STATE OF HARYANA AND ORS. A

v.

SMT. SANTRA

APRIL 24, 2000

[S. SAGHIR AHMAD AND D.P. WADHWA, JJ.] B

Consumer Protection Act 1986—Sections 2(1)(o) and (g).

Medical Negligence—Damages for—Labourer lady had undergone sterilisation operation at Government Hospital since she had already seven children and was issued a cretificate to this effect—However, she gave birth to a female child—It was found that only the right Fallopian Tube was operated upon leaving the other one untouched—Held : In spite of the moral and statutory obligation of the parents to maintain their minor children, the poor lady entitled to damages for medical negligence—State is also vicariously liable for the negligence of its employees Criminal Procedure Code, S. 125. C D

Hindu Law :

Hindu Adoptions and Maintenance Act, 1956 : Sections 20 and 23.

Minor children—Maintenance of—Held : Parents are liable to maintain their minor children. E

Muslim Law :

Minor children—Maintenance of—Held : Father is liable to maintain his minor children. F

Tort :

Negligence—Medical Negligence—Held : A doctor has a duty to act with a reasonable degree of care and skill.

G

Words and Phrases :

"Maintenance"—Meaning of—In the context of S.20 of the Hindu Adoptions and Maintenance Act, 1956.

Negligence"—Meaning of. H

A The respondent had undergone Sterilisation Operation at the Government General Hospital as she already had seven children and wanted to take advantage of the scheme of Sterilisation launched by the State Government. She was issued a certificate that her operation was successful. She was assured that she would not conceive a child in future. But she B conceived and ultimately gave birth to a female child.

Thereafer, the respondent filed a suit against the State and its Officers for recovery of damages for medical negligence. The explanation offered by the appellant-State who were defendants in the suit was that at the time of Sterilisation Operation, only the right Fallopian Tube was operated upon C and the left Fallopian Tube was left untouched. The courts below rejected this explanation and the suit was decreed. Hence this appeal.

On behalf of the appellant-State it was contended that the negligence of the Medical Officer in performing the unsuccessful sterilisation operation would not bind the State Government, that the State Government D would not be liable vicariously for any damages to the respondent; and that the expenses awarded for rearing up the child and for her maintenance could not have been legally decreed as there was no element of "tort" involved in it nor had the respondent suffered any loss which could be compensated in terms of money.

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Dismissing the appeal, this Court

HELD : 1.1. Negligence is a 'tort'. Every Doctor who enters into the medical profession has a duty to act with a reasonable degree of care and skill. This is what is known as 'implied undertaking' by a member of the F medical profession that he would use a fair, reasonable and competent degree of skill. [202-F]

Dr. Laxman Balakrishna Joshi v. *Dr. Trimbak Bapu Godbole*, AIR (1969) SC 128; *A.S. Mittal* v. *State of U.P.*, AIR (1989) SC 1570; *Poonam Verma* v. *Ashwin Patel*, [1996] 4 SCC 332 and *Spring Meadows Hospital* v. *Harjol* G *Ahluwalia*, JT (1998) 2 SC 620, relied on.

Bolam v. *Friern Hospital Management Committee*, (1957) 2 All ER 118; *Whitehouse* v. *Jordon*, (1981) 1 All ER 267; *Maynard* v. *West Midlands Regional Health Authority*, (1985) 1 All ER 635 and *Sidway* v. *Bathlem Royal* H *Hospital*, (1985) 1 All ER 643, referred to.

1.2. The Government at the Centre as also at the State level is aware that India is the second most populous country in the world and in order that it enters into an era of prosperity, progress and complete self-dependence, it is necessary that the growth of the population be arrested. It is with this end in view that family planning programme has been launched by the Government. The implementation of the programme is directly in the hands of the Government Officers, including Medical Officers involved in the family planning programmes. The Medical Officers entrusted with the implementation or the Family Planning Programme cannot, by their negligent acts in not performing the complete sterilisation operation, sabotage the scheme of national importance. The people of the country who cooperate by offering themselves voluntarily for sterilisation reasonably expect that after undergoing the operation they would be able to avoid further pregnancy and consequent birth of additional child. [206-B-D]

1.3. If the respondent, in these circumstances, had offered herself for complete sterilisation, both the Fallopian Tubes should have been operated upon. The Doctor who performed the operation acted in a most negligent manner. [206-E-F]

