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Commonwealth v. Walker, 392 Mass. 152, 466 N.E.2d 71 (1984)

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COMMONWEALTH v. WALKER

I. INTRODUCTION

In *Commonwealth v. Walker*[1] the Supreme Judicial Court of Massachusetts ruled out, once and for all, the use of polygraph tests[2] to impeach nonparty witnesses in criminal cases. The decision, culminating a series of recent rulings that have been steadily eroding the use of the "lie detector" in the state's criminal courts, has effectively made prosecution witnesses immune from impeachment by polygraph while criminal defendants remain exposed.

In 1982, the mother of an illegitimate child alleged nonsupport against William E. Walker.[3] Before his arraignment, Walker and the complainant, with the advice of her attorney, stipulated that she would take a polygraph examination and that neither side would object to admission of the results at trial.[4] The subsequent examination indicated the woman had lied when she denied having had sexual intercourse with another man just two nights prior to her rendezvous with the defendant.[5] After concluding that the test had been properly conducted,[6] the trial judge agreed to admit the evidence for impeach-

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1. 392 Mass. 152, 466 N.E.2d 71 (1984).

2. The polygraph "is a scientific device which through measurement and recording of involuntary bodily responses – blood pressure, pulse rate, respiration, and skin resistance to electricity – seeks to determine whether an individual is telling the truth." Commonwealth v. A Juvenile (No. 1), 365 Mass. 421, 426, 313 N.E.2d 120, 124 (1974).

Because of the complexity of the science of polygraph testing, a more detailed explanation is not possible here. For a concise overview of the polygraph process, see Commonwealth v. Vitello, 367 Mass. 426, 431-40, 381 N.E.2d 582, 586-90 (1978). For more detail, see J. REID & F. INBAU, TRUTH AND DECEPTION: THE POLYGRAPH TECHNIQUE (2d ed. 1977) [hereinafter cited as REID & INBAU].

3. 392 Mass. at 12, 466 N.E.2d at 71. Massachusetts General Laws provide:

> Any parent of an illegitimate child . . . who neglects or refuses to contribute reasonably to its support and maintenance, shall be guilty of a misdemeanor. If there has been any final adjudication of the paternity of the child, such adjudication shall be conclusive on all persons in proceedings under this section; otherwise, the question of paternity shall be determined in proceedings hereunder . . . .

MASS. GEN. LAWS ANN. ch. 273 § 15 (West Supp. 1983).

4. 392 Mass. at 153, 466 N.E.2d at 72.

5. *Id.* The woman's New Year's Eve escort could not be located within Massachusetts. *Id.*

6. A judge must make this finding before he may admit any polygraph evidence. *See infra* note 16.

ment purposes over the Commonwealth's objection.[7] Prior to trial, however, the judge reported the case for a ruling on admissibility.[8]

The court's holding in *Walker* was explicit: "We today announce the rule that the polygraph test results of a nonparty witness are not admissible in evidence in a criminal trial. This rule will apply regardless of whether the witness, the defendant, and the Commonwealth have signed a stipulation agreeing to admissibility."[9]

II. BACKGROUND

The rule is simple to understand. The reasoning behind it is not, however, if one looks solely to the text of the *Walker* opinion for enlightenment. Although the court carefully traced the history of its earlier polygraph decisions,[10] when the court finally stated the new rule, it did so with scant reference to the logic of the case law it had just cited.[11] Still, to understand the origins of the *Walker* decision and its significance, some background knowledge of the 20-year history of polygraphs in the Massachusetts courts is necessary.

The supreme judicial court first considered the admissibility of polygraph results in *Commonwealth v. Fatalo*.[12] There, the court held that polygraphic evidence was simply not reliable enough to be admissible.[13] Such stringent opposition to polygraphs, however, came under fire throughout the country and in 1974 the Massachusetts court

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7. The prosecution objected to the defendant's efforts to get the results admitted on the grounds that the Commonwealth had not been a party to the agreement. 392 Mass. at 154, 466 N.E.2d at 72.

