



**PennState**  
Dickinson Law

**DICKINSON LAW REVIEW**  
PUBLISHED SINCE 1897

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Volume 57  
Issue 4 *Dickinson Law Review* - Volume 57,  
1952-1953

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6-1-1953

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### Recommended Citation

William A. Challenger Jr., *The Law of Sexual Sterilization in Pennsylvania*, 57 DICK. L. REV. 298 (1953).  
Available at: <https://ideas.dickinsonlaw.psu.edu/dlra/vol57/iss4/3>

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## THE LAW OF SEXUAL STERILIZATION IN PENNSYLVANIA

By

WILLIAM A. CHALLENGER, JR.\*

In a recent article published in the *Canadian Medical Association Journal* it was said that for the past five or six years the Canadian Medical Protective Association has become increasingly concerned over the casual attitude adopted by doctors towards the sterilization of patients and over the consequent increase in the number of sterilizations being performed. The association asserted that there seemed to be lacking in some doctors a full realization of the implications, physical, mental and moral, of the operation and there seemed to be a failure to draw these considerations to the attention of patients about to be sterilized. Moreover, too few patients learned from their doctors the fact that the operative results were permanent and too often the operation was done in a wholly casual fashion as an incidental and often unnecessary part of some other surgical procedure, or was done on healthy persons for insufficient reasons of a temporary nature.

Whether the same situation applies in the United States I will not attempt to say, but in any event the law on the subject of sexual sterilization seems to be of more than casual importance to the legal and medical profession.

Sterilization as used herein refers to the intentional interference with the power of procreation. It may be utilized for eugenic purposes, for contraceptive purposes, or for therapeutic purposes.

*Eugenic Sterilization*

Pennsylvania was one of the first states to advance the cause of the advocates of eugenic sterilization. This took the form of a bill which was introduced in the Pennsylvania legislature in 1905 "for the prevention of idiocy." It provided that upon enactment, "it shall be compulsory for each and every institution in the State, entrusted. . . with the care of idiots. . . to appoint" a neurologist and a surgeon "to examine the mental and physical condition of the inmates." If this examination showed that there was "no probability of improvement of the mental condition of the inmate" and "procreation is inadvisable," the surgeon was authorized "to perform such operation for the prevention of procreation as shall be decided safest and most effective."

The bill was passed by the legislature but was vetoed by Governor Pennypacker who returned it to the Senate with this caustic comment:

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"This Bill has, what may be called with propriety, an attractive title. If idiocy could be prevented by an Act of Assembly, we may be quite sure that such an act would have long been passed and approved in this State, and that such laws would have been enacted in all civilized countries. . . . The nature of the operation is not described, but it is such an operation as they shall decide to be safest and most effective. It is plain that the safest and most effective methods of preventing procreation would be to cut the heads off the inmates, and such authority is given by the Bill to this staff of scientific experts. It is not probable that they would resort to this means for the prevention of procreation, but it is probable that they would endeavor to destroy some part of the human organism. . . ."<sup>1</sup>

Although Pennsylvania was in the forefront of the movement for eugenic sterilization legislation, no law authorizing the sterilization of habitual criminals or of persons likely to transmit tendencies to feeble-mindedness, insanity, epilepsy or degeneracy to their offspring has ever been enacted in this state. Since 1905, however, twenty-eight states have passed eugenic sterilization laws and approximately 50,000 sterilization operations have been performed pursuant to statutory authority.<sup>2</sup>

Sterilization laws have been attacked as inflicting cruel and unusual punishment, as being in violation of due process of law, and as depriving the subject of the equal protection of the law afforded him by the Constitution.

Probably the leading case involving the constitutionality of sterilization legislation is *Buck v. Bell*.<sup>3</sup> The facts of the case were that an eighteen year old patient was committed to the State Colony for Epileptics and Feeble-minded in the State of Virginia. She was the daughter of a feeble-minded mother in the same institution, and the mother of an illegitimate feeble-minded child. An act of Virginia recited that the health of the patient and the welfare of society may be promoted in certain cases by the sterilization of mental defectives without serious pain or substantial danger to life; that the Commonwealth is supporting in various institutions many defective persons who if now discharged would become a menace, but, if incapable of procreating, might be discharged with safety and become self-supporting with benefit to themselves and to society; and that experience has shown that heredity plays an important part in the transmission of insanity, imbecility, etc.