2.1. The courts in the different countries are not unanimous in allowing the claim for damages for rearing up the unwanted child born out of a failed sterilisation operation. In some cases, the courts refused to allow this claim on the ground of public policy, while in many others, the claim was offset against the benefits derived from having a child and the pleasure in rearing up that child. In many other case, if the sterilisation was undergone on account of social and economic reasons, particularly in a situation where the claimant had already had many children, the court allowed the claim for rearing up the child. [210-C-D]

Udale v. *Bloomsbury Area Health Authority,* (1983) 2 All ER 522; *Emeh* v. *Kensington and Chelsea and Westminster Area Health Authority,* (1984) 3 All ER 1044; *Thake* v. *Maurice,* (1984) 2 All ER 513; *Benarr* v. *Kettering Health Authority,* (1988) 138 NLJ 179; *Crouchman* v. *Burke,* (1997) 40 BMLR 163; *Robinson* v. *Salford Heath Authority,* (1992) 3 Med. LR 270; *Allan* v. *Greater Glasgow Health Board,* (1993) 1998 SLT 580; *Szekeres* v. *Robinson,* (1986) 715 P 2d 1076; *Johnson* v. *University Hospitals of Cleveland,* (1989) 540 NE 2d 1370 (Ohio); *Public Health Trust* v. *Brown,* (1980) 388 So 2d 1084; *Lovelace Medical Center* v. *Mendez,* (1991) 805 P 2d 603; *Adminis-*

A *trator, Natal* v. *Edouard,* (1990) 3 SA 581, *L* v. *M,* (1979) 2 NZLR 519; *CES* v. *Superclinics (Australia) Pty. Ltd.,* (1995) Ltd. (1985) 38 NSWLR 47; *Mc Farlane & Anr.* v. *Tayside Health Board,* (1999) 4 All ER 961 and Halsbury's Laws of England *4th Edn.* (Reissue) Vol. 12(1), para 896, referred to.

B 2.2. The principles on the basis of which damages have not been allowed on account of failed sterilisation operation in other countries either on account of public pleasure in having a child being offset against the claim for damages cannot be strictly applied to the Indian conditions so far as poor families are concerned. The public policy here professed by the Government is to control the population and that is why various pro-
C grammes have been launched to implement the state-sponsored family planning programmes and policies. [210-G-H]

3.1. It is, no doubt, true that the parents are under an obligation to maintain their minor children. This is a moral, apart from a statutory,
D liability in view of the provisions contained in Section 125 of the Criminal Procedure Code, 1973. It is also a statutory duty on account of Section 20 and 23 of the Hindu Adoptions and Maintenance Act, 1956. [211-C]

3.2. "Maintenance" would obviously include provision for food, clothing, residence, education of the children and medical attendance or treat-
E ment. [211-F]

3.3 Similarly, under the Mohammedan Law, a father is bound to maintain his sons until they have attained the age of puberty. He is also bound to maintain his daughters until they are married. But the statutory
F liability to maintain the children would not operate as a bar in claiming damages on account of tort of medical negligence in not carrying out the sterilisation operation with due care and responsibility. The two situations are based on two different principles. The statutory as well as personal liability of the parents to maintain their children arises on account of the principle that if a person has begotten a child, he is bound to maintain that
G child. Claim for damages, on the contrary, is based on the principle that if a person has committed civil wrong, he must pay compensation by way of damages to the person wronged. [212-C-D]

Mulls's Principles of Mohammedan Law (19th Edn.), p. 300, referred
H to.

4. In a country where the population is increasing by the tick of every second on the clock and the Government had taken up the family planning as an important programme for the implementation of which it had created mass awakening for the use of various devices including sterilisation operation, the doctor as also the State must be held responsible in damages if the Sterilisation operation performed by him is a failure on account of his negligence, which is directly responsible for another birth in the family, creating additional economic burden on the person who has chosen to be operated upon for sterilisation. [212-F]

State of M.P. **v.** *Asharam,* **(1997) ACJ 1224 (MP), approved.**

5. The contention as to the vicarious liability of the State for the negligence of its officers in performing the sterilisation operation cannot be accepted in view of the law settled by this Court. [213-B]

N. Nagendra Rao **v.** *State of A.P.,* **AIR (1994) SC 2663;** *Common Cause, A Regd. Society* **v.** *Union of India,* **[1999] 6 SCC 667 and** *Achutrao Haribhau Kodwa* **v.** *State of Maharashtra,* **(1996) ACJ 505, relied on.**

6. In the instant case, the respondent was a poor lady who already had seven children. She was already under considerable monetary burden. The unwanted child (girl) born to her has created additional burden for her on account of the negligence of the doctor who performed sterilisation operation upon her and, therefore, she is clearly entitled to claim full damages from the State Government to enable her to bring up the child at least till she attains puberty. [213-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2897 of 2000.