The distinction between a stipulation by the Commonwealth and one by the complaining witness in a nonsupport case is a dubious one because it is in reality the "nonparty" who stands to benefit from a successful prosecution. While the woman's stipulation in *Walker* apparently troubled the trial judge, the supreme judicial court declared the issue of stipulation irrelevant. *Id.* at 159, 466 N.E. 2d at 75. *See infra* note 9 and accompanying text. While the question of the validity of stipulations by a complaining witness is an interesting topic, it is beyond the scope of this note.

8. 392 Mass. at 154, 466 N.E.2d at 72. The case was transferred to the supreme judicial court on the high court's motion. *Id.* at 152, 466 N.E.2d at 71.

9. *Id.* at 159, 466 N.E.2d at 75.

10. *Id.* at 154-59, 466 N.E.2d at 72-75.

11. *Id.* at 159, 466 N.E.2d at 75.

12. 346 Mass. 266, 191 N.E.2d 479 (1963).

13. *Id.* at 270, 191 N.E.2d at 481. *See generally* Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

The admissibility and reliability of the polygraph have been the subjects of numerous scholarly works. *See, e.g.* REID & INBAU, *supra* note 2; Axelrod, *The Use of Lie Detectors by Criminal Defense Attorneys* 3 NAT'L J. CRIM. DEF. 107 (1977); Lester, *Polygraph Evidence: Are the Courts Failing to Keep Abreast of Modern Technology?*, 5 CRIM. JUST. J. 33 (1981); Comment, *The Admissibility of Polygraph and Hypnotic Evidence to Test the Credibility of a Witness* DET. C.L. REV. 97 (1982); and Comment, *Polygraph: Perceiving Us or*

seemed to relent. In *Commonwealth v. A Juvenile (No.1)*[14] the court held that enough progress had been made in the science of polygraphic testing to warrant limited[15] admissibility of a defendant's polygraph results when requested by the defendant and upon certain conditions.[16] Despite the practical implications of *A Juvenile (No.1)*, the court insisted it had not overruled *Fatalo*.[17] The significance of the court's claim became clear in the 1978 case of *Commonwealth v. Vitello*[18] in which the court began limiting the scope of the admissibility rule it had created just four years earlier.[19]

Deceiving Us?, 13 N.C. CENT. L.J. 84 (1981). For a more extensive list of secondary sources see State v. Dean, 103 Wis. 2d 228, 234 n.2, 307 N.W.2d 628, 631-32 n.2 (1981).

14. 365 Mass. 421, 313 N.E.2d 120 (1974).

15. Apart from the preconditions, *see infra* note 16, the admission was "limited" only in the sense that the polygraph results were to be treated as just another piece of substantive evidence and not as conclusive proof. *Id.* at 425-26, 313 N.E.2d at 124.

16. *Id.* at 425, 313 N.E.2d at 124. The conditions were that the defendant had to agree before taking the test that the results would be admissible, and that the trial judge had to be convinced of the qualifications of the examiner, of the fitness of the defendant to take the exam, and that the methods used to administer the test were proper. Finally, the court had to be satisfied that the defendant's constitutional rights had been fully protected. *Id.* at 425-26, 313 N.E.2d at 124.

Interestingly, while the defendant won for posterity the court's recognition of polygraphic evidence, he never succeeded in having his own test results admitted at trial. On remand, the trial judge, still reluctant to admit the test results, reported the case back to the supreme judicial court for clarification of a number of procedural matters. The supreme judicial court held that the trial court was not obliged to admit the results of the original test because it had been conducted without prior stipulation and therefore did not meet the high court's threshold requirement. 370 Mass. 450, 453-54, 348 N.E.2d 760, 762 (1976). Furthermore, the original examiner had since testified that a second test would not be "meaningful," given all that had transpired since the first test. *Id.* at 452-53, n.2 348 N.E.2d at 762, n.2. Because the court would not accept the results of the first test, and because the defendant was unfit to take a new test, the supreme judicial court affirmed the trial judge's decision not to grant a new trial "in the interest of ending this prolonged litigation." *Id.* at 454, 348 N.E.2d at 763.

17. *A Juvenile (No. 1)*, 365 Mass. at 434 n.11, 313 N.E.2d at 128 n.11.

18. 376 Mass. 426, 381 N.E.2d 582 (1978).

