Volume 59 | Issue 3 Article 3

April 1957

The Defense of Sterility in Paternity Cases

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COMMENTS

THE DEFENSE OF STERILITY IN PATERNITY CASES

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Decision usually goes against the accused man in a paternity case, if the issue is solely one of fact and credibility. If the accused succeeds, however, in injecting the necessary doubt, he will prevail. Or if he successfully presents and develops a defense of law, he will secure an acquittal. Or, if he successfully presents and develops a scientific or medical defense, he will prevail. Specifically, if he proves that he was sterile at the time of possible conception of the child, or shows that there was a high degree of probability of sterility, he should be acquitted.

In considering the great contribution of science to the law, we may aptly paraphrase an utterance of Sir Winston Churchill's: "Never before have so many owed so much to so few!" Scientists in their laboratories, and physicians pursuing and developing their specialties, have made discoveries of great social and legal significance. Scientific discoveries have not only prevented miscarriages of justice, but also have gone far to discourage the institution of false claims. Scientific testimony and proof have proven to be an effective weapon against blackmail.

Regularly in our courts, blood test exclusions exonerate a wrongfully accused man. An innocent man may rest more secure with the knowledge that a scientific blood test may be available to him as a shield against blackmail. In any event, blood tests act as a deterrent against the institution of false claims of paternity.

It has been argued that sterility is controversial. Even if we assume that to be so, medical evidence of sterility is nevertheless infinitely superior to testimonial evidence. For the court to ignore medical evidence of sterility, unshaken by cross-examination and uncontradicted, is a miscarriage of justice.

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When cross-examination has not shaken the medical expert's opinion, counsel often employs the time-worn device of engaging the medical expert in mutual speculation concerning possibilities. Is there any possibility that he was not sterile? A very remote possibility. Was there a chance that he was fertile? A very remote chance.

The New York Court of Appeals stated in *Pauley v. Steam Gauge and Lantern Co.:*

> "A mere conjecture built upon a bare possibility will not suffice to transfer the money or property of one man to the possession and profit of another. As we said in Bond v. Smith, 131 N.Y. 378, food for speculation will not serve as the basis of a verdict."[1]

In *Lomer v. Meeker,* the New York Court of Appeals stated:

> "The positive testimony of an unimpeached, uncontradicted witness cannot be disregarded by court or jury arbitrarily or capriciously. They are bound to believe, for judicial purposes, such testimony, and it would, in an instance like this, be the clear duty of the court to set aside the verdict of a jury founded upon a disbelief of clear, uncontradicted and undisputed evidence."[2]

Where medical testimony is unshaken and uncontradicted, testimonial evidence in the case should not dictate the decision. In *People v. Roetger,* a paternity case recently tried in the Children's Court, Rockland County, New York, complainant entrapped the defendant by tape-recording a phone conversation with the defendant, which was received in evidence. She entrapped the accused boy by a series of questions and statements cleverly calculated to draw from him admissions. (The accused, of course, did not know that the phone conversation was being recorded.) The following excerpt from the tape-recording received in evidence, clearly demonstrates her devious method of erecting evidence against the accused. (*C* is the complainant; *D,* the defendant.)

C. Aren't you worried about anything?
D. Huh?
C. Aren't you worried about anything?
D. No, not now, I don't think.

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[1] 131 N.Y. 90, 100, 29 N.E. 991, 1001 (1892).
[2] 25 N.Y. (11 Smith) 361, 363 (1862).

C. Why?
D. Well, you don't seem to want to cooperate.
C. Yes, I do.
D. What?
C. Now I do.
D. It's a little late, don't you think?
C. Yes, it's too late to get rid of it.
D. What?
C. I said, it's a little—too late, to get rid of the baby.
D. Yeah.
C. But you said you knew some people in Long Island or California, didn't you?
D. Yep.
C. Well, is it too late to go there?
D. What?
C. Is it too late to go there?
D. I would have to find out about California.
C. Oh, you know about the one from Long Island?
D. That's pretty sure.
C. It is?
D. Yeah, unless they got somebody else or something.
C. Oh! Well—suppose I went away and had it and lived—made my home in Michigan—for good?
D. What?
C. Suppose I went away—
D. Yeah—
C. Out in Michigan and made my home out there for good. Would you at least let me give the baby your last name?
D. Would I what?
C. Would you at least let me give your last name?
D. I told you I would.
C. Because, you know it's your baby.
D. What?
C. I said, you know it's your baby.
D. Yeah.
C. Because I don't want to tell my mother.
D. Yeah. I don't blame you. You wouldn't listen before. I tried to tell you.
C. Well, I figured maybe you would marry me. We got our blood test, didn't we?
D. Yeah. We didn't use it, though. You should have known then.
C. Well, you wouldn't marry me after you found out that I was pregnant. I can give the baby your last name?
D. Yeah.