From the Judgment and Order dated 3.8.99 of the Punjab and Haryana High Court in R.S.A. No. 2734 of 1999.

S.R. Sharma and Mahabir Singh for the Appellants.

The Judgment of the Court was delivered by

S. SAGHIR AHMAD, J. Leave granted.

Medical Negligence plays its game in strange ways. Sometimes it plays with life; sometimes it gifts an "Unwanted Child" as in the instant case where the respondent, a poor labourer woman, who already had many children and

had opted for sterilisation, developed pregnancy and ultimately gave birth to a female child in spite of sterilisation operation which, obviously, had failed.

Smt. Santra, the victim of the medical negligence, filed a suit for recovery of Rs. 2 lakhs as damages for medical negligence, which was decreed for a sum of Rs.54,000 with interest at the rate of 12 per cent per annum from the date of institution of the suit till the payment of the decretal amount. Two appeals were filed against this decree in the court of District Judge, Gurgaon, which were disposed of by Addl. District Judge, Gurgaon, by a common judgment dated 10.5.1999. Both the appeals - one filed by the State of Haryana and the other by Smt. Santra were dismissed. The second appeal filed by the State of Haryana was summarily dismissed by the Punjab and Haryana High Court on 3.8.1999. It is in these circumstances that the present Special Leave Petition has been filed in this court.

"Sterilisation Scheme", admittedly, was launched by the Haryana Govt. and taking advantage of that scheme, Smt. Santra approached the Chief Medical Officer, Gurgaon, for her sterilisation in 1988. The sterilisation operation was performed on her and a certificate to that effect was also issued to her on 4.2.1988 under the signatures of the Medical Officer, General Hospital, Gurgaon. Smt. Santra was assured that full, complete and successful sterilisation operation had been performed upon her and she would not conceive a child in future. But despite the operation, she conceived. When she contacted the Chief Medical Officer and other Doctors of the General Hospital, Gurgaon, she was informed that she was not pregnant. Two months later when the pregnancy became apparent, she again approached those Doctors who then told her that her sterilisation operation was not successful. Dr. Sushil Kumar Goyal, who was examined as DW-2, stated that the operation related only to the right Fallopian Tube and the left Fallopian Tube was not touched, which indicates that 'complete sterlisation' operation was not done. She requested for an abortion, but was advised not to go in for abortion as the same would be dangerous to her life. She ultimtely gave birth to a female child. Smt. Santra already had seven children and the birth of a new child put her to unnecessary burden of rearing up the child as also all the expenses involved in the maintenance of that child, including the expenses towards her clothes and education.

It was in these circumstances that the suit was filed by Smt. Santra which was contested by the State, who, besides taking up the technical pleas relating to non-maintainability of the suit on various grounds, denied in the

written statement that there was any negligence on the part of the Medical Officer of the General Hospital, Gurgaon. It was contended by the defendants that the sterlisation operation performed upon Smt. Santra on 4.2.1988 was done carefully and successfully and there was no negligence on the part of the Doctor who performed that operation. It was further pleaded that Smt. Santra had herself put her thumb impression on a paper containing a recital that in case the operation was not successful, she would not claim any damages. It was pleaded that she was estopped from raising the plea of negligence or from claiming damages for an unsuccessful sterilisation operation from the State which, it was further pleaded, was not liable even vicariously for any lapse on the part of the Doctor who performed that operation.

The trial court as also the lower appellate court both recorded concurrent findings of fact that the sterilisation operation performed upon Smt. Santra was not 'complete' as in that operation only the right Fallopian Tube was operated upon while the left Tube was left untouched. The courts were of the opinion that this exhibited negligence on the part of the Medical Officer who performed the operation. Smt. Santra, in spite of the unsuccessful operation, was informed that sterilisation operation was successful and that she would not conceive any child in future. The plea of estoppel raised by the defendants was also rejected. The trial court has recorded the following findings on the question of negligence:

> "The birth of the female child by plaintiff Smt. Santra after operation for sterilization is not disputed and the case of the defts is that there was no negligence and carelessness on the part of the deft. but on going through the documents placed on the file as well as testimony of PWs that the medical officer who conducted the operation has threw the care and caution to the winds and focussed attention to perform as many as operations as possible to build record and earn publicity. It is in such settling that a poor lady obsessed to plan his family, was negligently operated upon and treated and left in the larch to suffer agony and burden which he was made to believe was avoidable. Therefore, the act of the DW 2 Dr. Sushil Kumar shows that he did not perform his duty to the best of his ability and with due care and caution and due to the above said act, the plaintiff has to suffer mental pain and agony and burden of financial liability."

