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# Evidence--The Admissibility of Polygraph Test Results in Paternity Cases

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## EVIDENCE—THE ADMISSIBILITY OF POLYGRAPH TEST RESULTS IN PATERNITY CASES

Before the feasibility of admitting polygraph test results in evidence can be considered, one must understand the underlying theory of the test including the basic elements affecting its reliability. The polygraph is a scientific instrument which records physiological reactions to stimuli.<sup>1</sup> The most modern instruments measure blood pressure, pulse rate, respiration rate and depth, muscular pressure, and galvanic skin response.<sup>2</sup> The validity of the test rests upon the simple theory "that it takes more stress to lie than to tell the truth."<sup>3</sup>

The most important factor in the reliability of a polygraph test is the competency of the examiner.<sup>4</sup> Despite the importance of the human element, some authorities place the statistical accuracy of the polygraph test as high as one hundred percent. Others, however, claim its accuracy is as low as sixty percent.<sup>5</sup> A recent statement by eminent authorities in the field of polygraphs indicated that the known error in the technique is less than one percent with no diagnosis possible in only five percent of the cases.<sup>6</sup> Most errors are attributable to the training, skill, and experience of the examiner.<sup>7</sup> A recent study indicates that the examiner's tests be-

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<sup>1</sup>Note, *The Polygraph Revisited: An Argument for Admissibility*, 4 SUFFOLK U.L. REV. 111, 112 (1969) [hereinafter cited as *Admissibility*]; Comment, 5 ARIZ. L. REV. 76 (1963).

<sup>2</sup>J. REID & F. INBAU, *TRUTH AND DECEPTION* (1966). This book presents an in-depth discussion of each of these elements.

<sup>3</sup>*Admissibility*, *supra* note 1, at 112. The polygraph test is based on the principle that the sympathetic parts of the autonomic nervous system will respond to conditions of stress, involuntarily causing the activity of the heart, perspiration glands, and other internal organs to fluctuate. *United States v. Ridling*, 350 F. Supp. 90, 92 (E.D. Mich. 1972).

<sup>4</sup>Horvath & Reid, *The Reliability of Polygraph Examiner Diagnosis of Truth and Deception*, 62 J. CRIM. L.C. & P.S. 276, 281 (1971); Note, *The Admissibility of Polygraph Evidence Pursuant to Stipulation in Criminal Proceedings*, 5 AKRON LAW REV. 235, 237 (1972); Note, *The Role of the Polygraph in Our Judicial System*, 20 S.C.L. REV. 804, 816 (1968); *Admissibility*, *supra* note 1, at 120; Note, *Hypnosis, Truth Drugs, and the Polygraph: An Analysis of Their Use and Acceptance by the Courts*, 21 U. FLA. L. REV. 541, 542 (1969).

<sup>5</sup>*Admissibility*, *supra* note 1, at 116.

<sup>6</sup>REID & INBAU, *supra* note 2, at 234.

<sup>7</sup>*People v. Aragon*, 154 Cal. App. 2d 646, 316 P.2d 370 (Dist. Ct. App. 1957); *People v. Davis*, 343 Mich. 348, 72 N.W.2d 269 (1955); *State v. Gregoire*, 88 R.I. 401, 148 A.2d 751 (1959); Wicker, *The Polygraph Truth Test*, 22 TENN. L. REV. 711,

come more accurate with experience.<sup>8</sup> Furthermore, polygraph advocates claim that the few errors that do occur favor the innocent over the guilty; that is, the test is more likely to show a guilty person innocent than an innocent person guilty.<sup>9</sup>

The courts have looked to psychologists in order to determine whether the "general acceptance test"<sup>10</sup> has been satisfied as regards the admission of polygraph test results in evidence. The first case to deny the introduction of polygraph test results in evidence based its ruling on the lack of "recognition among psychological authorities."<sup>11</sup> Thus, it becomes important to determine the polygraph's acceptance among psychologists. Apparently, the only study of this subject was conducted approximately twenty-one years ago, and it indicated acceptance of the test's validity by a "substantial" body of scientific opinion.<sup>12</sup> Another such study would undoubtedly enhance the polygraph's case for acceptance in the courtroom.<sup>13</sup>

Appellate courts have consistently refused to sanction the admission of polygraph test results into evidence either in criminal<sup>14</sup> or civil<sup>15</sup> trials. The lone exception to this general rule of exclusion allows the parties to stipulate before the trial that the polygraph test results will be admissible by either side.<sup>16</sup> This ex-

712 (1953).

<sup>8</sup>Horvath & Reid, *supra* note 4, at 279.

<sup>9</sup>*Id.*

<sup>10</sup>The general acceptance test is discussed in the text accompanying notes 23-26 *supra*.

