

SOME LEGAL PROBLEMS ARISING FROM THE PRACTICE OF ARTIFICIAL INSEMINATION

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AT the outset I think it is necessary to state quite definitely the limited nature of the subject-matter upon which I propose to address you to-night. And the first step in the process of definition is to make clear what I do not intend to discuss. I have no intention of expressing any opinion on the vexed question of whether the practice of reproducing human beings by the artificial insemination of women is or is not a desirable thing. Upon that question considerations of morals, religion and aesthetics may all be relevant, and I do not think that this is a suitable time or place, nor am I sufficiently qualified to raise such a subject for discussion. Accordingly, nothing that I propose to say should afford any justification later in the evening for any controversial debate.

I am informed by my medical friends, and accept it as a fact, that in the U.S.A. and in Great Britain, and to a lesser extent in Australia too, there is in existence a practice whereby women under the supervision of reputable medical practitioners are impregnated by the injection of seminal fluid obtained from some man other than the husband of the woman concerned. I accept that as a basic assumption for the purpose of the legal problems which I propose to put before you. In order to limit the scope of those problems I propose to make some further basic assumptions.

For the purpose of discussion I shall assume that in every case the woman concerned is married and that her husband concurs in her desire to have a child by this means. I shall also assume that the identity of the man whom I shall refer to as "the donor" is known only to the medical practitioner concerned.

Even when the field of enquiry is limited in this way, sufficient legal problems of unusual difficulty will present themselves. The obvious and outstanding question with respect to a child conceived in this way is—Will the law treat him as legitimate or not?

Before one can approach this question there are some general observations, well known to lawyers, which I feel may not be so familiar to medical members of this Society. In general, I think it may be said that the lawyer is not engaged in the search for abstract truth as is, for example, the mathematician. A lawsuit must reach a decision. The decision must be given upon such evidence as is presented to the court, though all concerned in the case may know that the evidence is incomplete. And of course evidence may be incomplete either because no more evidence can be obtained or because such further facts as are available are excluded from proof by the rules of evidence which prevail in our courts.

Accordingly a legal decision that A is legitimate, though it will serve for practical purposes, will be seen upon analysis to mean no more than that upon the evidence brought before the court it was proper to find legitimacy rather than illegitimacy.

Considerations such as these lead me to think that it is better not to try to find an abstract or general solution to the question — Is the child of a married woman who is artificially inseminated legitimate or not? I propose instead to take certain specific situations in which the question may arise, consider what evidence is likely to be available, and see whether one can forecast what answer the law will give to our question in such a case.

It is in Victoria unusual to have legal proceedings in which the only issue is whether or not a given person is legitimate. In England in certain cases a person may petition the High Court for a declaration that he is the legitimate child of his parents. This right was conferred by statute in 1858 (Legitimacy Act 1858 §1 now replaced by Sup. Ct. of Judicature Act 1925 §188). But, so far as I have been able to discover, no similar statute has been passed in Victoria.

Questions of legitimacy will therefore arise in legal proceedings which are primarily concerned with the enforcement of legal rights of various kinds and in particular with the establishment of claims to property. But before illustrating cases of this kind it is, I think, worthwhile to glance at the divorce jurisdiction.

Any husband may petition for the dissolution of his marriage on the ground that his wife has been guilty of adultery. In this context adultery involves some form of sexual intercourse between the wife and another man. But while it has been said

that complete penetration is not essential to constitute adultery, the cases make it clear in my opinion that a wife does not commit adultery by submitting to the operation of artificial insemination.

But that does not dispose of all the problems which may arise in proceedings for divorce, for in the great majority of cases the evidence adduced to prove a wife's adultery is not direct, but circumstantial. If the petitioning husband can prove that his wife has given birth to a child and that at the relevant time he had no opportunity for sexual intercourse with his wife, the court will infer adultery and dissolve the marriage. In such a case the finding of adultery is based upon the assumption that in the course of nature a woman cannot give birth to a child without having sexual intercourse with some man and once the husband is excluded the inference of intercourse with some other man becomes irresistible.

