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ARTIFICIAL INSEMINATION: ITS PLACE IN WASHINGTON LAW

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Artificial insemination has found its place, or at least its beginning, in American society.[1] It has not yet found its niche in American law. This comment is an attempt to indicate and speculate just what that niche would be under the present cases, statutes, and policies of the Washington court and legislature.

Artificial insemination is the introduction of semen into the female reproductive tract by mechanical means in order to effect pregnancy without sexual intercourse. Artificial insemination can be either of two types. Where the husband is fertile and the wife capable of bearing children, but for some reason the act of sexual intercourse is impossible, semen of the husband can be used to inseminate the wife. This method is called homologous artificial insemination, or AIH, and poses no significant legal problems.

Heterologous artificial insemination, or AID, is the method by which the semen of a third party donor is used to inseminate the woman by mechanical means. This practice gives rise to many legal complications.

The foremost of the legal problems growing out of AID is whether or not a child born by this method is legitimate. A decision on this point will have a profound effect on several fields of Washington law, ranging from inheritance rights to child custody privileges. This problem is dealt with in generalities only, as it is not the most pressing and immediate legal questionmark arising out of this growing medical practice. Much has been written on the issue of legitimacy.[2]

The Washington court, when faced squarely with the issue of legitimacy of a child conceived by AID, may very likely hold that the child so conceived is the legitimate issue of lawful wedlock. Three possible rationalizations, or any combination thereof, may underly such a decision. First, the Supreme Court of Washington, like all other state courts, has repeatedly stated that when a legal marriage exists at the time of conception or at the time of birth,[3] there is a strong presump-

[1] Estimates of the number of test tube offsprings in the United States today vary from 20,000 to 100,000. Seymour and Koerner, *Artificial Insemination, Present Status in the United States as Shown by a Recent Survey*, 116 J. Amer. Med. Assn. 2747 (1941); 30 N.Y.U.L. Rev. 1016 (1955); 8 U. Fla. L. Rev. 304 (1955).

[2] 34 Can.B.R. 304 (1956); 17 U. Pitt. L. Rev. 659 (1956); 8 U. Fla. L. Rev. 304 (1955); 8 La. L. Rev. 484 (1948).

[3] This would seem to be the most common instance involving the use of AID.

tion that the child born is the legitimate issue of lawful wedlock.[4] Indeed this presumption is one of the strongest in American law. In a recent case on the trial level in Illinois,[5] the court held this presumption was not overcome by conflicting testimony to the effect that the child was conceived by artificial insemination. Concededly this presumption is only a presumption, and can be rebutted by evidence of non-access or complete absence of the husband when the child must have been begotten.[6] However, the very existence of such a presumption manifests an intent, evidentiary wise and policy wise, to protect a child from the brand of illegitimacy.

This presumption is not the only evidence of policy considerations which may underly a finding that a child conceived by artificial insemination is legitimate. Statements to the effect that the welfare of the children is the matter of primary concern appear repeatedly in the reports of divorce cases, custody proceedings, and actions for maintenance and support.[7]

A third theory has been advanced by the New York Supreme Court.[8] In the only case to reach appellate review in a state court which even indirectly touches upon the question of artificial insemination, the court held that a child conceived by AID had been "potentially adopted or semi-adopted"[9] by the husband. Therefore the court decided that the husband could not be deprived of his visitation rights on the basis that he was not the biological father of the child. The opinion is flavored with intimations that the child was legitimate,[10] but legitimacy was never directly in issue and the court did not decide the question. The author believes, however, that this case further reflects an underlying policy of protecting the child. Whether or not the Washington court would adopt a theory of semi-adoption is at least doubtful in view of

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[4] State v. Frenger, 158 Wash. 683, 291 Pac. 1089 (1930); Pierson v. Pierson, 124 Wash. 319, 214 Pac. 159 (1923).

[5] Ohlsen v. Ohlsen, Unreported, Super. Ct. of Cook County, Ill. (Nov. 1954), See 187 J. Amer. Med. Assn. 1639 (1955).

