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## NOTES AND COMMENTS

### Artificial Insemination Heterologous and the Matrimonial Offense of Adultery in the United Kingdom

Professor Hager's analysis<sup>1</sup> of problems incidental to the practice of artificial insemination discussed the controversial legal question whether artificial insemination heterologous<sup>2</sup> constitutes the matrimonial offense of adultery. It may be of value to supplement his reference to American and Canadian authorities by some discussion of the attitudes adopted on this issue by lawyers and courts in the United Kingdom.

Justice Vaisey and H. U. Willink, K.C., the legal representatives of a commission appointed in 1948 by the Archbishop of Canterbury to investigate the theological, ethical, sociological and legal aspects of artificial human insemination, expressed no doubt that the perpetration of A.I.D. legally would constitute adultery on the part of both the married donor and the married recipient.<sup>3</sup> However, in debate in the House of Lords in March 1949, Lord Merri-man, President of the Probate, Divorce and Admiralty Division of the English High Court, roundly criticized this opinion as "absolute nonsense."<sup>4</sup> The conclusion of the commissioners was based primarily upon the decision of Justice Orde in *Orford v. Orford*<sup>5</sup> and a dictum of Lord Dunedin in *Russell v. Russell*.<sup>6</sup> In the latter case the learned law Lord stated:<sup>7</sup> "The appellant conceived and had a child without penetration having ever been effected by any man. . . . The jury . . . came to the conclusion that she had been

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<sup>1</sup> Hager, *Artificial Insemination: Some Practical Considerations for Effective Counseling*, 39 N.C.L. REV. 217, 232-35 (1961).

<sup>2</sup> Artificial insemination heterologous is the technical term applied to instances where the seminal fluid to be used must be taken from a male other than the husband of the recipient. This technique is more popularly known as artificial insemination donor, see Hager, *supra* note 1, at 222-23, and will be referred to hereinafter as A.I.D.

<sup>3</sup> ARCHBISHOP OF CANTERBURY'S COMMISSION ON ARTIFICIAL HUMAN INSEMINATION, REPORT ON ARTIFICIAL HUMAN INSEMINATION 37 (London, 1948).

<sup>4</sup> 161 H.L. DEB. (5th ser.) 410 (1949). Two eminent Lord Chancellors, Lord Jowitt and Lord Kilmuir, have also regarded A.I.D. as falling outside of adultery. 161 H.L. DEB. (5th ser.) 511 (1950); 207 H.L. DEB. (5th ser.) 982, 1008 (1958).

<sup>5</sup> [1921] 49 Ont. L.R. 15, [1921] 58 D.L.R. 251.

<sup>6</sup> [1924] A.C. 687.

<sup>7</sup> *Id.* at 721.

fecundated *ab extra* by another man unknown, and fecundation *ab extra* is, I doubt not, adultery.”

A liberal interpretation of this dictum would suggest that adultery is not confined to a mutual surrender of the sexual organs but extends to a mutual surrender of the reproductive faculties by means of artificial insemination. Such an interpretation, however, divorces the statement from its context for it totally ignores the circumstances in respect of which Lord Dunedin's opinion was expressed. The fecundation *ab extra* referred to in *Russell* resulted not from artificial insemination but from certain acts of intimacy which fell short of a penetration of the female sexual organ.

The direct question whether A.I.D. constituted adultery was considered comparatively recently by the Scottish Court of Session in *MacIenman v. MacIenman*.<sup>8</sup> The facts of this case may be briefly summarized. The husband petitioned for divorce on the ground of his wife's adultery. The wife alleged that the child to whom she had given birth had been conceived as a result of her artificial insemination with the seed of a donor. The husband contended that this defense was irrelevant since A.I.D. was adultery in the eyes of the law, and further maintained that he did not consent to his wife's impregnation. After stating that specification of the time and place of the alleged artificial insemination was necessary to the admissibility of the wife's defense, the court, in a preliminary judgment by Lord Wheatley, ruled that A.I.D. did not constitute adultery.<sup>9</sup> It was conceded by the court that a married woman committed a grave and heinous offense against the marriage contract by submitting to artificial insemination without her husband's consent. Nevertheless, this was considered a matter in respect of which the legislature should determine an appropriate remedy and was deemed quite irrelevant to the issue before the court. Following a careful analysis of the authorities, including *Doornbos v. Doornbos*,<sup>10</sup> *Russell v. Russell*<sup>11</sup> and *Clark (otherwise Talbot) v.*

<sup>8</sup> [1958] Sess. Cas. 105, [1958] Scots L.T.R. 12.

