PROOF OF PATERNITY : THE HISTORY

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Proof of Paternity : The History

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ABSTRACT

This thesis traces the history of the various methods that have been used to try to prove paternity in England – from earliest times up to the implementation of the Family Law Reform Act 1987. This Act enabled courts to direct tests using DNA Fingerprinting on bodily samples in cases of disputed paternity and therefore to settle these cases using this new and accurate method – obviating the need for using other less accurate methods.

Before the discovery of DNA Fingerprinting in 1984 there was no way to prove without doubt that a putative father was or was not the biological father of the disputed child. A number of other methods were used, but none were entirely satisfactory.

This thesis first looks at the reasons why these cases needed to be resolved and shows why illegitimacy was to be avoided if at all possible. Then it shows how, in early times, fictional presumptions were used so that, in the absence of scientific methods, there could be some certainty in deciding these cases. It also charts the history of various quasi-medical methods which were used to help solve these problems – some more usefully than others. In addition it shows how artificial insemination by donor could, and did, complicate some cases – particularly when this took place in secret.

This thesis focuses mainly on the 20th century because at the beginning of this century it was discovered that blood groups were inherited and that therefore they could play some part in resolving disputed paternity cases. The thesis describes the struggle that took place before the courts would accept blood group evidence and the difficulties experienced before at last (at the third attempt) legislation was enacted in 1969. This Act (and the regulations made under it) set out a framework for the taking of blood, the testing of samples, its use by the courts and the inferences that could be drawn if parties refused to take blood tests.

The effect of, on the one hand, prejudice against all things new and/or scientific and, on the other hand, the search for truth, using all available methods, is shown by the use of articles in journals or the press and also by remarks made in court by members of the judiciary. The effect of the gradual change in attitude of the public and of religious leaders towards the rights of children – and in particular the right of the child to know both its parents, is also noted.
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Introduction

‘It is a wise father that knows his own child…
Truth will come to light; murder cannot be hid long;
a man’s son may, but, in the end, truth will out.’

Today more people than ever before want to know about their ancestry. This desire has been fuelled by television programmes such as ‘Who do you think you are?’ and ‘Long Lost Family’. Websites have mushroomed to help the process. Computer programmes are available to help us to construct our own family trees. And family history societies flourish. If we are adopted, or conceived with the help of Artificial Insemination by Donor (AID), we can now find out who our biological parents are; where they lived; perhaps even meet them; and learn whether or not they suffered from any inheritable diseases. Many people now think they and their children have a right to know the truth about their ancestors – whatever surprises they might discover. Some even refer to the European Convention on Human Rights. For some people, knowledge of their ancestry gives them a sense of belonging, of having ‘roots’, and of the ‘dignity’ that they feel is necessary for their well-being. They want to be able to pass this information on to their children – even if they do not possess vast estates or titles for them to inherit.

There has always been a need for this information – not just for social reasons and to satisfy mild curiosity, but to settle arguments about such things as inheritance, property and/or custody or maintenance of children. If blood or other bodily samples can be obtained, this information can now be found. However, it has not always been possible to provide that definite proof of paternity. Indeed in very early times it was not surprising that it was said ‘God alone knew in these cases by whom the women conceived.’

This thesis traces the history of the various methods used to try to prove paternity in England from earliest times up to the implementation of The Family Law Reform Act

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1 Shakespeare, Merchant of Venice Act II Sc. II
3 ECHR Article 8
4 YB 1 Hen 113
1987. This Act contained provisions enabling Deoxyribonucleic Acid (DNA) Tests (also known as DNA Fingerprinting, DNA Profiling, or Genetic Testing) to be directed by the courts. There is now no room for doubt when testing for paternity by this method – provided always that the tests are carried out in the approved way.

Until the discovery of DNA Fingerprinting in 1984\(^5\), except for a very small handful of cases where very rare blood groups were involved\(^6\), it was only possible, by the use of blood tests, to prove paternity on a percentage probability basis – this did not usually give sufficient proof to convince the courts.

Before the discovery at the beginning of the 20\(^{th}\) century that blood tests could assist with the process of proving paternity\(^7\), it was even more difficult. When using blood tests, it was often possible – unless all the blood groups concerned were very common – to eliminate putative fathers who rightly denied paternity. However, because there has always been a need for certainty, a number of presumptions were used in order to achieve this\(^8\) even if the results were not entirely accurate and at times it seemed that truth was sacrificed on the altar of certainty.

In addition, quasi-medical methods to ‘prove’ or ‘disprove’ paternity were also used. Defences of sterility, impotence, an unusually long period of gestation, and the use of contraception were sometimes advanced, or anthropological evidence was produced to prove a resemblance. The use of all these types of evidence by the courts will also be examined\(^9\). With none of these methods on their own could you say with absolute certainty that this man was the father of this child but by the use of several of these types of evidence together there was a much greater chance of proving (or disproving) paternity. Therefore, many of these methods still continued to be used during the 20\(^{th}\) century to help build the case for or against paternity and to supplement the use of blood test evidence.

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\(^5\) See Chapter 5  
\(^6\) *Mills v Attorney-General* (1963) Medical Legal Journal Vol. 31, 151  
\(^7\) See Chapter 3  
\(^8\) See Chapter 1  
\(^9\) See Chapter 2
Although blood tests were discovered at the beginning of the 20th century, it was not until 1969 that legislation was passed enabling directions to be made for blood tests to be carried out and setting guidelines for the administration of this useful method. This thesis tells the story of the history of blood tests from their discovery in 1901; the struggle to get this evidence accepted by the courts – and the reasons why this was so; and with the development of their accuracy.

It is clear that social and religious attitudes, doubts about the reliability of the evidence, arguments as to whether compulsion could be used or whether the liberty of the subject would be compromised, often just resistance to change – all played some part in slowing down the acceptance of blood test and/or other scientific/medical evidence by the courts. This will be examined with reference to remarks made in then current journals, relevant cases and debates in the legislature. Some of these attitudes will be discussed as will also the inevitable advance of scientific knowledge and the search for truth.

Lastly, changing attitudes towards children and towards marriage and illegitimacy will be taken into account. Over the last few decades there has been a substantial increase in cohabitation and a decrease in marriage. For a variety of reasons people do not feel the need to get married – whether they have children or not. There is today hardly any stigma attached to illegitimacy – in fact the very word has been abolished.

In earlier times no account was taken of children’s feelings or wishes and they were regarded as the property of their fathers. Currently children have rights, and decisions about their future should be made which are in their best interests and take into account their welfare. Today we have different attitudes as to how much we should tell our children about their origins – and most people believe it is important that they should know the truth. In addition, both parents are now regarded as important to their children – whether married or not.

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10 Family Law Reform Act 1969 (Part III)
12 Family Law Reform Act 1987
Many of these changes (scientific means of proof, differing attitudes towards illegitimacy, and recognition of children’s rights, welfare and best interests) were recognised by legislation in the 1970s and 80s.\(^{13}\) This thesis shows these changing attitudes and the way the law has therefore also had to change.

There have been a very small number of cases where maternity has been disputed\(^ {14}\), but almost all the arguments, articles and cases have been in respect of disputed paternity. Significant discoveries have been made in the last 30 years in the exciting field of assisted reproduction (AR) and, because of the increase in the numbers of children born as a result of these methods there might well be more cases of disputed maternity in the future – as well as some extra problems when proving paternity. However, most of these discoveries (or at least their development) took place after the discovery of DNA Fingerprinting and so do not come within the scope of this thesis. The only related advance in this field which does impact on this thesis is conception by artificial insemination. This has been in use for many years (and still is). A section on its history\(^ {15}\) is included because until recently children born with the use of AID were illegitimate and so the use of AID was kept secret and could confuse results of blood/DNA tests when seeking evidence of paternity.

Although there are from time to time criminal cases of contested paternity – for example in cases of incest – this thesis is concerned only with cases of proof of paternity in civil proceedings. There have been articles and books\(^ {16}\) written about the history of forensic science in general but I am not aware that the history of proof of paternity has until now been examined in any great detail.

The first section of Chapter I charts the situation of parents and their illegitimate children and it illustrates graphically the reasons why it was useful to be able to prove paternity. The second and third sections detail the history of two presumptions that were ‘invented’ so that paternity could be established with certainty.


\(^{14}\) *Slingsby v A-G* [1916] TLR 120

\(^{15}\) Chapter 5

Chapter 2 gives the history of four ways of helping to prove paternity by quasi-medical means. Until the discovery of the use of blood test evidence, these were the main means of proof (apart from factual evidence, for example, of opportunity) other than the presumptions already mentioned. Even after blood tests were in use, this quasi-medical evidence was used to back up blood test evidence.

Chapter 3 charts the history of the discovery and development of blood test evidence, the opposition to its use, the attempts at legislation in 1939 and 1961 and the long struggle for appropriate legislation to enable courts to give directions for the use of these tests.


Chapter 5 tells the story of some of the relevant discoveries and changes made in the 1980s and of the impact made by the use of artificial insemination. It also tells of the very early days in the history of DNA Testing and the changes made to the legislation – and in particular to The Family Law Reform Act 1987 – to enable this procedure to be fully accepted by the courts.
Chapter 1

a) The Burden of Illegitimacy

‘Whereas the old poor law had for centuries stressed the importance of paternal responsibility, Malthus provided the Commissioners with a theoretical and providential justification for shifting the entire burden of responsibility of illegitimacy on to the mother.’

This first section explains what it meant to be illegitimate in earlier times and tells the history of how this changed over the years and how important it was to be able to prove that your children were legitimate.

The father of a child born to a married couple could be presumed to care for the child – financially as well as emotionally. That child automatically had status in society, was recognised as legitimate by the law and the church, and could look forward to inheriting property and/or finance from his father. However, when a child was born to an unmarried mother, there was no such presumption of paternity (let alone legitimacy). Unless this could be proved, the mother and child had no means of support and had to be supported by the parish/ Poor Law/Welfare State. So there was a good financial reason for finding out who the father was so he could be made to pay for the child’s upkeep and education.

In very early days the illegitimate child was known as a filius nullius and suffered considerable legal disadvantages. At Common Law he had no rights of succession – even if paternity was proved he had no rights of inheritance to his father’s estate unless specifically named in the will. If he died intestate, his personal property passed to the Crown. The Church very strongly disapproved of parents whose behaviour had resulted in an illegitimate child and punished both them and also their child who was not allowed to hold office in the Church.

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At first the unmarried mother had custody of and was liable to maintain her illegitimate child, not the father. So the two main reasons for discovering the paternity of illegitimate children were:

a) So that the church could punish sexual incontinence and

b) So that the father (who could be presumed to have some income) could maintain the child and prevent it becoming a charge on the parish.

There are many instances recorded in the church court records of punishment for fornication. Punishment was exacted even though couples subsequently married, if it was proved that their child had been conceived before the marriage. This attitude was also exported to the colonies. In Chester Court, Pennsylvania in 1693 Eleanor and John Clowes were fined 50/- for fornication; Eleanor (only) had to stand at the common whipping post with a paper on her breast which read: 'I here stand for an example to all others for committing the most wicked and notorious sin of fornication.'

Interestingly, in that court in 1689, a case of the alleged fornication of Mary Turberfield with John Eldridge was adjourned so that a jury of 12 women was impanelled so they could inspect Mary. They made return that 'they cannot fine shee is with child neither be they sure shee is not'. See also ‘On pleading the belly.’

Peter Laslett records that at Manchester in 1704 the Justices ordered that Thomas Byrom, gentleman, should maintain a bastard he had begotten on a widow - he was also whipped in Manchester market place.

Those Justices were acting under a 1576 Statute which sought to avoid expense of maintaining bastards from the parish funds as such parents were:

'defrauding of the relief of the impotent and aged true poor of the same parish ... [So the justices shall] take order for the keeping of every such bastard child, by charging such mother or reputed father with payment of money weekly or other substentation for the relief of such child and such ways as they think

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19 James C Oldham, ‘On Pleading the Belly’ Criminal Justice History, 6 (1985) 1-64
20 Peter Laslett, The World We Have Lost (1971) Cam. Univ. Press 140-1
21 18 Eliz c.3 s.1
covenant. And if ... the reputed mother and father shall not observe and perform the order, then the party making the default in not performing the order, be committed to the common gaule.'

This sounds very like the reasons advanced for the Child Support Act!

Interestingly, Katharine Carlton and Tim Thornton found that during the same period, illegitimate children born to the gentry were treated much more kindly and often incorporated into their fathers’ families. They comment:

‘Contemporaries do not seem to have objected to the apparent dichotomy between such men (magistrates) punishing people for raising bastard children (admittedly offenders who would be chargeable to the parish ratepayers) and their own conduct in fathering illegitimate offspring (who would be provided for by private settlement).’

There was one period in our history when legislation took responsibility away from the fathers of illegitimate children. The quotation at the beginning of this chapter is from Thomas Nutt’s detailed description of the principles and background that led up to the Poor Law Amendment Act 1834 and to changes made by that Act which made the mother solely responsible for both the care and financial responsibility for her illegitimate child. The Poor Law Commissioners had stated that Providence had ordained that a bastard child should be a burden on its mother, and where she could not maintain it, on her parents. They therefore believed that punishment of the putative father was useless. They thought that the number of affiliation cases would diminish and along with it their perceived incentive to unmarried women to become pregnant as a means of securing a husband or an income. Ten years later, it was obvious that this was not working. Fathers were being allowed to walk away from their responsibilities and there was no reduction in the number of illegitimate children being born. So there was a complete reversal of policy. The Poor Law Amendment Act 1844 took bastardy proceedings out of the hands of the poor law authorities, turned them into a civil matter between the two parents and included the necessity for the mother to provide corroboration to back up her allegation of paternity. The Poor Law Amendment Act 1868 then foreshadowed 20th century legislation by restoring to the parish the power to recover the cost of maintenance from the putative father if the mother became a charge on the parish. Various Bastardy Acts in the 19th and early

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23 Op cit – note 17
20th century continued to legislate for this power which was then passed on to local authorities by the National Assistance Act – and eventually replaced by the Affiliation Proceedings Act 1957 and finally to the Child Support Act 1991.

So, with the exception of that 19th century decade it has always been necessary to prove paternity so that fathers could be persuaded to pay for the upkeep of their children and so that some of the costs of the benefits given to the mother and child might be recovered from the father. If the relevant authority was successful in obtaining an order against the putative father, this order could be transferred to the mother if, subsequently, she ceased to be in receipt of state benefits.

One way in which an illegitimate child could escape some of the disadvantages was if he could be declared legitimate. Legitimation by subsequent marriage had been around for many centuries – it was possible in Roman Law and then this procedure was inherited by countries which operated under civil law. However, it was not possible in this country until 1926. The Legitimacy Act 1926 assured legitimation for children whose unmarried parents subsequently married – and this accounted for a large number of children. However, this escape could not be made if adultery was involved – that is to say, if at the time of birth one parent was married to a third person and therefore committing adultery. Stephen Cretney24 describes the heated debates in the House of Lords when an attempt was made to include those children (‘adulterine bastards’) in the Act. There was very powerful opposition to the idea and some thought it would undermine the sanctity of marriage. The Archbishop of Canterbury said it would ‘gravely imperil the happiness and security of domestic life’.

These children were not able to be legitimated until the 1959 Legitimacy Act. Even after that length of time, although opinions had changed, there was still considerable opposition to the idea and there was a long debate. Many still thought that it would lead to a blurring of moral values, and the Bishop of Exeter (in the House of Lords debate on the Bill) said it would undermine the Christian idea of marriage.

24Stephen Cretney – Family Law in the 20th Century 551 et seq
Once legitimated it was possible to apply for re-registration of the birth and obtain a ‘normal’ new birth certificate. The man’s name on the birth certificate is prima facie evidence that he is the father.\(^{25}\)

Although the same methods of proving paternity (discussed in detail later) were available to children of unmarried parents as they were to married parents, unmarried mothers had extra burdens. There was no presumption of legitimacy\(^{26}\) to help establish paternity and in order to prove this and achieve an award of maintenance under the Affiliation Proceedings Act 1957 (successor to several similar Bastardy Acts), they had to prove they were ‘single women’ and their evidence had to be corroborated in some material particular by other evidence to the court’s satisfaction (s 4(2)) – this did not apply to proceedings instituted by authorities. Blood tests (vide Chapter 3) could provide this corroboration but it is clear that all sorts of other evidence could also be used. The following definition (from R v Baskerville\(^{27}\)) was approved in Thomas v. Jones\(^{28}\) as being applicable to bastardy proceedings:

> ‘It must be evidence which implicated (the prisoner) that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it ….. corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed by the accused.’

> ‘It must be evidence implicating the man which makes it more probable than not that the respondent to the summons is the father of the child.’

So, the fact that there had to be corroboration meant that although cases had only to be proved on the balance of probability – in contrast to cases involving the presumption of legitimacy (vide section (b)) which had to be proved by criminal standards, i.e. beyond reasonable doubt – nevertheless, because this extra evidence was necessary, it could be said that the standard of proof required to establish paternity needed to be higher than in other civil cases. This extra requirement was not removed until the Family Law Reform Act 1987.\(^{29}\)

\(^{25}\) Brierley v. Brierley [1918] P 257

\(^{26}\) See Chapter 1(b)

\(^{27}\) (1861) 2 KB 658

\(^{28}\) (1921) 1 KB 22 2

\(^{29}\) See Chapter 5 for a more detailed account
In 1918 the National Council for the Unmarried Mother and her Child was founded. They, and subsequently other similar organisations, fought hard to improve the position of the unmarried mother and her children. Eventually, in 1969, the DHSS (Department of Health & Social Security) set up a committee ‘to consider, report upon and make recommendations in respect of the financial and social hardships suffered by families actually dependent on a single parent’. Morris Finer chaired this committee which reported in 1974 and recommended the introduction of a Guaranteed Maintenance Allowance. The report was reviewed by Laurence Polak\(^30\) who welcomed this and hoped the Law Commission would take it further. However, the Solicitors Journal\(^31\) was not so enamoured and said:

‘It is surely not right to encourage irresponsibility. Those who bring children into the world should not have in mind the thought that it does not really matter if the marriage does not work as the state will look after the wife and children if the husband decides to move on.’

Jennifer Levin in her article on ‘Reforming the Illegitimacy Laws’\(^32\) made several suggestions relevant to proving paternity. She put forward the idea that there should be a number of presumptions of paternity –

- Where a man is named as father in the birth certificate (provided there is cogent evidence of paternity);
- Where a man makes a written statement acknowledging paternity;
- Where the mother was living together in the same household with the man throughout the time of possible conception; and
- Where the mother was married to the father – and not separated – at the time of conception (instead of the presumption of legitimacy)

In 1979 the Law Commission disseminated Working Paper No. 74 on Illegitimacy. They said in their introduction that they had noted the considerable volume of material published during ‘the last decade or so and Parliamentary concern about this issue’. They noted a study by the Board for Social Responsibility of the National Assembly of the Church of England (1966); a report of a 1968 conference of the National Council for the Unmarried Mother and Her Child (The Human Rights of Those Born out of Wedlock); two publications of the National Council for One Parent Families (‘Improving the lot of children born outside marriage’ and ‘Abolishing Illegitimacy’); and Jennifer Levin’s article (supra). They also

\(^{32}\) Jennifer Levin, ‘Reforming the Illegitimacy Laws’ Family Law (1978) 35
mentioned that the UK had signed, but not yet ratified, the Council of Europe Convention on the Legal Status of Children Born out of Wedlock. Acceptance of the Law Commission’s proposals would enable the UK to ratify this Convention.

The Law Commission clearly thought there was a need for change and put forward a proposal to abolish the status of illegitimacy, giving equal parental rights and duties for both parents; full succession and intestacy rights; the abolition of affiliation proceedings; and also a procedure for obtaining a declaration of parentage. Ruth Deech reviewed the proposals and noted that most of the proposals seemed to be directed towards improving the lot of the natural father. She was also concerned about rapist or incestuous fathers being given rights and drew attention to a different scheme in force in New Zealand.

There was then considerable discussion about whether to change the name ‘illegitimate’ to ‘non-marital’ and the Law Commission were about to implement this. However, the Scottish Law Commission, who had been working away at the same subject, said that if the name was changed it would be all right for a short time but then the stigma would return and you would be back to where you started. Our Law Commission took this on board and decided instead to recommend that although the concept of illegitimacy should remain, children should not be called illegitimate and where reference is made to their parents it should just state whether they were married or not. Parliament followed their recommendations in the Family Law Reform Act 1987 in spite of the fact that there were difficulties (in wording) with people who were rendered legitimate by s.1 of the Legitimacy Act 1976 (children of a void marriage); people legitimised by their parents’ marriage; people who had been adopted; and people who otherwise were treated in law as legitimate. Stephen Cretney noted:

‘Illegitimacy as a legal concept may not have been formally abolished, but the fact that a child’s parents are unmarried no longer stamps the child as legally fundamentally different from the child whose parents were in truth married at the time of his birth.’

34 Family Law in the 20th Century 565
In addition to abolishing the illegitimate status of children and decreeing that in future this name should only be applied to the parents of these children, the Act also, in addition to sections making it easier to prove paternity, established a new procedure for procuring a Declaration of Parentage which increasingly gave more status to these children.

The next two sections describe two presumptions that were used by the courts to establish with certainty the legitimacy of the children in issue. Without the advantage of our current scientific methods of proof of paternity, it was necessary to rely on these presumptions.
b) The Presumption of Legitimacy

'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.'

Over the years, the presumption of legitimacy (defined in the above quotation) has played a very large part in resolving cases where paternity has been contested. It was particularly useful in early times when certainty was required as at that time there were no scientific means of proving paternity. It was needed so that, for example, matters of inheritance or property could be settled. Later, when better means of solving these problems were discovered, its relevance was questioned. This section charts the history of the presumption and show how its strength and the means by which it could (or could not) be rebutted has varied.

At its simplest, the presumption was that a child born within lawful marriage was legitimate - *Pater est quam nuptiae demonstrant*. It was important that the law should be certain, and as Sir Edward Coke said in the seventeenth century:

'It is better, saith the Law, to suffer a mischief to one than an inconvenience that may prejudice many.'

A different view (with the same result but with Victorian values) was expressed in the nineteenth century by Sir Harris Nicolas:

'No man with the slightest powers of reflection can fail to perceive that the Law which presumes that the husband is the father of a child born of his wife tends to promote public morals and female chastity.'

The presumption is of very ancient origin. Writing in the 13th century, Henry de Bracton says (with perhaps more thought for the truth):

'He is presumed to be one's son by the very fact that he is born of one's wife, for marriage proves filiation and this presumption will stand until the contrary is proved ..... truth and real proof defeats the presumption ..... the truth itself demonstrates the contrary.'

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35 *Banbury Peerage Case (1811)* 1 Sim. & St. 153, per Leach VC 152
36 Sir Edward Coke (1 Coke 97b)
38 Henry de Bracton: *De legibus et consuetudinibus Angliae* - Thorne’s translation .34 & 204
Bracton gives several possible ways of rebutting the presumption and finding the truth – age, absence (for two years), sterility, impotence and illness. However, although it was difficult then to defeat this presumption, it became much more difficult in the next few centuries. Attitudes seemed to harden, so that even if the couple had not lived together or seen each other for years, as long as they both lived in the same country, the child was declared legitimate. In 1406 Judge Rickhill said: 39

“If John de C., the husband, was with the sea, the issue was mulier, and heir because he was issue male, for ‘who bulled my cow, the calf is mine.’”

And Sir Edward Coke: 40

‘By the Common Law if the husband be within the four seas, that is, within the jurisdiction of the King of England, if the wife hath issue, no proof is to be admitted to prove the child a bastard ... unless the husband hath an apparent impossibility of procreation ...’

Shakespeare clearly knew all about this rule and refers to it in King John 41,

'Sirrah, your brother is legitimate;
Your father's wife did after wedlock bear him,
And if she did play false, the fault was hers;
Which fault lies on the hazards of all husbands
That marry wives. Tell me, how if my brother,
Who, as you say, took pains to get this son
Had of your father claim'd this son for his?
In sooth, good friend, your father might have kept
This calf bred from his cow from all the world;
In sooth he might: then, if he were my brother's,
My brother might not claim him; nor your father,
Being none of his, refuse him: this concludes;
My mother's son did get your father's heir;
Your father's heir must have your father's land.’

It became so difficult to establish the illegitimacy of adulterous children, even though the parties to the marriage were not living together, and had not done so for some considerable time, that during the reign of Henry VIII the practice of bastardising known adulterous children by Act of Parliament was introduced – following royal

39 (1406) YB 7 Hen IV
40 1 Coke 224
41 Shakespeare, Act I, Sc. I (King John to Falconbridge):
example? There were Bills to bastardise the children of Lady Parr, Lady Burgh, Lady Roos and Lady Macclesfield among others. Lady Parr's states:

'That for the last two years she had eloped from her husband, William Lord Parr and had not in that time ever returned to, nor had any carnal intercourse with him, but had been gotten with child by one of her adulterers, and been delivered of such child, which child being, as is notoriously known, begotten in adultery, and born during the espousals between her and Lord Parr by the law of this realm is inheritable and may pretend to inherit all.'

However, this remedy was, of course, only available to the rich.

Some controversy was caused by Foxcroft's Case in which a woman was married secretly to an infirm bedridden man and had a son 12 weeks afterwards. It was decided the child was a bastard, and this case is therefore thought to prove that the rule was more flexible - that proof other than that of divorce, impotence and absence beyond the four seas could be sufficient to rebut the presumption. However, Sir Harris Nicolas suggests that although the court in Foxcroft's Case said:

'The principle to be deduced from the case is that if the husband could not by possibility be the father, that is sufficient to repel the legal presumption of the child's legitimacy.'

these remarks were obiter as the case was in fact decided on the grounds that the marriage was secret and the children were bastardised on that ground.

The strict rule was later relaxed slightly and it was not necessary to be beyond the four seas as long as continuous absence in another part of the country was proved. So in the case of St. Andrews and St. Brides, where the wife married for the second time, presuming her first husband to be dead, and had several children by her second husband - when the first husband turned up after 17 years absence it was held that the children were children of the second 'husband' and therefore should be provided for by his parish. Also in Pendrell v. Pendrell, where the parties to the marriage lived

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42 (1542) YB 34 Hen VIII
43 (1542) YB 34 Hen VIII
44 (1666) YB 18 Car 11
45 (1698) YB 10 Wm & Mar
46 Foxcroft’s Case (1282) 1 Roll. Abr. 359
47 Op cit note 37
48 (1717) YB 3 Geo. 1
49 Pendrell v Pendrell (1732) YB 5 Geo. 11
in London and Stafford, the Judge directed that the old maxim that the presumption could not be rebutted unless the husband was *extra quattuor maria* had been exploded.

However, it was still necessary to prove impossibility of access. So in Smyth v Chamberlayne 50 and Routledge v Carruthers 51 adulterous children were declared legitimate as there could have been access. Lord Craig said (in Routledge v Carruthers):

>'However great may have been the guilt of the mother, however uncertain it may be who was the real father, still at the time the child was begotten the parents were married, and there was no defect stated, no physical impossibility from distance or otherwise, of the husband being the father.'

In R v Luffe 52, although a child was bastardised because the husband had access only a fortnight before the birth, the principle (of impossibility of access) was still the same and Grose J said:

>'In every case we will take care, before we bastardise the issue of a married woman, that it shall be proved that there was no access as could enable the husband to be father of the child.'

*The Banbury Peerage Case*53, relaxed the rule still further when the House of Lords stated that the presumption of legitimacy can be rebutted either by proof of the fact that intercourse did not take place between husband and wife at the relevant time or that the husband was impotent. There have been some doubts as to the correctness of that decision, both because in the 21:13 vote in the House of Lords, all the lawyers were in the minority, and of the majority quite a large number had not heard any of the speeches at all. In addition, because (Sir Harris Nicolas argued) the legitimacy of the person in question should have been decided according to the law in the 17th and not the 19th century as the case had been disputed for two centuries. Nevertheless, whatever the doubts, the Chief Justice usefully stated the law as he saw it:

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50 Smythe v Chamberlayne (1792) mentioned by Harris Nicolas 154 op cit
51 Routledge v Carruthers (1806) mentioned by Harris Nicolas 157 op cit
52 R v Luffe [1807] 8 East p 193
53 Banbury Peerage Case (1811) 1 Sim & St 153 HL
'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. ... The physical fact of impotency, or of non-access, or of non-generating access, as the case may be, may always be lawfully proved by means of such legal evidence as is strictly admissible in every other case .... such proof must be regulated by the same principles as are applicable to the establishment of any other fact.'

This statement paved the way for the introduction of scientific evidence in the next century. The concept was further enlarged by the decision of Morris v Davies\textsuperscript{54}, in which it was said that in order to rebut the presumption that intercourse took place, evidence may be given not only of circumstances existing at the time of the conception and birth but also of relevant facts both preceding and following these. In that case it was said that the fact that a wife had concealed her pregnancy from her husband and his relatives or the family doctor, could indicate not only that she did not believe that the child is her husband's but that she knew that he would inevitably draw the same conclusion.

So also, over a century later, in Preston-Jones v Preston-Jones\textsuperscript{55} where the pregnancy would have had to have lasted 360 days, it became clear that the standard of proof was still beyond reasonable doubt where married couples were concerned. Lord Simmonds said:

‘A question was raised as to the standard of proof. The result of a finding of adultery in such a case as this is in effect to bastardise the child. That is a matter in which from time out of mind strict proof has been required. But that does not mean that a degree of proof is demanded such as in a scientific inquiry would justify the conclusion that such an event is impossible. In this context at least no higher proof of a fact is demanded than that it is established beyond all reasonable doubt.’

This possibility of there being ‘degrees’ of proof was also mentioned by Lord Denning in Bater v Bater\textsuperscript{56} in the same year when he said:

‘In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard .... So also in civil cases, the case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter.’

\textsuperscript{54} Morris v Davies (1837) 5 Cl & F 163
\textsuperscript{55} Preston-Jones v Preston-Jones (1951) AC 391
\textsuperscript{56} Bater v Bater (1951) P 35
An example of how far the courts were prepared to go to avoid bastardising a child is the case of *Knowles v Knowles*\(^{57}\) where the husband had left home in August 1953 and obtained a decree nisi in May 1957 which was made absolute on 5 July 1957. A child was born on 19 April 1958. Even though it seemed highly unlikely that they would have had intercourse between the decree nisi and the decree absolute, the child was declared legitimate.

Later, Lord Denning declared in *Blyth v Blyth*\(^{58}\) that matrimonial cases should not be regarded as analogous to criminal proceedings. In *Re L*\(^{59}\) he then tried to extend this to the presumption of legitimacy, but his fellow Judges were not in agreement with him. He said:

> ‘The burden is not so heavy nowadays. In divorce cases the presumption can be rebutted by showing on the preponderance of probabilities that the husband could not be the father (*Blyth v Blyth*). Logically the position should be the same in legitimacy proceedings or in any proceedings where paternity is in issue. It would be absurd to have a different result in a divorce case from other cases, so that a child could be found legitimate in one and illegitimate in another.’

Although the Law Commission in its report ‘Blood Tests and the Proof of Paternity in Civil Proceedings’ 1968, did not agree with Lord Denning’s interpretation of the legal authorities, there was no doubt that they were in agreement with his general principles:

> ‘In our view there is no doubt that it (*Blyth v Blyth*) cannot be regarded as authority for Lord Denning’s proposition in *Re L*.’\(^{60}\)

They recommended at para 31 ‘that the presumption of legitimacy be made rebuttable by proof on a balance of probabilities’. Their grounds for recommending this were – ‘We suggest that in most cases it is in a child’s best interest to know, if possible, the true position as to its paternity’ para 14. And ‘We suggest that today it is more important for the court to arrive at a right decision than for a child to be declared legitimate at all costs’.

