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DePaul Law Review

Volume 21
Issue 1 *Fall 1971: Medico-Legal Symposium II*

Article 5

The Problem of Defense of a Paternity Proceeding

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THE PROBLEM OF DEFENSE OF A PATERNITY PROCEEDING

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A CHARGE OF paternity strikes at the young—the young college student—a young man at the threshold of a career in law or medicine. Besides the "honor," paternal liability carries an overwhelming financial burden, *i.e.*, support for the child until twenty-one years of age. The paternity charge may be the young man's first brush with the law, and in view of the facility with which the girl can "prove" her case, and the total unanswerability of the charge, this first contact with the law will often leave the accused man with an utter sense of frustration.

In *A. v. B.*,[1] Petitioner (A.) charged that Respondent (B.) an honor graduate of X Law School and an editor of its law review, is the father of her child, born as a result of one alleged incomplete act of intercourse. This young law student prevailed at the trial, but this did not prevent petitioner from writing to the Committee on Character and Fitness of the Second Department, in a last ditch effort to prevent his admission to the Bar. The writer represented him at that hearing, and, fortunately, he was approved for admission to the Bar.

A recital of a few actual cases will illustrate this point and raise a doubt as to whether the much heralded phrase, "due process of law" has any real significance, as far as the trial court is concerned in paternity cases.

A certain M. W. was adjudged to be the father of a child born to one J. G. after a trial, in which the following facts were brought out:

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1. Unreported, P-3483 (Family Ct. N.Y. Co. 1966).

(1) the child, Charles, was born on March 11, 1952, and the woman waited 7 years to bring the case; (2) at various times during those 7 years, she had variously named 3 different men as the father of Charles; (3) she admitted that each time she had sex relations with M.W., he paid her a sum of money; (4) on several occasions, she confessed to the city welfare department that a man other than M. W. was the father of Charles; (5) she admitted that she had lied about the paternity of her child; (6) she wanted the case against M. W. to be withdrawn; and (7) in the hospital when Charles was born, another man, G., signed a sworn statement that he was the father of Charles, and Mr. G's name was named in the birth certificate as the father of Charles.

Despite the mass of lies, contradictions and perjury on the part of the woman, J. G., this is what happened when Mr. M. W. attempted to call as his witness, a man, J. S., who sought to testify that he also had sex relations with J. G.:

The witness: [J. S. being a married man, the court proceeded to warn him of his right to decline to answer any questions that might tend to incriminate or degrade him, to which the witness replied] I understand, but I have to tell the truth. I know, unfortunately, what happened. The court stated to this witness that if he testified, he might be charged with the full support of the child [a statement with doubtful basis in law].

The witness: I have to tell the truth.

Judge: And the full responsibility of support?

The witness: That's right, I understand all that.

Judge: And knowing what the Court has just advised you, you still want to be a witness in this case?

The witness: Correct, your Honor, because I have to tell the truth what happened. [*sic*].

Judge: I think we ought to have a member of the District Attorney's staff here. I think we should have a member of the District Attorney's staff to take notes of this witness' testimony.

For M. W. justice was ultimately done, for he appealed to a higher court from the judgment of paternity. The appellate division reversed the judgment and dismissed the complaint.[2]

In an earlier case that appellate court said:

From the very beginning of the common law it has been recognized that a fair trial is one of the most basic and fundamental essentials of our judicial process.[3]

2. Commissioner of Welfare of the City of New York v. Wiener, 15 App. Div. 2d 744 (1962) (mem.).

3. People v. Dovico, 6 App. Div. 2d 457, 179 N.Y.S. 2d 379 (1958).

A paternity case engenders so much emotion and sympathy, both for the unmarried mother and her child, that the accused man gets something less than a "fair trial." However, as illustrated by the above case, the appellate court is the forum where the accused man will have his "day in Court" and "a fair trial."

The appellate court is a court of logic, free of emotional factors, and its decisions are arrived at after a careful examination of the trial record with thought and deliberation, and with justice in mind. The emotional aspect dictates the decision in the trial of a paternity case, and this is understandable. To repeat, however, the appellate court will not render its decision on the basis of emotion, sympathy, or animosity toward the accused man, but on the basis of facts, logic and truth.