<sup>9</sup> An adjournment was granted to allow entry of the necessary amendments to the wife's defense. Counsel subsequently intimated to the court that the defendant had declined to provide the information needed to cure the defect in the pleadings; accordingly the court sustained the plaintiff's plea that the defense was irrelevant and sent the case to the undefended roll.

<sup>10</sup> 23 U.S.L. WEEK 2308 (1954), discussed in Rossman & Allen, *What's New in the Law*, 41 A.B.A.J. 263 (1955); Tallin, *Artificial Insemination*, 34 CAN. B. REV. 1, 14-15 (1956).

<sup>11</sup> [1924] A.C. 687.

Clark,<sup>12</sup> Lord Wheatley observed:<sup>13</sup>

[I]t seems possible to derive [from the cases] the following propositions, according at least to the law of England.

1. For adultery to be committed there must be the two parties physically present and engaging in the sexual act at the same time.

2. To constitute the sexual act there must be an act of union involving some degree of penetration of the female organ by the male organ.

3. It is not a necessary concomitant of adultery that male seed should be deposited in the female's ovum.

4. The placing of the male seed in the female ovum need not necessarily result from the sexual act, and if it does not, but is placed there by some other means, there is no sexual intercourse.

I appreciate that the second of these findings does not square with Lord Dunedin's *obiter dictum* in *Russell*, which seems to conflict with the decision of Pilcher, J., in *Clark* . . . , but even on Lord Dunedin's standard, the physical presence of the male organ and its close proximity and juxtaposition to the female organ seem to me to be essential ingredients of the act.

This opinion no doubt represents a rational judgment to the person who views intent as the essence of adultery.<sup>14</sup> To the matrimonial lawyer, however, it may reflect too rigid acceptance of the concept of adultery, the foundation of English divorce laws, in that it denies opportunity for the courts to afford legal recognition to a socially existing fact, namely, a broken marriage.

The decision of Lord Wheatly was the subject of debate in the House of Lords in February 1958, and in September of that year a departmental committee was appointed "to enquire into the exist-

<sup>12</sup> [1943] 2 All E.R. 540 (P.D.A.). In this case Pilcher, J., held that the marriage in issue had never been consummated despite the wife's fecundation *ab extra* by her husband.

<sup>13</sup> *MacLennan v. MacLennan*, [1958] Sess. Cas. 105, 113, [1958] Scots L.T.R. 12, 17.

<sup>14</sup> See generally Guttmacher, *The Legitimacy of Artificial Insemination*, 11 HUMAN FERTIL. 16, 17 (1946): "From the physician's point of view it is the intent which is all important. Adultery and artificial insemination are actually the absolute antithesis of each other. One is done clandestinely to deceive and enjoy carnal pleasure; the other decently and frankly to beget offspring without the emotional and physical enjoyment of coitus."

ing practice of human artificial insemination and its legal consequences and to consider whether, taking account of the interests of individuals involved and society as a whole, any change in the law is necessary or desirable." In its report,<sup>15</sup> which was presented to Parliament at Westminster in July 1960, the committee expressed the general conclusion that A.I.D. should neither be prohibited nor even regulated by law. In the context of matrimonial law it accepted the view previously adopted by the Royal Commission on Marriage and Divorce, 1951-1955<sup>16</sup> that a clear distinction be drawn between artificial insemination and adultery. The departmental committee<sup>17</sup> endorsed the recommendation of the Royal Commission that artificial insemination of the wife without the consent of her husband be made a new and separate ground of divorce or judicial separation. It further recommended that such a course of conduct on the part of a wife should entitle the husband to take proceedings in the magistrate's courts for a separation order.

It should be observed that the committee made no recommendation providing a matrimonial remedy for the wife whose husband donated semen for purposes of artificial insemination. This omission is unfortunate insofar as it reintroduces inequality between the sexes before the law. There are, of course, certain practical difficulties which impede the application of similar recommendations to the husband donor for, under present conditions, the anonymity which surrounds the donor's identity will generally preclude discovery of the offense by the wife. Although this particular difficulty might be met by statutory control or regulation of the practice of artificial insemination, other difficult legal problems would remain. For example, would the husband be penalized where his donation was made before marriage but utilized subsequent thereto?

The present inaction of Parliament at Westminster indicates a reluctance to legislate in this controversial province of law. Consequently, the judiciary remains confronted with the unenviable task of resolving legal issues pertaining to artificial insemination without any prior legislative determination of general policy considerations.

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<sup>15</sup> Human Artificial Insemination Committee, *First Report*, CMD. No. 1105, at 263 (1960).

<sup>16</sup> Royal Commission on Marriage and Divorce, *First Report*, CMD. No. 9678, at 90 (1956).

<sup>17</sup> Human Artificial Insemination Committee, *supra* note 15, at 115-17.

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