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\(^{57}\) *Knowles v Knowles* [1962] 1 All ER 659

\(^{58}\) *Blyth v Blyth* [1966] AC 643

\(^{59}\) *Re L* [1968] P 119

\(^{60}\) ‘Blood Tests and the Proof of Paternity’ Law Commissioners’ Report 1968 para 12
The Law Commission’s recommendation was incorporated in s 26 of the Family Law Reform Act 1969:

‘Any presumption of law as to the legitimacy or illegitimacy of any person may in any civil proceedings be rebutted by evidence which shows that it is more probable than not that that person is illegitimate or legitimate, as the case may be, and it shall not be necessary to prove that fact beyond reasonable doubt in order to rebut the presumption.’

Guidance was given to the interpretation of this section by Lord Reid in *S v S, W v Off. Sol.*61 – a case which was decided before the 1969 Act came into force:

‘That means that the presumption of legitimacy now merely determines the onus of proof. Once evidence has been led it must be weighed without using the presumption as a make-weight in the scale for legitimacy. So even weak evidence against legitimacy must prevail if there is not other evidence to counterbalance it. The presumption will only come in at that stage in the very rare case of the evidence being so evenly balanced that the court is unable to reach a decision on it. I cannot recollect ever having seen or heard of a case of any kind where the court could not reach a decision on the evidence before it.’

In spite of the remarks of the Law Commission and of the House of Lords in *S v S* – and of several other Judges – to the effect that it is in the best interests of the child that he should know the truth about his parentage, and that by that time illegitimacy did not matter so much, nevertheless there were still some who thought differently. In the *Ampthill Peerage Case*62, Lord Wilberforce said at p. 417

‘There can hardly be anything of greater concern to a person than his status as the legitimate child of his parents; denial of it, or doubts as to it, may affect his reputation, his standing in the world, his admission into a vocation, or a profession, or into social organisations, his succession to property, his succession to a title.’

There was still a reluctance to make a decree that would bastardise a child even though it was clear from population statistics that the number of children born out of wedlock was rising steeply and that there was not so much prejudice against illegitimate children as there had been earlier. There remains a presumption that the father of a child born to a married couple is indeed his/her biological father, but this presumption can now more easily be rebutted on the balance of probabilities.

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61 *S v S; W v Off Solicitor* [1970] 3 All ER 107 109

62 *The Ampthill Peerage Case* [1976] 2 All ER 411
c) The Presumption of Incapacity

‘It would, I think, be an absurd situation if a common law rule so ancient that the policy reasons behind it are not altogether clear, and which has so little relevance to reality… should be extended to civil proceedings.’

The above quotation is taken from a 1975 Tasmanian case which concerned the alleged paternity of a 13 year old boy. Neasey J said that the criminal law presumption that a boy under the age of 14 could not be guilty of rape had not been considered to apply to civil proceedings in that (Tasmanian) jurisdiction.

However, for many years it was assumed by our courts that this criminal law presumption applied also to allegations of paternity heard in the civil courts. This meant that it was not possible to discover whether or not the young boy in court was in fact the father of the young mother’s child because the presumption of incapacity was irrebuttable. It also left the mother with no remedy except for parish/welfare benefits. This section traces the history of that presumption until its eventual abolition in the 1970/80s.

The presumption is referred to in Justinian’s Institutes -

‘We have enacted that puberty in males shall be considered to commence immediately on the completion of the fourteenth year’.

This was in a Constitution that was promulgated on 6 April 529 and it may well be that our early common law jurists were influenced by this Roman Law presumption.

Ranulf de Glanvill (1112-1190) states, writing about rape in 1188:

‘But before judgment is given the woman and the accused can be reconciled to each other by marriage if they have licence from the King or his Justices and the consent of their families.’

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63 Reid v Hesselman [1975] Tasmanian State Report 95, Neasey J
64 Op cit
65 Op cit. 101
66 Inst. I, XXII – as referred to in Reid v Hesselman, supra by Chambers J
'Si un femme ad issue sa baron estant deins 14 ans d'age l'issue est un bastard.\textsuperscript{67}

(If a woman/wife has a child, her husband being less than 14 years of age, the child is a bastard)

On referring directly to the Year Book I found the age to be 13 years and not 14:

'Come est cas si un enfant deins XIII ans prend feme et il soit enfant l'issue est sa bastard pour ceo matiere special pour ceo que ne peut estre entendu par nul ley que l'enfant deins cet age peut engender.'\textsuperscript{68}

(As is the case, if a child less than 13 years takes a wife/woman and there be a child the issue is his bastard because it cannot be understood by any law that a child of less than this age can father a child).

This error is copied by later commentators - see R v. Luffe\textsuperscript{69}

Henry de Bracton (1210-1268), writing in the 13\textsuperscript{th} century, refers to the presumption of incapacity as one way in which the presumption of legitimacy can be rebutted:

'He is presumed to be one’s son by the very fact that he is born of one’s wife for marriage proves filiation and this presumption will stand until the contrary is proved as where it is shown that the husband has had no connexion with his wife for some time before because of illness or other cause, or was of such age that he could not procreate a child ...\textsuperscript{70}

The age at which a man could 'procreate a child' was not at that time defined in legal terms, and many cases are recorded in the Year Books where it had apparently been thought worthwhile to bring a case alleging paternity of a child of very tender years.

The age of marriage was at that time 14 years. Contracts to marry could be made earlier – and they were frequently so made in the case of the nobility – but they had to be ratified after the age of 14 years had been reached\textsuperscript{71}. The very fact that cases were brought relating to extremely young fathers makes it apparent that it was thought possible to prove or disprove capability – otherwise, why bring the case at all? Why not just declare the child illegitimate? So, it may well have been rebuttable in those early days.

\textsuperscript{67} (1666) Rolle’s Abridgement 358-9
\textsuperscript{68} (1422-3) YB 1 H 6 3b
\textsuperscript{69} R v Luffe (1807) 8 East 193
\textsuperscript{70} Bracton, (1210-68), De legibus et consuetudinibus Angliae Thorne’s translation 34
\textsuperscript{71} Co Litt. 79
Sir Henry Rolle (1589-1656) cites a case where the alleged father was only 3 years old:\footnote{72}{1 Roll Abr. 358}

'Si un feme ad issue son baron esteant lorsque del age de 3 ans, l'issue est un bastard, l8.H.6.31, pur ceo que appiert que il ne poet aver issue a cest age.'

He also cites cases where the alleged fathers are 6, 7, 8 and 9 years old\footnote{73}{YB H.6.34; 38 Aff.24; 29 Aff.54; 29 Aff.54} - the offspring are all declared to be bastards – clearly the courts did not believe they could father the children and, presumably, they concluded that the wife had committed adultery. Again, he cites a case where the alleged father is 'within the age of 14 years' and where the issue was declared a bastard.

Perhaps one of the reasons it became irrebuttable was, as Sir Edward Coke said:

'The principal end of punishment is, that others by his example may fear to offend ... but such punishment can be no example to madmen or infants that are not of the age of discretion.'\footnote{74}{3 Coke 4}

Perhaps also the fact that he could not escape the death penalty by offering to marry the woman (though he could contract a voidable marriage) was relevant. Sir Edward Coke refers to this presumption - though without referring to the specific age of procreation:\footnote{75}{1 Coke 244}

'By the Common Law if the husband be within the four seas ... if the wife hath issue, no prooфе is to be admitted to prove the childe a bastard, ... unless the husband hath an apparent impossibility of procreation, as if the husband be but 8 years old, or under the age of procreation ...'

In any event, it was firmly established and irrebuttable – even though medical evidence could prove the contrary – by the time Sir Matthew Hale (1609-1676) was writing in the 17th century:

'An infant under the age of 14 years is presumed by law unable to commit a rape, and therefore it seems cannot be guilty of it, and though in other felonies\footnote{76}{1 Hale PC 630} malitia supplet aetatem in some cases as has been shown, yet it seems as to this fact the law presumes him impotent as well as wanting discretion.'
‘Pubertas generally, in relation to crimes and punishments is the age of 14 years and not before …. at this age they are supposed to be doli incapaces.’

From Sir Matthew Hale's time onward these presumptions crystallised and the age of procreation or puberty was defined as 14 years (the age of marriage). So in 1762 a Gentleman of the Middle Temple was able to say:

'Now the presumption thus being that it is the husband's child it must be destroyed by contrary proof; and this negative, that it is not the husband's child is capable of no other proof than this only, that it must be shewn impossible it should be the husbands child; ... if the husband be under the age of 14 the issue are bastards; for before the age of puberty, generation is naturally impossible.'

The presumption of incapability was confirmed in the 19th century. In the bastardy case of R v. Luffe Lord Ellenborough CJ cites, among other cases, some of the old Year Book cases previously referred to and says:

'All these establish the principle, that where the husband in the course of nature [i.e. under 14] could not have been the father of his wife's child, the child was by law a bastard.'

Similarly the presumption was also clarified in a number of cases of rape and related offences in the 19th century. In Eldershaw, it was held that a boy under 14 cannot be convicted of assault to commit rape; in Groombridge, a boy under 14 was held not guilty of rape on grounds of incapacity; in Phillips, no evidence was admissible to show that an under 14 boy could commit rape; in Jordan, the same was applied to carnal knowledge; and in Brimelow, an under 14 boy was held not guilty of rape although the act was proved.

In all these cases the point at issue was the boy's capacity to commit a sexual offence, and his defence the presumption of incapacity, regardless of his real capacity. In

77 3 Hale PC 18
78 A Gentleman of the Middle Temple, New Abridgement of the Law, 310
79 R v Luffe (1807) 8 East 193 [205]
80 R v Eldershaw (1828) 3 C & P 397
81 R v Groombridge (1836) 7 C & P 582
82 R v Phillips (1839) 8 C & P 736
83 R v Jordan (1839) 9 C & P 118
84 R v Brimelow (1840) 2 Mood CC 122
several of these cases the boy was convicted of common assault – only his sexual capacity was questioned.

In Williams\textsuperscript{85}, a boy under 14 was convicted of indecent assault, but not guilty of rape. The possibility of a conviction of attempt to commit rape was argued but not decided, and there are conflicting dicta.

Unlike the earlier bastardy cases, there were in those rape cases no children involved, but the development of the presumption of incapacity seems to have been linked in the two types of case.

JF Josling in the third edition of Affiliation Law and Practice\textsuperscript{86} mentions that ‘the presumption is assumed on principle, at 3 Halsbury, 3\textsuperscript{rd} ed., p.113, to be applicable to affiliation proceedings’ but he submits with respect that it should not be adopted in such cases. He thought that the presumption might well have been introduced to save the young boys from the gallows, but his concern was that the mother would be entirely without remedy if it were applied in affiliation proceedings. And he goes on to say:

‘If magistrates have before them a defendant who was under 14 at the time of conception and receive strong evidence not only that he would, if he were 14, clearly be the father, but also that; he was sexually potent at that time (e.g. his own admissions and evidence of his parents), it is suggested that an affiliation order should be made. It is emphasised that the magistrates should have good evidence of the boy’s attainment of puberty; the complainant’s evidence alone on this would not suffice.’\textsuperscript{87}

In fact Affiliation Orders were being made in cases where the putative father was younger than 14. In Manchester City Magistrates Court on 27 August 1976 such an Order, for 5p. per week, was made (personal knowledge) where the father, at the time of conception was only 13 years old. This was for a minimal amount but the mother was given some security for the future and would have been able to apply for a Variation Order later when the father’s earning capacity and financial circumstances improved.

\textsuperscript{85} R v Williams (1893) 1 QB 320
\textsuperscript{86} Josling’s Affiliation Law and Practice (1971) 91
\textsuperscript{87} Ibid.92
In the case of *Kane v Littlefair* a mother brought proceedings under the Affiliation Proceedings Act 1957 alleging that the defendant, a boy of 13, was the father of her child. The magistrates found in her favour and he appealed, relying on the presumption. It was held that it was not necessarily the case that the rule of criminal law applied to paternity cases and there was no reason why the criminal law rule should be imported into the civil law. Paternity cases relating to boys under 14 should be considered without any preconceived notions or any presumptions. Each case must be decided on the facts. The magistrates were fully entitled to come to the conclusion that the defendant was the father. Interestingly, no recent cases were quoted on either side in this case – only the 19th century criminal cases (mainly of rape) I have referred to earlier in this chapter.

At the same time there was a movement to abolish this criminal law presumption. Smith & Hogan’s 1981 edition of Criminal Law reads:

‘There is an irrebuttable presumption that a boy under the age of 14 is incapable of committing rape, any other crime of which sexual intercourse is an ingredient, or sodomy. This is an absurd rule, capable of producing injustice.’

And the 1984 Criminal Law Revision Committee’s 15th Report – on Sexual Offences – recommended that this common law presumption should be abolished. It was eventually abolished by the 1993 Sexual Offences Act.

This chapter has shown how important proof of paternity has always been – mainly to establish whether an individual was legitimate or not so that inheritance questions could be settled. It has also shown how, in the absence of anything better, ‘fictional’ presumptions have been used to establish paternity. As scientific means of proof have improved, the use of these presumptions has become unnecessary. The growth of tolerance towards illegitimate children has also been charted.

Chapter 2 will examine various quasi-medical methods of proof of paternity and their history. Blood test evidence is dealt with in Chapter 3.

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88 *Kane v Littlefair* [1985] FLR 859
89 Smith & Hogan, *Criminal Law*. 412
90 Cmnd 9213 Recommendation No.7
Chapter 2 – Quasi medical evidence

a) STERILITY AND IMPOTENCE

'Where the husband is shown not to have cohabited with his wife for some time because of some serious illness or if he is frigid or impotent ... such a son will not undeservedly be excluded from the succession for he can be neither son nor heir.\(^{91}\)

As can be seen from the above quotation from Bracton (1210-68), discussions about sterility and impotence in relation to contested paternity cases, have been around for a very long time. But proving this has always been difficult. Katherine Watson\(^ {92}\) describes one method of proof – the unusual procedure of ‘trial by congress’ instituted in the 13\(^{th}\) century in cases of nullity where impotence was pleaded. In this procedure, midwives observed the couple in bed together over many nights before delivering their opinion. She notes that genital inspection (from which this method of trial developed) was institutionalized by Pope Innocent IV (1243-54). However, trial by congress had (fortunately perhaps) died out by the 16\(^{th}\) century. But the Law Commission\(^{93}\) noted that:

‘In former times disobedience to the court’s order to undergo an examination (physical examination in nullity cases) appears to have been regarded as contempt of court, and as late as 1842 in Harrison v Sparrow\(^ {94}\) the writ de contumace capiendo issued to the sheriff with a view to punishing a disobedient husband with imprisonment.’

That impotence was still recognised as a good defence was also confirmed in the Banbury Peerage Case:\(^{95}\)

‘The physical fact of impotency, or of non-access, or of non-generating access, as the case may be, may always be lawfully proved by means of such legal evidence as is strictly admissible in every other case in which it is necessary by the law of England that a physical fact be proved.’

\(^{91}\) Bracton (1210-68), De legibus et consuetudinibus Angliae - Thorne’s translation 186
\(^{92}\) Forensic Medicine in Western Society 114
\(^{93}\) Blood Tests and the Proof of Paternity in Civil Proceedings, 1968 para 23
\(^{94}\) Harrison v Sparrow (1842) 3 Curt.1 at 14
\(^{95}\) Banbury Peerage Case (1811) 1 Sim & St 153
So, even though it was always difficult to prove – particularly for a married person before the standard of proof was changed by The Family Law Reform Act 1969\(^6\), impotence has long been recognised as a good defence to a paternity suit. It may be due to age, illness, emotion, congenital defect or acquired conditions\(^7\). All diseases attended or followed by general debility may be likely to suspend at least temporarily sexual power on the part of the male, and impotence is likely so long as any acute illness lasts. Similarly drunkenness and the excessive use of narcotics or other drugs may cause temporary impotence while the habit lasts, and some mental illnesses may also be associated with impotence.

Impotency was not easy to establish, and although in the case of *Legge v. Edmonds*\(^8\), much medical evidence was given, it was not successful in overcoming the presumption of legitimacy. Sir W P Wood VC said:

>'Looking to the fact that Legge was only 35 years old, was of vigorous habits, and was thus far recovered, it is impossible to say that the 'irresistible presumption' (of sexual intercourse) did not take place, or that any natural impediment necessarily existed .... my own conviction is that intercourse did take place.'

Even if impotence is proved, this fact alone may not be a complete defence to an allegation of paternity. This is because it is possible to father a child by *fecundatio ab extra*, ie without complete penetration. In *Clarke v. Clarke*\(^9\) it was accepted that the child was born as a result of *fecundatio ab extra* and Pilcher J said:

>‘Dr. Burns, a gynaecological specialist who was called by the husband, explained that it was well-known in the medical profession that conception could take place without penetration of the woman’s vagina by the male organ.’

Similarly in *Russell v Russell* (later the Ampthill Peerage Case)\(^10\) it was claimed (and held) that although the third Baron never had full intercourse with Christabel and that she was found to be virgo intacta, that conception took place by external fertilisation and that therefore her son was legitimate.

\(^{6}\) Section 26  
\(^{7}\) Taylor’s Medical Jurisprudence, J & A Churchill 1956  
\(^{8}\) *Legge v Edmonds* [1856] 20 JP 19  
\(^{9}\) *Clarke v Clarke* [1943] 2 All ER 540 [541]  
\(^{10}\) *Russell v Russell* [1924] AC 687; Ampthill Peerage Case [1976] HL
Also, experts in this field stress that fertility depends on both the man and the woman, and on emotional as well as physical factors. Where a man with low potential fertility may not be able to father a child with one woman, he may well be successful with another. So, perhaps remarkably, in *Bury v Webber*\(^{101}\) divorce was granted on grounds of impotency even though when the husband remarried he was able to father a child by his second wife – *habilis et inhabilis diversis temporibus*. Many cases of infertility are known to be psychological in origin and can be cured sometimes merely by a visit to a consultant, with consequent relaxation of tension.

Absolute sterility (azoospermia) is a good defence to a paternity suit and may result from a number of causes, including congenital defect, disease or operation, for example, removal of the testicles. So, in *Done & Egerton v Hinton & Starkey*\(^{102}\) the children of the wife of a castrated person were declared to be bastards. The proof of his castration was enough to rebut the presumption of legitimacy. Care has to be taken when dealing with cases where the man has had a vasectomy as this does not result in immediate sterilisation – sperm may live for more than a week in the vas deferens.

Partial sterility or low sperm count and/or low sperm motility (oligospermia) is relatively common but courts would have been unwise to rely on this evidence alone as it is not unknown for a man with a very low sperm count to father a child.

It is clear that although evidence of impotence or partial sterility on its own was rarely enough to rebut the presumption of legitimacy, it could be useful to add weight to such a case. After the implementation of section 26 of the Family Law Reform Act 1969 and the consequent lowering of the standard of proof such evidence might well sway the balance of probabilities. However, account also has to be taken of the possibility that artificial insemination by donor\(^{103}\) might have taken place without the consent of the husband.

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\(^{101}\) *Bury v Webber* 40 Eliz. (1598) p28

\(^{102}\) *Done & Egerton v Hinton & Starkey* (1617) 1 Rol Ab. 358

\(^{103}\) See chapter 5(b)
b) THE PERIOD OF GESTATION

‘[Midwives] held positions of respect in the ancient world, being among the first medical personnel to appear as court witnesses.’

There have been a number of cases in which paternity has been challenged due to the length of gestation (coitus to birth) and this section charts the difficulties the courts have had in deciding what length of pregnancy can be said to be credible – taking into account all the special factors in the case as presented to them; bearing in mind that there can be considerable variation; and also that many women often have difficulty in remembering exact dates.

The average length of pregnancy has for a long time been agreed by the medical profession to be about 280 days (40 weeks). However, in a study in 1952 of 15,659 Birmingham births it was found that 75 cases had had pregnancies of over 44 weeks and the longest was 325 days. Both medical experts and the Courts have now accepted that there may be considerable variation and over the centuries the parameters of that variation have changed.

The earliest instances where this has been in issue in this country have been in connection with the Writ ‘De Ventre Inspiciendo’. The purpose of the Writ (the earliest record of which is at 4 Hen. III) was to find out whether a woman was pregnant and when her child would be born (de tempore conceptium quoque modo, quando, et ubi, et quando crediderit se esse parturam). The Writ was used when a woman claimed for purposes of inheritance to be pregnant by her dead husband. First, there was a physical examination of the woman, and then she was isolated in a castle. If, 40 weeks after her husband's death, she had not produced a child she was punished by fine and imprisonment.

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104 Katherine Watson - Forensic Medicine in Western Society 41
105 The Period of Gestation by McKeown & Gibson BMJ (1952) 938
In earlier times the ‘normal’ length of gestation was applied fairly strictly – probably it was considered more important to ‘hold the line’ on legitimacy than to be generous towards the child. So, in Radwell’s Case\(^{106}\), a posthumous child born 11 days after the normal time allowed for parturition was declared a bastard.

Later, in Alsop v. Bowtrell\(^{107}\), a child born 40 weeks and 9 days after the death of the woman’s husband was declared legitimate as it was thought that bad treatment by her father-in-law had prolonged the pregnancy.

Length of gestation was also an issue in the Gardner Peerage Case\(^{108}\) - although it was not the only issue. There seems to have been a complete mix-up in the number of days she was pregnant – 311 and 149 days were advanced as possibilities. However, there was other evidence of adultery and also of concealment of the child who was therefore declared illegitimate. In the case of Bowden v Bowden\(^{109}\) length of gestation was the sole issue. In that case, the last occasion on which husband and wife slept together was on the night of 19 December 1915. The next day he left for Egypt on active service and a child was born 307 days after he left England. There was no evidence of adultery (although the wife had had a menstrual period after his departure) and the child was held to be legitimate.

The possible length of gestation steadily increased and in Gaskill v. Gaskill\(^{110}\), it was accepted that a child born 331 days after intercourse which weighed 10 lbs and had a large head, was legitimate. Here again there was no evidence of adultery and the sole issue before the court was the period of gestation. The medical evidence was very detailed and a number of expert witnesses were called. The Lord Chancellor, when summing up the medical evidence said:

> ‘Between the time of fruitful coition and the time of conception there is an interval, the length of which cannot be determined. His (Dr Fairbairn’s) considered opinion, based on the known scientific data as well as his own experience is that considerable protraction of gestation may

\(^{106}\) Radwell’s Case (1290) 18 Ed 1  
\(^{107}\) Alsop v Bowtrell (1619) 17 Jac 1  
\(^{108}\) Gardner Peerage Case (1877) 2 AC 723 HL  
\(^{109}\) Bowden v Bowden (1917) 62 Sol Jo 105  
\(^{110}\) Gaskill v Gaskill (1921) TLR 1
occur extending to 331 or 332 days from coitus; but in such a case some effect on the child of so extreme a prolongation would be expected.’

This case was referred to in a leading article in 1921 in *The Justice of the Peace Journal*\(^{111}\) entitled ‘Courageous and Sensible’:

‘Though cases of prolonged gestation will require to be scrutinised with the utmost care, it cannot but be that the hitherto existing notions on the subject must be considerably modified. What can happen in one case can happen in another.’

That the Courts obviously did not want to take this too far, and did ‘scrutinise’ cases with the utmost care is shown by the fact that in 1922\(^{112}\) the Bench dismissed a case where there was insufficient evidence to convince them that the period of gestation was 342 days.

In 1939, the British Medical Journal (BMJ) records a different type of case. A child was born 315 days after the husband had been killed and a case brought under the Workmen’s Compensation Act: \(^{113}\)

‘Mr A’s death at work made his widow entitled to compensation and in fact the employers did pay the proper sum. But when they were confronted with the posthumous and post-mature child of the dead workman they felt that before paying a sum amounting to £208 in respect of this infant, they should have legal protection.’

Because of this, the child sued the employers in the County Court – judgment was entered for the infant, thus recognising a pregnancy of 315 days.

In *Wood v Wood*\(^{114}\), the possible period of gestation was further extended when a child born 346 days after intercourse was accepted as legitimate. Lord Merriman P said:

‘… we have been asked to say that there comes a point at which any judge must take judicial knowledge of the fact that the period (of gestation) is altogether outside what is possible. I agree … I absolutely decline, on the information before us in this case to say that we are judicially bound to hold that the period of 346 days is on the wrong side of any line which can possibly be drawn.’

\(^{111}\) ‘Courageous and Sensible’ JP Jo (1921) 365

\(^{112}\) Recent cases: JP Jo (1922) 141

\(^{113}\) Workmen’s Compensation Act BMJ (1939) 1 1155

\(^{114}\) *Wood v Wood* [1947] All ER 95
The Court of Appeal further extended this in *Hadlum v Hadlum*\(^{115}\), when they accepted that a child born 349 days after intercourse was legitimate. The BMJ said:\(^1^{16}\)

‘This period of 349 days is, we believe, the longest ever held by an English Court to be possible … It will be interesting to see where the courts stop: or rather, as they follow the medical evidence, where the medical witnesses stop.’

In 1949, there was another case dealing with a very long pregnancy\(^1^{17}\). In spite of the period being slightly less than in *Hadlum (supra)*, the Court held that a child born 340 days after intercourse was illegitimate. As with the other cases quoted, no evidence of adultery was given and medical advice was taken.

The British Medical Journal (BMJ)\(^1^{18}\) reported a case in front of Mr Justice Willmer who held that a child born 324 days after intercourse was legitimate, and said: ‘Despite the long period before the birth all the evidence pointed to the child being the husband’s and adultery was not proved.’

The whole question was discussed again in *Preston-Jones v Preston-Jones*\(^1^{19}\) where although their Lordships were not prepared to hold that a period of 360 days was impossible, they held on the evidence before them in that case, that the child was illegitimate. Their decision may well have been different had better or more convincing medical evidence been available. Lord Simmonds said:

‘I must, I think, however reluctantly, come to the conclusion that an additional period of 11 days making 360 days in all, ought not to be regarded as making the vital difference so that the Court can without any further evidence regard adulterous intercourse as proved beyond all reasonable doubt.’

And Lord Macdermot agreed with him.

However, Lord Morton did not:

‘For my part, I think that in the absence of any expert evidence on either side an interval of 360 days should be enough to satisfy the court.’

\(^{115}\) *Hadlum v Hadlum* [1948] 2 All ER 412
\(^{116}\) Recent cases: BMJ (1948) 2 840
\(^{117}\) *M-T v M-T & the Official Solicitor* (1949) P 331
\(^{118}\) *Bone v Bone* BMJ (1951) 2 979
\(^{119}\) *Preston-Jones v Preston-Jones* [1951] AC 391
All the above cases were decided when the presumption of legitimacy could only be rebutted by evidence that proved the illegitimacy beyond reasonable doubt. After the Family Law Reform Act 1969, the presumption could be rebutted on the balance of probabilities – and if this had been so earlier, the above cases might well have been decided differently. It is also interesting to note that there were few (if any) affiliation cases which had as their main issue the length of gestation. It seems clear that in most of the cases involving alleged exceptionally long periods of gestation, the courts were prepared to do their best to avoid making the child illegitimate and they were able to rely on the presumption of legitimacy to help them in this aim.

The above cases refer to excessively long periods of gestation but there have also been many attempts to fix the shortest period of gestation – and this period gets shorter and shorter as medical knowledge advances. In *Clark v Clark*[^120] for example, the husband asked for a divorce as his wife had given birth to a child after 174 days gestation. The child weighed 2½ lbs and there was no evidence of adultery. The Court held that the child was legitimate and the President said:[^121]

> ‘It is utterly impossible to say that there is anything extravagantly improbable about this being a viable child.’

Today, of course, many premature babies survive who when born weigh considerably less than that baby.

Most of the reported cases (referred to above) have involved the presumption of legitimacy and, as has been shown[^122], it was difficult to rebut this beyond reasonable doubt. The Family Law Reform Act 1969 section 26 changed the standard of proof and the presumption then only had to be rebutted on the balance of probabilities. However, until the advent of DNA testing, there may well have been cases where common blood groups were involved where it was still useful to produce evidence on the length of gestation.

[^120]: *Clark v Clark* [1939] P 228
[^121]: Op cit 235
[^122]: Chapter 1(b)
c) Anthropological Tests

‘I have called this principle, by which each slight variation, if useful, is preserved, by the term natural selection.’

This section examines the use which has been made of anthropological tests when determining paternity. These tests can involve observation and/or a physical examination to find out whether the parties exhibit various characteristics which are known to be inherited according to the established laws of genetics and which might or might not be shown both by the child and the putative father. Often they were used to give added weight to a case when there was already other evidence of paternity. The Law Commission\textsuperscript{124} gave as examples:

‘[T]he possibility of a child with brown eyes being born to a man and woman both of whom have blue eyes could be calculated statistically. Similarly, these tests may reveal the presence of webbed-toes or some other physical peculiarity in both the child and the putative father.’

The tests have only been used in a very few cases in spite of the fact that in the 1963 volume of the American Journal of Physical Anthropology (pp 81-82) Friedrich Keiter claimed that anthropological tests could determine paternity in 19 out of 20 cases – however this calculation was made combining the blood tests that were available at that time. The same journal also had articles about a study of Chileans, noting recognisable fissures of the tongue, scrotal tongue and double lips; one about a study of aboriginal skulls in California, noting specific palatal defects; and also a twin study of recognisable hand-wrist ossification.

Evidence of resemblance was admitted in the case of Bagot v Bagot\textsuperscript{125} and also in Burnaby v Baillie\textsuperscript{126}. In the case of Slingsby v A-G\textsuperscript{127} evidence of facial characteristics were admitted at first instance, this was reversed in the Court of Appeal but then the case was eventually decided on other grounds in the House of Lords. In any event, only one of the noble Lords was in favour of such evidence.

\textsuperscript{123} Charles Darwin, \textit{The Origin of Species}, ch 3
\textsuperscript{124} ‘Blood Tests and the Proof of Paternity in Civil Proceedings’ 1968 para 6
\textsuperscript{125} Bagot v Bagot (1878) ILR Ir. 1
\textsuperscript{126} Burnaby v Baillie (1889) 42 Ch.D 282.
\textsuperscript{127} Slingsby v A-G (1916) 33 TLR 120
being admitted. Such evidence was also admitted in *Russell v Russell and Mayer*\(^{128}\) although not without a very strong warning about the dangers of acting on it. These cases were all reviewed in the case of *C v C*\(^{129}\) when evidence of photographic evidence was admitted. However, again a warning was given that when considering the weight to be attached to it ‘the court should bear in mind the dangers inherent in such evidence.’

This decision was followed in the Canadian case of *McLeod v Hill*\(^{130}\) when deciding (after seeing the child) that evidence of facial resemblance between the alleged (white) father and the child of the Cree Indian mother could be admitted as corroboration in an affiliation case, saying:

‘In the present case I think that evidence of resemblance should be admissible and that I can take cognizance of my own observations of the resemblance …. The child bears none of the native characteristics evident in the facial features of the mother, at least none that I could detect. …. The child has a marked facial resemblance to the alleged father.’

The Law Commission’s Report on the use of Blood Tests (1968) in paragraph 6 considered whether courts should be given the power to order these tests but decided against this course of action even though they were aware that in some other countries (for example, Denmark) they could be so ordered. Their reasons were that:

‘There seems to be some doubt within the medical profession in this country as to the accuracy of anthropological tests and we understand that the necessary statistical material has not been compiled here.’