In *M. v. K.*,[4] the woman gave the following testimony on cross-examination: When she was two months pregnant, she had an A-Z (pregnancy) test. She gave her name to the laboratory as Mrs. V. L. She admitted that V. L. was a man whom she had dated. She admitted that she was in the habit of "picking up" strange men, whom she subsequently dated, and that course of conduct continued during her pregnancy. She has given up the child for adoption, never saw the child, and does not know the present whereabouts of the child, or proposed adoptive parents. She admitted demanding $25,000.00 from K., and, on his failure to pay the same, she caused criminal proceedings (statutory rape) to be instituted. She admitted she was expecting a large cash settlement, and, that not being forthcoming, she filed the criminal charges. Despite this damaging testimony, the respondent, J. K., was adjudged to be the father of the child.

The law in New York provides that paternity must be proven to the "point of entire satisfaction."[5] In the following actual case, the petitioner's proof fell far short of that required legal standard of evidence. In fact, the respondent disproved the charge to the point of

4. Unreported, P-337 (Family Ct. N.Y. Co. 1966).

5. Commissioner of Public Welfare of the City of New York v. Ryan, 238 App. Div. 607, 265 N.Y.S. 286 (1933); Commissioner of Public Welfare of the City of New York v. Unger, 264 App. Div. 894 (1942) (mem.); Commissioner of Welfare of the City of New York v. Rose, 283 App. Div. 781 (1954) (mem.); Hogeboom v. Hurlburt, 207 Misc. 997, 141 N.Y.S. 2d 691 (1955); Commissioner of Public Welfare of the City of New York v. Kotel, 256 App. Div. 352, 9 N.Y.S. 2d 1005 (1939); and *supra* note 2.

demonstrating non-paternity. Nevertheless, the anomaly resulted in the accused man being declared the father of the child, despite his demonstration of non-paternity.

Although in theory, paternity must be established to the "point of entire satisfaction," in reality the burden of disproving the charge is upon the accused. In fact, that burden goes beyond mere disproof of the charge; respondent must actually demonstrate non-paternity. Blood tests are the perfect demonstrator of non-paternity.

The case I shall describe, involving *azoospermia* (total sterility) was truly "trial by ordeal." After a trial, there was an adjudication of paternity, although there was irrebuttable medical testimony of total sterility. After that trial, the adjudged man submitted to a major surgical operation. Even after such surgery, with its attendant risks and which completely demonstrated sterility, his motion for a new trial was denied nevertheless. Despite medical evidence of total sterility, followed by the ordeal of surgery, leaving it beyond any question that the accused was not the father of the child, the court in defiance of the evidence adjudicated paternity.

Miss M. A., a single girl, twenty-three years of age, brought a paternity case in the Family Court, New York County, charging that R. W., a sergeant in the U.S. Air Force was the father of her child, born on September 24, 1963. Her last menstrual period before then was on December 16, 1963. She testified to these facts at the trial held on March 18, 1965. She went on to say that once and only once did she discuss her pregnant condition with him, in which discussion he denied responsibility for her condition. Not only was a single act of intercourse and a single confrontation with him regarding her pregnant condition alleged, but she admitted on the witness stand that during her pregnancy she went out on social dates with R. W.'s roommates, also members of the Air Force.

R. W. did not deny the one act of intercourse, which probably did occur in December, 1963, but he testified that around November, 1960, while in the Air Force stationed in California, he went to Tiajuana, Mexico, and submitted to a vasectomy, which rendered him sterile. He could not remember the name or address of that Mexican doctor in Tiajuana, and, consequently, he could not produce that medical witness in court. He did remember, however, that his scro-

tum was shaved, incised, and a local anesthetic given, and that he returned in four days and the stitches were removed. As for his motives in rendering himself sterile, it can only be said, on reliable authority,[6] that some 100,000 operations are carried out annually in the United States to render men sterile.

At the trial, R. W. produced two medical experts who testified that he was 100 per cent sterile. Prior to the trial, on November 7, 1964, Dr. John MacLeod, a leading authority on the field of male sterility, had examined him, and at the trial testified that he had examined a semen specimen and no spermatozoa or any type of cell which could be traceable to the testes were present—a condition known as azoospermia. Thus, as of November 7, 1964, R. W. was 100% sterile without any qualifications or reservation.

Dr. MacLeod went on to testify that, assuming that a vasectomy had been performed on R. W. for the purpose of sterilization, then the sterility as on November 7, 1964 can be explained, and such sterility dated from the time of the vasectomy. Another medical expert, Dr. Nathaniel M. Fede, who had made a semen analysis of R. W. previously, on September 19, 1964, also testified at the trial that no sperm were seen, and that R. W. was sterile beyond a doubt.