After a full hearing, an order was entered directing sterilization by salpingectomy. The constitutionality of the Virginia statute was sustained by the United States Supreme Court in an opinion delivered by Mr. Justice Holmes in which he made his now famous declaration: "Three generations of imbeciles are enough."

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<sup>1</sup> Vetoes By The Governor, of Bills Passed By the Legislature, Session of 1905, page 26.

<sup>2</sup> Birthright Inc., "Sterilization For Human Betterment," Pub. No. 5, 1949.

<sup>3</sup> 274 U.S. 200, (1927).

In holding that the principle that sustains compulsory vaccination is broad enough to include the cutting of the Fallopian tubes, that Court said:

"We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetency. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind."<sup>4</sup>

### *Contraceptive Sterilization*

Since Pennsylvania does not have any statute authorizing eugenic sterilization, is a physician or surgeon who performs a sterilization operation for contraceptive purposes, confronted with any civil or criminal liability?

A few states have enacted laws making it a misdemeanor to perform or to assist in the performance of an operation for the purpose of destroying the powers of procreation, unless the performance of the operation is a medical necessity. Pennsylvania has no such statute.

The nearest Pennsylvania comes to a declaration of public policy in this respect may be found in the Act of 1939 which provides that "Whoever . . . publishes or circulates any notice of any secret drug, nostrum, medicine, recipe or instrument, purporting to be for the use of females for the purpose of preventing conception. . . . is guilty of a misdemeanor, and shall upon conviction thereof, be sentenced to pay a fine not exceeding five hundred dollars (\$500) or undergo imprisonment not exceeding one (1) year or both."<sup>5</sup>

However, it has been held that this act does not prohibit the sale or keeping for sale of contraceptives, provided the articles are not publicized or exhibited in any manner.<sup>6</sup>

Even though there is no statutory declaration of public policy against sterilization, does such an operation come within the definition of mayhem?

"By the ancient law of England, he that maimed any man whereby he lost any part of his body was sentenced to lose the like part, *membrum pro membro*. . . . But this went afterward out of use, partly because the law of retaliation, . . . was . . . at best an inadequate rule of punishment, and partly because upon a repetition of the offence, the punishment could not be repeated. So that, by the common law as it for a long time stood, mayhem was only punishable with fine and imprisonment, . . . unless perhaps the offence of mayhem by castration, which all

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<sup>4</sup> *Ibid.*

<sup>5</sup> Act of June 24, 1939, P.L. 872, § 525, 18 P.S. 4525.

<sup>6</sup> *Commonwealth v. Payne*, 66 D. & C. 462 (1949).

our old writers held to be felony. . . . And this although the mayhem was committed upon the highest provocation."<sup>7</sup>

The *Pennsylvania Penal Code* of 1939 now controls, however, and under it one is only guilty of mayhem if he "on purpose, and of malice aforethought, by lying in wait, unlawfully. . . . cuts off or disables any limb or member of another. . . ."<sup>8</sup>

"Lying in wait" and "malice aforethought" in this definition probably exclude mayhem by sterilization, because neither of these essential ingredients would be present in sterilization operations performed by consent.

Of course, "consent" obtained by fraud would not be a valid defense. Witness the case of the doctor of theology who falsely pretended that he was a doctor of medicine and surgery. The prosecutrix was a married woman. One of her legs had been amputated and she was wearing an artificial leg. By representing himself as a doctor of medicine and as an agent of an artificial limb company, he had her disrobe so as to secure a view of her body practically naked in order to determine whether the prosthesis was functioning properly. Under these circumstances the fraud practised vitiated the consent and the defendant was guilty of an indecent assault.<sup>9</sup>

Neither would consent be a defense if the sterilization were performed unlawfully with the intent to procure an abortion. This would constitute the offense of committing or attempting to commit an abortion and both participants would be guilty even though the woman might not have been actually pregnant.<sup>10</sup>

While consent not obtained by fraud may be a full and complete defense to any criminal responsibility, is there any civil liability to the patient or to the spouse for a non-negligent contraceptive sterilization?

