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in his concurring opinion in *Strachman v. Palmer*,[25] counseled that "[f]ederal courts should not be overeager to hold on to the determination of issues that might be more appropriately left to settlement in state court litigation . . . ."[26]

In *McSparron*, the court expressed its awareness of the problems that could result if the recent *Newman v. Freeman*[27] precedent, a factually similar case, but which granted pendent jurisdiction on motion to join after suit had begun, were to be construed as allowing pendent jurisdiction as a matter of right. It thus appears that the *McSparron* court was cognizant of the need for this discretionary power and properly refused the mother's pendent claim.

The expansion of the doctrine of pendent jurisdiction has been justified on the grounds of judicial economy, convenience and fairness to litigants. The beneficial aspects of this doctrine make possible a complete remedy for the adjudication of the plaintiff's rights while avoiding piecemeal litigation. The essence of a successful application of this doctrine is a balancing process which should encompass discretion by the court in the weighing of the various problems involved. The federal courts should remain cognizant of the adverse effects of an infringement upon state court integrity. Since there is no general Congressional authorization for pendent jurisdiction, it appears that in each particular case, provided the requirements of the *Hurn* doctrine are satisfied, the federal courts have a wide discretion in deciding whether pendent jurisdiction is proper and expedient.

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Malpractice—Sterilization Operation

Ps, a mother of nine and her husband, employed *Ds*, three physicians, to perform a sterilization operation upon the wife. The operation was suggested by *Ds* to prevent deterioration of the wife's physical condition which would result from the birth of another child. Subsequently the wife became pregnant. Prior to the birth of the

[25] 177 F.2d 427 (1st Cir. 1949).

[26] *Id.* at 433. *See also* Note, *The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts*, 62 COLUM. L. REV. 1018 (1962); 46 ILL. L. REV. 646 (1951); Note, *Pendent Jurisdiction: An Expanding Concept in Federal Court Jurisdiction*, 51 IOWA L. REV. 151 (1965).

[27] 262 F.Supp. 106 (E.D. Pa. 1966).

child *Ps* sued *Ds* for breach of contract, malpractice, misrepresentation and fraud and deceit. The lower court sustained *Ds'* general demurrers without leave to amend on the ground that *Ps* failed to state sufficient facts to constitute a cause of action. *Held,* reversed and remanded with directions to rule on points presented by the special demurrers. If *Ps* are successful in establishing the liability of *Ds* they will be entitled to more than nominal damages even if a normal child is born and the wife suffers no physical injury as a result of the pregnancy. *Custodio v. Bauer,* 59 Cal. Rptr. 463 (1967).

The court's decision in this case represents a departure from past judicial policy in cases in which parents have claimed damages for the normal birth of a normal child resulting from the failure of a sterilization operation upon either the husband or wife. In decisions dealing with this question the courts have previously refused to find that there was any legally compensable injury, and consequently no compensatory damages have been awarded. However, the principal case refuses to follow that policy by recognizing that although the birth is a normal one and the child normal and healthy, the parents may, nevertheless, be injured by such birth and entitled to damages.

I. INJURY

To entitle an allegedly injured party to recover damages in a tort or contract action it must, of course, appear that the party suffered some actual damage or injury. Thus assuming, as *Custodio* did, that the other necessary elements of a cause of action can be established, is there a legally compensable injury to the parent in a case such as this? There is little authority on the point. Even in cases in which damages have been denied, the denial has not always been placed specifically on the ground that no damage or injury was suffered.[1] Reasons for refusal to award damages have been variously stated: the purpose (therapeutic) of the operation was not to save expenses incident to childbirth;[2] to award damages in such a case would be against public policy;[3] the plaintiff-parents suffered no damage from the normal birth of a normal child.[4] The general rule of policy which the courts have recognized seems to have

[1] Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934); Shaheen v. Knight, 11 Pa. D. & C. 2d 41 (1957).
[2] Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934).
[3] Shaheen v. Knight, 11 Pa. D. & C. 2d 41 (1957).
[4] Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964).

two variations. It may be stated that the normal birth of a normal healthy child does not result in injury or damage,[5] or that although there may have been injury or damage it is not legally compensable.[6] Other cases indicate that when the normal birth of a normal child follows the negligent failure to perform a sterilization operation that the parents have a right to recover damages.[7]

In *Custodio* and in another recent case, *Bishop v. Byrne*,[8] there is a recognition that the normal birth of a normal child can constitute a legal injury for which damages can be recovered. In *Bishop,* the court stated: "[A]ssuming that it can be established that it [the operation] was negligently performed, it follows that if the condition which it sought to avoid subsequently occurred and as a result mental or physical suffering, or both, accompanied it, the victim has been injured."[9] It seems indisputable that some injuries do result from the birth of a child under circumstances like those in *Custodio* and that damages should be awarded for such injuries.

