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The Trial of a Paternity Case

Judge Marvin C. Holz

THE TRIAL OE A PATERNITY CASE

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The writing of this article was prompted by the challenge a paternity case presents to counsel and the trier of the fact, judge or jury, and by the growing importance of the problem of illegitimacy. Frequently, the trial of these suits falls on the shoulders of young lawyers. This is due to the fact that he is often appointed as guardian *ad litem* for a minor defendant, or as counsel for an indigent defendant.

Long ago Lord Hale stated, in reference to the act which gives rise to the paternity action, that the "accusation is one easily made, hard to prove, and still harder to be disproved by one ever so innocent."[1] The act is one of "darkness and secrecy," one in which the parties are rarely surprised in committing. Ordinarily it must be established by circumstantial evidence.[2]

Although this article is not concerned with the social aspects of the problem of illegitimacy, the statement that it is of growing importance requires a few words of explanation.

The trend in the national illegitimacy rate over the past twenty-five years has generally been upward. From 1940 to 1957 there was an increase in the illegitimacy rate from 7.1 to 20.9 illegitimate births per 1,000 unmarried women 15 to 44 years of age. From 1957 to 1964 the rate increased by 12 per cent to 23.4 per 1,000.

In 1964 an estimated 275,700 illegitimate live births occurred. Almost seven per cent of all live births were illegitimate. While 40 per cent of such births occur to women under the age of 20, the sole reason that unmarried teenagers bear a larger number of illegitimate children than women of other ages is that there are more of them. It is believed that the number of illegitimate births will continue to increase even if the rate remains stable because of the rising number of women of child bearing ages.[3]

The incidence of illegitimacy in Wisconsin is similar to that experienced across the nation. The total out-of-wedlock births increased in the state from 1,895 in 1954 to 3,906 in 1965.[4] Approximately 4.7 per cent of all live births in the state in 1965 were out-of-wedlock. Milwaukee County accounted for almost 43 per cent of all out-of-wedlock births. Although 76 per cent of such births in the state were Caucasian, the rate for "non-white" is about seven times higher than the rate for the "white" population. In recent years the out-of-wedlock live birth

[1] Cleveland v. State, 211 Wis. 565, 248 N.W. 408 (1933); Wilcox v. State, 102 Wis. 650, 78 N.W. 763 (1899); State v. Connelly, 57 Minn. 482, 59 N.W. 479 (1894).

[2] Freeman v. Freeman, 31 Wis. 235 (1872).

[3] *Monthly Vital Statistics Reports*, 15 DEPT. OF HEALTH, EDUCATION AND WELFARE No. 3 (June 1966); Herzog, *The Chronic Revolution: Births Out of Wedlock*, 5 DEPT. OF HEALTH, EDUCATION AND WELFARE No. 2 (Feb. 1966).

[4] WIS. BOARD OF HEALTH, REPORTS OF BUREAU OF VITAL STATISTICS (1965). The reported figures are not considered complete because: some illegitimate births may not be registered at all, others may be concealed through falsified birth records, and a number are not reported as illegitimate in cases of married women even though the husband is not the father.

rate has increased more rapidly for the white population. The total increase results from the increase in the number of young females of child-bearing age born during the post-war birth boom.[5]

Females aged 15 to 19 years accounted for nearly 44 per cent of all such births in the State of Wisconsin. Such births tend to concentrate in the lower socio-economic group regardless of race or nationality. In a high proportion of the cases which reach the courts, the youthfulness and social background of the parties causes them to be unsophisticated and inarticulate. This adds to trial problems.

In Milwaukee County approximately 1,000 to 1,200 cases have been presented to the courts each year during the past four or five years. Much of such litigation is generated by the offices which administer aid to dependent children and the Corporation Counsel's office in an effort to recover monies paid out as aid to dependent children and services to such mothers.[6] In Milwaukee County the distribution of non-white to white cases runs about two to one.[7] The fact that approximately $2,500,000 was paid out in 1965 for the support of illegitimate children and for medical services to the mothers illustrates the problem to the community.[8]

The determination of the child's paternity is important to the child. Although he is deprived of a normal childhood, homelife, parental care, support, and rearing, filiation will place a duty to support upon the father, give the child some right of inheritance, and provide the father with a right to seek custody.[9] At the present time his sole remedy is through paternity proceedings,[10] from which these rights flow upon determination of paternity. Although the father's conduct may be tortious, the child cannot recover from him for being deprived of a normal home or for the stigmatization resulting from illegitimacy.[11]

[5] WIS. BOARD OF HEALTH, REPORT OF BUREAU OF VITAL STATISTICS, (1963).

[6] In 1965 there were 1333 referrals by the Department of Public Welfare to the Corporation Counsel's office. For various reasons, all do not result in the issuance of warrants.

[7] In 1964, 65% of those cases in which paternity was established were non-white. MILW. COUNTY COURT, CIVIL DIVISION, REPORT OF TRUSTEES DIVISION, (1964).

[8] The enforcement program administered by the County Courts-Civil Division in 1965 refunded some $333,000 to the Department of Public Welfare collected from the fathers of those children. There were certain other refunds to the Milwaukee County Institutions and Departments for lying in and medical services rendered. In addition there was partial recovery of court costs.

[9] At common law the father of an illegitimate child had no duty to support the child, nor did he have any right to custody. The child had no right to inherit from the father. MADDEN, PERSONS AND DOMESTIC RELATIONS 348-354 (1931). WIS. STAT. §52.37 (1965), requires the adjudicated father to support the child from birth until the child is 18 years of age. WIS. STAT. §52.21(2) (1965), adopted in 1963 (Laws of Wis. 1963, ch. 426) permits the court to make custody orders in favor of the father as in divorce cases. WIS. STAT. §237.06 provides that an illegitimate child shall be considered as an heir of his mother, and of his father who has been so adjudicated, or who has acknowledged his fatherhood in open court or in writing signed in the presence of a witness.

[10] WIS. STAT. §52.21-45 (1965).

[11] Zepeda v. Zepeda, 41 Ill. App.2d 240, 190 N.E.2d 849 (1963); Note, 18 STAN.

PRELIMINARY CONSIDERATIONS

There are two preliminary considerations of which counsel must be aware when handling a paternity suit. First, the proceedings are statutory in origin and must be tried in the manner fixed by the Legislature.[12] Consequently, certain special rules must be considered. Second, to understand the existing case law, counsel must realize that until 1957 the hybrid character of these proceedings caused great confusion concerning procedural rules. To the characteristics of the proceedings which had counterparts in criminal law, criminal practice was applied. Civil procedure rules covered the remainder of the proceedings.[13] In 1957 the Legislature denominated the proceedings to be "civil special proceedings" and provided that they were to be conducted according to the statutes applying to civil proceedings except as otherwise provided.[14] Much of the case law has been overruled by specific legislative provision.

FORM OF TRIAL, ISSUES, BURDEN OF PROOF

The primary purpose of the proceeding is to determine whether the defendant is the father of the complainant's child.[15] Once that is established, separate hearings are held to determine the amount the father shall pay for support until the child is eighteen years of age and, in some instances, who shall have custody of the child. By statute the proceeding is civil and rules of civil procedure, including rules of evidence, apply.[16]

Section 52.35 of the Wisconsin Statutes provides that the main issue shall be whether the defendant is or is not the father of the complainant's child. If the child was born to the complainant while she was the lawful wife of a specified man, there shall be determined first the issue of whether the husband was not the father of such child. This issue is in the negative because the husband is not a party to the suit.

The complainant has the burden of proving both issues by a clear and satisfactory preponderance of the evidence.[17] Prior to 1957 paternity had to be established beyond a reasonable doubt.[18] In 1957 the burden

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L. REV. 531 (1966); 28 ALBANY L. REV. 174 (1964); Note, 13 DEPAUL L. REV. 320 (1964); Note, 77 HARV. L. REV. 1349 (1964); Comment, 49 IOWA L. REV. 1005 (1964); Note, 25 OHIO ST. L. J. 145 (1964); Comment, 112 U. PA. L. REV. 780 (1964); Note 2 DUQUESNE L. REV. 125 (1963). *But cf.* Williams v. State, 260 N.Y.S.2d 953 (Ct. Cl. 1965) where a motion to dismiss a complaint was denied where an infant bastard sued the Manhattan State Hospital for negligently permitting a fellow patient to rape the mother while both were confined, which act resulted in the child's birth. Note, 66 COLUM. L. REV. 127 (1966); Note, 39 So. CAL. L. REV. 438 (1966); Note, 18 STAN. L. REV. 531 (1966).

[12] State *ex rel.* Sowle v. Brittich, 7 Wis.2d 353, 96 N.W.2d 337 (1959); State *ex rel.* Lang v. Civil Court, 228 Wis. 411, 280 N.W. 347 (1938).

[13] State *ex rel.* Sowle v. Brittich, *supra* note 12.

[14] Laws of Wis. 1957, ch. 296.

[15] Francken v. State, 190 Wis. 424, 209 N.W. 766 (1926).

[16] WIS. STAT. §52.45 (1965).

[17] WIS. STATS. §§52.355, 891.39 (1965).

[18] Timm v. State, 262 Wis. 162, 54 N.W.2d 46 (1952); State v. Bishop, 255 Wis.

of proof was changed by the Legislature to require "clear and satisfactory evidence, which shall be greater than a clear preponderance of evidence required in other civil cases, but which shall be less than proof beyond a reasonable doubt. . . ."[19] The burden, if the complainant was the lawful wife of another, remained beyond all reasonable doubt. Chapter 298 of the Laws of Wisconsin of 1959 created the present standards. The regulation of the burden of proof by the Legislature is procedural, therefore defendant has no vested right in a prior rule and is governed by the rule in effect at the time of trial.[20] The mere fact that the trial court erroneously gave the defendant the benefit of an instruction requiring a greater burden than prescribed by law will not upset a finding of paternity because he has not been prejudiced.[21]

The trial shall be by jury or the court. A jury trial must be demanded in writing within 20 days after the preliminary examination; however, the court has the discretion to subsequently order a jury trial. The same rules which apply to legislative changes governing the procedure by which a jury trial can be obtained or waived apply in the case of changes of burden of proof.[22] Section 52.35 which provides that a failure to make a written demand within the time required constitutes a waiver of the right is not an unreasonable regulation.

Because the procedure is civil the five-sixths verdict rule applies. It has been held that if a sealed verdict is defective or the jury, upon polling, refuses to affirm it, the jury may be sent out for further deliberation. A fuller or different verdict will be good even though the jury had separated.[23] A stipulation to proceed with eleven jurors because of the death of the mother of one of the jurors during the trial does not render the verdict illegal. In a civil case the defendant may waive strict adherence to the statutory or common law rules of proceeding.[24]

The judge may, in his discretion, exclude the public from attendance at such trials.[25]

If the mother dies, becomes insane, or cannot be found within the jurisdiction, or fails to continue to prosecute after the proceeding has been commenced the child shall be substituted as the complainant and the case shall be prosecuted by the district attorney. The testimony of the mother at the preliminary may be read in evidence insofar as it is competent, relevant, and material.[26] The court may proceed to judg-

416, 39 N.W.2d 399 (1949); Schuh v. State, 221 Wis. 180, 266 N.W. 234 (1936); Van Tassel v. State, 59 Wis. 351, 18 N.W. 328 (1884); Baker v. State, 47 Wis. 111, 2 N.W. 110 (1879); Zweifel v. State, 27 Wis. 396 (1871).

[19] Laws of Wis. 1957, ch. 296.

[20] State *ex rel.* Kapusta v. Weir, 12 Wis.2d 96, 106 N.W.2d 292 (1960); State *ex rel.* Sowle v. Brittich, 7 Wis.2d 353, 96 N.W.2d 337 (1959).

[21] State *ex rel.* Kurtz v. Knutson, 5 Wis.2d 609, 93 N.W.2d 348 (1958).

[22] State *ex rel.* Sowle v. Brittich, 7 Wis.2d 353, 96 N.W.2d 337 (1959).

[23] State *ex rel.* Volkman v. Waltermath, 162 Wis. 602, 156 N.W. 623 (1916).

[24] Rindskopf v. State, 34 Wis. 217 (1874).

[25] WIS. STAT. §52.35 (1965).

[26] *Ibid.*

ment without the presence of the defendant if he fails to appear after proper notice.[27]

Both parties are competent to testify.[28] The common law restriction against a mother of a child born in wedlock from testifying to non-access by the husband is removed by section 328.395. Although the Wisconsin Supreme Court has not ruled upon the point, the trial courts in Milwaukee County have constantly held that the defendant may be called adversely to testify because the action is a civil action. This is in accord with the general rule in other jurisdictions which hold that paternity proceedings are civil in nature.[29]

Upon cross examination the defendant may be asked if he had sexual intercourse with the complainant during the conceptive period even though no questions were asked by his counsel upon direct examination with respect to this matter. In *State ex rel. Burns v. Vernon* the defendant on direct examination confined his testimony to the effect that he had broken up with the complainant and was absent from the state when the conception allegedly occurred.[30] The question was permitted upon the theory that the right of cross examination of a party as distinguished from a witness is not to be restricted to the narrow limits of direct examination, and a wide scope of inquiry related to the matter at issue is to be allowed.[31]

The question concerning the right of the defendant to refuse to answer questions is another matter. It has been held in Wisconsin that the trial judge in a paternity suit has the right, if not the duty, to instruct a witness of his right to refuse to answer upon the grounds that his answer may tend to incriminate him.[32] The privilege may be invoked in civil proceedings as well as criminal, but the testimony which is proscribed must relate to criminal liability rather than civil.[33] It must be asserted personally.[34] The witness's statement invoking the privilege is not conclusive upon the court, but he should not be compelled to answer unless it is reasonably clear that his answer cannot tend to incriminate him.[35] The answer alone need not be sufficient to support a conviction but need only be a link in the chain of evidence to be protected.[36]

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[27] Baker v. State, 47 Wis. 111, 2 N.W. 110 (1879).
[28] McClellan v. State, 66 Wis. 335, 28 N.W. 347 (1886).
[29] Territory v. Lamier, 40 Hawaii 65 (1953); State v. Jeffrey, 198 Minn. 476, 247 N.W. 692 (1933); State v. McKay, 54 N.D. 801, 211 N.W. 435 (1926).
[30] 26 Wis.2d 563, 133 N.W.2d 292 (1965).
[31] Sprague v. State, 188 Wis. 432, 206 N.W. 69 (1925); Greene v. Agnew, 160 Wis. 224, 151 N.W. 268 (1915); Gordon v. State, 158 Wis. 32, 147 N.W. 998 (1914).
[32] Poplowski v. State, 194 Wis. 385, 216 N.W. 488 (1927). *Accord:* Wille v. State, 192 Wis. 224, 212 N.W. 260 (1927).
[33] Karel v. Conlan, 155 Wis. 221, 144 N.W. 266 (1913).
[34] Ingalls v. State, 48 Wis. 647, 4 N.W. 785 (1880).
[35] Karel v. Conlan, 155 Wis. 221, 144 N.W. 266 (1913).
[36] Blau v. U.S., 340 U.S. 159 (1950); Territory v. Lamier, 40 Hawaii 65 (1953).

Section 891.39(2) provides that in an action in which the mother to whom a child is born asserts that the husband is not the father, such mother shall not be prosecuted upon evidence given in the paternity suit.

PRESUMPTIONS

Under the present law designating paternity proceedings as civil in nature, only two presumptions are of significance. They are the presumption as to the time of conception[37] and the presumption of legitimacy.[38] Prior to the Legislature's denomination of paternity actions as special civil proceedings in 1957, the defendant was entitled to the presumption of innocence.[39]

There is no presumption that sexual intercourse occurred because there was mere opportunity.[40] As a matter of fact, evidence of mere opportunity for intercourse standing alone is not very convincing evidence.[41] Similarly, there is no presumption that the complainant has told the truth.[42]

The presumption concerning the presumed time of conception is discussed in following sections and will not be examined at this point. The second presumption of primary importance in the trial of a paternity case is the presumption of legitimacy. At early common law it was conclusively presumed that the child of a married woman was legitimate if born during lawful wedlock provided the husband was not impotent and was within the "four seas."[43] Later the rule was revised to provide that the presumption was not to be rebutted by evidence which created only doubt and suspicion. It could be wholly removed by a sufficient showing "that the husband was (1) incompetent; (2) entirely absent, so as to have no intercourse or communication of any kind with the mother; (3) entirely absent at the period during which the child must, in the course of nature, have been begotten; or (4) only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse."[44]

It was also well settled that the husband and wife were incompetent to testify as to non-access while they lived together. Testimony of the wife tending to show non-access or any fact from which non-access

[37] WIS. STAT. §891.395 (1965).
[38] WIS. STAT. §891.39 (1965).
[39] Timm v. State, 262 Wis. 162, 54 N.W.2d 46 (1952); Nelson v. State 210 Wis. 441, 245 N.W. 676 (1933); Gillis v. State, 206 Wis. 150, 238 N.W. 804 (1931); Windahl v. State, 189 Wis. 424, 207 N.W. 694 (1926); Riley v. State, 187 Wis. 156, 203 N.W. 767 (1925); Roen v. State, 182 Wis. 515, 196 N.W. 825 (1924); Emery v. State, 101 Wis. 627, 78 N.W. 145 (1899); Baker v. State, 47 Wis. 111, 2 N.W. 110 (1879).
[40] State *ex rel.* Nussear v. Breeden, 41 Ind. App. 370, 83 N.E. 1020 (1908); Walker v. State, 43 Ind. App. 605, 86 N.E. 502 (1908).
[41] Baker v. State, 69 Wis. 32, 33 N.W. 52 (1887); Freeman v. Freeman, 31 Wis. 235 (1872).
[42] State v. Halvorsen, 103 Minn. 265, 114 N.W. 957 (1908).
[43] This meant within the jurisdiction of the king of England.
[44] Shuman v. Shuman, 83 Wis. 250, 53 N.W. 455 (1892).

could be inferred was scrupulously kept out.[45] The rigorous limitation placed upon those having the most intimate knowledge of the fact of non-access increasingly fell subject to severe criticism.[46] Consequently, in 1923, the majority of the Wisconsin Supreme Court held that evidence of non-access by the complainant could be received in the absence of an objection on the part of the defendant. Nevertheless, the right of the alleged father to "break the seal which the law has placed upon the mother's lips by waiving her incompetency" was challenged by several members of the court.[47]

Where the impossibility of access at the time of conception by the husband was established by ample evidence of witnesses other than the complainant, the admission of a mother's testimony of intercourse with the defendant was held not to be error.[48]

A high degree of proof was required to overcome the presumption of legitimacy. It was referred to as "the most clear and conclusive evidence," "strong degree of proof," or "the clearest evidence."[49] The unfortunate results which occurred in *Romanowski v. Romanowski*[50] aroused the Legislature to change the rule.[51] In that case testimony of the mother and husband concerning access was not permitted. As a result there was a finding that the child was born of the parties, although the court found the evidence of separation sufficient to grant the divorce. The trial court was of the opinion that the presumption did not control the equities of the case and therefore declined to require the husband to support the child. Two years later, upon motion, it entered an order for support which on appeal was affirmed by a bare majority of the supreme court.

Three members of the supreme court dissented arguing that the presumption had been so effectively controverted by the trial court's determination of the separation issue that the trial court's original decision on support was the only equitable result. The minority was of the opinion that the parties' evidence of non-access should not have been rejected.

In the next session the Legislature adopted Chapter 38, Laws of Wisconsin of 1945, which became section 328.39. Now it has been renumbered as section 891.39. It provides in part as follows:

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[45] State v. Flynn, 180 Wis. 556, 193 N.W. 651 (1923); Shuman v. Shuman, *supra* note 44; Watts v. Owens, 62 Wis. 512, 22 N.W. 720 (1885); Mink v. State, 60 Wis. 583, 19 N.W. 445 (1884).

[46] III WIGMORE, EVIDENCE §§2063, 2064 (3rd ed. 1940); HOOPER, LAW OF ILLEGITIMACY 202, 217.

[47] State v. Flynn, 180 Wis. 556, 193 N.W. 651 (1923).

[48] Flynn v. State, 183 Wis. 348, 197 N.W. 716 (1924).

[49] Watts v. Owens, 62 Wis. 512, 22 N.W. 720 (1885); Estate of Lewis, 207 Wis. 155, 240 N.W. 818 (1932); Riley v. State, 187 Wis. 156, 203 N.W. 767 (1925).

[50] 245 Wis. 199, 14 N.W.2d 23 (1944).

[51] Vorvilas v. Vorvilas, 252 Wis. 333, 31 N.W.2d 586 (1948).

> Whenever it is established in an action or proceeding that a child was born to a woman while she was the lawful wife of a specified man, any party asserting in such action or proceeding that the husband was not the father of the child shall have the burden of proving that assertion by a clear and satisfactory preponderance of the evidence. In all such actions or proceedings the husband and the wife are competent to testify as witnesses to the facts. The court or judge shall in such cases order the child made a party and shall appoint a guardian ad litem to appear for and represent the child whose paternity is questioned.

Three specific matters were covered. Both the husband and wife were made competent to testify to the facts at issue; the burden to overcome the presumption was increased to proof beyond all reasonable doubt; the court was required to make the child a party and appoint a guardian *ad litem* to appear for and to represent it.

In 1957 the Legislature created section 52.355 which incorporated the burden of proof of section 328.39. Both sections were changed in 1959 to make the burden of proving the husband not to be the father to consist of a clear and satisfactory preponderance of the evidence.

When proof of non-access is relied on to rebut the presumption of legitimacy, it is not necessary to show that it was impossible for the husband to be the father. In *Zschock v. Industrial Comm'n*[52] the Commission's finding that the deceased was the father was set aside on review, because there was no testimony that the husband was absent from the mother at all material times. On appeal the supreme court restored the finding that the presumption had been rebutted. Access means more than the husband and wife being in each other's presence; it means opportunity for intercourse which is not to be presumed.[53]

It is said that the presumption is "founded in decency, morality, and policy,"[54] but it has a factual basis grounded upon experience. In *Shuman v. Shuman*[55] the court quoted an early English case:

> It is, however, very difficult to conclude against the legitimacy, in cases where there is no disabiilty and where some society or communication is continued between husband and wife during the time in question, so as to have afforded opportunities of sexual intercourse; . . . .