Despite this overwhelming disproof of the charge, amounting actually to a demonstration of non-paternity, on April 2, 1965, the family court judge adjudged R. W. to be the father of the child, and in a three-page opinion, the court said:

It only remains for the court to consider the defense of sterility in this proceeding. The respondent's experts examined specimens of his semen in September and November, 1964, and found him sterile. They could give no opinion, however, based solely on their findings at the time these tests were made that he was sterile on December 31, 1963 . . . The respondent sought to elicit expert opinion that he was sterile on December 31, 1963, on the basis of a hypothetical question assuming —subject to connection—that in 1960, a vasectomy was performed on his person. This was described as a sterilization procedure. However, the connection was not supplied by any competent medical proof in the case. There is only the respondent's word that in 1960, he went to a doctor in Tiajuana, Mexico, and requested an operation to become sterile. He claims to have undergone some procedure in his scrotum in the doctor's office lasting an hour and some minutes under local anaesthesia. It also appears that the condition of sterility in terms of lasting effectiveness may depend to some extent on the type of operation. Significantly, the respondent—

6. The writer was so advised by Dr. Adrian W. Zorgniotti, of New York City, a leading authority in the field of male infertility.

whose memory for details was generally good in other respects—could not remember the name of the doctor who allegedly deprived him of his procreative capacity. . . .[7]

The court went on to say:

The court does not believe him on this point or aspect of the case. If his condition of sterility in September and November, 1964, is not due to natural causes arising or developing after December, 1963, it only suggests the intervention of artificial means to produce the result subsequent to the petitioner's conception of the child involved in this proceeding.[8]

In other words, as suggested by the court, the respondent, after impregnating her on December 31, 1963, contrived by some strange device to make himself sterile, so as to avoid legal liability.

The respondent, incensed by the court's statement that it "does not believe him on this point or aspect of the case,"[9] on April 29, 1965, borrowed the sum of $376 from Household Finance Corporation, and on May 6, 1965, entered University Hospital in New York City, subjecting himself to the ordeal and hazards of a surgical operation to prove that he was telling the truth. On May 7, 1965, Dr. Adrian W. Zorgniotti performed a surgical operation for the purpose of exploring the scrotum and its contents. Under general anaesthesia, this procedure consisted of bilateral scrotal incision and examination of the testes and accessory organs with special attention to the *vas deferens*. In support of a motion for a new trial, Dr. Zorgniotti made an affidavit stating:

As a result, I am able to state with reasonable certainty that the respondent did in fact have bilateral interruption of the vas deferens which did produce sterility. This conclusion is based on surgical findings, radiographs taken in the operating room as well as microscopic studies made by myself and an independent hospital pathologist of an excised portion of vas deferens which included the site of interruption of the vas deferens.

I am further reasonably certain that this interruption was not of recent origin, but rather was probably performed some time before the 24 months prior to my surgery. This conclusion is based on the intrascrotal findings and on my failure to find evidence of scars on three separate careful inspections of the scrotal skin which would have had to be incised to perform the operation of vas interruption. Since it is generally accepted that any but the largest well healed scars of the scrotum

7. Portions of the unreported opinion of Judge Doran of Family Court, New York County. They may be found in the record on appeal in appellate division, first department, in the case of Commissioner of Welfare of the City of New York v. Wendtland, 25 App. Div. 2d 640, 268 N.Y.S.2d 547 (1966).

8. *Supra* note 7.

9. *Supra* note 7.

tend to disappear with the passage of 2-3 years time, it is my conclusion that a bilateral interruption was performed some time between two-three years prior to May, 1965.[10]

The Corporation Counsel of the City of New York opposed the motion for a new trial on the following grounds: (1) The motion was not made within fifteen days after the decision was rendered;[11] (2) that the evidence resulting from the surgical operation should have been produced at the trial;[12] (3) that Dr. Zorgniotti was only "reasonably certain" that respondent did have performed upon him a bilateral interruption of the *vas deferens* which did produce sterility and that interruption was not of recent origin; and this final *piece de resistance* concludes the City's opposing affidavit:

It may be logical to assume that the respondent had an operation performed upon his scrotum immediately after being apprized of the pregnancy of M.A. (end of January, 1964) and with the passage of approximately 15 months, the scars of the scrotum disappeared.[13]

The trial justice denied the motion for a new trial in a decision dated August 12, 1965, and in an accompanying opinion the court said:

The possibility was recognized that his condition of sterility in and after September, 1964, could be attributable to artificial means following conception of the child in this case.