However, they noted that there was, of course, nothing that would prevent such anthropological evidence being submitted.

Anthropological tests are now largely redundant in view of the availability of DNA testing, although they could presumably still be used to avoid the expense of DNA tests if racial or other such evidence is particularly striking.

\(^{128}\) *Russell v Russell and Mayer* (1923) 129 LT 151

\(^{129}\) *C v C* [1972] 3 All ER 577

\(^{130}\) *McLeod v Hill* (1975) 23 RFL 309
d) Contraception

‘Walking majestically up the aisle of his cathedral ……
with packets of child-killing drugs bulging out of each lawn sleeve.’\textsuperscript{131}

This section explores the use made by the courts of evidence of contraception when seeking to prove or disprove paternity. It shows how the early history of birth control was confused by religious, moral and medical fears and also fears of a declining population. This was reflected in a number of cases where paternity was contested and where birth control was advanced as a defence.

At the beginning of the 20\textsuperscript{th} century both the Anglican and Roman Catholic Churches were very much against any form of ‘mechanical’ birth control. In 1914 a Committee of Bishops stated that contraception was:

‘Dangerous, demoralising, sinful and erring against the first principles of true purity by making the physical side of sexual union an object in itself, apart from its proper purpose of procreation.’

And for daring to express a contrary opinion in his address to the National Birth Rate Commission in 1914 the Bishop of Birmingham was described by the Sunday Chronicle as above\textsuperscript{132}. Clearly the paper thought that what they wrote was an accurate reflection of public opinion at that time.

In 1918 the Lambeth Conference condemned all birth control practices outright and it was not until 1958 that the Conference retracted from its earlier position and stated that it saw responsible parenthood (which included contraception) as:

‘[A] wise stewardship of the resources and abilities of the family as well as a thoughtful consideration of the varying population needs and problems of society and the claims of the future generations.’

The Catholic Church is still not happy with artificial methods of contraception.

Privately funded Birth Control clinics were opened in the 1920s against considerable opposition and the Labour Women’s Conference supported a resolution that any doctor in a medical service supported by public funds should be permitted to give

\textsuperscript{131} Sunday Chronicle 1914 – description of the Bishop of Birmingham who had spoken in favour of birth control
\textsuperscript{132} See heading quotation
birth control information to married couples. However, it was not until July 1930 that the National Birth Control Council was founded.

These attitudes were reflected by the Courts. In 1883 Charles Bradlaugh was imprisoned for criminal libel for writing a book describing and recommending methods of birth control. And in 1925 Marie Stopes lost her libel case against Dr Sutherland who had described the method of birth control recommended in her clinics as ‘the most harmful method of which I have had experience’ and said, ‘it is truly amazing that this monstrous campaign of birth control should be tolerated by the Home Secretary.’ Medical witnesses in that case were clearly divided – while some agreed with Dr Sutherland, others (including Sir James Barr) thought ‘the method adopted at the plaintiff’s clinic was a perfectly simple method and perfectly harmless.’

After the First World War there were fears that the birth rate was declining, and so it was thought that any method of birth control would hasten this decline. As late as 1933, it was still possible to talk about this suspected decline as ‘one of the most significant of the population problems of western civilised communities’. Also in a review of ‘The Twilight of Parenthood – a biological study of the decline of population growth’ by Ed Charles, the reviewer in the BMJ talks about the menace of under-population and says that there is no danger of food shortages.

There were a number of cases in the 1940s concerned with contraceptives in connection with non-consummation of marriage in nullity cases. In Baxter v Baxter the House of Lords held that the marriage had been consummated notwithstanding the husband’s use of a condom. Wilmer J in White v White said about what is not known to be a very reliable method:

‘There is evidence from Dr McLean that when coitus interruptus is practised the possibility of conception none the less remains.’

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133 R v Bradlaugh (1883) 15 Cox CC 217
134 Sutherland v Stopes [1925] AC 47
135 ‘The Declining Birth Rate’ BMJ (1933) 1 213
136 ‘The Twilight of Parenthood’ BMJ (1934) 2 310
137 Baxter v Baxter [1947] 2 All ER 886
138 White v White [1948] 2 All ER 157 Wilmer J 153
In 1954 Barnard J, in *Watson v Watson*\(^ {139}\), approved the dictum of Sir Francis Jeune P in *Gordon v Gordon*\(^ {140}\), when Sir Francis said:

‘The law says that what has to be proved is that the husband did not have intercourse which might have led to the birth of the child. It does not allow the fact that another person had intercourse with the wife to be a material consideration.’

And Barnard J applied this to cases where contraceptives are used and said:

‘Although I am quite satisfied that the husband has told me the truth and that he was using contraceptives, I do not feel that the mere use of contraceptives in any way alters that proposition of law.’

Similarly in *Francis v Francis*\(^ {141}\) where the child was registered in the wife’s name alone and Lord Merriman P said:

‘The wife gave positive evidence … that each time when she and her husband had had sexual intercourse at the material time, her husband had used contraceptives.’

Following what was said in the previous cases, he did not consider the fact that contraceptives were used, to be enough to rebut the presumption of legitimacy.

Blood tests might well have solved these cases more satisfactorily and/or had the cases only to be proved on the balance of probabilities\(^ {142}\), the results might well have been different.

In 1954 Lord Denning was very forthright when talking about vasectomy –

‘Take a case where a sterilisation operation is done so as to enable a man to have the pleasure of sexual intercourse without shouldering the responsibilities attached to it. The operation is plainly injurious to the public interest. It is degrading to the man himself. It is injurious to his wife and any woman who he may marry, to say nothing of the way it opens to licentiousness.’

Later the judges’ opinions changed with the times and with public opinion. Family Planning Clinics became available on the NHS in 1977.\(^ {143}\)

\(^{139}\) *Watson v Watson* (1954) P 49 [54]
\(^{140}\) *Gordon v Gordon* (1903) P 141
\(^{141}\) *Francis v Francis* [1959] 3 All ER 206
\(^{142}\) S.26 Family Law Reform Act 1969
Lord Scarman said in 1985\textsuperscript{144} that contraceptive medical treatment is ‘recognised as a legitimate and beneficial treatment in cases where it is medically indicated.’

Today there are a wide variety of methods of contraception available but for most of the relevant period covered by this thesis, there were only minimum, often unreliable, methods in use. It is not surprising that courts were reluctant to accept evidence of contraception as being useful when paternity was an issue.

This chapter has examined the use of various quasi-medical/scientific methods of proof of paternity. These have been available for many years but, for the reasons stated supra, most of them have not been a great deal of use on their own in establishing paternity – particularly when it needed to be proved beyond reasonable doubt. However, they have been useful to corroborate factual/practical evidence.

The next chapter examines the impact on proof of paternity of the discovery that blood groups are inherited and could be used to settle paternity disputes. It tells of the difficulties experienced in getting this principle accepted by the courts and the long struggle to introduce legislation so that the use of blood test evidence could be regulated and tests could be directed by the courts.

\textsuperscript{143} National Health Service Act 1977
\textsuperscript{144} Gillick v Norfolk & Wisbech HA [1985] 3 All ER 402
Chapter 3

Blood Test Evidence

‘For how can they charitably dispose of anything when blood is their argument?’

The twentieth century saw the introduction of scientific methods of proving or disproving paternity. Scientific tests began to be used to detect sterility, calculate periods of gestation, and estimate impotence. More reliable methods of contraception were introduced. However, the discovery that was to make the greatest impact on disputed paternity cases was the fact that blood groups are inherited and could be used to help solve these problems.

The struggle for the introduction of the use of blood group evidence to settle paternity disputes, and for the courts to accept this newfangled evidence opened the way for the more advanced methods to be introduced later within the same framework. This struggle took a very long time. Not until 1969 (Family Law Reform Act) was there to be a statutory framework for the use of blood group evidence in the courts, although the first attempt to legislate for this purpose was in 1939.

There were various reasons for the delay in acceptance of such evidence by the courts – not to mention the outbreak of War in 1939. These include an inherent reluctance to accept anything new and as yet unproven; doubts as to the reliability of the evidence; difficulties experienced in knowing how to treat parties reluctant to give blood for testing; difficulties because only a negative could be proved with any certainty (positive proof could only be on a percentage probability basis); and prejudice against all things scientific.

This Chapter is divided into three sections. The first tells the story of the initial discovery of the importance of blood groups in this connection up to the first attempt at legislation in 1939. The second takes us up to the second attempt in 1961 and the third to the current Family Law Reform Act 1969 and the implementation of Part III of the Act in 1972.

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145 Shakespeare, Henry V Act III 149
146 DNA tests – see Chapter 5
a) Blood Tests: 1900 to 1939

‘Like all scientific knowledge whose demonstration involves a special and delicate technique, it (blood test evidence) is likely to be accepted with extreme caution in the courts of justice.’

This section tells the story of those early exciting years when the discovery that blood tests could be useful in helping to solve paternity cases was first realised. It tells of the initial objections and the early mistakes, and explains the limits of the first available tests. It ends with the first attempt to introduce legislation to cope with the use of blood tests in the courts – the Bastardy (Blood Tests) Bill 1939.

In 1901 Karl Landsteiner discovered that human blood could be divided into different groups and this, together with the discoveries of Gregor Mendel (father of modern genetics) in 1865, led to their application to paternity problems by Von Dungern and Hirschfeld in 1910. Landsteiner found that human beings could be divided into four types according to particular substances contained in the red cells of their blood. He called these types 'A', 'B', 'AB' and 'O', and later discoveries were to establish that these groups could be subdivided into many different sub-groups. An explanation of the way blood groups are inherited is to be found in the Law Commission’s Report on Blood Tests and the Proof of Paternity in Civil Proceedings. Blood groups could help in problems of doubtful paternity because they follow well-defined laws of inheritance and could be investigated by clear-cut objective tests. Race and Sanger said:

'A character that is to give unequivocal evidence concerning parentage must be simply inherited, and its mode of inheritance must be known with certainty; it must be adequately developed at birth or soon thereafter; it must retain its character throughout life, unobscured by climate, disease, age or by any other environmental or genetical agency. If that character is to be used to settle a dispute it must be objective. The blood groups, assuming proper tests and interpretation, fit these criteria.'

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147 JP ‘Medico-legal Importance of the Blood Groups’ 26 April (1924) 273
148 Transactions of the Medico-Legal Society (1924) by G Roche Lynch 65
149 ‘Mendel’ by Vitezslav Orel
150 Infra (note 153) The Lancet (1919) 2 675
151 Law Commission’s Report No. 16, 1968, Appendix B
152 Race and Sanger – Blood Groups in Man. (1968) 448
What were 'proper tests and interpretation' was to be disputed in the courts - particularly in the early days, but also occasionally later. Eventually the principle was accepted, although at first even this was disputed.

The first mention of the possibility of applying blood groups to medico-legal matters that I could find was in *The Lancet* (1919) where Drs. L & H Hirschfeld wrote:

'... When the parents had A or B we found sometimes the Group O occurring in the children. On the other hand, we never found either A or B property in a child when it was absent in the parents. This observation will permit under certain circumstances of medico-legal decisions being made in order to find the real father of a child. If we find in a child either A or B property when it is absent in the mother it must be present in the real father.'

This excited interest in those working in the same field and was eventually discussed at a meeting of the Medico-Legal Society in 1924 which was reported in *The Lancet*:

'At the recent meeting of the Medico-Legal Society, Dr. G Roche Lynch told the story of blood groups from their first discovery in 1900 with a view to determining their importance, if any, from the medico-legal standpoint. ... It would seem to be possible to demonstrate from the blood groups that a given child could not have been produced by some particular parents.'

That meeting was also reported in *The Justice of the Peace and Local Government Review (JPLGR).*

'The really hopeful line of enquiry was indicated by yet another speaker in the bio-chemical examination of the blood. Investigations on these lines are being zealously pursued both in America and here and some results have already been obtained.'

And later in the same issue:

'The future probably holds some interesting developments of the theory and especially of its application. We believe evidence based upon it has been accepted in the American courts, but we regret to say we do not know with what result. The theory will become more satisfactory if time confirms the

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153 L & H Hirschfeld – ‘Application of blood groups to paternity problems’ (1911) *The Lancet* (1919) 2 675
154 See also Chap 16 (Blood and Forensic Science) in Crime and Circumstance – Suzanne Bell. 157 et seq; also Learmonth - *J Genetics* (1920) 10 141, 147
155 Medico-Legal Society Proceedings *The Lancet* (1924) 1 913
156 ‘Medico-legal Importance of the “Blood Groups”’ *JPLGR* (1924) 49
157 op cit .273
alleged unalterable properties which determine the groups. But like all scientific knowledge whose demonstration involves a special and delicate technique, it is likely to be accepted with extreme caution in the courts of justice, and to be looked at askance by the 12 good men and true who have to decide the issue whether a man shall be hanged or not. Incidentally, as the law stands, there will be great difficulty in securing the blood of a person accused either of murder or of paternity.

The problem of whether or not it was possible to compel anyone to submit to a blood test was to be discussed exhaustively in the Courts, in Parliament and in the Journals for the next half century.

American Journals had discussed the use of blood group evidence three years earlier. In 1921 Dr. Reuben Ottenberg wrote in *The Journal of the American Medical Association*: 158

'Suppose then that the blood of a child and the alleged parents have been tested, what conclusions can be drawn? If the child's blood is the correct group for the alleged parents then we can say that the child could be their offspring not that it of necessity must be. But, on the other hand, if the child's group is wrong for the two asserted parents, then one can say with absolute certainty that the child must have a parent other than one of those asserted......In practice, of course, it may be difficult to obtain the consent of all 3 parties (or at times 4) to the blood test. The test can easily be done with a few drops of blood obtained from a painless prick with a small needle. In view of this, and the importance of the question often at issue, it seems as though some legal means could be devised by which the persons concerned could be compelled to allow the examination at the hands of a representative of the court.'

Clearly they also were concerned about the problem of compelling reluctant potential parents to be tested.

Although there is no record of blood test evidence being used in this country until 1932 (infra) in 1927 *The Times* 159 reported its use in Germany:

'A blood test to determine paternity has been used at a trial at Ellwanger (Wurtemburg) in which a woman was sentenced to six months for perjury. In a previous application for an Affiliation Order the woman had sworn that a certain man was the father of her illegitimate child. Blood tests were made on the child, the mother and the alleged father, and it was found that the qualities

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158 *Journal of the American Medical Assoc.* (1921) Vol 77 682
159 *The Times* 3.12.1927
of the blood bore no resemblance to those either of the man or of the woman, but on the contrary revealed completely different characteristics. The Court decided that these tests constituted proof that the paternity of the child must be attributed to another man, and that the accused had therefore been guilty of perjury.'

However, the very next day *The Times* reported another German case by a higher court which came to opposite conclusions:

‘In this case application was made on behalf of a child for support by the man whom the mother had designated as the father. The man denied paternity on the strength of a blood test. The Court, after examining the medical evidence, came to the conclusion that the requirements of the law were stricter than those of medical science…The fact that out of 2,093 tests undertaken in 1926, one case proved an exception to the rule was enough in the opinion of the Court to throw doubt upon the certainty of the method, and the law demanded absolute proof that the man could not possibly be the father. Owing to this one exception, the Court decided that it was not possible with absolute certainty to prove that a child never belongs to another blood group than the parents.’

Although the report of this case seems to limit the usefulness of blood test evidence, apparently it did not prevent their use altogether as two years later Dr F Schiff reported: 160

‘More than 5,000 blood tests have been made in Germany over the last five years, mostly over the last two. Up to 1926, 88 cases had been collected, though there were probably more, but not very many more. In 5,500 cases where blood tests were used, about every second man had been denounced unjustly.’

He also said that special experts were appointed to conduct these tests.

Although it is thought probable that there must have been some earlier use of blood tests in this country 161, it was not until 1932 that the first English case in which blood test evidence was used in a paternity case is recorded. G M Bartholomew, had found the earliest to be in 1935 162 but after a search I found the following case reported in *The Times* in 1932:

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160 *The Lancet* (1929) 2 921
161 ‘Medico-legal significance of blood groups’ *The Lancet* (1928) 2 711
The Sleaford (Lincs.) magistrates on Thursday adjourned an affiliation case for a blood test to be made to decide paternity. The applicant was a domestic servant. The defendant denied the girl's story in its entirety. What is known as the Bernstein blood test has been frequently used in Austria and Germany, principally for deciding paternity cases.\textsuperscript{163}

It is perhaps unfortunate (for these purposes, and for the advancement of the use of blood test evidence in this country) that the tests were inconclusive and \textit{The Times} reported:\textsuperscript{164}

\begin{quote}
‘When the case was resumed on Thursday, defending counsel stated that a test had been made by a London pathologist, but was of no use to either side, consequently the results of the test were not produced. The magistrates made the order applied for.’
\end{quote}

However, in that same year, and just previous to the above case (in January) the Irish Courts had accepted blood test evidence in a paternity case. An appeal to the Dublin Court was dismissed after a blood test had been taken:

\begin{quote}
‘An elderly man was sued by a young woman in the District Court for the maintenance of her child and the District Justice made an order against the defendant. On appeal to the Circuit Court, he produced the evidence of the (blood) group test that he could not be the father of the child. The test was carried out by three medical men in the presence of the solicitor of the two parties, and, after considering this and other evidence, the judge allowed the appeal. This occasion, is, we believe, the first on which the test has ever been accepted as evidence in the British Isles, although it is widely used in several continental countries.’\textsuperscript{165}
\end{quote}

Although it had not been used earlier in paternity cases, blood test evidence had been used in some criminal cases, and some time earlier than this had been accepted in two murder cases as a means of identifying blood stains.

\begin{quote}
‘[T]he unreported case of R v Blakeman, tried before Mr. Justice Acton at the Leeds Assizes a few years ago. In that case, Dr. Roche Lynch testified that the blood found on the clothing of the accused belonged to the same group as some stains discovered on the clothing of the infant he was accused of murdering - on this and other evidence the accused was found guilty but insane. The same expert witness gave evidence in the recent case of R v Kell tried at Winchester last November in which the accused was acquitted of the murder of a young girl. He found the blood of the girl belonged to the same
\end{quote}

\textsuperscript{163} ‘Blood Tests in Affiliation Cases’, \textit{The Times} 26.3.1932  
\textsuperscript{164} ‘Blood Tests in Affiliation Cases’ \textit{The Times} 19.4.1932  
\textsuperscript{165} ‘Blood Grouping and Paternity’ \textit{Solicitors Journal} (1932) Vol 76, 154
group as a blood stain found on a handkerchief said to belong to the accused.\textsuperscript{166}

There was, at that time, considerable opposition to the acceptance of blood test evidence by the courts in paternity cases (see below). It is perhaps surprising that blood test evidence was more acceptable to the courts in murder cases. However, some Magistrates did not care to use this modern evidence in paternity cases (for whatever reason), and without legislation, it was not possible to compel them to do so. On 24 April 1934, Sir Francis Freemantle asked the Secretary of State in the House of Commons:

'Whether he is aware that, in a recent case of disputed paternity, both parties agreed to accept a blood test as evidence, and that the magistrates decided the case without such evidence; and whether he will consider the advisability of securing the admission of such evidence on the requisition of either party with retrospective effect; whether he is aware that blood tests are accepted in several countries as normal evidence of non-paternity; that this evidence is found to be conclusive in one out of three cases of actual non-paternity; and whether he will take the necessary steps to make such proof admissible in the English courts?'

He was answered that such evidence was admissible and that he was sure that magistrates were fully aware of this; and that it was not possible for the case to be re-opened as it was 'for the Magistrates to sum up what was the value of such evidence'; and that without legislation blood tests could not be made compulsory. An article in the Justice of the Peace & Local Government Review (\textit{JPLGR}) discussed this, pointing out that though, of course, the case could be re-opened on appeal, the costs of this and the costs of blood tests as a whole, made it unlikely, not to mention the difficulties of bringing the expert to court:

'For these reasons we expect to see very few cases before justices in which expert evidence upon the blood groups is put forward. When it is put forward it ought to be received seriously and carefully considered. There is a tendency in some \textit{justices} to sweep it aside as fantastic. It is not very long since the same attitude towards fingerprints was common, and it still survives here and there in a non-receptive mind.'\textsuperscript{167}

\textsuperscript{166} Comment on \textit{R v Blakeman So. Jo.}(1932) Vol 76, 138
\textsuperscript{167} ‘Blood Groups in Affiliation Cases’ \textit{JPLGR} (2.6.1934) 355
In 1935 an affiliation case was reported in the *JPLGR* on 15 January before Shoreham (Sussex) Justices who apparently thought they were using blood tests for the first time ever:

'An important affiliation case came before Shoreham (Sussex) Justices on 15 Jan, the fate of the Summons being dependent for corroboration on the result of a blood test. Relying on the proviso laid down by Statute that 'the evidence of the woman must be corroborated in some material particular by other evidence to the satisfaction of the Justices', the Complainant's Solicitor stated that he could bring no corroboration excepting the result of the blood test, for the obtaining of which the hearing of the Summons had been adjourned. The child and the Defendant belong to the same (B) group and the Complainant to (O) group, therefore the test was inconclusive. Dr. Little agreed that because 'B' was found in the Defendant's blood and the child's there was no proof that he was the father any more than any other man of group 'B'. Dr. Little said he had not known of any other case in England where blood tests had been used.'

In order to obtain an affiliation order, it was necessary that there should be corroboration, and because of the inconclusive blood test there was held to be no corroboration and the case was dismissed. It is difficult to see how, at that time when so few tests were available, such evidence could ever amount to corroboration. Later, when blood tests became more sophisticated so that results were given as a probability ratio, it was so used - particularly where there were rare blood groups and consequent high probability ratios involved.

We have to wait until 1938 before a case is reported in which there is an exclusion result:

'In recent proceedings before the Marlborough Justices, the applicant expressed her willingness to co-operate in the (blood) test. Accordingly she, her child, and the man whom she alleged to be the father visited Dr. G Roche Lynch's laboratory and had specimens taken. Last Monday at the resumed hearing Dr. Lynch gave evidence that ..., he (the alleged father) could not be the real father of the child. The applicant's solicitor said he was quite prepared to accept Dr. Roche Lynch's statement and the chairman of the Bench therefore dismissed the application.'

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168 Reported Cases, *JPLGR*, (15.1.1935) 61
169 Reported Cases, *BMJ* (1938) 1 1135
In many countries legislation had already been introduced to make blood tests compulsory in disputed paternity cases - in Sweden (1933), New York (1935) - followed by 10 other US States later, and Denmark and Germany (1937).

The Bastardy (Blood Tests) Bill 1938/9

The first attempt to introduce legislation in respect of the use of blood tests in cases of disputed paternity in this country was made in 1938; although not until 30 years later was such legislation successfully incorporated into our law. This first Bill was 'killed' by the outbreak of World War II. However, but for this event, it seems very likely that it would have passed through both Houses of Parliament - it had already successfully been piloted by Lord Merthyr through the Lords without substantial opposition. It is interesting to speculate whether this would have been a good idea.

As its title suggests, the Bill applied to bastardy/affiliation cases only and not to matrimonial causes. There was no suggestion, nor any discussion, that the Bill might be widened; and that the inheritance of property might be questioned by an attack on the presumption of legitimacy – in spite of insistence by those in favour of the Bill that it was a good thing to establish the truth about paternity. It is clear from the introductory 'Explanatory Memorandum' that the Bill was mainly for the protection of wrongly accused alleged fathers – to help them escape from scheming women who sought to make them pay for children that they had not fathered. It did not help the woman to establish paternity:

'The proportion of the cases in which a man who is in fact innocent can be excluded is on an average about one in three, and in the remaining two cases the result will be inconclusive. If the man is innocent and in a rare group, the chances of his exclusion are greater than if he is in a common group. If he is the real father of the child, he cannot be excluded; but, of course, he cannot be fixed with paternity.'

This must have been reassuring to a largely male Parliament. It was not thought to apply to their daughters:
'I am afraid it will take some time before people of this class (girls who are unfortunate enough to bring these proceedings) can be persuaded that it is nothing at all to have your blood taken from you by some doctor who, after all, will not be anything but an ordinary practitioner.' Lord Maugham

The only opposition came from Lord Gorell, speaking on behalf of the National Council for the Unmarried Mother and her Child:

'It can in no circumstances; I suggest to your Lordships, benefit the applicant. It is a Bill framed from a man's point of view. From the point of view of the woman, which is that with which naturally my Council is primarily, though not exclusively concerned, the time is not yet ripe for the passage of this Bill.'

Viscount Dawson of Penn countered this point by saying:

'What injustice can there be to a woman to have the truth brought out? In my judgment one advantage of having these tests will be that there will be a definite reduction of the cases which are wrongly based and falsely brought. It is most important to emphasize that there is no injustice to anybody in any case by bringing out the truth... Every country in Europe adopts these principles. Those who adopt these principles are culled, not from the scientists of one country, but of the whole civilised world. I would submit to your Lordships that this is a fair test, and it is a test in the interests of justice.'

In that case why not apply the Bill to matrimonial causes? Maybe the truth might not always be so convenient in those cases.

Clause 1 gave the Court power to order blood tests on the applicant, her child and the defendant: ‘at the request of either party the Court ‘shall require’ those tests’. The sanction proposed was that if the applicant refused to undergo the tests the Court should dismiss her application. There is no mention of possible refusal by the defendant. There is also no mention of possible refusal by an older child – children were apparently presumed to be under the mother's control.

In the debate in the House of Lords on the Second Reading, Lord Merthyr said:

'We have deliberately used the word 'shall' because we fear that if it is not made compulsory the practice will very widely differ all over the country. ... I submit that it is reasonable to say that a court may use its own discretion if no party asks for it, and that if either party does ask for it then the court shall

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170 Hansard Feb (1939) 710
171 Op cit 701
172 Op cit 690
order it. ... The result of this clause will be, I think, that tests will be ordered wherever there is a real conflict of evidence in these cases.'

Lord Atkin was very much in favour of compulsion:

'... the question is whether they (the courts) should be empowered to demand it (blood test evidence). I suggest that they should have the power to require it to be laid before them.'

Clauses 2, 3 and 4 dealt with the appointment of testers, the admission of certificates (even if rare blood groups were involved and there was a strong possibility of paternity, no comment could be made), and costs.

Clause 5 allowed the Lord Chancellor to make administrative rules about conduct of tests, form of certificate, qualifications of approved persons, scale of fees, etc. Lord Maugham thought there might be difficulties:173

'It will not be an easy job for the Lord Chancellor to do that because your Lordships will observe there are difficulties regarding procedure in connection with the matter which in some cases would be difficult to get over.'

And Lord Gorell was unhappy - though he accepted the need for regulation:

'... it can hardly be denied that at the present time there may be many mistakes because these tests would not be fully and properly taken ... I am given to understand that they (the people qualified to conduct these tests) are very few indeed, and if that be so it would inevitably follow either that there would be great delay in the taking of the tests, or else they would be taken by those who are not properly qualified ....'

Clearly Lord Merthyr believed very strongly in this Bill, and foresaw many of the difficulties that lay ahead if the Bill did not succeed:174

'Finally, if this Bill does not pass into law, what will happen? These tests will go on. They are not illegal. They will go on in small numbers, but they will be expensive; they will be for the rich only; they will only be able to take place where there is agreement. They will be completely unregulated; there will be no standardisation of practice, there will be no rules.'

173 Op cit 710
174 Op cit 695
Those would undoubtedly have been the advantages of the Bill, but the fact that it was so narrowly drafted and so obviously weighted against the women applicants surely meant that its disadvantages outweighed its advantages.

The Bill was welcomed by the JPLGR

'Lord Merthyr's Bastardy (Blood Tests) Bill has, we are happy to see, secured its second reading in the House of Lords where it received a good deal of support based on informed discussion... The proposals as drafted seem to us proper and workmanlike, but they are novel, and require careful and detailed examination.'

After its Second Reading, the Bill was referred to a Select Committee of the House of Lords. Although the Select Committee made certain amendments to the original Bill, they recommended that the Bill as amended should be passed into law (3).

The Committee were:

'unanimously of opinion, that the qualities of blood underlying blood grouping, and the laws of inheritance governing the transmission of these qualities from parents to children are accepted by such a consensus of scientific opinion throughout the civilised world as to render it desirable in the interests of justice for this knowledge to be applicable in affiliation cases'. (2)

They were satisfied that:

'The risk of error in the making of blood tests has been reduced to negligible proportions and that the tests not only might, but would prevent injustice.' (4) They found that the preponderance of legal and medical opinion was emphatically in favour of the use of blood tests as evidence in affiliation cases (5a).

They rejected evidence that this was an:

'Interference with the liberty of the subject' or that 'a mother might well shrink from even so simple a proceeding' (6) Or that science was not yet sufficiently advanced. (8)

And they said that:

'After critical consideration of their (the scientists) evidence we see no alternative to accepting the conclusion that blood tests, carried out by approved experts, would render reliable and valuable assistance to the courts in affiliation cases.' (9)

175 Editor’s comment, JPLGR (1939) 105
They considered and rejected the proposition that blood tests should be compulsory in all affiliation cases, but decided that it should be mandatory where the defendant demanded blood tests, but otherwise should be discretionary (10). They considered whether there were any circumstances in which an Order in Bastardy could be made notwithstanding the refusal of the applicant to submit to the taking of blood for a test and in particular the very exceptional cases in which the taking of blood might be detrimental to the health of any of the parties, and more particularly of the child. But they thought that in view of the fact that responsibility for taking samples would rest with a qualified medical practitioner, there was no need for this (11). Presumably the applicant could not be said to have 'refused' to undergo tests if the medical practitioner had decided on his or her own responsibility not to go ahead with them.

The Committee thought the costs would be between £5 and £10 (possibly lower) (12) and agreed that the courts should have discretion to impose such costs upon the local funds. They should also be able to demand security for payment of costs. They were in agreement that the tests should be sufficient evidence of the facts shown thereby, but various other practical objections were considered and rejected.

The Committee recommended setting up approved testing centres - two immediately and possibly four later (16b). They suggested that the Court have power to appoint a woman's own medical adviser to take the samples because of possible nervousness (16d), but the Court should be able to decide at what stage in the proceedings the tests should be ordered.

Commenting on this Report, the *Solicitors Journal*\(^{176}\) were particularly concerned about the provision for payment out of public funds:

> 'The measure authorises magistrates in proper cases to order payment of the costs out of public funds and it was stated that the imposition upon local funds of the costs of obtaining medical evidence in these cases would be an innovation for which there was no precedent in law. The expenditure from public funds would have the effect of securing positive results in one third of the small proportion of such cases in which the respondent was not the father,

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\(^{176}\) (1939) *So. Jo.* 345, Comment on evidence given to HL Select Committee
and it appeared that the expenditure involved would be out of all proportion to the actual results which might be achieved.'

Mr. LR Dunne, Metropolitan Magistrate, was particularly concerned about the fact that compulsory tests were envisaged:177

'Compulsory blood tests ordered on the courts own motion involved an interference with the person and liberty of the subject. Blood tests should be only at the request of the defendant and the Court should hear the case and decide provisionally and then have a test, and if there was exclusion then the adjudication would be discharged.'

The Committee rejected this idea as (not surprisingly) they thought it would bring the Courts into ridicule and disrepute.

However, on the whole, the Bill was welcomed and all opposition seemed to have been vanquished.

'Lord Merthyr and his supporters are to be congratulated on the large measure of success which their proposals so far have met with.'178

After the Select Committee had finished with it, a number of amendments were made to the Bill. These were, in the main, of two kinds.