II. DAMAGES

If damage does result from a normal birth of a normal healthy child the question then arises as to what the measure of those damages will be. It is important to note that plaintiffs in *Custodio* alleged causes of action for both breach of contract and malpractice,[10] and thus could recover damages under a contract theory or a tort theory. It is well recognized that although a doctor is not a warrantor of his treatment, he may make himself liable for damages for breach of contract if he has contracted to achieve a particular result and has failed to do so.[11] And if the failure to perform the contract as promised is negligent, then by the single negligent failure to perform, he may also make himself liable for damages in a tort action.[12]

In some instances such as these, the operation is performed for therapeutic purposes only, *i.e.,* to protect the health of the wife from

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[5] *Id.*
[6] Shaheen v. Knight, 11 Pa. D. and C.2d 41 (1957).
[7] Doerr v. Villate, 74 Ill. App. 2d 332, 220 N.E.2d 767 (1966).
[8] 265 F. Supp. 460 (S.D. W.Va. 1967).
[9] *Id.* at 463.
[10] Custodio v. Bauer, 59 Cal. Rptr. 463, 466 (1967).
[11] Steward v. Rudner, 349 Mich. 459, 84 N.W.2d 816 (1957); Cloutier v. Kasheta, 105 N.H. 262, 197 A.2d 627 (1964).
[12] Steward v. Rudner, 349 Mich. 459, 84 N.W.2d 816 (1957); Colvin v. Smith, 276 App. Div. 9, 92 N.Y.S.2d 794, 795 (1949).

danger incident to childbirth; while in other cases the purpose is wholly economic, *i.e.,* to avoid the expense incident to the birth and rearing of a child. This distinction may be of significance in assessing damages. Applying both a contract theory and a tort theory and keeping in mind the two possible purposes for which a sterilization operation might be performed, it is interesting to consider the elements of damage for which plaintiffs might reasonably be expected to recover.

Both the husband and wife in *Custodio* sought to recover for medical expenses and the cost of rearing and maintaining the child.[14] In addition the wife sought to recover for pain and suffering and the husband for mental suffering.[15] The court indicated that damages, if proven, could be recovered for all of these elements.[16]

A. Medical Expenses

Where the parties have contracted for a particular result, damages are said to be limited to the payment made to the physician by the patient and the patient's expenditures for nurses or medicines or other damage flowing from the breach of contract.[17] Clearly the element of medical expenses falls within this rule whether the purpose of the operation be therapeutic or economic.

In a negligence suit, plaintiff is entitled to recover damages only for those injuries which proximately result from the defendant's negligence.[18] Medical expenses incident to the birth of a child are a proximate result of the defendant's negligence in performing a sterilization operation no matter what its purpose and should be recovered in a malpractice action.

B. Support

In regard to the element of damages for expense of rearing the child, a valid distinction can be made between operations for a therapeutic purpose and those for purely economic purposes, when

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[13] Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934); West v. Underwood, 132 N.J.L. 325, 40 A.2d 610 (1945); Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964).

[14] Custodio v. Bauer, 59 Cal. Rptr. 463, 467 (1967).

[15] *Id.*

[16] *Id.* at 476.

[17] Colvin v. Smith, 276 App. Div. 9, 92 N.Y.S.2d 794, 795 (1949).