[6] It should be noted that Washington does not follow Lord Mansfield's rule to the effect that declarations of a father or mother cannot be admitted to bastardize the issue born after marriage. *In re* the Adoption of a Minor, 29 Wn.2d 759, 189 P.2d 458 (1948); Pierson v. Pierson, *supra* note 4. See Schlemer, *Artificial Insemination and the Law*, 32 Mich. S.B.J. 44, 45 (No. 4, 1953).

[7] Allen v. Allen, 38 Wn.2d 128, 228 P.2d 151 (1951); Wheeler v. Wheeler, 37 Wn.2d 159, 222 P.2d 400 (1950); Fleck v. Fleck, 31 Wn.2d 114, 195 P.2d 100 (1948).

[8] Strnad v. Strnad, 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948).

[9] *Supra* note 8 at 391.

[10] *Supra* note 8 at 392, where the court stated that if the wife was artificially inseminated with the consent of her husband, the child was not an illigitimate child. This was dicta and not necessary to the court's holding that the husband could not deprived of his visitation privileges.

the Washington court's adherence to the requirement of strict compliance with the adoption statute.[11]

Turning more specifically to the criminal and civil liabilities which may attach to the parties participating in heterologous artificial insemination, the speculations become a little less vague. Surprising results could be reached under several Washington criminal statutes.

Adultery. Adultery is a statutory crime in Washington and carries criminal penalties.[12] In the words of the statute, the crime is committed when a married person engages in sexual intercourse with a person other than his or her lawful spouse. When the requisite elements of of the crime are established, both parties are guilty of the crime.

To decide that the legislature has prescribed the conduct in artificial insemination as criminally adulterous would be difficult. As the statute expressly requires sexual intercourse as an essential element of the crime, the definition of that term would seem to be decisive. RCW 9.79.030 defines sexual intercourse by saying "any sexual penetration, however slight, is sufficient to complete sexual intercourse." Does this definition necessarily exclude by implication the sufficiency of any other act as constituting sexual intercourse? Arguably the statute does not import any such negative implication. This literal reading of the statute could become important if the court decides that AID is contrary to a strong public policy and searches for a statutory sanction to proscribe it.

Basically, the issue of criminal adultery hinges on a choice between two conflicting theories pertaining to the definition and nature of adultery. More specifically, the conflict revolves around the necessity of sexual intercourse and its definition, if it is a necessary element.[13] One theory has found support in an English case,[14] a Canadian case[15] and, by way of dictum, a United States state court decision.[16] The theory advanced by these cases is that the essence of adultery is the voluntary surrender of the reproductive powers to a person other than the lawful spouse, thereby introducing into the family a false strain of blood. This theory of adultery does not necessitate any physical contact of the male and female sex organs. The cases which have advanced this theory

[11] *In re* Hope's Adoption, 30 Wn.2d 185, 191 P.2d 289 (1948); *In re* Sipes, 24 Wn.2d 603, 167 P.2d 139 (1946).

[12] RCW 9.79.110.

[13] A most extensive discussion of these two theories can be found in 34 Can.B.R. 1 (1956).

[14] Russell v. Russell, (1924) A.C. 689.

[15] Orford v. Orford, see 49 Ont. L. Rev. 15.

[16] Doornbos v. Doornbos, Unreported, Super. Ct. of Cook County, Ill. (1954); see 8 U. Fla. L. Rev. 304 (1955); 30 N.Y.U.L. Rev. 1016 (1955).

were not criminal prosecutions for adultery, but divorce and custody suits. It is the author's view that while adultery as grounds for divorce[17] could arguably be defined as not requiring physical contact of the sex organs but only a surrender of the reproductive organs by AID, a criminal prosecution could not rest on that basis. Adultery as grounds for divorce is based on a violation of the exclusive right to sexual intercourse between the marital partners. Adultery is a violation of that right. Criminal adultery, by way of contrast, is punishable because it offends society, and shocks morality.[18] What is punished criminally is the sexual gratification and satisfaction of lust of engaging in extramarital intercourse, not the surrender of reproductive organs.[19] Artificial insemination is not such a sexual gratification, and hence, in the writer's view, not criminal adultery.[20]

Fornication. The crime of fornication is actionable at common law, and common law crimes are actionable in Washington.[21] There is no statute defining the crime and the author is aware of no criminal prosecution for fornication in this jurisdiction. Several states which have prosecuted criminally have interpreted the common law definition with varying results with respect to the necessary marital status of the actors.[22] One common element of each interpretation is sexual intercourse, and more often than not, the woman engaging in sexual intercourse must be unmarried.[23] Although incidents of unmarried women seeking AID are not unheard of,[24] the hurdle of finding the requisite sexual intercourse would face the court, and the same argument against an affirmative finding in a prosecution for adultery would be applicable in a prosecution for fornication.