C. If I ever needed money, would you ever send it to me?

D. If I got it. It all depends. After that trick you pulled, I shouldn't give you nothing.

C. Well, I don't know, why you just couldn't marry me just to give the baby a name. Nobody had to know, not even your mother, and I could have lived by myself, like I said.

D. No.

C. Would you ever want me to send a picture of the baby?

D. Yeah. You can drop me a line, or something, if you go to Michigan or wherever you go, you know.

C. No, I think if I'm going to have it I might as well keep it, as long as you'll let me give it your last name I'll be satisfied.

D. Yeah. I told you that. I said I would.

C. You won't marry me, will you?

D. No.

C. Weren't you afraid that night you wanted me to get an abortion?

D. Certainly I was.

C. And don't forget the baby's birthday, being it's your baby.[3]

This artificial, recorded conversation, the tenor of which was to lull the defendant into a sense of security, almost each question calculated to damage defendant by eliciting from him a monosyllabic admission, however half-hearted,—together with her testimonial evidence,—was permitted to control the decision, despite unshaken medical evidence that the defendant was sterile.

In the *Roetger* case, the child was born on February 24, 1953, and the mother's prior last menstrual period was May 6 or 9, 1952. Two physicians testified that defendant was sterile. An examination in November, 1950, revealed that defendant had severe prostatitis and seminal vesiculitis. In the summer of 1951, the defendant's prostate condition not responding satisfactorily, he was examined by other doctors on September 10, 1952; November 13, 1952; and April 1, 1953. Medical opinion stamped the defendant sterile during the critical period of possible conception—May and June, 1952.

The examination of September 10, 1952, disclosed marked oligospermia—a very low sperm count. The first specimen was 8 million per c.c., the volume was 5.5 per c.c. Motility was 50%—sluggish. The spermatic fluid was tense—not liquefied—all of which is a sign of sterility.

[3] People v. Roetger, Civil No. 13771, Children's Ct., Rockland County, Dec. 4, 1952.

The examination of November 11, 1952, revealed that the volume was 2 c.c.'s; the sperm count was 3 million per c.c.; motility was 50%—sluggish.

In the *Roetger* case, in view of such high probability of sterility and non-paternity, bordering on certainty, the complainant undoubtedly did have sexual relations with another male person, at the time of conception. By resorting to entrapment of the accused, she stamped her own case as untrustworthy.

It is important to emphasize this: the New York law authorizes the court to grant a filiation order if the evidence is "entirely satisfactory", and "clear and convincing". The evidence must be "sufficient to create a genuine belief in the mind of the trier of the facts that the defendant is the father of the child."[4] Surely, unshaken and uncontradicted medical evidence of sterility, touching the very heart of the matter, renders the woman's testimony something less than "clear and convincing", and "entirely satisfactory". In view of such uncontradicted testimony, how can the court have a "genuine belief" that the accused is the father of the child?

A case comes to mind wherein Dr. John MacLeod—one of the country's leading experts in the field of male reproduction—characterized his own testimony of defendant's sterility "as close to impossible as any scientist can be in things like that" for defendant "to impregnate a female who gave birth to a normal child on January 29, 1948." Nevertheless, defendant was adjudged the father, and the filiation order was affirmed on appeal.[5]

In that case, *Bethel v. Peltier*, the defendant, a physician, was charged with being the father of a child born on January 29, 1948, with conception occurring in April or May, 1947.

The medical witnesses testified as follows: Defendant had had tuberculosis for about 35 years, which affected his testicles, bringing about permanent sterility. On December 1, 1948, defendant submitted to an operation—one testicle was removed and the other ligated. There had been microscopic examinations of defendant's semen, which disclosed complete absence of spermatozoa—a condition which existed from 1942 until the operation on December 1, 1948. Dr. MacLeod himself examined three separate specimens and found all three devoid of spermatozoa.

[4] Commissioner of Public Welfare of City of New York v. Ryan, 238 App. Div. 607, 265 N.Y. Supp. 286 (1st Dep't 1933).

[5] Bethel v. Peltier, 278 App. Div. 919, 105 N.Y.S.2d 906 (1st Dep't 1951).