19. Massachusetts was not alone in its reluctance to embrace the polygraph unequivocally. Although the "lie detector" has existed in one form or another since the 19th century, it has remained extremely controversial and its acceptance by the various jurisdictions has been far from universal. *Walker*, 392 Mass. at 159, 381 N.E.2d at 75.

Courts in Iowa, California, and North Dakota generally recognize polygraph results if there has been a prior stipulation, while states such as Alabama, Alaska, Florida, Indiana, Kentucky, Nevada, Ohio, Washington, and Massachusetts recognize the results only if specified preconditions have been met. *See* Annot. 53 A.L.R.3d 1011-14 (Supp. 1984). Other states, such as Louisiana, Maryland, Oklahoma, Pennsylvania and Illinois have blanket bans on the use of polygraphs, even when there has been a stipulation. *Id.* at 1010.

The ranks of those states opposing or embracing the polygraph are still changing and a trend is difficult to find. Some states, such as Georgia, have moved toward increased use of polygraphs. *See, e.g.* State v. Chambers, 240 Ga. 76, 239 S.E.2d 324 (1977); Smith v. State, 245 Ga. 205, 264 S.E.2d 215 (1980). Others, such as North Carolina and Wisconsin, have

Vitello was charged with armed robbery. As part of his strategy, the defense attorney moved for a polygraph test of his client "for the purpose of introducing its results into evidence. . . ."[20] The results of the test proved unfavorable to the defendant. Over the defendant's objections, the trial judge allowed the introduction of the evidence in the prosecution's case-in-chief[21] and Vitello was convicted. The supreme judicial court reversed on the grounds that the trial court improperly admitted the polygraph evidence.[22]

In a carefully articulated opinion, the *Vitello* court premised the creation of its polygraph admissibility policy on an evaluation of whether the probative value of such scientific evidence sufficiently outweighed the "costs" of introducing it.[23] Using that approach, the court stated that polygraphic evidence should never be admitted as part of either party's case-in-chief.[24] It nevertheless held polygraph evidence admissible for impeachment or corroboration.[25]

Even in the setting of impeachment and corroboration, however, the court did not leave the rule of admissibility intact for long. In *Commonwealth v. Moore*[26] the court apparently questioned the polygraph's viability in impeachment situations. The court held that a trial judge had not erred in refusing to admit test results that challenged veracity of a prosecution witness.[27] That case was followed by

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rejected the polygraph altogether. *See, e.g.* State v. Grier, 307 N.C. 628, 300 S.E.2d 351 (1983) (overruling State v. Milano, 297 N.C. 485, 256 S.E.2d 154 (1979)); State v. Dean, 103 Wis. 2d 228, 307 N.W.2d 628 (1981) (overruling State v. Stanislawski, 62 Wis. 2d 730, 216 N.W.2d 8 (1974)).

20. 376 Mass. at 427-28, 381 N.E.2d at 584.

21. *Id.* at 428, 381 N.E.2d at 584.

22. *Id.* at 428, 461, 381 N.E.2d at 584, 601.

23. *Id.* at 450-51, 381 N.E.2d at 596. The supreme judicial court saw the costs as: confusion and prejudice of juries because of the misconception that the tests are infallible; waste of court time in cross-examining expert witnesses and satisfying the judge that the exam was properly administered; intrusion into the jury's function; limitation of scope of rebuttal, (first, because the examiner and not the opposing party chose the questions asked during the test and second, because a rebuttal expert would not have seen the subject's reactions firsthand); and finally, likelihood that, with common use, defendants will eventually get wise to the test's "tricks" and learn how to beat the machine. *Id.* at 451-52, 381 N.E.2d at 596-97.

24. *Id.* at 453, 381 N.E.2d at 597.

25. *Id.* at 453-57, 381 N.E.2d at 597-99. It is interesting to note that the court, in ruling that such evidence was admissible for impeachment purposes, went much further than necessary. At Vitello's trial the evidence was specifically admitted as substantive proof of guilt and the court could have reversed the conviction without ever mentioning impeachment. For a possible explanation, *see infra* notes 39-40 and accompanying text.

26. 379 Mass. 106, 393 N.E.2d 904 (1979).

27. *Id.* at 114, 393 N.E.2d at 910.