Firstly, amendments making it even more obvious that no assistance was meant to be given to the women applicants – in particular, Clause I was amended to take away from the applicant the power to request tests, leaving this with the defendant alone, and secondly, amendments which tightened up some of the procedural aspects of the Bill.

Sadly, World War II intervened and all thoughts of proceeding further with the Bill had to be abandoned.

The next section examines the happenings and cases in this field which eventually led to the next attempt at legislation in 1961.

177 Sol Jo, op cit 386
178 *JPLGR* (1939) 567, Noting HL Select Committee Report
b) Blood Tests: 1940 to 1961

‘Yet who would have thought the old man to have had so much blood in him.’ ¹⁷⁹

This section deals with the events and cases following the abandoning of the Bastardy (Blood Tests) Bill due to the outbreak of World War II – and leads up to the introduction (and passage through the House of Lords) of the Affiliation (Blood Tests) Bill 1961. The 1939 Bill would have given power to the courts to order blood tests in addition to regulating the practice of taking and using blood test evidence. After a few years it was thought timely for another attempt to introduce legislation.

By this time, scientists had discovered several more blood groups that could be tested for so that more accurate information could be gathered to help decide disputed paternity cases. But although it became easier to decide when a man was not the father, it was still not possible to prove positive paternity.

At this time there were very few reported cases in which blood test evidence was used, but this was largely because most of the cases were heard in Magistrates Courts, and only the occasional appeal would be likely to be reported. That there were actually quite a number of cases is shown by the following quotation from an article by D Harley and G Roche Lynch, in *The Lancet.* ¹⁸⁰

‘The results of blood-group tests in a series of 50 cases of disputed paternity are presented in the accompanying table. Most of these cases were affiliation cases in which legal proceedings had been instituted or were pending. From the statistical standpoint the number of cases is too few for generalisations, but they are our results to date and we present them for what they are worth. In the 8 cases in which non-paternity was established evidence of the blood-group test has been given in court only once, the other cases being dropped by the plaintiff’s legal adviser as the result of the test.’

The last sentence in the above quotation is particularly significant as it shows the value of blood test evidence when dealing with disputed paternity cases – cases where

¹⁷⁹ Shakespeare, *Macbeth* Act IV 38
¹⁸⁰ David Harley & G Roche Lynch ‘Blood Group Tests in Disputed Paternity’ *The Lancet,* 18.5.1940 911
non-paternity could be established did not need to take up court time and the putative father did not need to face an unnecessary and difficult court experience. At that time about 5,000 affiliation cases were heard annually in the courts.  

In 1942 blood test evidence was used in a nullity suit. In Wilson v Wilson, the husband alleged that his wife was pregnant by another man at the time of their marriage. Although he admitted sleeping with her before the marriage he said this was after the time of conception. Blood tests had been taken and the husband was excluded from paternity - husband OM, wife BM, child ABMN. The Judge remarked that the case was clear and fully proved and pronounced a decree of nullity. Commenting on this case The Law Journal remarked that this could help circumvent the rule in Russell v Russell [forbidding a husband to give evidence of non-access in divorce cases - overruled by the Law Reform (Miscellaneous Provisions) Act 1949]:

‘If a pathologist swore that blood-grouping tests excluded the husband as the father, this might well be held to be sufficient evidence of adultery, and no question of non-access would arise.’

The Russell case itself may have helped to sway public opinion in favour of blood test evidence and the Wilson case was commented on in similar terms in the British Medical Journal.

However, that there was still not much known about the practice and availability of blood test procedure away from the main centres of population is shown by a letter (from Morecambe) published in the same volume of The Law Journal:

‘I have tried, through local medical practitioners and many other sources, to arrange for blood tests to be taken, but unfortunately the medical practitioners have been unable to grant any assistance at all. It would, I am convinced, be of the greatest help to the profession if it could be made known where blood tests could be carried out ...... Despite all the limitations of blood-group evidence and the necessity of all parties consenting, it could, if

181 ‘Blood Group Tests in Disputed Paternity’ The Lancet (18 May 1940) 911
182 Wilson v Wilson (1942) LJ 129
184 Russell v Russell (1924) AC 687
185 ‘Blood Groups in a Nullity Suit’ BMJ (20.6.1942) 776
made generally available at an economic figure, be a very real help in affiliation and like cases.’

In *The Medico-Legal Review*\(^{187}\) two interesting cases were reported. In the first (in the California Supreme Court), the attorney for the complainant was so impressed by the blood test evidence (which completely excluded the defendant) that he withdrew from the case – in spite of the fact that the California Supreme Court did not hold blood tests to be conclusive in the determination of paternity. In the second case (in South West London Police Court), the magistrate decided for the complainant in the face of blood test evidence excluding the defendant. In this case (a summons by the wife against her husband for maintenance), the husband denied paternity. The wife repudiated the adultery and agreed to have a blood test. The tests excluded the husband from paternity. There was no other evidence of adultery, and there was some evidence of cohabitation at the time of conception. Having heard and seen the wife, Mr. Mullins did not think she was of the type that commits adultery, and he was not prepared to bastardise the child on blood test evidence alone. The legal presumption that a child born in wedlock was legitimate was strong, and he was not prepared to upset it solely on scientific evidence. The *BMJ*\(^{188}\) supported Mr. Mullins and said:

‘Few who heard the decision doubted its wisdom. It would be an evil day for our courts if they ever felt obliged to elevate scientific evidence into a class by itself, instead of, as at present, keeping it on the same footing as other evidence.’

These remarks contrast with views expressed in the debate on the Bastardy Bill!

The Californian case also does not have a very satisfactory ending. Another attorney who was prepared to proceed with the case was found, and the Court held (as it was bound to do following previous authority of *Arais v Kalensnikoff*\(^{189}\)) that where scientific evidence and evidence of facts conflicted, the relative weight of the evidence must be determined by the jury or the trial court, and they decided in favour of the complainant. On appeal, the Supreme Court Judge concurred, but reluctantly:

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\(^{187}\) Blood Group Evidence set aside in favour of presumption of legitimacy *Medico-Legal Review* (1944) Vol. 12 106; Also ‘Disputed paternity: results of blood grouping tests held not to be conclusive’

\(^{188}\) ‘Assessment of Blood Group Evidence’ *BMJ* 22.1.1944 Vol. 1

\(^{189}\) *Arais v Kalensnikoff* (10 Calif. (2nd) 248, 74 P (2nd) 1043)
‘If courts do not utilise these unimpeachable methods for acquiring accurate knowledge of pertinent facts, they will neglect the employment of available potent agencies which serve to avoid miscarriages of justice.’\textsuperscript{190}

\textit{The Medico-Legal Journal}\textsuperscript{191} commented:

‘In the present case a widely accepted method of determining parentage had been applied, the results of which were definite, and improvement in the administration of justice was not promoted by rejecting the new and certain for the old and uncertain.’

In that case the defendant, Charles Chaplin, was well able to support the child - but was this justice?!

Next year (1948) in the nullity case of \textit{Liff v Liff}\textsuperscript{192} again blood test evidence which corroborated other evidence was allowed to prove that the child could not be the child of both petitioner and respondent, and a decree was granted, on the grounds of pregnancy by another man at the time of the marriage (unknown to the husband).

The \textit{BMJ} commented on this case:\textsuperscript{193}

‘In expert hands the tests are for all practical purposes infallible and it is a pity that lack of knowledge and suitable legislation has prevented their extended use in England. In many other countries the courts have for years been only too glad of their help in a very difficult class of case.’

Blood test evidence was accepted by the court (eventually) in an affiliation case reported in the \textit{JPLGR}\textsuperscript{194} under the heading ‘A Disquieting Case’. An apparently credible case was made out by the girl (‘a particularly attractive and intelligent girl of 19’) and the defendant denied paternity but admitted one act of intercourse outside the normal period of gestation. He said she had had intercourse with several other men, but she denied this. An order was made against him but he appealed and a blood test was taken which excluded him from paternity. The Journal commented:

\textsuperscript{190} \textit{Berry v Chaplin (t69 P (2nd) 442 Calif. 1946)}

\textsuperscript{191} ‘Disputed Paternity: Results of blood grouping tests held not to be conclusive’ \textit{Medico-Legal Journal} (1947) 140

\textsuperscript{192} \textit{Liff v Liff (1948)} Weekly Notes 128

\textsuperscript{193} ‘Nullity decree on blood grouping evidence’ \textit{BMJ} (17.7.1948) 2 178

\textsuperscript{194} ‘A Disquieting Case’ \textit{JPLGR} (1951) Vol. 115 451
‘That these proceedings terminated in a forensic victory for the defendant is clear, but reflection on the realities is less satisfying. The complainant’s evidence was never effectively challenged, and whilst her story and manner of telling it convinced not only a very experienced metropolitan magistrate, but impressed everyone concerned in the case with its truthfulness, the defendant on the other hand had admittedly told lies and misled his own advisers.’

Because this case was decided on blood tests alone, it provoked a certain amount of comment and correspondence in the journal. Later on in the same volume195, the writer told of a similar case with, on the face of it, an equally credible complainant, which never came to court because he found out by close questioning beforehand that the girl had had intercourse at the relevant time with another (unknown) man. Later on196 there is the comment:

‘Inertia, prejudice and timidity should not be allowed to stand in the way of a badly needed improvement in the administration of justice.’

However, no progress towards legislation was made in spite of various discussions. The joint Committee set up by the British Medical Association and the Magistrates Association to discuss the Law in Relation to the Illegitimate Child talked about it (reported in the JPLGR197), but:

‘The difficult question of blood tests was the subject of discussion by the joint committee but as it could not arrive at agreement no recommendation is made.’

But then, in 1954, at its Annual General Meeting, the National Council for the Unmarried Mother and her Child, who had opposed the 1939 Bill, changed its mind - though it is not clear why it did so, and decided to give warm support to it. And in 1957, Alan Grant MA, MD, MRCP, was able to say in The Medico-Legal Journal: 198

‘It is still frequently said that the Courts are unwilling to accept blood group evidence. This must reflect the past, for in my own experience, limited to the last five years, it is simply not true. I have never been concerned in a case where the court reached a decision that was not consistent with the blood group evidence.’

195 JPLGR op cit 506
196 JPLGR op cit 664
It was unfortunate that at this stage there should be reports of errors made by inexperienced testers in the USA. Alex. Wiener MD reported in *The Journal of Forensic Medicine*\(^{199}\) about one case where one of a family had been excluded for immigration purposes; one case where blood tests in a divorce case indicated non-maternity – and on re-testing the error was found; and one affiliation case where the father was excluded, the mother protested, and on re-testing an error was discovered. In all these cases the mistakes had occurred because inexperienced testers were not familiar with the procedure and did not take enough care. It was obvious that something would have to be done and that there was a need for some regulations or legislation to standardise procedure in order to safeguard against mistakes of this kind. In the hands of an experienced qualified tester there should be no possibility of such errors occurring.

In 1957 Lord Merthyr considered reintroducing the Bill and a Committee of eminent scientists and lawyers was gathered together to consider possible modifications needed to bring it up to date. However, in 1958 Lord Merthyr was elected Deputy Speaker of the House of Lords and was thus unable to re-introduce the Bill. Fortunately Lord Amulree later decided to sponsor the measure.

The cause received somewhat of a setback in 1958 by decisions in two Scottish cases, which, although not binding on the English Courts, had some persuasive authority. First, the case of *Imre v Mitchell*\(^{200}\). In this case a woman brought an action craving a declaration that her child was a bastard and not the child of her former husband whom she had married three weeks after the birth of the child - after a divorce the husband had been given custody, and she hoped to regain custody of the child. The only evidence upon which her case rested was evidence of a blood test which excluded her former husband from paternity.

Although there was some question about deciding the case solely on blood test evidence, it was accepted that a 100,000 to 1 chance of error was a sufficiently high degree of probability to discharge the burden of proof. But this was reversed on appeal, the Lord President stating:

\(^{199}\) *Journal of Forensic Medicine* (1956) Vol.3 139

\(^{200}\) *Imre v Mitchell* (1958) SLT 57 and (1959) SLT 13
‘In the result therefore I approach the facts with two considerations in view, firstly that there is in the circumstances of this case an almost irresistible presumption of legitimacy, and secondly that the testimony of the pursuer herself can be of no avail to overcome that presumption.’

Thus holding that blood group evidence on its own was insufficient to overcome the presumption of legitimacy. As GW Bartholomew said: ‘It is therefore rather difficult to understand the attitude that can refuse to act on scientific evidence, the margin of error of which is certainly no greater than 1 in 1,000; rejecting such evidence in favour of evidence whose margin of error is indeterminate but certainly very much wider than that of blood group evidence. There is something slightly silly about a situation in which evidence of this nature can be discounted in favour of evidence that an inquisitive neighbour saw a tall dark man leaving the house in the small hours of the morning. How can a court possibly weigh the one against the other? Where there is evidence of such high intrinsic probability, a probability which is far greater than that of any other evidence which can be brought with regard to the question, it seems unreasonable to hold that it cannot be regarded as conclusive on that matter. It may be admitted that blood group evidence is not 100 per cent certain; what evidence is? But to reject such evidence because of its failure to reach this ideal standard and then to act on other evidence which must be of far less probability is surely to strain after gnats and swallow camels’.

The second Scottish case is that of Whitehall v Whitehall202. This was a petition for divorce on the ground of adultery and the husband, wishing to prove the adultery, asked the court to order the wife and child to submit to a blood test. The Court refused to allow this. GW Bartholomew (op cit) goes into the facts and judgment of this case in some detail and concludes by saying at page 325:

‘It seems reasonably clear, however, that the decision in Whitehall v Whitehall turns upon questions of Scottish procedure which, in the opinion of Lord Wheatley, differing on this point from Lord Salvesen, does not necessarily correspond with the position in English law. It follows that the decision cannot be regarded as even possessing great persuasive authority so far as the English courts are concerned, and for the purposes of assessing the power of an English court to make an order for blood tests we must consider the position from the point of view of general principle.’

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202 Whitehall v Whitehall (1958) SC 252
He goes on to discuss old cases involving the *Writ de Ventre Inspiciendo* and the power the court has to order medical inspection in nullity cases involving impotence:

‘The effect of a refusal to undergo medical examination in nullity cases turning on questions of consummation is simply that the court may treat the refusal as sufficient evidence of the fact in issue and base a decree on the refusal. The English courts do not see the necessity for either compulsorily examining such women or incarcerating them, and there seems to be no logical reason why the Scottish courts should not be able to take the same view.’

After discussing also the power of the court to order discovery of documents he is of the opinion that an English court could have this power to order blood tests and:

‘There seems, therefore, to be nothing in principle which renders the ordering of a person who is not a party to the action to make available blood samples in any way an objectionable procedure. We would respectfully submit, therefore, that there is nothing in the arguments adduced in Whitehall v Whitehall which could be regarded as of great weight so far as an English court is concerned, and we would further submit, therefore, that if and when the problem comes before an English court the decision in Whitehall v Whitehall should not be followed.’

Bartholomew ends by quoting Wigmore:203

‘Must there be a precise precedent for everything? .... The courts can as well command a witness to let the jury, or qualified experts, inspect his premises, his chattels, or his persons, as to produce his documents. It is not to be supposed that our courts will finally commit themselves to the denial of such a plain dictate of principle and common sense.’

THE AFFILIATION PROCEEDINGS (BLOOD TESTS) BILL 1961

The Bill which Lord Amulree presented to the House of Lords204 in 1961 was entitled ‘An Act to empower Magistrates’ Courts and Courts hearing appeals therefrom to

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203 Wigmore’s Evidence Vol. VIII p.185
204 The quotations and page numbers in this part of this chapter are taken from the report in Hansard of the passage of the Bill through the House of Lords.
require the applicant for an affiliation order, her child, and the alleged father, to undergo blood tests, and for purposes connected therewith’.

Lord Amulree said it was ‘rather similar’ to the Bill introduced in 1939 by Lord Merthyr and, like that Bill, it only applied to affiliation cases and not to matrimonial causes. It was greatly changed during its passage through the House of Lords. The Bill also, like the 1939 Bill, gave power to the Court to order blood tests on the hearing of an Affiliation Order from mother, child and alleged father (and to dismiss the case if the order were not complied with) and it made arrangements for testing centres where these could be carried out. It also made provision for the court to order costs out of public funds.

When introducing the Bill, Lord Amulree gave a short summary of the scientific position and discussed the reliability of the tests and the possibility of mutation:

‘But one has to realise, I think, that there is no test in the world which gives results that are absolutely and invariably correct. In every test there is somewhere a flaw; but the number of exceptions to the principle is so extremely small that it does not affect what we feel about the value of the tests.’

He said the ABO, MN and Rhesus tests would be used and:

‘If those systems were used for the tests, it is reckoned that 55 or 60 per cent of the men wrongly accused of paternity would be exonerated; and I think your Lordships will agree that that is quite a satisfactory number.’

He suggested that the tests should be carried out in forensic laboratories attached to the Universities.

Mention has been made earlier of the difficulty of finding records of tests done, but some indication of the number at that time being carried out was given by Lord Amulree:

‘At the present time, there are about 200 tests a year which are done under the voluntary system.’
‘I was talking to one doctor who has carried out about 600 of these tests on a purely voluntary basis, and he tells me that he has been called to appear in court only three times, which shows that the bulk of the magistrates are prepared to accept this certificate given by the person who performs the test.’

Lord Amulree explained why they had given the Courts power to order a test:

‘When we were drafting the Bill, we felt that we must put in the word ‘shall’ so as to bring some kind of uniformity into the practice of the 900-odd courts in this country which might be called upon to deal with this kind of thing.’

But he did say that an Amendment (suggested by the National Council for the Unmarried Mother and her Child [NCUMC]) might be drafted to ‘provide for any case of conscience there might be.’

**Clause 3** of the Bill stated that the certificate should be commented on in court only if it showed that the man could not be the father. Lord Amulree in his introduction said he would be prepared to move an Amendment (also suggested by the NCUMC) allowing this to be introduced whatever the result might be.

The changes eventually made in the Bill were largely due to the efforts of Baroness Summerskill at the Second Reading:

‘This Bill deals with a tragic human figure, the unmarried mother, and there are certain provisions in this Bill which, if not carefully examined, will bear very hardly upon her. The noble Lord who has just spoken … did not deal in any one respect with what could be the inhuman repercussions of this Bill.’

She was particularly concerned that the Bill did not ‘weigh the scales of justice fairly between the man and the woman.’ and said also:

‘If the provisions of this Bill are examined impartially, I think that it can be held that their limited value to society cannot compensate for the undoubted hardship which they inflict upon unmarried mothers.’

Baroness Summerskill repeated what Lord Gorell had said in 1939 when he opposed the Bill and also what Mr. Dunne said in the Select Committee Report that ‘surely this
is an interference with the liberty of the subject’. She also spoke against the conscience clause suggested by the NCUMC:

‘If he inserts that Amendment, it means that a simple, ignorant woman will be compelled to formulate a rational argument in her defence; otherwise in a court of law her application will be dismissed.’

But she did support strongly the other Amendment of the NCUMC:

‘As Clause 4 states that only the certificate which is favourable to the man shall be produced, the only party who will demand further evidence must be the girl, who can be called upon to pay the expenses of a highly paid professional man or woman. Surely this is quite inequitable. I am not surprised, therefore, that the NCUMC recommend that all the certificates should be admitted as evidence and comment allowed upon them, rather than create an air of mystery about an inconclusive certificate. I feel strongly about this, and I believe that on this issue your Lordships should hesitate before giving it support.’

Baroness Summerskill went so far as to doubt the value of the NCUMC’s statement in support of the Bill since, as she said, there was a majority of men present at the relevant meeting. She ends as she began:

‘I plead the case of the unmarried mother, who I believe should evoke our compassion. It is she who will be punished throughout her life for her fault. Should we deliberately add to her burden, when she is desperately in need of our help and sympathy?’

Lord Merthyr strongly supported the Bill, demolished some of Baroness Summerskill’s points and explained some of the meetings that had led to the presentation of the Bill:

‘If it cannot help the unmarried mother, I say that the Bill cannot hurt her; it cannot harm her, I maintain, in any way unless, of course, her case is either fraudulent or mistaken. Then it can harm her. But does anybody really seriously claim that in that event she should not suffer?’

It is interesting that he does not say that she should not win her case, but that she should suffer! He went on to say:

‘I should like to deal with one or two of the points which the noble Lady made in her speech. She said that there would be inhuman repercussions. I hope
that question has been dealt with. I have tried to show what is the maximum hurt that will come to the woman, the mother of the child. It is nothing more or less than having her blood tested. I do not believe that it is more than that. The noble Lady said that this Bill was of limited value, and I am not disputing that. But if it is of any value at all, I would ask your Lordships, in the absence of really weighty objections, to pass it into law. The noble Lady said that it would be an interference with the liberty of the subject. That is a time-honoured phrase. Of course it is an interference with the liberty of the subject, exactly as is the rule of the road which compels us to drive on the left of it, instead of, when we want to, the right ….. Finally, the noble Lady said that the Bill, if it becomes law, will favour the man. The answer to that is simply this: that it will favour the man, but only if he has been wrongly charged with the paternity of the child. Only in that event, and in no other circumstances whatsoever, will it favour the man.’

Lord Taylor supported the Bill and added more details about the accuracy of the tests. Lord Longford, somewhat sarcastically (I presume) asked who these men were:

‘Have they, in fact, been what the noble Lord called paramours? They are not, in other words, innocent gentry – not like Members of this House.’

Earl Bathurst (for the Government) spoke of some of the technical problems that might arise:

‘What has to be considered is whether the assistance which might be rendered to the courts justifies the elaborate machinery which would have to be set up.’

But although he was rather lukewarm about it he supported the Bill in essence, although he was a little hesitant about costs:

‘I think it is only realistic to suppose that a large amount of the costs would be bound to fall on some public fund or other.’

Lord Amulree wound up the debate, replying to a question as to why the Bill did not apply to Scotland with the somewhat lame excuse:

‘The answer is that I really do not know, but I think that the reason was that when we were drafting the Bill we felt that there was no one expert enough in questions of Scottish Law to venture to make the Bill applicable to Scotland as well as to England.’

The House divided and approved the Second Reading with two against – Baroness Summerskill and Lord Longford.
The Bill was then referred to a Committee of the whole House. The large number of Amendments introduced prompted Lord Silkin to say:\textsuperscript{205}

‘I do want to draw the attention of the House to what looks to me like a considerable abuse of procedure. We gave this Bill a Second Reading on the assumption that this was the Bill we were going to deal with. I now find that, with the exception of Clause 9, every single clause has been withdrawn and that an entirely new set of clauses has been substituted …. I feel that that is going far beyond the proper procedure of this House …. I wonder whether we should really have given the noble Lord carte blanche to introduce something completely different.’

When Lord Amulree brought the Amendments before the House the option for the mother to ask for blood tests remained in. However, after a long discussion, it was taken out – on no real grounds, just that the House could not see when she might need to ask for a test. Perhaps, since the Bill only applied to Affiliation cases, this could have been so at that time, but \textit{Imre v Mitchell} might have given them cause to think for the future when a putative father might have some rights of custody. They also might have thought that scientific advances in the future might well mean that blood testing would soon acquire positive probative value – as of course it did. However, Baroness Horsborough said:\textsuperscript{206}

‘It is quite ridiculous to think that the mother would be asking for a blood test. If she knew what it meant, she certainly would not. I think it is an extraordinary suggestion that she should be brought in. I can see absolutely no reason whatsoever why she should.’

Considerations of equality did not signify, although some women’s organisations had tried. Lord Amulree said:\textsuperscript{207}

‘I was told by certain women’s organisations that they thought the mother should have an equal chance. I tried to convince them that they were wrong.’

Although the original Bill was stronger, the amended Bill by using the word ‘may’ gave discretion to the Court as to whether they should make a direction for blood tests – though it did not say how this discretion was to be exercised. This was only

\textsuperscript{205} \textit{Hansard} 1961, 113  
\textsuperscript{206} \textit{Hansard} 1961, 89  
\textsuperscript{207} \textit{Hansard} 1961, 92
accepted with some reluctance by Lord Amulree who thought the court should have to make the order if the alleged father applied for one. He clearly did not have a very high opinion of Magistrates’ intelligence:

‘I say that with great reluctance, because it takes away a little of the sharp edge of the Bill, which may be important in the case of a recalcitrant bench of Magistrates.’ …… ‘What I had in mind was not a stupid plaintiff, but a stupid bench of Magistrates.’

Neither were the mother and child to be compelled by the court to give blood – it was only to be a direction not a court order:

‘It was thought that the requirement for a blood test is not a suitable matter for a formal order of the court, which would automatically attract the penalty provisions of Section 54 of the Magistrates Court Act 1952.’

Although a certificate of blood test evidence would now be admitted whether or not it excluded the putative father, the Bill expressly excludes the possibility of using the evidence in a positive way - ie as corroboration – although scientists had hinted that this might be possible in rare cases and they hoped to be in a better position to do this in the future.

The Bill was welcomed by scientists, however, and Alan Grant said, that although he himself thought the Danish system where all fathers who have had intercourse at the material time must pay (after blood tests to see if any can be excluded) had much to recommend it, he welcomed the Bill as a step in the right direction:

‘Truth would be encouraged. Knowing that blood tests were likely to be ordered, a woman might hesitate to allege paternity by a man she knew was not the father or where there was no certainty in her mind.’

There was, as all knew, no prospect of the Bill becoming law as they were nearing the end of that particular Parliamentary Session. But it was hoped that it would be introduced early in the following Session. This was not to be.

208 Hansard 1961 85
209 Journal of Forensic Medicine (1961) Vol.8 (No.2) 80
210 Ibid 81
This Bill only applied to Affiliation cases and not to divorce or nullity cases – although several cases had already shown how useful it could be. It was clear that no-one was ready to have this procedure extended to what was thought to be much more middle class divorce cases.

The next section examines the cases and events which took place in the next few years and the change in public attitude towards telling children the truth about their paternity. This eventually led to the passing of the Family Law Reform Act 1969.

It is not known why the Bill was not reintroduced during the next session. Possibly this was merely lack of parliamentary time and that the Bill did not have priority. Possibly also because there was still some disagreement as to whether or not it would be right to try to make blood tests compulsory – an issue that was eventually resolved by the suggestions made by the Law Commission and incorporated in Part III of the Family Law Reform Act 1969.211

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211 See chap 4(b)
c) Blood Tests - 1961 to 1972

‘We suggest that in most cases it is in a child’s best interests to know, if possible, the true position as to its paternity.’

In the eleven years that elapsed between the 1961 Bill and 1972, when Part III of the Family Law Reform Act 1969 came into force, a great deal happened in this field. This section explains what led up to the next attempt to introduce legislation to regulate the taking and using of blood test evidence. Many cases clarified, (and some confused) the position and many articles were written. The above quotation from the Law Commission’s Report shows how it was increasingly being recognised that it was in the long term in the best interests of children that they should know the truth about their paternity. Their interests must be considered, not just the interests of the adult parties to the proceedings.

In 1962 the JPLGR reported two cases that confirmed the value of blood test evidence. The first was Hing v Hing & Clift\textsuperscript{213}. In this case the husband’s petition for divorce on the ground of his wife's adultery was granted. After blood tests Cairns J said that the medical evidence established affirmatively that the child was not the husband’s child, and, although originally the case was on the defended list, it became virtually undefended on production of this evidence. Similarly in A v A (otherwise L)\textsuperscript{214} the husband petitioned for nullity on the ground of pregnancy by another man at the time of the marriage. The blood tests proved to be overwhelmingly conclusive in the husband’s favour. In neither of these cases was the question of consent of either party raised.

Next came two cases of particular interest. First in 1962 a case of exclusion of maternity by blood tests was noted\textsuperscript{215}. A woman of 37 claimed to have given birth to a child after two years of marriage. The husband denied paternity, and also that she had ever been pregnant. The court ordered blood tests and it was found that the child was child of neither husband nor wife – presumably neither party had objected to

\textsuperscript{212} Blood Tests and the Proof of Paternity in Civil Proceedings. Law Com. No.1968 para.14
\textsuperscript{213} Hing v Hing & Clift (1962) JPLG 347
\textsuperscript{214} A v A (otherwise L) (1962) JPLG 347
\textsuperscript{215} Journal of Forensic Medicine (1962) 9 25 – report of cases
having blood tests taken and presumably also the mother was not legally represented and/or did not know what blood tests could show.

In 1963 *the Medico-Legal Journal* reported the case of *Mills v Attorney General*\(^{216}\). This was particularly interesting because it concerned a positive not an exclusionary blood test. It was a legitimacy suit. The husband admitted he was the father of the first two children, but not of the last two. When blood tests were taken, because of the very rare blood groups involved, Mr. Justice Hewson was able to say positively that the husband was the father of all the children. The probability ratio was such that it was impossible that there should be another man with the same likelihood of paternity who had had the same opportunity for intercourse.

In *W v W*\(^{217}\) the limits of the Court’s power was further defined – and in the opinion of some, a backward step was taken. This was probably the first time that the question of consent in paternity cases had been argued in an English court and arguments about this were to occur frequently over the next few years (*infra*). *W v W* was a nullity suit on the grounds of pregnancy by another man at the time of marriage, and the wife would not consent to a blood test. Cairns J rejected the proposition that blood tests were analogous to medical inspections for nullity, or that the Court had power under the Orders of the Supreme Court and he refused to compel the wife to submit to the tests. This decision was upheld on appeal. Willmer LJ said:

> ‘I think there can be no doubt that, without an order of the court, what the court is now being asked to order would prima facie be an unlawful act.’\(^{218}\)

He considered the arguments put forward by the husband’s Counsel that there was inherent jurisdiction in the court to order blood tests (by analogy with medical inspection) and rejected them on the ground that s.32 of the Supreme Court of Judicature (Consolidation) Act 1925 precluded reference to the old practice of the Ecclesiastical courts in this respect except in cases where ‘no special provision is

\(^{216}\) *Mills v Att Gnl* [1963] *Medico-Legal Jo.* Vol. 31 151

\(^{217}\) *W v W* [1964] *P 67*

\(^{218}\) *Op cit 74*
contained in this Act or in rules of court with reference thereto.’ He then went on to consider the Rules of the Supreme Court that Counsel said applied to the case:\(^\text{219}\)

‘The latter deals with the appointment of a court expert to inquire and report upon any question of fact or of opinion not involving questions of law or construction. It seems to me that that is very remote from the kind of application that is made in this case. Something much more specific would be required to justify the court in making an order against an unwilling party for a blood test. Nor do I think any greater assistance is to be derived from the provisions of RSC Ord. 50 r.3……. It does not seem to me that a provision relating to any ‘property or thing’ is very apt to confer power to take a blood test such as is being asked for in this case. In those circumstances I do not think that there is any power in the court to make the order asked for. I do not think such power can be derived from the previous practice of the Ecclesiastical courts. There is certainly no direct statutory authority; and for the reasons I have given I do not think that there is any power contained in any of the rules to make the order asked for.’

In 1966 David Lanham assessed the then current state of affairs in an article ‘Blood Tests and the Law’\(^\text{220}\) and considered in detail the questions of consent that had been raised by recent cases.

He recommended that 16 should be the age for consent to blood tests. If a child was under 16 and unable to understand, then the consent of the child’s guardian should be obtained; if under 16 but able to understand, then the consent of the child and the consent of the guardian should be obtained; if over 16 and under 21 the child’s consent should be enough, but in the then present state of confusion it would be wise to obtain the guardian’s consent.

