~~Mr Jackson~~

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PROOF OF PATERNITY IN CIVIL PROCEEDINGS

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PROOF OF PATERNITY IN CIVIL PROCEEDINGS

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PROOF OF PATERNITY IN CIVIL PROCEEDINGS

A. INTRODUCTION

1. At the beginning of 1966 the Judges of the Probate, Divorce and Admiralty Division suggested that the Law Commission might find it appropriate to consider the whole question of blood tests in paternity issues and in particular whether or not it would be right to amend the law to enable the courts to order parties to undergo blood tests. We have accordingly considered this suggestion as we are bound to do under s.3 (1) of the Law Commissions Act 1965.

2. A preliminary consideration of the issues made it clear that we should not study blood tests in isolation but should also consider whether any of the existing rules of evidence would need to be altered if compulsory blood testing were to be introduced. While, therefore, this Paper deals predominantly with the advisability of giving the court power to order blood tests, we propose to discuss this in conjunction with the wider question: is the present law governing the proof of paternity satisfactory?

3. Item X of the Law Commission's First Programme commits us to a preliminary study of (a) matrimonial law and (b) the law of family inheritance and property. The issues raised by the subject of blood tests have an important bearing, as we shall show, on aspects both of matrimonial law and the law of family inheritance.

4. We have decided to confine our enquiry to civil proceedings since the powers of the court to obtain evidence in criminal proceedings raise some quite distinct issues. Still less are we here concerned with blood tests carried out to determine the level of alcohol in the blood stream or the presence of drugs and other similar substances.

5. We attempt to summarize the information which we have received regarding the scientific basis of blood group evidence in detail in Appendices A and B.[1] We are informed that as medical knowledge stands at present blood tests may provide clear evidence in a negative sense; that is, they can prove that a given man could not, according to the biological laws of heredity, be the father of a particular child. They cannot prove conclusively that he is the child's father but they can show, with varying degrees of probability, that he could be. Where blood tests indicate that the man concerned could not be the child's father we shall term this an "exclusion result"; where the tests indicate that he could be the father we shall term this a "non-exclusion result." Where a man is wrongly accused of paternity there is now at least a 70% chance that blood tests will prove that he is not the father. This exclusion rate will no doubt be increased as further blood groups are discovered and more sophisticated tests developed. Even now, in individual

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1. Since we ourselves lack any expert knowledge of medical matters we have had to rely on others and are greatly indebted to Mr Justice Ormrod (a qualified doctor), Dr. K. Henningsen, Head of the Serological Department, University Institute of Forensic Medicine, Copenhagen, Dr. A. Grant, Lecturer in Forensic Serology, Guy's Hospital Medical School and Dr. A. R. Kittermaster, Consultant Pathologist, Kent and Sussex Hospital, for their help in compiling the scientific material in this Paper. Any errors which we have fallen into in the course of consulting medical text books on the subject are attributable entirely to us, and we trust that our readers will draw our attention to them.

cases where uncommon blood factors are present, the chances of excluding a wrongly accused man can be very much greater than 70%. Where blood tests provide a non-exclusion result they indicate a possibility that the man concerned is the child's father. The strength of this indication will depend primarily upon the incidence of the relevant blood factors in the population. Where common blood factors are present there may be a statistical possibility that any one of, say, 50% of the adult male population could be the child's father, but in an extreme case where uncommon blood factors are present the incidence of possible fathers could be as low as one in fifty million. The circumstances of an individual case may also increase the evidential value of a non-exclusion result. The presence of certain factors in a child's blood, for example, may be almost conclusive proof that a parent is of a particular ethnic group. There may be cases, for example the Scottish case of Sinclair v. Rankin,(2) where it is clear that the father of a child must be one of only two men. In such a case a non-exclusion result in respect of blood tests on the first man and an exclusion result in respect of the second man should be acceptable as proof that the first man is the child's father.

6. Important evidence bearing on paternity may also be provided by anthropological tests. These tests involve a physical examination of the parties concerned and an analysis of various characteristics which are known to be inherited according to the accepted laws of genetics. We understand, for example, that the possibility of a child with brown eyes being born to a man and a woman both of whom have blue eyes can be calculated statistically. Similarly, these tests may reveal the

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2. 1921 S.C. 933 and see Robertson v. Hutchinson 1935 S.C. 708. In this type of case blood tests could assist a woman who genuinely does not know which of two men is the father of her child.

presence of webbed-toes or some other physical peculiarity in both the child and putative father, the importance of which in determining the child's true paternity can, it is said, be expressed statistically. Anthropological tests are now being used by the courts of Denmark which may order them when blood tests have given a non-exclusion result showing a strong probability that the child's father is a certain man. We do not propose to discuss anthropological tests further in this Paper, since we understand that the necessary statistical material has not been compiled in this country and that their introduction at this stage is not feasible even if desirable. However, the Danish courts regard anthropological tests as a valuable addition to blood tests and we would appreciate medical opinion on this subject.

7. The main types of civil proceedings in which we contemplate blood tests playing an important part are those where paternity is an issue in suits for divorce or nullity, petitions for legitimacy declarations and affiliation proceedings. We also bear in mind the usefulness of blood tests in determining succession rights.(3) In para. 39 of their recent Report (4) the Committee on the Law of Succession in relation to Illegitimate Persons, under the chairmanship of Lord Justice Russell, draw attention to the increased value that would be attached to affiliation orders as evidence in proceedings concerning succession rights, etc., if blood tests could

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3. See e.g. B. v. Attorney General (N.E.B. and others intervening) [1967] 1 W.L.R. 776 where the petitioner prayed for a declaration that he was the legitimate son of N.E.B. as his legitimacy would have entitled him to share in a trust fund. Blood tests showed that the petitioner could not be the child of N.E.B. and the petition was accordingly dismissed, the petitioner offering no evidence.

4. Cmnd. 3051 of 1966.

be ordered. Even where there has been no affiliation order, blood tests could clearly be of assistance as evidence in any proceedings where a bastard claims an inheritance through living persons or through a deceased person whose blood grouping is known.

B. THE PRESENT LAW

8. Where paternity is in issue, the court has to arrive at a finding of fact, namely, whether a certain man is or is not the father of a certain child. In considering the part which blood tests at present play in assisting the court to arrive at this decision we wish to examine two separate questions:

(a) What is the nature of the evidence required by the court to prove or disprove paternity? and

(b) Does the court have power as the law stands at present to order blood tests?

(I) THE NATURE OF THE EVIDENCE REQUIRED

(a) Affiliation Proceedings

9. The most common type of proceedings in which paternity is in issue is affiliation proceedings in magistrates' courts brought under s.1 of the Affiliation Proceedings Act 1957. These proceedings enable the mother of an illegitimate child to obtain payment for its maintenance from the father. In recent years there has been a marked rise in the number of illegitimate births and the latest published figures [5] show that this rise is continuing. The number of applications for affiliation orders is small in comparison with the

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5. See the Registrar General's Statistical Review of England and Wales for 1965. In 1954 the proportion of illegitimate births to the total number of births was 4.7%; in 1964 it was 7.2% and in 1965, 7.7%.

total number of illegitimate births (66,000 in 1965), doubtless because of the well known reluctance of women to institute this type of proceeding and because very often maintenance arrangements are settled by voluntary agreement, even where the child is not born into a stable illicit union. Nevertheless, in 1965 there were 8,984 applications, and 7,739 affiliation orders were made. It is not possible to establish in how many of these cases the court might have been assisted if it could have ordered blood tests but it is well known that the court often has extreme difficulty in arriving at a decision on the evidence available under the present law.

10. In affiliation proceedings the mother [6] (the complainant) must prove that the defendant is the father of her child but she is only required to prove this on a balance of probabilities and not beyond all reasonable doubt. The evidence given by the complainant as to the paternity of her child must be corroborated [7] in some "material particular". [8] She must produce independent evidence implicating the defendant but this evidence may be direct or circumstantial, though it must be such that it shows more than a possibility that the defendant is the father of the complainant's

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6. A woman who was a single woman at the date of the birth to her of a child or is a single woman at the date of her application (and for this purpose a widow, or a married woman living apart from her husband will, in certain circumstances, be deemed a single woman) may apply to a justice of the petty sessions area in which she resides for a summons against the alleged father.

7. Affiliation proceedings constitute one of the few types of civil action where the evidence of a witness cannot be accepted without corroboration. The Scottish Law Commission, in its report of 16th February 1967 entitled "Proposal for Reform of the Law of Evidence relating to Corroboration", specifically recommends that corroboration should be retained as a requirement in affiliation proceedings, for "by the nature of the case, caution has to be exercised in accepting the evidence of a woman raising an action of affiliation."

8. Affiliation Proceedings Act 1957, s. 4 (2)

child. For example, where there is evidence that over a long period (including the time of conception) the defendant associated with the complainant on terms of affection and there is no evidence that the complainant associated with other men, the court may treat such evidence as sufficient corroboration of the complainant's evidence. (9)

11. The difficulty which magistrates frequently experience in deciding the question of paternity in affiliation proceedings on the evidence before them is illustrated by Lord Merthyr's speech during the Second Reading of the Affiliation Proceedings (Blood Tests) Bill introduced into the House of Lords in 1961 by Lord Amulree. In that debate Lord Merthyr said:

> "In my experience of these cases, apart from one other class - namely fish poaching cases - there is no class of case in which there is a greater degree of perjury in the courts. In the cases which are fought at all there is always a flat denial on the one side or the other of the facts at issue." (10)

(b) Divorce and Nullity Proceedings

12. In divorce and nullity proceedings, unlike affiliation proceedings, the decision of the court is restricted by the doctrine of the presumption of legitimacy. This long standing rule of English Law was authoritatively stated in the words of the Lord Chief Justice of the Court of Common Pleas delivering the unanimous opinion of the judges in the Banbury Peerage Case: (11)

> "That the fact that the birth of a child from a woman united to a man by lawful wedlock is, generally, by the law of England, prima facie evidence that such a child is legitimate" (sic).

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9. Moore v. Hewitt [1947] K.B. 831.
10. H.L. Debs., 21st March 1961, Col. 1090.
11. (1811) 1 Sim. & St. 153 per Sir James Mansfield C.J.

The strength of this presumption has varied at different periods. At one time it could only be rebutted by showing that the husband could not be the father because he was "beyond the four seas" during the whole of the possible period of conception,[12] but in modern times it may be rebutted by satisfactory evidence that the husband did not have sexual intercourse with his wife at any relevant time. But even this was made extremely difficult to prove as a result of what came to be known as the rule in Russell v. Russell.[13] This rule, which prohibited both the husband and wife from giving evidence of "non-access" if they were not separated by a court order at the time of the child's conception, was, however, abolished by the Law Reform (Miscellaneous Provisions) Act 1949. Nevertheless it is still not sufficient for the husband to show that he was probably not the father; he must prove beyond reasonable doubt that he was not. For example, the fact that the wife can be shown to have committed adultery with any number of men is not by itself enough to rebut the presumption, for it does not exclude the possibility of the husband also having had intercourse with her.[14] It was because the husband in Watson v. Watson [15] could not demonstrate beyond all reasonable doubt that the child was not his, that he was adjudged by Barnard J. to be liable for its maintenance in spite of the fact that the wife had refused a request made by the husband for tests to be made on the child's blood. The judge concluded[16] that the child was probably not the husband's but that he was constrained by the presumption of legitimacy to decide in favour of the wife.

