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Blood-Test Results as Conclusive Proof of Non-Paternity

If the trial court believes a fair trial is rendered impossible by the misconduct and, consequently, orders a mistrial, an accused may shelter himself with a double jeopardy plea. If no mistrial is declared, the accused may profit in court from the damage inflicted on the Government's case. This result not only mimics precedent but flaunts general principles of justice. Furthermore, the danger of encouraging attempts by counsel to provoke courts by purposeful misconduct into ordering mistrials and thereby to avail their clients of the double jeopardy plea cannot be discounted.

No doubt the district court's object was to curb arbitrary declarations of mistrials by trial courts. The court indicated its belief that the misconduct was minor.[36] But misconduct affecting the fairness of trial is hardly minor. Public interest in a fair trial, not misconduct, should remain the paramount issue.

BLOOD-TEST RESULTS AS CONCLUSIVE PROOF OF NON-PATERNITY

Disputed paternity proceedings have long presented a difficult problem because of the absence of reliable testimony and the inherent sympathy of jurors toward the unwed mother and her child. Today, both of these conditions may be counteracted by the use of a scientific process known as blood grouping, which in certain cases positively excludes paternity. The value of this test was recently recognized by a New York court in *Clark v. Rysedorph*[1] where an exclusion of fatherhood reported by three physicians was held to be conclusive of the paternity issue.[2]

Blood grouping is based upon the theory that certain identifiable properties of the blood are inherited by a child from its parents in accordance with Mendel's Law. By the presence or absence of these properties in the blood of a child, situations may be established which exclude certain persons as the putative father.[3] For example, if the mother of a child has group *B* blood, the child group *A*, and the alleged father group *B*, an exclusion is established, since one of the parents must have had the *A* property to transmit to the child. However, because many persons have the same type of blood, a result showing that the alleged father has a type consistent with fatherhood is generally of no probative value. In the above example, if the blood of the alleged father were of group *A*, he *could* be the father, but so could any other person of this same blood group.[4]

36. United States v. Whitlow, 110 F. Supp. at 876 (D.D.C. 1953).

1. 281 App. Div. 121, 118 N.Y.S.2d 103 (3d Dep't 1952).

2. The Supreme Court affirmed a dismissal of the proceeding by the Children's Court saying, "To reject such testimony is to ignore scientific facts." *Id.* at 124, 118 N.Y.S.2d at 106.

3. There are three systems of blood grouping: A-B, M-N, and Rh-hr. The A-B test has four groups; the M-N, three; the Rh-hr, eight that have been subject to confirmation. Using all three systems with their various types and exclusion possibilities, about 55 of every 100 men who are not the father will be excluded by the test. As new factors are discovered, the chances of exclusion naturally rise. With factors that have recently been discovered, but are not usable at the present time, added to the present tests, the exclusion ratio would be 60%. Davidsohn, Levine, Weiner, *Medicolegal Application of Blood Grouping Tests.* 149 A.M.A.J. 699-706.

4. For a thorough discussion of the blood grouping test see: SCHATKIN, DISPUTED PATERNITY PROCEEDINGS 131-149 (2d ed. 1947); Comment, 50 MICH. L. REV. 582 (1952). For a more detailed discussion see 1 WIGMORE, EVIDENCE §165 (b) (3d ed. 1940); Boyd,

The principle of blood grouping tests is accepted today among scientists without question.[5] Disease, medication, and age do not affect the blood group and type of an individual, as this is determined shortly after birth and remains constant throughout life.

While the theory is beyond question, there is chance of error in the actual testing of the blood. The person performing the test must be an expert in the field[6] as this will minimize the sources of error that may invalidate the test.[7] To make the chance of error negligible tests should be conducted independently at two or three different laboratories.