For psychiatric patients he suggested:

1. If a voluntary patient and able to understand he can consent
2. If not voluntary and understands, the consent of the patient and the medical superintendent or guardian should be obtained
3. If not voluntary and unable to understand, he thought it probably not possible for anyone to consent. [It is not clear why he thought the medical superintendent or guardian could not consent]

He therefore said:

\(^{\text{219}}\) RSC Ord. 50 r.3 and Ord. 37A r.1.

‘In view of the many doubts over consent both in respect of children and mental patients the time appears ripe for Parliament to enact a few simple rules, indicating who can give consent where the infant or patient is unable to do so.’

He then went on to suggest that, as long as there was no misrepresentation, blood test evidence was admissible even if taken without proper consent – following *Callis v Gunn* (fingerprint evidence taken improperly, but admissible). He suggested that if consent was refused, inferences could be drawn following *S v S* where it was held that a refusal to submit to a medical examination was evidence against a party in a nullity suit:

‘The result of the cases is, then, that in certain limited circumstances the court may be able to draw inferences from a person’s refusal to submit to a blood test.’

These views foreshadowed later legislation. Lastly, David Lanham considered the power of the court to order a blood test. He cited the powers of the court to order discovery of documents, the *writ de ventre inspiciendo* and inspection for impotence in nullity. However, he came to the reluctant conclusion that, because of the decision in *W v W*:

‘The fact remains, however, that the Court of Appeal has spoken and the present law is that the court has no power to order blood tests. Only Parliament or the House of Lords in its judicial capacity can alter that rule. It is only necessary for Parliament to concern itself with two main questions:

1. Who can give consent on behalf of a person under an incapacity?
2. In what circumstances and subject to what limitations can the court order a blood test without the consent of the person to be tested?’

*Holmes v Holmes* was another divorce case in which adultery was proved by blood tests. Ormrod J said:

‘This is another case in which the great advantage of blood group evidence is amply demonstrated. On the blood groups which appear from Dr. Grant’s Affidavit it is abundantly plain that the child Clive cannot be the son of the

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221 Op cit 193
222 *Callis v Gunn* (1964) 1QB 495
223 *S v S* (1905) 21 TLR 219
224 Family Law Reform Act 1969 s.23
225 Vide *Intract v Intract* (1833) P 191
226 *W v W* (1964) P 67
227 *Holmes v Holmes* [1966] 1 All ER 356
husband ……. 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.’

This case was closely followed by Blyth v Blyth\(^{228}\). Although no blood test evidence was concerned in this case it was significant in that Lord Denning refused to apply the criminal standard of evidence that there should be proof beyond reasonable doubt to the burden of proof of legitimacy and said:

‘The words ‘if satisfied’ do not mean ‘satisfied beyond reasonable doubt’. So far as the grounds for divorce are concerned, the case like any civil case may be proved by a preponderance of probability, but the degree of probability depends on the subject matter, and in proportion as the offence is grave, so ought the proof to be clear.’

Lord Denning was clearly trying to change/modernise the standard of proof but many of his fellow judges and, indeed, the Law Commission\(^{229}\) did not think this was possible without legislation

Two other cases where blood test evidence was useful were reported in 1966. B v Att. Gnrl\(^{230}\) (a petition for legitimacy that was not proceeded with because blood tests showed that the Petitioner could not be the father) in which Ormrod J said:

‘It is perhaps a case which illustrates very clearly the extraordinary advantages and immense value of blood tests properly and fully carried out to determine issues of paternity of this kind…… It saves the court having to rely on presumptions in order to help out with the evidence which would otherwise be called.’

Each year seemed to bring the discovery of more varieties of blood tests. If more tests were used, it was more likely that an exclusion result could be obtained in cases where the blood groups were relatively common, and the man accused of paternity was not the father. Stocker v Stocker\(^{231}\) illustrates clearly the advantages of using an expert who knows all the latest tests; Karminski J said:

‘Dr. Grant is a well known authority in this field, and amongst other qualifications he is a lecturer in forensic serology at Guy’s Hospital, and he has often given evidence on these matters in these courts. What I may call the ordinary tests, which were performed by taking blood samples from the husband, the wife and the baby, did not exclude the husband as the father;……

\(^{228}\) Blyth v Blyth [1966] 1 All ER 524
\(^{229}\) Blood Tests and the Proof of Paternity in Civil Proceedings, para 12
\(^{230}\) B v Att-Gnrl [1966] 2 All ER 145
\(^{231}\) Stocker v Stocker [1966] 2 All ER 147
he used a new or comparatively new test, which deals with haptoglobin, which
in Dr. Grant’s view is very nearly infallible….. Dr. Grant established to my
complete satisfaction on the haptoglobin tests that the husband could not have
been the father of this child, so that I am satisfied beyond any doubt, that, at
the time of the marriage, the wife was pregnant by some person other than the
husband.’

In \( H v H^\footnote{232} \) the Court refused to order blood tests on a child 3 years after the divorce
in the course of an appeal to vary maintenance, but said:

‘I am prepared to assume that there is power in the court to order a child to
submit to a blood test when such a course seems likely to be of advantage to
the child, or possibly when it is necessary for the determination of some issue
properly before the Court where the child’s interest is paramount.’

The next landmark was the case of \( Re L^\footnote{233} \). This was a divorce case where a trial of
the paternity issue was ordered. There were two men involved and they and the
mother consented to blood tests. However, the Official Solicitor, on behalf of the
child, objected to blood tests being taken. The Court of Appeal held that, by analogy
with the Chancery jurisdiction, the Court had power to order a blood test on the child,
in spite of the risk of bastardising the child and in spite of a psychiatrists report stating
that a blood test might emotionally disturb the child – and they ordered one. Lord
Denning also said, obiter, that a refusal by one of the spouses to submit to a blood test
might lead to an inference against him or her in any court. All three Judges
concurred on the main issue. However, Lord Denning with reasoning ‘as usual, bold
and cogent’\footnote{234} was prepared to take his principles further than his two colleagues.
Since he was later upheld by Statute in those principles, they will be examined in
more detail. He extended the proposition he himself had proposed in \( Blyth v Blyth \)
(supra) – that the presumption of legitimacy could be rebutted on the balance of
probabilities – to all cases where paternity is in issue:

‘It would be absurd to have a different result in a divorce case from other
cases so that a child could be found legitimate in one and illegitimate in
another.’

Part of Lord Denning’s decision to order Blood Tests was obviously based on very
practical considerations:

\footnote{232} \( H v H \) [1966] 3 All ER 560
\footnote{233} \( L v L \) (1968) P 119
\footnote{234} Recent Cases: ‘Blood Test ordered for child aged nine’ \( JPLGR \) (16.12.1967) 810
‘If the judge held, applying the presumption of legitimacy, that the husband was the father, then, as soon as the litigation is ended, the Official Solicitor will no longer be guardian ad litem of the child. The doctor may then say, with complete certainty, that the other man is the father and that the husband is not. As soon as that is done, the court would give leave to appeal out of time and reverse the judge’s findings.’

He rejected the Official Solicitor’s argument that only Chancery Judges could have power to order a child’s blood test – and then only if the child were a ward of court and said:

‘I hold, therefore, that in proceedings relating to the custody of a child any judge of the High Court can order a test to be taken of the child’s blood. So also in a paternity issue, or any proceedings where it is in the best interests of the child to have its paternity settled one way or another, the Court can order a blood test.’

Again Lord Denning talked of the inferences that could be drawn if an adult refused to be blood tested and said:

‘If an adult unreasonably refuses to have a blood test, or to allow a child to have one, I think that it is open to the court in any civil proceedings (no matter whether it be a paternity issue or an affiliation summons, or a custody proceeding) to treat his refusal as evidence against him, and may draw an inference therefrom adverse to him. This is simply common sense. It is in keeping with the rule that in a nullity case, if a party refuses to be medically examined, the court may infer that some impediment exists pointing to incapacity (see W v W (1912) P 78). Moreover being a rule of evidence it applies not only to the High Court but also to the magistrates’ courts, and to any court of the land.’

Lord Denning rejected the Official Solicitor’s argument that it was his (the Official Solicitor’s) responsibility to decide about a blood test:

‘I think this contention mistakes the position of a guardian ad litem. He has not custody of the child. He does not stand in loco parentis. His decisions do not rest in his unfettered discretion. He must on occasion seek the approval of the court, as for instance if he makes a compromise on behalf of the infant.’

Although Willmer LJ and Davies LJ concurred with Lord Denning on the major points in issue, ie that a Judge of the Divorce Division exercising his custodial jurisdiction has the power to order that the child be subjected to a blood test in the

235 Op cit. note 224 24
236 Op cit. note 224 25
237 Op cit. note 224 26
absence of consent on the part of the guardian ad litem, they did not agree to extend the power to order blood tests to paternity issues generally nor to divorce cases on grounds of adultery. Nor did they agree that the presumption of legitimacy could be rebutted on a mere balance of probabilities.

As a result of this decision the position with regard to children was a little clearer. However, it had not yet been decided what would happen if it was manifestly not in the child’s best interests (in discussing the decision they were quite satisfied that it was in the best interests not only of the child but of all the three adults in this case that the paternity should be settled now). In cases where there were only two possible fathers it was taken that there was a 90% chance of being able to decide who was the real father.

*The BMJ* commented:238

‘Strong views are held on this subject. While some favour the use of all available forms of evidence, even if compulsion is necessary, others see blood tests as invasion of personal liberty and a significant step along the road to totalitarianism. But fears that the courts will not know where to draw the line show a distressing lack of confidence. It is perhaps not insignificant that the trial judge in this case is medically qualified.’

And they appeared to have every confidence in the judiciary.

The decision in *Re L* left the matter in considerable doubt as to when the Court had jurisdiction to order a blood test. Would the Judges follow the obiter dicta of Lord Denning or of Willmer and Davies LJJ? Some followed one and some the others.

In the case of *L v L*,239 Wrangham J felt that he had to follow the opinions of the majority in *Re L* and decided that although he felt it would be in the best interests of the child, since it was a paternity issue, the Court had no jurisdiction to order a blood test. The parties in the case married in November 1962 and a child was born in May 1963. They divorced in April 1967. The husband applied for an order that the child

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238 *BMJ* (23.12.1967) 752
239 *L v L* The Times (15.3.1968)
should undergo a blood test, but this was refused by Wrangham J. As the BMJ commented: 240

‘The curious feature of cases in this series is that even where there has been a finding of a judge that it is in the child’s best interests that a blood test be given, the Official Solicitor, representing the child, still refuses to consent to the giving of a sample without an order of the court.’

The JPLGR 241 also noted:

‘The law is in an uncertain state; the Law Commission is examining the question whether the law should be amended to enable to court to order tests in paternity issues. This was suggested, in 1966, by the Judges of the Divorce Division.’

However, Lane J in Hardcastle v Hardcastle 242 ordered a test even in an adultery issue, saying it was in the best interests of the child – following Lord Denning’s obiter dictum.

This issue was finally resolved in BRB v JB 243. This time Lord Denning was sitting with Diplock and Sachs LJJ and they all agreed they saw no reason to confine the power to order blood tests to the courts custodial jurisdiction and they dismissed the appeal. But they were agreed that the power to make such orders was confined to the High Court and could not be transferred to the County Court. Sachs LJ thought that tests should not be ordered unless there was a substantial chance that they would solve the issue of paternity.

However, it was difficult to see how one could tell exactly what chance there was of resolving the issue by blood tests, until the tests had been taken on all three parties. Lord Denning thought the jurisdiction was wider:

‘The jurisdiction is unlimited in a Judge of the High Court. He can order a blood test to be taken whenever it is in the best interest of the child.’

Lord Denning also touched on a point that could cause considerable difficulty:

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240 ‘Compulsory Blood Tests’ BMJ (13.4.1968)
241 Recent Cases; ‘Blood Test for child in paternity proceedings’ JPLGR (30.3.1968)
242 Hardcastle v Hardcastle The Times (13.2.1968)
243 BRB v JB [1968] 2 All ER 1023
‘Even if the child is difficult, the court can order a blood test if it is clearly in
the interests of the child, just as it can order an operation in the case of a ward
of court.’

Although clearly this power existed, it would not be easy to carry out a blood test on
an unco-operative 14 or 15 year old.

*F v F*[^244^], the next case in which blood test evidence was used, was a divorce case
based on adultery, and was particularly interesting from the scientific point of view.
Rees J accepted the evidence of Dr. Grant who had made blood tests on husband, wife
and child and granted a decree (the Official Solicitor raised no objection). In
separation proceedings in 1962 the magistrates had said that chances of 1 in 50,000 of
mutation made it impossible to accept the blood test evidence. However, medical
knowledge had advanced so far since that date that Dr. Grant was then able to say that
the chance of mutation were thought to be 1 in 1,000,000. On these grounds His
Lordship held on appeal that the mutation possibility was too remote to be of practical
significance. It was agreed that the husband could succeed only if he proved adultery
beyond all reasonable doubt (because the child was born in wedlock) – this was done.

The *JPLGR*, commenting on this case when it was first reported in *The Times* said:[^245^]

> ‘This case, supported by the dicta of the Court of Appeal in Re L, shows that a
finding of adultery may be based upon blood tests in any court, including a
magistrates’ court, provided the court is satisfied beyond all reasonable doubt
in cases where the result will be to bastardise a child born during wedlock. In
other cases adultery may be proved on a mere balance of probabilities (*Blyth v
Blyth*) and it seems to make no difference whether the High Court or a
magistrates court is hearing the case, since the question is one of evidence.
Refusal by one of the spouses to submit to a blood test leads to an inference of
adultery against him or her, in any court (per Lord Denning in Re L).’

Dr. E Anthony JP commented,[^246^] expressing commonly held views:

> ‘I just cannot see why blood tests should not be compulsory – it would only
mean altering or amending the Legitimacy Act – and I would like to hear some
cogent reasoning from our lawyer friends why they are against blood tests.’

[^244^]: *F v F* [1968] 1 All ER 242
[^245^]: *Divorce decree on evidence of blood test, JPLGR* (1967) 810-811
[^246^]: *JPLGR* (1967) 411
‘My own suggestion would be that a compulsory blood test be made a compulsory preliminary before a case involving paternity could be heard in the High Court. Then, if a blood test was refused then the woman could not bring an action on behalf of herself or the child and it could involve a court order that the husband need no longer support the woman and child financially. When a man refused a blood test then the court could take that as an admission of guilt and order him to maintain at so much a week.’ p.779

In July 1968 Lord Denning in an address to the Magistrates Association advised Justices that the refusal of a blood test in a paternity issue could be regarded as corroboration 247.

A difficult result that blood tests (or any other proof of paternity) could have on custody cases was shown by B v B & F 248. After separation the husband obtained an order for blood tests which showed that the children were not his. He still wanted custody, but this was not granted as the children could not be children of the family or relevant children under the 1965 Matrimonial Causes Act as he had not accepted them after knowing they were not his.

It was still difficult to decide when a blood test was in the child’s best interests. M v M & G 249 shed some light (or confusion) on this issue. This was a case where the Court of Appeal (CA) decided it was not in the child’s best interests to be blood tested. At the time of the Appeal the child was 10 years old and there was no other definite person involved – the husband merely alleged adultery with a man unknown. The request for a blood test was refused as the sole purpose was to prove adultery. However, in this case the wife also had refused and since there was no way of ordering her to take a test, the whole exercise seemed a bit pointless and this may also have influenced the CA. Lord Denning said:

‘If it were possible, by means of the blood test, to show the husband was the father, it might be to the child’s benefit. But it cannot show that. This is not a case where one of two known men is the father. The only known man is the husband. There is a 70% chance that it may show the husband was not the father. But if that is shown, what good is it to the boy? It would only show that he is illegitimate and that the wife was telling lies when she said the husband was the father. That does the boy no good. On the other hand, if the

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247 JPLGR (12.10.1968) 498
248 B v B & F [1968] 3 All ER 232
249 M v M & G [1968] 2 All ER 243
blood test should show that the husband could be the father that will not do the boy any good either. Hundreds of other men also could be the father. This husband will not recognise the child as his. He has always denied paternity and will doubtless continue to do so. In this situation, I cannot help thinking that the sole reason why the husband wants a blood test is to prove that the wife was guilty of adultery over 10 years ago. Now in most cases it is best to know the truth; and I think the courts should help in the ascertainment of it, by ordering a blood test, if it is any possible benefit to the infant. But I do not think the infant should be made a pawn in a contest between husband and wife – not at any rate in the case of an infant of 10 who can understand what is happening.’

With respect, this decision seems a little inconsistent on the facts. After all, if the husband had constantly denied paternity the child would know it – if not now, then soon, and one would think that he might just as well know the truth (if it could be proved) rather than just have a suspicion for the rest of his life – knowing that his ‘father’ denied paternity. Therefore the decision might well have been made on the practicalities (because the wife refused) whatever was actually said! Although even in this case it would have been possible (following Lord Denning’s earlier dicta) to draw an inference from her refusal.

In B v B & E\textsuperscript{250} there was a slightly different situation. These were custody proceedings following a divorce. At the time of the separation the child had stayed with the husband and had been brought up as his. The wife then said the Co-respondent was the father as she wanted custody, and asked for a blood test. The father refused to have his blood tested. Lord Denning specifically said that in this case no inference could be drawn against the husband because of his refusal to undergo a blood test. And Harman LJ said:

‘There is a presumption that the child is the child of the marriage and without a blood test that is the end of it. The blood test could only show that the child might not be the child of the marriage, but that must be so in a great many cases. It is said that he is a wise man who knows his own father. That is why the presumption of legitimacy is in my opinion such a valuable safeguard to the life of the family.’

This decision was more understandable on the facts as the husband obviously believed – or at least would always say – that he was the father.

\textsuperscript{250} B v B & E [1969] 3 All ER 1106
Was the deciding factor not the ‘best interests’ of the child, but whether the adult having custody of the child agreed? If not, then there was some point in saying ‘no’. If they did there was no point as they would take the child to be tested once the case was over. Lord Denning said in *B v B & E* (supra):

‘When all three adults consent, there is a very good chance of proving which of the men is the father. In such a case, the court will nearly always order a blood test of the child; because, whenever doubt is cast on the paternity of a child, it is very important for the truth to be ascertained. It is nearly always in the best interest of the child as well as of justice …. but if one of the adults does not consent, it may be different; because there is less chance of ascertaining the truth.’

Lord Denning apparently departed from his stated principles about the best interests of the child in the case of *W v W*. Again the three adults could not all be tested (this time the odd one out was the Co-respondent). But the person having custody of the child (the mother) was willing for both herself and the child to be tested. The majority of the Court of Appeal relied on Lord Denning’s judgment in *B v B&E* and refused to order a blood test, but Lord Denning delivered a dissenting judgment saying that the court should have the best evidence available before it and it was surely in the best interests of everybody that it should so have. (Did he really mean that on grounds of expediency he had to decide that way since the person having custody – in this case the wife – could have the child tested once the case was over, whatever the decision)? The *BMJ* commented on 15 November 1969:

‘There is no judge in our courts who has expressed greater disregard for the rules of precedent than Lord Denning, and none who displays such a humane anxiety for justice at the expense (if need be) of legalism. When Lord Denning takes an opposite view on very similar cases within a very short space of months that is a most telling demonstration of the difficulty of decision in this sort of case.’

The facts of the case were that the parties married in 1957; a girl was born in 1959 and a boy in 1961. The wife left home in July 1963 and went to keep house for A. A full term child was born in December 1963 – the husband, although he had not seen it, paid maintenance for it. In 1964 the wife petitioned for divorce, alleging cruelty and desertion – the husband filed an answer alleging adultery with A. When he later saw a photograph of the child and saw that it was obviously slightly coloured, he

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251 *W v W [1970]* 3 All ER 107
changed to alleging adultery with B. A decree was granted and then a trial of the paternity of the child was requested. The Official Solicitor objected to blood tests on behalf of the child and the President agreed. The husband appealed. The CA dismissed the case and the appeal to the Lords was held at the same time as the following case (S v S).

The facts in S v S \(^{252}\) were that the parties married in 1946. There were three recognised legitimate children and then a fourth child was born in 1965. The husband denied paternity of this child. He petitioned for divorce on grounds of adultery of his wife with M and a decree was granted. On a trial of the paternity issue blood tests were ordered. M refused to comply but both husband and wife consented. The Official Solicitor objected (said it was not for the benefit of the child). The husband appealed and the CA allowed the appeal (Lord Denning and Karminski LJ, Sachs LJ dissenting).

Appeals from both these cases were considered by the House of Lords together. Lord Reid first discussed the affect of S.26 of the Family Law Reform Act 1969.\(^{253}\)

‘That means that the presumption of legitimacy now merely determines the onus of proof. Once evidence has been led it must be weighed without using the presumption as a make-weight in the scale for legitimacy. So, even weak evidence against legitimacy must prevail if there is no other evidence to counterbalance it. The presumption will only come in at that stage in the very rare case of the evidence being so evenly balanced that the court is unable to reach a decision on it.’

He discussed what was likely to be in the child’s best interests, especially in view of the then current social feelings about illegitimacy: \(^{254}\)

‘In former times it was plainly in the child’s interest to have a finding of legitimacy even where the presumption of legitimacy has been used to overcome evidence which without it would have pointed the other way. An illegitimate child was not only deprived of the financial advantage of legitimacy but in most circles of society, other than those considered disreputable, it carried throughout its life a stigma which made it a second class citizen. But now modern legislation has removed almost all the financial disadvantages of illegitimacy ….. Doubtless there are still many circles

\(^{252}\) S v S [1970] 3 All ER 107
\(^{253}\) Op cit 109
\(^{254}\) Op cit 111
where an illegitimate person is not well received. But there are many others, particularly in large towns, where nobody knows and nobody cares whether a newcomer is legitimate or illegitimate.’

He did not doubt ‘that a person of full age and capacity cannot be ordered to undergo a blood test against his will …. The real reason is that English law goes to great lengths to protect a person of full age and capacity from interference with his personal liberty.’ ‘But the position is very different with regard to young children’,255

‘So it seems to me to be impossible to deny that a parent can lawfully require that his young child should submit to a blood test. And if the parent can require that, why not the court?’

He thought it was an error to apply custody principles (of the best interest of the child) to blood tests and said:256

‘Justice requires that available evidence should not be suppressed but it may be against the interest of the child to produce it.’

And he notes that:

‘No case has yet occurred in which a court has ordered a blood test to be carried out against the will of the parent who has the care and control of the child, and I am not at all certain that it would be proper to do that after Part III of the 1969 Act comes into operation.’

He did not give any further help with regard to the operation of Part III except to say:257

‘S.20 (1) provides that the court ‘may’ give directions for the use of blood tests. I do not think that that can possibly be intended to confer an unfettered discretion on these courts. That would lead to endless argument and to very undesirable differences between one court and another, and if the matter be one of discretion the scope for appeal would be very limited. The Act gives no guidance as to the circumstances in which blood tests should be ordered, and I think that this must mean that superior courts are to settle principles insofar as it is necessary to disturb existing law in order to comply with the Act, and thereafter the lower courts are to apply those principles to cases which come before them.’

255 Op cit 111
256 Op cit 112
257 Op cit 113
Although Lord Reid was merely repeating established principles of precedence his remarks caused some confusion, and further guidance was called for. For example the *JPLGR* editorial said:\(^{258}\)

‘The Official Solicitor’s department cannot at present explain and clarify the observations of Lord Reid but counsel has advised that, for the present, the question whether or not an infant should be ordered to be blood-tested remains a matter for the High Court only. If and when this controversy is elucidated, a further note will appear in this journal.’

And Lawrence Polak in his article ‘*Blood Tests as Evidence of Paternity*’\(^{259}\) expressed the opinion of many when he said ‘Clear statutory guidance to all courts and to practitioners is obviously called for’.

Lord Macdermott expressed the controversial opinion that by virtue of its ancillary jurisdiction and following *Edmeades v Thames Board Mills Ltd*:\(^{260}\)

‘I know of no reason why the High Court should not in a proper case order a party who is sui juris to submit to a blood test.’

He was also satisfied that the Court could order blood tests on an infant but gave some examples when they would not:

‘For instance, if the court were satisfied that – as might possibly be the case on rare occasions – a blood test would prejudicially affect the health of the infant it would, no doubt, exercise its discretion against ordering the test. And, again, if the court had reason to believe that the application for a blood test was of a fishing nature, designed for some ulterior motive to call in question the legitimacy, otherwise unimpeached, of a child who had enjoyed a legitimate status, it may well be that the court, acting under its protective rather than its ancillary jurisdiction, would be justified in refusing the application.’

He discussed at length the decisions in *Re L and BRB v JB* and the opinion of the CA in these cases and finally said:\(^{261}\)

‘While the court should be alert to exercise its protective jurisdiction on behalf of an infant, it does not need to be satisfied before ordering a blood test that the outcome thereof will be for the benefit of the infant.’

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\(^{258}\) ‘Proposed blood test for child of tender years’ *JPLGR* *(12.9.1970)* 681

\(^{259}\) *Family Law* Vol. 1 24 27

\(^{260}\) *[1969]* 2 *All ER* 127 1

\(^{261}\) *S v S* *[1970]* 3 *All ER* 107 118
Lord Morris also discussed the affect of s.26 of the 1969 Act and also the advantage of hearing all the evidence and the result (socially and legally) today of being illegitimate and said:262

‘The general desirability of arriving at the truth when an enquiry is to take place points, in my view, to the further desirability of having the best evidence available.’

and puts his finger on a point, not till now, (see Ormrod J in Re L) discussed:

‘It is not as though, when considering whether to direct a blood test a suggestion of illegitimacy is then or thereby first being raised. It is not as though the tranquil air is then or thereby first being clouded. The events in relation to the child’s birth will already have been matters of dispute and controversy.’

‘Will it be in the interests of the child to have a conclusion expressed which the husband (if held to be the father) will never accept and which he will feel was given without evidence which would have supported his case? It will not advantage the child to have such a ‘father’. It will be no benefit to the child to have a ‘father’ from whom no recognition, no affection and no benevolence will come … I would think that in most cases comparable to the present one, the interest of a child are best served if the truth is ascertained.’

Lord Hodson was of the opinion (contrary to Lord Macdermott) that

‘No-one doubts that so far as adults are concerned the law does not permit such an operation to be performed against the wishes of the patient.’

He also thought there was no great disadvantage in being declared illegitimate:263

‘It is, I think, fair to say that whatever may have been the position in the past, the general attitude towards illegitimacy has changed and the legal incidents of being born a bastard are now almost non-existent.’

And he came down on the side of truth at all costs:

‘Why should the risk be taken of a judicial decision being made which is factually wrong and may later be demonstrated to be wrong? Failure to submit the child to a blood test may eventually lead the child to unnecessary doubt as to his paternity and the chance of removing that doubt may be lost in the passing of time.’

262 Op cit 121
263 Op cit 123
However, he did consider B v B with implied approval and therefore left open the question of when the Court would not order a test.

The *BMJ* expressed a common opinion:264

‘There can be no doubt that the decision whether or not to order a test will remain even now the most unenviable task of the judiciary – and the one to which the most anxious consideration must be given. While it may not be correct to predict that the courts will tend to err on the side of ordering a test, one thing is certain: the law reports will continue to be as full of such cases in the future as ever they were in the past.’

But in point of fact there have been very few cases since that date.

One more reported case was decided before Part III came into operation and is particularly illuminating of the way in which the courts will weigh blood test evidence when considering the presumption of legitimacy.

The facts of this case – *T (H) v T (E)*265 – were as follows: The parties were married in January 1963 and they separated three weeks later. They did not meet again except for one night in a club in December 1966 when they had a good deal to drink. The child S was born nine months later in the following September. There were divorce proceedings during which an issue arose as to the paternity of S. The wife alleged they had had intercourse that night – the husband denied it. Blood tests showed nothing that would prevent the husband being the father: 11% of European men had blood groups compatible with paternity of S. It was held that he was the father because although S 26 made it necessary only to establish proof on the balance of probabilities, he had not done this – taking into account both the incident at the club and the blood test – though there was no conclusive evidence either way. Rees J said (after quoting Lord Reid):

‘Accordingly I approach this issue on the basis that it is for the husband to show that the child is not legitimate and that the onus of proof rests on him only to the extent stated in the section which I have just read.’

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265 [1971] All ER 590
He said that taken by itself the evidence of what happened at the club was not sufficient and:

‘It is certainly possible that either might have been giving an accurate account of the events of the vital occasion in December 1966.’

But taken with the blood test evidence:

‘The result of the blood test in the present case is that one man in approximately nine or ten of western Europeans could be the father of this child.’ and

‘On a narrow balance I hold that the child, S, is the child of the husband.’

Summary

The position just before the Family Law Reform Act 1969, Part III, came into operation was therefore as follows:

1) The Courts had no power to order an adult to be blood tested (W v W 1964). However, this question had not been before the House of Lords – where at least one noble Lord (Lord Macdermott – W v W 1970) was prepared to hold that there was this power.

2) It was possible to draw an adverse inference if an adult refused to have a blood test. Whether this inference would be drawn depends on the circumstances. It could be drawn in any Court – High or Magistrates (Re L – Lord Denning). So there was nothing to prevent one party asking for blood tests in any court and the court drawing what inference they chose from the other party’s refusal.

3) Blood test evidence was admissible in any court (even if improperly obtained). Evidence of an exclusion is conclusive. Even weak slightly positive blood test evidence could be taken into account and could swing the balance of probabilities (T v T)

4) The High Court had power to order a blood test on a child (W v W 1970). The court would usually order this as it was in the interests of justice that available
evidence should not be suppressed, except in certain ill-defined circumstances. The court would not order a blood test against the will of the parent who had care and custody (Lord Reid) – this would seem to be a paramount consideration.

The next chapter examines the Law Commission’s Report on Blood Tests and the Proof of Paternity; the passage of the Family Law Reform Act 1969 through Parliament; and how Part III of the Act was implemented – taking into account the cases referred to in this chapter.
Chapter 4 – Legislation at last


‘Solicitors who are continually using the blood grouping service tend to use the same samplers and testers and the arrangements almost always work smoothly.’

In their first published programme, the Law Commission suggested that they would be looking at family law with a view to codification and in their second Annual Report (1966/67) they said in Para. 78 that ‘we have put in hand studies … which we expect to lead to legislative proposals … concerns reform of the law governing the proof of paternity in civil proceedings with special reference to the use of blood tests.’

However, it was not until their fourth Annual Report that they said at Para. 57 that the long awaited report on proof of paternity had been published in October 1968 and that the recommendations they made would be included in the Family Law Reform Bill.

First the Commission circulated a working paper but the ‘helpful comments’ in response to this were not all favourable. However, they noted that:

‘Although, naturally, the views which we received conflicted to some extent it is a significant fact, which we feel should be mentioned, that we did not receive one opinion which disagreed with the central proposition in our Working Paper, that the courts should have the power to order compulsory blood tests in certain circumstances.’

However they decided in the end that it would be better to give courts the power to direct tests and then allow inferences to be drawn – infra.

They said that they were satisfied that:

‘As medical knowledge stands at present blood tests may provide conclusive 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

266 Barbara Dodd, Law Soc Gazette Vol 72 No 8 217
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.’

**Standard of Proof:** The Report then reviewed the then present position, contrasting the nature of the evidence required in affiliation proceedings (requiring proof to be on the balance of probabilities) with that in divorce and nullity proceedings (where proof had to be beyond reasonable doubt and where the presumption of legitimacy operated). While realising the historical reasons for the difference in the standard of proof, they accepted that:

‘Today, society’s views on illegitimacy have moderated and the child is not placed under such grave material disadvantages’ (para 13) and suggested ‘that in most cases it is in a child’s best interests to know, if possible, the true position as to its paternity’ (para 14)

‘We suggest that today it is more important for the court to arrive at a right decision than for a child to be declared legitimate at all costs’ (para 15) and ‘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’.