13. Historically it is easy to see why the standard of proof

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12. Head v. Head (1823) 1 Sim. & St. 150 per Leach V.C. at 152.
13. [1924] A.C. 687. The rule was initially propounded in Goodright d. Stevens v. Moss (1777) 2 Cowp. 591.
14. Gordon v. Gordon [1903] P.141.
15. [1954] P. 48.
16. At p. 55.

required of a complainant in affiliation proceedings is lower than that required in matrimonial proceedings to rebut the presumption of legitimacy. In affiliation proceedings there is normally no argument about whether the child is illegitimate; the contest is only on who is the father. Where, however, an attempt is made in matrimonial proceedings to rebut the presumption of legitimacy the attempt, if successful, will bastardise a child who would otherwise be legitimate. In former times bastardy was a source of reproach and ridicule and the strength of the presumption of legitimacy was a reflection of this attitude. Furthermore the financial prospects of an illegitimate child could be bleak. Today, society's views on illegitimacy have moderated and the child is not placed under such grave material disadvantages; for example, supplementary benefits are now payable to the mother as of right. There are, however, still important differences between the status of legitimate and illegitimate children, notably in their rights of succession (though it is reasonable to expect that major changes in this part of the law will be made before long). (17)

14. Despite these changes in public and legal attitudes towards illegitimacy, the courts naturally still regard it as a very serious matter to make a decree which has the effect of bastardising a child (18). However, we suggest that in most cases it is in a child's real interest to know, if possible, the true position as to its paternity. Where a husband has denied being the father of his wife's child, but has been unable because of the strength of the presumption

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17. This is a subject with which we are already concerned under Item X (b) of our First Programme and on which the Russell Committee (see para. 7 supra) has already reported.

18. See e.g. Preston-Jones v. Preston-Jones [1951] A.C. 391 per Lord Simonds.

of legitimacy to prove that he is not, the emotional and financial effect on the child is not likely to be beneficial if the husband is nevertheless still firmly convinced that he is not its father [19]. It can be strongly argued that on balance it would be better for the child if it was firmly established who his father was rather than to leave this in doubt, even if leaving it in doubt secured for him the legal status of legitimacy. Also, it is to be remembered that the fact that a child is illegitimate at birth no longer means that he will remain illegitimate for all time [20]. Since the Legitimacy Act 1959, the subsequent marriage of the natural parents legitimates a child even though each or either parent was married to another at the time of its birth. In a great many cases the wife, after divorce proceedings, marries the co-respondent, thereby legitimating any child she has had by him. This is likely to be far more beneficial to the child than to leave it in a position in which it is in law a child of the previous (dissolved) marriage.

15. We suggest that today it is more important for the court to arrive at a just decision than for a child to be declared legitimate at all costs. And at present the cost often includes the injustice of making husbands maintain children who are probably not their own and the disrepute into which the law is brought as a result. We agree with Professor Cross' remarks, in his recent broadcast [21],

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19. The trial judge may even have stated that he is satisfied on the balance of probabilities that the husband is not the father; see, for example, Watson v. Watson (supra, n.15).

20. At present under the law of Scotland the subsequent marriage of its natural parents does not legitimate a child if at the date of its conception or birth either of them was married to a third person. The Scottish Law Commission in a Report published last April (Cmnd. 3223: "Reform of the Law Relating to Legitimation per subsequens matrimonium") have proposed the abolition of this rule.

21. 14th September 1966 in "The Law in Action" series in the B.B.C Third Programme.

that the danger of injustice to husbands justifies the reduction of the standard of proof required to rebut the presumption of legitimacy. We see no good reason why the presumption should not be rebuttable on a balance of probabilities to accord with the standard of proof required in affiliation proceedings [22]. We do not, of course, think that the presumption of legitimacy itself should be abolished; in our view the onus of proof should remain on a person seeking to bastardise a child born in wedlock. The onus would simply be less difficult to discharge if our recommendation were to be accepted.

16. We have seen that the strictness of the presumption of legitimacy was due to society's reaction to illegitimacy. Similarly the matrimonial offence of adultery was regarded as hardly less serious than a criminal offence and for this reason had to be proved in the courts with the same strictness. In 1948 this rule was reaffirmed by the Court of Appeal in Ginesi v. Ginesi [23] and shortly afterwards accepted by the House of Lords [24]. However, it is clear that if the standard of proof required to rebut the presumption of legitimacy is to be reduced then the standard of proof required to prove adultery must correspond. It would be absurd for a court to hold that evidence before it was sufficient to rebut the presumption of legitimacy, but insufficient to prove adultery. Since in England adultery is not a criminal offence we see no reason why it should not be capable of proof on a balance of probability like any other non-criminal act. We are not alone in questioning the desirability of the decision in Ginesi v. Ginesi mentioned above. In the same

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22. We do not, however, suggest that corroborative evidence should be required to rebut the presumption of legitimacy, such as is required in affiliation proceedings.

23. [1948] P. 179.

24. Preston-Jones v. Preston-Jones [1951] A.C. 391.

year the High Court of Australia [25] refused to follow Ginesi v. Ginesi. Recently, in Blyth v. Blyth [26], it was suggested in the House of Lords that matrimonial cases should not be regarded as analogous to criminal proceedings and obiter dicta of Lord Denning and Lord Pearce rejected Ginesi v. Ginesi in strong terms [27]. On the basis of these dicta Rayden on Divorce accepts that the effect of Blyth v. Blyth is that "as far as the standard of proof is concerned, adultery, like any other ground for divorce, may be proved by a preponderance of probability [28]". However, we do not consider that this can be regarded as clear. Their Lordships' remarks about the standard of proof required to prove adultery were, strictly, obiter and it may be that lower courts will still apply the rule in Ginesi v. Ginesi. Blyth v. Blyth has left the law in a state of uncertainty [29] and we feel that it is desirable to produce a clear legislative ruling rather than wait for the matter to be resolved by the House of Lords.

(II) THE PRESENT POWERS OF THE COURT

17. The lightest exercise of physical violence to the person is an assault in law, unless it has been consented to. The law regards any surgical operation as an assault [30] and in this technical sense the taking of a sample of blood for testing

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25. Wright v. Wright (1948) 22 Aust.L.J. 534.

26. [1966] A.C. 643.

27. See per Lord Denning at p.669 and Lord Pearce at p. 673.

28. Rayden on Divorce 10th ed. (1967) p. 176.

29. See, for example, Cross on Evidence 3rd Ed. (1967) p.97.

30. The concept of a surgical operation constituting an assault may well be out of date. See Professor Daube's views in "Ethics in Medical Progress", a Ciba Foundation Symposium 1966.

constitutes an assault in the absence of consent [31]. Where a person lacks capacity to give a valid consent any blood test on him will amount to an assault unless those who can consent on his behalf have done so. The two main categories of people who are not of full capacity are persons suffering from mental disorder and infants.

18. There is no clear authority to show whether a voluntary mental patient who is able to understand the nature of a blood test can validly consent to it without the concurrence of some other person, although in Bolam v. Friern Hospital Management Committee [32] the patient's consent alone appears to have been accepted as sufficient for the administration of electro-convulsive therapy. Where the patient is not a voluntary patient, but is compulsorily detained, the position is obscure, owing to the lack of authority on the subject[33]. If the patient is capable of understanding the implications of a blood test it is not clear whether his consent alone is sufficient or whether it is necessary to obtain the consent also of the person having control of him. This might be the medical superintendent, the guardian or, in some cases, the nearest relative having power to discharge the patient. Where the patient who is subject to control does not appear to understand the nature of a blood test it may be that no one can consent on his behalf. The difficulty in this last case is that a blood test is not medical treatment and the court might hold that the present rules relating to consent for medical treatment do not apply to blood tests. It is even less likely that the power of the court under ss.101 and 102

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31. Latter v. Braddell (1881) 50 L.J.Q.B. 448.

32. [1957] 1 W.L.R. 582.

33. See (1966) "Medicine, Science and the Law" Vol. 6. p.190.

of the Mental Health Act 1959 to administer a patient's "property and affairs" would extend to consenting to blood tests.

19. Since the Court of Appeal drew attention in Bickley v. Bickley[34] to the importance, whenever the paternity of a child of the family is called in question, of considering whether steps should be taken under Rule 56 of the Matrimonial Causes Rules 1957 to have the child separately represented, the Official Solicitor has appeared far more frequently as guardian ad litem for infants. The Official Solicitor takes the view that a guardian's consent is required until the infant attains the age of 21. However, the Medical Defence Union[35] has suggested that the law does at present allow an infant who has reached the age of 16 to give a valid consent to surgical treatment and Mr. David Lanham in an article entitled "Blood Tests and the Law"[36] argues that the age of 16 should be that at which an infant can validly consent to a blood test, "since this appears to be the age which the medical profession take to be the age of consent", though he concedes that a doctor would be wise to obtain the guardian's consent as well where the infant is under 21. There appears to be no direct authority on this point. Where the infant is not separately represented it will normally be for the parents to give or withhold consent to the taking of a blood test and the refusal of one of them will prevent tests being taken. The Committee on the Age of Majority[37] has yet to report but will no doubt make

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34. Reported as a footnote to S. v. S. [1964] 3 All E.R. 915 at 917.

35. In evidence submitted to the Committee on the Age of Majority under the chairmanship of Mr. Justice Latey.

36. See n.33, supra.

37. See n.35, supra.

recommendations on the question of consent to medical treatment.

20. The courts have power to order a physical examination of the parties in certain cases. The most important of these (fairly closely analogous to the power to order a blood test) is the ancient and undoubted power of the court to order a medical inspection in nullity cases where impotence is alleged. In former times disobedience to the court's order to undergo an examination appears to have been regarded as contempt of court and as recently as 1842 in Harrison v. Sparrow[38] the writ de contumace capiendo issued to the sheriff with a view to punishing a disobedient husband with imprisonment. In the event he was not imprisoned and he was allowed to prosecute his appeal; and it seems unlikely that any party would be imprisoned today for disobedience to the court's order for an examination. On the other hand refusal to submit to a medical inspection may be treated by the court as some evidence of incapacity.[39]

21. The power of the ecclesiastical courts to order medical inspection derived from the inherent jurisdiction of the court, but now s.32 of the Supreme Court of Judicature (Consolidation) Act 1925 prohibits reliance on the old practice of the ecclesiastical courts in matters of procedure and practice in so far as such matters are provided for in that Act or in rules of court. The court's power in this regard now rests entirely on Rule 24 of the Matrimonial Causes Rules 1957.[40]

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38. 3 Curt. 1 at p.14.