The results of various scientific tests have been accepted as valid and are admitted in evidence.[8] No matter how sound the theory of any of these tests, they are all subject to human error in practice. Based upon the least likelihood of error in procedure, the blood grouping test is rated second only to fingerprinting.[9] Because the procedure of the lie-detector technique and of other deception tests involves the judgment of the expert to a large extent, blood grouping should not be compared with them.[10]

Blood grouping test results are generally admissible in evidence in a

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in an article, *Protecting the Evidentiary Value of Blood Group Determination,* 16 So. Calif. L. Rev. 193 (1943), uses illustrations to show the process step by step. For a technical up to date report on these tests, see Davidsohn, Levine, Weiner, *supra* note 3.

5. Levinson, Medicolegal Problems 217 (1948); Schatkin, *op. cit. supra* note 4, at 183. This is borne out by the practice of relying on these tests for transfusion purposes where a wrong result could cause the death of the patient. Theoretically, there could be exceptions to the theory caused by mutations but this could occur only once in 50,000 to 100,000 times.

6. Schatkin feels that the physician chosen must be one who devotes his full time to the field of serology. Schatkin, *op. cit. supra* note 4, at 336. Boyd points out that the person need not be a physician but must have training and experience in the field (which an ordinary physician may not have). Boyd, *supra* note 4.

7. These errors are traceable to an appearance of agglutination without a real clumping (this may be prevented by use of a microscope or a salt solution that allows only true clumping); use of a weak serum (sera should be tested against blood of a person of known group); and testing blood before it has fully developed (the test is accurate if made six months after birth).

8. *Ballistics:* Evans v. Commonwealth, 230 Ky. 441, 19 S.W.2d 1091 (1929); State v. Casey, 108 Ore. 386, 213 Pac. 771, *motion to recall mandate denied,* 217 Pac. 632 (1923). *Fingerprint Identification:* People v. Jennings, 252 Ill. 534, 96 N.E. 1077 (1911). This evidence is sufficient to sustain a conviction. Moon v. State, 22 Ariz. 418, 198 Pac. 288 (1921). *X-rays:* Ligon v. Allen, 157 Ky. 101, 162 S.W. 536 (1914) (rule admitting photographs when shown to be accurate is applicable to X-rays). *Sound Moving-Pictures:* People v. Hays, 21 Cal. app. 2d 320, 71 P.2d 321 (Cal. 1937) (sound motion picture of defendant making confession to police admissible). *Photographs:* State v. Finch, 54 Ore. 482, 103 Pac. 505 (1909) (not error to permit physician who performed autopsy to identify deceased from photograph shown to be accurate). *Benet-Simon test results:* State v. Wade, 96 Conn. 238, 113 Atl. 458 (1921) (psychological test results admissible to establish mental age of a defendant pleading insanity as a defense to murder prosecution). *Dictograph recordings:* State v. Minneapolis Milk Co., 124 Minn. 34, 144 N.W. 417 (1913) (evidence obtained by dictograph at meeting of defendants admissible to show conspiracy to raise price of milk and cream). *Telephone conversation:* Commonwealth v. Miller, 297 Mass. 285, 8 N.E.2d 603 (1937) (evidence obtained by police commissioner by radio telephone connected to cells in which defendants were confined warranted verdict of guilty of carrying loaded weapon in automobile). *Handwriting identification:* Baird v. Shaffer, 101 Kan. 585, 168 Pac. 836 (1917); Stone v. Stone, 263 Ky. 732, 93 S.W.2d 617 (1936). *Results of chemical tests for alcoholic intoxication:* Willennar v. State, 228 Ind. 248, 91 N.E.2d 178 (1950); McKay v. State, 155 Tex. Cr. 416, 235 S.W.2d 173 (1951) (conviction on intoxication test alone not reversible).