. . . The medical speculation and basis for it as cautiously and, indeed, somewhat cryptically set forth in the affidavit of Doctor Zorgniotti on this motion—albeit with reasonable certainty—is not so convincing or persuasive that a re-opening of the proceeding or a new trial as requested by the respondent would be likely to change the result in the circumstances of this case. It need only be added that a motion of this kind is addressed to the sound discretion of the court.[14]

R. W. appealed to the appellate division, first department, from the order of filiation and the order denying his motion for a new trial. The appellate court, noted that "the issue should be thoroughly explored as a matter of simple justice" and that "respondent [should not] be unduly penalized because of a reluctance to undergo surgery of the nature involved prior to the trial, particularly in light of the

10. The affidavit of Dr. Zorgniotti will be found in record on appeal in Commissioner of Welfare of the City of New York v. Wendtland, *supra* note 7.

11. In reply thereto, the writer submitted an affidavit showing that the fifteen day time limit was not applicable to this motion.

12. In other words, surgery before trial?

13. The City's opposing affidavit will be found in record on appeal, in Commissioner of Welfare of the City of New York v. Wendtland, *supra* note 7.

14. Judge Doran's order denying the motion for a new trial is found in the *Wendtland* record on appeal, *supra* note 7.

medical testimony offered in his behalf, as well as the entire evidence on the case."[15]

Accordingly, the appelate court unamimously vacated the filiation order and remitted the case to the family court for further proceedings. The opinion of the appellate division concluded as follows:

> The orders appealed from should be modified on the law, the facts and in the exercise of discretion to vacate and set aside the order of filiation and remit the matter to family court for further proceedings not inconsistent with this determination, without costs or disbursements to either party.[16]

Apparently, the Corporation Counsel was not chastened by this reversal, for instead of considering a possible discontinuance of the proceeding, the Corporation Counsel persisted in his determination to re-try the case and again fasten paternity upon R. W.

The procedure on the new trial for R. W. was simple: Dr. Zorgniotti would testify to the fact of total sterility as revealed by the surgery and Dr. MacLeod would testify, in the light of such testimony by Dr. Zorgniotti, that sterility existed as far back as 1960. The Corporation Counsel commenced to "shop around" for a doctor to contradict the testimony of Drs. Zorgniotti and MacLeod. Dr. Leonard Dourmashkin, a urologist, was approached by the Corporation Counsel. After studying the case, he advised the Corporation Counsel that, in his judgment, there was no doubt of R. W.'s sterility and that he could not testify otherwise. The Corporation Counsel's office continued its search for a cooperative doctor and finally came up with one who was willing to contradict the findings of Doctors MacLeod, Fede, and Zorgniotti.

On February 20, 1967, a memorandum was personally delivered to the Corporation Counsel's Office, setting forth the above facts, urging that the city cease this irrational pursuit of a man who actually demonstrated his non-paternity of the child in question. There was no reply from the Corporation Counsel's Office to this plea to reconsider this prosecution of a demonstrably innocent man. It remained, therefore, to re-try the case, with Dr. Zorgniotti testifying to his surgical findings of utter sterility and Dr. MacLeod testifying that, in view of such surgical findings, R. W. has been one hundred percent sterile ever since 1960.

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15. Commissioner of Welfare of the City of New York v. Wendtland, *supra* note 7.

16. *Supra* note 7, at 642, 268 N.Y.S.2d at 550.

The case again proceeded to trial on May 2, 1967, at Family Court, New York County, before Judge Williams, and Dr. Zorgniotti testified to the results of the surgery, *viz.*, the clear evidence of the interruption and ligation of the *vas deferens*, and the respondent's state of utter sterility. His testimony was fortified by radiographs (X rays) taken during the surgery, which clearly demonstrated the ligation of the *vas deferens*. At the conclusion of his testimony, the trial was continued to May 9, 1967. On May 9, 1967, Dr. MacLeod took the stand and repeated his expert testimony of total sterility. Petitioner and respondent also testified as they had at the first trial. Judge Joseph B. Williams reserved decision on the motion to dismiss and reserved decision on the entire case.

On May 16, 1967, Judge Williams rendered his decision dismissing the petition, and adjudging that respondent is not the father of the child. In an accompanying opinion, which summarized the testimony of the parties and the medical testimony of Drs. Zorgniotti and MacLeod, Judge Williams stated, significantly enough, that "The court believes respondent was telling the truth when he stated he had the operation (vasectomy) in December, of 1960 or January, 1961."[17]

This judgment of filiation was compounded from a legal brew of cynical and complacent prosecution, superficial approach and treatment, lack of in-depth probing and unrestrained conjecture. Superficial prosecution and trial of paternity cases, long a tradition in this field of the law, must yield to conscientious prosecution and judicial in-depth probing and inquiry. With such a new dispensation, there will be fewer anomalies of a man, adjudged to be the father of a child, which is demonstrably not his.