<sup>11</sup>*Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

<sup>12</sup>Cureton, *A Consensus as to the Validity of Polygraph Procedures*, 22 TENN. L. REV. 728 (1953).

<sup>13</sup>Some authorities think the polygraph has already met the "general acceptance test." *Admissibility*, *supra* note 1, at 116.

<sup>14</sup>*United States v. Tremont*, 351 F.2d 144 (6th Cir. 1965) (interstate transportation of stolen automobile); *McCroskey v. United States*, 339 F.2d 895 (8th Cir. 1965) (interstate transportation of forged checks); *State v. Lowry*, 163 Kan. 622, 185 P.2d 147 (1947) (felonious assault); *People v. Frechette*, 380 Mich. 64, 155 N.W.2d 830 (1968) (murder); *People v. Leone*, 25 N.Y.2d 511, 255 N.E.2d 696, 307 N.Y.S.2d 430 (1969) (murder); *Henderson v. State*, 94 Okla. Crim. 45, 230 P.2d 495 (1951) (rape).

<sup>15</sup>*Gideon v. Gideon*, 153 Cal. App. 2d 541, 314 P.2d 1011 (1957) (divorce); *Stone v. Earp*, 331 Mich. 606, 50 N.W.2d 172 (1951) (chancery suit to be declared legal and equitable owner of a dump truck); *Parker v. Friendt*, 99 Ohio App. 329, 118 N.E.2d 216 (1954) (action on a note).

<sup>16</sup>Note, *The Admissibility of Polygraph Evidence Pursuant to Stipulation in Criminal Proceedings*, 5 AKRON L. REV. 235 (1972); Comment, 6 S.D.L. REV. 136 (1961).

ception has been adopted by eight jurisdictions.<sup>17</sup>

The mere fact that a polygraph is used in obtaining an otherwise voluntary confession will not bar the confession's admissibility into evidence.<sup>18</sup> Since a defendant has no constitutional right to have a polygraph test administered to him,<sup>19</sup> reference during a trial to the willingness of a defendant to submit to a test is improper.<sup>20</sup> Furthermore, neither the administration of a polygraph test to a party,<sup>21</sup> nor a party's refusal to take such a test,<sup>22</sup> is a proper subject for comment by either counsel.

*Frye v. United States* was the first case to reject the admission into evidence of polygraph test results.<sup>23</sup> The court felt that the polygraph had not "gained general acceptance in the particular field in which it belongs."<sup>24</sup> This rationale has survived to the

<sup>17</sup>*Arizona*: State v. Chambers, 104 Ariz. 247, 451 P.2d 27 (1969); State v. Valdez, 91 Ariz. 274, 371 P.2d 894 (1962). *California*: People v. Davis, 270 Cal. App. 2d 841, 76 Cal. Rptr. 242 (1969); People v. Houser, 85 Cal. App. 2d 686, 193 P.2d 937 (1948). *Florida*: Butler v. State, 228 So. 2d 421 (Fla. 1969); State v. Brown, 177 So. 2d 532 (Fla. 1965). *Illinois*: People v. Parisie, 7 Ill. App. 3d 1009, 287 N.E.2d 310 (1972); People v. Zazzetta, 27 Ill. 2d 302, 189 N.E.2d 260 (1963). *Iowa*: State v. Galloway, 167 N.W.2d 89 (Iowa 1969); State v. McNamara, 252 Iowa 19, 104 N.W.2d 568 (1960). *Missouri*: State v. Fields, 434 S.W.2d 507 (Mo. 1968). *New Jersey*: State v. McDavitt, 62 N.J. 36, 297 A.2d 849 (1972). *Washington*: State v. Ross, 7 Wash. App. 62, 497 P.2d 1343 (1972).

<sup>18</sup>*United States v. McDevitt*, 328 F.2d 282 (6th Cir. 1964); State v. Traub, 150 Conn. 169, 187 A.2d 230 (1962); Johnson v. State, 166 So. 2d 798 (2d Dist. Ct. App. Fla. 1964); Pinter v. State, 203 Miss. 344, 34 So. 2d 723 (1948); Fernandez v. State, 172 Tex. Crim. 68, 353 S.W.2d 434 (1962); State v. DeHart, 242 Wis. 562, 8 N.W.2d 360 (1943).

<sup>19</sup>State v. Freeland, 255 Iowa 1334, 125 N.W.2d 825 (Iowa 1964); Hyde v. Warden, 235 Md. 641, 202 A.2d 382 (1964); State *ex rel.* Sheppard v. Koblinz, 174 Ohio St. 120, 187 N.E.2d 40 (1962).