**Consent to blood testing:** They then considered the powers of the Court. They noted that the lightest exercise of physical violence to the person even though beneficent is an assault unless consent is given (para 18). In considering consent of persons under a disability the Commission referred to David Lanham’s articles (op. cit) and agreed with his conclusions. And they noted that the Committee on the Age of Majority had recommended that 16 should be the age of consent to medical treatment (para 22).

They considered the power to order inspection in nullity cases, and that refusal could be treated as some evidence of incapacity (para 23) and they looked at the effect of the decision in *W v W* and other cases and noted that:

‘As a result of the decisions of the CA in *Re L* and *BRB v JB* any judge of the High Court may order a child to be blood tested whenever it is in the best interests of the child for this to be done.’

However, they did not think this went far enough to obviate the need for legislation because:

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267 *W v W (1964) P 67*
a) The House of Lords had not yet considered the questions raised,
b) There was no power to order the testing of adults,
c) The power to order tests on children was only exercisable by the High Court,
d) The difference in the standard of proof should be changed, and
e) There was a lack of administrative machinery.

It is interesting to note that a distinction is made in the proposals between affiliation cases where the Defendant had the right to ask for a blood test (if he has a prima facie case) and other proceedings where the Court has discretion whether or not to direct the taking of blood tests at the request of the party.

**Summary of the Law Commission’s Proposals**

a) The presumption of legitimacy should be made rebuttable by proof on the balance of probabilities and it should be made clear that the same burden of proof applies to the presumption of illegitimacy.

b) The results of blood tests undertaken voluntarily should continue to be admissible in evidence.

c) In all civil proceedings in which the court has to determine the paternity of any child it should have the power to direct that the parties to the action, the child concerned and its mother submit to blood tests.

d) Any party to the proceedings should be entitled to apply for a direction.

e) No sample of blood should be taken from a person under a direction of the court unless that person consents to its being taken or, if he is incapable of consenting, unless consent is given in accordance with (h) to (j) below.

f) Where a person refuses to comply with the court’s direction, the court should be entitled to draw whatever inferences it thinks appropriate from the refusal.

g) Where a person is applying for relief and is relying on the presumption of legitimacy, if he refuses to comply with the court’s direction to submit to a blood test the court should have power to dismiss the application notwithstanding the presumption.

h) A child aged 16 or over should be capable of giving a valid consent to giving a sample of blood unless, if of full age, he would not have the capacity to consent.

i) Where a child is under the age of 16, the consent of the person having care and control of him should be required.
j) If a person is mentally incapable of giving a valid consent it should be in order to
take a blood sample from him if the person in whose care and control he is consents
and the medical practitioner under whose care he is certifies that giving a sample will
not be prejudicial to his proper care or treatment.

k) Both exclusion and non-exclusion results should be admissible in evidence

l) The party applying for blood tests should, initially, bear their cost but the court
should have a discretion to decide who should ultimately be responsible for paying
for the tests. The costs should be regarded as a legitimate disbursement to be borne
by the Fund in legally aided cases.

m) Regulations should be made governing the procedures for carrying out blood tests
directed by the court.

n) The results of blood tests should be capable of proof by a certificate from the
serologist responsible for the tests.

o) Provision should be made so that any party can call the serologist concerned to
give evidence in person and can cross-examine him.

p) Any person who impersonates another (from whom the taking of a blood sample
has been directed by the court) or proffers a child in place of the child named in a
direction should be guilty of an offence.

Family Law Reform Bill 1968

The Commission’s proposed legislation with regard to blood test evidence was
included as Part III of the Family Law Reform Bill. This ensured that most of the
debate and controversy centred round the rest of the Bill which included matters of
more general interest, notably the lowering of the age of majority following the
recommendations of the Latey Report, and the rights of succession of illegitimate
children. During the debate on the second Reading of the Bill in the House of
Lords268 a very small proportion of time was devoted to Part III – in fact many
members of the House did not mention it at all.

Baroness Serota introduced the Bill, stressing that it was based on recommendations
made in the Law Commission Report. She was at that time a Vice-President of the

268 Hansard, 26.11.1968
National Society for the Unmarried Mother and Her Child and that Society was then supporting the Bill – presumably to a large extent because of what it did for illegitimate children. Lord Amulree, another Vice-President, and Lord Colville of Culross, the President, also spoke in support. Baroness Serota restated the present position succinctly:

‘The position, however, is far from clear. All that can be said is that there is no power to order adults to be tested; there is some power, but in the High Court only, to order children to be tested; and there is no set of judicial or administrative procedures for testing.’

and she briefly summarised the main proposals:

‘The Bill accordingly provides in Clause 18 that in any civil proceedings where paternity is disputed the court may direct blood tests to be made and the report of those tests shall be receivable in evidence. It is important to make it absolutely clear that nobody in any circumstances will be forced to undergo a blood test, if he or she objects. Clause 19 states expressly that no blood tests shall be carried out on any person without his consent; though Clause 22 provides that if he refuses the court may draw whatever inferences it might think proper. Clause 19 also makes it clear that any person over 16 is capable of giving valid consent for himself ….. Clause 24 implements the other main recommendations of the Law Commission by making it clear beyond doubt that to rebut any presumption of legitimacy or illegitimacy it is only necessary to produce evidence that the probabilities are the other way.’

The Bill was wider than its predecessors in that it applied to all civil proceedings, not just affiliation proceedings – thus including divorce and nullity proceedings and petitions for declarations of legitimacy.

The Bill neatly avoided the previous controversies in respect of compulsion by giving courts power to direct blood tests and making provision for penalties if parties did not comply. However, Lord Amulree was of the opinion that it ought to be possible to compel a person to submit to a blood test, and said, speaking of his 1961 Bill:

‘The Government would not accept the word ‘shall’ and said that it must be changed to ‘may’. This seemed to me to weaken the Bill, and I can foresee the same sort of thing happening in the Bill that is now before us.’

And Lord Chorley was of the same opinion

\footnote{Hansard op cit 1142}
‘If it is proper case in the child’s interest that a blood test should be taken, then the court should be allowed to order accordingly, and I should like to see the Bill altered to give effect to a provision of that nature.’

Lord Denning had most to say about Part III and strongly supported this part of the Bill:

‘The Bill in this particular part, as I see it, puts the whole of the law on a proper footing in accordance with good sense.’

There was no real opposition to any part of the Bill in the House of Lords. It was given an unopposed second reading and sent to a Committee of the Whole House.

This stage was again taken up with a discussion about the reduction of the age of majority which they decided, by a very narrow majority, should be 20. Part III was hardly mentioned.

The Lord Chancellor, on moving the Third Reading of the Bill said:

‘A good deal of medical knowledge is necessary in dealing with blood tests, and I thought it was a tribute to the work now being done by the Law Commission that the whole of that (ie Part III) of the Bill not only met with no Amendment, but was not criticised in any way at all during the passage of the Bill through your Lordships’ House.’

The Bill was passed and sent to the Commons.

On the Second Reading in the Commons, although there was some controversy about the other parts of the Bill – Part III was generally welcomed although there was some confusion as to whether there was any distinction between ‘ordering’ and ‘directing’ a blood test. Mr. Oakes, MP for Bolton West, said:

‘Concerning Blood Tests in bastardy proceedings, I think that the House should unreservedly welcome this proposal. This protects the putative father just as much as it is of value to the mother. It is shameful that a man, disputing the proceedings, who asks for a blood test can be denied a blood test because the mother refuses to allow one on the child. The mother who was doubtful about the parentage of the child would be the very one to refuse a

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270 Hansard op cit 1177
blood test in that child’s case. Now the Court can order a blood test. I think that that is a wise provision which will prevent a great deal of injustice. It should have been done a long time ago in affiliation proceedings.’

Again Part III passed through the Report Stage and Third Reading with very little reference being made to it apart from a few words of welcome. Mr. Waddington, MP for Nelson and Colne, said:

‘I welcome Part III as much as anyone else. It is the least controversial part of the Bill. We should obviously allow the Courts to use all scientific methods of resolving disputes, particularly about paternity, which can be so difficult.’

At last legislation regulating blood test evidence was on the statute book – after 30 years and two former attempts. However, during this long wait, public opinion had changed, and many of the former objections had melted away. In the next sections we look at whether this final attempt was ‘fit for purpose’ for the late 20th century.
b) The Family Law Reform Act 1969 (part III)

‘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.’

The Act received the Royal Assent in July 1969 but Part III did not come into force until 1 March 1972 – nearly three years afterwards. During that time a number of cases were decided and articles written that contained some speculative suggestions as to how the Act would work out in practice. A Committee was set up by the Home Office, representing both medical and legal professions, to work out the best way to bring this part of the Act into operation and this resulted in some new regulations and some alterations to existing regulations.

The Law Commission’s Report – most of its recommendations were included in the Act – gave some indication of the way the Act could be interpreted. So also did the House of Lords decision in S v S and W v W. This case was decided before Part III of the Act came into operation, but when it was, of course, on the Statute book and it was referred to.

After discussions with my then supervisor, it seemed that there remained a number of questions that needed answering. What follows first is an account of these, mostly legal, questions and an indication of how some of them might have been (and some were) resolved. I have collected this information from cases decided and also textbooks and articles written at that time. I am not aware that this information has been collated and set out in this manner before, although, of course, many of the individual questions have been discussed in the textbooks, articles and cases referred to below. Then follows, in section 4(c), the results of a survey I carried out to try to find the answers to some of the more practical questions.

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The Blood Tests (Evidence of Paternity) Regulations 1971 (No. 1861)
The Rules of the Supreme Court 1965, Order 112
The County Court Rules 1936, Order 46, Rule 23

273 S v S & W v W [1970] 3 All ER 107
274 Prof. PM Bromley
1) By what court could the direction be made?

S.20 provided that blood tests could be directed in civil proceedings by any court in which paternity was an issue. In 1972/73 506 directions were made for blood tests to be taken – 451 in Magistrates Courts, 24 in County Courts, and 28 in the High Court. However, there was apparently some confusion immediately following the passing of the Act as to whether all Courts could give directions. The confusion arose because of a remark of Lord Reid’s in W v W quoted supra.

It soon became clear that Lord Reid was merely repeating established principles of precedent, but at the time his remarks and possibly the use of the word ‘thereafter’ were interpreted to mean that magistrates were not to direct blood tests until the principles had been settled by the High Court. Because of this confusion, further guidance was called for by several writers. The JPLGR noted this in an editorial (quoted supra) and promised to report further when ‘this controversy is elucidated’.

And Laurence Polak (Solicitor) expressed the opinion of many when he said – having discussed Lord Reid’s remarks – ‘Clear statutory guidance to all courts and to practitioners is obviously called for’.

Fortunately the Statutory Instruments issued in 1971 (supra) about the procedure for giving directions for the use of blood tests in Magistrates Courts clarified the position as it seems unlikely that Lord Reid was suggesting that only the High Court could direct that blood tests should be taken.

2) Who could apply for a direction for the use of blood tests? And from whom could the blood be taken?

Unlike the proposed earlier legislation in which the court could take the initiative and order blood tests, s 20 only allowed the court to make a direction for the use of blood tests on an application by ‘any party to the proceedings’ and not on its own initiative..

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275 Home Office Information on Blood Testing in Paternity Cases – see Chap. 4 (c)
276 W v W [1970] 3 All ER 107 113 – see page 88 for detailed quotation
277 JPLGR (1970) 681 – see page 89 for detailed quotation
The number of people from whom tests could be taken was also restricted, i.e., only from ‘that person’ (the child) ‘the mother of that person and any party alleged to be the father of that person’. It was therefore necessary first to find out who could be held to be a ‘party’ to the proceedings.

The definition of ‘party’ varies according to the difference types of proceeding. A very wide definition of ‘party’ was contained in the Judicature Consolidation Act 1925, s 225 – ‘party’ includes every person served with notice of or attending any proceedings, although not named on the record. However, stricter definitions included only the actual parties named on the summons or petition.

For the purposes of estoppel per rem judicatam, *Spencer-Bower and Turner* preferred the wider definition of ‘party’ when considering proceedings in personam, and suggested that it meant:

‘not only a person named as such, but also one who intervenes and takes part in the proceedings, after lawful citation, in whatever character he is cited to appear or who, though not nominatim a party, insists on being made so, and obtains the leave of the court for that purpose.’

They preferred the narrower definition when considering proceedings in rem.

Proceedings in Magistrates courts can never be ‘in rem’, as although the status (in this case the paternity) of a person may be in question, this status is open to investigation by the Divorce Court. Even the decision in affiliation cases was only prima facie evidence of paternity – although the High Court would no doubt think carefully before upsetting such a decision.

There were various different types of proceedings in which blood tests might be directed – Affiliation Proceedings, Guardianship of Minors Acts, Matrimonial Proceedings in Magistrates Courts, the Children Act, and Succession cases.

**In Affiliation Cases** there could be problems where there was more than one possible father involved as there could only be two parties in these cases. However,

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280 Civil Evidence Act 1968 s.12
if the complainant’s summons against the first defendant was dismissed and the second defendant was excluded by blood test evidence, she could take further proceedings against the first man on the grounds that there was fresh evidence to put before the court. Or alternatively take out summonses again all possible fathers, apply for blood tests in all cases and proceed against the most likely – very expensive and time consuming.

There were also potential difficulties where the husband of the complainant wished to claim custody and paternity. He could appear as witness for the putative father (if the putative father was denying paternity) and get him to apply for blood tests. However, unless he wished to rely on the wider definition of ‘party’ he would have been well advised to take out a summons under the Guardianship of Minors Act for custody, and this could have been heard at the same time as the affiliation summons.

b) Guardianship of Minors Acts 1971 and 1973
Proceedings under these Acts were usually between the two parents – for custody, maintenance, etc. Although the definition of ‘parent’ included the father of an illegitimate child, he could not be joined when the proceedings were between husband and wife. His summons could, however, be heard at the same time. The authority to issue a summons was discretionary and would not lie if an application for process seemed to be vexatious. The putative father had to be able to show some likelihood or opportunity of paternity.

c) Matrimonial Proceedings (Magistrates Courts) Act 1960
This Act was primarily concerned with separation proceedings between husband and wife, and with all the grounds on which such a separation could be obtained. It was also concerned with the arrangements for all the children of the family. In considering whether any, and if so what, provision should be included in a matrimonial order for payment by one of the parties in respect of a child who is not a child of that party, s 2(5) stated that the court should have regard to the liability (among other things) of any person other than a party to the marriage to maintain the

281 R v Sunderland JJ (1945) KB 502 and Robinson v Williams (1965) 1QB 89
282 Magistrates Courts Act 1952 s.1 as amended
283 Ex parte Lloyd (1889) 53 JP 612
child. In *Roberts v Roberts*\(^{284}\) the court recommended that the justices should adjourn their final adjudication in a matrimonial proceedings in order to allow the wife to take affiliations proceedings. However, in *Snow v Snow*\(^{285}\), Lord Simon drew attention to the provisions of Rule 4(2)(a) of the Magistrates Courts (Matrimonial Proceedings) Rules 1960 which said that a wife at the time of the complaint should state expressly (i) whether a child who is not the child of the husband has been accepted by him and (ii) who else may be liable for the child’s maintenance. And he said that if this procedure was followed then it should be possible to avoid the delay of adjourning for affiliation proceedings.

This procedure would make the putative father a party to the proceedings, and he would then have been able to apply for blood tests if necessary.

d) **The Children Act 1975**

In adoption proceedings the parent or guardian had to give consent to the adoption (s 12). The natural father of an illegitimate child, although not a parent\(^{286}\) was a guardian if he had custody under the Guardianship of Minors Act 1971. So, the father of an illegitimate child had the right to be heard and his opinion taken into account when deciding whether adoption would promote the child’s welfare. If the child was being Freed for Adoption then the court had to satisfy itself that no person claiming to be the child’s father intended to apply for the custody order. This ‘right to be heard’ made the putative father a party to the proceedings. Had he wished to ask for a direction for blood tests he could have done so.

e) **Succession**

The Family Law Reform Act 1969 removed many of the disabilities that formerly attached to illegitimacy. However, it let in the possibility of hitherto unknown illegitimate children claiming on the death of a wealthy father, or, alternatively, unknown fathers claiming on the premature death of their wealthy illegitimate offspring. If the Will stated specifically that only legitimate children could inherit, legitimacy had to be proved.

\(^{284}\) *Roberts v Roberts* \([1962] 2\) All ER 967

\(^{285}\) *Snow v Snow* \([1971] 3\) All ER 833

\(^{286}\) *Re M* \((1955) 2\) QB 479
If blood groups were known, these could be used as evidence, but probably only if they had been obtained in accordance with the procedure outlined in the FLRA Part III, ie with the consent of the person from whom blood was being taken.287

Similar considerations applied in proceedings under the Inheritance (Provision for Family and Dependants) Act 1975, although this Act is wider in application and provision could be made for legitimate or illegitimate children or children of the family.

3) In what circumstances would the court exercise its discretion not to direct blood tests?

The court had discretion as to whether or not to direct that blood tests should be taken. There were, however, some doubts as to when and in what way this discretion would be exercised. Courts were reliant mainly on what had been said in S v S and W v W288. Lord Reid had pointed out that the lower courts should look to the higher courts (supra) for elucidation of the principles as to how they should exercise their discretion. At that time the only other guidance was to be found in the Law Commission’s report.

The Law Commission was clear that, unlike custody cases where the interest of the child is paramount, in these cases it is important to find out the truth. (para 15):

‘We suggest that today it is more important for the court to arrive at a right decision than for a child to be declared legitimate at all costs.’

However, all the Lords were agreed that there could be some circumstances when the court might not direct a blood test. Lord Reid said:289

‘But here there is or may be a conflict between the interests of the child and the general requirements of justice. Justice requires that available evidence should not be suppressed but it may be against the interests of the child to produce it.’

287 Amphill Peerage Case [1976] 2 All ER 411
288 S v S; W v W [1970] 3 All ER 107
289 Op cit 112
Lord Hodson agreed:

‘The interests of justice in the abstract are best served by the ascertainment of the truth and there must be few cases where the interest of children can be shown to be best served by the suppression of truth.’

And Lord Morris was sure that the court should have all the available evidence before it to help it arrive at a correct decision:

‘If evidence as to the blood-grouping of the various persons involved could be valuable evidence and could assist the court to arrive at a correct conclusion, then on principle it would seem appropriate and desirable that the court should have that assistance … I would think that in most cases comparable to the present one the interests of a child are best served if the truth is ascertained.’

So what could the court take into consideration when deciding whether to exercise its discretion? Perhaps

i) Health Reasons

ii) Whether the application was of a fishing nature

iii) Whether any inference could be drawn

iv) Whether it was against the will of the parent with care and control

v) Whether it was in the interests of justice

**i) Health Reasons**

Lord MacDermott had suggested:

‘If the court were satisfied that – as might possibly be the case on rare occasions – a blood test would prejudicially affect the health of the infant it would, no doubt, exercise its discretion against ordering the test.’

The Law Commission had said (para 40):

‘So far as health is concerned, we are advised by the medical profession that there are hardly any cases where a person’s state of health would make it dangerous to have a blood sample taken, though there may be cases, such as with haemophiliacs, where precautions are necessary.’

It was also necessary to think of the effect on the mental health of the child. This point was in issue in the case of *R v R* when a psychiatrist’s report was produced to the court which said that he was:

290 Op cit 123
291 Op cit 119
292 Op cit p 115
‘Gravely concerned about the proposal to arrange blood tests on B because of the affect that this might have on the already disturbed 12 year old boy’ – and a request for a blood test was in fact refused.’

ii) Fishing Nature

Lord MacDermott said: 294

‘If the court had reason to believe that the application for a blood test was of a fishing nature, designed for some ulterior motive to call in question the legitimacy, otherwise unimpeached, of a child who had enjoyed a legitimate status, it may well be that the court, acting under its protective rather than its ancillary jurisdiction, would be justified in refusing the application.’

The reasons why paternity was in dispute were, regrettably, not always (perhaps rarely) for the good of the child in question, and very often it could be said that there was some ‘ulterior motive’ behind the request for blood tests. The motive was often financial – either where maintenance is concerned, or where there was some question of succession rights – or sometimes the blood tests were requested solely to try to provide evidence for divorce proceedings. It would have been extremely difficult for a Court to sort out the often mixed motives of the applicant for a direction. However, it seems that Lord MacDermott had in mind particularly the older child who ‘had enjoyed a legitimate status’ for some years. This certainly was the case in R v R. In this case the child concerned had been in the care of the Local Authority for about 10 years before any question of disputed paternity was raised, and the sole reason the blood test was required was for divorce purposes. The court decided on the facts that the husband was not the father, but refused to allow blood tests.

A case decided before Part III came into force which had somewhat similar facts was M (D) v M (S) & G. 295 The child was also about 10 years old and the mother, who had always had custody refused to allow blood tests. Even though the father had disputed paternity from birth, the court refused to order tests. However, this case would have been caught by s.23 of the Act had it been decided after it came into force, and an inference could have then been drawn by the Court against the mother.

293 R v R [1973] 3 All ER 182
294 W v W (op cit) 115
295 [1969] 2 All ER 243
iii) Could any inference be drawn?
Under s 23 of the Act it was possible to draw an inference, if necessary, against the person who refuses to have the child’s blood tested, and the court could make a decision against that person. Where a child was in the care of the Local Authority, and paternity was being contested between the parents, the Local Authority might refuse to allow the child to be blood tested. However, R v R was authority for saying that the court would not make a direction for blood tests if there is no-one against whom any inference can be drawn, should the blood tests not be carried out as directed. In this case it was clear that the Local Authority would rely on their psychiatrist’s report and would not implement the tests, and Sir George Baker P said:

‘It would be quite impossible to draw any inference here if the City of S or the Children’s Department, or the adopted parents, refused to consent and it seems to me that the probabilities are that they would each and all, refuse consent.’

iv) If it was against the will of the parent having care and control.
Lord Reid said:

‘No case has yet occurred in which a court has ordered a blood test to be carried out against the will of the parent who has the care and control of the child, and I am not at all certain that it would be proper to do that or that it will be possible to do that after Part III of the 1969 Act comes into operation.’

However, this was one of the situations that the Act was designed to prevent. It stated that a blood sample should not be taken without the consent of the persons concerned (s 21 (1)) or, if he be under 16 years, of the person who had care and control of him (s 21 (3)). Should this consent be withheld then an inference could be drawn under the Act (s 23) against the person concerned.

It was possible that the Official Solicitor might object to blood tests on the grounds that it was not in the child’s best interests – as happened in W v W. But where one of the parents has custody and particularly where both parents are themselves willing to be tested, it would be extremely unlikely for the court to refuse to direct blood tests – especially bearing in mind what Lord Denning said in Re L:

‘If the judge held, applying the presumption of legitimacy, that the husband was the father then, as soon as the litigation is ended, the Official Solicitor will

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296 [1973] 3 All ER 182
297 W v W [1970] 3 All ER 107 112
298 Re L (1968) P 119
no longer be guardian ad litem of the child. The mother will be able to take the child quite freely to a doctor and ask him to test the child’s blood. The doctor may then say, with complete certainty that the other man is the father and the husband is not. As soon as that is done this court would give leave to appeal out of time and reverse the judge’s findings.’

and what Lord Morris said in *S v S*: 299

‘The events in relation to the child’s birth will already have been matters of dispute and controversy … Will it be in the interests of the child to have a conclusion expressed which the husband (if held to be the father) will never accept and which he will feel was given without evidence which would have supported his case? It will not advantage the child to have such a ‘father’ … Will it be in the interests of the child if, because the court was hampered by not having all the reasonably available evidence, a conclusion is expressed which as the years go on may be demonstrated to have been erroneous and which will command neither confidence nor respect?’

v) *Is it in the interests of justice?*

Although in the main it seemed clear that in most cases it was better that the truth should be known about a child’s paternity, there are cases where it would not be just to upset a long established legitimacy. This was the case in the *Ampthill Peerage Case*300. Lord Wilberforce said: 301

‘It is said that … the law is preferring Justice to Truth. That may be so, these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth … ‘

In this case the legitimacy of the peer in question had been decided many years previously and there had been a Declaration of Legitimacy. It would seem that where there has been a court decision on paternity by a higher court, it is unlikely that another court in the future will direct that blood tests should be taken against the will of the parties.

299 *S v S* [1970] 3 All ER 107 121
300 *Ampthill Peerage Case* [1976] 2 All ER 411
301 Op cit 418
4) How ought the courts to have dealt with the results of the tests?

The Act also posed some procedural questions that proved particularly difficult for courts which had not yet got used to dealing with and evaluating scientific evidence\textsuperscript{302}.

S.20(2) is mainly concerned with establishing the way in which the report from the tester is presented to the court. Before the Act it was necessary for the tester to appear in court unless his evidence had been agreed by both parties. Afterwards only in the most exceptional circumstances would the tester be called to give evidence – for example if there was some dispute about the technique or about the identity of the person being tested. The Home Office appointed 16 Official Testers – see chap. 4(c). The results of the tests could indicate exclusion or non-exclusion.

i) Exclusion results

The main point that arose from the subsection is the interpretation of the word ‘exclusion’ Section 25 states that exclusion means ‘excluded subject to the occurrence of mutation’. It was accepted by the courts that the chances of mutation occurring were extremely small – so small as not to be worth taking into account\textsuperscript{303}.

However, the Law Commission were cautious in their recommendations – para. 55:

\begin{quote}
‘We do not recommend that an exclusion result should be binding on the court in the sense that the court be expressly prevented from finding paternity proved in the case of an exclusion result. We think that an exclusion result should be treated merely as evidence to be considered by the court, along with all the other evidence which is available. However, we would not expect a court to find paternity proved in spite of an exclusion result unless there was extremely strong evidence casting doubt on the validity of the exclusion result. In most cases where the validity of blood test results was in question a fresh set of tests would resolve any doubts, but it is conceivable that there might be reasons, in rare cases, justifying the court ignoring an exclusion result. It follows that we do not recommend that a complainant should be prevented from continuing with her case despite an exclusion result in respect of the defendant.’
\end{quote}

\textsuperscript{302} See Jones CAG – Expert Witnesses: Science, Medicine, and the Practice of Law (1994)

\textsuperscript{303} Rees J in F v F [1968] 1 All ER 242
Presumably the Law Commission had in mind cases where there was suspicion of, for example, a mix-up of the actual specimens of blood, or some difficulties over identity. It is conceivable that it might have been impossible to have a retest – due to one party having disappeared or died – but these would be most exceptional circumstances. In practice, if an exclusion result was obtained, the case would not be proceeded with.

In 1972/3 the average rate of exclusion obtained by the Home Office Testers was 26.5% (see next chapter). The rate soon became lower – undoubtedly due to the fact that the significance and accuracy of blood testing became more widely understood.

In 1975 Barbara Dodd wrote\(^{304}\) that the calculated average chance of a non-father being excluded was 90%. That average was obtained when using 17 different blood group systems – increasing numbers of blood group systems were being discovered every year, and thus the value of the tests was also increasing. However, the word ‘average’ had to be looked at with caution. Grant and Bradbrook said, in 1973, when there was an exclusion chance of 84%:\(^{305}\)

> ‘At first glance an average exclusion chance of 84% suggests that a non-father is very unlucky if the present tests do not exonerate him but one has only to remember the not infrequent cases in which we are still not able to exclude either of two possible fathers to realise that this view is deceptive. The figure is an average only; the actual chance may be much higher or much lower. If the groups of the mother and child happen to be very common and if there is frequent heterozygosity (different genes from each parent) in the numerous systems in which the antithetical (contrasting) factors are not investigated the chance of showing non-paternity may be quite low. In such a situation employment of an additional system may have a much greater chance of showing exclusion than in cases were the tests routinely applied have already given a high exclusion chance.’

**ii) Non-exclusion results**

The Act states that if the party is not excluded then the tester should state the value, if any, of the results in determining whether the party is the father. Grant and

\(^{304}\) Barbara Dodd, Professor in the Department of Forensic Medicine, London Hospital Medical College. *Law Society Gazette (Vol 72 No 8 217)*

\(^{305}\) Grant and Bradbrook: ‘Newer Techniques in Paternity Blood Grouping’ 61 *Modern Trends in Forensic Medicine 3 (1973)*
Bradbrook (op. cit.) suggested that there needed to be some indication of the chance of non-paternity:

‘Where the parties are European the simple calculation of the percentage of men that the tests would not have excluded provides this measure. For other races mathematical calculation is not possible but the serologist is usually able to assess the position and give expert guidance to the court ……… consideration has to be given to the possible occurrence of African genes in the population ……… it is necessary to know the race of the parties involved since there is considerable variation in group frequencies in different parts of the world.

However, an article by Chakroborty et al\textsuperscript{306} suggested that provided a sufficiently large number of systems are tested for, there was no great difference in probability ratios between populations.

‘Fortunately a probability statement based upon all of the systems enumerated will differ immaterially among most large populations although the contributions to this cumulative probability of individual systems may vary substantially. The similarity in overall probability of paternity exclusion which exists among blacks, whites and Japanese … despite differences in the number of systems for which gene frequency data exist, supports this assertion.’

Correspondence in the Justice of the Peace\textsuperscript{307} indicated that courts and their clerks were having difficulty in understanding the comments of serologists:

‘I advised my magistrates to dismiss from their mind anything written on the form other than the sentence signed by a qualified pathologist entitled to give an opinion showing the putative father was not excluded. … It seems highly prejudicial to add comments inviting speculation and in odds, although the wording of the final sentence does not show whether the odds are on or not.’

5) What should have happened if consent for the taking of a sample of blood was withheld?

Section 21 states explicitly that consent \textbf{must} be obtained, and deals with those situations where the subject of the direction is under a disability. The following cases should have been looked at separately:

a) Where an adult does not consent


\textsuperscript{307} A court clerk (anon) ‘Affiliation’, JPLGR (28.9.1974) 544
b) Where an adult in charge of a child consents but the child does not

c) Where there is some doubt as to the mental capacity for consent of the person concerned.

a) **Where an adult does not consent**

W v W\(^{308}\) decided that the court had no power to compel an adult to be blood tested. The sanction the Act provided was in the power to draw inferences under S.23

However, where an adult refuses to consent to tests on a child in their custody, the position is different. It is possible that, by using its residual power or by taking wardship proceedings, the court might order tests on an infant, but it is more likely, perhaps, to draw inferences against the adult. This would make the child illegitimate through no fault of its own. It might be possible for the child to re-open the matter of its paternity later\(^{309}\) as it would not be bound by a decision to which it is not a party – otherwise if it was separately represented.

b) **Where an adult in charge of a child consents but the child does not**

Difficulties could arise in the case of a minor aged, say 15, who refuses to co-operate despite the consent of his/her parent or guardian. The Act says ‘blood samples ‘may’ be taken’. This was considered in two cases – both before the Act. In *Re L*\(^{310}\) Ormrod J said:

> ‘So far as enforcement is concerned the court would undoubtedly reconsider and even rescind its order if it subsequently appeared that the child was refusing to allow the doctor to take a blood sample.’

And in *BRB v JB*\(^{311}\) Lord Denning said:

> ‘The views of the child should be taken into consideration but the child’s views are never decisive. Even if the child is difficult, the court can order a blood test if it is clearly within the interests of the child, just as it can order an operation in the case of a ward of court.’