The findings of the Lower Appellate Court on this question are as under:

A "In the instant case, admittedly, plaintiff Santra was operated for right tube and not for left tube. Dr. Sushil Kumar Goel while appearing as DW2 has categorically stated so. He has specifically stated that Santra, plaintiff was not traceable. I am of the considered opinion that if Santra, plaintiff was not operated for left side in that event the doctor should not have issued certificate of sterilisation to her. The B doctors who operated plaintiff Santra should have advised her to come for second time for her operation of left side. The plaintiff has placed family sterilisation case card Ex. P2 on the file. The defendant State has admitted in its written statement that she was successfully operated on 4.2.82 in General Hospital, Gurgaon. When admittedly C Santra, plaintiff was not operated, as discussed above, for her left tube in that event issuance of certificate to her of her sterilisation amounts gross negligence."

The High Court, as pointed out above, summarily dismissed the second appeal. D

Learned counsel appearing on behalf of the State of Haryana has contended that the negligence of the Medical Officer in performing the unsuccessful sterilisation operation upon Smt. Santra would not bind the State Govt. and the State Govt. would not be liable vicariously for any damages to E Smt. Santra. It was also claimed that the expenses awarded for rearing up the child and for her maintenance could not have been legally decreed as there was no element of "tort" involved in it nor had Smt. Santra suffered any loss which could be compensated in terms of money.

Negligence is a 'tort'. Every Doctor who enters into the medical F profession has a duty to act with a reasonable degree of care and skill. This is what is known as 'implied undertaking' by a member of the medical profession that he would use a fair, reasonable and competent degree of skill. In *Bolam* v. *Friern Hospital Management Committee*, (1957) 2 All ER 118, McNair, J. summed up the law as under:

G "The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. In the case of a medical man, negligence means H failure to act in accordance with the standards of reasonably compe-

tent medical men at the time. There may be one or more perfectly proper standards, and if he conforms with one of these proper standards, then he is not negligent."

This decision has since been approved by the *House of Lords in Whitehouse* v. *Jordon*, (1981) 1 All ER 267 HL; *Maynard* v. *West Midlands Regional Health Authority*, (1985) 1 All ER 635 HL; and *Sidway* v. *Bathlem Royal Hospital* (1985) 1 All ER 643 HL.

In two decisions rendered by this Court, namely, *Dr. Laxman Balakrishna Joshi* v. *Dr. Trimbak Bapu Godbole & Anr.*, AIR (1969) SC 128 and *A.S. Mittal* v. *State of U.P.*, AIR (1989) SC 1570, it was laid down that when a Doctor is consulted by a patient, the former, namely, the Doctor owes to his patient certain duties which are (a) a duty of care in deciding whether to undertake the case; (b) a duty of care in deciding what treatment to give; and (c) a duty of care in the administration of that treatment. A breach of any of the above duties may give a cause of action for negligence and the patient may on that basis recover damages from his Doctor. In a recent decision in *Poonam Verma* v. *Ashwin Patel & Ors.* [1996] 4 SCC 332 = AIR (1996) SC 2111 where the question of medical negligence was considered in the context of treatment of a patient, it was observed as under:

> "40. Negligence has many manifestations - it may be active negligence, collateral negligence, comparative negligence, concurrent negligence, continued negligence, criminal negligence, gross negligence, hazardous negligence, active and passive negligence, wilful or reckless negligence or Negligence *per se*, which is defined in Black's Law Dictionary as under :
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> > Negligence *per se*: Conduct, whether of action or omission, which may be declared and treated as negligence without any argument or proof as to the particular surrounding circumstances, either because it is in violation of a statute or valid municipal ordinance, or because it is so palpably opposed to the dictates of common prudence that it can be said without hesitation or doubt that no careful person would have been guilty of it. As a general rule, the violation of a public duty, enjoined by law for the protection of person or property, so constitutes."

It was also observed that where a person is guilty of Negligence *per se*,

A no further proof is needed.