[18] Alabama Power Co. v. Berry, 254 Ala. 228, 48 So.2d 231 (1950); Williams v. State, 308 N.Y. 548, 127 N.E.2d 545 (1955); Edwards v. Hobson, 189 Va. 948, 54 S.E.2d 859 (1949).

a contract theory is applied. When the purpose of the operation is economic, the application of the rule that a party to a contract is liable for all the damages which were within the contemplation of the parties as a result of a breach at the time the contract was formed would appear to be the proper measure of damages.[19] Certainly a party to a contract of this nature should be able to recover the very expenses his contract was designed to prevent. But when the contract is purely for therapeutic purposes, and its breach results in the normal birth of a normal child, and the mother is not harmed, it seems arguable that no damages for breach of contract should be recoverable. In this instance the damage which the contract was designed to prevent (harm to the wife's health) has not occurred, and in such a case the parents may receive a net benefit from the breach of contract in the enjoyment of rearing a child.

Also under a negligence theory the element of expenses of rearing a child seems to be a proximate result of the negligent performance of a sterilization operation when the purpose of the operation is economic. However in the cases of expenses of rearing and maintaining a child who is born as the result of negligently performed therapeutic sterilization operation, there may well be some merit to the opinion expressed by one court that the expenses are incident to the bearing of a child and their avoidance is remote from the avowed purpose of the operation.[20]

C. Pain and Suffering

Pain and suffering are proper elements of damages in a malpractice suit.[21] There is no mathematical measure for pain and suffering; rather it must be left to the determination of the jury.[22] It might be argued that damages for pain and suffering should be recoverable only to the extent that the pain and suffering in a particular case exceeds that which normally accompanies pregnancy and childbirth. But since there would have been no pain and suffering had the operation been successfully performed, it seems that damages should be recoverable for all pain and suffering. Also, in the case of the negligent performance of a therapeutic sterilization operation, the award of damages could conceivably be greater than in the case

[19] Hadley v. Baxendale, 156 Eng. Rep. 145 (Ex. 1854).
[20] Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620, 622 (1934).
[21] Olsen v. McAtee, 181 Or. 503, 182 P.2d 979 (1947); Hively v. Higgs, 120 Or. 588, 253 P. 363 (1927).
[22] Roedder v. Rowley, 28 C.2d 820, 172 P.2d 353 (1946); Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1957).

of an operation for economic purposes, since the pain and suffering in the former case might be greater due to the uncertainty concerning the ultimate effect of the pregnancy on the health of the wife and complications which may result. There are some recent indications that damages for pain and suffering are recoverable in a situation similar to that in *Custodio*.[23] However such damages have been denied in another case.[24] In *Bishop v. Byrne*[25] the court, taking judicial notice of what was common knowledge, recognized that a period of pregnancy followed by the birth of a child, under circumstances like those in *Custodio,* would cause the mother some pain and suffering and held that the amount of damages to be awarded for this was a question for jury determination. There is no indication in the *Bishop* case that the wife could recover damages only for the pain and suffering in excess of that which usually accompanies a normal pregnancy and birth.

D. Mental Suffering

Although *Custodio* indicated that the husband should be able to recover for mental suffering, this does not seem possible under established rules of law. Normally, a party cannot recover in tort for mental anguish unaccompanied by physical injury,[26] and here the husband has suffered no physical injury. Certainly if this damage were alleged by the wife it would seem to be compensable.[27] One case recognized this as an element of damage for both husband and wife under similar circumstances,[28] but others have refused to grant damages therefor.[29]

However, "where the contract is personal in nature and the contractual duty or obligation is so coupled with matters of mental concern or solicitude . . . that a breach of that duty will necessarily or reasonably result in mental anguish . . . compensatory damages therefor may be awarded."[30] Under this principle the husband

[23] Doerr v. Villate, 74 Ill. App. 2d 332, 220 N.E.2d 767 (1966); West v. Underwood, 132 N.J.L. 325, 40 A.2d 610 (1945).

[24] Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964).

[25] Bishop v. Byrne, 265 F. Supp. 460, 464 (S.D. W.Va. 1967).

[26] Bishop v. Byrne, 265 F. Supp. 460, 465 (S.D. W.Va. 1967); Monteleone v. Transit Co., 128 W. Va. 340, 348, 36 S.E.2d 475, 479 (1945).

[27] Norton v. Hamilton, 92 Ga. App. 727, 89 S.E.2d 809 (1955); West v. Underwood, 132 N.J.L. 325, 40 A.2d 610 (1945).

