id.* at 812 (where an analogy is drawn to the practice of sealing records of adoption proceedings and changing birth records of adopted children).

further likened to child custody cases in which the courts have considered the emotional stability of the child before considering the financial solvency of the person to whom custody of the child is to be entrusted.<sup>34</sup> The *Custodio* court, however, intimating that the concern for the emotional damage to the child is overstated, declared:

The emotional injury to the child can be no greater than that found in many families where "planned parenthood" has not followed the blueprint . . . .<sup>35</sup>

. . . .

One cannot categorically say whether the [new] . . . arrival in the *Custodio* family will be more emotionally upset if he arrives in an environment where each of the other members will have a happier and more well-adjusted life if he brings with him the wherewithal to make it possible.<sup>36</sup>

The court realized that the damages are not sought for the physical existence of the child, "but to replenish the family exchequer so that the new arrival will not deprive the other members of the family of what was planned as their just share of the family income."<sup>37</sup>

<sup>34</sup> *Id.* at 812 & n.22.

<sup>35</sup> 251 Adv. Cal. App. at 329-30, 59 Cal. Rptr. at 477.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 329, 59 Cal. Rptr. at 477.

The court concluded its opinion by stating that the plaintiffs to the extent that they prove their allegations should be able to recover damages according to the principles of tort and contract.

The *Custodio* court did not distinguish between damages awardable when the plaintiff sounds his complaint in tort or contract. Traditionally, however, the common law limits recovery for breach of contract to those damages that are within the contemplation of the parties. 22 AM. JUR. 2d *Damages* § 55 (1965). It seems reasonable that a plaintiff, suing for a breach of warranty of operational success, should be able to recover damages for pain and suffering subsequent to the discovery of the imminent birth of another child. Nevertheless, in *Doerr v. Villate*, 74 Ill. App. 2d at 336-37, 220 N.E.2d at 769, the court specifically excluded recovery of such damages. Some jurisdictions hold that, where the contract is personal in nature, recovery for mental anguish is considered to have been within the contemplation of the parties. See *Lamm v. Shingelton*, 231 N.C. 10, 14-15, 55 S.E.2d 810, 812-13 (1949) (a plaintiff widow was awarded damages for mental distress arising out of a breach of warranty in the sale of a burial vault); accord, *Stewart v. Rudner*, 349 Mich. 459, 468-72, 84 N.W.2d 816, 823-25 (1957) (plaintiff-wife recovered damages for mental distress when her child was stillborn as a result of the physician's failure to perform a Caesarian operation as stipulated by contract).

As to the question of recovery for expenses involved in the upbringing of the child, the court in *Christensen v. Thornby*, 192 Minn. at 126, 255 N.W. at 622, denied recovery on the grounds that such damages were not within the contemplation of the parties. In *Doerr*, the court stated recovery could be had for all damages normally arising from the breach. The question is whether the expenses involved in the upbringing of a child would come under this rule. Thus, in some jurisdictions it may make a substantial difference in the amount of recovery whether the plaintiff grounds his complaint in tort or contract.

*Custodio v. Bauer* is a case of first impression in California regarding the public policy questions inherent in a physician's civil liability for the performance of an unsuccessful sterilization;<sup>38</sup> in addition, the decision is a landmark by virtue of its extensive discussion of the recovery of damages. This discussion may be divided into two parts. In the first instance, the case represents the broadest application of the doctrine of *West v. Underwood* to the various hypothetical situations which may give rise to recovery for damages incident to the birth of a child. Furthermore, *Custodio* is the first judicial opinion which indicates that the costs of the rearing of a child are legally cognizable damages. Implicit in this ruling is the recognition of the cardinal legal principle that, in a civil suit, the defendant should be liable for the injuries sustained as a result of his breach of duty.<sup>39</sup>

On occasion this principle is overcome by reason of some overriding public policy or paramount social interest. In certain situations, courts have found that to subject a particular defendant to civil

