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PATERNITY PROCEEDINGS—A CHANGING CONCEPT

Sidney B. Schatkin

The author is an Assistant Corporation Counsel, City of New York, and is charged with the responsibility of handling all paternity proceedings which are referred to the Corporation Counsel's Office. Mr. Schatkin is the author of *Disputed Paternity Proceedings* and has published many articles in this and other legal journals dealing with the medico-legal aspects of paternity problems. This article was presented at the 1952 meeting of the Academy of Forensic Sciences.—EDITOR.

The first English paternity statute,¹ enacted in 1576 and engendered by condemnation of men charged with siring illegitimate children, is the parent statute of all Anglo-American legislation designed to secure support for children born out of wedlock. Paternity proceedings, therefore, are 375 years old. In the nature of things, not a day has passed during the past 375 years, when the statute has not been invoked to serve the purpose for which it was enacted. With this continuous invocation of a statute, conceived of a spirit of moral indignation against the accused man, how has the philosophy of paternity prosecutions developed during the past 375 years?

In 1938 in England, Judge Claude Mullins, a Magistrate of the London Police Courts, testified before a Parliamentary Committee, in opposition to a blood test bill, that he would hold as the father of the child any man who had intercourse with the mother around the probable time of conception. The Magistrate stated to the Committee that "the man who may be the father must pay," whether he is in fact the father or not, and asserted that intercourse at the material time should render a man liable to pay for maintenance of the child.²

The startling thing about that is not the view expressed, but rather Judge Mullins' intellectual honesty in giving utterance to it. That view is shared by many judges in the United States and England who lack, however, Judge Mullins' frankness and candor. Judicial proneness to convict a man if the court is merely satisfied that sex relations occurred around the probable period of conception (the question of actual paternity being far too elusive an issue) is in accord with public opinion which cannot work up any sympathy for the accused man.

In 1937, a year before Judge Mullins' frank utterance, an article entitled "The Paternity Scandal," published in England,³ commences in the following equally startling manner:

"Are you the father of the child?"

"No", says the youth.

1. 18 Eliz. Chap. 3.

2. Harley: *Medico-Legal Blood Group Determination*, p. 67, London, England.

3. Moore: *The Nineteenth Century and After*, pp. 394-400, March, 1937, London, England.

"Is this man the father of your child?"

"Yes", says the woman, and reels off a stream of unpleasant and unbelievably circumstantial 'evidence'—possibly lies from the beginning to end—which only too often condemns the boy to a sixteen year fine, generally from 10/ to £1 a week for 'maintenance', sufficiently heavy to prevent him marrying. Similar evidence from a policeman would not be sufficient to secure a conviction for a breach of parking regulations. How bitterly the injustice is felt may be deduced from the fact that 2,500 men are sent to gaol annually in default of payment, often repeatedly, in England and Wales—twice as many in proportion as in Scotland, where justice is better administered.

"The woman always pays!" Indeed, she does not. She stands to win every time in an 'affiliation' case. It is the man who pays, almost automatically, for our English Magistracy is apt to assume he is guilty unless he can prove his innocence—which is practically impossible. The fact that, not infrequently, the woman is notoriously a loose character, and that any one of several men may be the father of her child, often carries little, if any weight. The parties can seldom afford to pay for legal assistance. But the Home Office could, if it would, urge magistrates to call better evidence than at present in paternity cases, before sentencing men to the maintenance of children that, as often as not, are not theirs; and, in any case, to give greater facilities for appeal.

Voices have been raised in the United States against the injustices perpetrated under the egis of the paternity statute. Forty-two years ago, in 1909, we find an aroused attorney writing to the editor of a law journal, complaining of the unfairness of the paternity statute. The writer observes that in practically all sexual offenses some corroboration of the female's testimony is an indispensable prerequisite for a conviction. The single exception exists in paternity proceedings, where a conviction may be predicated on the sole, uncorroborated testimony of the complainant. He concludes:

. . . why an exception should be made in bastardy proceedings, where reputation and property are at stake, is to my mind beyond comprehension. A man can easily be made the victim of a conspiracy for extortion, and no doubt this is often the case.

With all the safeguards that the law affords a defendant, yet there should at least be corroboration in cases of bastardy where, if convicted, not only does it destroy the good name, but if the defendant should die intestate leaving no legitimate children, the bastard would be entitled to inherit.⁴

Public feeling against the accused man has remained undiminished despite such charges and attacks directed against the statute. Lawyers know that, as a practical proposition the accused man has the burden of disproving the charges. The moral indignation on the part of the community finds expression in the attitude of the court.

The problem whether the accused man is actually the father of the child is far too subtle and elusive for the court to solve. It is sufficient

4. Letter dated June 29, 1909, from Alfred J. Rifkind to editor, *New York Law Journal*, July 6, 1909 issue, p. 1468.

if the court is satisfied that sex relations occurred around the probable period of conception.

The centuries-old judicial attitude, prone to convict, has been supportable, and even justifiable, so long as paternity could not be disproven, and non-paternity actually demonstrated, by an unshakable scientific method. After all, the charge not actually being disproven, as observed by Judge Mullins, "the man who may be the father must pay."

