

“A matter of opinion”

Unofficial paternity tests and the impacts on children

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Introduction

It has often been said that:

“Maternity is a matter of fact, paternity is a matter of opinion”.

The accuracy of DNA paternity tests changes that. Now there is a different matter of opinion:

“In what circumstances is it acceptable to test paternity?”

This is clearly an ethical minefield. There are up to 4 individual stakeholders: mother, putative father, biological father, and child. These are potentially in conflict.

Some people believe that *official* paternity tests are a means for women to curb men’s freedoms. Some people believe that *unofficial* paternity tests are a means for men to curb women’s freedoms. That is a cultural and emotional debate that will run and run!

But it won’t run in this paper. It is probably much safer to concentrate on the impacts on children instead. This paper does so. It examines outcomes, privacies and rights for children.

Some people concerned with children’s welfare believe that paternity tests are an intrusion in to children’s privacy and are likely to damage their lives. Other people concerned with children’s welfare believe that paternity tests help children assert their fundamental human rights and are likely to improve their lives. Clearly such a dispute must be resolved.

The analysis in this paper suggests that paternity tests are beneficial to children overall. It will still be possible to find cases where they have matters worse. An alternative position is that paternity testing must be restricted for the sake of children. That cannot be taken for granted.

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He became interested in the reform of the UK’s child support system, after an earlier special interest in social security and welfare reform. Barry contributed at the Green Paper stage of the CSA reform process. He gave evidence to the Social Security Select Committee after the CSA White Paper was published. He is consulted by, and provides information to, academics, the media, politicians and lobby groups on child support matters.

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Barry is a Licentiate of the Royal Photographic Society, and displays some of his photographs at: “Photography by Barry Pearson”

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Preamble

This paper attempts to advance beyond the typical discussion of the topic of unofficial paternity tests. It doesn't spend much time and space discussing matters that have been thrashed out elsewhere.

One matter that this paper considers unimportant is the manner of collecting samples for DNA testing. Some paint a picture of men assaulting their putative children to obtain DNA samples. Others emphasise the unsavoury nature of sifting through dustbins for DNA samples¹. These tales may well create distaste for paternity tests. But they fail to address the real issues. Those who raise those matters would still object to unofficial paternity tests even if they used DNA cast off days earlier by the child in the commissioner's own house. Or supplied in the form of saliva on an envelope that the child has sent to the putative father.

This topic isn't about biochemistry, or human tissues, or contraventions of laws on theft, assault, trespass, harassment, data protection, etc. There are already laws covering these. If it were really about these topics the answer would be simple: “we need more resources to police these laws”. Perhaps we need to examine whether these laws need to be “tweaked” to cater for new technologies. But that is all. This is not a debate about physical things.

Another matter that is largely irrelevant here is “child support”. Statements made about child support in the context of unofficial paternity testing are normally poorly informed. It happens that child support has an influence on the subject of unofficial paternity testing. But this is to justify it, not condemn it. Men should be able to discover any future child support liability.

Paternity testing is sometimes treated as a branch of medical science. It might be better to treat it as a branch of social science.

Many of the criticisms of these tests are wrong or misleading or incomplete. Instead of being factual objections to these tests, they appear to be surface expressions of some significant underlying disquiet and unease. It is likely that refuting these explicit statements would not satisfy the person who made them. These statements appear to be *symptoms* of the underlying unease, not *causes* of it. This raises the question “so what *are* the underlying issues?”

This topic is really about *knowledge*. It is about who has the right to seek certain types of knowledge, who has the right to control those seeking it, and who has the right to know what someone else knows. It is therefore also about privacy and power, especially of adults. This topic is about the changing balances of control of knowledge among men, women, children, and society during the 21st Century. Other issues are minor in comparison.

There are two different considerations. First, how do we deal with the families that exist today? Second, what should we do so that tomorrow's families don't pose the same problems as today's families? We shouldn't let the answer to the first question interfere with the answer to the second question. It would be good if this were the last generation in which paternity testing was a serious concern.

¹ In California's *Kerkorian verses Bing* case, a private investigator searched through a dustbin. It was Bing's DNA in the dustbin, not a child's DNA. It was done for reasons that have no relevance in the UK.