39. S. v. B. (1905) 21 T.L.R. 219.

40. See W. v. W. (No. 4) [1963] 2 All E.R. 841, C.A.

22. Any power of the courts to order a blood test is not of course ancient since it was not until 1900 that Landsteiner announced his discovery of blood groups. The first use of blood group evidence in a criminal case in England appears to have been in 1932 and it was first used for the determination of paternity and in divorce cases during the following decade[41]. It would seem, therefore, that the courts cannot derive power to order a blood test from the practice of the old ecclesiastical courts whose jurisdiction in these matters was brought to an end in 1857. In 1963 the Court of Appeal in W. v. W. (No. 4)[42] decided that there is no power to order a blood test in nullity proceedings. However, Ormrod J. in his judgment in the recent case of L. v. L.[43] held that the court in custody proceedings has the power to order a blood test to be carried out on a child. This is because the Chancery Division in the exercise of its wardship jurisdiction[44] could order a blood test in respect of a child and a judge in the Divorce Division has all the powers which are available to any judge of the High Court in respect of children and all other matters. Ormrod J. held that W.v.W. did not apply to the case under consideration because the special powers of the court in relation to children were not considered in W. v. W. It was argued by counsel for the Official Solicitor that a decision that the court had power to order blood tests in custody proceedings would produce anomalous results in divorce proceedings where the legitimacy of a child was questioned. Unless the court adjourned such divorce proceedings and dealt with the issue of custody at once, it might be constrained by the presumption of legitimacy to find the child legitimate in relation to the divorce proceedings, although the blood test might prove otherwise in the custody proceedings. It therefore appears

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41. See Bartholomew, "The Nature and Use of Blood Group Evidence", (1961) 24 M.L.R. 313, n.3

42. See n.40, supra.

43. The Times, 2nd June, 1967 (hearing of custody application); notice of appeal has been given.

44. This jurisdiction is derived from the Lord Chancellor's parental functions discharged on behalf of the Sovereign as parens patriae.

that, whatever the outcome of the pending appeal in this case, the resulting state of the law is likely to be unsatisfactory in one way or another.

23. In the absence of an order of the court the attitude of the guardian ad litem (who will usually be the Official Solicitor) representing young infants becomes of considerable importance in any case where paternity is in issue. His duty is to consider the circumstances of the case only from the point of view of the child he represents. In consequence he - and private solicitors appearing for infants in proceedings - generally concludes that it is right that the child's legitimacy should be maintained and refuses his consent to the taking of a blood test. The courts are therefore left, as Ormrod J. pointed out in L. v. L. [45], with the unenviable task of acting on the presumption of legitimacy, knowing that the chances of the presumption being correct may be less than even.

24. The predicament in which the courts may find themselves in cases where paternity is in issue, is well illustrated by the remarks of the judges in two recent divorce suits. In one case evidence from blood tests was available to the court but in the other the mother refused to submit to a blood test and no evidence from blood tests could therefore be put before the court. In the first, Holmes v. Holmes, [46] Mr. Justice Ormrod, after finding that the wife's adultery had been proved on the evidence of blood tests made on the parties and the child whose paternity was in issue, said:

> "....had difficulties been put in the way of the child's blood being taken, it is manifest on the facts of this case that a grave injustice might have been done. It would have been virtually impossible upon the evidence, I think, for this man to establish that he was not, prima facie, the father of this child. He was living with the mother; it is true that he was not there at the crucial moment, but making all allowances for errors of calculation in periods of gestation and so on it

45. 28th June 1966 (unreported).

46. [1966] 1 W.L.R. 187.

> would have been a very close run thing for him, with the presumption that the child was his child - because it was born in wedlock - heavily against him. When, as I think in these days, it is possible to enable the Courts to do justice on a footing of fact and not to do injustice on a basis of presumption, I should myself greatly hope that no difficulties will ever be put in the way of a child's blood being supplied for blood grouping. I know it is a sad thing to bastardize a child, but there are graver wrongs; and I think that this is a matter which I am sure all those concerned will approach with great caution because I think there is nothing more shocking than that injustice should be done on the basis of a legal presumption when justice can be done on the basis of fact ...." (47)

25. Mr. Justice Ormrod's remarks were echoed by His Honour Norman Richards, Q.C., sitting as a Special Commissioner in the second of these cases, Tarran v. Tarran(48). He said:

> "I take the view that there is no obligation on the wife or the child, as the law is at present, to undergo a blood test and, as she is entitled to say no (although her reasons may not be such as commend themselves to the court), the court is not entitled to draw an inference adverse to her case on her refusal. But even more so, I take the view that the court in a matter of this kind, where the question of legitimacy is concerned, is not entitled to draw an adverse inference on that particular issue from the wife's refusal where the child is affected.
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> "I share the views expressed by Mr. Justice Ormrod to the effect that procedurally, the Rules should be altered .... so that there was an obligation on the party to provide for a blood test to be taken in these matters so that a just result might be arrived at. This very often could only be arrived at with the assistance of blood tests because it is clear that the evidence available to the court must of necessity be extremely sparse and very often confined to that of the two spouses on an issue of this kind. Further, as I think, it follows from these observations that such legislation should include a right for the court to draw an inference on refusal of a wife - or a husband for that matter - to permit the appropriate tests to be made; but until that happens, in my judgment the court is not entitled to draw such inferences". (49)

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47. At.p.188

48. 19th July 1966, unreported.

49. Quoted from the transcript.

C. SUGGESTED PROPOSALS

26. If the courts are to be given the power to order blood tests there are several questions of principle which must first be decided. To give this part of our Paper a coherence which it might otherwise lack we set out certain proposals, but we would emphasize that what follows is intended to be only a discussion of principles and, in some cases, the alternatives which we consider to be available. In this Paper we do not intend to make firm proposals and are anxious to receive criticisms and suggestions on any aspect of it.

(a) Power to Order Blood Tests

27. If, under the law as it stands now, the parties agree to submit themselves and the child to a blood test before there is any question of the appointment of a guardian ad litem in any proceedings the results of these blood tests are admissible in evidence (50). We think that no obstacle should be put in the way of the continuance in future of a practice which will tend to reduce the questions in dispute in litigation and cut out a number of contentious custody proceedings. Similarly, after a guardian ad litem has been appointed he should be entitled to agree to blood tests if he thinks that tests would be in the best interests of the child. It would be desirable for such voluntary testing to conform to the procedure suggested in paras. 41-45 below. In all civil cases, however, where no such tests have been carried out and the court has to determine the paternity of any child, as a question of fact, we suggest that it should have the power to order the parties to the action to submit to blood tests and to order the child concerned to submit to a blood test, even though the child is not itself a party to the action. We consider that in all cases, apart from affiliation proceedings, a child whose interest might be affected by the decision of the court should be separately represented. In affiliation proceedings, of course,

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50. See n.47 supra.

there is no question of the child's being legitimate or of its status being adversely affected.

28. It has been argued that the court should also have the power to order any other person, who is not a party to the action but who is disclosed by the evidence to be a possible father, to submit to a blood test. Such a power would clearly assist the court where the paternity of a child rests with one of two or more known men. In practice the exercise of this wider power to order blood tests might raise difficulties, such as tracing the persons concerned and of compelling them to submit to the court's order. But in Sweden, for example, the court does have such a power and also has the power to fine any third party who refuses to comply with the court's order.

29. If the court is not given the power to order blood tests on persons other than the child concerned and the parties to the action, then we suggest that the present procedure in affiliation proceedings should be given careful consideration. We are concerned with the position of the woman who, for example, knows that the father of her child must be one of two men but does not know (and has no means of herself discovering) which of the two it is. We suggest that the difficulties facing a complainant in cases such as Sinclair v. Rankin and Robertson v. Hutchinson, which we have already mentioned,(51) could be largely overcome if a complainant could take affiliation proceedings against more than one defendant, relying on blood-group evidence to indicate (if possible) which of them is the child's father. We have already suggested (in para. 5 supra) the possible value of blood tests in such a case. Similarly a man against whom an affiliation claim

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51. See n. 2 supra

is made who has reasonable cause to believe that there may have been another man or men should have the right to join the other or others. Our proposals would involve a fairly radical change in the present character of affiliation proceedings and we foresee that a number of difficult problems may have to be solved. These matters, however, are of some importance and we think that the attempt should be made.

30. One particular suggestion which has been made to us regarding affiliation proceedings is that if it can be proved that more than one man had sexual intercourse with the mother, within the possible period of conception, but it cannot be proved which of the men is the father of her child, then all the men concerned should be made to contribute towards the financial maintenance of the child. This system of a duty of support without the establishment of paternity operated in Norway for many years until abolished by legislation in 1956, for reasons discussed by Professor Arnholm in an article entitled "The New Norwegian Legislation relating to Parents and Children"(52). The following passage from the latter gives, in our view, compelling reasons why we should not introduce a similar system into our law:-

> "The part of the Act (of 1915) which caused most criticism as time went by was that containing the rules providing for the establishment of a duty of support unconnected with paternity .....[T]he 1915 Act - much against the intention of the legislature - came to depress the social position of those children whose right of support was granted without the establishment of paternity. Such a decision involved an assumption of the sexual promiscuity of the mother during the period of conception and the scheme of support served to remind the child of this very fact during the whole of its adolescence. This means placing a severe psychological strain on the child. Experienced social workers affirm that children settle down more easily where no duty of support is imposed at all. The child can then find refuge in the thought that the mother has only had sexual relations with one man, who has deserted her and cannot be found. Against the scheme of imposing on several men the duty of supporting the same child particularly sharp criticism was forthcoming. From an economic point of view, of course, it might be advantageous

52. Scandinavian Studies in Law 1959 published by Almqvist & Wiksell, Stockholm, at p.16.

> to hold several persons jointly liable. But the advantage was dearly bought. It involved a particularly brutal reminder of the mother's lapse."

For very much the same reasons Denmark, in 1960, also abolished the "duty of support unconnected with paternity."

31. If the court is to be given any power to order blood tests, a fundamental question is whether the exercise of this power is to be in the court's discretion or whether either of the parties is to have the right to require the court to order blood tests, with no power for the court to refuse such a request. If the court is to be given a discretion it is envisaged that it will hear the evidence of the parties before deciding whether or not further evidence is required from blood tests.

32. We suggest that the court should have a discretion whether or not to order blood tests, except in the case of affiliation proceedings where any party should have the right to require blood tests to be ordered. In divorce or nullity proceedings blood tests would generally be requested by a petitioner who was attempting to bastardise his wife's child either to enable him to prove thereby his wife's adultery, to avoid having to maintain the child, or to obtain an annulment of his marriage on the ground that at the time of its celebration the wife was pregnant by another man. Blood group evidence could be used to support, and perhaps prove conclusively, the husband's case. If the petitioner were given the right to require the court to order blood tests there would be a danger that petitions would be based on extremely slender evidence in the hope that blood tests would turn out to support the petitioner's case. For example, a husband might be encouraged to institute divorce proceedings on the ground of his wife's adultery, with no evidence

to support the allegations in the petition, but in the hope that blood tests would confirm them. To deter speculative litigation of this nature we suggest that in all cases, other than affiliation proceedings, the party requesting blood tests to be ordered should be required to make out a prima facie case justifying the ordering of blood tests.