The force of this conclusion was put in focus sharply in *Schmidt v. Schmidt*.[56] In that matter the trial judge stated quite forcibly that he could not believe that a husband and wife under no disability living in the same household would abstain from sexual intercourse for protracted periods of time. The evidence which supported his judgment of

[52] 11 Wis.2d 231, 105 N.W.2d 374 (1960).
[53] State v. Gouse, 134 N.Y.S.2d 328 (Child. Ct. 1954).
[54] Lord Mansfield, Goodright v. Moss, 2 Cowper 591 (1777); Mink v. State, 60 Wis. 583, 19 N.W. 445 (1884).
[55] 83 Wis. 250, 53 N.W. 455 (1892).
[56] 21 Wis.2d 433, 124 N.W.2d 569 (1963).

legitimacy included the fact that the birth and baptismal records were in the name of the husband, that the parties lived in the same house at the time the child was conceived, that the husband supported the child in their home and did not openly disavow paternity until the divorce trial, and that the wife's complaint alleged the child was born as a result of the marriage.

Contradicting evidence was the testimony of both parties that the date of last intercourse with one another would exclude the husband as the father and the testimony of the wife of intercourse with another who had agreed to pay $300 toward lying in expenses for the child in question. The supreme court expressed difficulty in conceiving of a possible motivation which would prompt both husband and wife to unequivocally testify that the child was not a product of the marriage. After carefully examining economic motives and all of the testimony supporting the trial court's judgment, it concluded that a clear and satisfactory preponderance of evidence rebutted the presumption. The court relied upon the embittered relations and emotional tension between the parties. Judgment was reversed.

The fact that a child was conceived prior to marriage does not affect the application or operation of the presumption.[57] In some states a lesser degree of proof is required to overcome the presumption of legitimacy in the case of an antenuptial conception.[58] The presumption applies to the issue of marriages which are subsequently declared null and void; and it makes no difference whether the litigation in which the question is raised is civil, criminal, or quasi-criminal.[59]

Section 245.24 provides that if a child is born to parents who have had a marriage solemnized according to law, but one of whom has a prior marriage in force, the offspring are legitimate if one entered the marriage in good faith and they continue to live as husband and wife after the impediment of the former marriage is removed by death or divorce of the former spouse.

There are no decisions in Wisconsin involving the situation in which a child is conceived during the existence of the mother's marriage to one man but born after her marriage to another and after the first marriage was terminated. Generally, the courts have applied the presumption to the second marriage, although there are cases to the contrary.[60] No presumption exists in the case of premarital birth, although the Kentucky and an English court have indicated that such

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[57] Mader v. Mader, 258 Wis. 117, 44 N.W.2d 924 (1950); Vorvilas v. Vorvilas, 252 Wis. 333, 31 N.W.2d 586 (1948); Flynn v. State, 183 Wis. 348, 197 N.W. 716 (1924); State v. Flynn, 180 Wis. 556, 193 N.W. 651 (1923).

[58] Richards v. State, 55 Ga. App. 184, 189 S.E. 682 (1937); McDermott v. McDermott, 125 Neb. 179, 249 N.W. 555 (1933); Jackson v. Thornton, 133 Tenn. 36, 179 S.W. 384 (1915); Wilson v. Babb, 18 S.C. 59 (1882).

[59] Watts v. Owens, 62 Wis. 512, 22 N.W. 720 (1885).

[60] Annot., 57 A.L.R.2d 729 (1958).

facts should create at least a weak presumption that the husband is the father.[61] Section 245.25 provides that when the father and mother of a child born out-of-wedlock marry, such a child shall become legitimated.

THE COMPLAINANT'S CASE

Proof of a Prima Facie Case

A prima facie case is established by proof of the birth out-of-wedlock, date of birth, weight at birth, an accusation that the defendant had sexual relations with the complainant during the conceptive period, and the denial of the complainant that she had sexual relations with any other man during the conceptive period. The complainant is permitted to state who the father of her child is. Such is treated as a statement of fact and not opinion.[62]

The conceptive period in the case of a child whose weight at birth is in excess of five and a half pounds is presumptively established by statute.[63] If the child is not a full term child, the conceptive period must be established by other competent evidence. It is not essential that the exact date of conception be proven.[64] One act of intercourse adequately identified as to time and place is sufficient to support a judgment of paternity.[65] The complainant's testimony, of course, need not be corroborated.[66]

Corroborating Circumstantial Evidence

After the complainant has proven a prima facie case, the trial becomes a battle of corroborating circumstantial evidence and the credibility of the witnesses. Counsel for the complainant must seek to introduce evidence which will corroborate her testimony of the act by the defendant and of her credibility.

Intimacy and Opportunity

Mere opportunity for sexual intercourse between the parties is not very convincing evidence standing alone because situations in which there is opportunity embrace many innocent situations and relationships.[67] Nevertheless, such evidence is admissible as a first step to show that the defendant is the father.[68]

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[61] Stevenson v. Washington's Adm'r, 231 Ky. 233, 21 S.W.2d 274 (1929); Stein's Adm'r. v. Stein, 32 Ky. L.Rep. 604, 106 S.W. 860 (1908); Gardner v. Gardner, L.R. 2 App. Cas. 723 H.L. (Eng. 1877).

[62] Brennan v. State, 151 Md. 265, 134 Atl. 148 (1926).

[63] WIS. STAT. §891.395 (1965).

[64] State *ex rel* Isham v. Mullally, 15 Wis.2d 249, 112 N.W.2d 701 (1961); Vogel v. State, 220 Wis. 677, 265 N.W. 567 (1936); Stresney v. State *ex rel.* Bean, 186 Wis. 214, 202 N.W. 334 (1925); State *ex rel.* Dewey v. Kibbe, 186 Wis. 210, 202 N.W. 333 (1925); Menn v. State, 132 Wis. 61, 112 N.W. 38 (1907); Humphrey v. State, 78 Wis. 569, 47 N.W. 836 (1891); Baker v. State, 69 Wis. 32, 33 N.W. 52 (1887).

[65] State *ex rel.* Kurtz v. Knutson, 5 Wis.2d 609, 93 N.W.2d 348 (1958).

[66] Roberts v. State, 84 Wis. 361, 54 N.W. 580 (1893).

[67] See Douglas v. State, 134 Wis. 627, 114 N.W. 1121 (1908); Hofer v. State, 130 Wis. 576, 110 N.W. 391 (1907); Freeman v. Freeman, 31 Wis. 235 (1862).

[68] I WIGMORE, EVIDENCE §132 (3rd ed. 1940).

Proof of the sex act is an element of both adultery and paternity cases; consequently, adultery cases provide some guidance for proof in paternity cases.[69] In a paternity case the fact of the birth of the child establishes the act of intercourse, but the identity of the father remains the elusive issue. Because the parties are rarely surprised in the act, the fact must be proven by circumstantial evidence. In adultery cases proof of adulterous inclination or disposition between the parties existing prior to the alleged act, combined with proof that the parties have been together in equivocal circumstances such as would lead the guarded discretion of a reasonable and just man under the circumstances to the conclusion of commission of the act by the defendant, justifies the inference that the act took place at the time of the opportunity. Although proof of inclination and opportunity suffice, inclination means more than ordinary human tendencies and must extend to proof suggesting specific libidinous tendency of each of the parties towards the other and the opportunity must be understood as meaning more than mere chance.[70]

In discussing the problem relative to adultery, the courts have indicated that the circumstances which lead to the conclusion that adultery has been committed cannot be laid down definitively in their entirety, though many of them are of a more obvious nature and of more frequent occurrence in life. It was said by the Wisconsin Supreme Court that it was "impossible to indicate them universally because they may be infinitely diversified by the situation and character of the parties, by the state of general manners, and by many other incidental circumstances, apparently slight and delicate in themselves, but which may have most important bearings in decisions upon the particular case."[71] Some of the more obvious circumstances of disposition to commit the act are a showing of unwarrantable predilection for the other person, clandestine correspondence, secret meetings, courtship, promises of marriage or engagement, and passionate declarations. The full gambit of circumstances of opportunity and disposition defy enumeration because they are not constant. Instead they are determinable upon grounds of common reason and human experience.

As specifically applied to paternity cases, these principles resulted in the approval of an instruction that the jury could consider evidence of the complainant being with another man at suspicious times, but that mere opportunity for intercouse is not very convincing as evidence.[72] Evidence of visiting, socializing, and agreement to marry by the parties

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[69] See, Till v. State, 132 Wis. 242, 111 N.W. 1100 (1907); Monteith v. State, 114 Wis. 165, 89 N.W. 828 (1902); Freeman v. Freeman, 31 Wis. 235 (1862).
[70] Hofer v. State, 130 Wis. 576, 110 N.W. 391 (1907); Till v. State, *supra* note 69.
[71] Freeman v. Freeman, 31 Wis. 235 (1862).
[72] Baker v. State, 69 Wis. 32, 33 N.W. 52 (1887).

although not within the conceptive period but at a time not remote has held to be material.[73]

Residence in the home of the defendant by the complainant as a housemaid and the taking of the complainant home late at night in horse and buggy by defendant have been characterized as frequent and favorable opportunities. Such evidence was held to be sufficient to support a verdict without a showing of disposition for intimacy by the parties where the court was strongly impressed with the credibility of the complainant.[74] Evidence of the presence of complainant and defendant being frequently alone in defendant's apartment was not persuasive, where it was the only circumstance corroborating complainant's assertion that defendant was the father of her child. It has been deemed sufficiently weak and unconvincing that, when coupled with the questionable credibility of the complainant, a mistake in the instruction, it was held to be error. Had the corroborating evidence been stronger, the erroneous instruction would not have been prejudicial.[75] The testimony of a sister with whom the complainant lived that she let the complainant and defendant into her house late at night and left them alone in the living room which contained a davenport upon which complainant slept was held sufficient to support a verdict of paternity. Such finding was both corroborated and contradicted by other evidence.[76]

Acts Outside Conceptive Period

Proof of an illicit relationship between the parties prior or subsequent to conception is admissible by the weight of authority. Rarely is an objection made if the testimony of the act of intercourse relates to the conceptive period as distinguished from a specific date upon which the complainant claims to have become pregnant.[77] However, the majority rule goes further and holds that evidence of acts occuring beyond the conceptive period is admissible to show the intimacy and disposition of the parties and as bearing upon the probability that intercourse took place at the times alleged to have occurred within the conceptive period.[78] The only limit to the rule is that such acts must have been

[73] *Ibid.*

[74] McClellan v. State, 66 Wis. 335, 28 N.W. 347 (1886).

[75] Vogel v. State, 220 Wis. 677, 265 N.W. 567 (1936).

[76] State *ex rel.* Jahn v. Rydell, 250 Wis. 377, 27 N.W.2d 486 (1946).

[77] State v. Hammond, 46 Utah 249, 148 Pac. 420 (1915); People v. Schilling, 110 Mich. 412, 68 N.W. 233 (1896); People v. Keefer, 103 Mich. 83, 61 N.W. 338 (1894); State v. Smith, 47 Minn. 475, 50 N.W. 605 (1891); Baker v. State, 69 Wis. 39 (1887).

[78] Leach v. State, 398 P.2d 848 (Okla. 1965); Moses v. District of Columbia, 129 A.2d 412 (Munic. Ct. App. D.C. 1957); State v. Stevens, 248 Minn. 309, 80 N.W.2d 22 (1956); State v. Becker, 231 Minn. 174, 42 N.W.2d 704 (1950); Fuller v. United States, 65 A.2d 589 (Munic. Ct. App. D.C. 1949); People v. Leneschmidt, 260 Mich. 671, 245 N.W. 544 (1932); Siefker v. State, 128 Okla. 96, 261 Pac. 211 (1927); Hatfield v. Commonwealth, 180 Ky. 642, 203 S.W. 562 (1918); State v. Hammond, 46 Utah 249, 148 Pac. 420 (1915); Brantley v. State, 11 Ala. App. 144, 65 So. 678 (1914); State v. Reese, 43 Utah 447,

sufficiently proximate in time and of sufficient significance in character to afford an inference of intimacy and disposition of the parties at the time of conception. The limits are fixed in the discretion of the judge.[79]

Proof of prior relations does not create a presumption that defendant committed the conceptive act but does corroborate evidence of a repetition and makes the defendant more readily disbelievable. A Connecticut court said such intercourse once begun is seldom discontinued unless there is a want of the means and opportunity.[80] There is a direct causal relationship between the acts and they constitute a link in the chain of circumstances.[81]

Evidence of illicit relations several months,[82] one or two years,[83] three years,[84] and five years[85] has been received under circumstances in which the court deemed them relevant.[86] In the latter case the first act was committed five years prior thereto, but continued through a period which terminated shortly prior to pregnancy. Proximity of time, continuity, frequency, and opportunity are important in determining relevancy and each factor strengthens the probability.[87] What is a probative period of time in determining remoteness depends upon the relationship of the parties, and each case must turn upon its own facts to provide the basis of admissibility.[88]

Some courts restrict the evidence to acts prior to conception,[89] but others permit testimony of subsequent acts particularly where the outward relationship of the parties and opportunities are the same as during the time of conception.[90] Some courts require that there be an

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135 Pac. 270 (1913); Commonwealth v. Blank, 79 Pa. Super. 49 (1911); People v. Jamieson, 124 Mich. 164, 82 N.W. 835 (1900); Harty v. Malloy, 67 Conn. 339, 35 Atl. 259 (1896); Gemmill v. State, 16 Ind. App. 154, 43 N.E. 909 (1896); People v. Keefer, 103 Mich. 83, 61 N.W. 338 (1894); Ramey v. State, 127 Ind. 243, 26 N.E. 818 (1891); Walker v. State, 92 Ind. 474 (1883); Holcomb v. People, 79 Ill. 409 (1874); Beers v. Jackman, 103 Mass. 192 (1869); Thayer v. Thayer, 101 Mass. 111 (1869); Thayer v. Davis, 38 Vt. 163 (1865); Norfolk v. Gaylord, 28 Conn. 309 (1859); Commonwealth v. Merriam, 14 Pick. 518 (Mass. 1833).

[79] Siefker v. State, *supra* note 78.

[80] Norfolk v. Gaylord, 28 Conn. 309 (1859).

[81] Commonwealth v. Blank, 79 Pa. Super. 49 (1911).

[82] Brantley v. State, 11 Ala. App. 144, 65 So. 678 (1914); Harty v. Malloy, 67 Conn. 339, 35 Atl. 259 (1896); Ramey v. State, 127 Ind. 243, 26 N.E. 818 (1891).

[83] State v. Becker, 231 Minn. 174, 42 N.W.2d 704 (1950); Siefker v. State, 128 Okla. 96, 261 Pac. 211 (1927); Walker v. State, 92 Ind. 474 (1883); Norfolk v. Gaylord, 28 Conn. 309 (1859).

[84] Thayer v. Davis, 38 Vt. 163 (1865).

[85] State v. Stevens, 248 Minn. 309, 80 N.W.2d 22 (1956).

[86] *Ibid.*

[87] State v. Stevens, *ibid;* Brantley v. State, 11 Ala. App. 144, 65 So. 678 (1914); People v. Keefer, 103 Mich. 83, 61 N.W. 338 (1894); Ramey v. State, 127 Ind. 243, 26 N.E. 818 (1891).

[88] State v. Reese, 43 Utah 447, 135 Pac. 270 (1913); Norfolk v. Gaylord, 28 Conn. 309 (1859).

[89] State v. Hammond, 46 Utah 249, 148 Pac. 420 (1915).

[90] People v. Jamieson, 124 Mich. 164, 82 N.W. 835 (1900); Gemmill v. State, 16 Ind. App. 154, 43 N.E. 909 (1896).

instruction that evidence of remote acts is to be considered only for the purpose of passing upon the credibility of the complainant and the defendant.[91] It must be made clear to the jury that a finding of paternity can be made only upon an act of the defendant found to have occurred in the conceptive period.[92]

This rule permitting such evidence is not to be confused with the rule which precludes evidence of the complainant's reputation for chastity, and it does not necessarily open the door to permit the defendant to offer evidence of illicit relations by the complainant with other men at times other than the conceptive period. Conceivably such might occur where it can be shown that the complainant had a plural and substantial relationship with two men as is frequently presented in the case of multiple illegitimacies.

Defendant's Admissions and Acknowledgements

After supporting the complainant's direct testimony of intercourse with the defendant in the conceptive period with evidence of opportunity and disposition to commit the act, the complainant's counsel will seek to elicit evidence of statements or acts of the defendant which are in the nature of admissions against his interest or which constitute acknowledgement of his responsibility. Sometimes there are direct verbal admissions of fatherhood made by the defendant to the complainant or third parties. Other times the inference of culpability may be weak and inconclusive. Whether a particular fact or circumstance is too remote to be admitted may not be readily determinable. A fact or circumstance in and of itself may seem trivial or wholly disconnected with the main fact. Yet when connected with other facts of which there is substantial evidence, such trivial fact may aid the trier materially in reaching a conclusion upon the issue of paternity.[93]

Direct admissions to the complainant or to third parties may be related by either.[94] Occasionally the admission takes the form of the boastful declaration "that's my boy,"[95] a doleful lament that "it was the first time he had gone outside (the marital relationship) and he got caught,"[96] or by standing drinks "on his new-born baby."[97]

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[91] State v. Stevens, 248 Minn. 309, 80 N.W.2d 22 (1956); State v. Becker, 231 Minn. 174, 42 N.W.2d 704 (1950).
[92] People v. Leneschmidt, 260 Mich. 671, 245 N.W. 544 (1932); People v. Schilling, 110 Mich. 412, 68 N.W. 233 (1896).
[93] Nicholson v. State, 72 Ala. 176 (1882).
[94] State v. Gouse, 134 N.Y.S.2d 328 (Child. Ct. 1954); Saratoga County Comm'n. of Pub. Welfare v. A.B., 205 Misc. 1004, 131 N.Y.S.2d 634 (1954); State v. Bowman, 231 N.C. 51, 55 S.E.2d 789 (1949); Ferrell v. State, 70 Ga. App. 651, 29 S.E.2d 185 (1944); Arais v. Kalensnikoff, 10 Cal.2d 428, 74 P.2d 1043 (1937); Moore v. Smith, 178 Miss. 383, 172 So. 317 (1937); Kline v. State, 20 Ohio App. 191, 151 N.E. 802 (1925).
[95] State v. Gouse, 134 N.Y.S.2d 328 (Child. Ct. 1954).
[96] Kline v. State, 20 Ohio App. 191, 151 N.E. 802 (1925).
[97] State v. Bishop, 255 Wis. 416, 39 N.W.2d 399 (1949).

Frequently statements made by the defendant when he was confronted by the complainant with the fact of her pregnancy are incriminatory. Evidence of efforts by the defendant to induce the complainant to take medication to precipitate a miscarriage or to have an abortion is admissible,[98] although it may be weak or inconclusive.[99] Offers of marriage are probative of a recognition of responsibility for the complainant's condition.[100] Promises of engagement,[101] courtship,[102] or letters of endearment or devotion[103] are similarly corroborative of an intimate relationship.

Such acts as visiting the complainant at the hospital during her confinement,[104] demonstrations of filial affection as sending greeting cards identifying oneself as "Dad,"[105] or visiting complainant's home and holding the baby[106] are also indications of such a relationship and tend to prove filiation. Voluntary assumption of the obligation of parenthood by the paying of the hospital and doctor bills for complainant's confinement, and provision for nursing care or clothing are also indicative of an acknowledgement of responsibility.[107] Proof of defendant's signature upon an unauthenticated document constituting an official admission of paternity in a foreign country,[108] and a paper in the defendant's handwriting bearing a calculation of anticipated costs of supporting the child have been admitted as admissions against the defendant's interest.[109] The transfer by the defendant of his property without consideration upon learning of the complainant's condition has

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[98] State v. Powers, 75 S.D. 209, 62 N.W.2d 764 (1954); State v. Tokstad, 139 Ore. 63, 8 P.2d 86 (1932); Swindle v. State, 21 Ala. App. 462, 109 So. 369 (1926); Leister v. State, 136 Md. 518, 111 Atl. 78 (1920); Brantley v. State, 11 Ala. App. 144, 65 So. 678 (1914).

[99] Nicholson v. State, 72 Ala. 176 (1882).

[100] Hughes v. State, 219 Wis. 9, 261 N.W. 670 (1935); State v. Stephon, 179 Minn. 80, 228 N.W. 335 (1929); Leister v. State, 136 Md. 518, 111 Atl. 78 (1920); Jones v. State, 132 Md. 142, 103 Atl. 459 (1918); Johnson v. Dahle, 85 Neb. 450, 123 N.W. 437 (1909); Laney v. State, 109 Ala. 34, 19 So. 531 (1896).

[101] Jones v. State, *supra* note 100; Brantley v. State, 11 Ala. App. 144, 65 So. 678 (1914); Gemmill v. State, 16 Ind. App. 154, 43 N.E. 909 (1896); Maisch v. State, 128 Okla. 226, 262 Pac. 203 (1927).

[102] Haddock v. State, 24 Ala. App. 402, 135 So. 649 (1931).

[103] Jones v. State, 132 Md. 142, 103 Atl. 459 (1918); Ferrell v. State, 70 Ga. App. 651, 29 S.E.2d 185 (1944); Graham v. State, 23 Ala. App. 331, 125 So. 200 (1929); State v. Powers, 75 S.D. 209, 62 N.W.2d 764 (1954); Gemmill v. State, 16 Ind. App. 154, 43 N.E. 909 (1896); Walker v. State, 92 Ind. 474 (1883).

[104] State v. Rydell, 250 Wis. 377, 27 N.W.2d 486 (1947).

[105] Zschock v. Industrial Comm'n., 11 Wis.2d 231, 105 N.W.2d 374 (1960).

[106] State v. Gouse, 134 N.Y.S.2d 328 (Child Ct. 1954); Arais v. Kalensnikoff, 10 Cal.2d 428, 74 P.2d 1043 (1937).

[107] Zschock v. Industrial Comm'n., 11 Wis.2d 231, 105 N.W.2d 374 (1960); State v. Gouse, *supra* note 106; Rossmiller v. Becker, 157 Neb. 756, 61 N.W.2d 393 (1953); State v. Bowman, 231 N.C. 51, 55 S.E.2d 789 (1949); Arais v. Kalensnikoff, *supra* note 106; Leister v. State, 136 Md. 518, 111 Atl. 78 (1920); Wille v. State, 192 Wis. 224, 212 N.W. 260 (1927).

[108] Kamp v. Morang, 277 Ala. 575, 173 So.2d 566 (1964).