In *M/s Spring Meadows Hospital & Anr.* v. *Harjol Ahluwalia through K.S. Ahluwalia & Anr.*, JT (1998) 2 SC 620, it was observed as under :

> "In the case in hand we are dealing with a problem which centres
> B round the medical ethics and as such it may be appropriate to notice the broad responsibilities of such organisations who in the garb of doing service to the humanity have continued commercial activities and have been mercilessly extracting money from helpless patients and their family members and yet do not provide the necessary
> C services. The influence exerted by a doctor is unique. The relationship between the doctor and the patient is not always equally balanced. The attitude of a patient is poised between trust in the learning of another and the general distress of one who is in a state of uncertainty and such ambivalence naturally leads to a sense of inferiority and it is, therefore, the function of medical ethics to ensure that the
> D superiority of the doctor is not abused in any manner. It is a great mistake to think that doctors and hospitals are easy targets for the dissatisfied patient. It is indeed very difficult to raise an action of negligence. Not only there are practical difficulties in linking the injury sustained with the medical treatment but also it is still more
> E difficult to establish the standard of care in medical negligence of which a complaint can be made. All these factors together with the sheer expense of bringing a legal action and the denial of legal aid to all but the poorest operate to limit medical litigation in this country."

F It was further observed as under:

> "In recent days there has been increasing pressure on hospital facilities, falling standard of professional competence and in addition to all, the ever increasing complexity of therapeutic and diagnostic methods and all this together are responsible for the medical negli-
> G gence. That apart there has been a growing awareness in the public mind to bring the negligence of such professional doctors to light. Very often in a claim for compensation arising out of medical negligence a plea is taken that it is a case of *bona fide* mistake which under certain circumstances may be excusable, but a mistake which
> H would tantamount to negligence cannot be pardoned. In the former

case a court can accept that ordinary human fallibility precludes the liability while in the latter the conduct of the defendant is considered to have gone beyond the bounds of what is expected of the reasonable skill of a competent doctor."

In this judgment, reliance was placed on the decision of the House of Lords in *Whitehouse* v. *Jordan & Anr.*, (1981) 1 ALL ER 267. Lord Fraser, while reversing the judgment of Lord Denning (sitting in the Court of Appeal), observed as under :

> "The true position is that an error of judgment may, or may not, be negligent; it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant holds himself out as having, and acting with ordinary care, then it is negligence. If, on the other hand, it is an error that such a man, acting with ordinary care, might have made, then it is not negligence."

The principles stated above have to be kept in view while deciding the issues involved in the present case.

The facts which are not disputed are that Smt. Santra, respondent, had undergone a Sterilisation Operation at the General Hospital, Gurgaon, as she already had seven children and wanted to take advantage of the scheme of Sterilisation launched by the State Govt. of Haryana. She underwent the Sterilisation Operation and she was issued a certificate that her operation was successful. She was assured that she would not conceive a child in future. But, as the luck would have it, she conceived and ultimately gave birth to a female child. The explanation offered by the officers of the appellant-State who were defendants in the suit, was that at the time of Sterilisation Operation, only the right Fallopian Tube was operated upon and the left Fallopian Tube was left untouched. This explanation was rejected by the courts below and they were of the opinion, and rightly so, that Smt. Santra had gone to the Hospital for complete and total Sterilisation and not for partial operation. The certificate issued to her, admittedly, was also in respect of total Sterilisation Operation.

Family Planning is a National Programme. It is being implemented through the agency of various Govt. Hospitals and Health Centres and at some places through the agency of Red Cross. In order that the National Programme

may be successfully completed and the purpose sought may bear fruit, every body involved in the implementation of the Programme has to perform his duty in all earnestness and dedication. The Govt. at the Centre as also at the State level is aware that India is the second most-populous country in the world and in order that it enters into an era of prosperity, progress and complete self-dependence, it is necessary that the growth of the population is arrested. It is with this end in view that family planning programme has been launched by the Government which has not only endeavoured to bring about an awakening about the utility of family planning among the masses but has also attempted to motivate people to take recourse to family planning through any of the known devices or sterilisation operation. The Programme is being implemented through its own agency by adopting various measures, including the popularisation of contraceptives and operation for sterilising the male or female. The implementation of the Programme is thus directly in the hands of the Govt. officers, including Medical Officers involved in the family planning programmes. The Medical Officers entrusted with the implementation of the Family Planning Programme cannot, by their negligent acts in not performing the complete sterilisation operation, sabotage the scheme of national importance. The people of the country who cooperate by offering themselves voluntarily for sterilisation reasonably expect that after undergoing the operation they would be able to avoid further pregnancy and consequent birth of additional child.

