

# The Problem of Judicial Weight of the Results of Blood Grouping

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## Recommended Citation

Strassburg, Bernard (1941) "The Problem of Judicial Weight of the Results of Blood Grouping," *St. John's Law Review*: Vol. 15 : No. 2 , Article 5.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol15/iss2/5>

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authorities have advocated and found that they may well be an important and satisfactory part of the merit system, whose policy should be extended wherever possible.<sup>38</sup> Even now, Congress has before it President Roosevelt's message and a report of a committee, consisting of some of our most distinguished attorneys, jurists and administrators, recommending an extension of the public service all the way up to the policy-determining positions, and especially to include lawyers.<sup>39</sup> It would be well to abolish as quickly as possible the present system as typified by the answer sent to the United States Civil Service Commission's questionnaire by Indiana's Attorney General, "none of the positions [in the attorney general's office] are filled by competitive examination; all are political appointments."<sup>40</sup>

BERNARD ROTHMAN.

## THE PROBLEM OF JUDICIAL WEIGHT OF THE RESULTS OF BLOOD GROUPING

### I

The Landsteiner-Levine blood-grouping test is now being used by New York and other courts in issues involving disputed paternity. In recent years, there have been several court decisions and such an abundance of matter thoroughly discussing the test that it is unnecessary to deal with the scientific and mechanical phases thereof.<sup>1</sup> It is

<sup>38</sup> *Fink v. Finegan*, 270 N. Y. 356, 11 N. E. (2d) 462 (1936).

<sup>39</sup> The President's Committee on Civil Service Improvement agrees that the Civil Service Commission should do the following: "(1) Undertake direct and personal recruiting of young lawyers for junior attorney positions, with such cooperation as the government law officers may furnish. (2) Hold nation-wide timely and annual examinations for the position of law clerk, appointees to become junior attorney upon admission to the bar. (3) Give special study to perfecting written and oral examination for junior and assistant attorney position. (4) Take full advantage of probationary period to terminate service of unsatisfactory selectees. (5) Hold competitive examinations for law apprentice if there is adequate demand by government law officers. (6) Train junior attorneys broadly within their major specializations, especially by a program of planned assignments. (7) Appoint to positions above grade P-2 (base salary of \$2600 annually) by promotion or transfer, using the committee type of examination of open competitive examinations. (8) Allow selective certification in appointments to higher attorney position when the interests of the public service require." N. Y. Times, *supra* note 2.

<sup>40</sup> (1939) 5 LEGAL NOTES ON LOCAL GOV'T 16.

<sup>1</sup> WIGMORE, EVIDENCE (3d ed. 1940) 165a, b, 2220; WIENER, BLOOD GROUPS AND BLOOD TRANSFUSIONS (1939); Britt, *Blood Grouping Tests and the Law: The Problem of "Cultural Lag"* (1937) 21 MINN. L. REV. 836; Wiener, *Genetics and the Law* (1933) 8 ST. JOHN'S L. REV. 70; Note (1934) 9 ST. JOHN'S L. REV. 102; *State v. Damm*, 64 S. D. 309, 266 N. W. 667 (1933); (1936) 104 A. L. R. 430, 441.

sufficient to remark, in general, that by subjecting a mother, her child, and an alleged father to a competent test, conducted by one experienced in that field of legal medicine, it is possible, by comparing the blood of each, to *exclude* the latter of the three from being the father of the child. If the blood of mother and child belong to certain groups, there are certain groups to which the father's blood cannot belong, and if the alleged father is in such a group he is exonerated from parenthood. For many years it has been the settled conviction of the serologist, as well as the expert in forensic medicine, based on extensive research and experiment, that the test is substantially infallible, certain, and practically without exception. In a recent report of the American Medical Association's Committee on Medicological Blood Grouping Tests, only one exception was noted out of tests made of more than 25,000 individuals.<sup>2</sup> Similar experiments have been conducted in Europe with the same convincing results.<sup>3</sup> In fact, the blood-grouping test found its place in the judicial systems of Austria, Germany, and other European countries many years before our courts considered its utilization.<sup>4</sup>

New York's attitude has been characterized as progressive in respect to the admission of blood-grouping findings as evidence.<sup>5</sup> Its legislature was first to sanction the admissibility of this negative form of evidence;<sup>6</sup> and the test and its principles are now available in annulment actions for the concealment of pregnancy;<sup>7</sup> in certain support and maintenance actions wherein the defense is non-paternity<sup>8</sup> to disprove a charge of seduction as a result of which act a child was born to complainant.<sup>9</sup> Its use in such instances follows from a logical interpretation of the statutes.