[109] Jones v. State, 132 Md. 142, 103 Atl. 459 (1918).

been held as an admission tending to show a consciousness of liability.[110]

The unexplained flight of the defendant, when he is aware that he is or may be suspected as the father, is indicative of a consciousness of guilt. His departure is admissible and such facts as his ignorance of the fact that he is charged or suspected, or of the birth itself are circumstances which explain away the guilty significance of the conduct. Hence the rule is stated that flight and all facts which increase or diminish the probative force of flight are admissible.[111]

Silence on the part of a person when the statement or assertion of another is made in his presence under circumstances which would naturally provoke a response or dissent if untrue may be tantamount to an admission of the truth of the statement.[112] Thus it has been held in a paternity case that silence and refusal to talk when an innocent person would ordinarily be vehement in his denial is conduct inconsistent with one falsely accused of such a serious charge.[113] Of course, the person against whom the admission is claimed must have heard and understood the charge.[114] In order to be culpatory the statement must be made under circumstances in which the defendant was free to reply. A good statement of the rule is made in *Vail v. Strong*,[115] and is as follows:

> Evidence of this character may be permitted to go to the jury, whenever the occasion, upon which the declaration is made in the presence of the party, and the attendant circumstances, call for serious admission or denial on his part; but the strength of the evidence depends altogether upon the force of the circumstances and the motives, which must impel him to an explicit denial, if the statement be untrue. But if no good reasons exist to call for disclosure, and the party declines to enter into useless discussion, or answer idle curiosity, no legitimate inference to his prejudice can be drawn from his silence.

Failure to disavow on the part of a husband, coupled with his support of the child, may not be conclusive because of equally strong countervailing circumstances.[116]

Of frequent application in paternity cases is the rule that evidence of offers to settle or compromise a claim is not admissible as an admission of liability, but that admissions of independent or distinct facts

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[110] State v. Anderson, 58 N.D. 721, 227 N.W. 220 (1929).
[111] Haddock v. State, 24 Ala. App. 402, 135 So. 649 (1931); II WIGMORE, EVIDENCE §276 (3rd ed. 1940).
[112] II WIGMORE, *op. cit. supra* note 111, §292. *Accord*: Mitler v. Associated Contractors, 4 Wis.2d 568, 91 N.W.2d 367 (1958); Pawlowski v. Eskofski, 209 Wis. 189, 244 N.W. 611 (1932).
[113] Rossmiller v. Becker, 157 Neb. 756, 61 N.W.2d 393 (1953).
[114] Johnson v. State, 16 Ala. App. 4, 74 So. 972 (1917); J. H. Clark Co. v. Rice, 127 Wis. 451, 106 N.W. 231 (1906).
[115] 10 Vt. 463 (1838).
[116] Schmidt v. Schmidt, 21 Wis.2d 433, 124 N.W.2d 569 (1963).

made during such negotiations may be offered.[117] The rule without specific reference to paternity cases is fully discussed in *State Medical Society v. Associated Hosp. Service*[118] and *Connor v. Michigan Wisconsin Pipe Line Co.*[119] What is an admission of independent or distinct fact or is part of an offer to compromise is often difficult to determine, and the determination must stand on its own facts.[120] The rule that offers of settlement are admissible in criminal cases does not apply because the proceedings are not criminal and the paternity laws encourage settlement.[121] If a compromise is defaulted the compromise is then admissible as an admission, as the policy basis for protecting compromises no longer exists.[122]

Declarations of the Complainant

The declarations of the complainant to third parties not in the presence of the defendant are inadmissible as self-serving statements.[123] By statute such evidence is admissible in Connecticut to corroborate the complainant's testimony.[124] Some other states also permit such testimony if made by the complainant in the time of her travail on the theory that the painful circumstances of the occasion give some trustworthiness to the declaration.[125] The Wisconsin Supreme Court and others have rejected such testimony.[126] Proof of such out-of-court declarations may be made to rebut testimony of the defendant that the complainant never accused the defendant to anyone.[127]

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[117] Commonwealth v. Luciano, 205 Pa. Super. 397, 208 A.2d 881 (1965); Simmons v. State, 98 Ga. App. 159, 105 S.E.2d 356 (1958); State v. Stevens, 248 Minn. 309, 80 N.W.2d 22 (1956); Pitts v. United States, 95 A.2d 588 (Munic. Ct. App. D.C. 1953); Harrison v District of Columbia, 95 A.2d 332 (Munic. Ct. App. D.C. 1953); People v. Haab, 260 Mich. 673, 245 N.W. 545 (1932); Looney v. State, 25 Ala. App. 23, 140 So. 181 (1932); People v. Gill, 247 Mich. 479, 226 N.W. 214 (1929); Kline v. State, 20 Ohio App. 191, 151 N.E. 802 (1925); Robb v. Hewitt, 39 Neb. 217, 58 N.W. 88 (1894); Olson v. Peterson, 33 Neb. 358, 50 N.W. 155 (1891); Miene v. Olsen, 37 Ill. App. 589 (1890); Martin v. State, 62 Ala. 119 (1878).

[118] 23 Wis.2d 482, 128 N.W.2d 43 (1964).

[119] 15 Wis.2d 614, 113 N.W.2d 121 (1962).

[120] State Medical Society v. Associated Hosp. Service, 23 Wis.2d 482, 128 N.W.2d 43 (1964); Kline v. State, 20 Ohio App. 191, 151 N.E. 802 (1925).

[121] Commonwealth v. Luciano, 205 Pa. Super. 397, 208 A.2d 881 (1965).

[122] Pitts v. United States, 95 A.2d 588 (Munic. Ct. D.C. 1953).

[123] Lockman v. Fulton, 162 Neb. 439, 76 N.W.2d 452 (1956); Armstrong v. Watrous, 138 Conn. 127, 82 A.2d 800 (1951); Moen v. Fry, 215 Iowa 344, 245 N.W. 297 (1932); People v. Haab, 260 Mich. 673, 245 N.W. 545 (1932); Akeson v. Doidge, 225 Mass. 574, 114 N.E. 726 (1917); State v. Spencer, 73 Minn. 101, 75 N.W. 893 (1898); Richmond v. State, 19 Wis. 307 (1865).

[124] Armstrong v. Watrous, *supra* note 123.

[125] Commonwealth v. Losey, 79 Pa. Super. 75 (1922); King v. State, 121 Miss. 230, 83 So. 164 (1919); Hellman v. Karp, 93 Conn. 317, 105 Atl. 678 (1919); Ham v. West, 117 Miss. 340, 78 So. 291 (1918); Burns v. Donoghue, 185 Mass. 71, 69 N.E. 1060 (1904); Bowers v. Wood, 143 Mass. 182, 9 N.E. 534 (1887); Commonwealth v. McLain, 8 Pa. D. & C. 765 (1860).

[126] State v. Watzek, 158 Minn. 351, 197 N.W. 669 (1924); Richmond v. State, 19 Wis. 307 (1865); State v. Hussey, 7 Iowa 409 (1858).

[127] People v. Cole, 113 Mich. 83, 71 N.W. 455 (1897).

Birth Certificates

Section 69.30 provides that the physician or midwife in attendance upon any birth shall file a certificate of birth, completely filled out, giving all particulars required by the statutes. The official form supplied by the Wisconsin State Board of Health inquires as to the name of the father.[128] Section 69.29 (1) requires that if the complainant is married the certificate must list the name of the husband as the father unless and until there has been a judicial determination to the contrary. Such a certificate is inadmissible in evidence in a proceeding to determine paternity.

Despite the fact that the information of the doctor completing the certificate is the self-serving declaration of the mother, such hearsay evidence is admissible in the case involving the unmarried mother. Section 891.09(1) makes the birth certificate presumptive evidence of the birth. Church, baptismal, and doctor records are also presumptive evidence of the facts contained therein relating to any birth including the names of persons, dates, and other material facts. Although the issue has not been determined directly in a paternity case, the Wisconsin Supreme Court has held that the information contained in the records covered by section 891.09 is admissible as prima facie evidence notwithstanding its hearsay character. It is rebuttable.[129] This determination has been made in two cases involving a minor child's claim for support as a dependent under the Workmen's Compensation Law. Birth certificates were received in evidence in those cases as affirmative proof establishing paternity.[130]

In the *Zschock* case[131] the court simply observed that the birth records are presumptive evidence. It also made reference to section 327.18 (1) which provides that official certificates and records made by any public officer are evidence of the facts stated therein, thus implying that birth records were official records although they are made by the attending physician engaged in private practice. It follows from these decisions that the court has considered the naming of the father as an item of fact as distinguished from conclusions, which are not admissible even though they are contained in official records.[132]

In *Schmidt v. Schmidt,*[133] a birth certificate showing the husband to be the father was received as proof of the husband's fatherhood. The

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[128] WIS STAT. §69.30(2) (1965) adds that if there is no attending physician or midwife, then the father, householder or owner of the premises, manager or superintendent of a public or private institution in which the birth occurred shall file the certificate.

[129] *In re* Estate of Eannelli, 269 Wis. 192, 68 N.W.2d 791 (1955).

[130] Zschock v. Industrial Comm'n., 11 Wis.2d 231, 105 N.W.2d 374 (1960); Waunakee Canning Corp. v. Industrial Comm'n., 268 Wis. 518, 68 N.W.2d 25 (1955).

[131] Zschock v. Industrial Comm'n., *supra* note 130.

[132] *In re* Estate of Eannelli, 269 Wis. 192, 68 N.W.2d 791 (1955).

[133] 21 Wis.2d 433, 124 N.W.2d 569 (1963).

probative weight of the birth certificate as evidence of paternity should be considered in juxtaposition with the court's ruling in the early *Richmond* case.[134] It will be recalled that it was said there that the mother's declaration as to the child's paternity made to the attending physician was inadmissible even though made during her travail. Query as to how much the trustworthiness of such a statement is improved by the fact that the physician has now put the mother's statement in writing.

There are relatively few cases which discuss the admissibility of birth records to establish paternity. Some jurisdictions receive the birth records as affirmative proof of the fact and others do not.

Over an objection that the birth certificate constituted hearsay and recited information obtained by the attending doctor from the complainant, Georgia has approved the receipt of birth certificates in evidence to establish paternity. The court observed that the portion of the certificate which related to the date of birth, sex of the child, and certain facts concerning the name, race, place of residence, and other facts concerning its mother were not obtained by the physician through hearsay and were clearly admissible. Hence, it dubiously reasoned, "most, if not all, of this evidence was admissible, and the (trial) court did not err in allowing it (the certificate) to go to the jury over the objection. . . ."[135] Moreover, as further justification, the court observed that the legislative act requiring the preparation of the birth certificate contemplated that the physician "by diligent enquiry" obtain some of the information which the certificate must contain.

The courts of Connecticut also permit certificates to be admitted as corroborative proof in behalf of the complainant, because the law requires the physicians to file them. Consequently, it was thought it had trustworthiness because it is less likely that a complainant would make a false accusation to "a representative of the law."[136]

It would also appear that the New York courts permit the introduction of such evidence for purposes other than impeachment. In *Coler v. McTighe*[137] it was held that the presumption of legitimacy was strengthened by a baptismal certificate which showed the husband as the father, although such information was obtained from the complainant. In another New York case it was held that an entry upon a birth certificate was outweighed by an entry upon a baptismal record, because the latter was made as part of a religious ceremony when the parents were present.[138]

The District of Columbia court has rejected the introduction of

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[134] Richmond v. State, 19 Wis. 307 (1865).
[135] Posey v. State, 46 Ga. App. 290, 167 S.E. 340 (1932).
[136] Hellman v. Karp, 93 Conn. 317, 105 Atl. 678 (1919).
[137] 213 App. Div. 831, 209 N.Y.S. 201 (1925).
[138] State v. Gouse, 134 N.Y.S.2d 328 (Child. Ct. 1954).

such evidence to establish paternity as hearsay, but admits it to establish the facts and date of birth.[139]

There, of course, is unanimity that such records can be used to impeach the testimony of the complainant when such record differs from the complainant's testimony given in evidence—except where the law, as in Wisconsin, requires that the name of the husband be inserted in the case of a married woman until a legal determination to the contrary is made.[140]

THE DEFENDANT'S CASE

The tools of the lawyer's craft in this area for defense counsel are extremely limited. Persuasion of the trier by proof of corroborative circumstantial evidence or of the credibility of the witnesses' testimony is at best a tricky business. The art of cross-examination and whatever other techniques the lawyer's ingenuity and circumstances permit frequently are not sufficient. The trier, whether jury or judge, tends to rely upon his experience in the affairs of life to determine what is or is not plausible. Sometimes the reasons upon which the axiom "truth is stranger than fiction" is founded are present, and the truth flies in the face of reason. Sympathy for the mother and her child may intervene. Attempts by the parties to clean up their story to make it more socially acceptable may mislead or confuse the trier as to where fiction ends and truth begins. A six year study conducted with the use of the lie detector in Chicago caused John E. Reid & Associates to conclude that 93% of the parties in paternity actions tested subsequent to trial lied in court in some respect concerning their testimony in reference to the sexual relations.[141]

Before taking his chances with the vagaries of a determination resting solely upon the credibility of the parties and circumstantial evidence, the experienced lawyer will explore the possibility of how medical science may help his client. Medical science provides several touchstones or guideposts in almost all cases and in some cases may provide conclusive or determinative proof.

The first logical question to be asked is whether the defendant was physically able to procreate at the time of the complainant's conception. Next, blood tests offer a high degree of possible exclusion of the defendant, if in fact he is not the father. It is believed that by the combined use of the three basic blood groups, false paternity charges can be eliminated in at least fifty-one per cent of the cases, and it is

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[139] Lee v. District of Columbia, 117 A.2d 922 (Munic. Ct. App. D.C. 1955).

[140] Commonwealth v. Smith, 177 Pa. Super. 522, 111 A.2d 151 (1955); Harrison v. District of Columbia, 95 A.2d 332 (Munic. Ct. App. D.C. 1953); Lawhead v. State, 99 Okla. 197, 226 Pac. 376 (1924).

[141] Arthur & Reid, *Utilizing the Lie Detector Technique to Determine the Truth in Disputed Paternity Cases*, 45 The Journal of Criminal Law, Criminology and Police Science 213 (1945).

hoped that the efficiency of more comprehensive testing and analysis will be raised to seventy or eighty per cent.

Because of the physiology and mechanics of impregnation, proof of intercourse by more than one man within the conceptive period precludes a finding that anyone is the father, unless all but one are excluded for some other conclusive reason.

Medical science is of help in establishing the time of conception. The time of conception is important because it fixes the date or time of the procreant act and thus may lead to one or more of the defenses with which the defendant can challenge the complainant's story. Heredity, over and above its operation in blood testing, may provide convincing proof in the form of racial factors or unusual physical characteristics. Finally, in some jurisdictions and under some circumstances, truth deception tests might be available to the parties.

Impotency and Sterility

As indicated above the first thing which might occur to the defense attorney is whether the defendant was capable of procreating at the time the child was conceived. This would be particularly true if the defendant were quite young or quite old. Proof establishing impotency or sterility is the most certain and the clearest proof of non-paternity.[142]

Normally, the male becomes fertile at the age of fourteen to sixteen and may remain fertile until seventy or eighty years; however, a boy may be fertile at nine years of age.[143] It is said that a man becomes old when he feels old and only becomes impotent when he gives up his potency.[144] Actually, age is an important factor in the reproductive potential, but is more significant in relationship to the ease of conception rather than the possibility. It is true, of course, that the chances of procreation diminish after the male reaches 50 years, but such chances may be improved by a more fertile partner.[145]

Impotency is defined as the inability to complete the sexual act. It is either functional, and of a psychological origin, or organic. Because male potency is highly susceptible to psychosomatic impulses, a male might be impotent with one woman and not with another. Hence, it is difficult to rule out paternity because of functional impotency. Organic impotency results from a physical deformity or disease making coitus impossible. It is estimated that 90 per cent of impotency is functional, and ten per cent is organic.[146]

[142] I JONES' COMMENTARIES ON EVIDENCE 129 (2d ed. 1926).
[143] GONZALES, VANCE, HELPERN & UMBERGER, LEGAL MEDICINE, PATHOLOGY & TOXICOLOGY 617 (2d ed. 1954); WERSHUB, SEXUAL IMPOTENCE IN THE MALE 95 (1959).
[144] WERSHUB, *op. cit. supra* note 143, at 97.
[145] WERSHUB, *op. cit. supra* note 143, at 95; BUXTON & SOUTHHAM, HUMAN FERTILITY 13 (1958); WHITE AND GREEN—ARMYTAGE, THE MANAGEMENT OF IMPAIRED STERILITY 290 (1962); ISRAEL, MENSTRUAL DISORDERS & STERILITY 533 (4th ed. 1959).
[146] WERSHUB, *op. cit. supra* note 143, at 36, 97-100.

Sterility and infertility, which are synonymous, denote the inability to procreate because of the absence of normal spermatozoa, presence of faulty spermatozoa, or the inability to transmit the spermatozoa. Various infections such as syphilis, tuberculosis, gonorrhea, and probably mumps might affect fertility.

The degree of male fertility is determined clinically by the volume of semen and the concentration, morphology, motility, and viability of the spermatozoa. Generally it is agreed that the quantity of normal ejaculate is in the area of 3.55 cubic centimeters containing a total of about 80 million spermatozoa per cubic centimeter. One cannot assume that the semen must meet a stated minimum standard, because procreation is dependent upon the respective fertility of both the male and female. Thus sub-standard semen may cause conception.[147] Most authorities consider a minimum of a total concentration of 60 million spermatozoa per cubic centimeter or 20 million active spermatozoa per cubic centimeter as the fertile level for conception given an average partner.[148]

Farris prescribes testing at five day intervals and sets minimum standards to include a volume 2.5 cubic centimeters of ejaculate with 80 per cent of the spermatozoa being of normal shape and at least 38 per cent being motile. These standards would provide 20 million active spermatozoa per cubic centimeter. He also finds pregnancy occurring in three per cent of those situations when the semen failed to meet these standards.[149]

It must be realized however that, from the medical viewpoint, pregnancy can result from a concentration as low as one million per cubic centimeter,[150] and that fertilization of the ova is by only one spermatozoa. Buxton and Southham state that it is impossible to classify a man as infertile unless azoospermia is found on repeated examinations.[151]

Sterility can be accomplished surgically by what is termed a vasectomy which simply blocks the exit of the sperm. Post-operative tests must be conducted because spermatozoa may continue in the semen following the vasectomy. Sperm are stored in the seminal vessels, and clearance may take two to eight weeks. Until then impregnation may occur. In rare instances the presence of an accessory vas deferens or spontaneous recanalization can occur; hence, spermatozoa might again be found in the semen.[152]

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147 ISRAEL, *op. cit. supra* note 145, at 533.
148 McLOED, THE SEMEN SPECIMEN, CONFERENCE IN THE DIAGNOSIS OF STERILITY (1946); ISRAEL, *op. cit. supra* note 145, at 541; WHITE AND GREEN-ARMYTAGE, *op. cit. supra* note 145, at 290.
149 FARRIS, HUMAN FERTILITY—THE MALE 87 (1950).
150 ISRAEL, *op. cit. supra* note 145, at 541.
151 BUXTON & SOUTHHAM, *op. cit. supra* note 145, at 57.
152 Kaufman, Vasectomy: *Medical and Legal Spects.*, TRAUMA No. 1, 110 (1960).

The courts generally have given evidence of impotency or sterility probative weight equal to its medical certainty as determined by the particular facts. Proof of impotency or sterility of course must be established as of the conceptive period.[153] Testimony of a medical expert establishing a prior successful vasectomy negates a conclusive presumption of legitimacy,[154] even when the burden of proof to overcome the presumption requires proof beyond a reasonable doubt.[155] In other cases medical opinion of impotency or sterility based upon organic defects coupled with seminal tests demonstrating no live sperm or sperm of doubtful quality has been characterized as strong or substantial evidence.[156]

Proof of sterility based upon examination of seminal fluid to determine presence or absence of motile spermatozoa alone and without substantial corroborating evidence of organic defect is less persuasive. In *Houston v. Houston*[157] a New York court observed that, unlike the techniques used in blood grouping tests to prove non-paternity, the tests of seminal fluids have not been developed to a point of scientific certainty. Quoting Hotchkiss[158] the court stated:

> More errors are made as a result of faulty collection of the semen than in any other single step in the examination of the husband. The ideal system would permit a sample of the ejaculate to be produced in contact only with the substances found *in vivo* and to be preserved under the same conditions of gas tension found in human genital passages.[159]

Because it doubted the quality of the laboratory examinations of the purported specimens of the defendant's seminal fluid and considered the total medical evidence inconclusive to prove sterility at the conception time and because there was a dearth of evidence of a paramour or inclination of infidelity on the part of the wife, the court refused to hold that the presumption had been overcome. Although the court's evaluation of the medical proof might be open to debate, the case demonstrates that care and thoroughness are required to establish the defense of sterility. Similarly, a medical opinion that a semen specimen represented a very poor specimen for successful insemination and satisfactory fertility purposes so that the consensus of medical opinion would be that such was not adequate to impregnate was held to

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153 Houston v. Houston, 199 Misc. 469, 99 N.Y.S.2d 199 (1950); Dunbar v. Dunbar, 191 Misc. 236, 77 N.Y.S.2d 586 (1948).
154 Hughes v. Hughes, 125 Cal. App.2d 781, 271 P.2d 172 (1954); Note, 28 So. CAL. L. REV. 185 (1955).
155 *In re* Kessler's Estate, 76 S.D. 158, 74 N.W.2d 599 (1956).
156 Lyons v. Scott, 181 Cal. App.2d 787, 5 Cal. Rptr. 529 (1960); Hogeboom v. Hurlburt, 207 Misc. 992, 141 N.Y.S.2d 691 (1955); Potasz v. Potasz, 68 Cal. App.2d 20, 155 P.2d 895 (1945).
157 199 Misc. 469, 99 N.Y.S.2d 199 (1950).
158 HOTCHKISS, FERTILITY IN MEN 102 (1952).
159 Houston v. Houston, 199 Misc. 469, 99 N.Y.S.2d 199, 205 (1950).

be important evidence, but not sufficient to overcome overwhelming evidence favorable to the complainant.[160]

Applying the rule that a trial court will not be reversed if there is substantial evidence to support its finding, the California Supreme Court held that proof of prior injury and sterility which might not have existed at the time of conception was insufficient to upset the finding of paternity.[161]

Uncontradicted medical proof of sterility following a successful vasectomy has been held not to be conclusively binding upon the trier in determining a motion for summary judgement, when there is lay testimony to the contrary. This was held to be true even though the lay testimony consisted only of sexual relations between the parties, and there was the child to prove it.[162]

The latter two cases are more of procedural significance rather than of determining the weight of such proof. When the issue is close, it has been held to be error to fail to grant an adjournment to permit counsel to prove sterility.[163] The Wisconsin Supreme Court has dealt with sterility as a defense in a paternity case on only one occasion. It was then held error for the trial court to take judicial notice that sterility resulting from mumps is intermittent, when there is medical opinion that the defendant was sterile during the conceptive period based upon findings of a current azoospermia and history of infection resulting from mumps.[164]

Use of Blood Tests

Alexander S. Wiener, one of the foremost American experts in the field of blood testing, has observed that the difficulty of establishing paternity has been recognized from the earliest Biblical times. He wrote that according to the Talmud no man may swear that he is the father of a child; only the woman may swear that she is the mother.[165] Another has said that maternity is a matter of fact, paternity is a matter of opinion.[166]

Thus, importance of blood tests in disputed paternity cases is dramatized by the fact that the possibility of excluding one who is in fact not the father is estimated to be at least 50 per cent when three basic blood group systems are employed.[167] The chances of proving non-paternity vary with the blood group of the individual and to some extent with

[160] De Angelis v. Guiseppe, 276 App. Div. 1102, 97 N.Y.S.2d 486 (1949).
[161] Krog v. Krog, 32 Cal.2d 812, 198 P.2d 510 (1948).
[162] Crepaldi v. Wagner, 132 So.2d 222 (Fla. 1961).
[163] Dept. of Pub. Welfare, City of New York v. Hamilton, 282 App. Div. 1025, 126 N.Y.S.2d 240 (1953).
[164] Timm v. State, 262 Wis. 162, 54 N.W.2d 46 (1952).
[165] Wiener, *Parentage and Blood Groups*, SCIENTIFIC AMERICAN, July 1954.
[166] GRADWOHL, LEGAL MEDICINE 565 (1954).
[167] GRADWOHL *op cit supra* note 166, at 546; Sussman, *Blood Grouping and Disputed Paternity*, 40 AMERICAN J. OF CLINICAL PATHOLOGY 38 (1963); REGAN AND MORITZ, HANDBOOK OF LEGAL MEDICINE 182 (1956); Cortese v. Cortese, 10 N.J. Super. 152, 76 A.2d 717 (1950).

the group distribution within the population.[168] New discoveries, of which the medical literature abounds almost monthly, raise the theoretical estimate to a present peak of seventy to eighty per cent or even higher, if the rare anti-sera and the latest achievements with inheritable serum are used.[169] No matter how many different blood tests are discovered, there will always be the chance that a man will have the incriminating blood type whether he is the father or not.[170]

European courts utilized the results of blood tests as early as 1924, but the first reported case in United States appeared in 1931.[171] Wisconsin was the second state to adopt legislation making proof of the results of blood test evidence in disputed paternity cases. The statute was first passed in 1935, and its 1939 amendments were drafted by Professor Wigmore. It was described as a model for future legislation, because it was comprehensive and embraced all of those features thought to be desirable.[172]

In 1952 the National Conference of Commissioners on Uniform Laws approved the Uniform Act on Blood Tests to Determine Paternity.[173] The Wisconsin statute governing blood tests and the uniform act are generally alike except in two instances. The former has broader provisions concerning the submission to these tests of those persons subject to the court's order. However, the Wisconsin statute does not permit admission of the results of a test to prove paternity, as does the uniform act under certain conditions.