If Smt. Santra, in these circumstances, had offered herself for complete Sterilisation, both the Fallopian Tubes should have been operated upon. The Doctor who performed the opeation acted in a most negligent manner as the possibility of conception by Smt. Santra was not completely ruled out as her left Fallopian Tube was not touched. Smt. Santra did conceive and gave birth to an unwanted child.

Who has to bear the expenses in bringing up the "unwanted child", is the question which is to be decided by us in this case.

The amount of Rs. 54,000 which has been decreed by the courts below represents the amount of expenses which Smt. Santra would have to incur at the rate of Rs. 3,000 per annum in bringing up the child upto the age of puberty.

The domestic legal scenario on this question appears to be silent, except one or two stray decisions of the High Courts, to which a reference shall be

made presently. Before coming to those cases, let us have a look around the Globe.

In Halsbury's Laws of England, Fourth Edition (Re- issue) Vol. 12(1), while considering the question of "failed sterilisation", it is stated in para 896 as under :

> "Failed sterilisation. Where the defendant's negligent performance of a sterilisation operation results in the birth of a healthy child, public policy does not prevent the parents from recovering damages for the unwanted birth, even though the child may in fact be wanted by the time of its birth.
>
> Damages are recoverable for personal injuries during the period leading up to the delivery of the child, and for the economic loss involved in the expense of losing paid occupation and the obligation of having to pay for the upkeep and care of an unwanted child. Damages may include loss of earnings for the mother, maintaining the child (taking into account child benefit), and pain and suffering to the mother."

In *Udale* v. *Bloomsbury Area Health Authority*, [1983] 2 All ER 522, a woman who had approached Hospital Authorities for sterilisation was awarded damages not only for pain and suffering on account of pregnancy which she developed as a result of failed sterilisation, but also damages for the disturbance of the family finances, including the cost of layette and increased accommodation for the family. The Court, however, did not allow damages for future cost of the child's upbringing upto the age of 16 years, on a consideration of public policy. *The Court held that the public policy required that the child should not learn that the Court had declared its life to be a mistake. The Court further held that the joy of having a child and the pleasure derived in rearing up that child have to be set off against the cost in upbringing the child.*

The doctrine of *public policy*, however, was not followed in *Emeh* v. *Kensington and Chelsea and Westminster Area Health Authority*, [1984] 3 All ER 1044 = [1985] QB 1012 and it was held that there was no rule of public policy which precluded recovery of damages for pain and suffering for maintaining the child. So also, in *Thake* v. *Maurice*, [1984] 2 All ER 513 =

A [1986] QB 644, in which a *vasectomy* was performed on the husband who was also told, subsequent to the operation, that contraceptive precautions were not necessary. Still, a child was born to him and damages for the child's upkeep upto the seventeenth birthday were awarded, though for an agreed sum. The Court of Appeal in its judgment since reported in [1986] 1 All ER 497 = B [1986] QB 644, held that the joy of having a child could be set off against the trouble and care in the upbringing of the child, but not against pre-natal pain and distress, for which damages had to be awarded.

In *Benarr* v. *Kettering Health Authority*, (1988) 138 NLJ 179, which related to a negligently performed vasectomy operation, damages were awarded C for the future private education of the child. In *Allen* v. *Bloomsbury Health Authority* [1993] 1 All ER 651, damages were awarded in the case of negligence in the termination of the pregnancy and it was held that these damages will include general damages for pain and discomfort associated with the pregnancy and birth as also damages for economic loss being the financial expenses for the unwanted child in order to feed, clothe and care for and D possibility to educate the child till he becomes an adult. On these considerations, a general and special damages including the cost of maintaining the child until the age of 18 were allowed. The judgment was followed in two other cases, namely, *Crouchman* v. *Burke*, (1997) 40 BMLR 163 and *Robinson* v. *Salford Health Authority*, [1992] 3 Med LR 270.

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In a case in *Scotland, namely, Allan* v. *Greater Glasgow Health Board* (1993) 1998 SLT 580, public policy considerations were rejected and cost of rearing the child was also awarded.