## II

The problem of current significance, which has become strikingly apparent, has resolved itself into this: Once the findings of the

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<sup>2</sup> (June 1937) 108 JOUR. OF THE AM. MED. ASS'N 2138, 2141, 2142. See also Hooker and Boyd, *Blood Grouping as a Test for Non-paternity* (1934) 25 J. CRIM. L. 187.

<sup>3</sup> Note (1934) 9 ST. JOHN'S L. REV. 102, 104.

<sup>4</sup> Galton, *Blood Grouping Tests and Their Relationship to the Law* (1938) 17 ORE. L. REV. 177, 185 ("In European countries the law has been quick to accept valid scientific advances. In the continent legal medicine is becoming a medical-school course. In France, Germany, and Italy, institutions of legal medicine, which have no counterpart in the U. S. frequently aid the courts in the medicolegal consideration").

<sup>5</sup> *Id.* at 190.

<sup>6</sup> N. Y. CIV. PRAC. ACT § 306-a; N. Y. INFER. CTS. ACT § 67-a; N. Y. DOM. REL. LAW § 126-a; N. Y. CODE CRIM. PROC. § 684-a.

<sup>7</sup> *D'Agostino v. D'Agostino*, 173 Misc. 312, 17 N. Y. S. (2d) 905 (1940).

<sup>8</sup> *In re Lentz*, 247 App. Div. 31, 283 N. Y. Supp. 749 (2d Dept. 1937) (wherein the child was born two months after the marriage). But see *Wilferth v. Wilferth*, 174 Misc. 1007, 22 N. Y. S. (2d) 264 (1940) (wherein test was denied as irrelevant to the prosecution of a divorce action).

<sup>9</sup> *People v. Garfinkel*, 169 Misc. 622, 7 N. Y. S. (2d) 728 (1938).

blood-grouping test are deemed to be admissible into evidence, what weight should be given to them? Relatively few expressions of opinion or recommendation come from the higher courts. In New York, no Court of Appeals decision on that question is found. In those states where there has been occasion to pass upon it, there are very few instances in which the courts have exhibited a liberal inclination.

The recent New York Domestic Relations Court opinion in *Harding v. Harding*<sup>10</sup> echoes the sentiment of those harboring a high degree of suspicion inasmuch as they still doubt the integrity and certainty of the test. In this case a proceeding was brought to compel the defendant to support his wife and a child born shortly after their marriage. Defendant denied that he was the father although he admitted having intercourse with his wife prior to the marriage. On these facts, it would naturally follow that the child would enjoy a presumption of legitimacy which would be beyond attack, and perhaps justly so.<sup>11</sup> The court, on motion of the defendant, ordered a blood test, the results of which indicated his non-paternity. Despite this bit of evidence, the court decided against the defendant. Much of the opinion aimed a direct attack at the blood tests which, the court stated, "by reason of their involved experimentation have no greater claim to credibility than other evidence".<sup>12</sup>

For his authority, the justice put rather great stress upon *State ex rel. Slovak v. Holod*,<sup>13</sup> wherein the Ohio Court of Appeals affirmed a jury's verdict finding paternity though a blood test indicated that the defendant was not the father. The opinion of the court was based not only upon the weight of other circumstantial evidence, as in the *Harding* case, but the court frankly admitted a lack of confidence in the test and the reliability of its results.<sup>14</sup> The court's view was predicated upon the comparative novelty of the test, certain exceptions

<sup>10</sup> 22 N. Y. S. (2d) 810 (1940).

<sup>11</sup> *Eisenlord v. Clum*, 49 Hun 340, 2 N. Y. Supp. 125 (1888); *Matter of Mathew's Estate*, 153 N. Y. 443, 47 N. E. 901 (1897); *Stillman v. Stillman*, 240 N. Y. 268, 148 N. E. 518 (1925); *Matter of Findlay*, 253 N. Y. 1, 170 N. E. 471 (1930).

<sup>12</sup> *Harding v. Harding*, 22 N. Y. S. (2d) 810, 821 (1940) (the court thought that more practical justice would result without the test, remarking at p. 817: "To question the legitimacy of a child challenges also the fidelity and good name of the wife. It also directly attacks and injures the reputation and standing of the entire family. Feminine dignity throughout all generations and races eternally alert and vigilant to resent the infamy of such a charge, and outraged at being thus degraded by a test of its decency and morality by a court order issued without any evidence in the first instance to sustain it, never forgives or forgets this deadly insult."); see comment in (1940) 31 J. CRIM. L. 525.