But when the practice of artificial insemination is recognized in the courts this line of reasoning must be severely shaken. In cases of this kind will it any longer be sufficient to prove the birth of a child of which the husband is not the father? Must the petitioning husband give in addition some evidence of his wife's association with another man? Or will the probability of adultery still be regarded as so compelling that a decree will be granted unless the wife proves that at the relevant time she was artificially inseminated? These are questions which our courts have not yet been required to answer and I should not like to guess what answer will ultimately be given. It is of course important to bear in mind that a finding of adultery in such circumstances means that the child is illegitimate and this is a conclusion which most judges would reach with reluctance.

It is in connection with cases of this kind that the rule in *Russell v. Russell*, (1924) A.C. 687, is commonly applied. The rule may be shortly stated thus: that where any question arises as to the legitimacy of the offspring of a married woman born during her marriage neither she nor her husband may give evidence to show directly or indirectly that they did or did not have sexual intercourse at the relevant time. Accordingly, in order to exclude the possibility of the husband being the father of a child born during wedlock, evidence as to his separation from his wife during the period of conception must be given by witnesses other than the parties to the marriage. You will remember that at the outset I assumed that the husband was a

consenting party to his wife's artificial insemination. But that does not exclude the possibility that they were not living together and that witnesses may be available to prove that there was in fact no opportunity for sexual intercourse between them at the relevant time.

Suppose a husband being desirous of divorcing his wife produces such evidence of non-access and proves the birth of a child. How could the wife meet such a case? I am disposed to think that she could not herself give evidence that she was artificially inseminated. The rule in *Russell v. Russell* would in my view make such evidence inadmissible. Could she call the medical practitioner as a witness? I see no reason why not. For even if we assume for the moment that the relation of physician and patient exists so as to make it an occasion of privilege, here the patient not only consents but requires the medico to give evidence.

When the medical man gives evidence in such a case it would seem irrelevant to any issue in the divorce proceedings that he should be asked the name of the donor. But if such a question became relevant I do not see how he could refuse to answer it. The relevant words of Section 28 of the Evidence Act 1928 are as follows: "No physician or surgeon shall without the consent of his patient divulge in any civil suit, action or proceeding . . . any information which he has acquired in attending the patient and which was necessary to enable him to prescribe or act for the patient." That provision would not, in my opinion, permit or require a doctor, in the circumstances I have supposed, to refuse to disclose the name of the so-called "donor". That, however, is somewhat of a digression; let us return to our hypothetical divorce case.

We have now reached the stage where the husband has produced evidence to prove that he had no opportunity for sexual intercourse with his wife at the relevant time and the wife has called a medical practitioner to prove that at the relevant time he artificially inseminated the wife. Assuming all this evidence to be accepted, the petition for divorce must surely fail. For "upon an issue of adultery in a matrimonial cause the importance and gravity of the question make it impossible to be reasonably satisfied of the truth of the allegation without the exercise of caution and unless the proofs survive a careful scrutiny and appear precise and not loose and inexact. Further circumstantial evidence cannot satisfy a sound judgment of a

state of facts, if it is susceptible of some other not improbable explanation." (per Dixon, J., in *Briginshaw v. Briginshaw*, 60 C.L.R. 336, at 368).

If then the husband's petition for divorce is dismissed, what bearing has that on the legitimacy of the child in question? If the husband had succeeded it could only have been upon the footing that his wife had given birth to a child of which he was not the father and which must therefore be illegitimate. But the evidence which has brought about the failure of the husband's petition may be said to concede, if not to prove, that he is not the father of the child. Yet I do not think that the judgment of the court in such a case should be regarded as a finding that the child is illegitimate. The court has refused to find the wife guilty of adultery; it has made no positive finding as to the paternity of the child, nor is any such positive finding, as it seems to me, necessary to the decision. If in some later proceedings the question arises whether the child is legitimate or not I venture to submit that the decision of the divorce court would not conclude that question.