In three cases in the *United States of America, namely, Szekeres* v. F *Robinson*, (1986) 715 P 2d 1076; *Johnson* v. *University Hospitals of Cleveland*, (1989) 540 NE 2d 1370 (Ohio) and *Public Health Trust v. Brown*, (1980) 388 So 2d 1084, damages were not allowed for rearing up the child. In the first of these three cases, the Supreme Court of Nevada refused to award damages for the birth of an unwanted child even though the birth was partially G attributable to the negligent conduct of the doctor attempting to prevent the child birth. In the second case, it was held that the parents could recover only the damages for the cost of the pregnancy, but not the expense of rearing an unwanted child. The basis of the judgment appears to be the public policy that the birth of a normal, healthy child cannot be treated to be an injury to the parents. In the third case in which the claim was preferred by a woman H alleging that the sterilisation operation performed upon her was negligently

done which resulted in pregnancy for a child which she never wanted, the Supreme Court of Florida was of the opinion that "it was a matter of universally-shared emotion and sentiment that the tangible but all-important, incalculable but invaluable 'benefits' of parenthood far outweigh any of the mere monetary burdens involved."

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However, in another case arising in the United States, the Supreme Court of *New Mexico in Lovelace Medical Center* v. *Mendez*, (1991) 805 P 2d 603 allowed damages in the form of reasonable expenses to raise the child to majority as it was of the opinion that the prime motivation for sterilisation was to conserve family resources and since it was a failed sterilisation case, attributable to the negligent failure of Lovelace Medical Center, the petitioner was entitled to damages.

C

In a South African case in *Administrator, Natal* v. *Edouard*, (1990) 3 SA 581, damages were awarded for the cost of maintaining the child in a case where sterilisation of the wife did not succeed. It was found in that case that the wife had submitted for sterilisation for socio-economic reasons and in that situation the father of the child was held entitled to recover the cost likely to be incurred for maintaining the child.

D

In a *Newzealand case in L* v. *M*, (1979) 2 NZLR 519, the court of appeal refused to allow cost of rearing a child.

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In a case from Australia, namely, *CES* v. *Superclinics (Australia) Pty. Ltd.*, (1995) 38 NSWLR 47, the expenses involved in rearing the child were not allowed. In this case, a woman who was pregnant, claimed damages for loss of the opportunity to terminate the pregnancy which Doctors had failed to diagnose. The claim was dismissed by the trial judge on the ground that abortion would have been unlawful. Meagher JA discounted the claim altogether on the ground of public policy, but the other Judge, Kirby A-CJ was of the opinion that the woman was entitled to damages both for the pain and suffering which she had to undergo on account of pregnancy as also for the birth and the cost of rearing the child. But he thought that it would be better to offset against the claim of damages, the value of the benefits which would be derived from the birth and rearing of the child. He was of the opinion that the matter of setting off of nett benefits against the nett injury incurred would depend upon the facts of each case. In the result, therefore, he agreed with Priestley JA, that the ordinary expenses of rearing the child should be

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A excluded. Priestley JA was of the view that,

> "The point in the present case is that the plaintiff chose to keep her child. The anguish of having to make the choice is part of the damage caused by the negligent breach of duty, but the fact remains, however, compelling the psychological pressure on the plaintiff may have been
B to keep the child, the opportunity of choice was in my opinion real and the choice made was voluntary. It was this choice which was the cause, in my opinion, of the subsequent cost of rearing the child."

From the above, it would be seen that the courts in the different
C countries are not unanimous in allowing the claim for damages for rearing up the unwanted child born out of a failed sterilisation operation. In some cases, the courts refused to allow this claim on the ground of public policy, while in many other, the claim was offset against the benefits derived from having a child and the pleasure in rearing up that child. In many other cases, if the
D sterilisation was undergone on account of social and economic reasons, particularly in a situation where the claimant had already had many children, the court allowed the claim for rearing up the child. These cases were considered by the House of Lords in *MC Parlane & Anr.* v. *Tayside Health Board*, [1999] 4 All England Reports 961, but the case eluded a unanimous verdict.

E

In *State of M.P. & Ors.* v. *Asharam*, (1997) Accident Claim Journal 1224, the High Court allowed the damges on account of medical negligence in the performance of a family planning operation on account of which a daughter was born after fifteen months of the date of operation.

F No other decision of any High Court has come to our notice where damages were awarded on account of failed sterilisation operation.

Ours is a developing country where majority of the people live below the poverty line. On account of the ever-increasing population, the country is almost at the saturation point so far as its resources are concerned. The
G principles on the basis of which damages have not been allowed on account of failed sterilisation operation in other countries either on account of public policy or on account of pleasure in having a child being offset against the claim for damages cannot be strictly applied to the Indian conditions so far as poor families are concerned. The public policy here professed by the
H Government is to control the population and that is why various programmes

have been launched to implement the state-sponsored family planning programmes and policies. Damages for the birth of an unwanted child may not be of any value for those who are already living in affluent conditions but those who live below the poverty line or who belong to the labour class who earn their livelihood on daily basis by taking up the job of an ordinary labour, cannot be denied the claim for damages on account of medical negligence.