It is not the purpose of the writer to attempt a detailed analysis or description of blood grouping tests, but a rudimentary understanding of the basic principles underlying serological blood tests is necessary to intelligently try a paternity action. Comprehensive discussions of the mechanics and principles employed can be found in a great number of legal and medical writings.[174]

In 1900 Karl Landsteiner, a famous pathologist, published the

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[168] GONZALES, VANCE, HELPERN & UMBERGER, LEGAL MEDICINE, PATHOLOGY & TOXICOLOGY 639 (2d ed. 1954); Schapiro, *Serology & Genetics of a "New" Blood Factor Hr*, 11 JOURNAL OF FORENSIC MEDICINE 52 (1964).

[169] Henningsen, *Some Aspects of Blood Grouping in Cases of Disputed Paternity in Denmark*, 2 METHODS OF FORENSIC SCIENCE 209-210 (1963); see 82 SCIENCE NEWS LETTER 256 (1962); BOYD, FUNDAMENTALS OF IMMUNOLOGY 230 (3rd ed. 1957); REGAN AND MORITZ, *op. cit. supra* note 167, at 182.

[170] Wiener, *supra* note 165.

[171] Commonwealth v. Zammarelli, 17 Pa. D. & C. 229 (1931); Maguire, *A Survey of Blood Group Decisions and Legislation in the American Law of Evidence*, 16 So. CAL. L. REV. 161 (1943).

[172] SCHATKIN, DISPUTED PATERNITY PROCEEDINGS 229 (3rd ed.).

[173] 9 Uniform Laws Annotated 102, adopted by six states as of 1964.

[174] ANDRESON, THE HUMAN BLOOD GROUPS (1952); GONZALES, VANCE, HELPERN & UMBERGER, *op. cit. supra* note 168; Wiener, *supra* note 165; Comment, *Evidence—The Use of Blood Tests in Disputed Parentage Cases*, 50 MICH. L. REV. 582 (1952); Comment, *From Here to Paternity; Blood Grouping Tests in Bastardy and Divorce Proceedings*, 3 S.D. L. REV. 125 (1958); Note, *Medicolegal Aspects of Blood Grouping Tests in Paternity Suits*, 21 U. PITT. L. REV. 85 (1959).

results of investigations concerning the clumping of blood upon transfusions. He found that when the serum and blood cells of certain people were mixed specific reactions occurred between the red cells and specific substances in the sera. These reactions were demonstrated to result from normal properties of blood. The most important of these is iso-agglutination in which the serum of one group agglutinates the red blood cells of another.

In the blood cells there are substances called agglutinogens of which there are different types. The presence of the types of agglutinogens is dependent upon laws of heredity. If a type of agglutinogen is not present, there will be present an anti-substance in the serum which is known as an agglutinin. It is this anti-substance which causes blood cells of another type to clump. This process can be seen by the naked eye. By testing bloods with sera containing different agglutinins, the type of blood can be determined. The sera is verified by using known blood types.

Landsteiner found that there were two major types of agglutinins which he designated anti-A and anti-B. This led to the discovery of a system of blood grouping called the A B O method in which there were four blood types, O, A, B, and AB. For his work Landsteiner received the Nobel prize in 1930. Soon thereafter another independent system, the MN system, was discovered which was then followed by the Rh -Hr system. By 1955 ten different major blood groups were found together with new factors refining the tests. In addition, there are many other groups of occurrence, some of which are limited to individual families.[175] In 1952 the Medicolegal Committee of the American Medical Association approved the use of the ABO, MN, and the Rh-Hr systems.[176] However, the courts have given results based on other systems evidentiary weight.[177]

The type of agglutinogen and other properties present in blood is governed by heredity. All hereditary characteristics are governed by the presence of at least one pair of factors called genes which are present in the nuclei of the cells of each individual. In the process of reproduction, one gene of each pair is derived from the maternal organism and the other from the paternal organism. If the two genes governing a character are alike in the maternal and paternal organism, the characters concerned are transmitted unchanged to the child. The two genes might be unlike and in such case a new combination will arise in the child. Hence, when the blood groups of the father and mother are known, it is possible to predict the types the child might have within the various groups. Conversely, when the blood group of a child is incompatible with that of the alleged father, according to the rules of

[175] Sussman, *Human Blood Groupings*, 2 TRAUMA No. 6, 50, 54 (1960).
[176] 149 A.M.A.J. 699 (1952).
[177] Groulx v. Groulx, 98 N. Hamp. 481, 103 A.2d 188 (1954).

heredity, non-paternity is established. Another way of putting it is that within each system certain constellations cannot occur among a mother, child, and the biological father. If such occurs the alleged father cannot be the natural father.[178]

For example, assume the mother to be of type N, the child of type MN, and the alleged father N. The man cannot be the father because agglutinogen M is lacking in both the mother and alleged father. It is the possible multiple combinations produced by the various types within each group which produces the definitive character of the tests. Wiener estimates that at least 288 different combinations are possible when the three basic systems are used.[179]

The evidentiary conclusiveness given an exclusionary result rests upon several biological characteristics of the blood as well as fixed hereditary principles. Blood grouping is demonstrable with comparative ease and extreme accuracy. One's blood grouping remains constant throughout one's life. Rare genetic phenomenon can occur and thus do not permit absolute certainty, but the tests are believed to be 99.99 per cent or more accurate.[180]

Although the reactions are easily observed, and the principles upon which the tests are founded are reliable, there are significant sources of error in conducting the tests.[181] These errors can be either administrative or technical. The source of administrative errors can be reduced by the adoption of standards and techniques assuring identity of blood tested as being that of the parties involved. This can be insured by requiring the parties to appear together at the laboratory. Proper identification and labeling of specimens; maintenance of quality controls of the blood specimens, serums, and reagents; cross checking of results and the conducting of independent duplicate tests are also necessary procedures. An examiner fully versed in serological methods and problems assures the installation of effective standards and adherence to those standards.

Skills are necessary to discern the possible effects of disease, temperatures, existence of rare blood groups, phenomena such as rouleaux formation, weak testing serums, atypical or irregular agglutination occurring in about three per cent of human sera, the bacteriogenic agglutination resulting from stale specimens, and the remote possibility of a mutation as an exception to the genetic laws.

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178 HENNINGSEN, *supra* note 169, at 209.

179 REGAN & MORITZ, *op. cit. supra* note 167, at 182.

180 HENNINGSEN, *supra* note 169, at p. 209; see supporting authorities cited in ROSS, *The Value of Blood Tests as Evidence in Paternity Cases,* 71 HARV. L. REV. 466 (1958).

181 ANDRESON, *op. cit. supra* note 174; Littell and Sturgeon, *Defects in Discovery and Testing Procedures: Two Problems in Medicolegal Application of Blood Grouping Tests,* 5 U.C.L.A. L. REV. 629 (1958); Ross, *supra* note 180, at 466; SCHATKIN, *op. cit. supra* note 172, at 203; GONZALES, VANCE, HELPERN & UMBERGER, *op. cit. supra* note 168, at 638; HENNINGSEN, *supra* note 169, at 209.

The reliability of medicolegal conclusions of blood tests is statutorily protected by the insistence upon examiners who are specialists in clinical pathology and the provision for their cross-examination. Because the determinations are schematic and independent of the other aspects of the parties' testimony, it is the general practice in Milwaukee County to accept a letter from the examiner certifying the results as evidence of the results. This is merely a rule of convenience which is practiced without objection by counsel.

Because the blood of a newborn child may not be fully developed, blood tests are usually postponed until the child is at least one month old. (Where the issue of paternity of an unborn child is raised in a divorce action, once the party raising such issue desires to have blood tests made, the trial court may adjourn the action on its own motion.[182]) The tests may be taken only by a duly qualified physician who has specialized in the field of clinical pathology or who holds a certificate from the American Board of Pathology. If an exclusion is established by the first test, a second test may be ordered by an independent physician similarly qualified.

The Wisconsin statute permits any party to request tests of the child, mother, defendant, and any male witness who has testified and who is directly involved in the controversy if such is relevant. Whenever there is evidence that the defendant or another male or males had sexual intercourse with the complainant during the conceptive period, the tests become relevant because of the possibility of excluding the defendant or the other males.[183] However, the phraseology of the statute limits tests of males other than the defendant to those who have testified and are involved in the controversy. This reaches those who come forward and admit having sexual relations with the complainant during the conceptive period, but not those whose names are suggested as paramours. If neither the defendant nor the other admitting male is excluded, and the trier is satisfied that both had intercourse with the complainant during the conceptive period, neither can be found to be the father.[184] However, if the other males are excluded, the defendant remains in the controversy.

In a relatively recent case, three men other than the defendant came forward and admitted having sexual relations with the complainant during the conceptive period. Although the defendant had admitted having sexual relations with the complainant during the conceptive period, and all three of the other male witnesses were excluded by the blood test, the defendant was nevertheless found not to be the

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[182] Limberg v. Limberg, 10 Wis.2d 63, 102 N.W.2d 103 (1960).

[183] Anthony v. Anthony, 9 N.J. Super. 411, 74 A.2d 919 (1950).

[184] Johnson v. State, 133 Wis. 453, 113 N.W. 674 (1907); Busse v. State, 129 Wis. 171, 108 N.W. 64 (1906); Baker v. State, 47 Wis. 111, 2 N.W. 110 (1879).

father because of the court's belief of promiscuity on the part of the complainant with still others during the conceptive period.[185]

In Milwaukee County the defendant is fully advised by the court or the corporation counsel of his right to a blood test, but he is told that the responsibility of arranging the test is upon him. He is also told that the court's clerk will arrange the first test at a specified clinic if he desires to use such facilities. This is done merely as an administrative convenience to expedite the testing and reporting. The defendant is warned that failure to appear at the appointed time may constitute a waiver of his right, and others are warned that they may be punished for contempt for failure to appear.

The right is, of course, a substantial one and its granting is mandatory upon the court. Final hearings are not set until the child is at least one month of age, and there has been ample time for the taking and reporting of the tests.[186] There is considerable evidence that admissions of paternity frequently are made in error because of the results of blood tests.[187] A court may order blood tests upon its own motion in the absence of specific statutory authority.[188] Fees are advanced by the County in accordance with the statute; hence, the indigent is not deprived of the right to a blood test.

Some difficulty occurs when the infant child has been adopted prior to the testing because of the policy against disclosure of the identity of adoptive parents. Usually, arrangements can be made to have the child appear at the clinic at a different date than the parties to the dispute so that the identity of the adoptive parents is not divulged.

The statutes provide that all arrangements are to be made by the requesting party and failure to have the test performed before trial constitutes a waiver unless there is a good cause to the contrary. It is generally held that a delay in requesting blood tests constitutes a waiver within the discretion of the court.[189]

As first written the statute did not make an exclusion conclusive proof of non-paternity.[190] In *Prochnow v. Prochnow*[191] a trial court, upon a record establishing intercourse between husband and wife during the conceptive period, found the husband to be the father of a child

[185] State *ex rel.* Carley v. Riche, Milwaukee County Court, XR 13-245.
[186] For a comparable policy followed in other jurisdictions, see Fowler v. Rizzuto, 121 N.Y.S.2d 666 (Ct. of Special Sessions, 1953); Gilpin v. Gilpin, 197 Misc. 319, 94 N.Y.S.2d 706 (1950).
[187] Sussman, *supra* note 167, at 38.
[188] State v. Eli, 62 N.W.2d 469 (N.D. 1954); Parsons v. Parsons, 197 Ore. 420, 253 P.2d 914 (1953); State *ex rel.* Wollock v. Brigham, 72 S.D. 278, 33 N.W.2d 285 (1948).
[189] Adams v. District of Columbia, 109 A.2d 140 (Munic. Ct. App. D.C. 1954); Commonwealth v. Dean, 172 Pa. Super. 415, 94 A.2d 59 (1953); Jensen v. Jensen, 13 N.J. Super. 155, 80 A.2d 244 (1951).
[190] Wis Stat. §325.23 (1935).
[191] 274 Wis. 491, 80 N.W.2d 278 (1956).

despite his exclusion by blood tests. Upon appeal the decision was sustained by a 4-3 majority. Although recognizing the possibility of human error in blood testing as in other procedures, the minority of the court urged that they should not wait for the Legislature to take the initiative to adopt what science conclusively establishes as factual. A few years later the Legislature made proof of non-paternity by blood tests conclusive evidence.

Because of the remote possibilities that an exception may occur to the genetic laws, complete accuracy has not always been claimed; however, it has been estimated that exclusionary results are correct in 99.99 per cent or more of the cases.[192] This almost absolute certainty when compared to a determination based upon problematical circumstantial evidence and the credibility of the respective parties justifies the evidentiary force accorded by the Legislature. Courts have taken judicial notice of medical opinions and legal authorities recognizing the reliability, accuracy, and value of blood test exclusions.[193] Because science cannot positively establish as yet who is the father, a non-exclusionary result generally has no probative value and is inadmissible. As a matter of fact, the admission into evidence of a non-exclusionary result is prejudicial error in most jurisdictions. This is because an aura of medical fact may be attached to it by the jury, thus misleading it to believe that the tests do have probative value.[194]

This is in great contrast to the trial of paternity actions under Danish law. Although all are not used, eleven systems of blood groupings are recognized by the University Institute of Forensic Medicine of Copenhagen. Information obtained from blood tests may be to the effect that the putative father (1) cannot be excluded because the tests yield information neither for or against paternity, (2) cannot be excluded but corroborates the assumption of non-paternity to a greater or lesser degree, (3) cannot be excluded and the blood tests corroborates the assumption of his paternity to a greater or lesser degree, or (4) paternity is excluded which information, however, may be of varying reliability according to the system and exclusion type in question. Acquittals may be had if the circumstances indicate the defendant's paternity to be "little probable." If two men are involved, a judgment of

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[192] Ross, *supra* note 180, at 468.

[193] United States *ex rel.* Dong Wing Ott v. Shaughnessy, 116 F. Supp. 745 (S.D. N.Y. 1953); Cortese v. Cortese, 10 N.J. Super. 152, 76 A.2d 717 (1950); Comm'r. of Welfare *ex rel.* Tyler v. Costonie, 277 App. Div. 90, 97 N.Y.S.2d 804 (1950).

[194] State *ex rel.* Isham v. Mullally, 15 Wis.2d 249, 112 N.W.2d 701 (1961); People v. Nichols, 341 Mich. 311, 67 N.W.2d 230 (1954); Miller v. Domanski, 26 N.J. Super. 316, 97 A.2d 641 (1953); State *ex rel.* Freeman v. Morris, 156 Ohio St. 333, 102 N.E.2d 450 (1951); Houston v. Houston, 199 Misc. 469, 99 N.Y.S.2d 199 (1950); Dunbar v. Dunbar, 191 Misc. 236, 77 N.Y.S.2d 586 (1948).

paternity can be made if the paternity of one man is "more probable than the paternity of any other man in the case."[195]

The Uniform Blood Test Act recognizes the advancement in the field of blood tests by making admissible an expert opinion that the blood tests show the possibility of the alleged father's paternity because of the infrequent blood type found to be present. The admissibility of the opinion rests in the court's discretion.[196]

A final question to be considered is whether one can be ordered to take a blood test against his will. Upon this issue two United States Supreme Court cases are usually cited for consideration of the due process problem. The forcible use of a stomach pump to secure evidence of narcotics from the person of a suspect has been held violative of due process under the Fourteenth Amendment.[197] But the taking of a blood test by a skilled technician from one who was unconscious was held not to be "conduct that shocks the conscience" or offends a "sense of justice."[198] Justice Clark writing for the majority stated:

> Furthermore, since our criminal law is to no small extent justified by the assumption of deterrence, the individual's right to immunity from such invasion of the body as is involved in a properly safeguarded blood test is far outweighed by the value of its deterrent effect due to public realization that the issue of driving while under the influence of alcohol can often by this method be taken out of the confusion of conflicting contentions.[199]

Three members of the Court dissented.

The Wisconsin Supreme Court has held that the taking of blood tests in drunken driving or homicide cases does not violate the state constitution in reference to the privilege against self-incrimination.[200] The taking of blood for a test while a defendant in a criminal action was in an unconscious or semi-conscious state and not under arrest has been held to violate the state constitution as an unreasonable search and seizure, because the defendant was not under arrest.[201] It was also held that the circumstances there constituted a violation of the due process clause; however that statement was withdrawn on rehearing. It should be noted that the *Kroening* case precedes the *Breithaupt* case in point of time. Other state courts have held that the use in evidence of blood tests taken against a defendant's will does not violate one's

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[195] HENNINGSEN, *supra* note 169, at 220.

[196] See Commissioners' Prefatory Notes, 9 Uniform Laws Annotated 102.

[197] Rochin v. California, 342 U.S. 165 (1952).

[198] Breithaupt v. Abram, 352 U.S. 432 (1956).

[199] *Id.* at 440-41.

[200] State v. Kroening, 274 Wis. 266, 80 N.W.2d 816 (1956); City of Barron v. Covey, 271 Wis. 10, 72 N.W.2d 387 (1955).

[201] State v. Kroening, 274 Wis. 266, 80 N.W.2d 816 (1956).

right against self-incrimination,[202] against unreasonable search and seizure,[203] of due process,[204] and/or his right of privacy.[205]

The effect of the statutory provision that the fact of a refusal of a party to submit to a test may be disclosed on trial was considered by a Milwaukee County circuit court recently.[206] In that matter the guardian *ad litem* of a child whose paternity was challenged in a divorce proceeding objected to submitting the child to a blood test for the reason that such might destroy the presumption of legitimacy. It was argued that the exclusive remedy provided by the legislature was that the fact of the refusal could be introduced into evidence. The court held that the statute provided an evidentiary alternative which permitted the requesting party to insist upon a court order for a blood test, or to merely stand upon his right to call this fact to the attention of the trier of the fact.

A New Jersey court has interpreted similar statutory language not to imply a privilege of declination to submit to a blood test in a paternity action.[207] The uniform act on blood tests to determine paternity provides that if any party in a civil action refuses to submit to a blood test the court may resolve the question of paternity against such party or enforce its order if the rights or interests of justice so require.[208] Of course, a person may be deprived of his right to a blood test if the child dies before a test can be made.

When Did It Happen?—Duration of Pregnancy

If none of the foregoing defenses are available to the defendant, he remains confronted with the complainant's testimony that he had sexual relations with her during the conceptive period. Before the trier can make a finding of paternity it must be satisfied that the defendant had sexual intercourse with the complainant during a time which in the ordinary course of nature would have caused the conception.[209] If the complainant's testimony concerning the time of the defendant's alleged impregnating act is incompatible with medical science, the credibility of her evidence is either destroyed or shaken to the extent of its improbability. The improbability might be sufficient to result in a failure to fulfill the required burden of proof.[210] Thus the inquiry requires a

[202] State v. Alexander, 7 N.J. 585, 83 A.2d 441 (1951); Commonwealth v. Statti, 166 Pa. Super. 577, 73 A.2d 688 (1950); Davis v. State, 189 Md. 640, 57 A.2d 289 (1948).
[203] State v. Alexander, *supra* note 202.
[204] State v. Alexander, *supra* note 202; United States *ex rel.* Dong Wing Ott v. Shaughnessy, 116 F. Supp. 745 (S.D.N.Y. 1953).
[205] State v. Alexander, *supra* note 202.
[206] Fairbanks v. Fairbanks, Milwaukee County Circuit Court, 310-829 (1964).
[207] Cortese v. Cortese, 10 N.J. Super. 152, 76 A.2d 717 (1950).
[208] 9 Uniform Laws Annotated 102.
[209] Sonnenberg v. State, 124 Wis. 124, 102 N.W. 233 (1905).
[210] State *ex rel.* Isham v. Mullally, 15 Wis.2d 249, 112 N.W.2d 701 (1961), (clear and satisfactory preponderance); Gillis v. State, 206 Wis. 150, 238 N.W. 804 (1931), (beyond reasonable doubt).

medical determination of when the complainant became "enciente with child." Because the date of birth usually is readily established and not in issue, the determination of time of conception depends upon the actual duration of the pregnancy. In the aptly descriptive words of one writer, the problem becomes one of the "mathematics of motherhood," or man's law of paternity versus nature's laws of gestation.[211]

Section 891.395 provides as follows:

> In any paternity proceeding, where the child whose paternity is at issue weighed 5½ pounds or more at the time of its birth, the testimony of the mother as to such weight shall be presumptive evidence that the child was a full term child, unless competent evidence to the contrary is presented to the court. The conception of such child shall be presumed to have occurred within a span of time extending from 240 days to 300 days before the date of its birth, unless competent evidence to the contrary is presented to the court.