33. We make an exception for affiliation proceedings partly because the power to order blood tests is unlikely to lead to speculative litigation (in most cases it will be the defendant who asks for a test) but also because we feel that where a man is wrongly accused of the paternity of an illegitimate child he should have the right to seek the help of blood tests to establish his innocence, whatever the strength of the evidence implicating him. It may be that the claimant is able to make out a strong case against the defendant, which is nevertheless entirely false, and that the defendant is able to offer little in the way of evidence himself beyond a straight denial. Bearing in mind the dangers of perjury in this type of case we suggest that the man accused of paternity should not be denied the right to obtain evidence from blood tests, which may in some cases be the only source of convincing evidence available to him. Similarly a woman who is sure that the defendant is the father of her child (even though he is able to make out a convincing defence) should not be denied the opportunity of supporting her case by asking for blood tests. Her demand for blood tests would demonstrate her sincerity and a non-exclusion result could not harm her case and might assist it if uncommon factors were shown to be present in the blood of the child and of the defendant. Under the present law it is possible that an unscrupulous woman might use the threat of affiliation proceedings as a blackmailing weapon

against a man who, though he had never had intercourse with her, might still be prepared to pay to avoid the scandal of involvement in affiliation proceedings. It has been suggested that giving the complainant a right to take proceedings against more than one defendant and also giving her a right to require blood tests to be carried out would be to risk increasing this abuse. However, we do not agree. If a complainant knows that a man has had intercourse with her at a time which makes it possible that he is the father of her child, we feel that she ought to be able to require blood tests to be carried out if she thinks that they will assist her case. If, however, the complainant is proceeding against a man whom she knows cannot possibly be the father of her child the thing most likely to destroy her case is an order for blood tests to be carried out. There would be at least a 70% chance that blood tests would give an exclusion result (and in individual cases the chance could be very much higher) and even if a non-exclusion result were obtained this would not give the strong indication of paternity which would be needed to assist her case. In any event the case where a woman brings affiliation proceedings against a man she knows cannot be the father of her child, is just the case where one would expect the man to ask for blood tests to support his denial of paternity. The very fact that the defendant could ask for blood tests to be carried out would deter speculative litigation by unscrupulous complainants.

(b) Effect of Tests

34. In para. 5 above we have indicated what blood tests can and cannot prove. In Appendices A and B we discuss further the scientific nature of blood tests and their application to the determination of paternity. It seems to be beyond dispute that the accuracy of these tests is proven, that where they are properly conducted they are fully accepted by authoritative medical opinion, and that they can give a conclusive exclusion result. They can,

in other words, prove conclusively that a particular man could not be the father. If the court had any reason to believe that the tests themselves were incorrectly carried out, it should have the power to order fresh tests but we do not think that it should be open to the court to find paternity proved in the face of a blood test giving an exclusion result, unless expert evidence satisfied it that in the particular case there was reason to question the validity of the findings.

35. Where blood tests show a possibility that the putative father could be the father of the child concerned, we consider that the court should be able to take this possibility into account, together with all the other evidence available. Clearly the court would have to be very careful as to what value it placed on such evidence. In some cases any one of say, 50% of the adult male population of the country, as well as the putative father, could genetically be the child's father; here no weight would be given to this evidence by the court. But there would be other cases where the presence of some uncommon genetic factor in both putative father and the child would make the chance of there being other possible fathers minute. Where such extremely uncommon blood factors are involved, the court should be able to rely on the blood test as weighty, though not conclusive, evidence of paternity. However, if our suggestion on this point is accepted it might be desirable to amend s.10 of the Affiliation Proceedings Act 1957 which requires the evidence of the complainant to be corroborated in "some material particular". We are not suggesting that the requirement of corroboration should be dispensed with but the difficulty with the present provision is that it is arguable that a non-exclusion result giving a strong indication

of paternity does not corroborate a "material particular" in the complainant's evidence. It would, of course, be capable of corroborating the general tenor of the complainant's case and, if it does, we think that it should provide the needed corroboration. We would prefer to see the requirement being that the evidence of the complainant must be corroborated by some other material evidence. (53)

(c) Refusal to Undergo Test

36. As soon as the court makes an order for the taking of a blood test the guardian ad litem has, of course, the duty to support it (unless he wishes to appeal against it). Until the court makes the order the guardian ad litem has the right to make submissions against it during the course of the proceedings. A more important question is how the court is to treat the refusal of either of the parties to an action to submit to blood tests. We do not think that it would be acceptable to public opinion to exert physical compulsion nor do we think that anything would be achieved by giving the court power to fine, or apply any similar sanction to, a party who refuses. In the case of the parties we would rather see such refusal considered as evidence against the refusing party, unless he or she could show good cause on religious or health grounds justifying, in the opinion of the court, his or her refusal (54).

37. If either of the parties, in a case where the presumption of legitimacy operates, refuses to submit to a blood test it may not be sufficient to provide that the court be entitled to treat such refusal as evidence against the refusing party. It must be decided what inference, if any, is to be drawn as to the legitimacy of the

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53. See e.g. s.2. Evidence (Further Amendment) Act 1869 regarding the requirement of corroboration in actions for breach of promise of marriage.

54. Cf. s. 2 of the Road Traffic Act 1962 as an instance where the court may treat a refusal to undergo a blood, urine or breath test as evidence against a person accused of being in charge of a motor vehicle while unfit to drive through drink or drugs.

child concerned. Suppose that a husband petitions for divorce on the ground of his wife's adultery and maintains that he is not the father of her child. If the wife refuses to submit to a blood test and the court is entitled to treat her refusal as evidence against her, it may infer from her refusal that she has committed adultery. But the fact that the wife has committed adultery does not mean that the husband cannot be the father of her child; he also may have had intercourse with her at the appropriate time. It can be argued therefore that the wife's refusal to submit to a blood test should have no bearing on the question of the paternity of her child. However, we believe that the court should be entitled to treat a wife's refusal as some evidence that her child is illegitimate (provided that her refusal is based on grounds which the court regards as unreasonable). If a wife has doubts as to the paternity of her child she might well agree to submit to a blood test in order to resolve the doubt in her mind. If, however, she thinks that her husband is not the father of her child she might be encouraged to refuse a blood test if her refusal would not affect the presumption of legitimacy and her prospects of rendering her husband liable to maintain her child. She might feel that if she agreed to submit to a blood test the result would probably prove that her husband could not be the father of her child and this would both establish her adultery and the illegitimacy of her child. It might pay her to refuse a test and take the risk that the court would infer her adultery; she would still leave her husband with the presumption of legitimacy to rebut without the help of blood group evidence; we have seen how difficult it can be for a husband to rebut the presumption of legitimacy without such evidence. She would have little to lose by refusal but could make it difficult for her husband to avoid responsibility for maintaining her child. But if, as we suggest, the court were entitled to draw inferences as to to the paternity of her child from her refusal, there would not be this inducement for her to refuse a test.

38. We hope that our suggested provision would deter parties from refusing blood tests, except on reasonable grounds, and that in practice the court would rarely have to draw any inference as to the legitimacy of a child from the refusal of a party to submit to a blood test. From the child's point of view we have already argued (see paras. 12-14) that it is more often than not in the child's interest that the true position as to its paternity should be established and that, if possible, its status as a legitimate or illegitimate child should not be determined by legal presumptions. It is for this reason, in particular, that we are concerned that parties should not be able to refuse blood tests for purely tactical reasons. The refusal by, say, the child's mother to submit to a blood test on grounds which the court decided were unreasonable would no doubt suggest to the child in later years that not only was its true paternity uncertain (as its legitimacy would have been affirmed by the court only on the basis of the presumption of legitimacy) but also that its mother had engaged in some form of trickery during the court proceedings.

39. The child's consent to the taking of a blood test ordered by the court produces a separate problem. In practice there will be very few cases involving paternity where the child is more than a few years old. In the case of affiliation proceedings the general rule is that proceedings must be brought within a year of the child's birth and in any event maintenance orders cease when the child is sixteen. In most divorce cases and nullity suits, where paternity is in issue, the child concerned will be well under the age of sixteen and in the great majority of cases will be only a few years old. Unless the child is a party to the proceedings, which will rarely be the case, it would be meaningless to provide that refusal is to be evidence against it. We suggest that the following principles should govern this problem, while recognising that further careful consideration

will need to be given to it:-

(a) Any child of the age of sixteen or over should be capable of giving a valid consent to having its blood tested, unless it would not be capable of giving a valid consent even if of full age. We consider that a mentally normal child of the age of sixteen is quite capable of appreciating the implications of submitting to a court's order for a blood test to be taken [55].

(b) If the child is under 16 its consent will not be effective. As already pointed out in para. 36 a guardian ad litem will be bound to support the court order. The function of the guardian ad litem is to represent the child "in the ordinary course of the proceedings" [56]; he does not act in a custodial capacity. Once the court has made an order for blood tests to be carried out it is not for the guardian ad litem to give or withhold his consent to the order being carried out for this is not a matter which falls within "the ordinary course of the proceedings". That, however, will not necessarily lead to the blood-testing being carried out since even though a guardian ad litem has been appointed either one of the parties or some other person (for example an ordinary guardian) will have actual care and control of the child. The consent of that person will in fact be required, since it would not be practicable to compel the administration of a blood test without his or her concurrence. If one of the parties has care and control of the child and refuses to allow the child's blood to be tested such refusal

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55. At the time when this was written the report of the Latey Committee on the Age of Majority had not appeared; it may be that this Report will contain relevant recommendations.

56. See R.S.C. O. 80 r. 2(2)

should be admissible in evidence against the party so refusing, unless the refusal is considered by the court to be reasonable on religious or health grounds. In the case of petitions for legitimacy declarations the court should be entitled to draw whatever inferences it feels are justified where the person having the right to decide on behalf of the child refuses. In the case of these petitions the child will be a party to the action and may well stand to benefit substantially, in a financial sense, from the result of the proceedings. Should not the court have power in these cases to override any refusal of consent which seems disadvantageous to the child?

(c) If the child is sixteen or over and refuses to submit to a blood test the court should be able to take into consideration any evidence touching on such refusal, such as persuasion by one of the parties concerned, and draw any inference which seems justified.

40. Subject to the same considerations of health and religious belief as should apply to children, the court should be empowered to order the administration of a blood test to a mentally disordered person where the patient is incapable of reaching a rational decision for himself and his interests or the interests of justice require that he should undergo a test.

(d) Testing Procedure

41. For the results of blood tests to be admissible in court, they should be undertaken in the prescribed manner at properly equipped centres and by recognised experts. It will be necessary for rules to be drawn up by the appropriate authorities in consultation with the Minister of Health, specifying:-

(a) the centres at which tests can be carried out,

(b) the selection of experts authorised to carry out the tests,

(c) the nature of the tests to be made,

(d) the procedure to be followed in making the tests, and

(e) the form in which the result of the tests should be initially communicated to the court.

42. We suggest that the results of blood tests should be presented to the court in the form of a separate certificate relating to each person whose blood has been tested. The certificate should specify the tests made, the results of such tests and the results of a second complete set of the same tests (to avoid, as far as possible, observer error) and the conclusion of the expert. In the event of the test showing a non-exclusion result, the certificate should also show, if this can be done, the incidence in the population of the factors shown by the test and the statistical probability of there being other possible fathers of the child concerned. We do not suggest that the certificate should be treated as conclusive in the sense that it should prevent the expert conducting the tests from being called to give evidence before the court, though we would hope that detailed certificates would be accepted unchallenged in the majority of cases.