Lewdness. Lewdness in Washington is a gross misdemeanor.[25] Either lewd and open cohabitation, open and gross lewdness, or exposure is the essential element. Sexual intercourse is commonly present but it is not required. In essence, lewdness is a form of immorality which offends the community morals[26] or has relation to sexual impurity.[27]

[17] Adultery is a grounds for divorce under RCW 26.08.020.
[18] See note 13, *supra.*
[19] See note 13, *supra.*
[20] The conduct could not conceivably be adulterous between the woman and the doctor if the latter was a woman.
[21] RCW 9.01.150.
[22] 139 Am. St. Rep. 365.
[23] 37 C.J.S., *Fornication* § 1 (1943).
[24] See note 13, *supra.*
[25] RCW 9.79.120.
[26] Abbott v. State, 163 Tenn. 384, 43 S.W.2d 211 (1931).
[27] U.S. v. Males, 51 Fed. 41 (DC Ind. 1892).

AID may or may not satisfy the requirements of open and gross lewdness so as to subject the participants to criminal prosecution. The practice of artificial insemination is generally clothed in secrecy as much as possible. Only the doctor knows the identity of the donor and donee in a particular case. The donor and donee remain anonymous to each other. This fact alone would seem to negative any finding of "open and gross" lewdness, even if AID were held to be a form of immorality offending the community morals or having relation to sexual impurity. However, if the practice of artificial insemination increases in the medical world and medical science strives to perfect that practice, extensive records and investigations may be necessary. With records and investigations come publicity, and this publicity may satisfy the requirement of openness. This could conceivably lead to a criminal prosecution of the participants if AID, after attaining greater notoriety, remains socially unacceptable. This form of criminal prosecution remains as a very real source of danger to the participants in artificial insemination.

AID As a Crime. There is no modern authority on which to base a speculation as to the legality of AID itself. In 1883, a French court held a doctor who administered artificial insemination guilty of unlawful conduct. The rationale of the holding is not clear. One writer has suggested that the personality of the doctor was the decisive factor.[28]

Plainly, if the woman who procures artificial insemination is guilty of criminal adultery or fornication, either the doctor or the donor, or both, could be prosecuted as a principal and be equally punishable.[29]

Forgery and Vital Statistics. Two very probable sources of criminal liability which could attach to all participants in AID arise from the statutory crime of forgery[30] and the statute requiring the filing of information concerning births.[31] It is not necessary to discuss the refinements of each statute. Basically, falsification of public records underlies a prosecution in each instance.

Attending physicians at birth are required to supply the pertinent information to the registrar, including the name of the father if known.

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[28] Koerner, *Medicolegal Considerations in Artificial Insemination,* 8 La. L. Rev. 484 (1948).

[29] RCW 9.01.030 defines a principal as one who is directly or indirectly concerned, or who aids or abets, in the commission of a crime.

[30] RCW 9.44.040 (2) defines second degree forgery, in part, as the making of any false entry in any public or private records.

[31] RCW 70.58.

If the doctor who administered artificial insemination knowingly names the husband as the father, he is in violation of both statutes.

Where, in order to avoid liability, one physician performs the insemination and another, who does not know that the insemination was artificial, attends at birth, the latter would not become liable. If, however, the husband and wife represent that the husband is the father of the child, or if they register the child themselves as their own natural issue,[32] they may be subject to prosecution under both statutes. The problem is illustrative only, and the analysis is not meant to be detailed. It indicates another source of criminal liability that faces the woman inseminated, her husband, and physicians that become involved in AID.

