

Conclusiveness Of Blood Tests In Paternity Suits - State v. Pernell

James P. Lewis

Larry H. Pozanek

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Family Law Commons](#)

Recommended Citation

James P. Lewis, & Larry H. Pozanek, *Conclusiveness Of Blood Tests In Paternity Suits - State v. Pernell*, 22 Md. L. Rev. 333 (1962)
Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol22/iss4/5>

This Casenotes and Comments is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

Comments and Casenotes

Conclusiveness Of Blood Tests In Paternity Suits

*State v. Pernell*¹

Defendant was charged in a bastardy proceeding with being the father of twins. The prosecuting witness testified to acts of sexual intercourse with the defendant (admitted by him) which in the natural course of events could have caused the pregnancy and the birth of children. Blood test results showed that it was impossible for the defendant to have been the father of one of the twins, Donald, but that the paternity of the other twin, Daniel, could not be excluded.² Thus, the two children in the instant case posed separate legal problems. Since there was no question that the blood-type of Donald excluded the defendant as father, the only question in regard to him was the weight to be given to the tests. Referring to *dicta* in *Shanks v. State*,³ the Court held that, in the absence of evidence that the

¹ Crim. Ct. of Balto. City, No. B.I. 872, 1956, as analyzed in Myerberg, *The Practical Aspects of Divorce Practice* (2d ed. 1961) 108. See, Bowen, *Blood Tests and Disputed Parentage*, 18 Md. L. Rev. 111 (1958) which this casenote supplements.

² The blood tests showed that the mother was of blood group O, while the blood group of the defendant was B. Donald's group was A, and Daniel's B. These results, confirmed by later tests, make it an apparent biological impossibility for the defendant to have been the father of the twin having blood group A, viz., Donald.

The use of blood samples as evidence in paternity cases stems from discoveries, beginning with the work of Landsteiner in 1900, that human blood contains certain characteristics which follow the Mendelian laws of inheritance. These characteristics are the tendencies of the individual's red corpuscles to gather together ("agglutinate") when in contact with certain substances known as agglutinens. Thus, if a person's blood is of group A, it will react by clotting only when tested with one agglutinen, while if it is of group B, such agglutination will occur only when a certain different agglutinen is used. If the blood clots in response to either of the testing fluids, it is described as "AB"; if it reacts to neither, it is called "O".

At least two other principle classifications of human blood, the MN types and Rh factors, and subsequently a number of less familiar classifications, have been discovered. For a lucid explanation of the mechanics of ABO groupings and MN series, see McCORMICK, EVIDENCE (1954) §§ 177, 178 and 1 WIGMORE, EVIDENCE (3d ed. 1940) § 165a, b, which contains a thorough discussion of the uses of ABO tests.

³ 185 Md. 437, 449, 45 A. 2d 85 (1945). In this case the Court of Appeals, referring to bastardy cases, stated: "[T]he court and the legislature are there dealing with a situation where self-incrimination is involved, and where the non-scientific evidence is often quite unreliable and scientific evidence may be conclusive as to non-paternity."

tests were improperly conducted, conclusive weight should be given to them, and defendant was exonerated of Donald's paternity.

In regard to Daniel, the Court was faced with the relevant Maryland statute governing admissibility of blood tests in paternity cases, which permits such evidence to be employed only where there is exclusion.⁴ The Court was forced to decide whether the exclusion which was found in Donald's case should extend to Daniel also. After hearing expert testimony as to the likelihood that twins might each have a different father, the Court concluded that this possibility is not sufficiently supported by medical authority to be the basis for a decision.⁵ In view of this conclusion and of the defendant's testimony indicating an admission on the part of the mother that he was not the father of the twins, the Court delivered a verdict of not guilty. Since, in rejecting the hypothesis that the twins had different fathers, the Court in effect decided that the tests excluded defendant as regards both children, it is interesting that the opinion does not insist that conclusive weight be given the test in Daniel's case. This reluctance may reflect some uncertainty as to the exclusion of Daniel, especially in view of the relative rarity of the blood group within which the father fell⁶ and the respectable amount of data in favor of the possibility that the twins had different fathers.

The Maryland statute governing blood tests for paternity enacted in 1941⁷ applies only to bastardy proceedings.⁸ It does not require the complainant to submit

⁴ 1 MD. CODE (1957) Art. 12, § 20.