Commonwealth v. Dilego.[28] There, the court dealt with the other side of the same question and held that the prosecution could not corroborate the testimony of its own witness by use of a polygraph, "at least in the absence of a stipulation."[29]

Despite the comprehensive nature of *Vitello* and the subsequent decisions in *Moore* and *Dilego*, the question remained whether a judge may allow defendants to use polygraph evidence to impeach prosecution witnesses. To that question, *Walker* provided an unequivocal "no."

III. ANALYSIS

Because of a paucity of analysis in *Walker*,[30] difficulty arises in identifying the source of the holding. The ruling apparently flows more from the court's suspicion of polygraphic evidence than from the facts of the case.[31] The cases reflect the court's skepticism. In *Vitello*, for example, the court spent nine pages underscoring the unreliability inherent in the polygraph.[32] The court's mistrust of polygraphs, however, is offset by its concern that criminal defendants not be unnecessarily encumbered when deciding to take the stand in their own defense. In *Vitello* the court noted that sometimes defendants with prior criminal records do not testify because they fear their records make them less believable. A positive polygraph might nevertheless encourage some defendants to take the stand.[33]

Indeed, *Commonwealth v. Martin*[34] illustrated the court's vision of how the polygraphs can encourage defendants to testify. Martin was indicted for rape, kidnapping, and assault and battery by means of

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28. 387 Mass. 394, 439 N.E.2d 807 (1982).

29. *Id.* at 394, 439 N.E.2d at 807.

30. For example, the court pointed out that one of Walker's arguments was that to refuse to admit the evidence in question would "violate his constitutional rights to due process of law and to confrontation of witnesses." 392 Mass. at 154, 466 N.E.2d at 72. The court, however, proceeded to rule against Walker, dismissing his constitutional claims in a footnote as not having been properly raised. *Id.* at 160 n.3, 466 N.E.2d at 75 n.3. Furthermore, the court dismissed the claim that the evidence was exculpatory and therefore relevant at the end of the opinion with the somewhat circular observation that it is not admissible and therefore not relevant. *Id.* The court's reasoning is particularly confusing in light of its position that "[a]s a general proposition, a judge does not have discretion to exclude relevant evidence." Commonwealth v. Martin, 392 Mass. 161, 163, 466 N.E.2d 76, 78 (1984). *Martin* was decided the same day as *Walker*.

31. *See infra* notes 43-44 and accompanying text.

32. 376 Mass. at 431-40, 381 N.E.2d at 586-90.

33. *Id.* at 455, 381 N.E.2d at 598.

34. 392 Mass. 161, 466 N.E.2d 76 (1984).

a deadly weapon.[35] Martin had a prior conviction for similar offenses but he also had an exculpatory polygraph.[36] Although the trial judge found that the examiner was qualified and the test properly conducted, he exercised his discretion and refused to allow the defense to enter the corroborative test results into evidence.[37] The supreme judicial court reversed, holding that the trial judge had no such discretionary power.[38]

As *Martin* illustrates, in the context of impeachment and corroboration[39] of a defendant's testimony by use of his/her own polygraph results, the court is willing to put aside its grave misgivings about the scientific reliability of the evidence. Under those circumstances, the court finds the polygraph to be "arguably a more direct, and more accurate, means of aiding the jury in judging the credibility of a witness than . . . the introduction of past criminal behavior."[40] It also found that the costs represent an acceptable trade-off for the benefit of encouraging the defendants to testify.[41]

Clearly, admitting the disputed test results in *Walker* would not have affected the defendant's decision to testify one way or another, while admission in *Martin* would have. In that sense both cases followed the earlier stated policies. *Martin* flowed smoothly from the prior case law. Walker, on the other hand, is open to serious criticism.

Vitello drives home the underlying lesson, common to all evidence cases, that the costs of admitting evidence must be weighed against the benefits.[42] Arguably, the application of the balancing test justifies outlawing the use of polygraph results as substantive proof of

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35. *Id.* at 161, 466 N.E.2d at 77.