Weight is medically and legally taken as the main index of the gestative age with 5½ pounds being the upper limit of prematurity. This figure is based upon statistical studies and upon experience demonstrating that if all other things are equal such infants can survive as well as larger infants.[212]

Length is also a guide to the gestative maturity of the child. The average length of white males at birth is twenty inches; females and Negro infants are slightly shorter. The lower limit of the length of a normal term infant is set at eighteen inches. There is some divergence of opinion as to whether length or weight is a better index to the maturity of the newborn infant.[213] It is interesting to note that Negro babies weigh about one-half pound less than white babies and are slightly shorter.[214] Such fact might have legal significance in a given case concerning the operation of the statutory presumptive period of gestation.

These figures are approximations and some full term infants might not attain such sizes or weights. Weight and length might be affected by illness of the mother. The presumption by its terms yields to medical testimony. Furthermore, a child physically normal can result from a pregnancy which ended five weeks earlier or later than the normal term, and an eight month child can be as mature as a full term child. Lack of hair or incompletely developed fingernails or toenails are also evidence of prematureness.[215]

The average duration of a pregnancy or a normal period of gestation

[211] Peer, *Mathematics of Motherhood,* POSTGRADUATE MEDICINE, Vol. 28, p. 48, Vol. 29, p. 44 (1960 and 1961).
[212] EASTMAN & HILLMAN, WILLIAMS OBSTETRICS 1066 (12th ed. 1961).
[213] See EASTMAN & HILLMAN, *op. cit. supra* note 212, at 1066 and Culiner, *Trauma to the Unborn Child,* 5 TRAUMA No. 1, 34 (1963).
[214] Culiner, *supra* note 213, at 34.
[215] Daegling v. State, 56 Wis. 586, 14 N.W. 593 (1883).

is 280 days, 40 weeks, or ten lunar months as measured from the first day of the last menstruation period to birth. The average duration is 282 days.[216] Usually the complainant's history of her last menstrual period is unreliable. Hence a calculation from that point is untrustworthy and the importance of the statutory presumption becomes manifest. The interval between the first day of menstruation[217] and ovulation averages thirteen days. Ovulation is the process of the maturation of an ovum, the reproductive cell of the female, and its escape from the ovary into the uterine tube where it is available for fertilization for about fifteen to sixteen days.[218] Thereafter menstruation occurs and the cycle is repeated.

The mean duration of actual pregnancy counting from the day of conception is thought to be 267 days[219] and averages between 266-270 or 268-272 days depending upon the statistical study used.[220] These averages are not critical because variations in the duration of pregnancies are great. Pregnancy occurs usually from 24 to 48 hours after intercourse[221] but can occur as late as 60 hours thereafter.[222]

It is customary to estimate the expected delivery date by counting back three months from first day of last menstrual period and adding seven days. This rule of thumb which is referred to as Naegle's rule and the aforementioned averages are not critical because studies reveal that only five per cent of pregnant women deliver on the calculated day, 35 per cent deviate one to five days either way, and the majority deliver beyond these periods. Prolongation by two or three weeks is common.[223] For slightly different but generally confirming data, see *Trauma to the Unborn Child.*[224]

These variations occur because ovulation does not consistently occur at the same time during the cycle, and because the menstrual cycle itself varies. The average menstrual cycle is twenty-eight days, but there

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[216] EASTMAN & HILLMAN, *op. cit. supra* note 212, at 221; see Culiner, *supra* note 213, at 31; State *ex rel.* Isham v. Mullally, 15 Wis.2d 249, 112 N.W.2d 701 (1961); Timm v. State, 262 Wis. 162, 54 N.W.2d 46 (1952); State v. Van Patten, 236 Wis. 186, 294 N.W. 560 (1940); Boudinier v. Boudinier, 240 Mo. App. 278, 203 S.W.2d 89 (1947); Dazey v. Dazey, 50 Cal. App.2d 15, 122 P.2d 308 (1942); Commonwealth v. Kitchen, 299 Mass. 7, 11 N.E.2d 482 (1937); *In re* McNamara's Estate, 181 Cal. 82, 183 Pac. 552 (1919).

[217] Menstruation is defined as the periodical physiological discharge of blood, mucous, and cellular debris from the uterine mucosa at more or less regular intervals except during pregnancy or lactation from puberty to menopause.

[218] See Steed v. State, 80 Ga. App. 360, 56 S.E.2d 171 (1949).

[219] EASTMAN & HILLMAN, *op. cit. supra* note 212, at 221.

[220] See EASTMAN & HILLMAN, *op. cit. supra* note 212, at 221 and Culiner, *supra* note 213, at 30, 31.

[221] Peer, *Mathematics of Motherhood,* 29 POSTGRADUATE MEDICINE 44 (1961); GONZALES, VANCE, HELPERN & UMBERGER, LEGAL MEDICINE, PATHOLOGY & TOXICOLOGY 562 (2d ed. 1954).

[222] ISRAEL, MENSTRUAL DISORDERS & STERILITY 563 (4th ed. 1959).

[223] EASTMAN & HILLMAN, *op. cit. supra* note 212, at 221.

[224] Culiner, *supra* note 213, at 31.

is no perfect regularity. The average normal menstrual duration is from four to six days; a two to eight day period is physiological.[225]

The courts have recognized that almost all children are born after 280 days or within one or two weeks of that point.[226] Anything beyond 300 days is quite exceptional, and each day thereafter intensifies the exceptional character of the pregnancy.[227] It has been said that there are authenticated cases when the period exceeded 320 days. Instances have been vouched for by reputable authorities in which the pregnancy exceeded 330 days;[228] however, these cases are usually suspect medically because of possible menstrual irregularities, or because the mother might have been mistaken concerning the date of her last period.[229] Schatkin also reports pregnancies known to extend 323, 324, and 336 days.[230] In actions challenging the legitimacy of a child, the English courts have recognized pregnancies asserted to have been from 331 to 346 days.[231] Our courts have accepted as true alleged durations of 299 to 336 days and in other circumstances rejected those alleged to last from 305 to 365 days.[232]

Prolonged pregnancies have been associated with anencephalic infants. Medical authorities report the termination of a pregnancy involving such a child after one year and 24 days after the last menstrual period.[233]

Conception may take place during a period of amenorrhea, absence of menses, and particularly during lactation; hence in those situations calculation by Naegle's rule is foreclosed.

It must be emphasized that the statutory presumption of the conceptive period applies only when there is no medical testimony to the contrary. Prior to the enactment of the statute, the Wisconsin Supreme Court on several occasions held it error for the trial court to instruct or guide itself by what it thought the normal period to be when there was medical evidence to the contrary. An instruction that 270 to 290 days was the period of gestation was held to be in error when the only evidence was that of a doctor who stated that the period of gestation may vary from 230 to 320 days.[234] The court's use of medical evidence given in another case to the effect that the period of gestation may vary

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[225] EASTMAN & HILLMAN, *op. cit. supra* note 212, at 111.
[226] Boudinier v. Boudinier, 240 Mo. App. 278, 203 S.W.2d 89 (1947).
[227] *In re* McNamara's Estate, 181 Cal. 82, 183 Pac. 552 (1919).
[228] Steed v. State, 80 Ga. App. 360, 56 S.E.2d 171 (1949); Boudinier v. Boudinier, 240 Mo. App. 278, 203 S.W.2d 89 (1947); *In re* McNamara's Estate, 181 Cal. 82, 183 Pac. 552 (1919).
[229] EASTMAN & HILLMAN, *op. cit. supra* note 212, at 334.
[230] SCHATKIN, DISPUTED PATERNITY PROCEEDINGS 538-41 (3rd ed. 1933).
[231] EASTMAN & HILLMAN, *op. cit. supra* note 212, at 202 and Culiner, *supra* note 213 at 31.
[232] Peer, *Mathematics of Motherhood,* 28 POSTGRADUATE MEDICINE 50 (1960).
[233] EASTMAN & HILLMAN, *op. cit. supra* note 212, at 223; Culiner, *supra* note 213, at 31.
[234] State v. VanPatten, 236 Wis. 186, 294 N.W. 560 (1940).

from 230 days to 320 days, when there was medical testimony in the case before it that the period of pregnancy was 266 days and that the probable date of birth is determined by counting 280 days forward from the first day of the last menstruation, was also held to be error.[235]

The importance of medical testimony of the duration of pregnancy as a fact independent of the complainant's testimony, and its compatibility or inconsistency with her testimony as related to the burden of proof is demonstrated by a number of Wisconsin cases. In *Shewalter v. Shewalter*[236] the Wisconsin Supreme Court found upon medical testimony that a gestation period of 243 days resulting in a normal full term child was within the field of medical probability. On the other hand, upon the testimony of the complaining witness that her pregnancy was normal and that the child was born 320 days after the alleged intercourse, it was held that the defendant could not be the father beyond a reasonable doubt in the absence of medical evidence of a protracted pregnancy.[237] Similarly, medical evidence of a prolonged pregnancy or delayed birth was held to be necessary to convert a medical possibility into a factual probability when the alleged act of intercourse or conception was claimed by the complainant to have been 309 days before birth.[238] The court recognized the medical fact that conception can take place beyond the limits designated by the statute, but held that complainant's testimony to that effect created a mere possibility which does not meet the burden of a clear and satisfactory preponderance of the evidence in the absence of supporting medical testimony. These cases also demonstrate the yielding of the statutory presumption of the time of conception to medical testimony and its weight and operation in the absence of medical testimony.

It is not necessary, of course, to establish the exact date of intercourse. A finding of paternity will be sustained, if the act is proven to have occurred within the statutory period[239] or that period established by competent medical testimony. The Wisconsin Supreme Court, early in its history, stated that the birth of a child is liable to be accelerated or delayed by circumstances, and the question of when the complainant became pregnant is purely one of fact to be decided upon all of the evidence.[240]

For similar reasons a New York court[241] refused to make a finding of adultery even though it appeared there was no access by the husband, who had left the country 355 days prior to the birth of a child. Al-

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235 Timm v. State, 262 Wis. 162, 54 N.W.2d 46 (1952).
236 259 Wis. 636, 49 N.W.2d 727 (1951).
237 Gillis v. State, 206 Wis. 150, 238 N.W. 804 (1931).
238 State *ex rel.* Isham v .Mullally, 15 Wis.2d 249, 112 N.W.2d 701 (1961).
239 *Ibid.*
240 Baker v. State, 69 Wis. 32, 39, 33 N.W. 52, 55 (1887), citing 2 GREENLEAF, EVIDENCE §152.
241 Lockwood v. Lockwood, 62 N.Y.S.2d 910 (Sup. Ct. 1946).

though the average duration of a pregnancy is 265-272 days and anything beyond 300 days is exceptional, there was medical evidence of a delayed birth. A medical question as to whether the last forty days were a part of the period of gestation or due to difficulty in delivering the child, was present.

Presumptive signs of pregnancy are cessation of the menses, changes in the breasts, morning sickness, quickening, discoloration of the mucous membranes of the vagina, abnormalities of pigmentation, disturbances in urination, and fatigue.[242] In a healthy married woman who previously menstruated regularly, cessation thereof strongly suggests pregnancy. No great reliance should be put thereon until the lapse of ten days. Probable pregnancy is indicated after a second period is missed. Absence or delay of a menstrual period at this stage may be explained because of psychic influence, change of climate, disease, or fear of pregnancy.[243]

It is not uncommon that a pregnant woman might have one or two episodes of a bloody discharge during the first one-half of her pregnancy. Apparently, such is more common among women who have borne children previously.[244] Claims of menstruation throughout pregnancy are of doubtful authenticity and probably pathological. The Missouri Supreme Court has considered that continued menstruation or bleeding at regular periods as many as three times after pregnancy to be possible.[245]

Evidence that the complainant was unaware of her pregnant condition has been considered in several cases. A doctor's testimony that it was possible for a girl nineteen years of age to mistake pregnancy for another ailment up to the date of delivery was held to be competent. The doctor testified that he had seen at least three cases in his own practice where the mother did not know she was pregnant until the day of delivery.[246] Failure to comment upon or reveal a pregnant condition on the part of the complainant as a circumstance casting suspicion upon her story has been discounted because of evidence that the pregnancy did not change her appearance due to her great normal weight.[247]

In the absence of medical testimony, the courts have frequently resorted to taking judicial notice of certain of these medical facts. The California Supreme Court has held that while the period of gestation is one of fact, it is an operation of natural laws and therefore is a fact of which the court may take judicial notice. Thus the court is not confined to the evidence in the record, but may seek information else-

[242] EASTMAN & HILLMAN, *op cit. supra* note 212, at 275.
[243] *Ibid.*
[244] *Ibid.*
[245] Boudinier v. Boudinier, 240 Mo. App. 278, 203 S.W.2d 89 (1947).
[246] State v. Willing, 259 Wis. 395, 48 N.W.2d 236 (1951).
[247] State v. Bishop, 255 Wis. 416, 39 N.W.2d 399 (1949).

where, and particularly in published technical works and articles by those recognized as authorities in this branch of human knowledge.[248] It has been held by the Massachusetts Supreme Court that a judge as a trier of fact was entitled to take into consideration with the evidence of record other facts which were matters of common knowledge relating to the operation of nature. Hence, the possibility of some variation from the normal length of period of gestation was recognized as being a matter of common knowledge. However, the time to which the period might possibly extend is not a matter of common knowledge, if indeed it is a matter of exact scientific knowledge.[249] The Wisconsin Supreme Court has refused to consider excerpts from medical texts on appeal which were not used in the trial and therefore not part of the record. It was held that on a hearing of a writ of error which brought only the record before it, such use of medical texts was to be excluded.[250]

Obviously, the process of conception is a hidden one, and the organs perform their appropriate functions without the volition of the female and without her being conscious that the process is occurring. This leads to the rule that where the complainant has had intercourse with more than one man during the possible conceptive period, and a child has resulted, neither she nor anyone else can say with reasonable certainty as to who the father is. Any weighing of probabilities under such circumstances is but a matter of speculation.[251] This fact was recognized by the Wisconsin Supreme Court in 1879 in *Baker v. State*,[252] and the rule has been followed in a number of subsequent cases.[253] The rule would not apply, of course, in situations where the other man or men are eliminated by blood tests, racial or other possible hereditary characteristics.

A determination of the conceptive period also may become important in the event of a claim of sterility on the part of the defendant. Expert testimony based upon a history of mumps affecting the defendant's testicles, and a sterile semen specimen taken 21 months after the beginning of the complainant's conceptive period was held to warrant a dismissal where the mumps were contracted prior to the conception of the complainant's child.[254] The trial court's conclusion that sterility resulting from mumps was so well established to be intermittent that judicial notice could be taken thereof was rejected by the Wisconsin Supreme Court, because there was expert testimony that the sterility existed and was constant.

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[248] *In re* McNamara's Estate, 181 Cal. 82, 183 Pac. 552 (1919).
[249] Commonwealth v. Kitchen, 299 Mass. 7, 11 N.E.2d 482 (1927).
[250] Timm v. State, 262 Wis. 162, 54 N.W.2d 46 (1952).
[251] *In re* McNamara's Estate, 181 Cal. 82, 183 Pac. 552 (1919).
[252] 47 Wis. 111, 2 N.W. 110 (1879).
[253] Johnson v. State, 133 Wis. 453, 113 N.W. 674 (1907); Busse v. State, 129 Wis. 171, 108 N.W. 64 (1906); Daegling v. State, 56 Wis. 586, 14 N.W. 593 (1883).
[254] Timm v. State, 262 Wis. 162, 54 N.W.2d 46 (1952).

The mathematics of motherhood provide no rules of easy application to exclude paternity, but they do provide a means of measuring allegations in terms of probabilities, improbabilities, or certainties. Therefore, they have an important bearing upon the weighing of the credibility of evidence relating to the degree of proof required to sustain a finding of paternity.

Resemblance

Other than in blood testing, the use of heritable traits to determine paternity is presently largely limited to racial and unusual physical traits. Although individual traits as hair color, eye color, body build, head shape, and facial features are determined by heredity, so many other genetic and environmental factors are involved that resemblance of such traits in father and child is an unreliable means of determining parentage.[255] A startling statement to the contrary is that of Fredrich Keiter of the University of Wurzburg, Hamburg, Germany. He states that the data now at the disposal of the physical anthropologist contains sufficient information to determine accurately nineteen out of twenty times whether an individual is or is not the parent of a child in question. Such anthropological paternity testing is done by the polysymptomatic combination of "critical values" of the various heritable traits of which there are seventy usable traits including those used in blood grouping.[256]

Since early times mankind has recognized that frequently the physical appearance of a parent is passed on to the child. Nevertheless there is a substantial conflict of authority concerning the admissibility of evidence of physical resemblance or dissimilitude of the child to the putative father to determine paternity.[257] The reasons for the rule against admissibility of evidence of resemblance are set forth in *Clark v. Bradstreet.*[258] The Maine Supreme Court conceded that it may be a well known physiological fact that the peculiarities of form, features, and personal traits are often times transmitted from parent to child. However, the court held that it is equally true as a matter of common knowledge that the features of an infant change and that resemblance is readily imagined.

Professor Wigmore contends that the sound rule is to admit the fact of similarity of specific traits, either by testimony or by presentation of the child in court provided the child is, in the opinion of the trial court, old enough to possess settled features or other corporeal indications.[259] Many courts, while aware of the danger that a jury might

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[255] Wiener, *Parentage and Blood Groups,* SCIENTIFIC AMERICAN, July 1954.
[256] Keiter, *Advances in Anthropological Paternity Testing,* NS 21 American J. of Physical Anthropology 81 (1963).
[257] Annot., 40 A.L.R. 97 (1926), Annot., 95 A.L.R. 309 (1935).
[258] 80 Me. 454, 456 (1888); Annot., 40 A.L.R. 97, 137 (1926); Annot., 95 A.L.R. 309, 317 (1935).
[259] I. WIGMORE, EVIDENCE §166 (3rd ed. 1940).

find a fanciful or notional resemblance of the child to the putative father, nevertheless, will permit evidence of similarity of specific traits when the child is old enough to have settled features.[260] Some courts permit such proof without limitation,[261] and others hold that the youth of the child goes to the weight of the evidence rather than admissibility.[262]

Very early in its history, the Supreme Court of Wisconsin held that a child of less than one year could not be exhibited to a jury to prove resemblance on the theory that such evidence is too uncertain and fanciful.[263] However, it has been held not to be error to permit the complaining witness to hold the child while giving testimony when there was no attempt to exhibit the child to the jury.[264] Wisconsin recognizes an exception when the appearance of the child demonstrates a dissimilitude because of distinctive racial features inconsistent with parentage of the mother and the putative father.[265]

Generally, in those states which do admit evidence of resemblance, an exception is made when specific or particular marked physical characteristics are present. Wisconsin has indicated that it would be unwise to place too great a reliance upon like malformations found in both father and child.[266] Corporeal peculiarities which have been considered to be hereditary include peculiarly shaped ear tips,[267] presence of supernumerary fingers,[268] but not color of hair even though distinctive.[269]

In a 1951 Swiss paternity action, the use of expert testimony of hereditary likeness between the child and father to corroborate the complainant's assertions that the defendant was the father was approved by its high court, the Bundesgericht. The basis of the expert's testimony was likeness in skin, hair properties, eyebrows, color and structure of the iris of the eye, nose, mouth, chin, whole face, form of head, shape of ears, fingerprints, and an anomaly in the upper jaw structure.[270]

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[260] Lohsen v. Lawson, 106 Vt. 481, 174 Atl. 861 (1934); Flores v. State, 72 Fla. 302, 73 So. 234 (1916); Annot., 40 A.L.R. 97, 119 (1926); Annot., 95 A.L.R. 309, 316 (1935).

[261] Annot., 40 A.L.R. 97, 112 (1926); Annot., 95 A.L.R. 314, 315 (1935).

[262] Scott v. Donovan, 153 Mass. 378, 26 N.E. 871 (1891); Annot., 40 A.L.R. 97, 152 (1926); Annot., 95 A.L.R. 314, 319 (1935).

[263] Hanawalt v. State, 64 Wis. 84, 24 N.W. 489 (1885).

[264] State *ex rel.* Sarnowski v. Fox, 19 Wis.2d 68, 119 N.W.2d 451 (1963); Johnson v. State, 133 Wis. 453, 113 N.W. 674 (1907); Hofer v. State, 130 Wis. 576, 110 N.W. 391 (1907).

[265] Hanawalt v. State, 64 Wis. 84, 24 N.W. 489 (1885); Annot., 31 A.L.R. 1119 (1924); Annot., 40 A.L.R. 97, 130 (1926); Annot., 95 A.L.R. 314, 316 (1935).

[266] Hanawalt v. State, 64 Wis. 84, 24 N.W. 489 (1885).

[267] Lawhead v. State, 99 Okla. 197, 226 Pac. 376 (1924).

[268] People v. Kingcannon, 276 Ill. 251, 114 N.E. 508 (1916).

[269] Zell v. State, 15 Ohio App. 466 (1922).

[270] *Federal Court Permits Anthropologicoheredobiologic Proof of Paternity*, 91 SCHWIEZORISEKE, MEDIZINISCHE, WOCHENSCHRIFT, Part 2, 1541-42 (1961); See Hooton, *Medico-Legal Aspects of Physical Anthropology*, 15 ROCKY MT. L. REV. 208 (1942).

Proof of general resemblance is of limited practical significance, because most cases are tried during the child's infancy while there has not been sufficiant physical development to enable the layman to discern likeness or dissimilitude except possibly in reference to race.[271] Paternity trials are usually required to be held while the child is quite young because of the operation of the statute of limitations.[272] It may well be that the anthropologist as an expert can discern the critical hereditary traits in the physically developed infant and provide probative evidence in the resolution of paternity actions, but at the present time such proof has little significance in the trial of paternity actions.

