Case Western Reserve Law Review

Volume 2 | Issue 1 Article 8

1950

Bastardy Proceedings--Blood-Grouping Tests

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Recent Decisions

BASTARDY PROCEEDINGS — BLOOD-GROUPING TESTS

In a bastardy action, the lower court, acting upon defendant's motion and under statutory authority,[1] ordered blood-grouping tests made to determine whether the possibility of defendant's paternity could be excluded. The tests[2] made showed non-paternity. There was no evidence that the tests were inaccurately performed. However, the jury found that defendant was the father of plaintiff's child. Defendant appealed. *Held,* defendant's motion for a new trial granted. The jury may determine only whether the tests were properly made. If the jury found that the tests were not so made, the finding must have been based upon conjecture or bias, for there was no evidence of inaccuracy in performing the tests.[3]

It is a fundamental biological law that a blood group factor cannot be present in the blood of a child unless it was present in the blood of at least one of the child's parents. In addition, if the blood of mother and child belong to certain groups, there are groups to which the true father's blood cannot belong, and if the blood of the alleged father is in one of the latter groups, he is scientifically exonerated from parenthood.[4] Therefore, if blood-grouping tests have been accurately performed,[5] their results can positively establish non-paternity in certain cases.[6] Medical authorities

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[1] ME. REV. STAT. c. 153, § 34 (1944).

[2] The tests to determine the group and type of the blood were performed eleven times and produced identical results each time.

[3] Jordan v. Mace, 69 A.2d 670 (Me. 1949).

[4] For discussions of the science and mechanics of blood-grouping tests, see 1 WIGMORE, EVIDENCE § 165 b (3d ed. 1940); Boyd, *Protecting the Evidentiary Value of Blood Group Determinations,* 16 SO. CALIF. L. REV. 193 (1943); Britt, *Blood-grouping Tests and the Law: The Problem of "Cultural Lag,"* 21 MINN. L. REV. 671 (1937); Denton, Blood-groups and Disputed Parentage, 27 CAN. B. REV. 537 (1949); Hooker and Boyd, *Blood-Grouping as a Test of Non-Paternity,* 25 J. CRIM. L. & CRIMINOLOGY 187 (1934); Hyman and Snyder, *The Use of the Blood Test for Disputed Paternity in the Courts of Ohio,* 2 OHIO ST. L.J. 203 (1936); *The Trend,* 19 ROCKY MT. L. REV. 169 (1947); Note, 15 ST. JOHN'S L. REV. 228 (1941).

[5] Berry v. Chaplin, 74 Cal. App. 2d 652, 169 P.2d 442 (1946) (suggests that tests are unreliable because of lack of training of serologists, use of commercial sera and failure to make a counter-test); Jordon v. Davis, 57 A.2d 209 (Me. 1948) (jury had right to decide that technical error was made); Shanks v. Maryland, 185 Md. 437, 45 A.2d 85 (1945); *In re* Swahn, 158 N.Y. Misc. 17, 285 N.Y. Supp. 234 (Surr. Ct. 1936); Slovak v. Holod, 63 Ohio App. 16, 24 N.E.2d 962 (1939) (warns of dishonesty in the experimenter, unfresh serums, and blood that may not be of proper age or consistency); Boyd, *supra* note 4, at 197, 205 (outlines satisfactory blood-grouping technique and states the qualifications for a blood-grouping expert, including advice to the expert on his courtroom presentation); Schoch, *Determination of Paternity by Blood-Grouping Tests: The European Experience,* 16 SO. CALIF. L. REV. 177 (1943) (detailed discussion of avoidance of laboratory errors); Note, 23 N.Y.U.L.Q. REV. 156 (1948).

[6] See note 4 *supra.* "In order for a physiologic trait to be applicable in medico-legal

are convinced of their infallibility.[7] The most frequent application of these tests is in disputed paternity cases.[8] It should be understood that the tests can never *affirmatively* determine paternity.[9] Moreover, blood groups cannot prove the innocence of every man falsely charged with paternity, for the real father and the putative father may belong to the same group.[10] Therefore, test results are of no significance, and should not be admissible in evidence, unless they positively exclude the accused as the father.[11]

Statutes specifically authorizing the court to order the making of blood-grouping tests have been enacted by many states.[12] Some statutes broadly authorize the ordering of such tests without expressly restricting the types of proceeding in which they may be employed.[13] Other statutes limit the

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cases it must fulfill three requirements: (1) it must be so clear-cut that all qualified observers will arrive at the same conclusions in regard to its presence or absence; (2) it must be constant throughout life; and (3) it must be inherited according to exact laws." Fulfilling all of these requirements, the human blood groups can be tested to positively disprove paternity. Hyman and Snyder, *supra* note 4, at 207.

