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# Paternity Blood Grouping Tests: Recent Setbacks

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# PATERNITY BLOOD GROUPING TESTS: RECENT SETBACKS*

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In 1901 Dr. Karl Landsteiner of the Rockefeller Institute reported the discovery of the four blood groups, A, B, AB, and O. Since then more than 5,000 articles and many monographs and books have been published upon the subject, and the forensic application of blood grouping tests—as legal evidence in court to prove non-paternity—is now firmly established in many jurisdictions. Blood grouping tests have been used in many European countries since 1920 with a substantial percentage of exclusions—that is, instances when the results of tests made on the child, the mother, and the alleged father indicated that the latter was wrongfully accused. For instance, in Denmark alone during 1933-1936, there were 775 exclusions of paternity in 3124 cases, nearly 25 per cent.[1]

European medical authorities regard the blood test as the most valuable method available toward the solution of the perplexing problem of deciding paternity disputes. The legal value of the evidence afforded by this test is acknowledged because it is based on facts scientifically and objectively established. Up to 1933, 8000 tests had been performed for European courts and with highly satisfactory results; yet it was not until 1935 that the first American legislation upon the subject was enacted in the State of New York. Thus far only four other states have enacted similar legislation: Wisconsin, Maine, Ohio, and New Jersey.

In Pennsylvania (which lacks a specific statute) some courts have granted blood grouping tests, and accepted the results thereof,[2] and others have refused them.[3] Blood grouping test results have been admitted as evidence in a California case, but the jury's disregard of the evidence which established the innocence of the alleged father was sustained by the Supreme Court of California.[4] In the District of Columbia, although there is no specific authority for blood grouping tests, a test was ordered under a rule of practice providing for physical examination of a party litigant.[5]

In the past few years, decisions have been handed down in four states which call for some comment. In three of these decisions the court disregarded

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1 Wiener, A. S., *Blood Groups and Blood Transfusions*, (2d ed., 1939) 265.

2 Blood test granted: Commonwealth v. Zammorelli, 17 Pa. D. & C. 229 (1931); Commonwealth v. Visocki, 23 Pa. D. & C. 103 (1936).

3 Blood test denied: Commonwealth v. Morris, 22 Pa. D. & C. 111 (1934); Commonwealth v. English, 123 Pa. Super. 161, 186 Atl. 298, 301 (1936).

4 Arias v. Kalensnikoff, 10 Cal. 2d, 428, 74 P. 2d, 1043 (1937).

5 *Beach* v. *Beach*, 114 F. 2d, 479 (1940).

the expert's finding on non-paternity, and in the fourth the court refused to order the test, although there was a specific statute upon the subject. It may prove interesting to examine the court's reasoning in each one of these cases.

In *Harding v. Harding*,[6] a support proceeding involving a dispute as to the paternity of the wife's child, blood grouping tests excluded the husband as a possible father. Nevertheless, the court disregarded the test results and held the respondent liable for the child's support. In the light of the exclusion the facts in the case are significant. The wife admitted having had antenuptial relations with her husband, and he married her on being informed of her pregnant condition. The child, therefore, although concededly legitimate and born in wedlock, was nevertheless *conceived out of lawful wedlock*. What warrant did the court have for assuming the wife was telling the truth, in the face of the blood grouping test exclusion? The court reasoned as follows: "Feminine dignity throughout all generations and races eternally alert and vigilant to resent the infamy of such a charge (that her child is illegitimate) and outraged at being thus degraded by a test of its decency and morality by a court order (for a blood test) issued without any evidence in the first instance to sustain it, never forgives or forgets this deadly insult." This line of reasoning does not cancel the *concrete, objective* evidence of non-paternity afforded by the blood test. Nor is it cancelled by the court's statement that the function of the Domestic Relations Court is "the reconstruction of families, the quieting of domestic discord, the reuniting of broken homes, the healing of marital wounds, and the restoration of the dignity of the family."

The court in the foregoing case also invoked the rule of presumption of legitimacy of a child born in wedlock. It is today well known, however, that such a presumption is subject to rebuttal. The evidence of illegitimacy, gathered impersonally and objectively in a laboratory, constitutes proof of the highest order and should be welcomed by the courts, and the presumption of legitimacy should give way when in conflict with the actual fact of illegitimacy afforded by a conclusive blood test result.