The outcomes for children

This section examines a hypothesis:

On average, unofficial motherless paternity tests improve the outcomes for children.

This may be counter-intuitive to many. The research needed to confirm this has not been done. But neither has the research needed to refute it. This section presents the argument.

How can paternity tests be good for children?

This hypothesis does not assert that *all* children will be at least as well off if unofficial motherless paternity tests are readily available. It is likely that, of all the children affected by the ready availability of such paternity tests, some will be worse off. It will be possible to present anecdotes where a child has undoubtedly become worse off.

The hypothesis is that many children will be better off, and a far smaller number of children will be worse off. Even where children become worse off, there will often be mitigating circumstances. Sometimes the initial appearance of being worse off will be misleading.

These unofficial motherless paternity tests will tend to strengthen the vast majority of families where they are used, giving those families a better prognosis. That justifies the alternative name for such paternity tests: “peace of mind tests”. The minority of families where such tests may prove disruptive are not “marriages made in heaven”. It isn’t obvious whether the children would be best off if the family remains intact or if it separates.

Paternity confirmed, 6 times out of 7

It has been reported that, of the men who have sufficient cause to commission a paternity test in the UK, 6 out of 7 are the biological father². Look at this from the child’s point of view:

- Would you rather spend your childhood being brought up by a father who suspects that you are not his child, and who is therefore also suspicious of your mother?
- Or would you rather spend your childhood being brought up by a father who has no doubt whatsoever that you are his own child?

In this vast majority of cases, the suspicions are unwarranted. The paternity test should put the father’s relationship with both the mother and the child on a better basis. Their own reciprocal reactions should also be better as a result. And the father also knows that if the relationship breaks down, he will probably end up paying child support. So his mind may be focused on success! So the outcomes for many children should be improved.

² David Hartshorne, spokesman for Cellmark, said, “In about one case in seven, the presumed father turns out to be the wrong man”. (Reported in Sunday Times by Lois Rogers, January 23rd 2000).

Paternity denied, 1 time in 7

These are relationships where the mother committed adultery and had a child as a result. She then lied about the child’s origins to the male partner, and probably to the child and to everyone else. She hasn’t got total respect for her partner. He has become suspicious of her and wonders whether the child isn’t his. This is not “a marriage made in heaven”! Even without a paternity test, the relationship may terminate early. Or it may be damaging to the child because of the lack of trust between the couple, and because of the man’s suspicions.

A negative paternity test may well trigger the final separation. There is also the possibility that it will bring openness to the relationship that will enable it to continue³. This separation may have been inevitable, and the test has brought it forward. Or the separation may have a better outcome for the child than the dysfunctional relationship that would have continued without the test. It is not obvious that, on balance, the paternity test has made things worse.

An argument sometimes used against such paternity tests is that they are “terribly difficult for the child and ... other siblings ... all the things that they understood about their family become different”. This supposes that the children will be informed by the unofficial test. That may not be the case. In fact, it is quite possible that they will find out some other way, for example as a result of an *official* test used by the Child Support Agency.

In this minority (1 in 7) of cases, it isn’t a matter of a clear contrast between a good outcome and a bad one. It is a matter of the various parties trying to make the best of a bad situation. There is no reason to believe that this will be achieved more reliably if one or more of the people are unaware of the truth.

Tentative conclusion

These unofficial paternity tests do not deserve their bad press. In the vast majority of cases, they strengthen the family and improve the outcomes for children. Even if the children never learn about them. And while several other means exist which may *reveal non-paternity*, only paternity tests can *assert paternity*. They are the only technology for *delivering good news*.

In the minority of cases there is non-paternity. The research probably hasn’t been done to know whether, on average, there is a better or a worse outcome for children. Bringing a child with misattributed paternity into a family creates a situation where there are likely to be serious uncertainties and probably losers. There is no reliable way of sorting out such a mess, and the best advice is:

“Do not find yourself in this situation”!

More research is needed. Overall, this analysis is compatible with (but doesn’t prove) the original hypothesis:

On average, unofficial motherless paternity tests improve the outcomes for children.