Even if medical evidence of sterility is controversial, it nevertheless injects such a doubt in the case as to prevent the granting of a filiation order. In any event, what can be more controversial than testimonial evidence? The complainant's assertions are countered by the defendant's denials. There is more than a mere controversy,—there is the sharpest kind of conflict. That conflict can be resolved if the court will but accept the complete and objective truth offered by science.

In the *Roetger* case, the court rendered the following decision:

> "The evidence in this case is, in the opinion of the court, clear, convincing and satisfactory that the defendant, Richard Roetger, is the father of Deborah Colleen Pieri, the child. The expert testimony introduced in behalf of the defendant with respect to alleged sterility is inconclusive. The defendant's motion to dismiss the petition is denied."[6]

There are, however, in the law reports, many examples of judicial receptivity toward medical evidence of sterility.

Hughes v. Hughes[7] involved the construction of section 1962, subd. 5 of the *California Code of Civil Procedure*, which provides:

> "The following presumptions, and no other, are deemed conclusive:
>
> "5. . . . The issue of a wife cohabitating with her husband, who is not impotent, is indisputably presumed to be legitimate."

In the *Hughes* case, although the title of the action might indicate otherwise, a wife sued a man, not her husband, for the support of her child. The wife and her husband, Annabelle and Frank Harbrauth, were married in 1932 and lived together continuously until October 1952. Under those circumstances, with continued cohabitation, there was clearly no impotence. Consequently, it would appear from subdivision 5 of the above statute, that there would be an indisputable presumption of legitimacy. The wife first had sexual relations with the defendant Hughes on October 6 or 7, 1952, and the child was born on June 29, 1953. The Harbrauths, husband and wife, became reconciled in February or March, 1953 (at which

[6] *Supra* note 3. The case is currently being appealed to the Appellate Division, 2d Dep't., on typewritten record.

[7] 125 Cal. App.2d 866, 271 P.2d 172 (1954).

time she was well advanced in pregnancy), and were living together at the time of the court hearing. Clearly, it could not possibly be claimed that the husband, Harbrauth, was ever impotent. At the hearing, medical testimony was given that the husband Harbrauth, was sterile.

The defendant Hughes, appealing from the judgment against him, contended that the husband, Harbrauth, must be conclusively presumed to be the father of the child, in the absence of proof of his impotency. Subdivision 5 of the above statute makes the presumption of legitimacy conclusive in the absence of a showing of impotency.

From the inception of the presumption of legitimacy in the law of England some hundreds of years ago, the husband's impotency has always been written into the law as a circumstance rebutting that presumption. In the equivalent statute, section 1962, subd. 2, of the *California Code of Civil Procedure,* a husband who is not impotent is conclusively presumed to be the father of his wife's child. In the *Hughes* case the court, although recognizing that the husband was not impotent, nevertheless permitted medical evidence of sterility to rebut effectively the presumption of legitimacy and affirmed the judgment.

In *Hogeboom v. Hurlburt,*[8] a paternity case, the complainant's testimony of sexual relations, conception and birth of the child, was uncontradicted by defendant, who did not take the stand. His defense consisted of medical evidence of his sterility. The medical evidence of sterility was given decisive effect by the court, which dismissed the complaint.

In *Department of Public Welfare of City of New York v. Hamilton,*[9] judgment of filiation was reversed and a new trial ordered. The appellate court stated in part:

> "In our opinion the trial court should have granted an adjournment upon the statement of defense counsel that he had additional medical testimony to prove that defendant was sterile in March, 1951, the alleged time of the conception. The undisputed expert testimony established that the defendant was sterile in February, 1953. The issue of fact was close and such

[8] 207 Misc. 997, 141 N.Y.S.2d 691 (Children's Court, Broom County 1955).

[9] 282 App. Div. 1025, 126 N.Y.S.2d 240 (1st Dep't 1953).

additional testimony would have had material weight in making a decision. . . ."

In *Potasz v. Potasz*,[10] the defendant testified that he was impotent due to an injury received as a child. A medical expert made an examination of defendant's semen and testified that in his opinion it was extremely doubtful if defendant in 1941 could have impregnated the female. The court held that the testimony constituted substantial evidence to sustain a finding of nonpaternity.[11]

In conclusion, the medical defense of sterility, to achieve conclusive evidentiary effect, must be competently—even skillfully—presented to the court and jury. Where the defense has not achieved the desired result, the failure can often be traced to counsel's inadequacy.

Science, like anything else, needs competent legal representation. The tools of science, in the hands of an expert legal craftsman, cannot fail to accomplish the purpose sought—the establishment of truth.

[10] 68 Cal. App.2d 20, 155 P.2d 895 (1945).
[11] *Id.* at 22, 155 P.2d at 896.