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# Artificial Insemination, Recent Cases, Publications

# POSTSCRIPTS

## *Artificial Insemination*

The subject of artificial insemination continues to attract considerable attention. Of greatest interest is the rather recent address of Pope Pius XII to the 2,000 delegates attending the Second World Congress on Fertility and Sterility, on May 19, 1956, in Naples. While commending the strictly scientific aspects of their work and the worthiness of their efforts, the Holy Father reminded them of the high spiritual and ethical values which must be taken into account.

His Holiness indicated, earlier in the address, that he had been prompted to speak again on this timely topic because of the rapid spread of the practice of artificial insemination and to correct certain erroneous impressions that had arisen as to the position of the Church in this matter.

In reference to the various moral questions involved, His Holiness referred back to an address given to Catholic physicians in 1949 wherein he had rejected artificial insemination although at the time he was careful to note that he did not thereby "necessarily proscribe the use of certain artificial methods intended simply either to facilitate the natural act or to enable the natural act, carried out in a natural manner, to attain its end." (This has been referred to by some Catholic theologians as "assisted insemination" to distinguish it from the objectionable practice of "artificial insemination.") The remaining portions of the recent address were by way of clarification and further refinement of the position already taken.

Directing his attention immediately to the marriage contract, the Holy Father indicated that:

> Artificial fertilization goes beyond the limits of the right that married persons have acquired by the marital contract. . . . The contract in question does not confer on them the right to artificial fertilization because such a right is in no way expressed in the right to the natural conjugal act and cannot be deduced from it. . . . The marriage contract . . . has as its object not a "child" but the natural acts which are capable of engendering a new life and which are intended for that purpose.

It should be observed here that were the actual procreation of a child the subject matter of the marital contract then every marriage in which at least one child did not emerge would be void for failure of consideration or inability to perform. This would place the over two million childless marriages in the United States in an embarrassing position.

The final moral question discussed by the Pope was the matter of masturbation as a method of procuring semen. In a rather lengthy passage the Holy Father emphatically rejected and condemned every form of masturbation whether it was "for the purpose of obtaining human semen for examination by laboratory technicians," "for the sake of sexual gratification," as "a remedy to those who suffer from nervous hypertension or neuroses," for "microscopic examination of sperm infected by bacteria of a venereal or other type of disease," or for any such similar purpose. The reason adduced by the Holy Father

for this categorical denial is that:

> The object and extent of this right (exercising the sexual faculty) is determined by the law of nature, not by the will of man. By force of this natural law there does not belong to man the right and power of fully and intentionally exercising the sexual faculty except when he performs the marriage act according to the norm prescribed . . . by nature itself. Outside of this natural act not even to those who are married is there given the right to the full enjoyment of the sexual faculty.

The Holy Father concluded his remarks to the Congress in warm praise of their aspiration ". . . not only to increase the number of men, but also to raise the moral level of humanity, along with its beneficient strength and its will to grow physically and spiritually."

**Recent Cases**

On July 17 of this year, the Vatican City newspaper, *L'Osservatore Romano,* commented on the ruling of the Tribunal of Rome which held that a husband could repudiate a child born to his wife by artificial insemination performed with his knowledge and consent.

This decision is important because Italian courts had never before ruled upon this aspect of artificial insemination. The Court observed that it was well aware of the Church's attitude on the matter and cited the official decree of the Holy Office of 1897 which it said condemned all practices of artificial insemination.[1] The Court continued by saying that this viewpoint which has been recently reaffirmed by the Church is a religious evaluation of the practice of artificial insemination and that "obviously" such an evaluation cannot be the basis of a secular system of law which must also consider social exigencies. It concluded with the statement:

> We must not only take into account ethical considerations, but also the fundamental law of the country and the general juridical conscience. And so our decision must be squared to the fundamental principles of our particular law.

*L'Osservatore Romano* remarked that this was a most serious matter because the separation of the secular system of law from religion in Italy was affirmed. It noted that the Italian Court failed to consider the ethical principles of the Church as applied to matters of social policy. The article pointed out that the Roman Court went out of its way to disclaim and impugn Catholic ethics as anti-social in this specific case. This distinction between the Italian secular system of law and the religious evaluation of the moral question, the newspaper said, is not consistent with the fact that in a Catholic nation in which the State officially proclaims the Catholic religion, the public system of law cannot prescind from Catholic morality.

Although the newspaper article found no objection to the ruling itself, it found particular fault with a remark of the court that "it does not accept the wholly negative evaluation the Church places on artificial insemination." This, the newspaper held was an unwarranted digression from the question in issue, and if anything, the Court should have upheld the position of the Church since the practice was against social policy.