⁵ The opinion points out that the prosecuting witness may either have had intercourse with a man in blood group AB, who fathered both children, or have had relations with a person in group A after or before having had intercourse with the defendant. The Court received opinions by Dr. Sacks and by Dr. Nicholson J. Eastman, retired professor of obstetrics at The Johns Hopkins University School of Medicine and obstetrician-in-chief at The Johns Hopkins Hospital, as to two hypotheses under which the twins might have had different fathers. Under one theory, known as superfecundation, intercourse with both males must have occurred within a matter of hours. The other theory, superfetation, much less firmly established, would require that the two acts of intercourse have been separated by approximately a month. The Court also noted that the children were of approximately the same weight (which would have been unnatural under the superfetation theory) and heard Dr. Eastman's opinion that superfetation is now believed impossible.

⁶ AB is the rarest of the four blood groups, occurring in some 3 per cent of the population; see *Shanks v. State*, *supra*, n. 3, and *McCORMICK*, *op. cit. supra*, n. 2, § 178.

⁷ 1 MD. CODE (1957) Art. 12, § 20.

⁸ *Shanks v. State*, 185 Md. 437, 449, 45 A. 2d 85 (1945). In this case the Court of Appeals upheld the trial court, which had allowed into evidence in a rape case the results of blood tests of defendant's coat to show the

to the test ordered by the Court, although such refusal may be disclosed at the trial. The application of the law is restricted to cases where definite exclusion is established. Since the statute does not indicate that evidence which does exclude the defendant shall be given conclusive weight,⁹ apparently the test results (or a complainant's refusal to be tested) may be weighed by judge or jury as one piece of evidence against other facts or possibilities in a case.

No case has required the Court of Appeals to decide directly whether conclusive weight must be given to the tests, although *dicta* in *Shanks v. State*¹⁰ may have so indicated. In *Fiege v. Boehm*,¹¹ the defendant, in a suit for breach of a contract to support the plaintiff's child (allegedly fathered by defendant), urged that he had been acquitted in the Criminal Court of Baltimore City on the basis of blood tests. The Court of Appeals stated that, in the contract case, it was immaterial whether or not the defendant was the father of the child, and references to blood-testing in the opinion were thus only *dicta*. In another case, *State v. Cook*,¹² the State was initially successful in using, as sole proof of non-access to rebut the presumption of legitimacy, the results of blood tests of the mother, her husband, and the child. This case did not directly involve the conclusiveness of the tests, nor did it reach the Court of Appeals, since the State did not prosecute further when the Supreme Bench of Baltimore City granted the defendant's motion for a new trial.

On the issue of whether evidence from expertly performed blood tests excluding a defendant should be conclusive, two views are found in other jurisdictions. The view espousing conclusiveness has the unequivocal support of the Uniform Act on Blood Tests to Determine Paternity.¹³ The Commissioners' Prefatory Note to the Act stated that no state statute on blood-testing up to the time of the Uniform Act had made the results conclu-

falsity of his assertions that the blood stains came from a fight with a different girl.

⁹ 1 Md. CODE (1957), Art. 12, § 20: "The result of the test shall be received in evidence, but only in case definite exclusion is established. (Emphasis added.)

¹⁰ *Supra*, n. 8.

¹¹ 210 Md. 352, 123 A. 2d 316 (1956).

¹² Daily Record, February 21, 1957 (B.I. No. 659, 1956).

¹³ 9 U.L.A. 102 (1957). As of 1961 the Uniform Act had been adopted as follows: in 1953 by California (C.C.P.A. §§ 1980.1-1980.7 (1960)), New Hampshire (R.S.A. 522: 1-522.10 (1955)), and Oregon (ORS 109.250-262 (1959)); in 1957 by Illinois (S.H.A. Ch. 1063/4, §§ 1-7 (1962)); in 1961 by Pennsylvania (28 P.S. §§ 307.1-307.10 (1962)).

sive. The Act very carefully provided for rigorous standards of testing by making conclusiveness depend upon agreement of the experts who made the tests in the particular case.¹⁴ The Note stated:

"The conclusion should be final if there is no dispute among the experts. . . . [A]nd true experts will not disagree. Every test will show the same results. * * * The character of the chromosomes of the blood is constant and consequently other experts will always arrive at the same results in further tests in classifying blood in a certain group. Should there be such a thing as disagreement among the experts, which will not be the case, then, of course, the finality would be a different matter, and provision should be made for submission to the triers of fact."¹⁵

Clearly, the only concern of the Commissioners is that the tests be expertly and honestly conducted; the validity then of the results is for them unquestionable. Their suggested consensus of experts is an adroit way of circumventing any trier of fact who, by alleging distrust of the competence of the performance of the tests, bases a decision solely on sympathy for a plaintiff.