³ Relate / Candis “Affairs Study”, January 2000. “Two thirds of respondents (66 per cent) believe an affair is not always grounds for ending a relationship”.... “Most respondents (55 per cent) thought an affair could be forgiven, men claiming to be more forgiving than women (60% : 54%)”.

Children’s rights to privacy

Types of privacy

Two very different issues about DNA testing need to be separated out, especially for paternity testing⁴. One is the sampling process. The other is the knowledge gained. They often gets mixed together in the literature, especially in the media.

These may be related to what Dr Graeme Laurie calls *spatial privacy* and *information privacy*⁵. But for ease this paper refers to *samples* or *sampling* and *information* or *knowledge*. The reason for keeping these concepts separate is that DNA testing does something interesting. It makes *sampling* much less invasive, and *knowledge* potentially much more invasive. This helps pinpoint where the concerns about DNA testing are.

Is paternity testing an invasion of a child’s privacy?

If a child “owns” the rights to a piece of information, then obtaining a copy of that information would be an invasion. (It would still be invasion if the child didn’t personally know the information concerned). What does society feel that a child owns?

This is easily illustrated. A mother would happily tell a complete stranger, in the child’s presence, “the child inherits my brains and his father’s looks; here is a picture of the father”. A mother would rarely tell anyone “the child is a carrier for cystic fibrosis” or “the child will probably submit to Huntington’s Chorea by the age of 60”. From birth, we consider that children’s parentage is something that we can freely talk about.

This is not simply a discussion about social fatherhood. This is illustrated by the willingness to discuss what the child has inherited from each parent. Or from phrases such as “like father, like son”. UK society does not consider that knowledge of a child’s biological parentage belongs to the child. It belongs at least to the family, and in fact is typically in the public domain. (Although sometimes with errors!) The same applies to many other societies.

Can we say (for some reason) that knowledge of *probable* parentage is in the public domain, but knowledge of *true* parentage really does belong to the child? Then consider:

- Is it a breach of the child’s privacy for the *mother* to know if the putative father really is the child’s biological parent? If so, what should we do about it?
- Is it a breach of the child’s privacy for the *mother* to know that *she* really is the child’s biological parent? If not, why are mothers and fathers different in terms of privacy?
- Is it a breach of the child’s privacy for the child to be given false knowledge about its biological parents, and therefore to “own a lie”?

⁴ “The truth is out there” - Commentary on “Move to outlaw secret DNA testing by fathers”. Appendix D: Ethics of personal knowledge paternity tests.

⁵ Genetic Privacy: A challenge to Medico-legal Norms. Dr Graeme Laurie, Faculty of Law, University of Edinburgh. Cambridge University Press, 2002. ISBN 0 521 66027 0. See also his response to the HGC’s ‘Whose hands on your genes?’ consultation.

Is this about the dignity or the autonomy of the child?

A genetic test may determine whether someone can purchase insurance or get a job. A paternity test may determine whether a man is the child’s biological father. The only factor that connects these tests is *the use of DNA*. It appears that this common factor has caused unwarranted assumptions to be made about the need for common regulation.

The President of the Australian Law Reform Commission is Professor David Weisbrot. The Commission published proposals for laws on genetics information⁶. Terry Lane interviewed him on a programme called *The National Interest* in June 2003⁷. Here is part of the transcript:

Terry Lane:

Well you have recommended a protocol for obtaining genetic tissue for testing from children where paternity is in dispute; how are you recommending that should be done?

David Weisbrot:

Well essentially we’ve said that this one of those areas - and I should say it’s consistent with the way we’ve approached it all the way through our inquiry - although there’s been a lot of focus on the parentage testing, we’ve said much the same thing in respect of employment, insurance, scientific experimentation, medical procedures, and that is that the dignity of the individual, the autonomy of the individual is so important that where at all possible, they should be able to consent or not to it.

Professor Weisbrot asserted the need for consistency between genetic diagnosis and paternity testing. He used the grounds of *dignity of the individual, the autonomy of the individual*. This was not just for the radio programme. It is a feature of the Reform Commission’s report.