<sup>20</sup>State v. Anderson, 261 Minn. 431, 113 N.W.2d 4 (1962); State v. La Rocca, 81 N.J. Super. 40, 194 A.2d 578 (1963); Commonwealth v. Saunders, 386 Pa. 149, 125 A.2d 442 (1956); Commonwealth v. McKinley, 181 Pa. Super. 610, 123 A.2d 735 (1956).

<sup>21</sup>Wilcutt v. State, 41 Ala. App. 25, 123 So. 2d 193 (1960); People v. Aragon, 154 Cal. App. 2d 646, 316 P.2d 370 (1957); People v. Welke, 342 Mich. 164, 68 N.W.2d 759 (1955); State v. Kolander, 326 Minn. 209, 52 N.W.2d 458 (1952); Pittman v. State, 236 Miss. 592, 111 So. 2d 415 (1959); State v. Smith, 113 Ohio App. 461, 178 N.E.2d 605 (1960); Leeks v. State, 95 Okla. Crim. 326, 245 P.2d 764 (1952).

<sup>22</sup>Mills v. People, 139 Colo. 397, 339 P.2d 998 (1959); State v. Emory, 190 Kan. 406, 375 P.2d 585 (1962); State v. Kolander, 236 Minn. 209, 52 N.W.2d 458 (1952); State v. Britt, 235 S.C. 395, 111 S.E.2d 669 (1959); Barber v. Commonwealth, 206 Va. 241, 142 S.E.2d 484 (1965).

<sup>23</sup>293 F. 1013 (D.C. Cir. 1923). Comment, 6 S.D.L. Rev. 136, 138 (1961).

<sup>24</sup>293 F. at 1014.

present day and is currently the most frequently cited reason for barring the admission of polygraph test results.<sup>25</sup> Of course, in the fifty years since *Frye* was decided, the courts have used numerous other reasons for rejecting polygraph test results. One such reason concerns the potential impact of polygraph evidence on a jury. The polygraph is said to invade the realm of the jury or even supplant the jury system itself<sup>26</sup> in that the many variables and ramifications of the test impose too subtle a task of evaluation upon untrained laymen.<sup>27</sup> Consequently, the test results would weigh too heavily in the jurors' minds.<sup>28</sup> Other courts have rejected polygraph evidence on constitutional grounds, holding that the polygraph violates either the privilege against self incrimination<sup>29</sup> or the hearsay rule, thus impairing the vital function of cross-examination.<sup>30</sup>

Some courts have grounded their decisions to reject polygraph test results upon factors directly related to the machine itself. These courts feel that the examiner and the test instrument have not been sufficiently standardized<sup>31</sup> and that the test does not work on people who have physiological or psychological abnormalities, such as schizophrenia or high blood pressure,<sup>32</sup> or on people with

<sup>25</sup>Comment, 5 ARIZ. L. REV. 76 (1963).

<sup>26</sup>United States v. Stromberg, 179 F. Supp. 278 (S.D.N.Y. 1959); People v. Schiers, 160 Cal. App. 364, 329 P.2d 1 (Dist. Ct. App. 1958); State v. Smith, 113 Ohio App. 461, 178 N.E.2d 605 (1960); Peterson v. State, 157 Tex. Crim. 255, 247 S.W.2d 110 (1951); Comment, 6 S.D.L. Rev. 136-37, 140 (1961). See Silving, *Testing of the Unconscious in Criminal Cases*, 69 HARV. L. REV. 683 (1956).

<sup>27</sup>Boeche v. State, 151 Neb. 368, 37 N.W.2d 593 (1949).

<sup>28</sup>People v. Frechette, 380 Mich. 64, 155 N.W.2d 830 (1968); State v. Perry, 274 Minn. 1, 142 N.W.2d 573 (1966); State v. Cole, 354 Mo. 181, 188 S.W.2d 43 (1945); State v. Foye, 254 N.C. 704, 120 S.E.2d 169 (1961); Commonwealth v. McKinley, 181 Pa. Super. 610, 123 A.2d 735 (1956).

<sup>29</sup>E.g., People v. Sims, 395 Ill. 69, 69 N.E.2d 336 (1946). *Contra*, Inbau, *Scientific Evidence in Criminal Cases*, 24 J. CRIM. L. & C. 1140, 1151 (1933). The West Virginia Supreme Court of Appeals has held that an accused in a criminal case is protected against compulsory self-incrimination, State v. Bragg, 140 W. Va. 585, 87 S.E.2d 689 (1955). The court has also held that conduct on the part of the accused tending to show consciousness of guilt is usually admissible against him. State v. Wright, 130 W. Va. 336, 43 S.E.2d 295 (1947).