9. Smith, *Scientific Proof,* 52 Yale L. J. 586 (1943).

10. Neither should it be compared with intoxication tests, because while the blood may be the element examined in the latter test, the alcoholic content of the blood stream varies in a short time due to oxidation, whereas the blood group of a person is constant throughout life.

suit where paternity or identity is at issue.[11] Taking the test does not invade the right of privacy,[12] nor does it the privilege against self-incrimination even when the specimen is taken under compulsion.[13] In some states the admissibility of test results has been provided by statute.[14] In others, the courts have exercised their discretion in admitting the results of scientifically valid tests in evidence.[15] The federal courts allow the test on the basis of Rule 35(a) of the Federal Rules of Civil Procedure.[16] It has been recognized that the defendant has a right which cannot be denied when the test is provided by statute,[17] and a New York court has held that if the defendant is financially unable to pay for the test it must be performed at the county's expense.[18] While admission either by statute or judicial discretion is a step forward, the statutory method is to be preferred because it gives a definite right to the defendant, and can specifically restrict the admission of the results to cases where non-paternity is established.

The Wisconsin statute, drafted by the late Dean Wigmore, is an excellent example of the provisions which a statute should include. It provides:

> Evidence: blood tests. Whenever it shall be relevant to the prosecution or the defense in an illegitimacy action, the trial court, by order, may direct that the complainant, her child and the defendant submit to one or more blood tests to determine whether or not the defendant

11. Annotation, 163 A.L.R. 951 (1946); Note, 29 N.D. L. REV. 156 (1953).

12. Anthony v. Anthony, 8 N.J. Super, 411, 74 A.2d 919 (1950) (disapproving Bednarik v. Bednarik, 18 N.J. Misc. 633, 16 A.2d 80 (1940) where an application for a blood test was denied).

13. State v. Alexander, 7 N.J. 585, 83 A.2d 441 (1951); *accord,* Davis v. State, 189 Md. 640, 57 A.2d 289 (1948); People v. Haeussler, 260 P.2d 8 (Cal. 1953) (blood sample taken while unconscious and used in evidence to prove intoxication). In some states the paternity proceeding is a quasi-criminal action. But even so, it is difficult to see how the objection based on the privilege against self-incrimination can prevail since it is the *complaining* party that is being forced to submit to the test.

14. At the present time, nine states have statutes authorizing their courts to order a blood test. ME. REV. STAT. c. 153, §34 (1944); MD. ANN. CODE GEN. LAWS art. 12, §17 (1951); N.J. STAT. ANN. §2:99-3, 4 (Supp. 1951); N.Y. CIV. PRAC. ACT. §306 (a); N.Y. DOM. REL. LAW §126 (a); N.Y. CODE CRIM. PRO. §684 (a); DOM. REL. ACT OF THE CITY OF N.Y. §34 (1942); N.C. GEN. STAT. §49-7 (1950); OHIO REV. CODE ANN. §2317.47, 3111.16 (1953); Pa. Acts 1951, No. 92; S.D. CODE §36.0602 (1939); WIS. STAT. §166.105, 325.23 (1951). In its 1953 session the Illinois legislature passed the following bill which was vetoed by the governor without explanation:

> "In civil actions in which the paternity of any person is relevant, the court, by order, may direct such parties to submit to blood grouping tests. These tests are to be made by blood test experts and their testimony is admissible in the trial of these issues. The presumption of legitimacy of a child born during wedlock is overcome if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the tests, show that the husband is not the father of the child." 20 Legislative Synopsis and Digest 33 (1953).

15. Commonwealth v. Zammarelli, 17 Pa. D. & C. 229 (1931); State v. Damm, 62 N.D. 123, 252 N.W. 7 (1933), *rehearing,* 266 N.W. 667 (1936); Arais v. Kalensnikoff, 10 Cal.2d 428, 74 P.2d 1043 (1937); State v. Wright, 59 Ohio App. 191, 17 N.E.2d 428 (1938). *Contra,* Dale v. Buckingham, 241 Iowa 40, 40 N.W.2d 45 (1949), where the Supreme Court held it no abuse of discretion by the trial court to refuse to allow the test to be made, although the court was influenced by the defendant's failure to request the test until the day of the trial.

16. Beach v. Beach, 114 F.2d 479 (D.C. Cir. 1940) (blood characteristics are part of physical conditions and therefore within Rule 35 (a) requiring physical condition of a party to be in controversy before the court can order an examination).