Prohibited Marriages and Incest. The possibility of criminal liability can be extended another step and present an unjustifiable hazard to the children born of artificial insemination. At the present time the supply of donors is limited. This inadequacy stems from the time-consuming search by physicians for nearly perfect males having mental and physical characteristics matching those of the husband. After a near-perfect match is found, the selected prospective donor often refuses because of his moral, religious, and social convictions. The shortage necessitates the repeated use of one donor in several different inseminations. As a result, more than one offspring may be born of the same biological parent. Assuming the physician administering AID has a stable group of patients drawn from one geographical area or social level, multiplication of the number of donees to each donor creates a potent possibility of intermarriage of half brother and half sister. The result is a prohibited marriage under RCW 28.04.020.[33] The physical incidents of this marriage would be subject to additional criminal punishment. The Washington incest statute[34] makes criminal the act of sexual intercourse between any male and female closer of kin than second cousins. The prohibited marriage does not bar such a prosecution,[35] and knowledge of the blood relationship is not an essential element of the crime.[36]

Blackmail. The patent defect in these analyses lies in the fact that a

[32] RCW 70.58.080 requires the mother and father to file the pertinent information if no physician or mid-wife attends at birth.

[33] RCW 26.04.020 provides in part that a marriage is prohibited "when the parties thereto are nearer of kin to each other than second cousins, whether of the whole or half blood . . ."

[34] RCW 9.79.090.

[35] State v. Nakashima, 62 Wash. 686, 114 Pac. 894 (1911).

[36] State v. Glindemann, 34 Wash. 221, 75 Pac. 800 (1904), where the court held that knowledge, as an essential element, was not necessary to satisfy due process.

veil of secrecy usually surrounds the practice of AID. As a practical matter, the facts most often remain unknown to the prosecutor. This secrecy, however, does not preclude awareness on the donor's part that if his participation in AID has been successful, he is the biological father of a child born of a woman not his spouse. If by chance his donee becomes known to him, he may claim custody rights to the child[37] or a right of inheritance if the child dies. In lieu of such a claim, or if AID and a child born thereof carry an undesirable social stigma, the donor might attempt to blackmail the child, the mother, or the mother's husband by threatening to reveal the truth concerning the child's origin. These acts by an unscrupulous donor would be punishable under the Washington blackmail statute.[38]

The possibilities of criminal punishment of participants in AID as here set forth are illustrative only and not meant to be exhaustive. They do indicate, however, that the impact of artificial insemination upon criminal concepts should be realized with a view towards meeting the problems before they arise.

Bastardy. In the area of quasi-criminal liability, the donor and doctor engaging in AID encounter a possible source of trouble under the Washington filiation statute.[39] It provides in part,

> When an unmarried woman is pregnant or has been delivered of a child not the issue of lawful wedlock, she or her parents or guardian may file a verified complaint with a justice of the peace accusing some person of being the father of her child or being responsible for her condition.

This statute would seem applicable to the case where divorce follows conception by AID but precedes the birth of the child. Arguably the child conceived by artificial insemination is not the issue of lawful wedlock. The donor is the biological father of the child, and, in that sense, is responsible for the woman's condition. It also could be held that the doctor is responsible for her condition. He has provided the mechanical means which have resulted in the condition of pregnancy. Either finding might provide the basis for an action for payment of the expenses of child birth, the costs of the suit, and maintenance of the child until it reached the age of sixteen. Failure to comply with the order to pay would be subject to severe criminal penalties.[40] The problem of liability in this area is very real. The filiation statute does

[37] Fitzgerald v. Leuthold, 30 Wn.2d 402, 192 P.2d 371 (1948).
[38] RCW 9.33.050.
[39] RCW 26.24.010.
[40] RCW 26.24.100.

not expressly require sexual intercourse. In an action based on this statute, as contrasted to a prosecution for criminal adultery, the court would not be faced with the problem of defining that term.

The area of civil liability presents further problems and legal complications which may result in liability for the participants in artificial insemination. The following problems are those which the author feels are most worthy of comment and most indicative of the fact that AID has not yet found its place in Washington jurisprudence.