<sup>30</sup>United States v. Stromberg, 179 F. Supp. 278 (S.D.N.Y. 1959); State v. Lowry, 163 Kan. 622, 185 P.2d 146 (1947); Boeche v. State, 151 Neb. 368, 37 N.W.2d 593 (1949); State v. Foye, 254 N.C. 704, 120 S.E.2d 169 (1961); Henderson v. State, 94 Okla. Crim. 45, 230 P.2d 495 (1951).

<sup>31</sup>State v. Lowry, 163 Kan. 622, 185 P.2d 147 (1947); People v. Davis, 343 Mich. 348, 72 N.W.2d 269 (1955).

<sup>32</sup>People v. Davis, 343 Mich. 348, 72 N.W.2d 269 (1955); Boeche v. State, 151 Neb. 368, 37 N.W.2d 593 (1949).

temporary disorders, such as drunkenness, colds, or hiccups.<sup>33</sup>

The objection that the polygraph invades the realm of the jury should be obviated by the realization that too often the courtroom is the scene of intentional perjury.<sup>34</sup> The court is ultimately looking for truth, and if a device such as a polygraph will aid in producing it, the courts should accept the instrument's assistance. Furthermore, if the test results are restricted to use as corroborating evidence or in evaluating credibility, then it is for the jury to determine the corroborative weight and effect such testimony should be given.<sup>35</sup> Thus, the test results would supplement the jury system rather than supplant it. In supplementing the jury system, the polygraph test would not impose too subtle a task of evaluation upon a jury, nor would the test results weigh too heavily in the jury's mind.<sup>36</sup> The argument of subtlety is an old enemy of the jury system which is no more persuasive today than it has been in the past.<sup>37</sup> The failure of courts to recognize modern science will only hinder their ability to administer justice.<sup>38</sup>

Two remedies are available to alleviate the problem of a jury considering the test results as conclusive evidence. The first is cross-examination of the polygraph examiner in order to demonstrate that he must draw "inferences" from objective results. This serves to orient the jury's attention toward the examiner rather

<sup>33</sup>Higlezman, *The Deceptive Certainty of the Lie Detector*, 10 HASTINGS L.J. 47, 60 (1958). Three other reasons propounded for not admitting polygraph test results as evidence are: (1) The machine is not infallible, *Commonwealth v. Delworth*, 179 Pa. Super. 64, 115 A.2d 865 (1955); (2) premature acceptance would do more harm than good, *People v. Davis*, 343 Mich. 348, 72 N.W.2d 269 (1955); *State v. Bohner*, 210 Wis. 651, 246 N.W. 314 (1933); (3) admission of polygraph test results would violate due process of law under the fifth and fourteenth amendments to the United States Constitution. Note, *Hypnosis, Truth Drugs and the Polygraph: An Analysis of Their Use and Acceptance by the Courts*, 21 U. FLA. L. REV. 541, 549-50 (1969).

<sup>34</sup>Wicker, *The Polygraph Truth Test and the Law of Evidence*, 22 TENN. L. REV. 711, 712 (1953).

<sup>35</sup>*State v. Valdez*, 91 Ariz. 274, 283, 371 P.2d 894, 900 (1962).

<sup>36</sup>In *United States v. Ridling*, 350 F. Supp. 90, 96 (E.D. Mich. 1972), the court held that polygraph test results were admissible in a perjury prosecution, refuting the argument that the jury would give too much weight to such evidence. In West Virginia, this argument was made against the admissibility of photographs of victims taken at the scene of a crime. The court rejected it and admitted the photographs, *State v. Bruner*, 143 W. Va. 755, 105 S.E.2d 140 (1958), thereby following the reasoning of *Ridling* in an analogous situation.

<sup>37</sup>Karcher, *The Case for the Jury System*, 45 CHI.-KENT L. REV. 157, 166 (1968); Note, *The Jury: Is it Viable*, 6 SUFFOLK U.L. REV. 897, 900 (1972).

<sup>38</sup>*Boeche v. State*, 151 Neb. 368, 37 N.W.2d 593 (1949).

than the test instrument.<sup>39</sup> The second remedy is a limiting instruction to the effect that the test results are not to be deemed conclusive.<sup>40</sup>

Other arguments against the use of polygraph evidence do not pose an impenetrable barrier. Since recordings on a polygraph do not constitute testimonial utterances,<sup>41</sup> virtually nothing is left of the argument that requiring an individual to take a polygraph test violates his constitutional privilege against self-incrimination.<sup>42</sup> Concerning the hearsay objection,<sup>43</sup> the recordings of the polygraph machine itself are not determinative of any issue, and, as shown above, the relative accuracy of the polygraph test as a whole depends upon the competency of the examiner. Thus, the polygraph test results could be considered similar to the results of other mechanical devices, such as cameras, x-ray machines, and electrocardiographs, which are admitted into evidence as exceptions to the hearsay rule.<sup>44</sup> Just as the results of other mechanical tests are of no value to judge or jury until interpreted by an expert, the results of a polygraph test are likewise of limited value without interpretation.<sup>45</sup> Thus, there should be no valid objection that the admission of polygraph test results into evidence impairs the right of cross-examination, since the examiner, the most important fac-

<sup>39</sup>Admissibility, *supra* note 1, at 123.