[28] Bishop v. Byrne, 265 F. Supp. 460 (S.D. W. Va. 1967): West v. Underwood, 132 N.J.L. 325, 40 A.2d 610 (1945).

[29] Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934); Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964).

[30] Lamm v. Shingleton, 231 N.C. 10, 14, 55 S.E.2d 810, 813 (1949).

would seem to be entitled to damages for his mental suffering. This certainly was a contract of a personal nature coupled with matters of personal concern and solicitude. Breach of the contract, especially when the contract is for therapeutic purposes, would reasonably give rise to mental anguish.

The *Custodio* court indicated that although the wife might survive without injury, there would still be some loss, since she must spread her society, comfort, care, and protection over a larger group, and that if the change in family status could be proved in terms of monetary loss it should be compensable.[31] No other case similar to *Custodio* has indicated that damages of this nature might be recoverable. In fact, one recent case which recognized that the normal birth of a normal child could constitute a legally compensable injury failed to recognize any loss caused by change in family status as an element of recovery.[32] Certainly as a practical matter this intangible factor would be so difficult to prove, and of such a speculative nature, that it should not be compensable.

A recent case, *Bishop v. Byrne*,[33] which is in point with *Custodio* is most significant. The court there recognized specifically that if a therapeutic sterilization operation were negligently performed, and as a result the condition that it was designed to prevent occurred, *e.g.*, pregnancy, accompanied by mental or physical suffering by plaintiff, the victim would be injured.[34] This appears to be the first case to recognize specifically that the normal birth of a normal child could constitute damage. Although the court held that plaintiff-wife could not recover under a breach of warranty theory because there was no proof of a contract between the defendant-physician and plaintiff, the court indicated plaintiff could recover damages in tort for physical pain and suffering and mental worry and anxiety if the jury determined she had suffered such damage.[35] The court held that whether the wife experienced mental or physical suffering or both from the pregnancy and Caesarian section presented disputed issues of fact which precluded a grant of summary judgment.[36]

The primary significance of the *Custodio* case and the *Bishop* case is the holding that a legally compensable injury may result from

[31] Custodio v. Bauer, 59 Cal. Rptr. 463, 476 (1967).
[32] Bishop v. Byrne, 265 F. Supp. 460 (S.D. W.Va. 1967).
[33] *Id.*
[34] *Id.* at 463.
[35] *Id.* at 464.
[36] *Id.*

the normal birth of a normal child. Both courts also recognized that plaintiffs could recover damages for these injuries. This conclusion appears to be a reasonable one when considered in relation to well established rules of law regarding damages. Under these rules there appear to be no barriers to the recovery of damages by plaintiffs in cases similar to *Custodio.*

The problems presented by these cases are novel ones and are not easily resolved, but the courts appear to have arrived at a very satisfactory solution. Certainly it is not possible to predict to what extent, if at all, other courts will follow the holdings of the *Custodio* and *Bishop* cases. Nevertheless the decisions in these cases appear to lay a solid foundation on which other courts may base their decisions when confronted with similar problems of this nature in the future.

James Alan Harris

Procedure—Intrastate Application of *Forum Non Conveniens*

P was injured in an automobile accident and brought suit against *D,* a foreign insurer, in the jurisdiction where *D* was domiciled. *P* could elect to proceed against *D* in alternate jurisdictions, either the situs of the accident or the domicile of *D.* Upon *D's* motion, a change of venue to the situs of the accident was granted inasmuch as a crowded court docket would be relieved and the convenience of the litigants and witnesses would best be served by reducing travel time. *P* appeals, charging the transfer as error. *Held,* reversed. The doctrine of *forum non conveniens* is foreign to Louisiana jurisprudence and contrary to the general venue statute which provides a change of venue may be had only where a fair and impartial trial cannot be obtained in the forum in which the action has been initially brought.[1] *Trahan v. Phoenix Insurance Co.,* 200 So. 2d 118 (La. 1967).

The doctrine of *forum non conveniens* deals with the discretionary power of a court to decline to exercise a possessed jurisdiction when it appears that the cause before it could be more conveniently and appropriately tried elsewhere.[2] One of the functions of the doctrine

[1] LA. STAT. ANN.—C.C.P., art. 122 (West 1961).
[2] Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law,* 29 COLUM. L. REV. 1 (1929).