A further reason given for the court's decision in the *Harding* case appears in the following excerpt from the opinion:

"The language (of the blood test statute) by implication substitutes the medical expert for the court as the determiner of the fact of 'exclusion'. This implication is drawn from these words *'the result of such tests may be received in evidence but only in cases where definite exclusion is established'*. According to this language the 'exclusion' as to paternity is already determined before the facts establishing the exclusion are submitted in evidence."

The italicized portion of the foregoing excerpt was the subject of an amendment to the New York Statute on May 4, 1936, designed to protect the defendant against the erroneous impression that might be created by an inconclusive blood test result. "The amend-

[6] 22 N. Y. Supp. (2d) 810 (1940).

ment . . . modified the provisions thereof to bring them into accord with the most modern scientific practice. Medical experimentation has reached the point where the exclusion of a given person as the parent of a child can be determined with scientific certainty; but blood grouping tests are purely negative in efficacy and cannot, at the present time, establish paternity as a positive fact."[7] Thus, the test will not be granted upon the mother's request because, clearly, the result cannot prove paternity.[8]

In a recent New Jersey case, *Bednarik v. Bednarik*,[9] a husband sought a divorce from his wife, claiming that the child was not his own and alleging his wife's adultery. His motion for a blood test was denied on constitutional grounds. The court said: "To subject a person against his will to a blood test is an assault and battery, and clearly an invasion of his personal privacy. It involves the sticking of a surgical needle into his body. Perhaps the operation is harmless in the great majority of cases, although the risk of infection is always present. But if we admit such encroachment upon the personal immunity of an individual where in principle can we stop? Suppose medical discovery in the future evolves a technique whereby the truth may infallibly be secured from a witness by trepanning his skull and testing the functions of the brain beneath. No one would contend that the witness could be forced against his will to undergo such a major operation at the imminent risk of his life, in order to secure evidence in a suit between private parties. How then can he be forced to undergo a less dangerous operation, and at what point shall the line be drawn? To my mind, it is not the degree of risk to life, health, or happiness which is the determinative factor, but the fact of the invasion of the constitutional right to personal privacy."

An interesting article on blood tests, with particular emphasis on the legal question whether a person can be compelled to furnish the necessary drop of blood, was published in 1926 and is well worth reading today.[10] The author of that article cites examples of drastic remedies in the courts (jailing a material witness; physical examination in a personal injury action; if paralysis is claimed, a test of sensitiveness to pain; exhibition of wound or disfigurement to the jury) and then asks, "Are these not the same courts which once ordered people to trial by ordeal and trial by battle? Has a drop of blood grown too great for them?"

In the *Bednarik* case the court inquired: "Upon what social theory can the compulsory blood grouping test of a defendant and her child in a divorce suit ordered for the purpose of attempting to prove her guilty of adultery, be justified?" The answer, it seems, is obvious. The court wants the truth. Without the truth, it cannot render a correct decision. As the court put it in *State v. Damm*,[11] "The primary func-

[7] Spellman, *Criminal Codes, Inferior Criminal Courts Act*, Annotation to Section 67, 1002.

[8] Flippen v. Meinhold, 156 Misc. 451, 282 N. Y. Supp. 444 (1935).

[9] 16 Atl. (2d) 80 (N. J., 1940).

[10] Lee, B., "Blood Tests for Paternity," Amer. Bar Assn. Journal 12: July 441 (1926).

[11] 62 S. D. 123, 252 N. W. 7 (1933), 266 N. W. 677 (1936).

tion of the judiciary is the administration of justice, and justice can never be rightly administered unless truth be first ascertained as nearly as may be. * * * We perceive no valid reason why courts of record may not require of any person within their jurisdiction the furnishing of a few drops of blood for test purposes when, in the opinion of the court, so to do will or may materially assist in administering justice in a pending matter."