Commissioner of Welfare v. H. R.,[18] was a paternity case tried before a panel of three justices of the court of special sessions. (Since September 1, 1962, paternity trials have been held before a single Family Court Judge). In the case of H. R., the woman testified that during the period May through August, 1957, while she and H. R. cohabited in an apartment in Astoria, New York, she became pregnant. Certified records of the Chief of Naval Operations, Washing-

17. *Supra* note 7.

18. Unreported, (Ct. of Sp. Sess., N.Y. Co.).

ton, D. C. showed that during the period, May-August, 1957, Mr. H. R. was a member of the crew of a destroyer, *S. S. Caper*, which was in the Mediterranean Sea near Gibraltar, during the entire period. Despite this evidence, Mr. H. R. was adjudged to be the father of the child. (I advised Mr. H. R. that an appeal would, in my judgment, result in a reversal of that judgment, but he decided not to appeal.)

A man, accused of siring an illegitimate child, is indeed fortunate if he has the financial means to make a lump sum settlement. For such a settlement, with the court's approval, is binding, and enables both parties—mother and alleged father—to write the case, and each other, out of their lives. The man's financial ability to settle the case enables him to avoid a trial that can, as a rule, have only one conclusion—an adjudication of paternity in the absence of an absolute demonstration of non-paternity.

Both English and American courts are concerned with only one matter in trying paternity cases: Is this man, to the exclusion of all others, the father of this child?

In a debate in the English House of Lords on a proposed blood test bill to establish non-paternity in such cases, Lord Merthyr stated:

> In my experience of these cases, apart from fish-poaching cases, there is no class of case in which there is a greater degree of perjury in the courts. In the cases which are fought at all there is always a flat denial by one side or the other of the facts at issue.[19]

Formerly, up until 1956 in Norway, and in Denmark up to 1960, the courts did not ask whether or not the man is the father of the child. They were concerned with his relationship with the woman. If it could be established that he *might* be the father of the child, that is all that concerned the court. It was his *possible* paternity which was established or not. The former Scandinavian law was much fairer in practice and resulted in much less perjury and injustice. Because, if it was established that the man could possibly have been the father, then he and all other men who might have been the father were required to contribute to the child's support.[20] This law of contribution was abolished in Norway by legislation in 1956, and in Denmark by statute in 1960. It was felt that despite the advantage of

19. Harley, Medio-Legal Blood Group Determination 61 (1967).
20. Illegitimacy Act of May 7, 1937, § 14 (Denmark).

discouraging perjury, it constituted a stigma for the child by assuming the promiscuity of the mother. But since English and American law insist on positive proof that he is (or is not) the one and only father, he is then forced to prove that he is not. Since a blood test will not always prove him innocent even if he may be, as many men have the same type blood, his only remaining defense is to prove that some other man had intercourse with the woman and might possibly be the father.

The logic and virtue of the former Scandinavian law is that perjury by the woman is discouraged. In New York State, the woman must conveniently "forget" that she was sexually involved with another man, especially at the critical time of possible conception. The law will come to her aid only if she remains firm and maintains that the accused is the "only man," and that, hence, he is the father of her child. Unlike the Scandinavian law, which encouraged truth-telling, the New York law encourages her to commit perjury and suppress any evidence that will automatically defeat her claim.

I tried a paternity case in family court, New York County on behalf of a man who was charged by a demure, attractive school teacher from another city with the paternity of her child. A single act of intercourse and a single conversation in her eighth month of pregnancy were alleged. At that time, she claimed, she told him of her condition and he denied responsibility. Her testimony was completely unsupported by either witnesses or any other evidence.

Upon investigation and cross-examination, I discovered the following: That she had made a study of paternity trials and their results throughout the United States; that she had told a number of persons that it is quite easy for any woman to win a paternity case, for the court always accepts the word of the woman; that she had had intimate relations with a number of men; that she was keeping company with another man, whom she planned to marry and who was to adopt the child in question upon the conclusion of the case; that the child was to be raised in the religion of the man she planned to marry; and that, if my client did not make a substantial cash settlement, she had threatened to inform his wife of the situation. Investigation also produced a photograph, which this demure school teacher conceded was herself in bed, clad only in a shorty nightgown, with another man. The photograph was most devastating to her case. Of

course this woman's plea was denied. But what would have happened to my client if I had not been able to make the proper investigation?

In actual practice, the real burden is upon the accused man to disprove the charge. More than that, he must practically demonstrate non-paternity. In order to sustain that burden, he needs time and an opportunity for investigation—which is so basic, and yet which a poor man cannot afford.[21] Yet the law provides that, if the accused asks for a postponement of the trial, he can be held in jail during the period of the adjournment.[22] This is not calculated to aid him in the investigation and preparation of his defense.