17. State v. Snyder, 157 Ohio St. 15, 104 N.E.2d 169 (1952); Fowler v. Rizzuto, 121 N.Y.S.2d 666 (1953) (citing Clark v. Rysedorph at 667).

18. Van Epps v. Doherty, 261 App. Div. 86, 24 N.Y.S.2d 821 (3d Dep't 1941).

> can be excluded as being the father of the child. The result of the test shall be receivable in evidence but only in cases where definite exclusion is established. The test shall be made by a duly qualified physician or physicians, or by another duly qualified person, or persons, not to exceed three, to be appointed by the court and to be paid by the county. Such experts shall be subject to cross-examination by both parties after the court has caused them to disclose their findings to the court or to the court and jury. Whenever the court orders such blood tests to be taken and one of the parties shall refuse to submit to such test, such fact shall be disclosed upon the trial unless good cause is shown to the contrary.[19]

While the Wisconsin statute is more comprehensive than those of other states, there are several improvements which could be made. The expert's qualifications should be made explicit by requiring training and experience in blood group testing; tests should be made independently by two persons; the court should be given the right to enforce its order with the contempt power; and coverage should include criminal cases as well as civil.[20] The policy followed by New York of having the parties (or the court if the statute is similar to Wisconsin's) choose the physicians to perform the test from a list of qualified experts drawn up by the local Academy of Medicine, is advantageous. A list compiled by the American Association of Immunologists however, would have the added advantage of including all other qualified experts in the field and not just medical men. The Uniform Act on Blood Tests to Determine Paternity, approved by the American Bar Association in 1952, offers these further improvements: if the experts disagree the results are to be submitted with all the evidence in the case; if there is a possibility of paternity, the court is to use its discretion in admitting the results;[21] if the result is negative, it is conclusive of the case, overcoming the presumption of legitimacy.

California has a long history of refusing to recognize the test as conclusive[22] while the New York courts accept an exclusion as conclusive in

19. WIS. STAT. §166.105 (1951). The advantages which this statute offers include: provision for the appointment of examiners by the court and their compensation by the county, thereby removing the partisan interest of the expert; admission of the results only when exclusion is established, preventing jury prejudice when the results show the defendant could be, but is not necessarily, the father; direction of disclosure at the trial of a refusal to submit to the test; and permission for any qualified person to make the test rather than restriction to physicians. It should be noted that the Illinois bill would permit the test to be made by "blood test experts". It also goes a step further than the Wisconsin statute in expressly providing that the presumption against legitimacy may be overcome by an exclusion. Note 23 *supra.*

20. Muehlberger and Inbau, *The Scientific and Legal Application of Blood Grouping Tests,* 27 J. CRIM. L. & CRIMINOLOGY 578 (1937). Blood grouping tests may be used to match accused's blood with stains on his clothing claimed to be his own. The grouping test is capable of being performed on specimens of dried blood, seminal fluid or stains, and saliva.

21. This suggestion is expressly against what the statutes now provide, but it can be justified. The Rh-hr system contains certain rare blood types which, for practical purposes, could prove paternity. If an alleged father is one of these types, the possibility is very small that any other person is the father. Since the possibility varies with the rarity of the type, the court would be allowed to use its discretion in admitting such results.

22. In Arais v. Kalensnikoff, 10 Cal.2d 428, 74 P.2d 1043 (1937), a seventy year old man, who as testimony brought out was impotent, was excluded from paternity by a blood grouping test. Nevertheless, the Supreme Court, reversing the Appellate court, 67 P.2d 1059 (1937), allowed the verdict of the jury to override this evidence relying on a statute prohibiting conclusive evidence. CAL. CODE CIV. PRO. §1978. The Supreme Court ignored the provisions allowing the courts to take notice of facts concerning laws of nature and to

both bastardy and divorce actions.[23] The Maine Supreme Court became the first state court of last resort to hold the test conclusive, pointing out that if the jury could disregard the scientific results, legislation providing for the test would have little practical effect.[24]