36. *Id.*

37. *Id.* The trial court did so on the grounds that it had already excluded evidence of Martin's prior convictions and that Martin had other evidence supporting his alibi. *Id.* at 161-62, 466 N.E.2d at 77. The trial judge's action was by no means illogical. He apparently recognized the supreme judicial court's stated connection between impeachment by prior criminal conduct and the admissibility of corroborative polygraphs as a *quid pro quo* and simply chose to deal with the problem by excluding the prior record rather than admitting the polygraph. The high court, however, was not willing to go that far.

38. *Id.* at 163, 466 N.E.2d at 78.

39. As opposed to the ultimate guilt or innocence of the defendant.

40. *Vitello*, 376 Mass. at 455, 381 N.E.2d at 598.

41. The court could, of course, ban the use of polygraphs for impeachment of a defendant's testimony but continue to allow their use for corroboration. Such a distinction would further advance the court's goal of encouraging defendants to testify because a defendant with an unfavorable polygraph would likely be discouraged from testifying if the test results were available for impeachment. The court, however, treats impeachment and corroboration as two sides of the same coin and is unwilling to separate them. *See id.* at 451-53, 381 N.E.2d at 596-97.

42. *See supra* notes 23-25 and accompanying text.

guilt or innocence while allowing their use for impeachment. It does not necessarily follow, however, that results which would normally be admissible for impeachment are somehow less probative simply because they relate to the veracity of a prosecution witness instead of a defendant. This reasoning, however, appears to be the basic premise of *Walker*.[43] The supreme judicial court, furthermore, chose to enunciate its new rule in a paternity suit, a classic example of a case in which the court's reasoning does work. In cases such as *Walker*, the outcome depends as much on the credibility of the accusing witness as it does on the credibility of the defendant.[44] In *Walker* the test results indicated that the accusing witness lied about a very significant fact. The court is willing to allow her to testify with the blemish on her credibility safely hidden from the jury. The defendant, on the other hand, possesses no power to hide the test results, short of sacrificing the right to testify in his own defense.

The court's continued use of broad language[45] when enunciating polygraph rules may shed light on the court's willingness to accept such uncomfortable results. The supreme judicial court appears to be looking beyond *Walker*, or the peculiarities of any other individual case, in search of predictability and a bright line test. In *Martin*, for example, the court expressed its fear that allowing the Commonwealth's trial judges to exclude defendants' polygraph results "would grant virtually unreviewable discretion to trial judges, [and] *would discourage uniformity of treatment of defendants.*"[46]

IV. CONCLUSION

Basically, the court does not trust the polygraph. Despite its earlier efforts to accomodate the machine the court has ultimately adopted a rule of inadmissibility. The court has found only one policy

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43. The *Walker* court maintained that "[w]here the veracity of a witness [is not] as critical to the determination of guilt or innocence as the defendant's credibility would be," admission of polygraph evidence would not be warranted in light of the costs. 392 Mass. at 158-59, 446 N.E.2d at 75 (citing *Dilego*, 387 Mass. at 397-98, 439 N.E.2d at 809). In *Dilego* the court asserted that the credibility of a witness "generally" *would not* have "as direct a bearing on a defendant's guilt" as the defendant's own testimony. 387 Mass. at 397, 439 N.E.2d at 809. The court did not explain why *Walker* fell within its "general" rule.

44. Owing to the generally private nature of people's sexual proclivities, paternity litigation will frequently come to a choice between believing the accusing witness or believing the defendant. Generally there will be no other witnesses to the alleged act. Logically, the woman's credibility is no less significant than the man's.

45. *See supra* note 9 and accompanying text. Note also that in *Vitello* the court spoke generally of hypothetical defendants who might benefit from the corroboration rule. 376 Mass. at 455, 381 N.E.2d at 598. *See also Dilego*, 387 Mass. at 397, 439 N.E.2d at 809.

46. 392 Mass. at 163, 466 N.E.2d at 78 (emphasis added).

concern strong enough to warrant breaking the rule; the need to encourage defendants to testify when they feel it is in their interest to do so. When the testimony in question is that of a non-party witness, even if it be the accusing witness, the one overriding policy concern which justifies making the exception simply does not exist. While allowing a case-by-case approach might have avoided the uncomfortable result in *Walker*, it could not have provided the kind of predictability of results that the court's approach to polygraph admissibility guarantees.

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