In the *Bednarik* case the court gave no indication that it considered the blood test unreliable. To the contrary, it cited various decisions upholding the reliability of the test. In fact, the parties stipulated as to the validity and evidential value of the blood test. A considerable portion of the opinion is devoted to a discussion of the constitutional immunity against self-incrimination. On the other hand, a distinction has been drawn between real evidence (such as a physical examination) and testimonial evidence, and the former kind has been held not to violate the immunity provision. The court conceded it a debatable question whether a compulsory blood test violates the constitutional privilege against self-incrimination, but, nevertheless, it was denied as an unconstitutional invasion of the right of personal privacy of the wife and child.

In a paternity proceeding, *State* v. *Wright,* tried before the Court of Common Pleas, Franklin County, Ohio, a pathologist's report of an absolute exclusion of paternity was admitted in evidence, but the jury found the defendant guilty. A motion for a new trial upon the ground that the verdict was against the weight of evidence was granted, and from this decision the State appealed. Upon appeal, it was urged (1) that the trial court abused its discretion in setting aside the verdict of the jury and in granting a new trial; (2) that the court erred in admitting the blood test evidence of non-paternity; and (3) that the court erred in permitting the pathologist to give her opinion that the defendant was not the father of the child, that being an ultimate fact to be determined by the jury.

The appellate court disposed of the State's contentions (2) and (3) by noting that even if the admission of that evidence were error, it was not prejudicial, for the jury found in favor of the State, and that for any error to be the basis of reversal it must be a prejudicial one. On the merits of the question, however, the court found there was no error in admitting this evidence, saying: "We think that it was proper to introduce the testimony (of non-paternity by the blood test) under such safeguards as should always surround the testimony of an expert witness, and we are of the opinion that those were present in this case. The testimony complained of, as to the expression of the opinion by the expert to the effect that the accused could not be the father of the child, is not in our opinion such as is obnoxious to the rule."

After citing *Commonwealth* v. *Zammarelli,*[12] wherein the jury's verdict of guilty in disregard of the exclusion of

[12] *Op. cit supra* note 2.

paternity was reversed on appeal, the court said: "If the tests capable of being made are so accurate, as testified to by the expert, that it is possible by the process of exclusion to protect a man who is innocent of the charge, it will be a most valuable assistance in cases of this kind."

In upholding the trial court's decision in granting a new trial on the ground that the jury's verdict was against the weight of the evidence, the appellate court stated: "With the view we have of the competency of the evidence as to the blood test, we are not prepared to say that the court was wrong in setting aside the verdict."

In *Arias v. Kalensnikoff*,[13] a paternity proceeding in California, despite the results of blood grouping tests establishing non-paternity, the defendant was adjudged the father of the child. A verdict was entered against the defendant even though the evidence in his behalf showed that (1) the complainant was twice married; (2) she named another man in the birth certificate as the father of the child; and (3) the defendant was 70 years of age, and according to his wife, impotent for a number of years.

Although there was no specific statute in California, the District Court of Appeal took judicial notice of the blood test as an established scientific fact and reversed the conviction, saying: "We are not required to believe what physical facts demonstrate to be untrue or that which is contrary to immutable physical laws. . . . Hence a finding of fact based solely upon testimony of a witness contrary to a scientific fact will be set aside by this court on appeal as not supported by substantial evidence."

That court included in its opinion a recommendation that the California legislature enact a specific statute allowing the test, similar to those in New York and Wisconsin.[14] Subsequently, however, the original judgment of conviction was affirmed by the Supreme Court upon the ground that the expert's report was not conclusive but was to be considered together with all the other facts, which constituted "ample evidence to support the finding of parentage."

In *State ex rel. Slovak v. Holod* an Ohio appellate court affirmed a judgment of filiation, although the blood test showed the defendant could not have been the father of the child. In holding that blood test evidence of non-paternity is not conclusive but should be considered along with all the other evidence, the court raised the following points:

(1) An exception has been found to the laws of inheritance.

(2) Will the blood of "bleeders" or hemophiliacs, such as members of the family of the deposed King of Spain, react to the test in the same uniformity?

(3) Will the blood of human hybrids so react?

(4) Professor Einstein's mathematical calculations have conclusively established the incorrectness of Newton's Theory that objects fall in straight

[13] *Op. cit supra* note 4.

[14] Assembly Bill No. 2216 authorizing the use of blood tests was passed by the Assembly on May 21, 1937, and the Senate on May 28, 1937, but was pocket-vetoed by the Governor.

lines. Therefore, there fell by the wayside one of those laws of Nature long held immutable, which courts perhaps have judicially noticed and applied as conclusive.