What can happen to a man who is charged with paternity? A filiation order (a court order declaring him the father of the child) may be granted upon the uncorroborated testimony of the woman.[23] Upon such unsupported testimony, he may be ordered to support the child until it reaches the age of twenty-one years. Whether a man is the father of the child, may be known to God alone. It is conceivable under certain circumstances that the mother cannot be sure. I know of a case where the mother truthfully admitted sex relations with two men during the critical period; she wanted desperately to have the baby and to have the men undergo a blood test. Her honesty was rewarded when one of those two men was excluded as a possible father.

In another case, an investigation revealed facts that discouraged the woman from proceeding with her case. On the night of the child's birth, a hotel record showed that she was registered as man and wife with another man. At four a.m. when she had labor pains, the man accompanied her to the hospital. There were other records, showing the woman and the man in various hotels over a considerable period of time, as well as a record of visits by him to her home and the hospital about the time of the birth of the child. There was much

21. Incidentally, the prosecution does not make any investigation whatsoever of the truth of the charges.

22. N.Y. Family Court Act § 533 (McKinney 1963).

23. Commissioner of Public Welfare of the City of New York v. Simon, 270 N.Y. 188, 284 N.Y.S. 981 (1936); Commissioner of Public Welfare of the City of New York v. Ryan, 238 App. Div. 607, 265 N.Y.S. 286 (1933); and Cote v. Longley, 241 App. Div. 539, 272 N.Y.S. 595 (1934).

evidence of an intimate association between the two for a number of years, before and during pregnancy, and after the birth of the child. When confronted by this evidence on the day of trial, the woman withdrew her petition. Incidentally, if the accused man attempts to offer evidence that other men had sex relations with the woman at the critical period of possible conception, those men will not be permitted to testify unless their testimony is corroborated by other facts and circumstances.[24] That is why a lengthy, time-consuming investigation is needed to find evidence that will support such witnesses.

A basic question in such cases is: how much proof is needed to prove paternity? According to the Appellate Division of New York State, there must be genuine belief that the accused is the father of the child and paternity must be proven to the point of "entire satisfaction."[25] "If that belief is not established because of the contradictory assertions of the witnesses, or for other circumstances, the claimant should be deemed to have failed to establish the charge made."[26]

To sum up: the courts must face up to the challenge and the opportunity of paternity cases—that is, the challenge presented by the delicate and elusive nature of proving fatherhood and the opportunity to clarify the law and bring it out of chaos. Although the law requires that evidence of paternity must be "entirely satisfactory" and must "proceed to the point of entire satisfaction,"[27] that is a standard of evidence to which the court merely pays lip service. Filiation orders are granted on flimsy, suspicious and unsupported evidence. Similar evidence from a policeman would not be sufficient to convict in a traffic case, involving a ten dollar fine. However, in a paternity case there is a child to be supported for twenty-one years and a father to be found; that paternal vacuum must be filled.

Contradictions, evasiveness and inconsistencies in petitioner's testimony, constitute a fertile field for potential reversal of a filiation order. The appellate division has made it abundantly clear that con-

24. N.Y. Family Court Act § 531 (McKinney 1963).

25. Commissioner of Public Welfare v. Ryan, *supra* note 5; Commissioner of Public Welfare of the City of New York v. Kotel, *supra* note 5; Commissioner of Welfare of the City of New York v. Rosato, 256 App. Div. 352, 9 N.Y.S.2d 1005 (1939).

26. *Ryan, supra* note 5.

27. *Ryan, supra* note 5.

tradictions, evasiveness and inconsistencies in petitioner's testimony require reversal. In *Commissioner of Welfare of the City of New York v. Field*,[28] the appellate division, reversing a filiation order and dismissing the complaint, stated in part:

> It is difficult to contradict with evidence a charge of paternity. In the face of the practical impossibility of direct contradiction of the complainant upon the issue, we must consider the more carefully her credibility as revealed by her own testimony and by contradictions thereof. [cases cited].[29]

In *People v. Ruggiero*[30] the Appellate Division, Third Department noted:

> Reliability of complainant's proof is a minimal requirement to support a charge of paternity.[31]

In *Drummond v. Dolan*,[32] the court noted:

> . . . Nevertheless, in the practical impossibility of direct contradiction of the complainant upon the issue, we must consider then more carefully her credibility as revealed by her own testimony and by contradictions thereof.[33]

However, in the field of testimonial evidence, even though such evidence may be punctuated with contradictions, evasiveness and inconsistencies, petitioner will prevail unless those contradictions can be "nailed down" by documented proof that contradictions and inconsistencies actually exist. Such documented proof may consist of petitioner's admissions to the welfare department, hospital records, or a bill of particulars.