As to an adult unmarried patient, since voluntary sterilization does not constitute a criminal offense under our *Penal Code*, there could be no civil liability to the patient, in the absence of fraud, for a non-negligent contraceptive sterilization operation.

Even if it were a criminal offense, there is respectable authority to the effect that the surgeon would not be civilly liable to the person assenting to the criminal invasion. In its *Restatement of The Law of Torts*, the American Law Institute gives the following illustration of non-liability in a criminal abortion:

"A, at B's solicitation, performs a criminal abortion upon her. The operation is skilfully performed. A is not liable to B."<sup>11</sup>

<sup>7</sup> Sharwood's Blackstones Commentaries, vol. 4, p. 204.

<sup>8</sup> Act of June 24, 1939, P.L. 872, § 715, 18 P.S. 4715.

<sup>9</sup> Commonwealth v. Gregory, 132 Pa. Super. 507 (1938).

<sup>10</sup> Commonwealth v. Thomas, 159 Pa. Super. 584 (1946).

<sup>11</sup> Restatement, Law of Torts, vol. 1, p. 114.

If this principle is valid in the case of a criminal abortion, it should also apply to a non-negligent contraceptive sterilization.

As to minors, of course, no operation could be performed without first obtaining the consent of the parents or of the guardian of the child.<sup>12</sup> Even with parental consent, it is questionable whether civil liability would not be imposed on a surgeon for the contraceptive sterilization of a minor child for the reason that a non-therapeutic contraceptive sterilization would be an unnecessary interference with the child's right of personality.

As to a spouse, a different question is presented. If we were concerned with sterilization as a surgical necessity and if the husband were in full possession of his faculties so as to be able to give his own consent to the operation, his wife's consent would not be necessary. So also if sterilization were a surgical necessity, a wife is as much entitled to determine whether she shall submit herself to an operation as is the husband in respect to an operation on himself.<sup>13</sup>

Can one spouse give a valid and effective consent binding the other spouse? In British Columbia a woman entered a hospital for the delivery of her child. At the time of the confinement, when difficulty was being encountered in delivery, the husband, at the request of the surgeon, signed a permission for a Caesarian section and authorized sterilization if it were found to be necessary.

At operation there were numerous fibroid tumors present in the uterus. The largest one, about the size of an orange, was enucleated, the remainder left in place and both Fallopian tubes tied to prevent the patient from undergoing the hazards of a second pregnancy. Thereafter, upon learning the nature of the operation, the wife entered suit against the operating surgeon to recover damages for the sterilization operation performed upon her without her consent. In assessing damages against the surgeon, the court said:

"It must be remembered that the effect of the procedure here was to deprive the plaintiff of the possible fulfilment of one of the great powers and privileges of her life. The possibility of her exercising that power or privilege may well be subject to risk but where is the necessity for an immediate decision? Where is the urgency? . . . There is no evidence that these tumors were presently at the time of the operation dangerous to her life or health. The evidence is only that they *might* constitute a hazard in the event of a further pregnancy. That may go to the quantum of damages, but it does not, in my opinion, justify a 'trespass' to her person without her consent. I think therefore, she is entitled to judgment."<sup>14</sup>

If consent is obtained from the spouse upon whom the operation is performed but not from the other spouse, does the non-consenting spouse have a

<sup>12</sup> Zaman v. Schultz, 19 D. & C. 309; In Re Tony Tuttendaro, 21 D. R. 561.

<sup>13</sup> Markijohn v. Decker, No. 77 April Term 1937, Allegheny County.

<sup>14</sup> Murray v. McMurchy, 2 D.L.R. 442 (1949).

right of action against a surgeon for a non-therapeutic contraceptive sterilization operation performed upon the other spouse? Undoubtedly such an operation might have a profound effect on the marital relations.