Deception Tests

Because the complainant's accusation and the defendant's denial of intercourse between them is hardly a matter upon which either can be mistaken, the existence of willful perjury is almost always involved. Thus, there is a natural desire of the courts to resort to some absolute or foolproof method of ascertaining the truth. Dean Wigmore has written:

> . . . judicial practice is entitled and bound to resort to all *truths of human nature established by science,* and to employ *all methods recognized by scientists* for applying those truths in the analysis of testimonial credit.
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> Indeed, it may be asserted that the courts are ready to learn and to use, whenever the psychologists produce it, any method which the latter themselves are agreed is sound, accurate, and practical.[273]

LIE DETECTOR

The first mechanical deception testing technique which comes to mind is the lie detector. It is reported that some of the courts in Los Angeles and Cook counties have utilized polygraph tests in domestic and paternity actions.[274] Arther and Ried also relate that judges of the Chicago Court system have requested parties and witnesses to take the lie detector tests after they have testified in paternity cases. In a sample of 312 cases ninety-three per cent of the tested parties were determined to have lied in some respect concerning the alleged sexual relations. Sometimes complainants merely exaggerated the number of

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[271] Lay testimony has been permitted concerning a person's apparent race, and juries have been allowed to consider such by exhibition of the child. 2 JONES, EVIDENCE 756, 852. Perhaps the use of expert testimony for such proof might be more prudent.

[272] WIS. STAT. §893.195 (1965) provides that paternity actions must be commenced within five years of birth, but can be tolled by the issuance of a warrant or complaint within such time.

[273] III WIGMORE, EVIDENCE 875 (3rd ed. 1940).

[274] Pfaff, *The Polygraph: An Invaluable Judicial Aid,* 50 A.B.A.J. 1130 (1964); Arthur and Reid, *Utilizing the Lie Detector Techniques To Determine The Truth In Disputed Paternity Cases,* 45 J. OF CRIM. LAW, CRIMINOLOGY, AND POLICE SCIENCE 213 (1954).

times they had intercourse during the conceptive period with the defendant. Fifty-seven per cent of the male witnesses (other than the defendants) who had testified that they too had had sexual relations with the complainant during the conceptive period were found to have lied.[275] Judges who try many paternity cases are not startled by these fiigures. In fact, they constitute the reason for a search of better proof than testimonial evidence.

Judicial approval of the results of a lie detector test was first sought in 1923.[276] The court however then declined to admit the results of a systolic blood pressure deception test, because such had not yet gained general acceptance "among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from discovery, developments, and experiments thus far made."[277] Although years have passed by, the courts continue to reject testimony of the results of lie dectector tests because they have not yet attained scientific acceptance as a reliable and accurate means of ascertaining the truth.[278] Other objections are: the trier, particularly juries, might place too great a weight upon the examiner's interpretations of the results; such evidence violates the hearsay rule and usurps the function of the jury; and mandatory tests violate due process and the right against self-incrimination.

Although a number of trial courts have received evidence regarding the use and results of lie detector tests where the parties have stipulated to such,[279] the appellate courts which have considered the question of stipulation are divided in opinion. California, Iowa and Arizona admit such testimony,[280] Kansas has implied it would admit such evidence,[281] and Wisconsin, Michigan, Kentucky, New Mexico, and Illinois have rejected it.[282] The Kentucky court rejected the

[275] Arthur and Reid, *supra* note 274.

[276] Frye v. United States, 293 Fed. 1013 (D.C. Cir. 1923).

[277] *Id.* at 1014.

[278] Commonwealth v. Fatalo, 346 Mass. 266, 191 N.E.2d 479 (1963); People v. Zazzetta, 27 Ill.2d 302, 189 N.E.2d 260 (1963); State v. Arnwine, 67 N.J.Super. 483, 171 A.2d 124 (1961); Marks v. United States, 260 F.2d 377 (10th Cir. 1959); People v. Schiers, 160 Cal. App.2d 364, 324 P.2d 981 (1958); Lee v. Commonwealth, 200 Va. 233, 105 S.E.2d 152 (1958); Colbert v. Commonwealth, 306 S.W.2d 825 (Ky. Ct. App. 1957); Hawkins v. State, 222 Miss. 753, 77 So.2d 263 (1955); Commonwealth v. Dilworth, 179 Pa.Super. 64, 115 A.2d 865 (1955); Peterson v. State, 157 Tex. Crim. 255, 247 S.W.2d 110 (1952); Henderson v. State, 94 Okla. Crim. 45, 230 P.2d 495 (1951); People v. Wochnick, 98 Cal. App.2d 124, 219 P.2d 70 (1950); State v. Pusch, 77 N.D. 860, 46 N.W.2d 508 (1950); Boeche v. State, 151 Neb. 368, 37 N.W.2d 593 (1949); State v. Lowry, 163 Kan. 622, 185 P.2d 147 (1947); State v. Cole, 354 Mo. 181, 188 S.W.2d 43 (1945); People v. Becker, 300 Mich. 562, 2 N.W.2d 503 (1942).

[279] See Comment, 1943 WIS. L. REV. 430.

[280] State v. Valdez, 91 Ariz. 274, 371 P.2d 894 (1962); State v. McNamara, 252 Iowa 19, 104 N.W.2d 568 (1960); People v. Houser, 85 Cal. App.2d 686, 193 P.2d 937 (1948).

[281] State v. Lowry, 163 Kans. 622, 185 P.2d 147 (1947).

[282] People v. Zazzetta, 27 Ill.2d 302, 189 N.E.2d 260 (1963); State v. Trimble, 68 N.M. 406, 362 P.2d 788 (1961); Colbert v. Commonwealth, 306 S.W.2d

evidence because of the character of the stipulation, and the Wisconsin case is generally regarded to have been decided for the same reason.[283]

A proper stipulation for the use of such evidence should contain the agreement to submit to the test, designate the examiner, set forth the purpose, and stipulate to admissibility of results in the form of an opinion. It should permit the examiner to state his qualifications, procedure used, and the reasons for his opinions. Cross examination should be permitted. To avoid subsequent problems the matter of how expenses are to be paid should be determined. Finally, it should also contain a declaration that the parties understand that they are under no legal compulsion to submit to the tests. If the case is to be tried to a jury, it should be agreed that the court shall instruct the jury regarding the terms of the agreement and that the opinion should not be accepted as conclusive, but that it is to be considered with all of the evidence and be given that weight they believe it entitled.

Asking a witness whether he made himself available for a lie detector test has uniformly been held improper but not necessarily prejudicial error.[284] Similarly, a revelation or intimation by counsel to the jury that tests were taken is error, but such might not require reversal.[285] The inadmissibility of evidence of offers to submit to or of refusal to take a lie detector test follows as a corollary to the rule that the results of the tests are inadmissible.[286] Applications by a party for the right to be administered a lie detector test have been denied.[287]

Section 165.01(3)(a) provides that the state crime laboratory is to provide technical assistance to local officers, including services in the field of lie detector or deception tests. The statute further provides that upon a defendant's request in a felony case, and the court's approval, the department shall conduct analysis of a defendant's evidence in his behalf.[288] It has been held that this section does not require the laboratory to give a lie detector test to the defendant upon his request.[289]

825 (Ky. Ct. App. 1957); Stone v. Earp, 331 Mich. 606, 50 N.W.2d 172 (1951); LeFevre v. State, 242 Wis. 416, 8 N.W.2d 288 (1943).

[283] Comment, 6 S.D. L. REV. 136 (1961); Note, 15 ALA. L. REV. 248 (1963); Comment, 41 CHI.-KENT. L. REV. 115 (1964). *But see* Comment, 1943 WIS. L. REV. 430, 442.

[284] State v. Baker, 16 Wis.2d 364, 114 N.W.2d 426 (1962); Kaminski v. State, 63 So.2d 339 (Fla. 1953).

[285] People v. Adams, 182 Cal. App.2d 27 (1960); People v. Parrella, 158 Cal. App.2d 140, 322 P.2d 83 (1959); Marable v. State, 203 Tenn. 440, 313 S.W.2d 451 (1958); Lusby v. State, 217 Md. 191, 141 A.2d 893 (1958); People v. Schiers, 160 Cal. App.2d 364, 324 P.2d 981 (1958); People v. Aragon, 154 Cal. App.2d 646, 316 P.2d 370 (1957); Leeks v. State, 950 Okla. Crim. 326, 245 P.2d 764 (1952); State v. Kolander, 236 Minn. 209, 52 N.W.2d 458 (1952); People v. Wochnick, 98 Cal. App.2d 124, 219 P.2d 70 (1950).

[286] People v. Carter, 48 Cal.2d 737, 212 P.2d 665 (1957); Commonwealth v. Saunders, 386 Pa. 149, 125 A.2d 442 (1956); State v. Kolander, 236 Minn. 209, 52 N.W.2d 458 (1952).

[287] State v. Stidham, 305 S.W.2d 7, (Mo. 1957); State v. Cole, 354 Mo. 181, 188 S.W.2d 43, *motion to rehear denied,* 189 S.W.2d 541 (1945).

[288] WIS. STAT. §165.04(1) (1965).

[289] State v. Perlin, 268 Wis. 529, 68 N.W.2d 32 (1955). Dr. Sheppard in the cele-

Confessions made after one has voluntarily submitted to a lie detector test have been held admissible.[290] If the test is used as part of a coercive interrogation or applied without consent, then such a confession is not admissible.[291]

Due to the reasons for which the courts have rejected evidence of lie detector tests, their use in paternity cases in the future is doubtful. Perhaps there may be some area of permissible use and utility in large metropolitan court systems in which there is a substantial volume of paternity cases. Their use may lie in a pre-trial screening or evaluation process of the truthfulness of the complainant's story by the corporation counsel or by the district attorney's office. Overall, this may be substantially less expensive than the present method of conducting several hearings in each case. The tests need not be administered and used as mental blackjacks. However, many charlatans have entered the field and, to some degree, have discouraged a fresh reappraisal of any use of the device.[292]

Proponents of the use of lie detector tests argue that conscious perjury is too often triumphant over our present methods of ascertaining truth. Cross-examination requires cleverness and intuition not always possessed by the interrogator. Such skills, even when present, can be of no avail against a shrewd witness. Judges and juries, habitually and with the sanction of the law, make determinations of credibility by interpreting changes of appearance, expression, voice, respiration, or demeanor—just as the lie detector scientifically measures emotional indicia which is subject to interpretation by a skilled examiner and which may enable him to detect deception.[293]

Twenty-five years ago conservative experts claimed seventy-five per cent accuracy in detecting deception when the examination was conducted by a trained examiner. They believe that in twenty per cent of the cases the results were too indefinite or inconclusive for a definite diagnosis and that in the remaining five per cent the possibility of erroneous diagnosis existed.[294] More recent statistics cause its proponents to claim accuracy in 95 per cent of the cases, with four per cent

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brated *Sheppard* murder case was denied the opportunity of a lie detector test and hypnosis after conviction to show that he was not lying or to elicit forgotten facts establishing his innocence. State *ex rel.* Sheppard v. Koblentz, 174 Ohio St. 120, 187 N.E.2d 40 (1962). See 77 HARV. L. REV. 358 (1963).

[290] State v. Dehart, 242 Wis. 562, 8 N.W.2d 360 (1943); Tyler v. United States, 193 F.2d 24 (D.C. Cir. 1951); Commonwealth v. Jones, 341 Pa. 541, 19 A.2d 389 (1941); Commonwealth v. Hipple, 330 Pa. 33, 3 A.2d 353 (1939).

[291] Bruner v. People, 113 Colo. 194, 156 P.2d 111 (1945); People v. Sims, 395 Ill. 69, 69 N.E.2d 336 (1946).

[292] Three states have adopted legislation requiring examiners to be licensed for the purpose of assuring proper training, competency, and honesty. Smith-Hurd Ill. Anno. Stats., ch. 38 §202 (1966); Ky. REV. STATS., ch. 329 (1963); N.M. Stats., ch. 67, Act 31 (1965).

[293] McCormick, *Deception-Tests and the Law of Evidence,* 15 CAL. L. REV. 484 (1927).

[294] INBAU, LIE DETECTION AND CRIMINAL INTERROGATION 54.55 (1942).

inconclusive results and a maximum possible error of one per cent.[295] This is due to the improved technique. It has been observed that total accuracy has never been used as a standard for other types of scientific evidence.[296]

TRUTH SERUMS—NARCOANALYSIS

The use of drugs to obtain confessions or information is said to date back to 1200 B.C.[297] Historically wine is credited with being a "loosener of the tongue." Odysseus observed that wine even makes a wise man "blurt out what had been better left unsaid," and the Latin phrase "in vino veritas" translates to "the truth is in the wine."[298] Modern science is far more sophisticated, but as yet no court has admitted statements obtained by interrogation conducted while the subject was under the influence of a so-called truth serum.[299]

The attitude of at least one court is expressed as follows: "This court is not disposed to lead a safari into the jungle (*i.e.*, revision of the law of evidence) without first being satisfied that the new devices to be employed have obtained full scientific acceptance."[300]

There is of course no such thing as a truth serum. Certain drugs will induce a mental state of altered consciousness in which the individual loses the ability to critically survey his responses to questions. His answers are more or less automatic, and his capacity to associate thoughts and choose those to which he desires to give utterance is inhibited. Some drugs produce delirium with vivid hallucinations or confuse the subject's dreams and wishes with reality. Others produce a state of narcosis in which the subject's mind is fairly clear, but in which he is unable to critically censor any of his responses. This state of narcosis is believed to be the truth telling level.[301]

Narcoanalysis has been used as an aid in psychiatric examinations. The distinction is frequently made that statements obtained while the subject was under narcoanalysis are not admissible to prove the truth

[295] INBAU & RIED, LIE DETECTION AND CRIMINAL INTERROGATION 111-12 (3rd ed. 1953); Harmon & Arthur, *The Utilization of the Ried Polygraph By Attorneys and The Courts*, 2 CRIM. L. REV. 12 (1955); Arthur, *The Lie Detector—Has It Any Value?*, 24 FED. PROB. 36 (1960).

[296] Note, *Lie Detection—Admissibility Under Pre-Trial Stipulation*, 15 ALA. L. REV. 248 (1963).

[297] Polen, *The Admissibility of Truth Serum Tests*, 35 TEMP. L. Q., 401 (1962).

[298] See Depres, *Legal Aspects of Drug-Induced Statements*, 14 U. CHI. L. REV. 601 (1947); Moenssens, *Narcoanalysis in Law Enforcement*, 52 J. CRIM. LAW, CRIMINOLOGY AND POLICE SCIENCE 453 (1961).

[299] Dugan v. Commonwealth, 333 S.W.2d 755 (Ky. Ct. App. 1960); People v. Jones, 52 Cal.2d 636, 343 P.2d 577 (1959); State v. Sinnott, 24 N.J. 408, 132 A.2d 298 (1957); Lindsey v. United States, 237 F.2d 893 (9th Cir. 1956); State v. Thomas, 79 Ariz. 158, 285 P.2d 612 (1955); State v. Lindemuth, 56 N.M. 257, 243 P.2d 325 (1952); Henderson v. State, 94 Okla. Crim. 45, 230 P.2d 495 (1951); People v. Cullen, 37 Cal.2d 614, 234 P.2d 1 (1951); People v. McNichol, 100 Cal. App.2d 544, 224 P.2d 21 (1950); Orange v. Commonwealth, 191 Va. 423, 61 S.E.2d 267 (1950); State v. Hudson, 289 S.W. 920 (Mo. 1926).

[300] Dugan v. Commonwealth, 333 S.W.2d 755, 757-58 (Ky. 1960).

[301] Lorenz, Jr. 245 (1932).

of the statement, but the psychiatrist may consider such information in reaching his opinion as to the sanity of the defendant[302] or to determine if he was a sexual deviate.[303] These inroads however do not portend the admissibility of such statements to prove the truth of the fact stated.

HYPNOSIS

Statements made while under hypnosis have been excluded for the same reasons that statements obtained under narcosis have been excluded.[304] The law does give some recognition to hypnosis in that it has been held that the right of the accused to consult with his counsel includes the right to have a hypnotist present.[305] These decisions are grounded in part on the theory that the hypnotist might be an aid to recall forgotten information beneficial to the defendant or to determine sanity.

Circumstantial Evidence in Defense

In the absence of scientific evidence of deception tests, or to supplement same, the defendant must resort to circumstantial evidence which suggests his own innocence or the guilt of someone else. Basicly, this falls into two principal categories. The first concerns proof of intercourse with another man during the conceptive period, and the second involves admissions of the complainant tending to exonerate the defendant or which implicate someone else. Admissions have the twofold function of impeaching the testimony of the complainant and constituting affirmative evidence for the defendant.

ACTS WITH ANOTHER MAN

Proof of intercourse with another man during the conceptive period entitles the defendant to an instruction that a finding of not guilty must be returned if the jury believes that the complainant had such intercourse at or about the time of the alleged conception.[306] This is due to the doubt concerning which act of intercourse resulted in pregnancy. For example, in *Baker v. State*,[307] the evidence was clear that the defendant had sexual intercourse with the complainant at a time nearer the termination of her menstruation period and further removed from the birth of the child. The act of intercourse with the other man was two weeks subsequent to that of the defendant. Because the medical authorities indicated that the responsibility of one or the other

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[302] People v. Cartier, 51 Cal.2d 290, 335 P.2d 114 (1959); People v. Esposito, 287 N.Y. 389, 39 N.E.2d 925 (1942).

[303] People v. Jones, 42 Cal.2d 219, 266 P.2d 38 (1954).

[304] State v. Pusch, 1 Dak. 131, 46 N.W.2d 508 (N.D. 1950); People v. Ebanks, 117 Cal. 652, 49 Pac. 1049 (1897).

[305] Cornell v. Superior Court of San Diego County, 52 Cal.2d 99, 338 P.2d 447 (1959); *Ex parte* Ochse, 38 Cal.2d 230, 238 P.2d 561 (1951).

[306] Johnson v. State, 133 Wis. 453, 113 N.W. 674 (1907); Daegling v. State, 56 Wis. 586, 14 N.W. 593 (1883).

[307] 47 Wis. 111, 2 N.W. 110 (1879).

was very questionable and was by no means without reasonable doubt, the rule applied and a judgment of paternity could not be returned.

Although the rule was originally stated to the effect that the law refuses to recognize the ability of the mother or anyone else to know with any sufficient measure of certainty that the defendant is the father beyond a reasonable doubt,[308] it is applied today under rules which permit a finding of paternity under a lesser quantum of proof.[309]

The rule of course does not apply, unless the act with the other man is established to the satisfaction of the jury.[310] As a result a verdict holding the defendant to be the father was sustained although another man testified to having sexual intercourse with the complainant during the conception period.[311] This testimony was denied by the complainant, and there was other evidence supporting the verdict. Later the court refused to reopen the trial upon an application based upon newly discovered evidence which consisted of the subsequent conviction of such witness for fornication based upon the intercourse with the complainant to which he had admitted at the paternity trial. The court held that such conviction was not admissible or conclusive in the paternity case.

Because the sole issue is whether or not the defendant is the father of the child in question, the general rule is to limit such proof to acts during the time of gestation.[312] Related to this rule is the rule that the reputation of the complainant for chastity is not admissible. Hence, defendant's counsel cannot inquire of the complainant whether she ever had intercourse with others,[313] whether she has other children, or when she had her first act of sexual intercourse; unless the court is satisfied that such may have relevancy because it will be linked with other evidence indicating the complicity of the defendant.

As noted earlier, direct proof of the act of intercourse by the complainant and a particular man is rare; hence association with men other than the defendant under suspicious circumstances affording an opportunity for sexual intercourse usually is the best evidence that the defendant can hope to produce. The Milwaukee courts are inclined to

[308] Busse v. State, 129 Wis. 171, 108 N.W. 64 (1906).
[309] See Wis. Jury Institutions—Criminal 2010.
[310] Jacobsen v. State, 205 Wis. 304, 237 N.W. 142 (1931).
[311] Johnson v. State, 133 Wis. 453, 113 N.W. 674 (1907).
[312] I. v. D., 60 N.J. Super. 211, 158 A.2d 716 (1960); State v. Stevens, 248 Minn. 309, 80 N.W.2d 22 (1956); Huggins v. Campbell, 130 Colo. 183, 274 P.2d 324 (1954); Brasseau v. Padlo, 113 Vt. 300, 34 A.2d 186 (1943); Mensing v. Croter, 209 Cal. 318, 287 Pac. 336 (1930); State v. Ferguson, 157 Wash. 19, 288 Pac. 239 (1930); Clark v. State, 144 Okla. 7, 289 Pac. 313 (1930); State v. Stephon, 179 Minn. 80, 228 N.W. 335 (1929); Guy v. State, 20 Ala. App. 374, 102 So. 243 (1924); Dixon v. State, 88 Okla. 172, 212 Pac. 600 (1923); Baehr v. State, 136 Md. 128, 110 Atl. 103 (1920); Seibert v. State, 133 Md. 309, 105 Atl. 161 (1918); DeMund v. State, 167 Wis. 40, 166 N.W. 328 (1918); Brantley v. State, 11 Ala. App. 144, 65 So. 678 (1914); State v. Reese, 43 Utah, 447, 135 Pac. 270 (1913); *In re* Gird's Estate, 157 Cal. 534, 108 Pac. 499, 137 Am. St. Rep. 131 (1910); Busse v. State, 129 Wis. 171, 108 N.W. 64 (1906); Duffies v. State, 7 Wis. 567 (1858).
[313] Duffies v. State, *supra* note 312.

permit the defendant to show mere association with other men as preliminary to and upon the assumption that there will follow a showing of circumstances reasonably imputing sexual intercourse. Unless there is a good faith effort to do this, the courts can and will shut off that line of testimony.