A series of California decisions demonstrates the effect of adoption of the Uniform Act in one state. In 1937, prior to the adoption of the Act, the Supreme Court of California refused, in *Arais v. Kalensnikoff*,¹⁶ to hold the results of blood tests conclusive. Subsequently, in the widely-publicized case of *Berry v. Chaplin*,¹⁷ an intermediate appellate court, noting that *Arais* had not been overruled or modified felt obliged to submit the question of paternity to the jury, which returned a verdict for the plaintiff despite the testimony of experts that blood tests excluded defendant. In neither the *Arais* nor the *Chaplin* opinions is there any suggestion that the tests were not competently performed; indeed, in *Chaplin* the qualifications and integrity of the designated physicians were conceded. But the recent case of *Kusior v. Silver*,¹⁸ makes it plain that

¹⁴ For a discussion of the need for the highest standards of testing, see the report to the 1937 Atlantic City convention of the American Medical Association by Drs. Ludvig Hekloen, Karl Landsteiner and Alexander S. Wiener, of the Association's Committee on Medicolegal Problems, 108 J.A.M.A. 2138 (1937).

¹⁵ 9 U.L.A. 102, 103 (1957).

¹⁶ 10 Cal. 2d 428, 74 P. 2d 1043 (1937).

¹⁷ 74 Cal. App. 2d 652, 169 P. 2d 442 (1946).

¹⁸ 54 Cal. 2d 603, 354 P. 2d 657 (1960).

the adoption of the Uniform Act by California¹⁹ will make blood-test results conclusive in future cases similar to *Arais* and *Chaplin*.

The Supreme Judicial Court of Maine, in applying a statute which did not give conclusive effect to the results of blood tests, settled the matter judicially. In *Jordan v. Davis*,²⁰ while conceding that the testimony of definite exclusion had been given by an eminently-qualified expert, the Court had refused to say that the jury had been manifestly wrong in refusing to follow the blood-test evidence. The following year, in *Jordan v. Mace*,²¹ the same Court found that a jury had no grounds for doubting the care and skill with which the tests had been made, and that they therefore had had no basis for their verdict against the defendant.

Perhaps a leading example of a jurisdiction which refused to give conclusive effect to blood tests is New Jersey. In 1940 the Court of Chancery, in *Bednarik v. Bednarik*,²² held that a statute authorizing courts to order blood tests in civil cases²³ was an unconstitutional invasion of the right of privacy. In 1950 the holding in *Bednarik* was expressly overruled by the Appellate Division of the Superior Court in *Cortese v. Cortese*,²⁴ which reserved the question of conclusiveness. In *Ross v. Marx*²⁵ the same court, citing cases on both sides in other jurisdictions, concluded that expert opinions as to non-paternity based on blood-grouping tests were not so infallible as to be conclusive. However, regardless of the theory stated, the decision itself was in accord with the tests. The Court quoted from a then very recent report by Drs. Israel Davidsohn, Philip Levine, and Alexander S. Wiener, of the American Medical Association's Committee on Medico-legal Problems,²⁶ which was published to update a similar report issued in 1937.²⁷ The later report concedes the

¹⁹ *Supra*, n. 13.

²⁰ 143 Me. 185, 57 A. 2d 209 (1948).

²¹ 144 Me. 351, 69 A. 2d 670 (1949). The facts in *Mace* strikingly parallel those in the present case, in that there too the defendant was excluded as father of one twin, but not as to the other twin. Since the jury had found the defendant to be the father of both, the Supreme Judicial Court granted the new trial without deciding what view the court below should take of the twin not excluded. For further analysis of the *Davis* and *Mace* cases, see Bowen, *op. cit. supra*, n. 1, 116-118.

²² 18 N.J. Misc. 633, 16 A. 2d 80 (1940).

²³ 2A N.J.S.A. (1952) §§ 83-2, 83-3.

²⁴ 10 N.J. Super. 152, 76 A. 2d 717 (1950).

²⁵ 24 N.J. Super. 25, 93 A. 2d 597 (1952); petition for certification den. 14 N.J. 466, 102 A. 2d 694 (1954).

²⁶ 149 J.A.M.A. 699 (June 14, 1952).