In a case which came to trial in Hamilton, Ontario, for the performance of a sterilization operation on the wife without first obtaining the consent of the husband, Mr. Justice Kelly said:

"As the relationship between a husband and wife is not only confidential, but is of the most intimate nature and is attended upon with such far reaching consequences, I am of the opinion that anything that might be done which would interfere with such a sacred relationship and its consequences should be undertaken only with the consent of both parties and after discussion with the parties and advising them upon the consequences."<sup>15</sup>

The "Divorce Law" of this Commonwealth provides that "it shall be lawful for the innocent and injured spouse to obtain a divorce from the bond of matrimony, whenever it shall be judged. . .that the other spouse at the time of the contract, was and still is naturally and incurably impotent, or incapable of procreation."<sup>16</sup>

In Philadelphia, a husband attempted to secure a divorce on the ground that at the time of the marriage his wife was impotent or incapable of procreation. It appeared that some years prior to the marriage, the wife had submitted to a surgical operation and her ovaries, Fallopian tubes and uterus were removed. A divorce was denied on the ground that sterility or incapacity to procreate is not an independent ground for divorce where it appears that the party complained against was capable of natural and complete copulation.<sup>17</sup> However, where physical conditions present at the time of the marriage prevent sexual intercourse and the party complained against refuses to undergo a minor operation to correct the deformity, a divorce may be granted.<sup>18</sup>

As the "Divorce Law" relates to the physical condition of the parties at the time of the marriage, it has been held that a voluntary castration by the husband after the marriage is not a ground for divorce at the instance of the wife.<sup>19</sup>

<sup>15</sup> The Legal Aspects of Sterilization, Canadian M.A.J., May 1948, vol. 58, p. 512.

<sup>16</sup> Act of March 19, 1943, P.L. 21, § 1, 23 P.S. 10.

<sup>17</sup> Wilson v. Wilson, 126 Pa. Super. 423 (1937).

<sup>18</sup> Biancucci v. Biancucci, 8 Beaver 77 (1946).

<sup>19</sup> Berger v. Berger, 23 Pa. C.C. 232 (1899). Compare the grounds for annulment contained in the Act of Parliament passed during the reign of Charles the Second in the year 1670: "That all women of whatever age, rank, profession or degree, whether virgins, maids or widows, that shall from after the passing of the Act, impose upon and betray into matrimony any of His Majesty's male subjects, by scents, paints, cosmetics, washes, artificial teeth, false hair, Spanish wool, iron stays, hoops, high-heeled shoes, or bolstered hips, shall incur the penalty of the laws now in force against witchcraft, sorcery and such like misdemeanours, and that the marriage upon conviction shall stand null and void . . . ."

Although a conclusive answer can not be given to the question as to whether a non-consenting spouse has a cause of action against the operating surgeon, the safest procedure to follow if a contraceptive sterilization is to be performed, is to have a consent to the operation executed by both husband and wife.

### *Therapeutic Sterilization*

Finally, as to therapeutic sterilizations there can be no doubt as to the legality of sterilization where medical necessity requires it. Where the operation is necessary to protect the life of the wife, we are not confronted with the question of public policy. And since the operation of sterilization upon a man is a simple one, accompanied by very slight hazard, whereas that upon a woman is more serious and since, as far as progeny is concerned, the results to a married couple would be the same, were effective sterilization performed upon either, it has been held that it is entirely justifiable to take the simpler and less dangerous alternative and have the husband sterilized.<sup>20</sup>

Even in therapeutic sterilizations all difficulties are not eliminated. The consent to the operation must be genuine and not be obtained by fraud or deceit. The following example of a fraudulent consent is given by the American Law Institute:

"A, a surgeon, induces B to submit to a treatment of his eyes by falsely representing that the treatment will cure his vision. A's sole purpose is to obtain a fee. If the treatment involves nothing more than harmless touching of B's eyes, A is not liable to B. If it involves any pain or physical harm, A's fraud makes him liable to B even though the treatment is otherwise properly given."<sup>21</sup>

Reference has already been made to the desirability of securing a written consent and authorization to the operation executed by both husband and wife. Such a form might read as follows:

I, Jane Doe, of Blackacre, Pa., having been advised by John Jones, M.D. that I have pulmonary tuberculosis and that it would be dangerous to my life to become pregnant, request, authorize and direct John Jones, M.D. of the Mercy Hospital to sever my Fallopian tubes from the uterus so that conception cannot take place. I fully understand and realize that after this operation I can never bear children. And I further release John Jones, M.D., his heirs, executors, administrators and assigns, and Mercy Hospital from all claims, demands, actions and damages whatsoever arising out of or resulting from the operation.