Let us now consider a case in which the question is whether a child is entitled to succeed to property, claiming to be the son of A and as such one of his next of kin. A, of course, is dead and we have no direct evidence from him. But it is clear that the claimant is the son of A's wife, born during the marriage. Here the decision may well turn on the amount and nature of the evidence produced.

We start with a general presumption of legitimacy in such circumstances, and as legitimacy involves sexual intercourse between husband and wife, there is therefore a presumption when a child is conceived and born during wedlock that such intercourse took place at a time when, according to the laws of nature, the husband could be the father of the child.

In the Estate of L., (1919) V.L.R. 17.

This presumption may be rebutted by evidence of circumstances establishing beyond doubt that sexual intercourse did not take place between the spouses at the period of conception.

Cocks v. Juncken, 74 C.L.R. 277.

But as I have already indicated, such evidence of non-access may not be given by either of the spouses. What evidence then may we expect to be produced?

The conduct of the spouses towards the child will be of great weight. Thus we may find the husband registering the birth of the child and describing himself as the father. We may also have evidence that the child was brought up in the conjugal house and treated as a member of the family.

In the Estate of L., (1919) V.L.R. 17.

Now if to all these circumstances there is added the fact that the spouses were living together at the relevant time, I doubt whether the presumption of legitimacy would be displaced even if it were proved that at the relevant time the wife was artificially inseminated.

It has been said that the law will not in such circumstances permit an enquiry whether the husband or some other man is more likely to be the father of the child; it must be affirmatively proved, before the child can be bastardized, that the husband did not have sexual intercourse with his wife at the time when it was conceived.

Morris v. Davies, (1837) 5 Cl. & Fin. 163, per Lord Cottenham, L.C., at 243.

But this fact of non-intercourse may be proved by circumstantial evidence provided it be strong enough.

Accordingly, if we assume a case in which it is proved that the husband and wife were living together, and that the child was treated by both as legitimate, I do not think that the proof by the medical practitioner that the wife was at the relevant time artificially inseminated will prevent the child being legitimate.

Mr. Justice Cussen expressed the opinion that once the court was satisfied that sexual intercourse at the critical time did take place, the question would always be decided in favour of legitimacy, except perhaps in a very extraordinary case, as for example where both husband and wife being white, the child was black.

In the Estate of L. (*supra*).

To the scientific mind it may seem strange that where the probabilities are that A is not the child's father—as they would be if there were no other children of the marriage—yet the law should decide against the probabilities by what lawyers would describe as a process of reasoning. But legal reasoning is not

always strictly logical and in a case such as we are supposing it reaches a result which has considerable social advantages.

May I now complicate the case we have just been considering by adding one further factor? So far I have been assuming that the only way in which it can be proved that husband and wife did not have sexual intercourse at a particular time is to show that they were separated and so had no opportunity of intercourse. For in general the law is disposed to assume that married couples who have opportunities for sexual intercourse do not fail to take advantage of such opportunities. That is merely a presumption based on common experience which may easily be overcome by showing that in the circumstances intercourse was unlikely to have taken place.

But, of course, non-intercourse may be due to physical incapacity, and if that be clearly proved the presumption of legitimacy loses its foundation. This additional factor will now need to be considered. I suppose that in most of the cases in which artificial insemination is resorted to, the reason is to be found in the failure of the couple to produce children in the conventional way. So far as the law is concerned this is not in itself regarded as evidence of impotence in the husband. But when a medical man is consulted he will, I should suppose, before embarking upon the process of artificial insemination, take some steps to see whether it is not possible for the parties to have children in the ordinary way. In fact one would imagine that it is only in cases when this result is regarded as impossible or highly improbable that resort will be had to artificial methods. I have said "impossible or highly improbable" but between the two there may be a world of difference in legal results.

If it were proved to be impossible for the husband to have sexual intercourse it seems to me that the child produced as the result of artificial insemination must be treated by the law as illegitimate. But if the case proved is that, although intercourse is possible, procreation of children is most unlikely, then I should think the presumption of legitimacy would prevail.