David Lanham\(^{312}\) in his article ‘Reforms in Blood Test Law’\(^{313}\) explored in detail the implications of this section when circumstances like this arise. He suggested:

\(^{308}\) W v W(1964) P 67

\(^{310}\) *Re L* [1967] 2 All ER 1110 [1124]

\(^{311}\) *BRB v JB* [1968] 2 All ER 1023 1025

\(^{312}\) Lecturer in Law, University of Nottingham
'In some circumstances if the child is claiming some form of relief from the court, it may be possible to secure his consent by pointing out that the court may dismiss his claim unless his consent is forthcoming. In cases where the minor is not claiming relief, it would seem that there is no effective sanction unless the doctor is willing to participate in an operation involving holding the minor down while blood is extracted from him. Possibly the wisest course for the doctor faced with this predicament would be to seek a ruling of the court.'

Stephen Cretney \(^{314}\) suggested that:

> ‘If a child’s parent consents to his receiving surgical treatment that consent will be a good defence to the surgeon against an action for assault on the child.’

This may be so, but it did not make it any easier to deal with such a situation in practice. At the very least, in such a case, the child should have been separately represented. Probably inferences could then have been drawn against it and any decision as to its legitimacy (or indeed for the payment of maintenance) would have been binding on it. It would, however, seem undesirable for the court to have been forced into a position whereby it contemplated the possibility of physically compelling the child to be blood tested.

c) Where there is some doubt as to the mental capacity for consent of the person concerned

The Law Commission considered the problem of people who suffer from mental disorder in para. 49 of their report:

> ‘It would be possible to provide that the court should have the power to dispense with the need for consent in such cases provided that there were no medical reasons why a blood sample should not be taken. This would, however, have one serious defect; it would not cover the case where the court was unaware of the mental disorder. The doctor who is to take the blood sample may be the first to discover that the person concerned is mentally incapable to consenting and we think it important that the doctor faced with such a situation should have clear guidance as to how safely to proceed.’

David Lanham \(^{315}\) thought that this section did not perfectly achieve the Law Commission’s aims. He said:

> ‘If in fact the patient is able to understand the nature of the tests the purported consent of the ‘person in care and control’ is not lawful authority. If the

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\(^{314}\) Cretney SM: *Principles of Family Law*, 315

\(^{315}\) Op cit
patient did not himself consent, both the doctor and the person in care and control would be liable for battery. If there is no doubt about the incapacity of the patient, then there is no real harm in the doctor’s sharing his responsibility with the person having care and control. This could be achieved by providing that the consent of the person with care and control should be a sufficient authority for the doctor to proceed (subject to the medical certificate referred to above). In cases of doubt it seems unfair to involve the doctor and the person in charge in possible liability for battery.’

He suggested that in fact the matter should be brought back to court again where there is any doubt. And suggested redrafting the section with the addition of the material in brackets

‘A blood sample may be taken from a person who is (or whom the medical practitioner taking the sample reasonably believes to be) suffering from mental disorder within the meaning of the Mental Health Act 1959 and is, (or whom the said medical practitioner reasonably believes to be) incapable of understanding the nature and purpose of blood tests if (i) the person who has the care and control of him consents (or the court so orders) and (ii) the medical practitioner in whose care he is has certified that the taking of the blood sample from him will not be prejudicial to his proper care and treatment’

This section has dealt with some of the legal ‘problems’ or ‘difficulties’ that were perceived at that time. Many were resolved later although some needed additional legislation. The next section describes how Part III worked out at grass roots level and examines some of the attitudes of those who had to make it work.
c) A 1974 survey of the use of blood test evidence

‘As science has hastened on and as more and more children are born out of marriage it seems to me that the paternity of any child is to be established by science and not by legal presumption or inference.’

This section tells of my attempt to find out how the procedure and regulations in respect of blood test evidence (as set out in Part III of the Family Law Reform Act 1969) were working out in practice at that time. I wrote to the Home Office and obtained a copy of the statistics they kept during the first year of operation of Part III (see below); I interviewed Dr. Jennison – then the nearest tester to me – and obtained from him a list of the local Magistrates’ Courts which had sent cases to him for analysis; I sent all these courts a questionnaire about their use of blood test evidence (see Appendix); and I also sent questionnaires to local solicitors who were known to work in this field (see Appendix). I then analysed the results (see below)\(^\text{317}\). It is accepted, of course, that this is only a very small survey and that no firm conclusions can be drawn from it. Nevertheless, it gives some indication of the effect of the then new procedure and the enthusiasm with which it was taken up.

Brian Harris, in his article in the Justice of the Peace\(^\text{318}\) reviewed the Blood Test procedure in Part III in great detail. In particular, he examined the probable effect of the Statutory Instruments Magistrates Courts (Blood Tests) Rules 1971\(^\text{319}\) and the Blood Tests (Evidence of Paternity) Regulations 1971\(^\text{320}\) and discussed how he thought the procedure laid down in these statutory instruments would work out in practice. He was not very optimistic and said:

‘One day soon someone will have to sit down and make sense of this plethora of explanatory forms. Why should a woman who takes out a summons against her adulterous husband have to be frightened by a warning that the court may give custody of her children to anyone under the sun? Why should a court explain about blood tests but not about legal aid? How much explanatory writing is ever read and what is the maximum amount of explanatory matter that should be sent out?’

\(^{316}\) Lord Justice Ward in Re H (a minor) (Blood Tests: Parental Rights) [1996] 3 FCR 201 p.220
\(^{317}\) Susan Hartshorne: Unpublished data – questionnaires, correspondence, etc.
\(^{319}\) SI (1971) No. 1991
\(^{320}\) SI (1971) No. 1861
'The characteristic defendant in an affiliation summons, even if he is capable of reading and understanding the court documents, has no experience whatever of keeping appointments, and even with the best will in the world is likely to make a hash of administrative arrangements which, one is tempted to think, are more suited to persons of an entirely different social and educational background.'

'The Act appears to contemplate that a test which gives an exclusion result will normally be followed by an order that the complainant mother pay the defendant’s costs, but this is to ignore the realities of the facts attending most affiliations summonses, where the mother is impecunious and the defendant is far from morally blameless. Despite the terms of the subsection, magistrates’ discretion to make whatever order they think fit as to costs appears in no way to be restricted and there is seemingly nothing to prevent them from refusing an award of costs to a successful defendant in an appropriate case, even of the blood test fees. In that case the costs will lie where they have fallen unless reimbursed from the generous coffers of the legal aid fund.'

This survey, which was made very shortly after Part III came into force, gave some indication as to whether Brian Harris’s dire predictions came true.

a) Home Office Statistics

Statistics were obtained from the Home Office as they kept a record of the number of blood tests which were directed by the courts during the period 1 March 1972 to 28 February 1973 – the first year after Part III came into operation. Unfortunately, they did not continue to keep such statistics after the first year.\footnote{Letter to the author from the Home Office 13.2.74} In 1976 I enquired whether the Home Office had changed its mind but they said:\footnote{Letter to the author from the Home Office 5.3.76}

‘The information which we collected during the first 12 months was in order to see how Part III of the Family Law Reform Act 1969 was operating and to help us assess whether any adjustments to the scheme were required. At the conclusion of this period we reviewed the scheme and decided there was no further need to ask testers to supply information for a further year.’

So it was not possible to do a comparative study involving a different future year. However, during that first year, the Home Office also kept records of the type of court by which these tests were so directed, and whether the tests did or did not exclude the
subject from paternity. These statistics are attached. As might be expected, by far the largest number of tests were directed from Magistrates’ Courts – 451 out of a total of 508.

It is interesting to look at the exclusion rate obtained by the Testers. The statistics show an average exclusion rate of 26.5%, but this figure conceals a very wide range of results. The percentages vary from 10.5 to 53%. It might be thought that this showed that applicants for blood tests had more knowledge of the reliability of the tests in one part of the country than another, but in fact the highest result (53%) was from one Tester in Sheffield where there were two Testers – the other having an exclusion rate of only 26%.

**BLOOD TESTING IN PATERNITY CASES**

Home Office information received from tests 1.3.72 to 28.2.73

<table>
<thead>
<tr>
<th>Tester</th>
<th>Court which directed blood test</th>
<th>Test excluded</th>
<th>Test did not exclude</th>
<th>% exclusion</th>
<th>No report</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Magistrates Court</td>
<td>County Court</td>
<td>Crown Court</td>
<td>High Court</td>
<td>subject from paternity</td>
</tr>
<tr>
<td>Dr G W G Bird (Birmingham)</td>
<td>62</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>14</td>
</tr>
<tr>
<td>Dr C C Bowleg (Sheffield)</td>
<td>29</td>
<td>3</td>
<td>17</td>
<td>15</td>
<td>53%</td>
</tr>
<tr>
<td>Dr T E Cleghorn (Middlesex)</td>
<td>13</td>
<td>2</td>
<td>11</td>
<td>15%</td>
<td></td>
</tr>
<tr>
<td>Dr B E Dodd (London)</td>
<td>23</td>
<td>7</td>
<td>16</td>
<td>30%</td>
<td></td>
</tr>
<tr>
<td>Dr A Grant (London)</td>
<td>62</td>
<td>5</td>
<td>15</td>
<td>28</td>
<td>53</td>
</tr>
<tr>
<td>Dr R F Jennison (Manchester)</td>
<td>59</td>
<td>2</td>
<td>3</td>
<td>12</td>
<td>52</td>
</tr>
<tr>
<td>Dr PJ Lincoln (London)</td>
<td>23</td>
<td>2</td>
<td>7</td>
<td>18</td>
<td>28%</td>
</tr>
<tr>
<td>Dr M M Pickles (Oxford)</td>
<td>2</td>
<td>2</td>
<td>2</td>
<td>2</td>
<td>28%</td>
</tr>
<tr>
<td>Dr R D Popham (Bury)</td>
<td>10</td>
<td>3</td>
<td>11</td>
<td>4</td>
<td>11</td>
</tr>
<tr>
<td>Dr D F Roberts (Newcastle)</td>
<td>45</td>
<td>6</td>
<td>17</td>
<td>34</td>
<td>33.00%</td>
</tr>
<tr>
<td>Dr K L Rogers (London)</td>
<td>3</td>
<td>3</td>
<td>3</td>
<td>3</td>
<td>33%</td>
</tr>
<tr>
<td>Dr D S Smith (Southampton)</td>
<td>12</td>
<td>2</td>
<td>3</td>
<td>13</td>
<td>19%</td>
</tr>
<tr>
<td>Dr GH Tovey (Bristol)</td>
<td>34</td>
<td>3</td>
<td>1</td>
<td>1</td>
<td>4</td>
</tr>
</tbody>
</table>
Dr A Usher  
(Sheffield) 57 3 2 16 46 26%  
Dr J Wallace  
(Scotland)  
Dr R A Zeitlin  
(Surrey) 17 24 5 28 135 23.50%  
Total 451 24 5 28 135 371 26.50% 2

Most tests were, as might be expected, carried out in the London area (124), but a substantial number were done in other large centres of population – Sheffield (86), Manchester (69), Birmingham (62) – but only two in Oxford. Although the Act did not apply to Scotland a Tester was appointed – not surprisingly no tests were done there.

I interviewed Dr. RF Jennison, the official tester in Manchester. He said that about 50% of the cases he handled were directed by the courts – he was able to give me a list of these courts – and about 50% came direct from solicitors. Although when the Act first came into operation his exclusion rate was about 26%, he said this had fallen, probably due, he thought, to the fact that more was known about the reliability of the tests and that consequently mothers were not likely to name a man as father unless they were reasonably sure of their facts.

b) Magistrates Courts

I circulated Justices' Clerks at Magistrates Courts where directions had been made, and where the blood tests had been carried out by Dr. Jennison. There were 39 Courts involved and completed questionnaires were received from 23 of these.

## Results of 1974 Survey about blood tests in Magistrates' Courts

<table>
<thead>
<tr>
<th>Court</th>
<th>Type of case</th>
<th>Legal Aid</th>
<th>Procedure Adequate</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Affiliation</td>
<td>Others</td>
</tr>
<tr>
<td>Ashton</td>
<td>4</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Anglesey</td>
<td>6</td>
<td>1</td>
<td>7</td>
</tr>
<tr>
<td>Blackpool</td>
<td>17</td>
<td>15</td>
<td>2</td>
</tr>
</tbody>
</table>

323 See Appendices 1 and 2
<table>
<thead>
<tr>
<th>Court</th>
<th>Cases</th>
<th>Blood Test</th>
<th>Affiliation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bootle</td>
<td>1</td>
<td>11</td>
<td>1</td>
</tr>
<tr>
<td>Birkenhead</td>
<td>4</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>Chester</td>
<td>11</td>
<td>11</td>
<td>1</td>
</tr>
<tr>
<td>Eddisbury (Vale Royal)</td>
<td>2</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Flint</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Halifax</td>
<td>1</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Isdulas</td>
<td>2</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Leigh</td>
<td>5</td>
<td>5</td>
<td>1</td>
</tr>
<tr>
<td>Liverpool</td>
<td>12</td>
<td>9</td>
<td>3</td>
</tr>
<tr>
<td>Liverpool County</td>
<td>5</td>
<td>5</td>
<td>1</td>
</tr>
<tr>
<td>Morecambe</td>
<td>2</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Prestbury &amp; Macclesfield</td>
<td>8</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Northwich</td>
<td>3</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>North East Cheshire</td>
<td>4</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>Newcastle-under-Lyme</td>
<td>5</td>
<td>5</td>
<td>1</td>
</tr>
<tr>
<td>Salford</td>
<td>2</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>St Helens</td>
<td>3</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Southport</td>
<td>2</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>South East Cheshire</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Stockport</td>
<td>4</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>165</td>
<td>69</td>
<td>12</td>
</tr>
</tbody>
</table>

It is difficult to draw any definite conclusions from this survey, due mainly to the fact that, although a reasonable number of tests had been directed in total, each individual Court only dealt with a small number – sometimes only one – and therefore could not give very meaningful answers or opinions about the new regulations. Nevertheless some interesting facts and comments emerged.

**Summary of Magistrates Courts’ Survey Results**

- The majority of cases in Magistrates Courts in which blood test evidence was used at that time were Affiliation cases. (105 Affiliation, 4 others)

- Most of the parties in these cases were legally aided, but there were a significant number (13.5%) who had to pay their own expenses. To have to make a down payment of over £50 at that time was quite a consideration, not always balanced by the (not always very likely) possibility of recovery of costs later.

- Most (17) of the Courts found the procedure adequate, though this may be because they did not have very many cases to deal with. A significant
number found the procedure too complicated and expensive. One specifically quoted Brian Harris’s article which he thought was still relevant, and went on to say that he thought the Act was

‘A sledge hammer to crack a nut. The waste of time of solicitors, clerks, parties, does not justify the results or benefits obtained. The failings of this legislation have been born out in the light of experience. Solicitors invariably do not follow the procedure, do not give required information and do not understand (or have not read) the rules. This leads to protracted correspondence.’

Several courts found the procedure time-consuming both because of the number of forms and also because the parties ‘did not always co-operate’.

- The majority of Court Directions for the taking of Blood Tests were complied with, though a significant number were not. The reasons for this were various, but expense was obviously a problem. Also, one court mentioned delaying tactics, another the failure to provide photographs.

- Apart from when it was directed by the Court, blood test evidence was not used very frequently – only 9 courts said they ever used blood tests and those did not use it very frequently.

- There was some evidence that although the complicated procedure took time in the Court offices, it could also save the Court’s time because cases were withdrawn or not contested when the results of tests were known.

c) Solicitors

Manchester City Magistrates Court produced a detailed explanation of the blood test procedure to help solicitors and their clients and a letter was sent in November 1974 to 30 firms of Solicitors in Manchester enclosing a questionnaire about the use

324. An explanation of the use of blood tests in paternity disputes’
19 firms replied and the following results were obtained.

- **Court Directions:** One of the most striking results obtained from this survey was the very small number of firms who had had blood tests directed by the Court. Just under 6% of the cases recorded, that is 7 out of 119, had been as a result of a Court Direction. Considering the fact that Dr. Jennison (the official Tester for Manchester) had said that 50% of the cases that came to him came as a result of a Court Direction, this percentage is very low. The main reason for this seems to be the very small number of directions that were made by Manchester City Magistrates during this period. Although many of the solicitors contacted also practised in other courts, in all probability most of their cases would have been in Manchester City Court.

- **Numbers of cases:** Of the 19 firms that replied, two had had no cases of disputed paternity at all in the last two years; 10 had less than 5 per annum; and 7 had between 5 and 25 cases per annum. Of the 10 who had had less than 5 cases per annum – six firms had no cases in the last two years in which blood tests were used, 3 had two cases, and one had one case. Of the 7 who had between 5 and 25 cases per annum – 2 had 30 cases in the last two years, 2 had 12 cases, and 2 had 5 cases. One could not remember the exact figure but said that blood tests were used in 75% of their cases.

  It was apparent that those firms dealing with a large number of cases of disputed paternity per annum used blood test evidence in a very large percentage of cases – about 75%. However, when dealing with very small total numbers, it was difficult to get a meaningful percentage – a total of two cases in two years works out at a percentage of 25%, but could, of course be altered significantly by the addition or subtraction of just one case.

- **Exclusion results:** These were obtained in only a small number of cases, apart from one firm who said that exclusions results were obtained in 25% of

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325 See Appendices 3 and 4
their cases. Of the others, one firm had 3.3% (one out of 30); one 6.6% (2 out of 30) and one 27% (3 out of 11). The average exclusion results obtained by official testers is much higher than this – nearly 30% in the country as a whole, though nearer 20% for Manchester. Again it was difficult to get accurate percentages when dealing with such small numbers.

**Legal Aid:** Legal Aid was not always obtained for both parties. Significantly perhaps, the two firms who dealt with the largest numbers (30 cases in each instance) of these cases were able to obtain Legal Aid for both parties in every case, and it was only those firms who handled a small number of cases who apparently had difficulty in obtaining Legal Aid.

**The usefulness of the procedure:** An almost equal number of firms said they found the procedure under the Act useful as found it not useful. And this answer seemed to bear no relation to the number of cases they had had to deal with. Of those who did not find it useful, one said: ‘It is cumbersome and more expensive than a direct application to the path. labs at St. Mary’s or Macclesfield’ And another said: ‘It takes much longer through the Court than privately, and is sometimes more expensive’

Two firms thought that there had been a drop in the number of cases in which paternity was disputed. One suggested:
‘There used to be more cases and now there are less due to

1) The Pill, and
2) The DHSS dealing with many cases themselves’

And the other: ‘There had been some drop in numbers since the Abortion Act came into force’

One firm remarked that they did not think that the Court should be given the full details of the test when the result was that the man could possibly be the father, as ‘Non-medical people are apt to draw wrong inferences from statements of blood groups’. They obviously did not have a very high opinion of the intelligence of the Bench! However, in view of the
correspondence referred to earlier in the *Justice of the Peace*\(^{326}\) perhaps it was the Clerks who needed some training.

**Conclusions**

Although the numbers involved in these surveys were small and not therefore significant, the answers given were interesting. Clearly at that time blood test evidence was rarely used in the Courts unless a Direction had been given. However, Solicitors said that the majority of blood tests they had had taken were not taken as a result of Court directions. Probably this was because as far as the solicitors were concerned, if an exclusion result was obtained, then that was the end of the case. If not, then unless very rare blood groups are involved indicating a very high probability ratio, then except in the event of there being no other evidence available, they were unlikely to rely on this evidence in Court. This does not mean to say that the blood tests were useless as they were probably of considerable significance in helping the parties to make up their minds as to whether or not to proceed with the case.

Dr. Jennison said that he received requests for blood tests in equal numbers (almost) from the Courts and directly from solicitors. Since at least some of the firms of solicitors contacted obtained blood tests in a large number of disputed paternity cases per annum, only a very small number of which were directed by the Court, it seems obvious that there were many solicitors who did not use this sort of evidence at all. Indeed the lower the number of cases of disputed paternity handled by solicitors, the lower the proportion of cases in which blood test evidence was used – six firms who had less than five cases per annum did not use blood tests at all.

One of the firms who dealt with the largest numbers of cases where blood test evidence was used did not have any taken as a result of a Court Direction. This was one of the firms who thought the procedure under the Act not useful and more expensive than having tests taken by a direct application to the labs. When this could be arranged – with adequate safeguards as to identification – then perhaps it would have been sensible and time-saving to do this. Indeed, there was some indication that making blood (or now DNA) testing a compulsory requirement in all

\(^{326}\) *JPLGR* (28.9.1974) 544
disputed paternity cases would be useful. If done as routine – as seemed then to be the case in firms that handled a lot of paternity cases – it could save court time.

However, perhaps one of the most useful results arising from the survey was the need for sufficient training of Courts and Solicitors when introducing new scientific procedures – to make sure that both the advantages and also the possible disadvantages and problems are well known. Hopefully this was taken on board later when DNA Fingerprinting was introduced.
Chapter 5

Working towards Certainty

‘The 1969 Act was designed for a time when wedlock was the norm for having children and the sexual revolution was in its infancy. The world has changed much since then.’

In the 1970s and 1980s there were a number of changes that impacted on the subject of this thesis. Some of these changes were scientific and some were changes in public opinion.

Scientists continued to expand their knowledge of blood groups in the 1970s and it became a little easier to make decisions about paternity. However, although it was usually possible to prove with certainty that a non-father had been wrongly accused, it was still not possible to give positive proof of paternity unless very rare blood groups were involved.

The 1980s were also a time when new methods of assisted reproduction were being developed. Following the birth of Louise Brown in 1978 – the first baby to be born by in vitro fertilisation (IVF) – and largely as a result of anxieties expressed by the public, a Committee was set up by the Government under the chair of Mary Warnock to look at the impact that these discoveries were making and to see whether additional regulations were needed. The Warnock Committee reported in 1984. As mentioned earlier, the only method of assisted reproduction I am dealing with in this thesis is that of Artificial Insemination (AI) and a history of this method, and its impact on proof of paternity, is included in this chapter.

Public opinion at this time was also changing. No longer was it thought by many people to be disgraceful to produce children before getting married. Cohabitation was becoming more common and more and more children were growing up in one

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328 Cmnd. 9314. Report of the Committee of Inquiry into Human Fertilisation and Embryology
parent families. The Finer Committee noted this increase and reported in 1974\textsuperscript{329} on the difficulties of one parent families. Public pressure mounted for the Government to improve the legal position of illegitimate children. The Law Commission consulted\textsuperscript{330} and then produced a report on illegitimacy.\textsuperscript{331} Eventually the Family Law Reform Act 1987\textsuperscript{332} went a long way to getting rid of the stigma that attached to these children and to equalise their rights with those of children born legitimate.\textsuperscript{333}

Another relevant change that occurred in the 1980s was the recommendation by the Criminal Law Revision Committee in 1984\textsuperscript{334} to take away the ‘protection’ from allegations of paternity for boys under the age of 14 by abolishing the irrebuttable presumption of incapacity. This recommendation had to wait until 1993\textsuperscript{335} before it was implemented, but thereafter the same standard of proof applied to young boys under 14 as it did to others over 14 in that situation.\textsuperscript{336}

The discovery of DNA fingerprinting in the early 1980s and its application to the proof of paternity changed for ever the way in which evidence in paternity cases was regarded by the courts. A very short account of the early history of this ground breaking discovery is therefore included here.

So, this chapter is divided into several sections. Firstly, I will continue the story of advances in the discovery of new blood groups in the 1970s and their use by the courts. Secondly, I will give an account of the history of artificial insemination and discuss its impact on proof of paternity. Then I will give a brief account of the discovery of DNA Fingerprinting and lastly I will discuss the Family Law Reform Act 1987 and the changes that it brought to those seeking to prove paternity.

\textsuperscript{329} Cmnd 5629 Finer Committee Report
\textsuperscript{330} Law Commission Working Paper No 74
\textsuperscript{331} Law Commission Report No 118
\textsuperscript{332} S. 1
\textsuperscript{333} see Chapter 1(a)
\textsuperscript{334} 15th Report on Sexual Offences. Cmnd 9213
\textsuperscript{335} Sexual Offences Act 1993
\textsuperscript{336} see Chapter 1(c)
a) Blood Tests 1973 to 1987

‘(T)he right to have a family life is seriously interfered with if you cannot find out who your parents are.’

After the Family Law Reform Act 1969, scientists continued to discover new blood groups – all of which made it easier for non-fathers to disprove paternity and for there to be an increasing probability ratio when dealing with putative fathers – helping them to establish paternity. In 1973\(^{338}\) Alan Grant and Ian Bradbrook reported the discovery of the haptoglobin groups and also said that haemoglobin grouping had ‘become increasingly useful now that paternity problems involving African and Asian descended infants have to be investigated.’ However, they doubted whether all laboratories had sufficient up-to-date equipment in order to carry out all the possible tests. They also said they thought that court directions would ‘come to be a matter of last resort and a considerable proportion of cases will continue to be investigated before court hearing is commenced’.

Soon afterwards Chakraborty et al reported\(^{339}\) that there were now 57 immunological and biochemical genetic systems that could be used and ‘easily become routine’. They also usefully commented on the difference that this could make when testing blood from other ethnic groups.

However, in spite of these possible 57 groups, Barbara Dodd\(^{340}\) found that no more than 17 groups were necessary for routine cases as with these she was able to exclude 90% of non-fathers. She emphasised the necessity of following the procedure even if it was rather tortuous – in particular making sure of proper identification (perhaps by photographs) of babies.

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338 Alan Grant and Ian Bradbrook: ‘Newer Techniques in Paternity Blood Grouping’ Modern Trends in Forensic Medicine 3 1973
339 Chakraborty: Am Jo Hum Genetics 26: 477-488 (1974); see also supra 113 note 301; 125 note 326
Although scientist testers were asked, on the statutory form, to state the likelihood of paternity, it was clear that some courts had difficulty in interpreting this.\textsuperscript{341}

Meanwhile discussion continued as to when it was right to direct that blood tests be taken, what had to be considered when making that decision and whether discovering the truth was always desirable. In the case of \textit{R v R}\textsuperscript{342} Sir George Baker was reluctant to direct that blood tests be taken as it might have an adverse effect on the child who had been born after his mother left the home and who was in the care of the local authority. In the end, Sir George ducked the question and said he could decide the case on other grounds.

This question was also discussed in \textit{Hodgkiss v Hodgkiss} and another\textsuperscript{343} where the trial judge had directed blood tests but this was reversed on appeal as ‘paternity was not a relevant matter in relation to the care and upbringing of the children’.

The case of \textit{Re JS (a minor)}\textsuperscript{344} further (but rather confusingly) defined the limits of directing blood tests. This was a case where the child had been made a ward of court and it was held (inter alia) that the issue of paternity should not be tried in wardship proceedings

‘unless determination of the issue would have a material bearing on some other issue in the proceedings and it was in the child’s interests that its paternity should be investigated, in which case there should be an order for the trial of the paternity issue’.

In that case since the child had a secure relationship with his mother and her new partner and since the child refused to give a sample of blood, Ormrod J did not think a test was appropriate. Barbara Dodd agreed with him\textsuperscript{345} and wondered: ‘Is it of paramount importance to discover the true biological father of a child who is a member of a stable family unit with the ‘wrong’ father?’ However, Alec Samuels\textsuperscript{346} did not entirely agree with her and said:

\begin{flushright}
\textsuperscript{341}\textit{JPLGR} (28.9.1974) 544 and supra 113 and 125
\textsuperscript{342}\textit{R v R} (1973) \textit{Family Law} 182
\textsuperscript{343}\textit{Hodgkiss v Hodgkiss} & anor (1984) FLR 563
\textsuperscript{344}\textit{JS (a Minor)} [1980] 1 All ER 1061
\textsuperscript{345}Barbara Dodd: ‘When Blood is their Argument’ \textit{Med Sci Law} (1980) Vol 20 No 4 231
\textsuperscript{346}Alec Samuels: ‘\textit{Blood Test Law and Practice}’ \textit{Family Law} (1981) No 4 124
\end{flushright}
The truth is a great virtue in itself. The suppression of the truth can rarely be beneficial. Paternity almost inevitably has been the subject matter of considerable dispute and controversy. If the court refuses a blood test the paternity doubts will continue, despite any judicial finding based upon other evidence. The child as he grows up may feel a lurking doubt about paternity which may gravely affect his psychological well-being and personal relationships.

However, he did accept that sometimes it might be right not to direct that blood tests be taken.

Another thorny issue that had been discussed in a number of earlier cases came before the courts in the case of Serio v Serio. This disputed paternity case turned on the standard of proof. The trial judge followed s.26 of the Family Law Reform Act 1969 and applied the ‘balance of probabilities’ test but on appeal Sir David Cairns following Denning LJ in Bater v Bater said that the standard to be applied was not a mere balance of probabilities but ‘a standard commensurate with the seriousness of the issue involved’.

In W v K Latey J said that Re JS and Serio v Serio ‘had established that the standard of proof was one commensurate with the gravity of the issues of paternity and legitimacy and should be a heavy one’. He agreed that ‘the standard of proof in such cases was heavier than the narrow civil standard of the balance of probabilities but not so heavy as in criminal proceedings’.

This caused confusion and it became difficult to decide paternity cases because of what amounted to a flexible standard of proof which might be varied according to individual court’s prejudices.

Evidence of the mother in affiliation cases still, at that time, needed to be corroborated and Turner v Blunden usefully decided that the results of blood tests could be used.

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347 Serio v Serio (1983) 4 FLR 756 This was to change with the discovery of DNA fingerprinting in the early 1980s and its application to the proof of paternity. A short account of the history of this ground breaking discovery is therefore included.
348 Bater v Bater (1951) P 35
349 W v K (1986) Family Law 64
350 Re H (Minors) (Sexual Abuse: Standard of Proof) (1996) AC 563 later stated there was only one civil standard of proof
as corroboration. The commentator on the case in Family Law said this was ‘sensible and welcome.’\textsuperscript{352} This case was followed in McVeigh v Beattie\textsuperscript{353} where the putative father’s failure to submit to a blood test was capable of constituting corroboration of the mother’s evidence.

Presumably knowledge about the likelihood of non-fathers being excluded by blood tests spread through the legal profession, but in spite of this there did not seem to be a drop in the numbers of names of putative fathers that were put forward and were excluded. Barbara Dodd noted\textsuperscript{354} she was excluding about 1 in 6. She did produce a useful guide to help those who had difficulty in interpreting the Paternity Index (PI). The PI is ‘a simple ratio of the chance the tested man has of providing all the blood group genes required for fathering the child compared to his chance of doing so if he had been wrongly named and was, therefore, randomly selected from the population.’ This table was then quoted in a number of cases and articles.

A number of other related articles, reports and cases took place during this period – for example:

The Finer Committee Report\textsuperscript{355} was published on 2 July 1974\textsuperscript{356}. But although had these proposals been implemented they would have improved the finances of unmarried mothers and their children the report had little to say about the law relating to illegitimacy and affiliation\textsuperscript{357}.

Also, usefully, the case of \textit{F v D}\textsuperscript{358} decided that the issue of paternity could be tried as a preliminary issue under the Guardianship of Minors Act 1971 on an application for custody. And \textit{Re J (a minor)}\textsuperscript{359}, in addition to being the first reported case when DNA Fingerprinting was used, also established that a parent could be stopped from leaving the country until a directed blood sample had been given.