---

<sup>38</sup> *Id.* at 322, 59 Cal. Rptr. at 472 the *Custodio* court cited only three California cases dealing with sterilization. Two of these cases do not deal with the same factual situation of the instant case: *Kritzer v. Citron*, 101 Cal. App. 2d 33, 224 P.2d 808 (1950) (sterilization of the wife where there was no consent); *Wiley v. Wiley*, 59 Cal. App. 2d 840, 842; 139 P.2d 950, 951 (1943) (annulment sought by the husband was not defeated because he submitted to a sterilization on the representation of his wife that it was for medical reasons).

In *Bathke v. Rahn*, 46 Cal. App. 2d 694, 696, 116 P.2d 640-41 (1941), the husband brought a malpractice action for an alleged negligently performed double vasectomy, which the defendant-physician warranted would prevent future pregnancy of his wife, and would not "impair the ability of plaintiff to follow his occupation of travelling salesman." The plaintiff did not pray for damages covering the cost of the child's upbringing. Following the trial court's granting of a general demurrer on the grounds that his claim was barred by the statute of limitations, the plaintiff appealed, relying on the principle that where a cause of action is fraudulently concealed by the wrongdoer, the statutory period is interrupted until plaintiff's discovery of the injury. In affirming the lower court's judgment, the District Court of Appeal said: "Were the allegations on [fraudulent concealment] . . . limited to the warranty of sterility, plaintiff's reliance thereon and the subsequent pregnancy of the wife, the complaint would seem to fall within the rule announced . . . . But the complaint is not so limited." *Id.* at 696, 116 P.2d at 641. Noting that the plaintiff also alleged suffering a nervous disorder, the court held that the fraudulent concealment doctrine was not applicable in this instance as a defense to the statute of limitations. *Id.*

The plaintiffs in *Custodio* argued that the language of the opinion in *Bathke*, quoted above, indicated that if there had been no allegation of a nervous disorder, the complaint would have stated a valid cause of action. Hence, by way of dicta, the *Bathke* court, the plaintiffs argued, acknowledged a cause of action for damages resulting from malpractice in a sterilization operation and that this claim was not barred by public policy. Brief for Appellants at 5, *Custodio v. Bauer*, 251 Adv. Cal. App. 308, 59 Cal. Rptr. 463 (1967). However, the *Custodio* court did not use *Bathke* as authority for sustaining the plaintiffs' cause of action.

<sup>39</sup> 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 25.1 (1956).

liability for certain acts may be unjust or socially or economically inexpedient. Hence, in these situations the defendant is deemed immune from certain consequences of his actions which would otherwise give rise to a cause of action for damages in favor of the injured party. Since this results in an injured plaintiff's being foreclosed from obtaining pecuniary compensation, the courts do not, and should not, reach this conclusion without a careful weighing of the various social interests affected. It is this problem—the balancing of the public interest versus the interest of certain private parties—which is the legal battleground on which *Shabeen* and *Custodio* were decided.

The California District Court of Appeal concluded that recovery for the cost of the unexpected child's upbringing would relieve the imminent financial burden thrust upon the parents and, in addition, would neither do violence to the institutions of family and marriage nor seriously endanger the child's emotional well-being. Professor William L. Prosser has observed that, while "[t]he shadow of history lies heavily on the law . . .," social ideas inevitably adapt to new and different problems of a changing society.<sup>40</sup> *Custodio v. Bauer* has recognized the significance of a sterilization operation as one means of implementing the concept of family planning in the twentieth century; furthermore, it has determined that there are no cogent public policy reasons why a physician should not be liable to his patient for all damages arising from the unexpected birth of a child following a sterilization where there has been proof of a breach of contract, negligent malpractice or deceit.

DANIEL M. HORWICK

---

<sup>40</sup> W. PROSSER, TORTS § 4 (3d ed. 1964).