<sup>40</sup>*Id.* at 124. Although the effect of a limiting instruction is sometimes doubtful, this is not a problem unique to the admissibility of polygraph test results. *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (dissenting opinion).

<sup>41</sup>F. INBAU, SELF-INCRIMINATION 66 (1950); C. McCORMICK, HANDBOOK ON THE LAW OF EVIDENCE 266 (1954); McCormick, *Deception — Tests and the Law of Evidence*, 15 CALIF. L. REV. 484, 502 (1927); McCormick, *Deception — Tests and the Law of Evidence*, 6 TENN. L. REV. 108, 131 (1928); Hardman, *Lie Detectors. Extra-Judicial Investigation and the Courts*, 48 W. VA. L.Q. 37, 39 (1942). *Contra*, Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie Detection*, 70 YALE L.J. 694, 725 (1961).

<sup>42</sup>*Schmerber v. California*, 384 U.S. 757 (1966). Compare *Schmerber with United States v. Ridling*, 350 F. Supp. 90 (E.D. Mich. 1972), where the court held that since the defendant must consent to a polygraph test before it can be administered, admitting evidence of test results does not violate his privilege against self-incrimination.

<sup>43</sup>See *United States v. Ridling*, 350 F. Supp. 90, 99 (E.D. Mich. 1972). This case involved a prosecution for perjury in which the court admitted the testimony of the polygraph examiner concerning his opinion as to the truthfulness of the defendant's answers as an exception to the hearsay rule.

<sup>44</sup>J. REID & F. INBAU, *supra* note 2, at 240; Note, *The Role of the Polygraph in Our Judicial System*, 20 S.C.L. REV. 804, 821 (1968).

<sup>45</sup>Comment, 5 ARIZ. L. REV. 76, 79 (1963).

tor in the test, is subject to cross-examination on his diagnosis.<sup>46</sup>

Objections relating to the nature of the polygraph are no longer valid. The polygraph measures variations in certain physiological factors,<sup>47</sup> which means that individual abnormalities can diminish the reliability of a test. The examiner can usually recognize such abnormalities and take them into consideration if they are excessive enough to affect the test results materially.<sup>48</sup>

Finally, the objection that the polygraph test is not standardized<sup>49</sup> is easily remedied. Standardization can be achieved by requiring rigid standards for the admissibility of polygraph test results.<sup>50</sup> Standardized requirements, which would bind every court in the State to the same procedures, could best be established by the legislature. However, absent legislative guidelines, a court could establish its own rigid standards. No court or legislature should settle for anything less than the most ideal procedures and test atmosphere.<sup>51</sup>

The use of the polygraph may have its most beneficial effect in paternity proceedings.<sup>52</sup> An illustration of this peculiar applica-

<sup>46</sup>*Id.*

<sup>47</sup>*Admissibility, supra* note 1, at 121.

<sup>48</sup>J. REID & F. INBAU, *supra* note 2, at 184.

<sup>49</sup>Only fifteen or sixteen states require polygraph examiners to be licensed, and consequently, it is generally true that almost "anybody can buy a machine and put up a shingle." F. BAILEY, *THE DEFENSE NEVER RESTS* 17 (1971).

<sup>50</sup>*Admissibility, supra* note 1, at 124.

<sup>51</sup>There is already a national organization of polygraph examiners which has set high requirements for membership. Note, *The Role of the Polygraph in Our Judicial System*, 20 S.C.L. REV. 804, 816 (1968).

<sup>52</sup>Another area in which the use of the polygraph would be particularly beneficial is in perjury prosecutions. A recent case has held polygraph test results admissible in such cases. *United States v. Ridling*, 350 F. Supp. 90 (E.D. Mich. 1972). A perjury case is based on "willfully" or "knowingly" giving false evidence, and the polygraph test is aimed exactly at this aspect of truth. A subject may give an answer which is obviously wrong. If, however, he has answered according to his honest belief, the examiner will interpret the answer as being truthful. In *Ridling*, the court stated that polygraph test results should be admitted in evidence upon the following conditions: (1) the parties recommend to the court three competent polygraph experts other than those offered by the defendant; (2) the court then appoints one or more of these experts to conduct a polygraph test; (3) the defendant must submit himself for such test at an appointed time; (4) the expert appointed by the court should conduct the test and report the results to the court and counsel for both; (5) if the results show either that the defendant was telling the truth or that he was not telling the truth on the issues directly involved in the case, the testimony of both the defendant's expert and the court's expert should be admitted; (6) if the tests indicate that the examiner cannot determine whether the defendant is or is