In *M. v. D.*,[34] a paternity case tried in the family court, of New York County in September, 1967, an order was granted declaring paternity. The case was appealed, and the brief contained the following:

WELFARE DEPT. RECORDS	MOTHER'S TESTIMONY AT THE TRIAL
1. The Welfare Records describe the incident in question as "heavy petting."	1. At the trial the mother testified unequivocally to the occurrence of 4 actual acts of sexual intercourse.
2. On April 14, 1966 the mother definitely told a social worker of the welfare dept. that there was no act of intercourse.	2. At the trial, the mother unequivocally and without reservation testified to 4 actual acts of sexual intercourse.

28. 25 App. Div. 2d 504 (1965) (mem.).
29. *Id.* at 505.
30. 275 App. Div. 726, 86 N.Y.S.2d 825 (1949).
31. *Id.* at 727, 86 N.Y.S.2d at 826.
32. 155 App. Div. 449, 140 N.Y.S. 307 (1913).
33. *Id.* at 450-51, 140 N.Y.S. at 308.
34. Unreported, P-4044 (Family Ct., N.Y. Co. 1966).

The question was raised as to how a court could adjudicate paternity where there was a grave doubt whether sexual relations actually occurred. It was clear that the mother had told the Welfare Department that there was no act of intercourse; her testimony at the trial, that there was actual intercourse, was, no doubt, the result of prodding. How can a court adjudge a man to be the father of a child, where there was such a grave doubt whether sexual intercourse actually occurred?

The investigator of the Welfare Department to whom petitioner made a full statement testified at the trial that the mother told her that there was no act of intercourse; that conversation was reduced to writing in that department's records. Throughout that record appears petitioner's repeated statement that no act of intercourse occurred. Surely, petitioner's testimony at the trial to the effect that sexual intercourse did occur (whether the result of prodding or otherwise) represents a contradiction and inconsistency too vital to be ignored. However, as above stated, such a vital contradiction on the central issue of the occurrence or non-occurrence of an act of intercourse did not prevent petitioner from prevailing at the trial. It is hoped that this decision does not establish a precedent for declaring paternity in the absence of an act of sexual intercourse.

In *B. v. S.*,[35] a paternity case tried in the family court, of New York County, the result was a filiation order and a support order of $45 per week. S. was a young doctor, engaged in medical research. It will be of interest to consider the evidence upon which the declaration of paternity was based. Her testimony was as follows:

She is a single woman of thirty-six, college-educated, with several degrees in science. She became acquainted with S. while working in the same laboratory. She testified to one act of intercourse (or it might have been two, she is not sure) on the night of September 16, 1965, became pregnant as a result, and gave birth to her child on June 17, 1966. She is positive of the date of September 16, 1965, for that is the only time in her entire life that she had sexual relations with any man. She testified that she did not know she was pregnant until the end of January, 1966, after missing five menstrual periods

35. Unreported, P-4657 (Family Ct., N.Y. Co. 1966).

and, although she saw S. each day in the laboratory, she did not tell him of her pregnancy until February, 1966.

There were two trials in this case. The first trial was before Judge McCaffrey on January 10, 1967, at which time she swore that the one and only act of intercourse had occurred, not on September 16, 1965, but on September 23, 1967. Dr. S. at the trial on January 10, 1967 proved that on September 23, 1965, he was actually in Cleveland, Ohio. He had a plane ticket and a Cleveland motel registration to prove that fact. Judge McCaffrey continued the trial to January 24, 1967, for the production of three physicians who were with him in Cleveland to establish that fact beyond dispute.

On January 24, 1967, on the first calendar call of this continued trial, I advised Judge McCaffrey that I was ready to proceed with the three doctors, who had traveled a considerable distance to appear in court on January 24, 1967 as witnesses. At that point, Judge McCaffrey made a startling disclosure. He proceeded to disqualify himself and declared a mistrial because in the interim between January 10 and 24, 1967, "someone intervened and spoke to me in behalf of the petitioner."[36] Retrial was set down for March 8, 1967.

On March 8, 1967, the case was retried before Judge Lutsky, and on that second trial, petitioner testified that the sole act of intercourse was on September 16, 1966, and not on September 23, 1966, as she had unequivocally testified on January 10, 1967. In the second trial she knew that September 16, 1966, was a safe date for Dr. S. had testified that, although he was in Cleveland on September 23, 1966, he was definitely in New York on September 16, 1966.