Alienation of Affections. The husband of the artifically inseminated woman may have a cause of action against the donor and doctor for the alienation of his wife's affections. This tort is actionable in Washington and does not require sexual intercourse.[41] In *Lankford v. Tombari*,[42] the court said that the intent to alienate the wife's affections was a requisite, but that it could be inferred from the seductive acts. If AID qualifies as a seductive act, the fact of conception from the donor's semen and the mechanics aiding conception furnished by the doctor may be sufficient to support an inference that the requisite intent was present. Two obstacles stand in the way of a successful suit. First, the husband would have to show that his wife's affections were in fact alienated. This would be difficult in many instances. Ordinarily, and without debating the point, a child would have the effect of tying the childless marriage more closely together. Secondly, the husband may be estopped by his consent to the operation, and this consent is normally required by doctors. The latter of these obstacles may not exist, however, if the practice of AID is deemed unlawful and the consent inoperative.

Criminal Conversation. The husband of the woman inseminated may have a cause of action against the donor for criminal conversation. The Washington cases to date have all involved actual sexual intercourse.[43] If sexual intercourse is a requisite of the tort of criminal conversation, liability of the doctor and donor would depend on the court's interpretation of that term, and whether or not AID falls within that definition. If the court is ready to adopt the theory advanced by the Canadian and English cases,[44] liability of the donor and doctor could be predicated upon use of the reproductive organs of the husband's

[41] Lankford v. Tombari, 35 Wn.2d 412, 213 P.2d 627 (1950); Kenworthy v. Richmond, 95 Wash. 407, 163 Pac. 924 (1917).
[42] See note 41, *supra*.
[43] Bernier v. Kochopulos, 37 Wn.2d 305, 223 P.2d 205 (1950).
[44] See note 13, *supra*.

wife. Consent to AID by the husband may work an estoppel unless it is found inoperative.

Legitimation. Recognition of paternity by the donor could lead to serious legal complications under the Washington probate code.[45] The code provides that if a person acknowledges that he is the father of an illegitimate child, that child shall inherit from the father as if it were of legitimate birth. Liability under this statute is based on the premise, of course, that the court holds the child born of AID to be illegitimate. Acknowledgement by the father must be by a written statement, signed in the presence of a competent witness.[46] The statement does not have to be made with the intent to legitimize the child, and it can be found in a variety of documents.[47] It is apparent that if a donor consents to adoption of the child by a writing sufficient to satisfy the statute, he may have legitimized the child unwittingly for purposes of inheritance. The adoption of the child by the donee and her husband would not terminate the child's rights of inheritance from the donor. An adopted child inherits from both his natural and adoptive parents.[48] If the donor later makes a will and neglects to expressly disinherit the child, or if he dies intestate, the child may claim an intestate share of the donor's estate.[49]

Sales Warranty. Both the doctor and donor may incur civil liability for breach of implied warranties under the sales act.[50] While a physician may not be commonly thought of as a vendor under this statute, there may be an implied warranty on his part that the semen is fit for the purpose for which it is to be used. There could be no question that the physician knows the purpose. Plainly the wife and husband rely on his judgment. Damages for a breach of this warranty would be measured by the natural consequences flowing from the breach. A verdict could reach enormous proportions.

There is a body of related cases from which analogies can be drawn. In several instances patients have been given blood transfusions which resulted in death or serious relapses because of a mismatching of blood types. In actions against the hospitals by the injured patient or his personal representative for negligence and breach of implied warranties,

[45] RCW, Title 11.

[46] RCW 11.04.080 (An amendment to this section providing that any acknowledgment, written or oral, would be sufficient to establish the child's right to inherit was indefinitely postponed by the 1957 legislature. H.B. 126 and 214.).

[47] *In re* Beekman's Estate, 160 Wash. 669, 295 Pac. 942 (1931); *In re* Rohrer, 22 Wash. 151, 60 Pac. 122, 50 L.R.A. 350 (1900).

[48] *In re* Roderick's Estate, 158 Wash. 377, 291 Pac. 325 (1930).

[49] RCW 11.12.090.