bility is shown in *A. v. B.*,<sup>53</sup> in which the court took cognizance that an unwed mother is a reluctant witness who would prefer not to admit that she had sexual relations with more than one man during the period of conception.<sup>54</sup> Conversely, the male will often claim that he had no sexual relations with the mother during the period of conception or that others besides himself had such relations.<sup>55</sup> Thus, as the court stated in *Paternity*, the end result of a paternity proceeding is generally two directly opposing stories, only one of which can be true.<sup>56</sup> Although the device of blood-group testing is available,<sup>57</sup> it is helpful only where the alleged father can be excluded as a possible parent.<sup>58</sup> A polygraph test would be invaluable in those cases where the alleged father is not excluded, since only rarely are there witnesses or physical evidence on either side.<sup>59</sup>

As previously stated, several courts regularly admit polygraph test results upon stipulation.<sup>60</sup> The courts adhering to this view feel that the polygraph is at least reliable enough to be used in deter-

not telling the truth, none of the polygraph evidence should be admitted; and (7) in the event the defendant declines to cooperate in the test, none of the polygraph evidence should be admitted.

<sup>53</sup>336 N.Y.S.2d 839 (Family Ct. 1972) (hereinafter referred to as *Paternity*). Most states, unlike New York, do not report their trial court decisions. Thus, it is virtually impossible to determine if trial courts in other jurisdictions have ordered pretrial polygraph tests. However, at the present time there is one other New York trial court decision in which the court ordered a pretrial polygraph test administered to the parties. *Walther v. O'Connell*, 339 N.Y.S.2d 386 (Civil Ct. 1972). This case concerned the validity of an oral contract to loan money where there was no evidence except the directly opposing contentions of the parties. The case is similar to the situation in *Paternity*, in that both courts felt the polygraph especially useful in the determination of truth where the only evidence was the directly conflicting contentions of the parties.

<sup>54</sup>336 N.Y.S.2d at 843.

<sup>55</sup>*Id.*

<sup>56</sup>*Id.*

<sup>57</sup>W. VA. CODE ANN. § 48-7-8 (1966). Upon motion seasonably made, the court shall order the mother, her child and the alleged father to take one or more blood grouping tests. These test results are admissible in evidence only where a definite exclusion is established.

<sup>58</sup>Reid, *The Lie Detector in Court*, 4 DEPAUL L. REV. 31, 40 (1954).

<sup>59</sup>Arther & Reid, *Utilizing the Lie Detector Technique to Determine the Truth in Disputed Paternity Cases*, 45 J. CRIM. L.C. & P.S. 213, 214 (1954).

<sup>60</sup>These courts are set forth in note 17 *supra*. Pretrial stipulations have been held binding in West Virginia. *Spencer v. Steinbrecher*, 152 W. Va. 490, 164 S.E.2d 710 (1968); *Butler v. Smith's Transfer Corp.*, 147 W. Va. 402, 128 S.E.2d 32 (1962). Thus, there is no obstacle to the adoption of the modern view that polygraph test results are admissible into evidence upon stipulation with the safeguards referred to in this note.

mining credibility.<sup>61</sup> Since credibility is usually the only issue in a paternity case, it would seem that a court faced with such a case would be willing to accept evidence that might not be admissible under the strict rules of evidence. In addition, many of the anti-admissibility arguments discussed previously disappear when a stipulation is used to allow the polygraph test results to be admitted. After stipulation, the parties are deemed to have waived their rights to object to the admission of the polygraph test results.<sup>62</sup> However, the right to cross-examine with respect to examiner qualifications, test conditions, general reliability and any other matters deemed relevant by the trial judge is retained. Stipulations are generally utilized in cases where evidence on both sides is unconvincing.<sup>63</sup> This situation exists in most paternity proceedings, resulting in many decisions being based on guess work. The use of polygraph test results in paternity cases would provide a more

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<sup>61</sup>State v. Valdez, 91 Ariz. 274, 283, 371 P.2d 894, 900 (1962). See United States v. Ridling, 350 F. Supp. 90, 94 (E.D. Mich. 1972), wherein the court held that the decisions of state and federal courts excluding polygraph testimony because of its unreliability were entitled to great weight in determining whether to admit polygraph evidence in a perjury prosecution. However, such decisions were held not persuasive in light of improvements in the polygraph and the testing procedure.