The allegations of the plaintiff were, at best, improbable in the light of common experience: (1) a thirty-six year old woman who had but one act of sexual intercourse in her entire lifetime; (2) her ignorance of her pregnancy in spite of her training in medicine and chemistry; and (3) her juggling of the date of that one act. Despite the unlikelihood that Dr. S. fathered her child, the appellate court unanimously affirmed the decision, without opinion. Dr. S. is currently under a support order of forty-five dollars per week, but there will for all time be a cloud on that judgment, based, as it was, on

36. Judge McCaffrey made this statement from the bench, and then declared a mistrial.

suspicious facts and polluted by an attempt to subvert justice. The writer submits that in that case paternity was not established "to the point of entire satisfaction," which is the standard of proof for paternity proceedings in New York.[37]

In *Gray v. Rose*,[38] the Appellate Division, in reversing a filiation order and granting a new trial, wisely and significantly noted:

> In many of the paternity cases reaching Appellate Courts it seems reasonably clear that no more than lip service, if that, has been accorded either the stricter standard of proof required or the presumptions applicable in certain factual settings; with the result, we fear, that often the determination represents the trial court's tacit finding of preponderant evidence merely and the application of the judge's subjective judgment. Thus, in some cases, although not necessarily in this, a putative father nominated by the woman, sometimes long after conception and sometimes only after insistance by the welfare authorities, may be held responsible and this burden of a continuing financial obligation imposed upon him, without adequate judicial evaluation of the record, particularly of the accuser's testimony, and of any attempted impeachment of her character as respects her veracity and, in some cases, her promiscuity. This result seems to follow with some regularity if the respondent fails to testify or if he takes the stand and is candid enough to admit intimate relations at sometime or another. Either course may be damning to him as affording at least a superficial basis for an affirmative finding against him.

The above opinion of reversal contains a damning indictment of a trial court that merely gives "lip service" to the standard of evidence of proof to the point of entire satisfaction and a superficial treatment of the evidence. Unless there is on the trial court's part an in-depth, not superficial, appraisal of the evidence, injustice will continue.

Not infrequently, where the trial court is perplexed as to how to decide the issue of paternity often stamped by a sharp conflict, the court will recall petitioner to the stand and inquire, "Did you ever have sexual intercourse with any other man?" What does the court really expect her answer to be? As soon as she gives the "right" answer, decision will be rendered in her favor. There must not be a "subjective" judgment on the part of the trial court. Naturally, the court will have compassion and sympathy for the unwed mother and her child. But, unless the court is prepared to be a court of law, and is willing to decide the case according to law and the established standard of evidence, there may come a time, as has occurred in several jurisdictions and countries, when paternity cases will be

37. Morris v. Canfield, 19 App. Div. 2d 942, 244 N.Y.S.2d 448 (1963); Rebmann v. Muldoon, 23 App. Div. 2d 163, 259 N.Y.S.2d 257 (1965).

38. 30 App. Div. 2d 138, 290 N.Y.S.2d 647 (1968).

entirely abolished as too scandalous and mischievous in their result. If that should happen, it will be due to the fact that the court's sentiment and sympathy have been permitted to override the law, and the decision is dictated, not by law and logic, but sentiment and prejudice.

In *O. v. R.*,[39] petitioner gave birth to triplets, and after a trial in the family court, R. was adjudged to be the father of the triplets. The incidence of triplets is in the proportion of one in 6400 live births, and obviously unique in the field of paternity proceedings. Petitioner was a nurse in the hospital where R. was a resident intern. At the trial, petitioner admitted that on the night when conception probably occurred, another intern was in her room in the hospital at one or two a.m. and R. was not permitted to enter her room until the other man had left.

There must be a new dispensation for the accused man, not only on the trial, but also the appellate level. As above noted, the appellate division in *Gray v. Rose*,[40] reversed, among other reasons, because of the trial court's superficial approach to the issues involved. How often do we find decisions of the Appellate Courts, "affirmed without opinion; all concur," a phenomenon known in appellate circles as "ANOPAC." True, the functions of appellate and trial courts are dissimilar. However, in this field of the law, as indicated in *Gray*, the appellate court should seriously consider whether the trial court's determination is superficial. For superficiality in this field of the law is all too prevalent. If justice is to be done in cases in this area of the law, trial courts, as well as appellate courts, must be concerned that its judgments are based, not upon sympathy and bias, but upon reasoning and the appropriate legal standard of proof.

39. Unreported, P-2588-90 (Family Ct., N.Y. Co. 1966).

40. *Supra* note 38.