[50] RCW 63.04.150, 160.

the courts have decided that the hospital was not a seller within the terms of the sales act. In *Gile v. Kennewick Hospital Dist.*,[51] the Washington court held that the transfer of blood was not a sale to which a warranty attached, but only a transfer incidental to services rendered. The court quoted the following from a leading New York case involving similar facts:

> It has long been recognized that, when service predominates, and transfer of personal property is but an incidental feature of the transaction, the transaction is not deemed a sale within the sales act.[52]

The author believes that these cases are not decisive of the issue as applied to artificial insemination. In the *Gile* case, the blood transfusion was in fact but an incidental part of the services rendered.[53] In the case of AID, the service performed centers around the transfer of semen to the donee. The operation is quite simple and quickly performed.[54] Services do not predominate to such a great extent, if at all. Another factor detracts from the analogy between the blood donation cases and artificial insemination. Blood transfusions are recognized socially as well as medically. Public policy encourages blood donations and blood banks. Public policy, at the present time, does not look favorably upon the donation and transfer of human semen.

Summarily disposing of any privity problems, a similar warranty theory could be the basis of an action against the donor if a defective child is born or other ill effects resulting from the insemination are traceable to his semen. In at least one aspect, the argument against the donor is stronger than against the doctor in that the donor performs no services aside from making available a substance to be transferred for a particular purpose. The argument is detracted from by the fact that the woman does not rely on the donor, but rather the doctor, in selecting the source of semen to be used.

Fraud, Misrepresentation, and Negligence. The possibility of tort actions against the donor and doctor in this area are almost unlimited. It is not necessary to evaluate each possible cause of action to illustrate that the problem exists. Basically, the determinative fact in each case will be the standard of care placed on respective parties to AID in their dealings with each other.

[51] 48 Wn.2d 774, 296 P.2d 662 (1956).
[52] Permutter v. Beth David Hospital, 308 N.Y. 100, 123 N.E.2d 792, 794 (1954).
[53] The reported facts indicate that the blood transfusion was a routine surgical service, and that the patient was undergoing a major knee operation.
[54] Koerner, *Medicolegal Considerations in Artificial Insemination,* 8 La. L. Rev. 484 (1948).

There seems to be no reason for supposing that a physician will not be required to exercise the same degree of care and honesty in inseminating a woman artificially as he is required to exercise in any other treatment. If he fails to exercise due care he will be liable for damages in the same manner as he would for any other professional negligence. Just how much research into the medical history of the mother and donor will be necessary to meet that standard, and just how careful he must be in obtaining semen from the donor,[55] is not subject to an arbitrary limitation. This must be left for court decisions.

The duties of the donor in this area should be no different from those imposed on similar dealings in other contexts. Certainly he may be subject to a damage action sounding in negligence for failure to disclose facts about his medical history or his capabilities as a donor which he should have known. Similarly, he could be held liable for fraud and misrepresentation if he deliberately conceals information pertinent to his selection as a donor.

CONCLUSION

The author's conclusion, like his analysis, is speculative. The most that can be said is that a solution to the problems raised by AID does not seem readily available except through legislation.[56] Just what form that legislation should take is similarly speculative. If a particular legislature is unreceptive to AID, on policy grounds, it may consider making AID itself criminally punishable. In the author's view, this does not provide a satisfactory answer to an undesirable problem. Such legislation may very well have the effect of taking AID out of the hands of reputable physicians and concealing it, much like the practice of abortions as it exists today.

If Washington is more responsive to the practice of AID, legislation should take the form of regulation and control as opposed to absolute proscription. Writers have proposed forms which this regulatory legislation should take,[57] and no purpose would be served by repeating them here. It should be noted in this connection that governmental regulation will mean an end to most of the secrecy which cloaks the practice of artificial insemination at the present time. If this secrecy is still desirable socially, regulatory measures would not seem to be a completely satisfactory answer.

[55] To assure complete secrecy of identity of donee and donor to each other, it has been suggested that the semen only should be brought to the clinic or office where the insemination is to take place.

[56] Legislation has been proposed in six states. For a discussion of these proposals, see 8 U. Fla. L. Rev. 304, 313 (1955).

[57] See note 56, *supra*.