²⁷ *Supra*, n. 14.

possibility of mutations in extremely rare instances and also appears to favor tests which are not binding on the courts, as a safeguard against improperly-conducted tests. The Court in *Ross* would appear to have found weighty authority for its conservative position, and the recent case of *State v. H.C.*,²⁸ reiterates that position.

In view of the tremendous discoveries which have led to blood testing, and of the manifest value of the tests in suits involving disputed paternity, it would be natural to agree emotionally with the Commissioners on Uniform State Laws. Nearly everyone would agree that the results reached by juries in *Berry v. Chaplin*²⁹ and *Jordan v. Mace*³⁰ were deplorable. Even the most conservative discussions of the development of blood testing emphasize its almost absolute accuracy, at least where exclusion is found. While there remains the possibility that, in a given case, mutation may occur to cause an apparent exception to the Mendelian laws of inheritance, statistical studies would seem to reduce this possibility to an infinitesimal chance. There appears little likelihood that further research will do anything to reverse the present evaluation of blood testing. Nor would it seem likely that the lamentable but inevitable increase in mutations which is promised as a result of nuclear testing will be sufficient to significantly affect the value of blood tests in the future.

The issue, however, is whether these scientific discoveries should result in an absolute presumption that, where experts agree that a defendant is definitely excluded, their testimony should prevail over all other types of evidence. It is apparent that, to reach a result in accord with scientific knowledge in *Jordan v. Mace*, it was not necessary that the Supreme Judicial Court of Maine be bound by a statute such as the Uniform Act. Admittedly, a statutory requirement of conclusiveness could have prevented the miscarriage of justice at the trial level which apparently occurred in the *Davis*³¹ and *Mace* cases. However, it is to be hoped that judges and even juries are approaching a level of sophistication which may prevent such decisions and verdicts.

The handling of the present case is a practical demonstration that just and realistic results can be reached without a statute which would in effect substitute a panel of experts for judge or jury. In the case of the one twin

²⁸ 61 N.J. Super. 432, 161 A. 2d 273, 274 (1960).

²⁹ *Supra*, n. 17.

³⁰ *Supra*, n. 21.

³¹ *Supra*, n. 20.

definitely excluded, the Court, relying on the *dictum* in *Shanks v. State*,³² gave conclusive weight to the test results. Without that dictum, there is no reason to suppose that the Court would have reached another result. Moreover, in the more complex issue of the second twin, the Court disregarded the whole, quite superfluous doctrine of "conclusiveness". As we have seen, the Court did not, however, dispense with expert advice. Had the Court not been content with the opinions of the experts who testified, additional authorities might have been consulted. It is difficult to see how a sounder decision could have been reached had a panel of experts, rather than a judge (or, in a different case, a jury advised by a judge), in effect arbitrated the question. Indeed, such a panel would have been obliged, even if the Uniform Act had governed this trial, to wait until the Court decided whether definite exclusion in fact obtained. When, in the present case, this had been decided, the Court was as well qualified as experts to render a properly scientific decision.

Finally, if, in a future case, there should be any doubts as to the skill or integrity with which the tests were made, it would be very questionable indeed whether justice could be best served by a court bound by a requirement (statutory or judge-made) that the expert testimony be given conclusive weight. This seems to have been in the minds of the eminent physicians of the American Medical Association's Committee on Medicolegal Problems when they stated in 1952:

"While the results of the blood tests are admissible when they exclude paternity, the findings are not binding on the court. That is as it should be. It is the duty of the court to examine the evidence in order to convince itself that the tests have been properly carried out by qualified experts. When the court feels that adequate safeguards have not surrounded the tests, it should order the tests to be repeated by an independent expert, and there is nothing to prevent shipping of the blood to another part of the country if there is no other qualified expert in the state in which the case is being tried. In divorce and separation actions the court often takes into account other considerations, aside from the scientific results of the blood tests. To base decisions entirely on the results of the blood tests in such cases may harm an innocent

³² *Supra*, n. 8.

third party by bastardizing the child. For this reason in a number of cases the court has refused to grant a divorce on the basis of the blood tests alone. In uncontested divorce actions, however, when the blood tests exclude paternity, the court has no choice but to grant the decree."³³

In the absence of a new report by the Committee, the Maryland Legislature or the courts of this State should not try to be more "scientific" than the scientists.

JAMES P. LEWIS

LARRY H. POZANEK

³³ *Supra*, n. 26, pp. 703, 704.