A good illustration of a court's application of these rules in a paternity trial is provided in *State v. Patton*.[314] Upon cross-examination the defendant's counsel persistently asked numerous questions concerning the complainant's relationship with another man. The court concluded that these questions were designed to impress upon the minds of the jurors that certain damaging facts probably existed. A good faith attempt to show such suggested facts actually existed was not made. Citing other authority the court stated:

> If counsel for defendant was able to produce any evidence tending to prove any of the facts implied by this adroit line of cross-examination, it was incumbent upon him to do so in his own case and not prove his case by cross-examination of prosecutrix or her witnesses. 'Under the pretense of cross-examination of a witness one party to an action cannot make out his case by witnesses for the other side.'[315]

In order to be admissible an association with another man or men must be at improper or suspicious times and under circumstances from which intercourse could be readily inferred.[316] Mere opportunity for intercourse is not very convincing,[317] and something further than an innocent relation or association between young people must be shown.[318]

A very apparent case of highly suspicious circumstances is a recent case in which the Supreme Court of Wisconsin upheld a jury finding of no paternity. The evidence showed that the complainant left a tavern after the closing time on three or four occasions with different men during the probable conception period. What made the evidence highly significant was the undisputed fact that the complainant and the defendant had intercourse the very first night he took her home from the tavern. There was no suggestion of a love affair between the complainant and the defendant to distinguish her relationship with him from that which might have existed between her and the other men.[319] Perhaps courts are inclined sometimes to confine such evidence of association with another too rigidly to the conceptive period because of the general rule and its corollary which

[314] 102 Mont. 51, 55 P.2d 1290 (1936).
[315] *Id.* at 1292.
[316] Vogel v. State, 220 Wis. 677, 265 N.W. 567 (1936); DeMund v. State, 167 Wis. 40, 166 N.W. 328 (1918); Humphrey v. State, 78 Wis. 569, 47 N.W. 836 (1891); Baker v. State, 69 Wis. 32, 33 N.W. 52 (1887); Daegling v. State, 56 Wis. 586, 14 N.W. 593 (1883).
[317] Freeman v. Freeman, 31 Wis. 235 (1872).
[318] Douglas v. State, 134 Wis. 627, 114 N.W. 1121 (1908).
[319] State *ex rel.* Stollberg v. Crittenden, 29 Wis.2d 413, 139 N.W.2d 94 (1966).

does not permit the complainant's reputation for chastity to be put in issue.[320]

There is an exception to the general rule which permits proof of illicit acts with other men outside of the conceptive period to be introduced. If it can be shown that such intimacies and opportunities continued after the child was begotten, evidence of an illicit relationship prior to the conception period is admissible.[321] Similarly, evidence of a prior illicit relationship is admissible if it can be linked with a suspicious current relationship so as to imply a resumption of the former relationship.[322] The admissibility rests in the court's discretionary determination of relevancy.[323] Although the Wisconsin Supreme Court has held that evidence of the complainant's association with other men outside the conceptive period is immaterial, such is relevant to impeach complainant's testimony that she went out with no one else once she started to associate with the defendant.[324]

ADMISSIONS OF THE COMPLAINANT

Admissions of the complainant which tend to implicate another man and thus exonerate the defendant can be by word, act, or silence. Again, such evidence is usually circumstantial. It can be produced by the defendant affirmatively.

A promise to marry on the part of the defendant while the complainant is pregnant has been held to corroborate other testimony implicating the defendant.[325] Conversely, engagement or marriage to another man during pregnancy or shortly after the birth of the child would appear to be relevant to the complicity of that man and at least call for explanation.

A more frequent circumstantial admission occurs when the complainant causes the birth certificate to indicate the father is "unknown," uses the first name of her husband or of a boy friend with whom she has had opportunity for sexual relationship during the conceptive period, or when it appears from the certificate that the father's name has been changed or altered. In these instances it has

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[320] See notes 312, 313 *supra* and accompanying text, and Steed v. State, 80 Ga. App. 360, 56 S.E.2d 171 (1949).

[321] State v. Rudy, 62 N.D. 403, 244 N.W. 28 (1932); State v. Stephon, 179 Minn. 80, 228 N.W. 335 (1929); Guy v. State, 20 Ala. App. 374, 102 So. 243 (1924); Odenwald v. Woodsum, 142 Mass. 512, 8 N.E. 347 (1886); State v. Woodworth, 65 Iowa 141, 21 N.W. 490 (1884).

[322] Mensing v. Croter, 209 Cal. 318, 287 Pac. 336 (1930); State v. Stephon, *supra* note 321; Stahl v. State, 67 Kans. 864, 74 Pac. 238 (1903); State v. Borie, 79 Iowa 605, 44 N.W. 824 (1890).

[323] Odenwald v. Woodsum, 142 Mass. 512, 8 N.E. 347 (1886).

[324] State v. Buss, 273 Wis. 134, 76 N.W.2d 541 (1956).

[325] State v. Stephon, 179 Minn. 80, 228 N.W. 335 (1929); Moisch v. State, 128 Okla. 226, 262 Pac. 203 (1927); Leister v. State, 136 Md. 518, 111 Atl. 78 (1920); Jones v. State, 132 Md. 142, 103 Atl. 459 (1918); Brantley v. State, 11 Ala. App. 144, 65 So. 678 (1914).

been held proper to permit the complainant to explain the apparent discrepancy of her prior inconsistent statement.[326]

An accusation by the complainant charging another man with responsibility or her statements implicating another man are admissible.[327] The complainant may be required to produce culpatory letters in her possession from another man. However, her statements in reference to other men made to the attorney who proceeds in the paternity action on behalf of the public, such as the district attorney, are within the attorney-client privilege.[328]

The acts of another man implying his guilt are not binding upon the complainant, unless she has in some way involved herself so that her participation or acquiescence constitutes an admission on her part. The same general rules relating to adoptive admissions by silence apply to the complainant as well as the defendant.

Complainant's failure to inform the defendant upon learning of her pregnant condition is frequently offered to exculpate the defendant. The effect of such evidence is dependant upon the total circumstances. The failure itself is not sufficient as a matter of law to require a dismissal.[329] On several occasions such evidence, when coupled with an erroneous instruction, has been given sufficient weight by the Wisconsin Supreme Court to cause it to reverse a determination of paternity.[330]

In *State v. Van Patten* the complainant failed to accuse the defendant, until he was served with a complaint at the instance of her parents although she knew where he lived and saw him at public dances on several occasions. This fact, an erroneous instruction, and the improbability of the circumstances under which the complainant testified the act of intercourse took place caused the supreme court to order a new trial.

In *Vogel v. State* the complainant failed to speak of her pregnancy to or accuse the defendant, although she saw him daily and even baby sat for him. There was also testimony of an opportunity under suspicious circumstances for the complainant to have had intercourse with another man.

Similarly, the failure of a nineteen year old school girl to seek

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[326] Lee v. Dist. of Columbia, 117 A.2d 922 (Munic. Ct. App. D.C. 1955); Commonwealth v. Charen, 177 Pa. Super. 522, 111 A.2d 155 (1955); Harrison v. Dist. of Columbia, 95 A.2d 332 (Munic. Ct. App. D.C. 1953); State v. Bishop, 255 Wis. 416, 39 N.W.2d 399 (1949); Lawhead v. State, 99 Okla. 197, 226 Pac. 376 (1924).

[327] State v. Bishop, 255 Wis. 416, 39 N.W.2d 399 (1949); Nelson v. State, 210 Wis. 441, 245 N.W. 676 (1933); State v. Gabert, 41 S.D. 173, 169 N.W. 517 (1918).

[328] Ratzlaff v. State, 122 Okla. 263, 249 Pac. 934 (1926).

[329] State *ex rel.* Syarto v. Barber, 268 Wis. 74, 66 N.W.2d 696 (1954).

[330] State *ex rel.* Syarto v. Barber, *supra* note 329; State v. Van Patten, 236 Wis. 186, 294 N.W. 560 (1940); Vogel v. State, 220 Wis. 677, 265 N.W. 567 (1936).

out and charge the defendant with responsibility after she became pregnant and prior to the birth of the child was held to raise grave doubts of the truth of complainant's charges, even though she had informed him of her pregnancy and his responsibility when they met without prearrangement at several social affairs they both attended. The court believed her not to be "an ignorant unschooled country maiden." There was also evidence that the complainant had intercourse with another within the conceptive period and that she had also sought to place the responsibility upon that person.[331]

Circumstances, however, may make the failure to accuse the defendant immediately of no consequence.

In *State v. Bishop*[332] complainant's pregnancy was not noticeable due to her normal heavy weight. Under the circumstances the court did not think her reticence concerning her condition to be suspicious in the absence of comment or question by others. Despite the fact that the complainant first accused another whose name appeared on the birth certificate, the supreme court declined to hold as a matter of law that there was reasonable doubt of the defendant's guilt. The verdict was supported by evidence which indicated that the complainant was not responsible for the information on the birth certificate, defendant and complainant had opportunity to have intercourse during the conceptive period, and the defendant had set up drinks to honor the occasion of his "newborn son."

Because a doctor testified that he had three previous cases in which the mother was unaware of her pregnancy until the birth of of the child, it was held that the testimony of a nineteen year old girl who had suffered from adhesions and a kidney ailment so that she thought she might have a tumor, was credible evidence. She also wore her usual clothes during her pregnancy and worked until the day before her labor. Hence, her failure to accuse the defendant and discuss her condition with him until the birth of the child was held to be of no consequence.[333]

A prior inconsistent statement by the complainant, a high school girl, that she did not know who the father was and her failure to file a paternity action when she discovered she was pregnant was held to be satisfactorily explained by a desire on the part of the complainant and defendant to conceal the matter from his parents. In addition, the complainant had expressed a willingness to assume the responsibility because she believed she was as much at fault as was the defendant.[334]

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[331] Nelson v. State, 210 Wis. 441, 245 N.W. 676 (1932).
[332] 255 Wis. 416, 39 N.W.2d 399 (1949).
[333] State v. Willing, 259 Wis. 395, 48 N.W.2d 236 (1951).
[334] State *ex rel.* Burns v. Vernon, 26 Wis.2d 563, 133 N.W.2d 292 (1965).

Other jurisdictions have also considered significant the failure of the complainant to accuse the defendant until shortly before the child's birth when there was prior opportunity to do so,[335] but have considered such failure to be of no consequence where circumstances were such that it could not be expected that the complainant would or could do so.[336]

CREDIBILITY

Because the only persons who can speak from actual personal knowledge as to the factum probandum[337] are the parties, the courts fully recognize that determinations of paternity cases stand or fall upon the credibility of the parties.[338] The judge's or jury's task to pass upon the relative weight and credibility of the parties' testimony is peculiarly difficult and important. The usual considerations of interest, demeanor upon the witness stand, opportunity for observation and knowledge of the matters and things given in evidence by them, bias or prejudice of witnesses, clearness or lack of clearness of recollections, and inherent reasonableness or improbability of the testimony are to be weighed by the trier, as well as all other facts which, by the experience of mankind, tend to support or discredit the testimony of witnesses.

When the case is tried to a jury, it is within the exclusive province of the jury to determine the credibility of the evidence introduced. According to familiar rules the resolution of conflicting evidence and the credibility of witnesses is for the jury to determine.[339] It is not the duty of the jury to count the witnesses but to weigh the testimony of each.[340] Hence, it is competent for the jury to believe the testimony of the complainant as against the defendant and his witnesses.[341] A rather graphic example of the operation of this rule is an Iowa case in which the court held that it was competent for the jury to believe the complainant's testimony that she had intercourse only with the defendant, despite the fact that three other men testified that they had intercourse with her during the conceptive period.[342]

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335 Armstrong v. Watrous, 138 Conn. 127, 82 A.2d 800 (1951).

336 Seibert v. State, 133 Md. 309, 105 Atl. 161 (1918).

337 Douglas v. State, 43 Wis. 392 (1877).

338 State v. Buss, 273 Wis. 134, 76 N.W.2d 541 (1955).

339 Olson v. Holway, 152 Wis. 1, 139 N.W. 422 (1913); Adams v. Chicago & N.W. Ry. Co., 89 Wis. 645, 62 N.W. 525 (1895); Roberts v. State, 84 Wis. 361, 54 N.W. 580 (1893); McCoy v. Milwaukee Street Ry., 82 Wis. 215, 52 N.W. 93 (1892); Sieber v. Amunson, 78 Wis. 679, 47 N.W. 1126 (1891); Telford v. Frost, 76 Wis. 172, 44 N.W. 835 (1890); Shekey v. Eldredge, 71 Wis. 538, 37 N.W. 820 (1888); McClellan v. State, 66 Wis. 335, 28 N.W. 347 (1886); Bierbach v. Goodyear Rubber Co., 54 Wis. 208, 11 N.W. 514 (1882).

340 Van Doran v. Armstrong, 28 Wis. 236 (1871).

341 Bookhout v. State, 66 Wis. 415, 28 N.W. 179 (1886).

342 Loggins v. Bundy, 248 Iowa 153, 79 N.W.2d 545 (1956).

On occasions the Wisconsin Supreme Court has exercised its discretionary power under section 251.09 to reverse a finding of paternity because the complainant's evidence was so inherently improbable that as a matter of law reasonable doubt of the defendant's guilt existed.[343] In each case when the verdict was upset because of the inherent improbability of the complainant's evidence, a combination of facts was involved, and there was always some other substantial or positive evidence which militated against the credence of the complainant's testimony.

Some of the facts which the courts found difficult to believe in combination with others were—that only one act was committed, that prior to such act there was only a casual relationship between the parties, that the complainant had been virtuous prior thereto, and that the circumstances under which the act was allegedly committed were such that they were difficult to believe. An example of the latter is testimony that the act took place in the presence of other people in a car who were unaware of its occurrence.

The mere fact that there be contradictions or uncertainties as to the details of minor matters in the testimony of the parties does not preclude the jury from believing or disbelieving a party's testimony concerning the central fact of intercourse,[344] nor is it fatal that the complainant is not absolutely certain in her testimony as to when pregnancy occurred if there had been repeated acts of intercourse between the parties.[345] It has been held not to be error to permit the complainant to correct her testimony as to the date of intercourse after hearing the testimony on the part of the defense, particularly where there is no claim of prejudice by the defendant.[346]

Material prior inconsistent statements made in the preliminary examination may be offered to challenge complainant's credibility,[347] but she has the right to offer evidence to explain prior inconsistent statements.[348]

Considerable doubt may be cast upon a complainant's testimony when she repeatedly and positively, but erroneously, fixes a significant date from which she determines the time of other material events. In *Vogel v. State*[349] a verdict of guilty was upset partly for the reason that the complainant mistakenly fixed the date of a party, at which there was opportunity and suspicious circumstances im-

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[343] State v. Van Patten, 236 Wis. 186, 294 N.W. 560 (1940); Schuh v. State, 221 Wis. 180, 266 N.W. 234 (1936); Hughes v. State, 219 Wis. 9, 261 N.W. 670 (1935); Jacobsen v. State, 205 Wis. 304, 237 N.W. 142 (1931).
[344] Douglas v. State, 43 Wis. 392 (1877).
[345] Baker v. State, 69 Wis. 32, 33 N.W. 52 (1887).
[346] Humphrey v. State, 78 Wis. 569, 47 N.W. 836 (1891).
[347] Vogel v. State, 220 Wis. 677, 265 N.W. 567 (1936).
[348] State *ex rel.* Burns v. Vernon, 26 Wis.2d 563, 133 N.W.2d 292 (1965).
[349] 220 Wis. 677, 265 N.W. 567 (1936).

plying intercourse with another, at a time outside the conceptive period, when the actual date of the party placed it within the conceptive period of the child whose paternity was at issue.

Because of the critical importance of the credibility of the witnesses, counsel will seek to create an inference of untruthfulness as to the main issue by demonstrating the witness is in error on other points. It is a well established rule that a witness cannot be impeached as to collateral matters.[350] Because the meaning of collateralness cannot always be sharply delineated, the matter is controlled by the discretion of the court.[351] A fact is not collateral, if it could have been offered in testimony for any purpose independent of the contradiction. Hence, contradiction may be sought of any facts immediately connected with the subject of the inquiry, or which could otherwise be received for the purpose of impeaching some specific testimonial quality of the witness sought to be contradicted.[352]

Proof that a witness has given erroneous statements on many minor points may strengthen the inference that his testimony is untrustworthy as to the main fact in issue, but such pursuit will be terminated by the court when it appears that the matters sought to be contradicted are trifling, create confusion to the main issue, or will lead to the trial of innumerable irrelevant issues.

Frequently, the elementary rule—if a witness is sought to be impeached by proof of prior inconsistent statements, a proper foundation must be laid—is overlooked or purposefully ignored by counsel. The witness must first be asked if the statement was made at a certain time and place for the purpose of directing the witness's attention to the statement. If the witness denies the statement, proof may be offered of the precise statement made. The witness must have the privilege of admitting it just as it occurred.[353] Failure by the court to enforce the rule upon timely objection opens the door to permitting the jury to believe the existence of facts as to culpatory statements or improper associations with other men which in fact may not exist at all.[354]

The pecuniary interest of a litigant generally is a strong induce-

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[350] Madler v. Pozorski, 124 Wis. 477, 102 N.W. 892 (1905); Illinois Steel Co. v. Jeka, 123 Wis. 419, 101 N.W. 399 (1905); Schwantes v. State, 127 Wis. 160, 106 N.W. 237 (1906); Waterman v. Chi. & Alton R.R., 82 Wis. 613, 52 N.W. 247 (1892).

[351] Commonwealth v. Smith, 177 Pa. Super. 403, 111 A.2d 151 (1955); Commonwealth v. Petrillo, 341 Pa. 209, 19 A.2d 288 (1941).

[352] See III WIGMORE, EVIDENCE §§1003-06 (3rd ed. 1940).

[353] Sieber v. Amunson, 78 Wis. 679, 47 N.W. 1126 (1891); Ferguson v. Truax, 136 Wis. 637, 118 N.W. 251 (1908); Hunter v. Gibbs, 79 Wis. 70, 48 N.W. 257 (1891); Stone v. Northwestern Sleigh Co., 70 Wis. 585, 36 N.W. 248 (1888); Dufresne v. Weise, 46 Wis. 290, 1 N.W. 59 (1879).

[354] See Rindskopf v. State, 34 Wis. 217 (1874).

ment which may actuate the party to testify falsely.[355] Older cases considered the prosecutrix as an involuntary witness for the state with no pecuniary interest. Nevertheless, instructions that both parties were not of equal credibility were refused, because such determinations are solely for the jury.[356]

Certainly, it is true that the defendant has a primary and direct pecuniary interest, but the realities of life do not relieve the mother completely from all financial responsibility to and expenditures for an illegitimate child. The mother is the natural custodian of the child and frequently must supplement the child's support from her own means.[357] It has been said quite succinctly that while the bearing of an illegitimate child is a most unfortunate experience for the complainant, the accusation of responsibility is a most serious matter to the defendant. If a defendant is guilty of having sexual relations with the complainant, but is not the father, he should be punished by other means than by being named the father.[358] Several cases reflect the notion that it is incredulous that a complainant would willfully name an innocent man as the defendant.[359]

The propriety of making the jury aware of the fact that the child is or is likely to become a public charge has arisen in a number of jurisdictions. Frequently, the defendant will try to elicit information from the complainant implying that the complainant was forced to name someone by the relief agency from whom she sought assistance.[360] Several jurisdictions have permitted an instruction that the purpose of the proceeding was to compel the father to support the child and indemnify the public against the burden of supporting the child.[361] These decisions have been justified in that the instructions are true statements of law and that possible prejudice to the defendant can be eliminated by a precautionary instruction that an innocent man should not be shouldered with an unjust burden to relieve the taxpayer. Wisconsin, Indiana, and Ohio have held such an instruction to be prejudicial.[362]

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[355] Kenney v. State, 74 Wis. 260, 42 N.W. 213 (1889); McClellan v. State, 66 Wis. 335, 28 N.W. 347 (1886).
[356] Roberts v. State, 84 Wis. 361, 54 N.W. 580 (1893).
[357] Francken v. State, 190 Wis. 424, 209 N.W. 766 (1926).
[358] Gillis v. State, 206 Wis. 150, 238 N.W. 804 (1931).
[359] Dingman v. State, 48 Wis. 485, 4 N.W. 668 (1880); McClellan v. State, 66 Wis. 335, 28 N.W. 347 (1886).
[360] Ford v. Dist. of Columbia, 96 A.2d 277 (Munic. Ct. App. D.C. 1953).
[361] People v. Finks, 343 Mich. 304, 72 N.W.2d 250 (1955); Ford v. District of Columbia, 102 A.2d 838 (Munic. Ct. App. D.C. 1954); State *ex rel.* Feagins v. Conn., 160 Kan. 370, 162 P.2d 76 (1945); State v. Cotter, 167 Minn. 263, 209 N.W. 4 (1926); Lawhead v. State, 99 Okla. 197, 226 Pac. 376 (1924); State v. Pratt, 40 Iowa 631 (1875).
[362] Menn v. State, 132 Wis. 61, 112 N.W. 38 (1907); Cunningham v. State, 65 Ind. 377 (1879); State *ex rel.* Freeman v. Morris, 156 Ohio State 333, 102 N.E.2d 450 (1951).

In accordance with general rules, the credibility of a party or witness may be impeached by evidence that his reputation for truth and general character is bad.[363] Furthermore, the impeaching witness may be asked whether, upon such general reputation, he would believe the party sought to be impeached upon oath.[364] Evidence of only general reputation for truth and veracity or character is admissible as distinguished from particular acts of immorality or wrongdoing which might reflect upon the integrity of the witness.[365] Once the general reputation of the witness for truth and veracity or character is attacked, the witness may offer proof that his general reputation is good.[366]

Wisconsin is in accord with the general rule that the prosecutrix's reputation for chastity is inadmissable.[367] It is said that the complainant's character for chastity is already impeached by the fact that she is a complainant in a paternity action. If character is meant to imply general reputation this is, of course, not true because all it proves is her want of chastity in one instance. The true reason is that the want of chastity is not material to the witness's character for truth and veracity. Reputation, of course, is evidence of the net expression of a multitude of personal opinions of the witness's disposition for a particular quality. Because the issue in a paternity case is the paternity of the child in question, evidence of unchasteness by way of general reputation or specific acts is not admissible, unless it bears a definite relationship to the probability of sexual intercourse during the conceptive period. The rule is otherwise in rape, seduction, or assault where the issues are different.[368]

When paternity cases were held to be quasi-criminal, it had been held that it was error to exclude testimony that the defendant's reputation for chastity and morality was good, even though his general good character or reputation had not been impeached.[369] The ruling rested upon the criminal nature of the proceedings.

An exception to the rule that only general reputation, as distinguished from particular acts, can be proven is in the case of a prior conviction of a crime. Section 885.19 makes persons convicted of

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[363] Suckow v. State, 122 Wis. 156, 99 N.W. 440 (1904); State v. Knight, 118 Wis. 473, 95 N.W. 390 (1903); Bookhout v. State, 66 Wis. 415, 28 N.W. 179 (1886); Wallis v. White, 58 Wis. 26, 15 N.W. 767 (1883); Wilson v. State, 3 Wis. 798 (1854).

[364] Wilson v. State, *supra* note 363.

[365] State v. Baker, 16 Wis.2d 364, 114 N.W.2d 426 (1961); Corti v. Cooney, 191 Wis. 464, 211 N.W. 274 (1926); Duffy v. Radke, 138 Wis. 38, 119 N.W. 811 (1909); Ketchingham v. State, 6 Wis. 417 (1857).

[366] State v. Wrosch, 262 Wis. 104, 53 N.W.2d 779 (1952); Johnson v. State, 129 Wis. 146, 108 N.W. 55 (1906).

[367] Bookhout v. State, 66 Wis. 415, 28 N.W. 179 (1886); Duffies v. State, 7 Wis. 567 (1858); Annot., 104 A.L.R. 84 (1936); Annot., 57 A.L.R.2d 742 (1955).

[368] Cleveland v. State, 211 Wis. 565, 248 N.W. 408 (1933).