43. Some practical difficulties may arise in connection with the interpretation of certificates, particularly in affiliation proceedings. While the jurisdiction in affiliation proceedings continues to be with magistrates' courts it may be difficult for the relatively few expert serologists to be available if cross-examination on blood test evidence becomes a common feature of these proceedings, bearing in mind the number of magistrates' courts and their geographical distribution, throughout the country. It may also be difficult in some cases for the magistrate to interpret the findings revealed by the certificate without further expert evidence which may not be called by the parties. In the

Scandinavian countries the court may refer difficult cases to the Medico Legal Council which, with its panel of distinguished experts in the appropriate scientific fields, gives its written opinion to the court. It may be that a similar body could be set up in this country either to give an opinion at the request of the parties or of the court. We are not, of course, suggesting that the right of the parties to cross-examine should in any way be affected. We do, however, hope that the practical difficulties which we have mentioned in this paragraph will be considered, particularly by the medical profession, for it is a matter on which we would like to receive comment.

44. It has been suggested that the risk of impersonation would detract from the evidential value of blood tests. One way of avoiding this possibility would be for blood samples to be taken by a medical practitioner nominated by the court, all the parties attending at the same time and place so as to identify each other. In some cases, however, the relations between the parties might be so strained that this would be highly distasteful and detrimental to the child. As an alternative, the present system of medical inspection in nullity cases might be preferable.(57) Under this system, the identity of the party to be examined is established by the solicitor accompanying him. If the party attends the examination unaccompanied, he produces a photograph certified by solicitors to be a true likeness of the party in question and this is attached to the medical report. In adapting this system to the administration of blood tests for the purpose of determining paternity it might well be necessary to provide additional safeguards to prevent substitution where very young children are concerned, e.g. by supplying a footprint as well as a dated photograph.

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57. Matrimonial Causes Rules 1957, r.24 (5) and (6), substituted in 1963.

45. We understand that the accuracy of some of the blood group tests currently used can be affected if the person whose blood is being tested has recently suffered from certain illnesses or received a blood transfusion. We therefore recommend that a person whose blood is to be tested under a court order should be required to make a statutory declaration specifying whether or not he or she has suffered from any illness during the preceding twelve months or has received a blood transfusion within the preceding four months.[58] Such a declaration should also be made where blood tests undertaken voluntarily are submitted to the court as evidence. The declaration should be submitted to the expert carrying out the tests, who should be required to comment on the facts disclosed and their effect, if any, on the tests made by him. The twelve and four month periods which we suggest are based on similar provisions in other countries but they are clearly somewhat arbitrary and we would be grateful for medical opinion on this point.

(e) Cost of Tests

46. The cost of blood tests is a matter on which we have yet to receive clear information, but it has been suggested that a set of tests on three persons should not cost more than twenty or twenty-five pounds. This however is another point on which we should like medical opinion.

47. It must be decided who is to bear the cost of blood tests ordered by the court. It is possible to have a rigid rule, as in some American jurisdictions, that the person demanding the tests, or for whose benefit they are ordered, should bear the cost. It can be argued that a rule such as this would act as a deterrent against a person who knows that he is the father demanding tests in the slender hope that an error in the tests themselves would show an exclusion result. This rule also has the advantage that it is clear to the parties and to the court who must bear the costs of

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58. A false declaration would attract the usual penalties.

blood tests, before they are ordered. However, we would prefer to see the court given a discretion to order the costs to be borne by one side or the other or divided between the parties in whatever proportion the court decided. It would be unjust for a man wrongly accused of paternity to have to bear the cost of blood tests in every case, particularly where the court feels that the mother was, for example, acting maliciously in accusing him, and it would be equally unjust where the mother demands tests for her always to have to bear the cost of them. Of course an increase in the use of blood tests must cast some additional burden on the Legal Aid Fund.

D. OBJECTIONS TO THE INTRODUCTION OF COMPULSORY BLOOD TESTS

48. The proposal that the courts of this country should have the power to order blood tests is not a new one, at least so far as affiliation proceedings are concerned. In both 1938 and 1961 Private Member's Bills were introduced in the House of Lords by Lord Merthyr and Lord Amulree respectively. Lord Merthyr's Bill, the Bastardy (Blood Tests) Bill,[59] lapsed with the advent of the Second World War; Lord Amulree's Bill, the Affiliation Proceedings (Blood Tests) Bill[60] was passed by the House of Lords but was too late in the Session to make any progress in the Commons. In Appendix C we set out the Affiliation Proceedings (Blood Tests) Bill in the form in which it was passed by the House of Lords. This may be found helpful in considering our proposals.

49. The attention which blood tests have received both in the courts and in Parliament has led to several basic objections being raised against the introduction of a power to order such tests. In this part of our Paper we propose to examine what we consider to be the main objections advanced.

(a) Self-Incrimination

50. In a recent Scottish case[61] Lord Wheatley expressed very forcibly one argument against our proposals. In that case a husband,

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59. H.L. Debs. 8th February 1939, col. 686 (Second Reading).

60. H.L. Debs. 21st March 1961, col. 1075 (Second Reading), and H.L. Debs. 9th May 1961, col. 84 (Committee).

61. Whitehall v. Whitehall 1958 S.L.T. 268.

in divorce proceedings against his wife on the ground of her adultery, asked the court to order the wife and child to submit to blood tests to support his contention that he was not the child's father. Lord Wheatley refused to grant such an order on the ground that the wife should not be forced to produce evidence unfavourable to her case. In Lord Wheatley's words[62]:-

> "The obvious purpose of the proposal is to ordain the defender to make available to the pursuer evidence which might be favourable to the pursuer's case and damaging to her own...A motion to ordain a party to a cause to provide to the other side the basis of evidence of such a nature is one to which I would not give effect unless I was obliged to do so by the authority of principle or precedent. It seems to me that the proposal offends against all conceptions of justice and is contrary to the fundamental principles of our law."

The fundamental principle which Lord Wheatley had in mind was, we assume, that which the English law knows as the privilege against self-incrimination. This privilege still operates very strongly where proof of adultery is concerned[63], despite the abolition of the rule in Russell v. Russell[64]. S.43 of the Matrimonial Causes Act 1965 provides:

> 43.-(1) The evidence of a husband or wife shall be admissible in any proceedings to prove that marital intercourse did or did not take place between them during any period; but a husband or wife shall not be compellable in any proceedings to give evidence of the matters aforesaid.
>
> (2) The parties to any proceedings instituted in consequence of adultery and the husbands and wives of the parties shall be competent to give evidence in the proceedings: but no witness in any such proceedings, whether a party to the proceedings or not, shall be liable to be asked or be bound to answer any question tending to show that he or she has been guilty of adultery unless he or she has already given evidence in the same proceedings in disproof of the alleged adultery.

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62. At p.268.

63. For a recent review of the present scope of the privilege, see S. v. E. [1967] 1 All E.R. 593 at 595-596 per Chapman J.

64. [1924] A.C. 687 and see n.13, supra.

51. Before discussing the application of the privilege to cases involving adultery we wish to distinguish between two questions:

(a) is the privilege, so far as it applies to adultery, one which ought to be retained? and

(b) would compulsory blood tests conflict with the privilege even if it should be retained?

52. We are not here concerned with the question whether the privilege[65] should be totally abolished; this wider question would be more appropriately considered by the Criminal Law Revision Committee and the Law Reform Committee in the course of their current review of the law of evidence in criminal and civil proceedings respectively. Our concern is solely with its application to blood tests. In this connection it is relevant to consider what Wigmore on Evidence[66] regards as the two basic reasons for the retention of this privilege today:

> "The first is to remove the right to an answer in the hard core of instances where compulsion might lead to inhumanity, the principal inhumanity being abusive tactics by a zealous questioner. The second is to comply with the prevailing ethic that the individual is sovereign and that the proper rules of battle between government and individual require that the individual be not bothered for less than good reason and not be conscripted by his opponent to defeat himself."

Clearly these reasons are primarily applicable to criminal proceedings and we are not convinced that where adultery is an issue in divorce proceedings the spouses require such protection.

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65. The privilege from self-incrimination appears to have taken root as a fundamental doctrine of English law in the middle of the seventeenth century as a reaction to the Ecclesiastical Court's ex officio power of putting an accused person to answer on oath and the abuse of this power by the Court of Star Chamber and the Court of High Commission. This abuse seems to have been largely procedural and the argument in Lilburn's case [(1637-45) 3 How. St. Tr. 1315] was directed against those courts' improper methods of accusation rather than against the practice of making the accused answer incriminating questions on oath.

66. 3rd. Ed., Vol. VIII, p.310.

In contested divorce cases both parties will generally give evidence as a matter of tactics, but where a person resisting a charge of adultery takes advantage of s. 43 of the Matrimonial Causes Act 1965[67] to avoid giving evidence, the court is already entitled to take his refusal into consideration but probably should not regard this as particularly strong evidence against him [68]. The protection given to the parties in a matrimonial suit by s. 43 (2) of the Matrimonial Causes Act 1965 (quoted in para. 50 above) was criticised by the Gorell Commission [69], the Denning Committee[70], and the Morton Commission[71], and the abolition of the rule recommended by all three[72]. We endorse their recommendation.

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67. See para. 50 supra.

68. Poyser v. Poyser [1952] 2 All E.R. 949.

69. The Royal Commission on Divorce and Matrimonial Causes presided over by Lord Gorell; 1912, Cd. 6478, paras. 381-386.

70. Final Report on Procedure in Matrimonial Causes; 1947, Cmd. 7024, paras 70-74.

71. Royal Commission on Marriage and Divorce presided over by Lord Morton; 1956, Cmd. 9678, paras. 933-935.

72. The Gorell Commission thought that the result of the rule was that "however guilty the petitioner may be, and however much the judge may suspect his or her guilt, so long as he or she confines his or her evidence to the case against the respondent, no questions can be put to the petitioner as to guilt on his or her side, and all that the court can do is to direct the King's Proctor's attention to the case. Moreover, if a respondent does not choose to appear, and the co-respondent does and fights the case, he is in a difficulty about compelling the respondent to give evidence; so also is a respondent if a co-respondent will not contest a case. These restrictions should in the interests of justice be done away with." (para. 384) More recently the Morton Commission said "We consider that it is no longer necessary to protect the parties to a matrimonial suit or their witnesses from being questioned about their adultery. The conduct of the spouses is very material to the trial of the issues between them; the conduct of their witnesses may be relevant in so far as it relates to credit. The rule has had only a limited application since the introduction of grounds of divorce additional to that of adultery and we have had no suggestion that the lack of proceedings based on those other grounds has caused any difficulty. In our view the court can be relied upon to prevent any abuse if the protection afforded by the rule is removed." (para. 935)

53. But even if the privilege from self-incrimination in its application to adultery were to remain, is it correct to say that the power of the court to order blood tests would offend the principle of this privilege? There are many instances where "real"(73) evidence may be forcibly acquired from an accused person if the court orders; his fingerprints may be taken, his clothing taken for examination, his personal belongings searched and so on. Very closely analogous to the power of the court to order blood tests is the power to order medical examinations in nullity proceedings, which may well produce evidence adverse to the party being examined. However that may be, we do not think that there is any place for the application of the privilege in this context.