<sup>62</sup>State v. Chambers, 104 Ariz. 247, 451 P.2d 27 (1969); People v. Davis, 270 Cal. App. 2d 841, 76 Cal. Rptr. 242 (1969); People v. Houser, 85 Cal. App. 2d 686, 193 P.2d 937 (1948); Butler v. State, 228 So. 2d 421 (Fla. 1969); State v. Brown, 177 So. 2d 532 (Fla. 1965); State v. Galloway, 167 N.W.2d 89 (Iowa 1969); State v. McNamara, 252 Iowa 19, 104 N.W.2d 568 (1960); State v. Fields, 434 S.W.2d 507 (Mo. 1968).

<sup>63</sup>Note, *The Role of the Polygraph in Our Judicial System*, 20 S.C.L. REV. 804, 814 (1968). In State v. Valdez, 91 Ariz. 274, 371 P.2d 894 (1962), the court stated qualifications for admission of polygraph test results upon stipulation: (1) The prosecutor, defendant, and defendant's counsel must enter into a written stipulation providing for defendant's submission to the test and the subsequent admission at the trial of the results and the examiner's opinion by either side; (2) notwithstanding the stipulation, the admissibility of test results is subject to the discretion of the judge; (3) if the test results are offered into evidence, then the opposing party can cross examine as to (a) the examiner's qualifications, (b) test conditions, (c) limitations and possibilities for error in a polygraph test, and (d) any other area deemed pertinent in the discretion of the trial judge; (4) if the test results are admitted, the jury should be instructed that the test does not prove or disprove an element of the crime, but only indicates that at the time of the examination the defendant was lying or telling the truth, and that the jury is to determine the corroborative weight and effect of the examiner's testimony. See Note, *The Admissibility of Polygraph Evidence Pursuant to Stipulation in Criminal Proceedings*, 5 AKRON L. REV. 235 (1972), for a discussion of the admission of polygraph test results upon stipulation from the point of view of the defendant's counsel and a sample form for a stipulation.

accurate basis for a decision than any guess by judge or jury.<sup>64</sup>

The most desirable procedure for use of the polygraph in paternity proceedings would require the blood-group test to be administered first and then order the parties to take a polygraph test only if the blood test fails to exclude the alleged father as a possible parent.<sup>65</sup> Although an examinee's counsel cannot be present during the polygraph test,<sup>66</sup> all test results should be sent to both attorneys and the judge at the earliest possible date.<sup>67</sup> The test results should then be admissible as evidence to support either party's case. This procedure would include using the test results for corroboration or impeachment of testimony.

To hold that polygraph test results are only admissible against a party if he testifies<sup>68</sup> is a rule without a reason. In a paternity proceeding, as a practical matter, a party has no evidence except his own testimony.<sup>69</sup> He is forced to take the stand or present no case at all. Furthermore, the attorney of the party whose test results were unfavorable has the opportunity to cross-examine the polygraph examiner as to the validity of the test of his client as well as to the validity of the favorable test of the opposing party. Finally, the court should order that the polygraph test be given by an expert selected by the court itself. If the court appointed polygraph examiner determines that the party is capable of being tested accurately, then both the court appointed examiner and an examiner selected by the party himself should be allowed to testify concerning the respective test results, regardless of whether the two tests indicate the same results. However, if the court appointed examiner determines that the party is not capable of being

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<sup>64</sup>Note, *The Role of the Polygraph in our Judicial System*, 20 S.C.L. REV. 804, 814 (1968).

<sup>65</sup>J. REID & F. INBAU, *supra* note 2, at 247 n.45.

<sup>66</sup>Specific test conditions and procedures which should be adhered to are explained in J. REID AND F. INBAU, *supra* note 2, at 5-6. One of the test conditions requires that there be no extraneous distractions. This would seem to require that only the examiner and examinee be present in the test room.

<sup>67</sup>Polygraph test results in paternity cases should be available to the judge, especially in a jury trial. In a jury trial, the judge must prepare the jury to interpret polygraph evidence properly, because the jury is the fact finder and weigher of credibility. However, in either a jury or non-jury trial the judge should have the test results before trial so that he may familiarize himself with the report of the examiner. The judge must make the initial determination of admissibility, and, therefore, he should be informed of the test results as soon as possible.

<sup>68</sup>336 N.Y.S.2d at 844.