Now, however, the complete blood test (A-B-O, M-N, and Rh-Hr) will detect 55 out of 100 false accusations of paternity. In actual practice, out of 100 blood tests ordered by the court, 18 exclusions result. The ratio of 18 to 55 being $33\frac{1}{3}$ per cent, it follows that one-third of the paternity cases brought to the Court of Special Sessions in New York City are false charges.

Inasmuch as in many of the 18 exclusions in every 100 blood tests ordered by the court there is convincing and at times apparently overwhelming evidence of paternity, there must be a re-appraisal of the evidence—especially the testimonial evidence—in paternity cases. The evidence must be scrutinized more carefully. A greater degree of proof should be required by the courts, just as in England it was suggested that "the Home Office urge Magistrates to call better evidence than at present in paternity cases."⁵ And where the woman's testimony is entirely uncorroborated, it must be sedulously examined.

With the advent of blood tests, with their potentiality of infallibly detecting non-paternity in 55% of false claims, the old concept that "the man who may be the father must pay," must be discarded. That concept was supportable provided that nonpaternity could not be scientifically demonstrated.

The 19th century Victorian writer, Walter Bagehot, wrote that "Maternity is a matter of fact, paternity a matter of opinion." Blood tests have even shaken that concept.

Dr. Alexander S. Wiener, the noted serologist, has described an interesting case that occurred in Buffalo, New York.⁶ Mrs. T., a seven times-married woman, started a separation suit against her husband, who counterclaimed for an annulment. She asserted that during her sixth marriage venture she had an affair with Mr. T. as a result of which she became pregnant. Mr. T., then believing himself responsible for her condition, became her seventh husband. Further, he in-

5. Note 3, *supra*.

6. Blood Grouping Tests in the New York Courts, *United States Law Review*, Dec., 1936, pp. 689-690.

sisted that the child in question was not even his wife's offspring, and that he had been inveigled into the marriage on the pretext that it was. Blood tests carried out by Dr. Wiener excluded Mrs. T. as the child's mother. An investigation revealed that Mrs. T. had had her uterus and tubes removed by an operation performed in 1916. Ultimately, the true father of the child was located, and it was learned that Mrs. T. had obtained the child from an orphan asylum where it had been placed by him after the true mother's death. Mr. T. was granted an annulment.

Three months after a certain child was born on November 28, 1948, it was placed with the New York City Welfare Department as a public charge. On April 26, 1949, Mr. and Mrs. W., claiming parentage of that child, demanded that that department surrender the child to them. The Welfare Department, doubtful that Mr. and Mrs. W. were telling the truth as to parentage, consulted the writer, who suggested a blood test, which, carried out by Dr. Wiener, excluded them as both mother and father of that child.

An investigation disclosed, to the satisfaction of the City of New York, that the true mother of the child was an unknown unmarried woman. Mr. and Mrs. W., anxious to have a child, arranged for the delivery, and paid the confinement expenses. The true mother signed a statement surrendering custody of the child to Mr. and Mrs. W., who never saw or knew the identity of the mother. Further investigation revealed that Mrs. W. was not pregnant in 1948. Shortly after the child's birth, it was received in the home of Mr. and Mrs. W., but later, due to illness of Mrs. W., and temporary desertion by Mr. W., the child was placed with the City. Under these circumstances, and in the light of the blood test exclusion, the City placed the child for adoption.

In the recent Virginia case of *Commonwealth v. Pauline "Paul" Hufford*, the defendant was arrested upon a warrant obtained by the young mother of a child, in which she charged the defendant "Paul" Hufford with seduction. The maternal grandmother furnished supporting evidence of courtship, plans for marriage, and identity of the accused. The defendant stated the accusation was false, inasmuch as the defendant was a *female*, and could not be the father of the child. The accused agreed to submit to a medical examination, and the examining physicians reported to the court that the defendant was female. The warrant was dismissed. In a personal communication from Hon. Alton I. Crowell, Attorney for the Commonwealth of Virginia, to the writer dated Dec. 11, 1950, he concluded: "My thought was

that while this defendant has been much in company with the complaining witness, she was in error as to the paternity, and had probably overlooked other possibilities."

Blood tests have proven that the woman is capable of lying about the paternity of her child. As shown above, she is capable of attempting to affiliate a supposititious child. The recurring question whether a woman is capable of accusing a man with whom she never had intercourse, can be answered by the case in Virginia where the defendant had the complete and perfect defense that "he" was a female.

Even in the ordinary, average paternity case, however, where the accuser is actually the mother and the defendant possesses the essential capacity as a male; experience has shown that no matter how convincing her evidence may be—and no matter how overwhelming may be the evidentiary indications of the accused man's paternity—the issue of actual (not indicated) paternity, still eludes the court.

The old concept that the man who may be the father must pay, engendered in a spirit of moral condemnation of the accused man, must yield to the truth and light of science. Blood tests have shaken that concept, and have demonstrated that the woman is capable of lying about the paternity of her child.

We must re-examine the prevailing standard of evidence for paternity proceedings. A stricter standard must be erected. The evidence adduced must be scrutinized most carefully.

In the light of science, there must be a new dispensation for the man accused as the father of a child born out of wedlock.