(b) Sex Discrimination

54. An objection raised against the Affiliation Proceedings (Blood Tests) Bill in 1961 was that the introduction of compulsory blood testing would be favourable to men only and would discriminate against women. It would, it was said, enable men to disprove paternity but would not help women to prove it. As we have seen this is not wholly true. Although at present it is mainly valuable as producing an exclusion result it can sometimes produce weighty positive evidence of paternity. It would incidentally be of real value to the mother who genuinely does not know which of two possible men is the father. In any case we feel that the argument tends to avoid the central issue, which is whether the courts are to be assisted in arriving at a correct decision as to paternity, thereby increasing the likelihood of avoiding injustice. If it is accepted that the use of blood tests can assist the courts in this way we consider that the argument that such tests would be dis-

73. "Real evidence" is not a term which has been established by judicial usage, but it is generally accepted to cover the production of material objects in evidence. See Cross on Evidence, 3rd Ed. p.7.

criminatory, because they would rarely help women, does not bear close examination: dishonest women might be prejudiced and honest men wrongly accused might be benefited. The measure would go no further than this in discriminating between the sexes. Furthermore the whole argument disregards the real interests of the child which we should treat as paramount.

(c) Possibility of Error

55. Criticism has been made of blood test evidence because of the possibility of observer-error or of genetical errors, such as mutations[74], occurring. In 1952 the Inter-Scandinavian Meeting on Genetics and Legal Medicine held in Copenhagen assessed the accuracy of findings based on each of the blood group tests employed in determining paternity and these figures were brought up to date in 1958 and 1961. In Appendix B we set out the current assessment of the accuracy of the various tests made by the Inter-Scandinavian Meeting. Lord Wheatley in Imre v. Mitchell[75], accepted the opinion of a highly qualified specialist in blood grouping that the chances of the MN test being accurate were in the order of 100,000 to 1. Even greater accuracy is expected from the recently introduced blood grouping machines which are used in conjunction with classical methods and which may well totally eliminate observer-error. To discount the value of blood test evidence on the basis of chances of error of this order seems to us to be entirely unrealistic. We regard it as unlikely that the court, in determining paternity issues, reaches decisions with anything like a comparable degree of accuracy, hampered as it often is by perjured evidence, the notorious unreliability of human observation and recollection

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74. See para. 4 of Appendix A.

75. 1958 S.L.T. 57 at 59.

and the strict presumption of legitimacy. One has only to consider the remarks of the judges whom we quoted earlier in this Paper to realise that correct findings as to paternity are sometimes extremely elusive as the law stands today.

(d) Administrative Problems

56. It has been suggested that the number of blood tests which would have to be made each year would be out of all proportion to their value. It is, of course, difficult at this stage to estimate accurately the number of blood tests which would be ordered annually, the costs of the tests and whether there would be a sufficient number of experts and centres available for the tests to be conducted properly. These are all questions on which we are anxious to obtain information and advice and on which we hope to obtain guidance from the experience of other countries. Our initial view is that the number of tests would not be excessive. The majority would undoubtedly be made in connection with affiliation proceedings of which we have seen that there were approximately 9,000 in 1965. We would not expect there to be a great number of tests made in connection with divorce proceedings. As for nullity suits and legitimacy declarations, in 1965 there were only 21 petitions for nullity on the grounds of the wife's pregnancy by another man at the date of the marriage and petitions for legitimacy declarations number approximately the same. Apart from affiliation proceedings we do not expect that the number of cases in which blood tests would be ordered could exceed 100 per annum.

57. So far as affiliation proceedings are concerned the deterrent effect of the court having power to order blood tests must not be overlooked; a claimant would be less likely to bring proceedings against a man who, she knew, could not possibly be the

father. The experience of the Cuyahoga County Juvenile Court of Ohio over the period from 1948 to 1961 (inclusive) is perhaps a useful guide. During this period the court handled some 12,000 paternity cases but in only 734 of these were blood tests ordered. Judge Walter G. Whitlach and Dr. Roger W. Marsters, in analysing these figures,[76] commented on the relatively low number of cases in which blood tests were ordered (which they found particularly surprising as the accused, in Ohio, has the right to demand tests) and concluded from the evidence available to them that in the great majority of cases the accused knew, or thought he knew, that he was the father of the child concerned.

E. SUMMARY OF SUGGESTIONS

58. The presumption of legitimacy should be rebuttable on a balance of probabilities and not only on proof beyond all reasonable doubt. (paras. 12-15)

59. Adultery should be capable of being proved on a balance of probabilities. (para. 16)

60. Even if s.43(2) of the Matrimonial Causes Act 1965 remains in force it should be clearly provided that the section will not operate to justify a refusal to undergo a blood test. (paras. 50-53)

61. (a) In all civil cases where paternity is in issue and blood test evidence is not already available the court should have the power to order blood tests to be carried out on the parties to the action and on the child concerned. (paras. 27-33)

(b) It is for consideration whether the court should have the power to order blood tests to be made on persons who are not parties to the action. (para. 28)

(c) In affiliation proceedings the complainant should

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76. (1962) 14 Western Reserve Law Review 115.

perhaps be enabled to proceed against more than one defendant and a defendant should be able to join other men who he thinks are possible fathers. (para. 29)

(d) In affiliation proceedings either party should have the right to require that the court should order blood tests, but in all other cases the decision whether or not to order tests should be in the court's discretion. (paras. 31-33)

(e) The court should accept an exclusion result from blood tests, as evidence of non-paternity unless it has reason to doubt the accuracy of the tests (in which case it should order fresh tests to be carried out) or unless expert evidence justifies the court in doubting the validity of the conclusions drawn from the tests by the experts carrying out those tests. (para. 34)

(f) A non-exclusion result should be admissible as evidence from which the court can draw such inferences as it thinks justified. In affiliation proceedings the requirement should be that the evidence of the complainant must be corroborated by some other material evidence and not corroborated in some "material particular." (para. 35)

(g) A refusal by a party to comply with an order of the court directing the making of blood tests should be considered by the court as evidence against the party refusing unless the court regards such refusal as justified on religious or health grounds. (para. 36)

(h) Where a party unreasonably refuses to comply with an order of the court directing that party or the child

to undergo a blood test the court should be entitled to disregard the presumption of legitimacy and draw such inferences of fact as to the legitimacy of the child as it thinks warranted. (para. 37)

(i) A child of 16 or over should be capable of giving a valid consent to a blood test; special rules would apply where consent on behalf of an infant was refused (see para. 39). Special rules would also have to be introduced clarifying the position where consent on behalf of a mentally disordered person was required. (see para. 40)

(j) There should be power to prescribe by rule how tests should be carried out. (para. 41)

(k) The persons whose blood is to be tested should attend together before a medical practitioner appointed by the court for the taking of blood samples, the tests themselves being carried out at designated centres. Safeguards against impersonation might be those suggested in para. 44.

(l) A statutory declaration concerning recent illnesses and blood transfusions should be made by each person whose blood is to be tested. (para. 41)

(m) The result of blood tests should be communicated to the court in the form of a standard certificate. It should be open to the parties to cross-examine the medical expert issuing the certificate. (paras. 42-43)

(n) The court should have a discretion to order payment of the costs of blood tests as it thinks fit. (paras. 46-47)

(o) All civil proceedings commenced after the coming into force of the necessary legislation should be subject to the changes in the law proposed in this Summary of

Suggestions.

62. We wish to acknowledge our indebtedness to Mr. Justice Ormrod who has given us valuable information on the legal and still more the medical aspects of blood group testing.

63. We appreciate that this Paper has a very narrow bearing on the subject of illegitimacy and that it does not deal with affiliation proceedings in detail. These subjects are, of course, extremely important and they are not being ignored. As we have mentioned, the Russell Committee has already reported on the Law of Sucession in Relation to Illegitimate Persons; the Society of Public Teachers of Law has put in hand an inquiry for us into the whole problem of the legal status of illegitimate children and, in accordance with item XI of our First Programme, the Home Secretary has appointed a Committee, under the chairmanship of Miss Jean Graham Hall, to study financial limits in Magistrates' Orders in Domestic and Affiliation Proceedings.

64. The Law Commission will be grateful if all comments on this Paper can be sent in by 15th December 1967.

APPENDIX A [77]

THE NATURE OF BLOOD GROUP EVIDENCE (Para. 5)

1. The existence of blood groups, first demonstrated at the beginning of this century by Landsteiner, explained the hitherto unintelligible disasters (such as death or severe illness) which occurred frequently when blood transfusions were given to patients. Landsteiner found that sometimes when blood was mixed with blood serum the red cells of the blood formed dense clusters, a phenomenon known as agglutination, but that sometimes with the same serum no agglutination occurred. Landsteiner deduced from this that the red blood cells must contain different chemical substances and that agglutination occurs when the cells contain a chemical which is "incompatible" with the blood serum being used in the experiment. He found that he could classify all blood into four specific groups, which he termed O, A, B and AB, and that blood from one group was either compatible or incompatible with blood from one or more of the other groups according to a predictable pattern. Since Landsteiner's original discovery several other systems of blood groups have been found, including the MN and Rhesus systems. The substances which differentiate these groups cannot, as yet, be identified in terms of their chemical constitution but their presence or absence can be shown by the technique of agglutination which we have mentioned.

2. Subsequently, other types of tests, such as the Hp and Gc tests have been evolved. With these the technique is entirely different, for complex proteins in the blood are separated out and identified by a process called electrophoresis. This process depends upon the fact that the chemicals concerned can be made to

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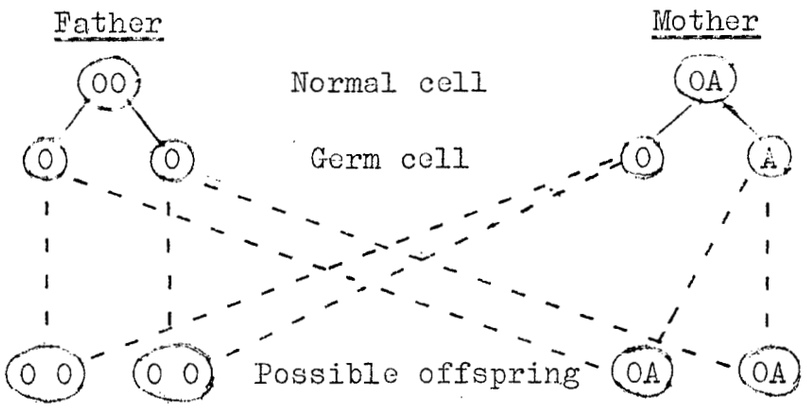
77. We are greatly indebted to the doctors and other experts who have helped us in the preparation of the material in this Appendix (see supra n.1).

move through a medium such as starch gel by an electric field and that they move at different rates, dependent on their molecular size. Thus Hp-1 takes up a characteristic position in the gel some distance from Hp-2 and the two substances can be separated from each other.