(5) It (the blood test) may brand many honest women, who have committed one indiscretion, with promiscuity and as liars.

In his recent article, which appeared in this Journal,[15] Dr. Alexander S. Wiener, who has done considerable work in this field, had occasion to reply to the above points in the *Holod* case.

The single exception referred to by the court is quoted from a report of the American Medical Association's Committee on Medicolegal Blood Grouping Tests (of which Dr. Wiener was a member). This exception was the only one among 25,000 individuals tested. Assuming, says Dr. Wiener, that this was a real exception, the possibility of error is in the proportion of 1 in 25,000.

Dr. Wiener points out that the phenomenon occurring in the blood of hemophiliacs, wherein their blood does not coagulate normally, bears no relation to the reactions of agglutination used in blood tests. The blood groups among hemophiliacs have the same uniformity in behavior as normal individuals. Further, the laws of inheritance are the same regardless of race, hybridity, etc.

Addressing himself to the point raised by the court that Newton's Theory was invalidated by Einstein's Theory, Dr. Wiener points out that this is not so in everyday life. "Einstein's Theory," says Dr. Wiener, "becomes important when dealing with velocities approaching in magnitude that of the velocity of light—180,000 miles a second. Ordinarily, however, we deal with velocities not exceeding 500 miles per hour, and for such speeds Newton's laws of motion are certainly accurate enough."

The *Holod* case was critically commented upon in an article in the Iowa Law Review which concluded as follows: "The uncontradicted testimony of the expert negativing paternity should be final. If it is doubted, other experts could take new tests until the facts of the blood content could be shown with accuracy. Then, when this was established but one result would be scientifically possible, and for a court to hold to the contrary seems an absurdity." This, it seems, should be the court's attitude and procedure, if it is striving solely for justice. The court should not convict, when the blood test exonerates; but it is equally the court's duty to verify that the test has been properly conducted by competent physicians. Once that is done, the court's duty is plain. Any decision contrary to such scientific findings should not be considered real justice.

From March 22, 1935, to December 31, 1940, 549 blood tests have been performed in the City of New York pursuant to orders of the Courts of Special Sessions and Domestic Relations. Of this number 52 resulted in absolute exclusions of paternity—nearly 10

[15] Wiener, A. S., "The Judicial Weight of Blood Grouping Test Results," J. Criminal L. and Crim. (Pol. Science Sec.) *31* (4), Nov.-Dec. 523-525 (1940).

per cent. Inasmuch as today, with the use of both the M-N and A-B tests, one out of three false accusations can be detected, the conclusion is apparent that nearly 30 per cent of the accused men *who demand the test* are not the fathers of the children in question.[16]

It is, of course, of vital importance that a competent and qualified physician perform the test. Every safeguard should be thrown around the test to insure its proper performance. In the case of each and every exclusion, it has been the practice of the Corporation Counsel's Office to have a repeat test conducted by the same or another equally qualified doctor. If there is the slightest doubt about the result, even a third test may be ordered. Every possible avenue of error, whether of technique or quality of sera used, is closed. When all that has been done, and the report still shows an absolute exclusion of paternity, there can be no doubt of the defendant's non-paternity.

With each exclusion of paternity that has come to the writer's attention, he has made it a practice to closely interrogate the complainant. It is a noteworthy commentary on the utter accuracy of the blood test result that almost invariably the complainant admits, for the first time, sexual relations with another man *about the time she became pregnant.*

In the light of these facts, any obstruction put in the path of the tests is an obstruction of justice. Nor should the courts be over-technical in their interpretation of legislative enactments designed for the exclusive purpose of aiding in the administration of true justice. For centuries cases of disputed parentage have perplexed both courts and legislatures. Not until the advent of scientific blood tests has there been any substantial aid to the courts in solving this perplexing issue. Science has made a noteworthy contribution to the law of our time, and the courts should hesitate before lightly casting this gift aside.

In the writer's opinion, it is only a question of time before the value of this scientific evidence becomes apparent to the legislatures of all forty-eight states. The forward march of truth cannot be stopped!

[16] *Op. cit supra* note 1 at p. 260.