<sup>13</sup> 63 Ohio App. 16, 24 N. E. (2d) 962 (1939).

<sup>14</sup> *Id.* at 24 N. E. (2d) 963 (1939) ("We simply find that blood test expert evidence of non-paternity may be unreliable, but in view of its correctness in many cases, is admissible, as was held in the *Wright* case, *supra*, 'for whatever weight it may have to prove the non-paternity of the alleged father.'") The court elsewhere said, "It transgresses upon the usual rule that positive evidence is ordinarily of greater weight than negative proof". On the question of negative proof see (1934) 9 ST. JOHN'S L. REV. 102, 104.

which have appeared and a deficiency of scientific knowledge of the secrets of heredity. All of these contentions were answered by Dr. Alexander S. Wiener, one of the foremost authorities on this subject.<sup>15</sup> He points out that the novelty of the test in no way detracts from its credibility "since 'the law of gravitation was just as reliable and effective an hour after it was expounded as it is today.'" The exception, which has so far appeared, "if it really can be considered as such, was the only one among more than 25,000 individuals tested". As to the unknown depths and secrets of heredity, Dr. Wiener defends: "If the court is trying to state that further refinements in the mechanism of heredity may be discovered in future studies, just as Einstein's theory is in a way a refinement of Newton's theory to be used with velocities of the same order as the velocity of light, a similar reply is in order: *The reliability of the blood-grouping test will still be so great that no other type of evidence can approach it*". (Italics mine.)

This last statement is representative of the view taken by those who favor the unlimited and unqualified adoption of the test for all its possible worth.<sup>16</sup> The belief of the serologist is that the test can prove beyond a "scientific doubt that the accused cannot possibly be the father of the child", and that the results of the tests are worthy of a status of conclusiveness.<sup>17</sup> It is at this junction that one can best see the true clash of the judicial principle with the scientific concept. The scientist, in effect, maintains that justice, in this case, can be done more effectively in the laboratory than in the court-room. The jurist, on the other hand, is reluctant to relinquish or sacrifice any of the well established laws of evidence and proof, which reluctance is precipitated by a degree of jealousy and a greater degree of caution.<sup>18</sup>

### III

The blood-grouping expert is identifiable with ". . . a class of expert helpers which is characterized by an almost complete lack of

<sup>15</sup> Wiener, *The Judicial Weight of the Blood Grouping Test Results* (1940) 31 J. CRIM. L. 523, 524.

<sup>16</sup> See Britt, *Blood Grouping Tests and the Law: The Problem of "Cultural Lag"* (1937) 21 MINN. L. REV. 671.

<sup>17</sup> N. Y. L. J., June 24, 1937, p. 3184, col. 3 (citing *Arais v. Kalensnikoff*, 89 Cal. App. Dec. 537, 67 P. (2d) 1059, *rev'd*, 95 Cal. Dec. 45, 74 P. (2d) 1043 (1938)).

<sup>18</sup> Britt, *Blood Grouping Tests and the Law: The Problem of "Cultural Lag"* (21 MINN. L. REV. 671, 698 ("Then, too, the courts have so often been filled with the testimony of 'experts' who have given highly conflicting statements that judges are necessarily cautious. They have heard the cry of "wolf" so often, in all sorts of cases involving everything from handwriting to homicide, from intoxication to insanity. The lag that exists between scientific discoveries and their legal acceptance is the law's digesting period. Because of unpleasant memories of eating green or unripe discoveries, or at least eating too quickly, the law has learned to masticate slowly and to allow a considerable period of relaxation before exercising"); Note (1939) 15 NOTRE DAME LAWY. 153, 159; *Frye v. United States*, 293 Fed. 1013, 1014 (C. C. A., D. C. 1929)).