You will notice that I said "if it were proved"; but let us keep to specific instances and not be tempted to generalize even at this point. Bearing in mind the rule in *Russell v Russell* (*supra*), how is the husband's physical capacity to be proved?

You will remember that we are considering a case in which the child claims a share, as a legitimate child of the marriage, in the intestate estate of the deceased husband. The only wit-

ness to the husband's physical condition in all probability will be the medical adviser. That brings us back to Section 28 of the Evidence Act—"no physician or surgeon shall without the consent of his patient divulge in any civil suit, action or proceeding . . . any information which he has acquired in attending the patient and which was necessary to enable him to prescribe or act for the patient."

Now if the physician has been consulted by both husband and wife and has examined the husband, I should have no doubt that the husband is his patient for the purposes of the section. It seems equally clear that the physician's knowledge of the husband's ability to procreate children is, in the words of the section, "information which he has acquired in attending the patient". But was it also "information which was necessary to enable him to prescribe or act for the patient"? It may be said that he did not prescribe or act for the husband as the result of the information he obtained. Perhaps the true view is that the physician obtained information from the husband to enable him to act for the wife. That is a strict and literal reading of a section which was perhaps intended to be liberally construed. But if it be correct, then the physician can be compelled to give evidence of the husband's physical condition and if he proves that the husband was incapable of sexual intercourse he will have achieved an unenviable distinction. For by his evidence alone some young man or young woman who prior to the institution of the proceedings had no suspicion about his or her parentage will be branded as illegitimate.

At this stage perhaps you will be in favour of the view that Section 28 of the Evidence Act should be construed so as to include cases of this kind. May I add in parenthesis that if you practised medicine in England this would not help you because in England the medical man has no statutory protection of that kind at all. However, I am prepared to assume for the moment that Section 28 of the Evidence Act prevents the medical practitioner from being compelled to divulge the husband's physical condition without the consent of his patient.

The patient is dead but the High Court has held that the section does not cease to operate on that account.

National Mutual Life Assn. v. Godrich, 10 C.L.R. 1.

In the same case it was left undecided whether the patient's executor could consent—but perhaps we had better not pursue

that problem at present. We reach the position that if the physician is forbidden by statute to disclose his knowledge of the husband's physical capacity, again great responsibility rests on the medical man. For if in fact the husband was incapable of sexual intercourse, some person is going to inherit property not because he is as a matter of scientific fact entitled to it, but solely because a legislative provision for the protection of confidences between patient and medical adviser prevents the full facts being known. However illogical or unscientific this may appear to be, it can I think be defended on grounds of social policy.

We stray still further from the straight path of logic in the next example I propose to put before you. Let us assume this time that the wife has died intestate and that she is survived by her husband and the child whose fortunes we have been following this evening.

Under Section 47 of the Administration and Probate Act 1928 the wife's estate will be distributed as follows: (a) If the child is legitimate the husband will take one-third of the estate and the child two-thirds; (b) if the child is illegitimate the husband will take half of the estate and the illegitimate child the other half.

In these circumstances the husband has a pecuniary interest to have the child declared illegitimate and if in addition they have quarrelled the husband may be tempted to play his own hand. Assuming again that the husband was found to be physically incapable of sexual intercourse, he calls the medical man to prove that fact and thereby the child's illegitimacy.

So you see if the question arises in connection with the distribution of the husband's estate the child's legitimacy may be unchallengeable. If the question arises in connection with the distribution of the wife's estate it may rest with the husband to call or refuse to have called the evidence which will declare the child illegitimate.

So far we have considered only problems which will arise not infrequently either in divorce proceedings or in regard to the succession to property on the intestacy of either the husband or the wife. One could imagine more complicated situations of rarer occurrence in which the problems would prove even more difficult of solution. But those of you who hanker after certainty in this changing world will already be asking whether there is not some way in which the legal situation of a child

resulting from artificial insemination can be made more definite. Will it help matters at all if the husband and wife adopt the child shortly after its birth?

The Adoption of Children Act 1928 by its terms does not seem appropriate to the adoption by parents of their own legitimate child. But under the corresponding legislation in England it seems to be established that a husband and wife can obtain an order for the adoption of a child who is in fact the illegitimate offspring of the wife.