[7] Flacks, *Evidential Value of Blood Tests to Prove Non-Paternity,* 21 A.B.A.J. 680 (1935); *Report of the Committee on Medicolegal Blood Grouping Tests,* 108 A.M.A.J. 2138 (1937); 25 IOWA L. REV. 823 (1940). In a study of 604 blood tests that resulted in 59 exclusions of paternity, every one of the exclusions was subsequently verified by the mother's admission — for the first time — of sexual relations with another man at about the time she became pregnant. Current Note, 36 J. CRIM. L. & CRIMINOLOGY 42 (1945).

[8] Wiener, *Blood Grouping Tests in the New York Courts,* 70 U.S.L. REV. 683, 686 (1936).

[9] Flippen v. Meinhold, 156 N.Y. Misc. 451, 282 N.Y. Supp. 444 (N.Y. City Ct. 1935); Walker v. Clark, 144 Ohio St. 305, 58 N.E.2d 773 (1944); Hobson v. Hobson, 59 N.S.W.W.N. 85 (1942).

[10] Flacks, *supra* note 7, at 682. Probabilities of negativing the paternity of accused are discussed in 1 WIGMORE, EVIDENCE § 165 a; Hooker and Boyd, *supra* note 5, at 193; Keeffe and Bailey, *A Trial of Bastardy Is a Trial of the Blood,* 34 CORNELL L. Q. 72, 75 (1948) (because of the limited number of blood-group factors presently known, the exclusion of every falsely accused defendant cannot be guaranteed); Note, 23 N.Y.U.L.Q. REV. 156, 163 (1948) (improperly accused man has 55% chance of conclusively proving his innocence through the tests).

[11] Ohio provides that results shall not be admitted unless exclusionary. OHIO GEN. CODE § 12122-1: "In cases *where exclusion is established* the results of the tests together with the finding of the expert or experts of the fact of nonpaternity shall be receivable in evidence." (italics supplied) Flacks, *supra* note 7, at 682, explains that if the blood group of the child does harmonize with that of the accused, the accused ". . . is no more proved to be the father of the child than any other man belonging to that group and to permit such evidence before a jury would be unduly prejudicial to the accused." Hooker and Boyd, *supra* note 5, at 194, states, ". . . the real father may well be in the same group as the accused; almost half of our population belong in group O." See Keeffe and Bailey, *supra* note 10.

[12] *E.g.,* OHIO GEN. CODE § 12122-1 (in illegitimacy proceedings); *id.* § 12122-2 (in civil or criminal actions). See the various state statutes collected in Keeffe and Bailey, *supra* note 10, at 77.

[13] Maguire, *A Survey of Blood Group Decisions and Legislation in the American Law of Evidence,* 16 SO. CALIF. L. REV. 161, 172 (1943).

authorization to bastardy proceedings.[14] Judicial construction of some of the more broadly-stated statutes has resulted in refusal to order tests in non-bastardy proceedings.[15] A federal rule,[16] authorizing the ordering of a physical examination of a party whenever his mental or physical condition is in controversy, has been held to include the ordering of a blood-grouping test.[17] Some courts will order tests in the absence of statutory authority, declaring that it is within their inherent power to do so.[18]

When tests are ordered by the court in a bastardy action, the general rule is well settled that the mother may not under a claim of constitutional privilege refuse to furnish a sample of her blood or of her child's.[19] A few cases, however, have held to the contrary.[20]

After the tests have been performed, the scientific conclusions drawn from them are usually admissible in evidence as the subject of expert testimony.[21] *Arais v. Kalensnikoff*[22] established the generally accepted rule that the tests are not conclusive evidence of non-paternity but may be

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[14] *Ibid.*

[15] Bednarik v. Bednarik, 18 N.J. Misc. 633, 16 A.2d 80 (Ch. 1940) (divorce on grounds of adultery); *In re* Swahn, 158 N.Y. Misc. 17, 285 N.Y. Supp. 234 (Surr. Ct. 1936) (will-contest).

[16] FED. R. CIV. P. 35 (a); Sibbach v. Wilson, 312 U.S. 1, 61 Sup. Ct. 422 (1941) (Rule 35 (a) held valid rule of procedure).

[17] Beach v. Beach, 114 F.2d 479 (D.C. Cir. 1940) (blood-grouping characteristics are part of one's "physical condition").

[18] Arais v. Kalensnikoff, 10 Cal.2d 428, 74 P.2d 1043 (1937); Van Camp v. Welling, 22 Ohio L. Abs. 448 (C.P. 1936); Commonwealth v. Zammarelli, 17 Pa. D. & C. 229 (1931). *Contra:* Union Pacific Ry. v. Botsford, 141 U.S. 250, 11 Sup. Ct. 1000 (1891) (physical examination); Commonwealth v. English, 123 Pa. Super. 161, 186 Atl. 298 (1936); Commonwealth v. Morris, 22 Pa. D. & C. 111 (1934). Denton, *supra* note 4, at 549, states that under existing Canadian law, courts may not order blood-grouping tests in cases of disputed parentage.

[19] 8 WIGMORE, EVIDENCE, §§ 2216, 2220, 2265 (3d ed. 1940). See, *e.g.*, Van Camp v. Welling, 22 Ohio L. Abs. 448 (C.P. 1936). MODEL CODE OF EVIDENCE, Rule 205 (1942).