[369] Windahl v. State, 189 Wis. 424, 207 N.W. 694 (1926).

criminal offenses competent to testify, but permits his conviction to be proven to affect his credibility. The proof may not go beyond proof of conviction,[370] unless the door is opened by the adverse party.[371] Interrogation as to the number of convictions is permissible,[372] but only evidence of convictions are admissible. Evidence of arrests,[373] charges,[374] or jailings[375] is admissible.

Certain language of the Court in *Ray v. State*,[376] a paternity case which concerned a juvenile complainant, is capable of the construction that evidence of the complainant's involvement in four juvenile court proceedings was received to impeach her but that testimony of the nature of the proceedings was excluded. An examination of the record in the case indicates that the evidence of the involvement was actually excluded, even though the supreme court made reference thereto. At the time section 48.07(3) provided that the disposition of a child in juvenile court shall not be admissable against the child in any proceeding in any other court. The present statute[377] provides that no adjudication under the Children's Code shall be deemed a conviction and such shall not be admissible as evidence against the child in any proceedings in any other court. Thus, it appears that adjudications under the Children's Code are not admissible as evidence of prior convictions.

There is occasion in paternity cases to apply the rule of *falsus in uno, falsus in omnibus*—false in one thing, false in everything. The rule is now set forth as a uniform instruction.[378] The rule simply provides that the trier may disregard all of the testimony of a witness, except insofar as it is supported by other credible evidence, if the trier becomes satisfied that a witness has wilfully testified falsely as to any material fact.[379] To warrant giving the instruction, the trial court must be satisfied that there is sufficient evidentiary basis to show there was wilfull false swearing to a material fact. It already has been observed that the parties in paternity actions frequently attempt to clean up their stories to some degree to make it more socially acceptable according to their individual beliefs. It

[370] State v. Adams, 257 Wis. 433, 43 N.W.2d 446 (1949); State v. Raether, 259 Wis. 391, 48 N.W.2d 483 (1951).
[371] State v. Roberson, 254 Wis. 595, 36 N.W.2d 677 (1949); see State v. Kopacka, 260 Wis. 505, 50 N.W.2d 917 (1952).
[372] State v. Ketchum, 263 Wis. 82, 56 N.W.2d 531 (1953).
[373] State v. Raether, 259 Wis. 391, 48 N.W.2d 483 (1951).
[374] McKesson v. Sherman, 51 Wis. 303, 8 N.W. 200 (1881).
[375] Patten Paper Co. Limited v. Green Bay & Mississippi Canal Co., 104 Wis. 24, 83 N.W. 1119 (1899).
[376] 231 Wis. 169, 285 N.W. 374 (1939).
[377] WIS. STAT. §48.38 (1965).
[378] Wis. Jury Instructions—Civil, Part I, 405.
[379] Beauregard v. State, 146 Wis. 280, 131 N.W. 347 (1911); Miller v. State, 139 Wis. 57, 119 N.W. 850 (1909); Blankavag v. Badger Box & Lumber Co., 136 Wis. 380, 117 N.W. 852 (1908); Suckow v. State, 122 Wis. 156, 99 N.W. 440 (1904); Allen v. Murray, 87 Wis. 41, 57 N.W. 979 (1894).

is wilfull false swearing to material facts which brings the rule into operation and not discrepancies, conflicts, or contradictions which are manifestly honest mistakes due to faulty observation, imperfect recollection, or mistaken impressions of facts.[380]

A final evidentiary consideration relating to the credibility of the parties in paternity suits involves the failure to produce a witness who could testify to a material fact. It is a well established rule that if a party fails to produce the testimony of an available witness to a material fact of the case; and it would naturally appear in the interest of that party to produce him, it may be inferred that the evidence which he would give would be unfavorable to the party failing to produce, unless there is a satisfactory explanation for the failure to produce the witness.[381] Although there may not be a witness to the act, frequently there is a witness to critical corroborative circumstantial evidence. Many of these cases must be tried inso far as counsel are concerned on a low budget, but it is most helpful to the trier if there is corroborative proof of key circumstantial evidence supporting the respective party's contentions.

Prejudicial Testimony

Because of the intense battle to destroy the credibility of the other party's testimony, the overzealousness of counsel sometimes causes them to run the risk of committing prejudicial error. This is perhaps more true in paternity cases than others.

The court's role in this regard is set forth in *Rubin v. State.* [382] It was there said that reasonable latitude should be allowed for cross-examination, but it is the plain duty of the court to intercede even without objection of proponent's counsel when there is an attempt to browbeat, insult, or intimidate a witness. Questions which inject unfair insinuations, comment upon the witness's testimony, or abuse the witness are not to be tolerated.[383]

Thus, a question which sought to elicit the fact that another child had been born to the complainant six months after she was married was held prejudicial, because it had no probative effect upon the question in issue.[384] Similarly, it was held that a question as to whether the complainant had been an inmate of a brothel was held improper, when it referred to a period which was far removed from the conceptive period.[385] Persistent cross-examination calcu-

[380] Pumorlo v. Merrill, 125 Wis. 102, 103 N.W. 464 (1905).
[381] Bowen v. Industrial Comm'n., 239 Wis. 306, 1 N.W.2d 77 (1941); Booth v. Frankenstein, 209 Wis. 362, 245 N.W. 191 (1932).
[382] 192 Wis. 1, 211 N.W. 926 (1927).
[383] Groling v. Goltz, 267 Wis. 390, 66 N.W.2d 195 (1954); Scarfield v. Rudy, 266 Wis. 530, 64 N.W.2d 189 (1954); Corti v. Cooney, 191 Wis. 464, 211 N.W. 274 (1926); Crawford v. Christian, 102 Wis. 51, 78 N.W. 406 (1899).
[384] Jacobsen v. State, 205 Wis. 304, 237 N.W. 142 (1931).
[385] Duffies v. State, 7 Wis. 567 (1858).

lated to show a pattern of loose morality just prior to the conceptive period, despite objections sustained by the court, may constitute the basis for a mistrial.[386]

Insinuations that the defendant is rich are improper.[387] Although the defendant's earnings, savings, or financial condition are irrelevant to the issue of paternity, timely objections must be made to these questions.[388] These matters are gone into at a separate hearing after there has been an adjudication of paternity.

The extent to which the court should allow testimony of the details of act of intercourse presents some problems of delicacy. In a Washington case it was said that evidence of the intimate and lurid details regarding sex play and acts of intercourse is "highly dubious, palpably of interest only to the morbidly curious, but otherwise not material."[389] The trial judge has the task of deciding when such evidence no longer serves the pursuit of determining credibility.

The propriety of permitting the mother to hold the child while in the courtroom has been considered several times in Wisconsin. In an early case it was held that the child should not be exhibited to the jury as evidence for the purpose of showing its likeness to the defendant.[390] In the next case it was determined that merely permitting the complaining witness to hold her baby in her arms while giving her testimony was not error, because there was no attempt to offer the baby in evidence or exhibit it to the jury.[391] In a relatively recent case, it was held that the child's presence in the courtroom before the trial commenced was not prejudicial, because the child was removed from the room before the jury was made aware of the nature of the case.[392] In these jurisdictions in which evidence of resemblance is held admissible, the presence of the child in the courtroom is not objectionable.[393]

It would appear that the general case law does not require the separation of the mother and the child while the mother testifies or is in court, as long as the child is not informally exhibited or used to excite the prejudice of the jury.[394] Better practice dictates that the child should be excluded from the courtroom.

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[386] State *ex rel.* Stollberg v. Crittenden, 29 Wis.2d 413, 139 N.W.2d 94 (1966).
[387] Jacobsen v. State, 205 Wis. 304, 237 N.W. 142 (1931).
[388] State *ex rel.* Sarnowski v. Fox, 19 Wis.2d 68, 119 N.W.2d 451 (1963).
[389] State v. Taylor, 39 Wash.2d 751, 238 P.2d 1189, 1191 (1951).
[390] Hanawalt v. State, 64 Wis. 84, 24 N.W. 489 (1885).
[391] Johnson v. State, 133 Wis. 453, 113 N.W. 674 (1907).
[392] State *ex rel.* Sarnowski v. Fox, 19 Wis.2d 68, 119 N.W.2d 451 (1963).
[393] State *ex rel.* Dickerson v. Tokstad, 139 Ore. 63, 8 P.2d 86 (1932); See cases in Annot., 40 A.L.R. 97, 143 (1924).
[394] Annot., 40 A.L.R. 97, 144-147 (1924).

INSTRUCTIONS

A standard instruction for cases involving an unmarried woman[395] has been prepared. Its use has been generally accepted as written, although some courts make minor variations. The standard instructions have not been the subject of review by the Wisconsin Supreme Court.

It is the practice of many courts to give most of the instruction as to the paternity issue at the very outset of the trial as a preliminary instruction. At the very outset the jury is told that the complaining witness was delivered of a child on whatever date the child was born and that the mother was unmarried at the time. Then the jurors are informed that the complainant alleges that the defendant is the father of the child, that he denies such charge, and that it will be for them to determine from the evidence and according to the instructions of the court whether the defendant is the father. It is made clear that the sole issue is whether the defendant is the father of the child and that he is not charged with merely having sexual relations with the complainant.[396] They are told that the sexual intercourse between the parties, if any there was, is only incidental to the issue of paternity as is the chastity of the complaining witness.

After the form of the verdict is read, the jury is advised, if such is undisputed, that the testimony will establish that the weight of the child was in excess of 5½ pounds at birth. Consequently, it is presumed that the child was a full term child and to have been conceived within a span of time extending from 240 days to 300 days before its birth. The jury is advised that it is presumed therefore that the child was conceived between whatever the specific dates happen to be.[397] The jurors are then cautioned that before they can find the defendant to be the father they must be satisfied by the degree of proof required that the defendant and the complainant had sexual intercourse within this period of time and that she did not have sexual intercourse with any other man at a time which could have resulted in such conception.[398] If there is evidence that someone other than the defendant had intercourse with the complainant during the conceptive period but was excluded by a blood test, then there must be added language to the instruction to make it clear

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[395] Wis. Jury Instructions—Criminal 2010.

[396] Baker v. State, 47 Wis. 111, 2 N.W. 110 (1879).

[397] It is error to advise the jury that the average period of gestation is 280 days with a margin of ten days either way, when the only medical testimony was that although the average is 280 days the period may vary between 230 to 320 days. State v. Van Patten, 236 Wis. 186, 294 N.W. 560 (1940).

[398] Johnson v State, 133 Wis. 453, 113 N.W. 674 (1907); Baker v. State, 69 Wis. 32, 33 N.W. 52 (1887); Daegling v. State, 56 Wis. 586, 14 N.W. 593 (1883).

that the reference to the "other man" is someone other than the one who has been excluded by blood tests.

Because of the importance of credibility, many courts, as part of the preliminary instructions, forewarn the jury of its duty in this regard. Usually the factors bearing upon credibility are stated for the guidance of the jurors at this point.

At the conclusion of the arguments by counsel, the jury is instructed in full. In addition to what had been previously covered, the jury is instructed that it is not necessary that the complainant prove the exact date on which the child was conceived, but that an act of sexual intercourse with the defendant must be proven to have occurred on such a date which will satisfy it by the proof required that the child is the result of sexual intercourse with the defendant.[399] Such an instruction is erroneous, if there is no evidence of intercourse except as to a specific date; and complainant's testimony is positive as to that day and excludes all others.[400]

Generally, the instruction on credibility is reported, but it is given in its full form at this time. Of course, an instruction on burden of proof to the effect that the jury must be satisfied or convinced to a reasonable certainty by a clear and satisfactory preponderance of the evidence is essential. A final requirement is an instruction that a five-sixths verdict is sufficient.[401]

If the child is not a full term child by virtue of the fact that its weight is less than 5½ pounds, or there is undisputed medical evidence to the contrary, the presumption as to time of conception drops out of the case.

If the mother was married so that the presumption of legitimacy applies, the first issue which must be determined is whether the husband was not the father. Consequently, the jury is instructed that if the child was born while the complainant was the lawful wife of a specified man, she has the burden of proving by a clear and satisfactory preponderance of the evidence that the husband is not the father. In addition the jury is advised that it may consider the testimony relating to whether or not the complainant's husband had access to the complainant during the conceptive period under circumstances in which sexual intercourse could have occurred or was entirely absent, together with all other testimony which bears on this issue. If the complainant fails to satisfy the burden as to this prior issue, the jury cannot go to the second question which asks whether the defendant is the father.

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[399] State v. Van Patten, 236 Wis. 186, 294 N.W. 560 (1940); Stresney v. State *ex rel.* Bean, 186 Wis. 214, 202 N.W. 334 (1925); State *ex rel.* Dewey v. Kibbe, 186 Wis. 210, 202 N.W. 333 (1925).

[400] Menn v. State, 132 Wis. 61, 112 N.W. 38 (1907).

[401] Wis. Stats. §§52.45, 270.25 (1965).

It has been previously noted that several of the earlier cases indicated that it was improper to instruct the jurors that the complainant and defendant were of equal credibility, because such would constitute an unwarranted invasion of the jury's province.[402] Nevertheless, it has been held not to be error to simply instruct the jury that insofar as pecuniary interests are concerned the parties do not stand equal.[403]

An instruction that the interests of "the state and county to be relieved from expense by reason of this illegitimate child was at stake, and therefore 'the case is equally important to both sides,' " has been characterized as a very doubtful proposition.[404]

An instruction in which the court stated that in regard to minor matters about which there was conflicting testimony, the prosecutrix might be mistaken, but as to her testimony of having sexual intercourse with the defendant she was either telling the truth or not, was held to submit the credibility of the complainant to the jury fairly.[405]

The function of instructions are to state the issues of fact and principles of law applied. Therefore, a charge which asks the jury to consider whether it was likely that a woman would falsely charge a man if such were not true, or, if she would, would she not make a better choice, is prejudicial. Such an instruction constitutes a forcible argument on behalf of the complainant and invades the province of the jury.[406]

If the defendant exercises his right against self-incrimination, he is entitled to an instruction concerning his failure to testify, but he must make such requests.[407]

ARGUMENT

The usual civil rules concerning argument of counsel to the jury apply.

In an early paternity case, objections were sustained when counsel went outside the record by alluding to a prior trial involving the parties.[408] Such was held not to be prejudicial, but the court outlined the general rules governing such remarks. It was observed that frequently some fact or circumstance occurs in a trial which never becomes a part of the record but nevertheless is open to comment by counsel. Opposing counsel may indulge in proper comment

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[402] Roberts v. State, 84 Wis. 361, 54 N.W. 580 (1893); McClellan v. State, 66 Wis. 335, 28 N.W. 347 (1886).
[403] Kenney v. State, 74 Wis. 260, 42 N.W. 213 (1889).
[404] Menn v. State, 132 Wis. 61, 112 N.W. 38 (1907).
[405] Douglass v. State, 43 Wis. 392 (1877).
[406] Dingman v. State, 48 Wis. 485, 4 N.W. 668 (1879).
[407] Johns v. State, 14 Wis.2d 119, 109 N.W.2d 490 (1960).
[408] Baker v. State, 69 Wis. 32, 33 N.W. 52 (1887).

thereupon, but the matter rests in the broad discretion of the trial court.

A more frequent problem arises when there are appeals to sympathy, passion, or prejudice. No clear line of demarcation can be drawn between fair and unfair argument. Some comfort, if not guidance, is given to trial courts in *Fields v. Creek*[409] by the following language:

> It is difficult to lay down precise standards which will successfully separate fair argument from unfair argument. We are not prepared to strike down all colorful, forensic thrusts before the jury. Oral argument to the jury need not be confined to the sterile reiteration of the testimony which was presented. Counsel have the right to analyze and exhort. As long ago as 1878, this court recognized that counsel in argument should be given 'the very fullest freedom of speech.' *Brown v. Swineford* (1878), 44 Wis. 282, 293.
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> There is a point when enthusiastic advocacy becomes an appeal to prejudice. It is the burden of the trial court to make sure the arguments do not exceed the bounds of fairness.

When counsel abuse their privilege of legitimate argument, the trial court has the duty to immediately and vigorously intercede on its own motion.[410]

It has been previously observed that testimony insinuating that the defendant was rich or evidence of his financial condition is inadmissible.[411] Hence arguments calculated to thrust the burden of support on defendant because of his ability to pay regardless of his responsibility are improper.[412] Argument which tells the jury that the state will be compelled to support the child if the defendant is not required to do so and that the jurors as taxpayers would suffer is improper.[413] Such a remark may be sufficient to justify a new trial in a close case,[414] but might be cured by an instruction to disregard it in other situations.[415]

There are no Wisconsin cases which discuss the right of counsel to comment upon the defendant's failure to testify. Generally, the

[409] Fields v. Creek, 21 Wis.2d 562, 124 N.W.2d 599 (1963).

[410] Pecor v. Home Indemnity, 234 Wis. 407, 291 N.W. 313 (1940); Markowitz v. Milw. E. R. & L. Co., 230 Wis. 312, 284 N.W. 31 (1939); Hanley v. Milw. E. R. & L. Co., 220 Wis. 281, 263 N.W. 638 (1936); Georgeson v. Nielsen, 218 Wis. 180, 260 N.W. 461 (1935); Hanes v. Hermsen, 205 Wis. 16, 236 N.W. 646 (1931); Rissling v. Milw. E. L. & R. Co., 203 Wis. 554, 234 N.W. 879 (1931); Masterson v. Chi. & N.W. Ry., 102 Wis. 571, 78 N.W. 757 (1899); Andrews v. Chi., Milw. & St. P. Ry., 96 Wis. 348, 71 N.W. 372 (1897).

[411] Jacobsen v. State, 205 Wis. 304, 237 N.W. 142 (1931); State *ex rel.* Sarnowski v. Fox, 19 Wis.2d 68, 119 N.W.2d 451 (1962).

[412] Menn v. State, 132 Wis. 61, 112 N.W. 38 (1907).

[413] People v. Freitas, 34 Cal. App.2d 684, 94 P.2d 397 (1939); State *ex rel.* Burghart v. Haslebacher, 125 Ore. 389, 266 Pac. 900 (1928).

[414] People v. Freitas, *supra* note 413.

[415] People v. Haslebacher, 125 Ore. 389, 266 Pac. 900 (1928).

defendant realizes that his silence will be taken by the trier to be an admission of guilt despite his constitutional right not to incriminate himself. Consequently, it is unusual for the defendant not to take the witness stand.

In Wisconsin a witness in a civil proceeding may invoke the right of self-incrimination to shield himself from criminal liability but not from civil liability.[416] The rule has been applied in paternity matters to a witness as distinguished from a party.[417] Of course, the act which gives rise to a paternity action involves a sex crime of at least fornication.

Comment by the prosecutor in oral argument in a criminal case concerning the defendant's failure to testify is a violation of the defendant's right to freedom from self-incrimination.[418] It is error which may be prejudicial,[419] or merely improper and cured by an instruction.[420] Merely to sustain an objection to the comment is insufficient; the court must promptly condemn the statement and advise the jury of the defendant's rights and admonish the jury to disregard the remark.[421] Several jurisdictions have held such comment to be error without regard to whether paternity proceedings were civil or criminal.[422]

A putative father cannot be compelled in Ohio to testify against himself, but his failure to testify may be considered or be the subject of comment in argument. Paternity proceedings in Ohio are quasi-criminal, and the Ohio Constitution permits such comment and consideration in criminal proceedings.[423]

In Georgia, the defendant's failure in a criminal case to testify cannot be made a matter of comment. If the defendant does however testify in a paternity suit and fails to deny a material fact brought out in the evidence, comment may be made thereon.[424] The states of Ohio, Oklahoma, and Kansas permit comment upon the failure of the defendant to testify on the basis that paternity proceedings are civil.[425]

It would seem that if a party may invoke the right against self-incrimination, he should also be protected from comment which, if

[416] Karel v. Conlan, 155 Wis. 221, 144 N.W. 266 (1913).
[417] Poplowski v. State *ex rel.* Lewandowski, 194 Wis. 385, 216 N.W. 488 (1927).
[418] Griffin v. California, 380 U.S. 609 (1965).
[419] Pleau v. State, 255 Wis. 362, 38 N.W.2d 496 (1948); Martin v. State, 79 Wis. 165, 48 N.W. 119 (1891).
[420] Dunn v. State, 118 Wis. 82, 94 N.W. 646 (1903); Haffner v. State, 176 Wis. 471, 187 N.W. 173 (1922).
[421] State v. Jackson, 219 Wis. 13, 261 N.W. 732 (1935).
[422] People v. Stoeckl, 347 Mich. 1, 78 N.W.2d 640 (1956).
[423] State *ex rel.* Steiger v. Gray, 30 Ohio2d 394, 145, N.E.2d 162 (1957).
[424] Tolbert v. State, 12 Ga. App. 685, 78 S.E. 131 (1913).
[425] State *ex rel.* Raydel v. Raible, 69 Ohio L. Abs. 356, 117 N.E.2d 480 (1954); Codapony v. State, 178 Okla. 61, 61 P.2d 677 (1936); State v. Wright, 140 Kan. 679, 38 P.2d 135 (1934).

permitted, would make his utilization of the privilege prejudicial in a civil case. As a practical matter the same effect can be accomplished by forcing the defendant to invoke the right. As distinguished from a criminal case, the defendant in a paternity case may be called adversely or he may be asked on cross examination whether he had intercourse with the complainant within the conceptive period even though such is not within the scope of the direct examination.[426]

It is not improper for the district attorney or corporation counsel to inform the jury that the evidence in the case has convinced him beyond all reasonable doubt that the defendant is the father of the child.[427]

Although in an old case, comment in argument upon the resemblance of the child to the defendant was not held to be prejudicial,[428] such would now be held to be improper unless evidence of such resemblance were admissible under the rules of evidence and had been made part of the record.

CONCLUSION

The issues are simple. It is hoped that this article will provide some aids and ideas so that these matters can be more ably tried.

Two important matters which every lawyer must consider when confronted with a paternity trial have not been discussed in this article, because they are outside its scope. First, he must plan the intelligent use of his client's right to a preliminary examination of the complainant. Second, the possibility of a reasonable settlement must always be weighed carefully. If a settlement is possible, it is essential that both counsel and client understand the exclusive statutory procedure and restrictions placed upon such agreements, the fact that such may be entered without an admission of paternity upon the part of the defendant, and the consequences in case of default.[429]

Despite whatever assistance this article may be by way of suggestions or statement of rules, the trial of a paternity case will continue to challenge the understanding, knowledge, and wisdom of both prosecutor and defense counsel in the ways of experiences of life.

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[426] State *ex rel.* Burns v. Vernon, 26 Wis.2d 563, 133 N.W.2d 292 (1964).
[427] Fuerstenberg v. State, 201 Wis. 574, 230 N.W. 628 (1930).
[428] Baker v. State, 69 Wis. 32, 33 N.W. 52 (1887).
[429] WIS. STATS. §§52.28-.30 (1965).