In re C., (1938) Ch. 121.

Accordingly the husband and wife could in my opinion obtain an order for the adoption of the child upon the footing that it is not a legitimate child of the marriage. In some respects this would be more advantageous than leaving the question of the child's legitimacy to depend upon the fortunes of some future litigation which may not take place until the child is an adult, and the nature and result of which cannot be foreseen. In regard to all questions of the custody and maintenance of the child the position of the adopters will be the same as if the child were the lawful child of their marriage. (Sec. 7 (1).)

Upon the intestacy of either the husband or the wife, the adopted child will have the same right of succession as if it were legitimate. To this extent adoption is advantageous in that it avoids the risk we have already considered of the husband obtaining a finding of illegitimacy for the purpose of the distribution of his intestate wife's estate.

But an adopted child has no right of succession to property of a relative of the adopters who dies intestate. Perhaps an illustration is called for here. Suppose the husband has a bachelor brother who survives the husband and dies intestate. Let us suppose also that the next of kin of this bachelor brother are his surviving brothers and sisters and the children of deceased brothers and sisters—a not unusual situation. If the husband's child were legitimate it would share in the distribution of the bachelor uncle's estate. As an adopted child it will not be entitled to share—so that in this instance the child might have been financially better off if it had not been adopted, but had relied on the presumption of legitimacy not being rebutted.

Much the same situation may arise where some relative of the husband or of the wife leaves property by will to their children. Unless the will expresses an intention that the adopted

child was to be included within the expression "children" the adopted child will not take under such circumstances. On the other hand, had there been no adoption order the presumption of legitimacy would have given the child a reasonable chance of succeeding to the property in such a case.

There is yet another type of case which seems worth noticing in this connection. Where an adoption order has been made it does not affect any interest in property arising under a will or settlement made before the date of the adoption order. I can illustrate this point by reference to the facts of a reported case—*Re Pearson*, (1946) A.L.R. 387.

A testator by his will left his estate to his widow for life and after her death to be divided equally amongst his children, with a provision that if any of his children died during the widow's lifetime leaving issue, such issue should take their deceased parent's share. A daughter of the testator died during the lifetime of the widow. She left no children but she had an adopted child, who had been adopted after the date of the testator's will. It was held that the adopted child could not be treated as the issue of the testator's deceased daughter. Upon the facts we are assuming such a child, if not adopted, might have been declared legitimate for want of evidence to rebut the presumption and so have succeeded to his mother's interest in the estate.

These illustrations are sufficient to show that the adoption by a husband and wife of the child borne by the wife as the result of artificial insemination will not give to such a child all the rights possessed by the legitimate offspring of their marriage.

It is now time to sum up the conclusions reached so far. In the first place we saw that the practice of artificial insemination will raise problems in cases of divorce on the ground of adultery. The answer to those problems, though not yet predictable with certainty, can I think be found ultimately by the application of the usual processes of legal reasoning. With regard to claims to succeed to property, I think the examples I have chosen are sufficient to show that one cannot lay down any general rule that a child produced in this way will or will not be treated by the law as legitimate. And finally we have seen that the process of adoption does not provide an entirely satisfactory solution.

In considering the social problems which this practice is bound to raise, our chief concern will naturally be for the children whose lives and fortunes may be affected. Some people will say at once, "Let us deal with the problem by legislation."

I doubt whether any political party will show any enthusiasm to introduce legislation on such a subject. Even amendments to the divorce law are notoriously difficult to obtain because of the passions and prejudices which such measures arouse.

Furthermore, the draftsman of such legislation would have an extremely difficult task. The subject impinges on many aspects of life and so on many branches of the law. I have deliberately confined myself to-night to a few of the more obvious points. I must apologize to those of you who came here expecting to hear the answers to all the problems which this new aspect of medical science will create for the lawyers. But I hope that what I have said will suffice to show that it is not always as easy as the layman thinks for the lawyers to keep the law in line with changing conditions of the society in which we live.