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William Edward Taay

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NOTES

BLOOD TESTS TO NEGATIVE PATERNITY

Advances in the various modern sciences have been made to such an extent that in a great number of court actions it is now possible to substitute scientific determination for former guesswork and opinion. One of the most recent scientific developments is the use of blood-grouping tests which offer considerable assistance in two principal types of legal proceedings: first, the determination of the blood group of a specimen of blood found at the scene of a crime, or upon the person or possessions of a suspect with a view toward a comparison being made with that of the victim or suspect as the case may be; second, the application of the tests in the frequent cases of disputed paternity whether it be in a civil action or criminal prosecution.

In recent years, the appellate courts of this country have taken a progressive attitude in passing upon the admissibility of many types of scientific evidence. Although only a few appellate courts have had before them the problem of the blood test to negative paternity, these decisions have been very favorable to its admission.¹

The recent case of *State v. Wright*² contains an important discussion of the problem. In this case, an expert, a research professor in genetics, whose qualifications were above question, testified that tests of the blood of the infant, the mother, and the alleged father showed conclusively that the accused could *not* have been the father of the child in question. The jury, however, found a verdict of guilty, but the trial court granted a motion for a new trial.

On appeal, the action of the trial court was sustained. The appellate court said: "We are of the opinion that if, as testified by the expert, this science of blood-grouping has been so developed and has proved so accurate, that it is not only admissible, but of very high value; the woman who has been promiscuous in her relations can no longer make her selection of the male to be charged and secure a verdict against him through the natural sympathy aroused in a jury.

"The blood-grouping is the finger-print of blood, although there is a pronounced difference in that identification is made by finger-prints, because no two persons in the world have finger markings so nearly alike that the difference cannot be detected, while in the blood test it is asserted that all living humans have blood that falls within twelve different groups. The purpose of the test is not to determine who may be the father, but who can *not* be the father, and is therefore to be excluded."

¹ *State v. Wright* (Ohio 1938) 17 N.E. (2d) 428; *Arais v. Kalensnikoff*, 10 Cal. (2d) 428, 74 P. (2d) 1043 (1937); *State v. Damm*, 64 S.D. 309, 266 N.W. 667 (1936). These three cases deal with the issue of paternity.

² *Supra* note 1.

The court in *State v. Damm*³ declared: "It is our considered opinion that the reliability of the blood test is definitely, and indeed unanimously, established as a matter of expert scientific opinion entertained by authorities in the field, and we think the time has undoubtedly arrived when the results of such tests, made by competent persons and properly offered in evidence, should be deemed admissible in a court of justice whenever paternity is in issue."

Relative to the test itself,⁴ scientific research has revealed the presence or absence of certain substances in the red blood cells of all human beings. These substances can be readily distinguished and are known as *A* and *B* and *M* and *N*.

Using substances *A* and *B* as the basis, all human blood falls into one of four blood groups: 1) Group *O* which lacks both substances *A* and *B*; 2) group *A* which contains the single substance *A*; 3) group *B* which contains the single substance *B*, and 4) group *AB* which contains both substances *A* and *B*.

Using substances *M* and *N* as the basis, all human blood falls into one of the three blood groups: 1) Group *M* which contains the single substance *M*; 2) group *N* which contains the single substance *N*, and 3) group *MN* which contains both substances *M* and *N*.

Thus, there are twelve possible combinations resulting from the various blood groups, namely:

O-M	O-N	O-MN
A-M	A-N	A-MN
B-M	B-N	B-MN
AB-M	AB-N	AB-MN

Individuals do not change in their blood-grouping classification, and the classification is not affected by disease, drugs, climate, occupation, living conditions or other physical circumstances or factors. Further, the biological laws (Mendelian principles) governing the inheritance of the above blood groups are so exact that it can be determined by the examination of both parents of what blood group their children will be, for the blood group of any individual depends entirely upon the blood groups of the parents.

If the blood group of the mother is known and also that of the child, the blood group of the father can be determined. If the child belongs to group *M*, both parents must belong to group *M*; and if the child belongs to group *N*, both parents must then belong to group *N*.

³ *Supra* note 1.

⁴ See Muehlberger and Inbau, *The Scientific and Legal Application of Blood Grouping Tests* (1936) 27 J. CRIM. L. & CRIMIN. 578; WIGMORE, EVIDENCE (1934 Supp.) §§ 165a, 165b; *State v. Wright*, *supra* note 1; *State v. Damm*, *supra* note 1.

If both parents belong to the same group, it is biologically impossible for the child to inherit any other blood group.

The case of *State v. Wright, supra*, shows how effectively the blood test under consideration may serve an accused person innocent of the charge against him. The mother belonged to group *M*, the child to group *M* and the alleged father to group *N*. Since the child inherited substance *M* from both parents, the father would have to belong to group *M* also. The defendant, however, belonged to group *N*, lacked substance *M*, and, therefore, could *not* be the father. Any off-spring of the mother and alleged father could only be *MN* children.