3. The value of our knowledge of blood groups for the determination of paternity lies in the fact that the different factors present in each group are transmitted from one generation to another by the recognised principles of heredity. The mode of inheritance of blood groups has been established with a high degree of certainty by an enormous mass of research in many countries, involving many thousands of families, and the results of these experiments are completely in accord with the accepted rules of genetics. Without embarking on a detailed discussion of the mechanism of heredity a brief description can be given of how this mechanism applies to the inheritance of blood groups. In the nucleus of every normal human body cell (except in the germ cells, i.e. ova and spermatozoa) there are 46 visually identifiable bodies known as chromosomes, arranged in 23 pairs, each chromosome of the pair having the same shape as the other. These chromosomes each carry a number of smaller bodies called genes and, put very simply, the transmission of every inherited characteristic from one generation to another depends upon the transmission of the corresponding gene or groups of genes. The human germ cells contain only 23 chromosomes, only one of each pair of chromosomes from the normal 46-chromosome nucleus being used in the formation of the germ cell nucleus. Let us take, by way of illustration, a father who has the "O" factor in each of the relevant pair of chromosomes and a mother who has the "A" factor in one chromosome of the relevant pair and the "O" factor in the other chromosome of that pair. When the paired chromosomes divide in the formation of germ cells the father will produce germ cells which can only contain the "O" factor.

The mother can, however, produce germ cells with either the "A" factor or the "O" factor, depending on which chromosome of the pair the germ cells take. The diagram below shows the possible combination of factors which the child of this mother and father can have, depending on which germ cell from the father fertilizes which germ cell from the mother. (It should be borne in mind that when a germ cell is fertilized by another germ cell the 23 chromosomes in each germ cell pair to give an embryo with the normal 46 chromosomes).



It can be seen that the child of these two parents cannot possess the "B" factor. If it does, then the father must be a man whose chromosomes contain the "B" factor and cannot be the man in our illustration. In Appendix B we set out further diagrams (dealing only with the ABO and MN systems) showing possible and impossible combinations of factors in children of parents whose ABO or MN groups are known.

4. There is, theoretically, a possibility that in dividing to form germ cells the chromosomes may undergo a change in chemical composition so that, for example, a chromosome containing the O factor could change to possess the B factor instead. Clearly if this change, termed a mutation, were to occur it would invalidate the reasoning behind the diagram in the preceding paragraph. However, mutations in nature are known to be extremely rare and so far as blood factors are concerned only one such case has been demonstrated in all the millions of cases investigated. Even that

one is not regarded by the leading authorities in this country as more than fairly convincing [78].

5. A second fact which bears on the reliability of blood tests is that in any laboratory test there is the possibility of human observer-error. However, a vast experience of the techniques of blood grouping has been acquired in connection with the blood transfusion services in many countries. While observer-error is always a possibility, this can be virtually eliminated by repeating the tests on several samples of blood and in any event the risk of observer-error is probably less than that involved in the identification of finger prints. The experimental accuracy of these tests to establish blood groups has been put by the Inter-Scandinavian Meeting on Genetics and Legal Medicine at 99.9 to 99.99% [79] provided that the technique is impeccable. To ensure that the technique is impeccable evidence in paternity cases should only be provided by serologists who are specially skilled in this class of work.

6. We have seen how blood groups can be determined and how the transmission of factors from one generation to another works in principle. Additional valuable evidence, so far as paternity findings are concerned, is provided by a statistical analysis of the distribution of factors in the population of any country. In England the distribution of the ABO groups is approximately:-

O - 46%

A - 41%

B - 8%

AB - 3%

Statistical calculations show that using these groups alone the chances of being able positively to exclude a given man average about 17% although if the child is group B or AB a greater proportion of men would be excluded as so few Englishmen have B to give.

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78. Race and Sanger - Blood Groups in Man 4th Edition (1962).

79. See para. 55, supra.

7. Since Landsteiner's original discovery and particularly since 1940, a considerable number of other blood groups have been discovered, i.e., a considerable number of other chemical substances have been shown to exist on the red cells though as yet the differences can be determined only by serological tests. These substances are inherited independently of one another and so are described as different blood group systems. The relevant ones for determining parentage are set out below [80], together with the cumulative chances of excluding a given person by determining the group of the child and of the mother and putative father in each system, if all the available tests are employed.

	Exclusion by each system (%)	Cumulative Exclusion (%)
1. ABO	17.6	17.6
2. MN.S	23.9	37.2
3. Rh. (D,C,c,E)	25.2	53.0
4. Kell (K)	3.7	54.8
5. Lutheran (Lu^a)	3.3	56.3
6. Duffy (Fy^a)	4.7	58.4
7. Kidd (Jk^a)	2.0	59.6

These tests alone offer, on average, a 60% chance of exclusion. It must be remembered that this table applies only to Englishmen and Englishwomen though it is applicable with sufficient accuracy to Western Europeans.

8. In individual cases the prospects of exclusion may be considerably higher than the figures in the table, if either the child or the putative father is found to have an uncommon blood group or a combination of uncommon groups. In extreme cases the chance of two unrelated men having the same combination of uncommon groups may be as low as 1.6 in one hundred million. In other cases the chance may be of the order of 1 in ten thousand or 1 in fifty thousand. In such cases proof that both child and putative father

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80. Modified from Race and Sanger, supra.

have the same rare or very rare combination is valuable positive evidence that the putative father is in fact the father.

9. The blood groups mentioned in the table above are all based on chemicals found on the red cells of the blood. There are, in addition, other chemical substances which can be identified in the blood serum i.e.,the liquid component of the blood. These substances have also been shown to be transmissible from one generation to another in accordance with the rules of heredity and can therefore assist us in the determination of parentage. As we already briefly stated, the techniques involved are quite different from those used in the identification of blood groups, but they are equally reliable in skilled hands. Two such substances are now being used in paternity cases and have been approved by the medico-legal authorities of Denmark and other Scandinavian countries. These are the Haptoglobin groups and Gc groups. It is possible to classify all samples of sera into three haptoglobin groups and three Gc groups described as Hp.1-1, Hp.1-2 and Hp.2-2 and Gc.1-1, Gc.1-2 and Gc.2-2. Approximately 15% of the population of Western Europe are Hp.1-1, 47% are Hp.1-2 and 36% are Hp.2-2. The haptoglobins alone exclude 18% of men erroneously alleged to be the father of the child and the Gc groups exclude 15%. Since the Hp and Gc groups are inherited independently of one another and of the groups mentioned before, the combined exclusion rate if these tests are used also is raised from 59.6% (see table above) to approximately 72%. The haptoglobin and Gc tests have to be used carefully, for haptoglobins are not definitely developed in a child under three months old and ill health may sometimes make it difficult to identify these substances.

10. Another system of blood grouping is the Gamma-globulin, discovered by Grubb in 1956. He showed that the blood sera of normal persons could be divided into two groups, Gm (a+) and Gm (a-) according to whether or not their serum prevented agglutination of

anti-D coated rhesus positive cells by an antibody present in the serum of a proportion of rheumatoid arthritis sufferers and occasional normal individuals, ability to inhibit agglutination being inherited as a Mendelian dominant character. Other Gm groups have since been discovered. Gm (a) and Gm (b) have been used in evidence in paternity cases in Norway since 1962 and a third factor, Gm (x) has been employed in some countries. Most of the gamma-globulin present in the newborn child is of maternal origin and it is not until the child is some months old that its Gm groups can be determined.

11. We understand that Phosphoglucomutase grouping is likely to be employed in paternity testing before very long. Here the lead is in this country.(81) This is an inherited system of blood-tissue enzymes which is already being used in anthropological studies and forensic identification tests. Grouping is by starch-gel electrophoresis (like the haptoglobin grouping) followed by a special enzyme staining technique.

12. Another group of substances present in blood serum, the lipo-proteins, are at present under intensive study and it is possible that in the near future these will be valuable in the determination of parentage.

13. The Royal Postgraduate Medical School at the Hammersmith Hospital is already using a computer for experiments in general medical screening, including blood testing (though we understand that this does not include blood group testing) and it is by no means impossible that computers will in the future be used extensively in blood group testing. Not only would this save time, but the chances of human error could be greatly reduced, and the correlation and elucidation of statistical evidence, for example of the distribution of factors amongst the population and the determination of the number of possible fathers of a given child, greatly facilitated.

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81. See Nature, 1964, 204, 742.

APPENDIX B

PART I

INHERITANCE OF THE OAB AND MN FACTORS

Parents' Blood Groups	Their children's Blood Groups	
	Possible	Impossible
O - O	O	A, B, AB
O - A	O, A	B, AB
O - B	O, B	A, AB
O - AB	A, B	O, AB
A - A	A, O	B, AB
B - B	B, O	A, AB
A - B	O, A, B, AB	None
A - AB	A, B, AB	O
B - AB	B, A, AB	O
AB - AB	A, B, AB	O

INHERITANCE OF THE MN FACTORS

M - M	M	N, MN
N - N	N	M, MN
M - N	MN	M, N
M - MN	M, MN	N
N - MN	N, MN	M
MN - MN	M, N, MN	None

IMPOSSIBLE FATHER/CHILD COMBINATIONS

Man	Child
O	AB
AB	O
M	N
N	M

APPENDIX B.

PART II.

The following is a translation of the Danish version of the Scandinavian Guide to the Forensic Evaluation of Blood Group Examination in Legal Cases of Disputed Paternity (82) :-

"Provided with adequate technical facilities and clear-cut unequivocal reactions, the following will apply to paternity exclusions according to the different blood and serum group systems.

1) A_1 A_2 BO System

Based on present Scandinavian data, the reliability of paternity exclusions by the ABO system may be estimated at an order of magnitude of 99.99%.

Subdivision of the A factor into A_1 and A_2 factors may demonstrate paternity exclusions, the reliability of which based on present Scandinavian experience may be estimated at an order of magnitude of 99.9%.

If the subtypes are indeterminable, the designation A is used. In that event no conclusion can be drawn concerning the heredity of the subtypes. In those instances in which the exclusion by the subtypes is based on an A_2 character in the child, a second determination of the subtype should be performed when the child has attained the age of about 12 months.

2) MN System

Based on present Scandinavian data, the reliability of paternity exclusions by the M and N factors may be

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82. See "Methods of Forensic Science" 1963 published by Interscience Publishers Vol.II p.223.

estimated at an order of magnitude of 99.99%.

Based on present experience, the reliability of exclusions of paternity by the S factor of the MN system may be estimated at an order of magnitude between 99-99.9%.

3) Rh System

Based on present Scandinavian data, the reliability of paternity exclusions by the Rh system may be estimated at an order of magnitude of 99.9%.

For certain types of exclusion of paternity by the Rh system the reliability must be assumed to be somewhat lower. In such cases a special evaluation will be performed.

4) Hp System

Based on present experience, the reliability of paternity exclusions by the Hp system may be estimated at an order of magnitude of 99.9%.

5) Kell System.

Based on present experience, the reliability of paternity exclusions by the K factor may be estimated at an order of magnitude between 99-99.9%.

6) P System

Based on present experience, the reliability of paternity exclusions by the P system may be estimated at an order of magnitude between 99-99.9%.

7) Duffy System

Based on present experience, the reliability of paternity exclusions by the Duffy system may be estimated at an order of magnitude between 99-99.9%.

8) Cases to be Evaluated Individually.

If special technical difficulties, atypical reactions

or the like are met with within the systems treated above, these circumstances will be given in the statement. A general reliability cannot be attributed to such cases, but each case must be evaluated individually. The same applies to the evaluation if exclusions depend on the use of rare anti-sera.

Exclusions of paternity by the secretor-non-secretor, the Lewis system, the Lutheran system and the Kidd system are also to be evaluated individually, among other things because present experience is still rather small. The same applies to the recently found Gm and Gc systems etc."