What do *dignity* and *autonomy* mean here? Do they refer to the *sampling*, or to the *knowledge*? DNA sampling does little to violate one’s person. Since the Reform Commission’s proposal is to restrict the use of DNA tests, rather than the sampling of DNA, these words probably refer to *knowledge*. They refer to the need to have respect for a child as an individual, to avoid intrusion into matters specific to a child, and to provide choice. Dr Graeme Laurie has pointed out to the HGC some serious limitations of the concept of *autonomy*⁸. In fact, it is hard to know what it means in the context of paternity testing. Autonomy is about *independence* or *self-governing*. Paternity tests are not about an *independent person, a self*. They are about a *relationship* between two people.

Society doesn’t treat knowledge of biological parentage as a matter private to a child. Society does, however, does treat some aspects of the physical nature of the child, such as knowledge of the risk of certain health problems, as private. So if the comparison between genetic diagnosis and paternity testing really is to do with *knowledge*, these types of test are seen to be very different. As many have said, one size (of law) doesn’t fit all.

⁶ “Essentially Yours: The Protection of Human Genetic Information in Australia”. Australia Law Reform Commission and Australian Health Ethics Committee, March 2003.

⁷ <http://www.abc.net.au/rn/talks/natint/stories/s868380.htm>

⁸ Response to the ‘Whose hands on your genes?’ consultation, Dr Graeme Laurie, Faculty of Law, University of Edinburgh.

Children’s rights to information

This section is concerned with information and knowledge. It isn’t concerned with any “tactical” means of learning it, such as DNA. Any rights are likely to differ between men, women, and children. The determination that a particular man and child are related is a single piece of information, but its context and its value are different to the man, woman, and child.

There are relatively few formalised rights on this matter. Asserted “rights” are often variants of wishful thinking. Sometimes they are based on analogies with other rights, such as comparisons between *computer hacking* and *sampling someone else’s DNA*. Rights differ across the world. For example, the US hasn’t ratified the UN Convention of the Rights of the Child. This paper is primarily about the UK, but draws on experience elsewhere.

This section takes as given the standard rights we have under the law for our protection and well being. These are standard laws for assault, theft, human rights, harassment, data protection, etc. A good question is whether we need revisions to these laws.

Formal rights of children

These are the best-recognised rights in this area. Key conventions and laws are:

- *UN Convention on the Rights of the Child*. This was ratified, with qualifications, by the UK in 1991.
- *European Convention on Human Rights and Fundamental Freedoms*.
- *Human Rights Act 1998*, based on the above European Convention.

The UN Convention talks of “*the right to know and be cared for by his or her parents*”⁹. This doesn’t necessarily mean the biological parents, but the trend is in that direction. For example, responding to the UK’s 1999/2002 Convention Report¹⁰, the UN states¹¹:

31. While noting the recent Adoption and Children Bill (2002), the Committee is concerned that children born out of wedlock, adopted children or children born in the context of a medically assisted fertilisation have not the right, as far as possible, to know the identity of their biological parents.

32. In light of articles 3 and 7 of the Convention, the Committee recommends the State party to undertake all necessary measures to allow all children irrespective of the circumstances of their birth or adoptive children to obtain information on the identity of their parents as far as possible.

Identifying the wrong man as the biological father is surely as open to criticism as failing to identify the right man. An unofficial paternity test won’t necessarily inform the child. But children surely won’t benefit from a climate of secrecy about true parentage.

⁹ Article 7 of the UN Convention on the Rights of the Child

¹⁰ 2nd periodic report of the United Kingdom, 14 September 1999, plus June 2002 supplement.

¹¹ “Concluding Observations of the UN Committee on the Rights of the Child: United Kingdom” October 2002.

The European Court’s judgement in *Mikulic v. Croatia*, 17th January 2002, criticised Croatia for not providing a paternity test for a child of about five¹². The Court’s report stated:

“Private life, in the Court's view, includes a person’s physical and psychological integrity and can sometimes embrace aspects of an individual's physical and social identity. Respect for “private life” must also comprise to a certain degree the right to establish relationships with other human beings ... In the Court’s opinion, persons in the applicant’s situation have a vital interest, protected by the Convention, in receiving the information necessary to uncover the truth about an important aspect of their personal identity”.