From the California cases, and others refusing to hold blood tests conclusive, it would appear that the purpose of the law in paternity proceedings is not to find the actual father but to permit the jury to consider the wealth of the defendant, the situation of the mother, and the plight of the child. This position can be supported only by permitting the welfare of the child to be the sole consideration.[25]

The purpose in this area of the law *must* be to hold the father, and only the father, liable for support of his child. While concern for the child's welfare is admirable, if the father is unavailable, or the mother cannot name the true father, the state should perhaps undertake to support the child. In any event, the mother must be prevented from bringing charges

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set aside findings contrary to scientific fact. The decision in Arais v. Kalensnikoff was followed in Berry v. Chaplin, 74 Cal. App.2d 652, 169 P.2d 442 (1946) where the appellate court affirmed a trial court verdict in favor of the plaintiff in spite of the unanimous report of exclusion by blood tests performed by three physicians. The verdict in this case led to a statement by the Boston Herald on April 19, 1945 to the effect that: "Unless the verdict is upset, California has in effect decided that black is white, two and two are five and up is down." But California still refuses to recognize the test as conclusive. Hill v. Johnson, 102 Cal. App.2d 94, 226 P.2d 655 (1951). An Ohio court, in State ex rel. Slovak v. Holod, 63 Ohio App. 16, 24 N.E.2d 962 (1939), held the test not to be conclusive on the ground that many honest women, who committed one indiscretion would be branded as promiscuous and as liars. But if the defendant is not the father, these many "honest" women are probably promiscuous and certainly liars!

23. Earlier, the Domestic Relations Court of the City of New York held the test inconclusive citing the *Arais* and *Slovak* cases. Harding v. Harding, 22 N.Y.S.2d 810 (Dom. Rel. Ct. N.Y. 1940), *appeal dismissed without opinion,* 261 App. Div. 924, 25 N.Y.S.2d 525 (2d Dep't 1941). However, this view was superseded by two later cases, Commissioner of Welfare ex rel. Tyler v. Costonie, 277 App. Div. 90, 97 N.Y.S.2d 804 (1st Dep't 1950; Houston v. Houston, 199 Misc. 469, 99 N.Y.S.2d 199 (Dom. Rel. Ct. N.Y. 1950), and now the blood test is accepted as conclusive in the New York courts. Cuneo v. Cuneo, 198 Misc. 240, 96 N.Y.S.2d 899 (1950) (husband suing for annulment); Schulze v Schulze, 35 N.Y.S.2d 218 (Sup. ct. 1942) (husband granted divorce, blood test overcoming legal presumption of legitimacy); Saks v. Saks, 189 Misc. 667, 71 N.Y.S.2d 797 (Dom. Rel. Ct. N.Y. 1947) (divorce granted on basis of exclusion by Rh-hr test). As can be seen, these New York cases permit the blood test to overcome the presumption of legitimacy. This result is justified since the presumption is an artificial rule of evidence established to cover the cases in which doubt is shown as to paternity. But the blood test leaves no doubt, and if the husband is excluded from being the father by the blood test, the child is not legitimate. Regarding the conclusive use of the test in New York, Schatkin observes that the Court of Special Sessions has not granted one filiation order where a man has been excluded by the test. SCHATKIN, *op. cit. supra* note 4 at 174-5. In cases where exclusion does result, women generally confess to other indiscretions. In actual practice, the tests excluded 18 out of 100 accused. Since the test will exclude 55 out of every 100 false accusations, this establishes that 18/55 or approximately 1/3 of the charges brought are false. Schatkin, *Paternity Proceedings: A Changing Concept,* 42 J. CRIM. L. & CRIMINOLOGY 821 (1952). The Court of Appeals, the highest New York court, has not had occasion to consider the problem.

New Jersey, following the holdings in New York, also permits an exclusion to be conclusive of the paternity issue. Ross v. Marx, 21 N.J. Super 95, 90 A.2d 545 (1952).