The Superior Court of Los Angeles, on March 8th, 1956, ordered a young man to

[1] The tribunal mistakenly construed the decree of 1897 as being a condemnation of *all* practices of artificial insemination. Specifically, it referred to the practice of masturbation in procuring seed from the husband.

support the 18 month old daughter of an unwed mother until her paternity suit comes to trial. The defendant contends that the baby was conceived by artificial insemination but was imputed to him as a plot to force him to wed the mother.[2]

In the area of proposed legislation, the Royal Commission on Marriage and Divorce, an official fact-finding body, recommended some easing of Britain's divorce laws. After four and a half years of study, the Commission approved of three new grounds for divorce, the second of which was acceptance by a wife of artificial insemination by a donor without her husband's consent. These recommendations were referred to Parliament for consideration.[3]

**Publications**

Among the articles and comments on artificial insemination, (which continue in abundance in both the professional and popular press), the three articles appearing in the CANADIAN BAR REVIEW take precedence both because of their length and sprightly presentation. The first two were written by G. P. R. Tallin, Dean of the Manitoba Law School.[4] The third, by way of reply to the first two, was written by H. A. Hubbard, a student at the Osgoode Hall Law School, Toronto.[5] Dean Tallin approaches the subject by observing that artificial insemination may require a reassessment of many social values and profound changes in several fields of law. His articles, however, boil down essentially to a reappraisal of the definition of adultery. His view is that in the light of several recent Canadian cases, the definition of adultery can no longer be regarded as accurate. After a rather long analysis, Dean Tallin comes to the conclusion that adultery must have three essential characteristics: (1) It must involve two persons of opposite sexes, one of whom must be married; (2) There must be contact by at least one of the actors with the primary sexual organs of the other for purposes other than purely medical care; (3) The person against whom adultery is alleged must have voluntarily made or submitted to such a contact. Dean Tallin also considered the question of legitimacy of offspring in artificial insemination by donor, and comes to the absolute opinion that the A.I.D. child is not the issue of the marriage and is therefore spurious. He also speculates at length on the liability of the various parties involved and makes several legislative proposals to offset the deleterious effects of artificial insemination if it is to be allowed at all.

Mr. Hubbard, in his reply, is in total agreement as to the position taken by the dean on legitimacy, but takes him severely to task for his proposed definition of adultery and his opinion that A.I.D. be considered as adultery. Mr. Hubbard feels that the definition of adultery as evolved by Dean Tallin is so broad as to encompass a variety of other forms of sterilizing operations and recent operations for the modification of the sex of an individual. His view is that the question of A.I.D. should be resolved by appropriate legislation (and in his view it should be outlawed) and that it should be handled for what it is, an unnatural act leading to bastardy, and should not be handled by extending the definition

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[2] N. Y. Daily News, March 8, 1956, p. 4, col. 1.

[3] N. Y. Times, March 21, 1956, p. 11, col. 1.

[4] Tallin, *Artificial Insemination,* 34 CAN. B. REV. 1 (1956); Tallin, *op. cit. supra* at 166.

[5] Hubbard, *Artificial Insemination; A Reply to Dean Tallin,* 34 CAN. B. REV. 425 (1956).

of adultery beyond all reasonable lengths in order to catch it under the present statutes.

The UNIVERSITY OF PITTSBURGH LAW REVIEW presented a survey of the status of artificial insemination in an extended note significantly titled *Seed of Doubt*. The note confined itself to a rather factual presentation of cases, issues and controversies. The writer concludes with the comment that the labeling of A.I.D. as adulterous is questionable and leads to harsh results. Reflecting on the common law tradition, however, the author admits that the dicta in the *Orford* case[6] is understandable. The dicta referred to has to do with the argument of Justice Orde that A.I.D. is contrary to traditional Judaeo-Christian morality in that it introduces a false blood line into the family and consequent economic burden on the husband. The suggestion is made that the matter is best handled by the legislature rather than the courts.[7]

THE LINACRE QUARTERLY, the Official Journal of the Federation of Catholic Physicians' Guilds, which deals with medico-ethical problems, ran an article on *The Teaching of Pope Pius XII on Artificial Insemination*.[8] This was a reprint, with minor changes, of an article appearing in the UNIVERSITY OF DETROIT LAW JOURNAL.[9] This article actually brings up to date a previous article in THE LINACRE QUARTERLY by incorporating the concepts expressed by His Holiness in his talk to the Catholic physicians in Sept., 1949. Of course, this article appeared prior to the Holy Father's recent address of May 19, 1956.

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6 Orford v. Orford, 58 D. L. R. 251 (1921).

7 17 U. PITT. L. REV. 659 (1956).

8 Kelly, *The Teaching of Pope Pius XII on Artificial Insemination*, 23 THE LINACRE QUARTERLY 5 (1956).

9 Kelly, *Artificial Insemination: I. Theological and Natural Law Aspects*, 33 U. DET. L. J. 135 (1956).