In witness whereof, I have hereunto set my hand and seal this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

\_\_\_\_\_(SEAL)  
Sworn to and subscribed before me, the undersigned authority, this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

<sup>20</sup> Christensen v. Thornby, 192 Minn. 123, 225 N.W. 620 (1934).

<sup>21</sup> Restatement, Law of Torts, vol. 1, p. 110.

I, Robert Doe, husband of Jane Doe, have read the above request, authorization and direction of my wife and join with my wife therein, and I further release John Jones, M.D., his heirs, executors, administrators and assigns, and Mercy Hospital from all claims, demands, actions and damages whatsoever arising out of or resulting from the operation.

In witness whereof, I have hereunto set my hand and seal this — day of \_\_\_\_\_, 19—.

\_\_\_\_\_ (SEAL)

Sworn to and subscribed before me, the undersigned authority, this — day of \_\_\_\_\_, 19—.

Even when consent is obtained to the operation, legal difficulties are sometimes encountered.

In a case arising in Minnesota it appeared that the plaintiff's wife had experienced great difficulty with the birth of her first child and had been advised that it would be dangerous to her life to bear another. The husband thereupon consulted a surgeon who agreed to and did perform a vasectomy. At the trial the plaintiff asserted that defendant advised him that the operation had been successful and guaranteed sterility. Sometime following the operation and relying upon the defendant's advice and representations he resumed sexual relations with his wife, but, notwithstanding the operation, his wife became pregnant. He alleged that on that account he experienced great anxiety and was subjected to considerable expense both before and after the birth of the child which his wife in due course survived, and he sought a recovery of \$5,000 from the defendant to compensate him for his anxiety and expense.

In dismissing the action Justice Loring of the Minnesota Supreme Court said:

"The purpose of the operation was to save the wife from the hazards of her life which were incident to childbirth. It was not for 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 expenses 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."<sup>22</sup>

Apart from any consent, there are those therapeutic sterilizations which are unanticipated but which become necessary in the course of a surgical operation in order to preserve the patient's life.

In a case arising in the Province of Quebec, the patient was rushed to the hospital on account of an attack of acute appendicitis, and upon being informed by

<sup>22</sup> Christensen v. Thornby, 192 Minn. 123, 255 N.W. 260 (1934).

the surgeon that it would be necessary to operate immediately and remove the appendix, the husband said, "Well, if she must be operated on, I want her to be operated on at once and for all." Nothing whatever was said about any operation on the ovaries. When the incision was made the surgeon found that, in addition to a diseased appendix, the patient's ovaries were badly diseased and in such a condition that their removal within a short time would be necessary. They were accordingly removed and following the operation the husband was so informed.

Subsequently the husband brought an action for damages, alleging that the surgeon removed his wife's ovaries without either his or his wife's consent. The surgeon contended, *inter alia*, that the operation was necessary to restore the patient to health. The matter came on for trial before Sir Francois Lemieux, C.J., and that distinguished judge, while finding there was some evidence of consent, took occasion to deal with the rights and duties of a surgeon in the absence of consent. The medical testimony, he pointed out, showed that the operation complained of was urgently necessary in the interest of the patient. With the conditions which the surgeon found, and the medical testimony that the removal of the ovaries was for the welfare of the patient, the surgeon was held not to be liable in the action for damages.<sup>23</sup>

In conclusion, it should be stated that much of the law of sterilization is still to be formulated by the courts. To a large extent it will be determined by public opinion and by the advances in medical science.

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<sup>23</sup> Caron v. Gagon, 68 Que. S.C. 155 (1930). See also: Beatty v. Cullingworth (1896), Medico-Legal Society, vol. VI, p. 132 (1909); Bennan v. Parsonnet, 83 N.J.L. 20, 83 A. 948 (1912); Faulk v. Wirts, 425 April Term 1916, Court of Common Pleas, Allegheny County; Marshall v. Curry, 3 D.L.R. 260 (1933); Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1905); Pratt v. Davis, 224 Ill. 300, 79 N.E. 562 (1906); Rolater v. Strain, 39 Okla. 572, 137 P. 96 (1913); Schloendorff v. New York Hospital, 211 N.Y. 125, 105 N.E. 92 (1914); Parnell v. Springle, 5 Rev. de Jur. 74 (1899).