24. Jordan v. Mace, 144 Me. 351, 69 A.2d 670 (1949).

25. A New York case, Saks v. Saks, 189 Misc. 667, 71 N.Y.S.2d 797 (Dom. Rel. Ct. N.Y. 1947), solved this problem of the child's welfare by requiring the husband to support his wife even though it was shown that he was not the father because he knew she was pregnant when he married her. This reasoning is not particularly impressive, but the court was at least honest in basing its decision on the likelihood of the wife's becoming a public charge and not on the ground that the husband was the father.

against any man she may choose, if injustice[26] and blackmail[27] are to be avoided. By following this purpose, the moral problem is also placed in a truer perspective.[28]

To put this policy into effect, the blood test would be used to show conclusively that a defendant could not be the father of the plaintiff's child. A suit against a man who is not the father would be dismissed;[29] a husband suing for a divorce on the basis of contested paternity would be granted a decree since the exclusion of him as the father would prove adultery.[30]

On accepting the test as conclusive, the jury still must determine if the test was carried out correctly.[31] The jury may also be needed where no exclusion is established, for in these cases a trial would take place with the jury as finders of fact.

Confidence in the courts has been somewhat shaken by the decisions directly against scientific fact, and lawyers have been openly blamed for the failure to apply the blood grouping test where it could be of aid.[32] In view of this, it is reassuring to find the realistic approach taken in the recent New York case of *Clark v. Rysedorph.*

26. Injustice can easily result under the present system in most states of allowing the jury to consider the blood test with the other evidence. If the mother's testimony is convincing enough, nothing can prevent the jury from returning a verdict against an innocent defendant (innocent in the sense that he had no sexual relations at all with the mother).

27. The threat of one of these suits without any assurance of a chance to clear one's name affords an excellent opportunity for blackmail. However, if an innocent person is given the chance to show by means of a blood test that he is not the father of a child and such result were determinative in a paternity proceeding, any attempt at blackmail would have little effect because his innocence could be quickly and surely shown. (And, as stated, the chances of his exclusion are 55 out of 100.)

28. It may seem to the jury, from the mother's testimony, that the act resulting in the birth of the child was her one indiscretion. If such were true, there may be a strong reason for allowing the jury to dispose of the case on the basis of its sympathy and other emotional considerations. But the moral picture is seldom this clear. As noted previously, women, on being confronted with results of exclusion of a named father knowing these results to be conclusive, generally admit, or remember another man who could also have been the father. Thus, a result of exclusion shows one of two things: the mother has been promiscuous, at least to the extent of intercourse with two men; or, if she has not been promiscuous but has limited her relations to the actual father, she is knowingly accusing an entirely innocent man. In either case, the moral balance swings in favor of the defendant. There need be no fear that the mother has been taken advantage of by allowing the blood test to conclusively exclude a named father.

29. While deterring fornication should not be the primary aim of this area of the law, as a corollary result of some other purpose, it is not objectionable. By dismissing suits against excluded defendants, the state need not fear its having to underwrite unrestrained fornication. This approach does retain very real deterrents, first in the possibility of the male actually being the father, and second in the blood test not excluding him thus subjecting him to a trial.

30. Assuming, of course, that adultery is a ground for divorce. This seems a harsh result when the child's welfare is weighed apart from any other factors, but if the trial were an ordinary adultery trial, and adultery were proven, a divorce would be granted. When a husband has not only proved adultery, but also that he would be supporting a child that is not his, the reasons for granting the decree become even more impressive.

31. Presumably, qualification of expert witnesses would be determined by the court. Boyd, *op. cit. supra* note 4, at 206-7, sets forth the information that should be presented to demonstrate that the expert is qualified and that the test was carried out correctly. If the result is doubted, the samples of blood may be saved since the test is always reproducible, in the courtroom if necessary.

32. Britt, *Blood-Grouping Tests and the Law: The Problem of "Cultural Lag,"* 21 MINN. L. REV. 671 (1937); Note, 39 CALIF. L. REV. 277 (1951).