conflict, and this because of its exactitude . . ." <sup>19</sup> Some courts have held the testimony of these witnesses to be more than mere opinion, in that they testify to fact revealed by the use of mechanical means scientifically established to a degree of actual demonstration.<sup>20</sup> The reasons stated by the expert for his opinion necessarily carry conviction.<sup>21</sup> In these cases his conclusion gives "precise facts in science as ascertained and settled, or states the invariable conclusion which results from the facts stated . . ." <sup>22</sup> "The expert in stating the result of his test is delivering a scientific, factual proposition to the court; from this he derives his opinion in the particular case at bar. The original link in the chain is factual and not an inference in the legal sense. . . ." <sup>23</sup> The latter statement was made in characterization of the blood-grouping test. Assuming that mechanical details are accurate and according to the recognized formula, there can be no disagreement or varied construction among experts on what the findings are, because "their interpretation follows with mathematical preciseness from factual premises." <sup>24</sup> There is no room for difference of opinion, and this fact is sufficiently obvious to both expert and jurymen. Demonstration will serve to convince if doubt is present. Under such circumstances the triers of fact would necessarily be precluded from disagreeing as the matter is entirely outside the realm of speculation. If judicial notice is taken of the nature of the test, as it has been by New York's Surrogate Wingate in *Matter of Swahn*,<sup>25</sup> if not the equivalent recognition of its validity by the legislature in enacting laws empowering the court to order the test,<sup>26</sup> it should seem to follow that any New York court or jury would bind itself by the results of the blood-grouping test.<sup>27</sup> At least, the findings of the expert should assume as much weight as is given to any direct or real evidence.<sup>28</sup>

What has been the approach of other courts to the question of

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<sup>19</sup> Note (1939) 13 ST. JOHN'S L. REV. 328, 338 (citing Osborne, *Reasons and Reasoning in Expert Testimony* (1935) 2 LAW AND CONTEMP. PROB. 488, 492); WIGMORE, *THE SCIENCE OF JUDICIAL PROOF* (3d ed. 1937) 294.

<sup>20</sup> *Boyd v. Gosser*, 78 Fla. 64, 82 So. 758 (1918); *Soules v. Northern P. R. R.*, 34 N. D. 7, 157 N. W. 823 (1916).

<sup>21</sup> *In re N. Y. Elevated Ry.*, 12 N. Y. Supp. 857 (1890).

<sup>22</sup> See *People v. Barbieri*, 47 N. Y. Supp. 168 (1893); Note (1939) 13 ST. JOHN'S L. REV. 328, 339 (" . . . The scientific expert brings to the attention of the tribunal facts which can be perceived only by either the use of instruments which offer mechanical aid to the senses or by investigation based upon the invariable laws of chemistry . . .").

<sup>23</sup> Note (1934) 9 ST. JOHN'S L. REV. 102, 103.

<sup>24</sup> *Id.* at 104 (" . . . National and international authorities in science are in agreement as to the technic, interpretation and application of the procedure . . .").

<sup>25</sup> 158 Misc. 17, 285 N. Y. Supp. 234 (1936).

<sup>26</sup> See note 6, *supra*.

<sup>27</sup> The stigma of bias and charlatanism should not despoil the testimony of the serologist because the court appoints the expert who is to perform the test.

<sup>28</sup> Flacks, *Evidential Value of Blood Grouping Tests to Prove Non-Paternity* (1937) 23 A. B. A. J. 472 (" . . . Their admission has been urged as a matter of real evidence over which the courts have always exercised a power of compulsion . . .").

weight and value of such evidence? A recent Ohio case<sup>29</sup> coming from a county other than the one writing the unfortunate *Holod* decision, affirmed the verdict of a trial judge who had set aside the verdict of the jury finding paternity in a bastardy proceeding. The court based its judgment to a great extent upon the exclusionary results, in holding that the trial judge exercised a sound discretion since the jury's verdict was against the weight of the evidence.<sup>30</sup>

Similarly, the Supreme Court of Wisconsin<sup>31</sup> granted a new trial for the putative father on the basis of the negative findings of a blood test. Although inadmissible because of formal non-compliance with the statute, they were a sufficient indication of non-paternity to entitle the defendant to a new trial in the interests of justice. The court said, "However, it appears that a very strong factor in the original determination of the trial court to grant a new trial<sup>32</sup> was the fact that while the report was not admissible in evidence, it appears to have been accurate and authentic and to point strongly to the innocence of plaintiff-in-error."<sup>33</sup> Likewise, the federal courts have lately taken judicial notice of the nature and efficacy of the test.<sup>34</sup>