No case involving the blood-grouping test has reached the Wisconsin Supreme Court even though the Wisconsin legislature has enacted statutes upon the subject. The section pertaining to paternity cases reads as follows:

"Whenever it shall be relevant to the prosecution or the defense in an illegitimacy action, the trial court, by order, *may* direct that the complainant, her child and the defendant submit to one or more blood tests to determine whether or not the defendant can be *excluded* as being the father of the child. The result of the test shall be receivable in evidence but only in cases where *definite exclusion* is established. The tests shall be made by duly qualified physicians, or other duly qualified persons, not to exceed three, to be appointed by the court and to be paid by the county. Such experts shall be subject to cross-examination by both parties after the court has caused them to disclose their findings to the court or to the court and jury. Whenever the court orders such blood tests to be taken and one of the parties shall refuse to submit to such test, such fact shall be disclosed upon the trial unless good cause is shown to the contrary."⁵

The section pertaining to regular civil proceedings is similarly worded:

"Whenever it shall be relevant in a *civil* action to determine the parentage or identity of any child, person or corpse, the court, by order, *may* direct any party to the action and the person involved in the controversy to submit to one or more blood tests, to be made by duly qualified physicians or other duly qualified persons, under such restrictions and directions as the court or judge shall deem proper. Whenever such test is ordered and made the results thereof shall be receivable in evidence, but only in cases where *definite exclusion* is established. The order for such blood tests may direct that the testimony of such experts and of the persons so examined may be taken

⁵ Ch. 351, Laws of Wis. (1935) (Approved Aug. 9, 1935); WIS. STAT. (1937) § 166.105. Italics supplied.

by deposition. The court shall determine how and by whom the costs of such examination shall be paid.”⁶

Under the first Wisconsin statute, *supra*, a court may indirectly enforce its order against a party in a paternity case by permitting the fact of refusal to submit to a blood-grouping test to be introduced in evidence, but the statute is silent as to the procedure to be followed. May the courts in such instances avail themselves of their contempt power and treat the person who refused to submit to such test as a recalcitrant witness? Since the legislature attempted to relieve the courts of difficulties likely to be encountered in blood-grouping cases, it should have been specifically stated in the statutes that a court may enforce its order in accordance with its usual contempt power.

Concerning the expert qualifications defined in the statutes, the provisions should have been more explicit by inserting in place of “duly qualified” the phrase “qualified by training and experience in the making of blood group classifications.”

The above statutes, however, do contain some outstanding features. First, there is the important provision that the results of the tests are admissible in evidence only when definite *exclusion* is established. Second, there is the provision for the appointment by the court of experts to conduct the blood-grouping tests, and providing for their payment by the county for their services *to the court*. As to the last provision, the fact should never be lost sight of that the most scientific and accurate tests count for very little if the results can be misinterpreted or distorted by incompetent or unscrupulous “experts.” Under a system or procedure where the skilled witness acts as an agent of the court there is less likely to be a perversion of justice in the name of science.⁷

In view of the importance of blood-group comparisons in certain types of criminal cases, it is submitted that the Wisconsin statutes upon the subject should be made broader in scope to cover all cases, civil and criminal⁸ in which the results of the tests would be of value.

⁶ Ch. 351, Laws of Wis. (1935) (Approved Aug. 9, 1935); WIS. STAT. (1937) § 325.23. Italics supplied.

⁷ For discussion of blood test legislation see Muehlberger and Inbau, *supra* note 4, whose suggestions were incorporated in this note for Wisconsin readers.

⁸ Proposed statute: Blood Tests in Criminal Cases.

Whenever it shall be relevant to the prosecution or the defense in a criminal action, the trial court, on motion of the prosecution or the defense, shall order both the defendant and the prosecuting witness or either of them to submit to one or more blood tests to be made by physician or other persons duly qualified by training and experience in the making of blood tests and blood group classification under such restrictions as the court or judge shall deem proper. Such experts, not to exceed three, shall be appointed by the court and paid by the county. Whenever the court orders such blood tests to be taken and any party shall refuse to submit to such test, such fact shall

While there would be the possibility that any such statute directed at a defendant in a criminal case may be subjected to attack on the ground of its constitutionality, it should be noted that the tendency of the modern courts is to receive all kinds of real evidence or proof of physical facts which speak for themselves as fingerprints, the urinalysis test,⁹ and the blood test. The general trend appears to be that scientific tests, once accepted by the courts, do *not* violate the constitutional privilege against self-crimination, namely, *testimonial compulsion*.¹⁰

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be disclosed upon the trial unless good cause is shown to the contrary, and the court may enforce its order in accordance with its usual contempt power. Whenever such test is ordered and made to determine the parentage of any child, the trial court shall also order a blood test of the child, but the results of such test shall be admissible in evidence only in cases where definite exclusion of the defendant is established. Whenever such blood test is ordered and made for purposes of establishing identity, the results thereof shall be admissible in evidence in the sound discretion of the trial court. The experts shall be subject to cross-examination by the prosecution and the defense.

⁹ See 22 MARQ. L. REV. 105 (1938).

¹⁰ *Ibid.* For an excellent discussion and citation of numerous authorities relative to the use of the blood test to determine intoxication see Ladd and Gibson, *The Medico-Legal Aspects of the Blood Test to Determine Intoxication*, 24 IOWA L. REV. 191 (1939).