UK courts appear to be adopting principles such as “it is better for the child to learn sooner rather than later”; and “it is better for a child to learn by paternity test rather than live with rumours”. For example, an appeal court judge, Lord Justice Ward, said: *“If [the child] grows up knowing the truth, that will not undermine his attachment to his father figure, and he will cope with knowing he has two fathers. Better than a time bomb ticking away”.*

In another case, Mr Justice Bodey decided that all the adults and the child had rights to respect for their private and family life, which conflicted with each other. The parents had the right not to have their life destabilised. But the most important right was the child’s right to know *“his true roots and identity”*. He used the phrase *“the inappropriateness of a child being allowed to live a lie”*¹³. Paternity tests are now sometimes being ordered against the mother’s wishes¹⁴.

The Adoption and Children Act 2002 s56-s65 permits children to learn more about their birth. So far the UK has not removed anonymity from sperm donation, in spite of a campaign for this. But that particular topic will probably not go away:

*“Countries that have already removed donor anonymity are Sweden, Austria, The Netherlands and Switzerland. The state of Victoria and a clinic in California also allow offspring to trace donors. Research among donor offspring in California suggests that 85 per cent would like to trace their genetic parents at some point”*¹⁵.

*“USA and Spain - anonymity can be abolished if a court decides it is in the interest of the child”*¹⁶. (Germany doesn’t have anonymity either).

None of these applies directly to unofficial paternity tests. But they reflect the trend that the interests of the child are typically to know the truth, sooner rather than later. And this should sometimes override the wishes of either or both parents. As far as the child is concerned, the mother’s lover was an anonymous sperm donor!

When will a child take its mother to court to make her divulge with whom she committed adultery?

¹² Article 8 of the European Convention on Human Rights and Fundamental Freedoms states “1. Everyone has the right to respect for his private and family life, his home and his correspondence”.

¹³ The case of *Re T (Paternity: Ordering Blood Tests) [2001] 2 FLR 1190*, noted in Genetic testing and the impact on the family, Ann Northover and Grainne Dennison, Fam Law October 2002.

¹⁴ The Child Support, Pensions, and Social Security Act 2000 amended the Family Law Act 1986 to permit this.

¹⁵ From the website for “Abolish Adoption”.

¹⁶ From the University of Surrey website.

Summary

Do paternity tests deserve their bad press?

Genetic diagnosis runs all the risks of creating a “genetic underclass”. There is no corresponding risk of a “misattributed paternity underclass”. Illegitimacy has little or no stigma attached to it. It is (sadly) common for children to live in different homes from their biological fathers.

Knowing about a child’s biological parentage isn’t seen as an invasion of the child’s privacy. DNA samples are easy to obtain without distress. There is no other need to regulate paternity tests in the same way as genetic tests. *So why are there worries about paternity tests?*

The real worries don’t appear to be to do directly with children. The worries are to do with the difference between the “published statements” about a child’s paternity and “the truth”. *Knowing the truth* isn’t inherently bad. It is the *difference* that is thought to be bad. Possible consequences are:

1. These tests will reveal things that some mothers would prefer were never known.
2. Some adults and some children will suffer from the consequences of “1”.
3. These tests will restrict women’s reproductive choices in future.
4. The *genetic definition* of the family may undermine the *social definition* of the family.

These are largely true, although of course an unofficial paternity test doesn’t necessarily inform the child. But paternity tests are not the problems; they are the messengers. These problems have to be managed, not covered up.

If there were no misattributed paternity, would we still be concerned about paternity tests? No. They are not inherently wrong. Their danger isn’t that they discover paternity. Their danger is that they discover *misattributed* paternity. Should nations legislate to hide errors?

What would be the consequences of legislation?

For those who still believe it is useful to restrict these tests by legislation, here is an important question. If suspicious men had to get the permission of mothers or courts in order to learn the truth about their paternity: *in what way would this make things better for the children?*

Some suspicious men commission motherless paternity tests. Consider the majority case, where the man really is the child’s father. Would the children be better off if he were required by law to ask the mother’s permission first? Would anyone be better off? It is unlikely.

Consider the minority case, where he is not the real father. Would the result be any better if he were required to ask the mother’s permission first? Why would it make a difference?

END.