It is not to be understood that the *Harding* case<sup>35</sup> accurately reflects the attitude taken by the courts of New York. The Appellate Division of this state has already held that the blood test may be engaged to rebut the presumption of legitimacy, which is one of the strongest presumptions known to the law.<sup>36</sup> The Court of Special Sessions, which has exclusive jurisdiction over paternity proceedings,<sup>37</sup> is liberal in the application of the blood test to disprove paternity.<sup>38</sup>

The decision handed down by the California court of last resort in *Arais v. Kalensnikoff*,<sup>39</sup> contained these relevant, but unfortunately unqualified statements: "Whatever claims the medical profession may make for the test in California, 'no evidence is by law made conclusive or unanswerable unless so declared by the code'. . . . *The law makes no distinction between expert testimony and evidence of other character. . . .* Although it encourages the demonstration of the truth of

<sup>29</sup> *State v. Wright*, 59 Ohio App. 191, 17 N. E. (2d) 428 (1938).

<sup>30</sup> *Id.* at 17 N. E. (2d) 431 (1938); see also *Comm. v. Zammarelli*, 17 Pa. Dist. & Co. R. 229 (1931). *Contra*: *Comm. v. Morris*, 22 Pa. Dist. & Co. R. 111 (1934); *Comm. v. English*, 123 Pa. Super. 161, 186 Atl. 298 (1936).

<sup>31</sup> *Euclide v. State*, 231 Wis. 616, 286 N. W. 3 (1939).

<sup>32</sup> A new trial had been denied on prior appeal because the court thought that jurisdiction was lacking. *State ex rel. Zimmerman v. Euclide*, 227 Wis. 279, 278 N. W. 535 (1938).

<sup>33</sup> *Euclide v. State*, 231 Wis. 616, 286 N. W. 3 (1939).

<sup>34</sup> *Beach v. Beach*, 114 F. (2d) 479 (D. C. A., 1940).

<sup>35</sup> *Harding v. Harding*, 22 N. Y. S. (2d) 810 (1940).

<sup>36</sup> *In re Lentz*, 247 App. Div. 31, 283 N. Y. Supp. 749 (2d Dept. 1937).

<sup>37</sup> N. Y. INF. CTS. ACT § 671a.

<sup>38</sup> Wiener, *Blood Grouping Tests* (1936) 70 U. S. L. REV. 683, 686 (discussing a number of unreported cases in New York effected by the results of the test).

<sup>39</sup> 95 Cal. Dec. 4, 74 P. (2d) 1043, *rev'g*, 89 Cal. App. Dec. 537, 67 P. (2d) 1059 (1937).

the issues before a court by any means which are generally accepted as tending to prove the facts in dispute, when there is a conflict between scientific testimony and testimony as to the facts, the jury or trial court must determine the relative weight of the evidence." In this case the defendant was a married man, seventy years of age, and according to his testimony and that of his wife, impotent. The blood-grouping test showed that there was no possibility of the defendant being the father of the plaintiff's child. However, the jury found for the plaintiff. On appeal the District Court of Appeals reversed,<sup>40</sup> their opinion being that "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."<sup>41</sup> But as already indicated, the District Court of Appeals was reversed and the verdict of the trial court was sustained. It is quite obvious that the intent of the high court was to protect the functions of the jury from being usurped by any other agency or instrumentality.

#### IV

In the light of the decisions of the various jurisdictions and the well-settled rules of evidence, it is not an easy task to put one's finger on any specific viewpoint and recommend that it be accepted as a standard by which the judicial weight of the blood-test results should be measured. The problem would be much simpler if these results were to be given a status of conclusiveness, but such a step is not to be anticipated on the part of the judiciary. The entire problem is apparently legislative, and as far as that body is concerned, action is logically premature. Until such time, we must content ourselves with the open minds and fairness of the court and jury. It is most important, however, that the judiciary be enlightened on the scientific efficacy and certainty of the test so that they may accurately and judiciously accord to the defendant the fullest benefit of such valuable evidence, or sufficiently and understandingly inform the jury of the purpose and potentialities of the blood-grouping test. This process of enlightenment is being vigorously conducted by the serologist and many allies. When this indecision and suspicion have been removed, it is readily foreseeable that the blood grouping results will be a most useful facility in dispensing justice. Considering the fact that the test is exclusively defensive in its nature, as distinguished from other scientific methods, it will provide an impregnable shield from false accusations or mistaken charges of paternity in the civil or criminal courts.

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<sup>40</sup> 89 Cal. App. Dec. 537, 67 P. (2d) 1059 (1937).

<sup>41</sup> *Id.* at 67 P. (2d) 1060.