It is, no doubt, true that the parents are under an obligation to maintain their minor children. This is a moral, apart from a statutory, liability in view of the provisions contained in Section 125 of the Code of Criminal Procedure. It is also a statutory liability on account of Section 20 of the Hindu Adoptions and Maintenance Act which provides as under:

> "20. (1) Subject to the provisions of this section a Hindu is bound, during his or her lifetime, to maintain his or her legitimate children and his or her aged or infirm parents.
>
> (2) A legitimate or illegitimate child may claim maintenance from his or her father or mother so long as the child is a minor.
>
> (3) The obligation of a person to maintain his or her aged or infirm parent or a daughter who is unmarried extends in so far as the parent or the unmarried daughter, as the case may be, is unable to maintain himself or herself out of his or her own earning or property.
>
> *Explanation.*- In this section "parent" includes a childless stepmother."

"Maintenance" would obviously include provision for food, clothing, residence, education of the children and medical attendance or treatment. The obligation to maintain besides being statutory in nature is also personal in the sense that it arises from the very existence of the relationship between parent and the child. The obligation is absolute in terms and does not depend on the means of the father or the mother. Section 22 of the Act sets out the principles for computing the amount of maintenance. Sub-section (2) of Section 23 provides that in determining the amount of maintenance, to be awarded to children, wife or aged or infirm parents, regard shall be had to the position and status of the parties; the reasonable wants of the claimant; if the claimant was living separately, whether the claimant was justified in doing so; the value of the claimant's property and any income derived from such property, or from the claimant's own earnings or from any other source and the number of

A persons entitled to maintenance under the Act. But we are not concerned with these factors in the instant case. A reference to Section 23 of the Hindu Adoptions and Maintenance Act has been made only to indicate that a Hindu father or a Hindu mother is under a statutory obligation to provide maintenance to their children.

B Similarly, under the Mohammedan Law, a father is bound to maintain his sons until they have attained the age of puberty. He is also bound to maintain his daughters until they are married. [See: Mulla's Principles of Mohammedan Law (19th Edn.) Page 300]. But the statutory liability to maintain the children would not operate as a bar in claiming damages on C account of tort of medical negligence in not carrying out the sterilisation operation with due care and responsibility. The two situations are based on two different principles. The statutory as well as personal liability of the parents to maintain their children arises on account of the principles that if a person has begotten a child, he is bound to maintain that child. Claim for damages, on the contrary, is based on the principle that if a person has committed civil D wrong, he must pay compensation by way of damages to the person wronged.

Under every system of law governing the patriarchal society, father being a natural guardian of the child, is under moral liability to look after and maintain the child till he attains adulthood.

E Having regard to the above discussion, we are positively of the view that in a country where the population is increasing by the tick of every second on the clock and the Government had taken up the family planning as an important programme for the implementation of which it had created mass awakening for the use of various devices including sterilisation operation, the F doctor as also the State must be held responsible in damages if the sterilisation operation performed by him is a failure on account of his negligence, which is directly responsible for another birth in the family, creating additional economic burden on the person who had chosen to be operated upon for sterilisation.

G The contention as to the vicarious liability of the State for the negligence of its officers in performing the sterilisation operation cannot be accepted in view of the law settled by this Court in *N. Nagendra Rao & Co.* v. *State of A.P.*, AIR 1994 SC 2663 = (1994) 6 SCC 205; *Common Cause, A Regd. Society* v. *Union of India & Ors.* [1999] 6 SCC 667 = AIR 1999 SC 2979 and H *Achutrao Haribhau Khodwa & Ors.* v. *State of Maharashtra & Ors.*, (1996)

ACJ 505. The last case, which related to the fallout of a sterilisation operation, deals, like the two previous cases, with the question of vicarious liability of the State on account of medical negligence of a doctor in a Govt. hospital. The theory of sovereign immunity was rejected. A

Smt. Santra, as already stated above, was a poor lady who already had seven children. She was already under considerable monetary burden. The unwanted child (girl) born to her has created additional burden for her on account of the negligence of the doctor who performed sterilisation operation upon her and, therefore, she is clearly entitled to claim full damages from the State Govt. to enable her to bring up the child at least till she attains puberty. B

Having regard to the above facts, we find no merit in this appeal which is dismissed but without any order as to costs. C

V.S.S. Appeal dismissed.