APPENDIX C

AFFILIATION PROCEEDINGS (BLOOD TESTS) BILL 1961

(as amended and passed by the House of Lords) (Para.48)

An Act to empower magistrates' courts and courts hearing appeals therefrom to require the applicant for an affiliation order, her child and the alleged father to undergo blood tests; and for the purposes connected therewith.

Power of the court to require blood tests.

1.-(1) Upon the hearing of an application for an affiliation order under the Affiliation Proceedings Act, 1957, the court may, at the request of the alleged father, give a direction for the use of blood tests to ascertain whether such tests show that the alleged father is excluded from being the father of the child, and may at any time revoke any such direction previously given.

(2) Where a direction is given under this section the alleged father shall pay the cost of taking and testing blood samples for the purpose of giving effect to the direction (including any expenses reasonably incurred by the mother or by any person having the custody, charge or care of the child in taking any steps required of her or him for the purpose), but the amount paid shall be treated as costs incurred by him in the proceedings.

(3) The results of blood tests taken for the purpose of giving effect to such a direction shall (in such form and manner as may be prescribed by rules made under section fifteen of the Justices of the Peace Act, 1949) be certified to the court by the person carrying out the tests, together with

his opinion on the question whether the alleged father is thereby excluded from being the father of the child, and the court shall take the certificate into account as evidence in the proceedings of the matters certified; but the results of blood tests so taken shall not in any event be treated in those proceedings or in any other proceedings for an affiliation order under the Affiliation Proceedings Act, 1957 (including proceedings on appeal) as satisfying the provision of that Act requiring the mother's evidence to be corroborated.

(4) In any proceedings for an affiliation order under the Affiliation Proceedings Act, 1957 (including proceedings on appeal) things done for the purpose of giving effect to a direction under this section, whether given in those proceedings or not, may be proved by documentary evidence in such cases, and in such manner, and subject to such conditions as may be provided by rules made under section fifteen of the Justices of the Peace Act, 1949.

(5) A court of quarter sessions on the hearing of an appeal against an affiliation order under the Affiliation Proceedings Act, 1957, or against the dismissal of an application for such an affiliation order, shall have the like power to give a direction under subsection (1) above as a magistrates' court has on the hearing of such an application, and subsections (2) and (3) shall apply accordingly.

(6) A court shall not give a direction under this section where a previous direction has been so given by any court in respect of the same persons and the results of blood tests taken to give effect

to the previous direction have been duly certified to the court giving that direction.

Power to prescribe nature and conditions of blood tests, etc.

2.-(1) The Secretary of State may by regulations make provision as to the administration of this Act and the manner of giving effect to directions under section one, and in particular may make provision -

(a) for regulating the taking, identification and transport of blood samples;

(b) for prescribing the blood tests to be carried out, and the person by whom and the manner in which they may be carried out;

(c) for regulating the charges that may be made for the taking or testing of blood samples;

(d) for securing that in all cases the blood samples of the mother, child and alleged father are tested by the same person.

(2) The power of the Secretary of State to make regulations under this section shall be exercisable by statutory instrument, and on any proposal to make regulations for a purpose mentioned in paragraph (b) of subsection (1) above he shall consult such persons or bodies of persons as appears to him to be requisite.

Enforcement of directions.

3.-(1) Where a court gives a direction under this Act, and the mother or any person having the custody, charge or care of the child fails without reasonable cause to take any steps required of her or him for the purpose of giving effect to the direction, the court may dismiss the application for the affiliation order or, in the case of quarter sessions, allow the appeal of the alleged father or, if he is not the appellant, dismiss the appeal.

(2) If for the purpose of providing a blood sample for a test required to give effect to a direction

under this Act any person wilfully and fraudently personates another, or wilfully and fraudently proffers a child other than the child named in the direction, he shall be liable on conviction on indictment to imprisonment for a term not exceeding two years, or on summary conviction to a fine not exceeding one hundred pounds or to imprisonment for a term not exceeding three months, or to both.

Interpretation.

4. In this Act -

the expression "affiliation order" means an order adjudging a man to be the putative father of a child;

the expression "alleged father" shall mean the defendant in an application for an affiliation order under the Affiliation Proceedings Act, 1957.

the expression "blood samples" shall mean blood taken for the purpose of blood tests;

the expression "blood tests" shall mean tests carried out under this Act, and shall include any test made with the object of ascertaining the inheritable characteristics of blood;

the expression "excluded" shall mean excluded subject to the occurrence of mutation.

Extent.

5. This Act shall not apply to Scotland or to Northern Ireland.

Short title and commencement.

6. This Act may be cited as the Affiliation Proceedings (Blood Tests) Act, 1961, and shall come into force on such day as the Secretary of State may appoint by order made by statutory instrument.

APPENDIX D.

THE USE OF BLOOD TESTS IN OTHER COUNTRIES.

1. From the comparative material which we have been able to examine at this stage it is clear that the value of blood tests in determining issues of paternity is recognised in many countries and that where courts have power to order blood tests valuable evidence often results from them.

Denmark(83)

2. The rule pater est quem nuptiae demonstrant(84) is applied in Danish law and can only be rebutted by absolute proof that the husband has not had intercourse with the wife or that his paternity is excluded for other reasons. As the husband often finds it extremely difficult to prove that he has not had intercourse with the wife his only chance is to show that his paternity is otherwise excluded, and he, as well as the mother who wants to prove that another man may well be the father of her child, will resort to blood tests. The part which evidence provided by blood tests plays can be traced from a number of cases which have established a set of rules which may be briefly summarised as follows:-

(a) In divorce and nullity proceedings if a wife admits having had intercourse with menother than her husband, the latter may rebut the presumption of legitimacy by showing that a blood test

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83. A member of the Law Commission staff recently visited Copenhagen, and had discussions with Dr.K. Henningsen, the expert serologist who runs the blood testing centre (see n.1 supra), Miss I.M. Petersen, an experienced judge in paternity proceedings and Mr. J.Gersing of the Ministry of Justice. We are particularly grateful for the valuable information which resulted from these discussions.

84. i.e. the father is prima facie the husband. This is the same rule as the English law's presumption of legitimacy.

excludes him as a possible father. If, however, the wife denies having had intercourse with other men the fact that blood tests exclude the husband as a possible father will not be conclusive evidence and the husband is still required to prove that the wife is lying.

(b) In the equivalent of our affiliation proceedings a putative father will be excluded even though he has had sexual intercourse with the woman at the time of conception, if blood tests exclude the possibility of his being the father. On the other hand, even though the mother admits having had intercourse with other men at the time of conception a man may he held to be the father of the child if the other putative fathers are excluded by blood tests or otherwise.

3. In dealing with the paternity of illegitimate children Danish law is fundamentally different from our own. The Danish illegitimate child has the right to take its father's name and also has rights of inh eritance from its father. Naturally these rights make it important that the paternity of an illegitimate child is established and there is a duty on every woman who gives birth to an illegitimate child to disclose the identity of its father. This obligation is inposed on the woman not only because it is felt that she should not have the right to deny her child its legal rights by refusing to reveal the identity of its father, but also because it is regarded as wrong that the taxpayer should be called upon to support the mother and child, through social benefit payments, if the father can be found and made to contribute. In England the illegitimate child has, as yet,(85) no rights of inheritance and there is no obligation on the mother to disclose the identity of the father. A

85. See para. 7 supra.

second fundamental difference between our own procedure and that of Denmark is that in the latter a man who acknowledges paternity of an illegitimate child may be registered as the father by a purely administrative procedure. The father then has a statutory duty to contribute towards the child's maintenance without the matter having gone through a court of law. If the mother either does not know who the father is, or will not reveal his identity, or the man she names denies being the father, it is then the duty of the court, acting in an inquisitorial capacity, to try to establish paternity. In approximately 60% of cases the father acknowledges paternity and this is registered by an entirely administrative procedure with none of the publicity or embarrassment to the mother of our affiliation proceedings. Those cases which cannot be dealt with by the administrative procedure go before the court, which conducts the judicial inquiry into the paternity of the child concerned. These court proceedings do not take the English form of a contest between the mother and putative father and, in fact, the parties are often unrepresented. With the help of blood tests and anthropological tests the courts have a high degree of success in finding the father in those cases which come before them and, coupled with the administrative procedure, the paternity of the great majority of illegitimate children is established.

4. In some 2,000 cases a year blood tests are ordered and this involves something in the order of 10,000 blood samples being tested. All these tests are handled by one centre in Copenhagen headed by an expert serologist with a relatively small staff.

Germany, France and Switzerland

5. The courts of these three countries accept the probative value of blood tests in excluding potential fathers and the finding of an expert serologist cannot be challenged on the grounds that the probative value of blood tests is doubtful.

> "....it is clearly accepted that blood tests give, in the negative sense, results which are proved and certain - provided that they are carried out by recognised experts (who have extensive experience) in laboratories which possess the necessary complex equipment." (86)

It appears that the presence in the child and putative father of the same rare blood factors is allowed as positive evidence identifying the man in question as the child's father(87) but such cases are still exceptional.

United States

6. The courts of the majority of American States have the power to order blood tests to prove paternity in any case where they are relevant. New York, for example, first provided in 1935(88) that blood tests could be taken from the child and any party to the action, subsequently extending the power to apply to the putative father as well. Generally although the courts can order blood tests they cannot physically compel the administration of such tests; however, California has recently enacted that the court may enforce its order "if the rights of others and the interests of justice so require".(89) In most States the evidence is admissible only when it establishes

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86. "De la filiation en droit allemand, suisse et français" par Georges Holleaux. Travaux et rechèrches de L'Institut de Droit Comparé de L'Université de Paris, 1966.
87. L.G. Köln 13.10.61. M.D.R. 1962, 309.
88. Ch. 196.
89. Statutes of 1965, Ch. 299, s.892.

definite exclusion and the case is decided accordingly; but in at least one State[90] evidence of the possibility of paternity is admitted at the court's discretion. The experts responsible for the tests are called as witnesses and may be subjected to cross-examination. The States have varying provisions in the event of a refusal to submit to the test. In California the court may resolve the issue against the party who refuses; in other States the refusal is merely a fact to be disclosed to the court.

7. We set out the relevant part of the Ohio Revised Code as an illustration of the application of blood tests in that State (S.3111.16):

> "Whenever it is relevant to the defence in a bastardy proceeding, the trial court, on motion of the defendant, shall order that the complainant, her child, and the defendant submit to one or more blood grouping tests to determine whether, by the use of such tests, the defendant can be determined not to be the father of the child. The tests shall be made by qualified physicians or other qualified persons not to exceed 3 selected by the Court, and under such restrictions and directions as the Court or judge deems proper. In cases where exclusion is established the results of the tests together with the finding of the expert of the fact of non-paternity shall be receivable in evidence. The blood tests experts shall be subject to cross examination by both parties after the court has caused them to disclose their findings. If either of the parties refuses to submit to the test, such facts shall be disclosed upon the trial unless good cause is shown to the contrary. In the event such tests have been made prior to the trial, the results shall be receivable in evidence. The court shall determine how and by whom the costs of such tests are to be paid."

90. New Hampshire: Revised Statutes Annotated s.522:4.