<sup>69</sup>Arther & Reid, *supra* note 60, at 214.

accurately tested, then no evidence concerning either test should be admitted.<sup>70</sup> A court ordered polygraph test would not waive the standards which must be met to insure reliability. Besides cross-examination, the avenues of motion<sup>71</sup> or objection would still be open to challenge the competency of the examiner, the test environment, the test procedure or any other factor which might affect the results.<sup>72</sup> Thus, the final decision on admissibility is left to the discretion of the court. If the test results are admitted, the jury should be instructed that the polygraph test is not determinative of the ultimate issue, but only tends to indicate whether the examinee was telling the truth at the time of the examination. The instruction should also inform the jury that they alone are to determine the corroborative weight and effect of the examiner's testimony.<sup>73</sup>

There are no reported cases in West Virginia dealing with the admissibility of polygraph test results. Therefore, when the West Virginia Supreme Court of Appeals is faced with the issue, it will be able to canvass the previously mentioned arguments objectively without regard to local precedent. The present case law presents no problem for the admissibility of such evidence. In West Virginia, the admissibility of evidence based on experiments depends upon whether such evidence will enlighten the jury and enable them to consider the issues more intelligently.<sup>74</sup> As previously stated, paternity proceedings very often turn on the believability of the parties, and the polygraph test can be an invaluable aid to the jury on the issue of credibility. The polygraph test can meet the condition that experiments must be conducted under proper circumstances and conditions if a high level of competency of both examiner and test equipment are required.<sup>75</sup> All experiments re-

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<sup>70</sup>United States v. Ridling, 350 F. Supp. 90, 99 (E.D. Mich. 1972).

<sup>71</sup>In *Paternity*, one of the parties made a timely motion which required the court to determine the admissibility of the polygraph test results. If the court rules that such results are inadmissible, no mention of the test should be allowed during the trial. 336 N.Y.S.2d at 841.

<sup>72</sup>The extent to which a party may contest the admissibility of test results should be left to the discretion of the trial judge. The ultimate issue in a paternity proceeding may be obscured by the collateral issue of polygraph admissibility.

<sup>73</sup>State v. Valdez, 91 Ariz. 274, 371 P.2d 894 (1962).

<sup>74</sup>State v. Newman, 101 W. Va. 356, 132 S.E. 728 (1926).

<sup>75</sup>*Admissibility*, *supra* note 1, at 124. Requirements in test procedure and examiner qualification could be better determined by the legislature. However, in the absence of guidance the courts could set high standards themselves, although the standards set would lack uniformity unless delineated by the West Virginia Su-

quire that a proper foundation be laid before the evidence is admissible, and no exception should be made for polygraph test results. The requirements for a proper foundation for the admissibility of polygraph test results should be fashioned in the same manner as the requirements stated in a recent case concerning the results of a breathalyzer test.<sup>76</sup> It should be sufficient to show that: 1) the testing device was in proper working order; 2) the person giving and interpreting the test was properly qualified; 3) the test was properly conducted; and 4) there was compliance with all statutory requirements.<sup>77</sup> Another requirement for admissibility of experimental evidence in West Virginia is the separation of the human element from the mechanical element.<sup>78</sup> This accords with the general theory under which polygraph test results should be admissible. Cross-examination should demonstrate that the examiner is the most important single factor affecting the reliability of a polygraph test, thus turning the jury's attention toward the examiner rather than the test instrument itself.<sup>79</sup>

It is clearly feasible to use the polygraph in West Virginia courts, at least in paternity proceedings. This procedure allows the judge to employ every available method to determine the truth. Even if court ordered tests are not acceptable, stipulations could be used in paternity proceedings as an alternative. The courts should look to the polygraph test as an aid in establishing a sense of justice in this very unpredictable area of the law.

*Dale F. Sheppard*

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preme Court of Appeals. If the requirements stated in this note are generally adhered to, then uniformity will be substantially satisfied.

<sup>76</sup>*State v. Hood*, 184 S.E.2d 334 (W. Va. 1971). See *United States v. Zeiger*, 350 F. Supp. 685 (D.D.C. 1972), *rev'd.*, 475 F.2d 1280 (1972) (*per curiam*). This case involved a prosecution for assault with intent to kill while armed and other related offenses. The court granted a motion for a pretrial evidentiary hearing on the admissibility of polygraph test results and thereafter ordered the proffered testimony to be admitted at the trial. In granting this motion, the court considered the testimony of experts on the polygraph, the qualifications of the examiner who administered the test, the manner in which the test was administered, the contemplated vigorous cross-examination, and the contemplated preparation of the jurors to enable them to evaluate the test results properly. The court added that the examiner would be allowed to state his opinion of the test results concerning factual questions asked the defendant and to explain the basis for his opinion, but he would not be allowed to express an opinion as to guilt or innocence.

<sup>77</sup>*State v. Hood*, 184 S.E.2d 334 (W. Va. 1971).

<sup>78</sup>*Spurlin v. Nardo*, 145 W. Va. 408, 114 S.E.2d 913 (1960).

<sup>79</sup>*Admissibility*, *supra* note 1, at 124.