[20] *E.g.* Bednarik v. Bednarik, 18 N.J. Misc. 633, 16 A.2d 80 (Ch. 1940); Commonwealth v. Krutsick, 151 Pa. Super. 164, 30 A.2d 325 (1942); Commonwealth v. English, 123 Pa. Super. 161, 186 Atl. 298 (1936). The *Bednarik* case suggested that compulsory blood tests invade a right of personal privacy. Asks Wigmore: where, in any constitution, is the right of privacy given protection? 1 WIGMORE, EVIDENCE § 165 a (Supp. 1949). *But see* Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931). The mother's refusal should reflect upon her good faith in bringing the action. However, the *Krutsick* and *English* cases, *supra*, refused to permit adverse comment by opposing counsel on the mother's refusal. See Maguire, *supra* note 12, at 174.

[21] *E.g.*, Slovak v. Holod, 63 Ohio App. 16, 24 N.E.2d 962 (1939); Euclide v. State, 231 Wis. 616, 286 N.W. 3 (1939). See Note, 163 A.L.R. 931, 950-52. The most remarkable bit of reasoning supporting a refusal to admit blood test evidence appears in Commonwealth v. Krutsick, 151 Pa. Super. 164, 167, 30 A.2d 325, 326 (1942), where the court said: "In such case the putative father would have everything to gain and nothing to lose by the test, while the mother would have everything to lose

given whatever weight the jury finds them to have.[23] Expert opinions are ordinarily not conclusive evidence and no statute makes blood test results conclusive.[24] There is, however, some trend toward the adoption of a rule that the exclusionary result of accurately performed blood-grouping tests is conclusive.[25] Exclusionary results, when combined with other evidence, have been held to be of sufficient weight to justify granting a motion for a new trial where the jury had found the defendant guilty notwithstanding the blood test results,[26] or to rebut successfully the presumption of legitimacy.[27]

Although various objections have been advanced as reasons for refusing to accept the results of accurately performed blood tests as conclusive,[28] none of these objections has sufficient validity to warrant the retention of the outmoded rule of the *Arais* case.[29] It must simply be admitted that the law is over-cautious in refusing to yield to scientific truths.[30] The public and the legal profession should recognize that blood tests are not a mere experiment, but a reliable tool for obtaining scientific evidence.[31]

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and nothing to gain by it. The man's 'pitch' or 'throw' would always be 'Heads *I* win and tails *you* lose.' " For a discussion of the Ohio cases, see Hyman and Snyder, *supra* note 4.

[22] 10 Cal. 2d 428, 74 P.2d 1043 (1937).

[23] Justice McComb, concurring in Berry v. Chaplin, 74 Cal. App.2d 652, 667, 169 P.2d 442, 452 (1946) expressed the belief that the California court was in error in the *Arais* case, *supra.* In Harding v. Harding, 22 N.Y.S.2d 810 (N.Y. Dom. Rel. Ct. 1940), test results were held not entitled to greater weight than lay evidence. The court in Jordan v. Davis, 57 A.2d 209, 210 (Me. 1948), stated that it did not propose ". . . to lay down as a rule of law that the triers of fact may reject what science says is true. . . ."

[24] 25 IOWA L. REV. 823 (1940).

[25] Note, 23 N.Y.U.L.Q. REV. 156 (1948). See Keeffe and Bailey, *supra* note 11, at 80. Blood-grouping tests have been declared to be well-known for their value, Beach v. Beach, 114 F.2d 479, 480 (D.C. Cir. 1940); and blood types matters of common or ordinary knowledge, Shanks v. Maryland, 185 Md. 437, 449, 45 A.2d 85, 90 (1945). In *In re* Swahn, 158 Misc. 17, 21, 285 N.Y. Supp. 234, 238 (Surr. Ct. 1936), it was declared that it would not strain the doctrine of judicial notice for a court to recognize the principles underlying the blood tests.

[26] Jordan v. Mace, 69 A.2d 670 (Me. 1949); State v. Wright, 59 Ohio App. 191, 17 N.E.2d 428 (1938), *rev'd on other grounds,* 135 Ohio St. 187, 20 N.E.2d 229 (1939); Commonwealth v. Zammarelli, 17 Pa. D. & C. 229 (1931); Euclide v. State, 231 Wis. 616, 286 N.W. 3 (1939). *Contra:* Slovak v. Holod, 63 Ohio App. 16, 24 N.E.2d 962 (1939).

[27] Schulze v. Schulze, 35 N.Y.S.2d 218 (Sup. Ct. 1942); Commonwealth v. Visocki, 23 Pa. D. & C. 103 (1935). *Contra:* Bednarik v. Bednarik, 18 N.J. Misc. 633, 16 A.2d 80 (Ch. 1940) (divorce).

[28] Britt, *supra* note 5, at 691.

[29] *Ibid.*

[30] Maguire, *supra* note 18, at 166.

[31] Current Note, 36 J. CRIM. L. & CRIMINOLOGY 42 (1945).