\textsuperscript{351} Turner v Blunden (1986) Family Law 191
\textsuperscript{352} Family Law (1986) 182
\textsuperscript{353} McVeigh v Beattie [1988] 2 All ER 500
\textsuperscript{354} Barbara Dodd: ‘Blood Grouping Tests’ 1987 Law Society Gazette 22.7.87
\textsuperscript{355} Cmdn 5629
\textsuperscript{356} see Chapter 1(a)
\textsuperscript{357} Jennifer Levin: Reforming the Illegitimacy Laws. 1978 Family Law 35
\textsuperscript{358} F v D The Times (2.12.82)
\textsuperscript{359} Re J (a minor) (wardship) (1988) 1 FLR 65
Other cases and/or articles decided in this period which involved Artificial
Insemination are to be found in section 5(c), and those involving DNA Fingerprinting
are to be found in section 5(d).
b) Artificial Insemination

`Everyone has the right to respect for his private and family life, his home and his correspondence.`  

Today artificial insemination (AI) is only one of several methods of assisted reproduction by which children can be born, but in the 1980s the techniques of IVF (in vitro fertilisation) in its various forms, egg donation and surrogacy were in the early stages of development and had not then been perfected. Louise Brown, the first IVF baby, had been born in 1978 and was almost thought of as a miracle baby. However, AI was by that time relatively common and if done without the husband’s consent, could result in problems if paternity was disputed – particularly where the marriage broke up and the husband denied paternity. So, this section will trace the history of AI and the opposition to its use by some Christian denominations and other organisations. I will mention the Warnock Report\(^\text{361}\) which enquired into all aspects of assisted reproduction but will only discuss the report’s comments on artificial insemination in detail, and the children born by this method of reproduction. Although much of the earlier discussion was about religious objections to the use of AI, later discussions of AI have been about secrecy, whether or not to tell the children how they came into this world, and about the legal status of these children.

Although we tend to think of AI as a modern scientific discovery, it is in fact of fairly ancient origin, although it did not become common until the 20th century. GW Bartholomew has comprehensively traced its history in articles in the Eugenics Review\(^\text{362}\) and the Modern Law Review\(^\text{363}\). He said that the first instance of AI – but with horses – was found in the 14th century when it was used by the Arabs for breeding. And the first recorded human application was in 1790 – performed by John Hunter. However, this was of AIH (artificial insemination with the husband’s sperm) and the first recorded instance of AID (artificial insemination by donor sperm)

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\(^{360}\) ECHR Article 8  
was performed by Professor Pancoast in 1884. From that time until the 1930s the practice appeared to grow slowly but steadily.

AID was used mainly where the wife was fertile but the husband was infertile and the couple wished to have a child that was at least 50% their own, but also where the husband suffered from some hereditary disease that could possibly be passed on to his children. In addition there had been discussions about the possibility of using AID for eugenic reasons (see below). This was fuelled by those who were concerned by the loss of lives during World War I and the consequent drop in population numbers. As long ago as 1935 Herbert Brewer in the *Eugenics Review*[^64] in an article entitled ‘Eutelegenesis’ wrote:

> ‘We may consider the results which might follow an experiment in human reproduction carried out by using the germ cells of a few highly selected males to impregnate the general body of females. Such a process might produce a great and rapid improvement in the hereditary qualities of the race.’

And this was supported by Julian Huxley in his Galton Lecture[^65]. But the idea was soon dropped – probably when Hitler’s experiments became widely known.

Parallels can be drawn with the use of artificial insemination for the purposes of cattle breeding. In the UK this was in the hands of the Milk Marketing Board and the semen was not owned by the farmer until it had been inseminated. I visited the local offices and saw the system in operation. This was in contrast to the situation in the USA where semen was available to be bought and stored and had resulted in a black market in particularly desirable specimens of semen.

After World War II, in 1948, there was a suggestion that AID might be used to give the surplus women a chance of achieving motherhood[^66]. However, there was also, at the same time, pressure from some of the Churches to make AID a criminal offence[^67] and in addition they said that AID (even with consent) was adultery:

[^65]: Galton Lecture Feb 17 1936 ‘Eugenics and Society’
[^67]: Artificial Human Insemination, SPCK 1948
‘Is it ever the will of God that children should be begotten in our society, by two people (*one being the donor*) who not only are not, but cannot be married? And they answer: no.’

In this the Churches had the backing of the decision in *Orford v Orford*:368

‘Sexual intercourse (*by this means*) is adulterous because in the case of the woman, it involves the possibility of introducing into the family of the husband a false strain of blood. Any act on the part of the wife which does that would therefore be adulterous.’

A Commission appointed by the Archbishop of Canterbury in 1948 was highly critical of AID and recommended that it should be made a criminal offence.369

In 1949 the question of AI came before an English court in the case of *REL v EL* 370. In this case the marriage was never consummated for psychological reasons and the wife was anxious to have a child. She was inseminated with semen from her husband, but they separated a month afterwards. Although later a child was born, the wife petitioned for a decree of nullity on the grounds that the marriage had not been consummated. The court decided AIH did not amount to consummation of the marriage, neither, on the facts, was the wife deemed to have approbated the marriage. The fact that the decree would bastardise the child was no grounds for refusing the decree. Similarly in *Slater v Slater*371 it was assumed that unsuccessful AID did not amount to consummation or approbation.

In the case of *Maclennan v Maclennan*372 a wife alleged that a child who appeared to have been born to her as a result of an adulterous union had been conceived by AID. It was held that this did not constitute adultery – in spite of earlier cases (supra).

Very soon afterwards, in the same year, the Government appointed a ‘small Interdepartmental Committee’ to enquire into the subject and to make recommendations. In 1960 the Feversham Report on Human Artificial Insemination

368 *Orford v Orford* (1921) 49 Ontario LR 13
369 Reported later in The Guardian 15.1.83 ‘Looking Back’
370 *REL v EL* (1949) P 211
371 *Slater v Slater* (1953) P 235
372 *Maclennan v Maclennan* (1958) SLT 7
was the result. They found the subject difficult, spent many hours meeting together, and gathered evidence from a wide variety of medical and religious bodies. In the face of conflicting opinions given by Churches and lawyers, they issued a very negative report. They hoped that:

‘… the practice may diminish or entirely disappear and that the publication of this report and a fuller disclosure of the facts relating to the practice so far as it exists in this country, and of the implications of that practice for the individuals concerned will assist to this end.’

And recommended that:

‘… the answer is that AID falls within the category of actions known to students of jurisprudence as ‘liberties’ which while not prohibited by law, will receive no kind of support or encouragement from the law.’

They thus recommended leaving AID in a sub-legal position, subject to no controls or legislation, and leaving the children born as a result of AID (even with the consent of the mother’s husband) to be illegitimate. A leading article in the ‘Justice of the Peace’ agreed:

‘The whole idea of AID is to most people repugnant, and it is to be hoped that less will now be heard of it and that the practice will not spread.’

Two of the members of the Feversham Committee produced a dissenting report as they could not agree that the children born as a result of AID should remain illegitimate. Their opinion prevailed eventually as in fact the practice increased and did ‘spread’, although since there were no exact central records kept, it is difficult to estimate how wide-spread it was. Some indication can be gathered from other countries. In the USA it was estimated that in 1966 there were between 5,000 and 10,000 AID births (Behrman).

The Catholic Lawyer noted and discussed conflicting cases in the USA in respect of the illegitimacy of children produced by AI but ended by quoting from Barbara

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373 HMSO, 1960 (Cmd 1105) para 264 para 266 (1960) JPLGR 491
374 Anon (Recent Decisions): 9 Catholic Lawyer, Autumn (1963) 340
375 Gursky v Gursky 39 Misc. 2d 1083; Dornbos v. Dornbos 23 USL Week 2308

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Dodd’s article\(^{379}\) that ‘Any doubts there may be under present law as to the legitimacy of a child conceived with the husband’s consent … through AID … should be removed by legislation.’

By the 1970s there were 30 to 40 doctors practising AID in the UK. From personal contacts at that time, I found two doctors in Manchester who between them saw about 50 women a week, many of whom needed a considerable number of visits before they achieved pregnancy (if at all). I interviewed both of these doctors in 1976.\(^{380}\) They said that students were often used as a source of sperm for these inseminations – useful income for the students. Sometimes, also, grateful husbands of women who had been successfully treated for infertility volunteered. The practice was not regulated but responsible practitioners limited the number of times a donor was used – though not all could be assumed to be ‘responsible’. Occasionally, in the absence of a suitable donor, the practitioner would use his own sperm.\(^{381}\) No records were kept – in fact they were often (usually?) destroyed when the woman became pregnant – as it was realised that legally the donor (if known) could be sued for maintenance. The doctor who inseminated the woman did not take care of her at the birth and therefore ran no risk of perjuring himself over the child’s identity. The husband put his own name on the birth certificate. These practices may have seemed right at the time, but could have resulted in a great deal of confusion when more accurate methods of proving paternity became available and people began to try to trace their ancestry.

In 1973 a Committee set up by the British Medical Association under the chairmanship of Sir John Peel reported on the demand and use of AID\(^{382}\). They circulated heads of obstetric and gynaecological departments in the UK. 143 out of 315 stated that they had received enquiries about the possibility of having AID during the previous six months.

The Peel Report noted that AID was used almost exclusively to relieve infertility. They estimated that 10% of marriages in Great Britain were infertile, and that ‘a

\(^{379}\) Barbara Dodd: 56 Law Soc Gazette (1959)
\(^{380}\) B Sandler (Medical Officer at Manchester Jewish Hospital Infertility clinic); RW Burslem (Consultant Obstetrician and Gynaecologist at Manchester Withington Hospital)
\(^{381}\) Personal confidential information
maximum of 1,400 (marriages) could at some time be possible candidates for AID’
every year (s.18). It recommended that:

‘A limited number of accredited centres for AID, .... should be established
within the National Health Service, to which couples could be referred for
treatment after they had undergone thorough investigation to determine their
suitability for AID.’

Foreshadowing Warnock it also recommended regulations for thorough examination
of donors of semen; for control of frozen semen banks; for a code of practice to
maintain confidentiality of hospital records of patients treated with AID; for proper
follow-up studies; and it also made recommendations in respect of the status of the
children born by AID. It said:

‘The panel considers that the trend in public attitudes towards AID at the
present time merits amendment of the laws relating to legitimacy and
registration of births. It recommends that the definition of legitimacy be
extended to include a child born as the result of AID to which the husband of
the mother has consented; and for the purpose of registration of birth of such a
child the husband should be deemed to be the father of the child.’

In the 1970s the technique of freezing human sperm had not yet reached the same
high standard of advancement as that in the animal field – frozen cattle sperm could
be kept without deterioration for an unlimited number of years. This was soon to
change.

In March 1978 the Inner Manchester Branch of the Magistrates Association passed a
Resolution asking the Governmentt to ‘examine the issues raised by the practice of
AID and to clarify the status of children born by this method’. 383 This was only one
of numerous such requests that were made to the Government. Many others –
scientists, doctors and lawyers – were concerned about the spread of this practice
without any review of the legal consequences. Moral, ethical and religious aspects
of AID were hotly debated. The number of children born by this method was clearly
increasing and something ought to be done to safeguard their legal position.

The Feversham Report which had hoped, ostrich-like, that the practice would
diminish or entirely disappear, was clearly mistaken. In the early 1980s, at a

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383 Proposed by the author
conservative estimate, there were over three dozen clinics for AID and several NHS frozen sperm banks. It was estimated that between 1500 and 2000 women were treated with AID every year for several reasons – because of a husband’s sterility or vasectomy, or the possibility of inherited diseases.

The practice was so widespread that to think of calling a halt to it was impossible. Pregnancies were achieved by using kits that were available – by post or in high street shops. A commercial sperm bank announced its intention of setting up in Europe and marketing its products here. It was reported (Observer 7.2.82) that the bank at that time ‘sends out 100,000 inseminating units annually – in the USA’. It was difficult to estimate the number of children born annually by this method because of the secrecy surrounding it but in view of the above fact the numbers must have run into hundreds, if not more.

Children born by this method were illegitimate, and advanced blood testing techniques could easily prove this to be so. Their mother’s husband would have committed perjury by declaring himself to be the father on their Birth Certificate. Their biological father was probably unknown but if known, would have rights and duties towards the child – for example, rights of access and a duty to maintain the child. The child would have (among other rights) a right of inheritance to the estate of the donor (and vice versa). If secrecy was maintained then obviously these rights and duties could not be exercised but secrets are not always kept. Indeed it was questionable as to whether in this instance they should be. These problems were discussed widely – for example in the pages of the newsletter of the National Association for the Childless.

Something had to be done and eventually, in 1982, Mary Warnock was asked to chair ‘a committee to examine the social, ethical and legal implications of recent, and potential developments in the field of human reproduction’. They had a huge task and knew that it would be impossible to please everyone. They consulted widely and found that ‘in the decade since the Peel Report, the trend of increasing acceptability and demand for AID has continued’ and that in 1982 there had been at least 1,000 pregnancies in the UK conceived following AID.

384 Winter 82/3
At the same time the Law Commission was considering the legal position of the AID child and published their conclusions (agreeing with those of the Warnock Committee) in 1982\(^{385}\).

The Warnock Report was published in 1984\(^{386}\) and most of their recommendations were included in the Human Fertilisation and Embryology Act 1990. In particular, provided AID was undertaken at a licensed centre and that the husband/partner consents, the child conceived would be the child of the husband/partner who would have the same rights and duties as if he was the biological father and the donor would have no rights.\(^{387}\) This, however, still left the child who was conceived by AID privately (not at a licensed centre) in the same position as before – illegitimate.

The AID child was given the right to discover non-identifying information about his/her biological father when s/he reached the age of 18.\(^{388}\) Identifying information is now available – since 2005\(^{389}\) – in the same way as information is available for adopted children to find their biological mothers. This conforms to current opinion which suggests that children should know their fathers and that it is nearly always better to tell the truth. However, at the time, there was considerable discussion as to whether disclosure of information about their AID origins was a good thing. Jacqueline Priest\(^{390}\) suggested that:

‘The Warnock proposals go too far. Above all it must be borne in mind that until the desired change in attitudes is achieved, attempts to compel disclosure may lead some couples to evade the legal requirements by resorting to AID on a do-it-yourself basis, with the concomitant disadvantages of loss of donor screening and anonymity, and reliance on private promises of confidentiality, with all the accompanying opportunities for exploitation and extortion.’

Many more discoveries have been made since the Warnock Report was published, but perhaps the most important to the subject of this thesis was the discovery of DNA Fingerprinting.

\(^{386}\) Report of the Committee of Inquiry into Human Fertilisation and Embryology, July 1984 Cmd. 9314
\(^{387}\) Section 28 (4)
\(^{388}\) Section 31 (4) (a)
\(^{389}\) Human Fertilisation and Embryology Act - Disclosure of Information Regs 2004
\(^{390}\) Jacqueline Priest: ‘Reports of Committees’ 48 MLR (1985) 73
c) DNA Fingerprinting

‘Where did you come from baby dear?
Out of the everywhere into here.
Where did you get your eyes so blue?
Out of the sky as I came through.’

In September 1984 Alec Jeffreys was working with DNA (DeoxyriboNucleic Acid) in his laboratory when he had what he described as a ‘eureka’ moment. On the photographic plate he was examining he saw a clear pattern of inheritance between the individuals he was studying, and he could immediately see the potential for forensic investigations and paternity. He wrote about this in *Nature* and very soon received an enquiry from lawyers who wanted to use DNA fingerprinting to solve their immigration case about a Ghanaian boy who was refused entry because the authorities did not believe that he was his mother’s son. He was, and the new process successfully resolved their case.

The DNA process was soon patented by the Lister Institute and the right to use this was acquired by ICI Cellmark Diagnostics. In a letter in *Family Law* PA Webb from Cellmark explained for the un-scientific that a DNA fingerprint ‘resembles the bar code seen on supermarket goods’. And said that:

‘Disputes over paternity can now, for the first time, be positively resolved beyond reasonable doubt……DNA fingerprinting can resolve the complicated cases which previously could not be solved using ordinary blood tests’.

Barbara Dodd gave more details about the process and noted that it ‘is very labour-intensive and needs both meticulous expertise and much experience’. She said there was still work to be done to perfect it but recognised that when this was done it could

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391 George Macdonald (1824-1905)
392 R McKie (science editor) ‘Eureka Moment that led to the Discovery of DNA Fingerprinting’ The Observer 24.5.2009
394 ‘DNA Fingerprinting: DNA Probes Control Immigration’ Nature 319 (1986) 171
revolutionise forensic biology. A. Bradney was even more optimistic in his article in Family Law\textsuperscript{397}. He accepted that changes in the regulations must be made and testers needed to be found and said:

‘Once accepted, DNA tests should obviate consideration of many of the areas that have hitherto caused legal problems and provide secure evidence of a child’s parentage’.

This proved to be the case but although many people thought the regulations governing blood test evidence could probably also be applied to DNA fingerprinting evidence, this was not certain. Changes needed to be made so that Part III of the 1969 Act could be sure to apply to this new process. The required changes to the legislation (extending the process to ‘bodily samples’ as well as to blood) were eventually incorporated in the Family Law Reform Act 1987 s.23.

Section 23 experienced no difficulty in the Bill’s passage through the Lords. By this time there had already been a number of criminal cases (including the high profile rape and murder case of Colin Pitchfork\textsuperscript{398}) using DNA fingerprinting evidence successfully – some to convict and others to clear the defendants. And this probably helped to dispel any remaining doubts.

Lord Kilbracken started to speak about the relevant changes needed, but the Lord Chancellor stopped him and said he was ‘pushing at an open door’. And others agreed with him. The Bill’s passage through the Commons was similarly uneventful. The only difficulty was that it was clearly going to take some time to draft relevant regulations and appoint testers. Although most of the Act, therefore, came into force in April 1988, s.23 was delayed.

When the regulations were finally completed, the majority of the remaining sections came into force in April 1989. Then and only then could three testers from Cellmark be appointed\textsuperscript{399}. However, that delay did not prevent the use of DNA fingerprinting either in criminal cases or voluntarily in paternity cases. It just

\textsuperscript{397} A Bradney: Family Law (1986) 378 - Blood Tests, Paternity and the Double Helix
\textsuperscript{398} The Times 22.11.1986 – mentioned in MLR Mar 1988 149; see also Watson KD: ‘Forensic Medicine in Western Society’ 2011 Routledge 144
\textsuperscript{399} Appendix II to Home Office Circular 248/1971 (amended May 1989)
prevented the Courts from directing that these tests should be made and from drawing any inferences. Stephen Gold in November 1987 noted that ‘As at last week, Cellmark had registered 1550 cases since June 1987.’ These included both criminal and civil cases and had resulted in a back-log which Cellmark gave assurance would soon be reduced, taking into account their planned staff recruitment. Robin White and Jeremy Greenwood, found that the first reported paternity case using DNA evidence was in 1987 in Re J (a Minor).

Not everyone was convinced. LJ Connor seemed a little unsure about this new procedure and called for a High Court decision to give the ‘stamp of authority’ to DNA fingerprinting and said:

‘The sooner that could be achieved the better, because until then it is a bad advert for the law stumbling along in the wake of technology.’

Jonathan Montgomery pointed out that ‘Approaches to the definition of ‘parent’ based on the social, marital or consensual models fit ill with the general concept of parentage as developed in the 1987 Act.’

Michael Sookias in the Law Society Gazette also sounded a note of caution. He warned – as Barbara Dodd had indicated earlier – that this process needs experience and expertise. He said it was open to human error through (a) mis-identification of samples; or (b) incorrect interpretation of results. He suggested that there should be alternative laboratories available so that an independent check on the results could be made. He would have felt vindicated when a number of cases were later reported in the USA in which mistakes had been made due to human error. This mirrored the mistakes that were made soon after blood test evidence became widely available.

The fact that a different process was used in the USA was not apparent in some of the

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400 Stephen Gold: ‘DNA Explosion’ 137 NLJ (Nov 1987) 1102
402 The Times 22.5.1987 - Re J (A Minor) (Wardship) [1988] 1 FLR 65
403 LJ Connor: ‘DNA Testing – the answer to a maiden’s prayer’ JP 6 Feb 1988
406 Andrew Hall: ‘DNA Fingerprinting – black box or black hole’ NLJ Feb 16 (1990)
407 Errors made by inexperienced testers in the USA – Journal of Forensic Medicine (Vol 3 1956 139)
reports; caused some to have doubts as to the reliability of the tests, and suggested ways for defence lawyers to argue against their accuracy.

Mary Hibbs[^408] reviewed the use of DNA fingerprinting at that time and noted that:

> ‘In 1988 Cellmark received more than 2,000 requests for tests in paternity disputes and in approximately 80% of the cases the alleged father proved to be the parent.’

And she said that although at that time s.23 was not yet in force, most civil courts were already accepting voluntarily DNA testing in cases of disputed paternity.

Cellmark soon recovered from the setback they had received as a result of the USA mistakes and, helped by the Family Law Reform Act 1987, DNA Fingerprinting became well-established as the routine test process used in cases of disputed paternity.


‘Illegitimacy with its stigma has been legislated away.’

It had long been recognised that registration of a man as father on the birth certificate was prima facie evidence of paternity. However, there is no requirement that the paternity of the child should be tested before details of the man who is saying he is the father are entered on the certificate. This was only prima facie evidence and could be challenged later if stronger evidence was found. Findings of paternity in court proceedings were also open to challenge later as this evidence was in personam and only bound the parties concerned. There was at that time no procedure for obtaining declarations of paternity which would be in rem and binding on all persons.

So, for some time there had been a felt need for a procedure to obtain a Declaration of Parentage. A child might need a determination of paternity in order ‘to amend his birth certificate, to establish the right to inherit property or to acquire nationality or citizenship’.

Section 56 of the Family Law Reform Act 1986 filled that need and allows ‘the child’, but no-one else, to seek a declaration from the County Court or High Court that the person named in the application is the father or the mother or that particular persons are the parents of the applicant, and/or that the applicant is the legitimate child of his parents, and/or that the applicant has become or has not become a legitimated person.

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Family Law in the 20th Century – Stephen Cretney 565
Births & Deaths Registration Act 1953
Widened by s.83 of the Child Support, Pensions & Social Security Act 2000
Later widened to include Magistrates Courts (supra)
The 1987 Family Law Reform Act brought together and changed a number of issues relevant to proof of paternity which both helped to relieve the situation of the illegitimate child and also made it easier to prove paternity. It gives some indication as to how far public opinion had moved since the debates surrounding the Family Law Reform Act 1969.

- The 1987 Act abolished Affiliation proceedings and tried to abolish the stigma of illegitimacy – thenceforth the stigma, if any, should be on the parents and not the child.

- Children whose parents were not married were given almost the same rights as those whose parents were married – rights such as succession, property, etc. (But not to succession of Titles of Honour).

- The court could apply for tests on its own initiative in addition to allowing the parties to the proceedings to do this.

- Tests on bodily samples could be made in addition to samples of blood.

- The word parentage was substituted for paternity and it was possible to apply for a Declaration of Parentage (re-enacting similar provisions in The Family Law Reform Act 1986).

- When a married couple have children conceived by AID the child would be treated as the child of the couple and not the donor (provided they had carried out the prescribed procedure). Mary Hibbs (supra) pointed out the difficulties that could arise when AID has taken place and the children do not know their parentage.

There was a considerable amount of discussion in Parliament about whether or not AID children should, like adopted children, be told the truth about their parentage – and if so when. Now that DNA tests had made it easier to discover the truth, some thought they should be told. During the passage of the Bill through the House of Lords, the Bishop of London said he believed that a child had a right to know its origins:

‘We would wish to affirm the importance of clarity and truthfulness in these matters and that any use of the practice which involves deceit clouds the genetic identity of a child so brought into the world as offensive to Christian values’

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414 Section 1
Baroness Faithful while agreeing about truthfulness pointed out that this question often depends on how and when that truth is told to the children. In the event, nothing was done then about this thorny question – it was later resolved on the side of truth in 2005.\footnote{Human Fertilisation and Embryology Act (Disclosure of Donor Information) 2004}

Although the section allowing courts to direct tests on ‘bodily samples’ was not brought in until April 2001 – until then, only directions for DNA tests on blood samples could be made – nevertheless the struggle to find an accurate scientific method of proving paternity and to get this method accepted by the courts, was over.

This thesis has told the story of that struggle, of the advances made by scientists in discovering better and better ways of providing that proof; and of the difficulties the courts and the legislature have had in keeping up with these scientific advances without stretching too far the nation’s social and religious conscience and prejudices. It has taken into account the changing attitudes of the public in respect of their growing realisation that people are to be valued for what they are and not just for their status – be it legitimate or illegitimate. The thesis has also referred to some of the then emerging and exciting discoveries in DNA Fingerprinting, and in the field of assisted reproduction.

Later, new discoveries in this field spawned a host of other legal problems relating to paternity – and some relating to maternity – for example:

- Techniques of freezing sperm have improved and it is now possible to bank sperm and keep it fertile for many years – enabling sperm to be banked before undergoing radiotherapy for cancer treatment, and also enabling a mother to have children when their father has been dead for some time.
- Although the birth of Louise Brown in 1978 was considered then almost a miracle it is now commonplace.
- IVF (and several other methods of assisted reproduction) can be carried out using either the husband’s sperm or donor sperm.
- Surrogacy has begun to be used more widely – causing a rethinking of the definitions of both father and mother.
• Embryos can now be frozen safely – whether fertilised or not – and be kept for a considerable period of time.

• Homosexual couples are now able to be united in a civil ceremony that closely resembles marriage. They have almost the same rights as a married heterosexual couple and can have children or foster or adopt them.

• Science has made it possible to select the sex of your child.

• Science has also enabled a woman, like Diane Blood, to extract sperm from a dying man, be impregnated with it and bear his child.  

These ‘problems’ (or ‘exciting discoveries’ - depending on your point of view), and many others, have all been considered in much more recent articles and cases, and new regulations produced to deal with them. And side by side with this, the general public has grown more accepting of different varieties of family life. Gay rights movements have helped us move to a greater acceptance of homosexual people and their relationships; increased immigration has introduced other cultures and practices; and increasing numbers of people have experienced different ways of life through foreign holidays.

However, changes were already starting to take place in our society even in the late 1980s – changes that were referred to in Rebecca Probert’s chapter on Cohabitation and the Law in The Continuing Evolution of Family Law. Most people had begun to realise that it was impossible to condemn all parents who produced children without benefit of marriage – particularly when some of the children were their own grandchildren!

So perhaps the main conclusions to be drawn are that in these fields discoveries will continue to be made; science will not stand still; and public opinion is constantly changing. The law must continue to find new ways of dealing with these – making sure that vulnerable people are not exploited; that all are treated equally and in accordance with their human rights; that new procedures are reasonably regulated; and that lessons are learnt from past mistakes.

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416 See R v HFEA (1997) 2 All ER 687 – Diane Blood
417 The Continuing Evolution of Family Law, ed. Douglas & Lowe, chap. 3
In respect of this thesis and the proof of paternity, however, we could perhaps agree with Rachel Fuchs when she said:418

‘It is ironic that as blood relationships have become more determinable, their significance with regard to the meaning of fatherhood has declined in some cases.’

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418 Rachel Fuchs: Contested Paternity, .286
Appendices

1.

Warden's Lodge,
Hulme Hall,
Oxford Place,
Manchester,
M14 5SR

5th April 1974

Dear Sir,

I am carrying out some research at Manchester University into the use of Blood Tests in cases of disputed paternity, and I should be extremely grateful if, (in spite of all the extra work you may have at the moment due to reorganisation) you could possibly answer the questions on the enclosed form for me.

I am particularly interested in the operation of the Blood Test procedure under Part III of the Family Law Reform Act 1969. As you know, this came into operation in March 1972, and, according to the records, your Court has directed that Blood Tests be taken in case(s).

I realise that you may well not be able to supply all this information, but even if you can only supply some of it, I should be most grateful for the return of the form in the stamped addressed envelope provided, and would like to thank you in advance for your help.

Yours sincerely,

[Signature]

Mrs. S.V. Hartshorne, J.P., LL.B.
<table>
<thead>
<tr>
<th>Question</th>
<th>1973/74</th>
<th>1974/75</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. How many Applications were received by your Court for a) Affiliation Orders b) Separation Orders</td>
<td>1973/74</td>
<td>1974/75</td>
</tr>
<tr>
<td>2. In what type of case was the direction for Blood Tests made - if more than one, please indicate number? (Please put each case down only once, e.g. if Affiliation Order included maintenance, put down only under Affiliation)</td>
<td>Affiliation</td>
<td>Separation</td>
</tr>
<tr>
<td></td>
<td>Custody</td>
<td>Maintenance</td>
</tr>
<tr>
<td>3. Were the parties legally aided?</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>4. Do you consider that the procedure under the Act is adequate?</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>5. If 'No' could you please give any reason, if possible, e.g. too complicated, time-consuming,</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>6. Have you experienced any cases where the parties have not complied with a Court direction that Blood Tests be taken?</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>7. If 'Yes', have you any idea why not - e.g. initial expense?</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>8. Apart from the occasions when the use is directed by the Court, could you give any indication how often blood test evidence is used in your Court?</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>9. Any further comment you feel may be helpful, particularly in respect of any inference drawn by the Court either a) where the parties have not complied with a Court direction, or b) where there is no exclusion result from the Test but some indication of likelihood of paternity is given.</td>
<td>Yes</td>
<td>No</td>
</tr>
</tbody>
</table>
University of Manchester,
Faculty of Law,
Manchester,
M13 9PL.

November 1974

FOR THE ATTENTION OF THE COMMON LAW FARTNER

Dear Sirs,

The Use of Blood Tests in Disputed Paternity Cases

I am carrying out some research at Manchester University, under the supervision of Professor P.D. Bromley, into the use of blood tests in cases of disputed paternity - whether arising in the course of divorce, affiliation, separation or custody proceedings. And I am particularly interested in the operation of Part III of the Family Law Reform Act 1969 which, as you know, came into operation in March 1972.

I should be most grateful if you could help me by answering a few questions on the enclosed form. I realize that you may not have all the answers available, but any information you can let me have will be useful. Although I hope to publish the statistics obtained from this survey, no individual names of firms will, of course, be mentioned.

I enclose a stamped addressed envelope for your reply, and would like to thank you in advance for your assistance.

Yours sincerely,

Miss S.V. Brown
The Use of Blood Tests in cases of Disputed Paternity

(Please delete where there are alternative answers)

1. The number of cases per annum of disputed paternity
   (whether they have been settled, dropped or have come to court) dealt with by this firm is approximately
   
<table>
<thead>
<tr>
<th>Less than 5</th>
<th>5 - 20</th>
<th>20 - 50</th>
<th>more than 60</th>
</tr>
</thead>
</table>

2. The number of cases in which blood test evidence was obtained was approximately
   
<table>
<thead>
<tr>
<th>1972/3</th>
<th>1973/4</th>
</tr>
</thead>
</table>

3. In these cases Legal Aid was obtained for
   (Please state number of cases)
   
<table>
<thead>
<tr>
<th>both parties</th>
<th>one party</th>
<th>neither party</th>
</tr>
</thead>
</table>

4. The number of cases which were dropped because an exclusion result was obtained was

5. The number of our clients who had blood tests taken as a result of a Court Direction under part III of the Family Law Reform Act 1989 is approximately

6. The number of our clients who have blood tests taken without a Court Direction is approximately

7. This is more/less than before Part III of the Family Law Reform Act came into force

8. We have found the procedure under Part III useful/not useful

9. If not) We have not found the procedure useful because

10. The majority of our clients in paternity cases are aware/not aware of the reliability of blood tests

11. After explanation of procedure and reliability all/some/none of our clients decided not to proceed with their cases

12. Expense has has not been a factor in deciding whether or not to have blood tests taken

13. Any further comment you feel may be helpful:

Thank you for your help!
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