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LIE DETECTOR TESTS: POSSIBLE ADMISSIBILITY UPON STIPULATION

INTRODUCTION

The scene is a criminal case, the accused is in jail awaiting trial on a charge of a serious felony.[1] The defendant urges his innocence and in an effort to implement proof of his innocence the defendant decides to take a polygraph[2] or lie detector test.

The test results indicate that the defendant is telling the truth. At the trial, the defendant attempts to have the results admitted, but the trial court, relying on appellate court precedent, refuses to admit them.[3]

On appeal, the court of review upholds the trial court's de-

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[1] Almost all of the appellate cases dealing with the admissibility of lie detectors have been criminal cases. In the handful of civil cases on point, the standards of admissibility seem to be the same as in criminal cases. *See* Herman v. Eagle Star Ins. Co., 283 F. Supp. 33 (C.D. Cal. 1966); California Ins. Co. v. Allen, 235 F.2d 178 (5th Cir. 1956); Gideon v. Gideon, 153 Cal. App. 2d 541, 314 P.2d 1011 (1957); Commissioner *ex rel.* Hunter v. Banmiller, 194 Pa. Super 448, 169 A.2d 347 (1961); Fernandez v. Security-First Nat'l Bank, 206 Cal. App. 2d 676, 24 Cal. Rptr. 25 (1962); State v. Chang, 347 P.2d 5 (Hawaii 1962); Stone v. Earp, 331 Mich. 606, 50 N.W.2d 172 (1951).

[2] Keeler named the polygraph which is short for pneumo-cardio-sphygomal-vano-graph; contra; polygraph means "many pictures"; State v. Valdez, 91 Ariz. 274, 371 P.2d 894 (1962). For a physical description of the polygraph *see* F. INBAU & J. REID, LIE DETECTION AND CRIMINAL INTERROGATION 3-8 (3d ed. 1953); Trovillo, *Scientific Proof of Credibility*, 22 TENN. L. REV. 743, 748-57 (1952); Hensley, *The Lie Detector in Action*, 2 TEX. B.J. 482 (1940); Keeler, *Debunking the Lie Detector*, 25 J. CRIM. L. 153, 156 (1934). For a brief discussion of questioning techniques *see* Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie Detection*, 70 YALE L.J. 694, 704 (1961); Inbau, *The Lie Detector*, 26 B.U.L. REV. 264, 265 (1946). 16 CHI.-KENT L. REV. 269 (1938):

> There are three types of 'lie-detectors' used for detection of deception:
> (a) The blood-pressure method originally proposed on the Continent, has been developed in the United States principally by Martson, Larson and Keeler . . . . The instrument merely records the reactions in a subject's blood pressure and respiration when asked questions pertinent to the . . . investigation. . . .
> (b) The respiration method measures and records the time of respiration between question and answer, and the interpretation detects a lie. This method has not been developed as an independent one, and is now usually combined with the blood-pressure method.
> (c) The galvanometer method measures the variation in resistance of the skin to electric-currents administered during emotional disturbances, the variations being attributable due to changes in the activity of the sweat glands . . . .

[3] The exact antithesis of this situation is where the judge not only would allow the results of the test admitted but instructs the parties to take the test. *See* People v. Nimmer, 25 Ill. 2d 319, 185 N.E.2d 249 (1962); Stone v. Earp, 331 Mich. 606, 50 N.W.2d 172 (1951). In Illinois there is a statutory prohibition against such action on the part of a trial judge in civil cases, ILL. REV. STAT. ch. 110, §54.1 (1967), which forbids the judge to *require* or *request* such a test; and in criminal cases, ILL. REV. STAT. ch. 38, §158-1 (1967), which forbids the trial judge to *require, request* or even *suggest* such a test.

cision that lie detector test results are properly excludable on the theory that they are unreliable and *lack general acceptance in the scientific community.*[4]

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[4] Unreliability and lack of general scientific acceptance are not the only objections to the admission of lie detectors. Other objections raised by commentators and the courts include:

(A) Violation of a constitutional privilege (U.S. CONST. amend. V, ILL. CONST., art. II, §10) against self incrimination — Skolnick, *Scientific Theory and Scientific Evidence: An analysis of Lie Detection*, 70 YALE L.J. 694, 725 (1961); People v. Simms, 395 Ill. 69, 69 N.E.2d 336 (1946); Hardman, *Lie Detectors: Extra Judicial Investigation and the Courts*, 48 W.Va. L.Q. 37, 39 (1941); McCormick, *Deception Tests and the Law of Evidence*, 15 CALIF. L. REV. 484, 502 (1927); People v. Schiers, 160 Cal. App. 2d 364, 324 P.2d 981 (1958); *contra*, Inbau, *Scientific Evidence in Criminal Cases*, 24 J. CRIM. L. 1140, 1151 (1933); *but cf.* People v. Houser, 85 Cal. App. 2d 686, 193 P.2d 937 (1948).

(B) The validity of the test results rely too much on the skill of the operator — People v. Zazzetta, 27 Ill. 2d 302, 189 N.E.2d 260 (1963); State v. Gregoire, 148 A.2d 751 (R.I. 1959); People v. Aragon, 15 Cal. App. 2d 646, 316 P.2d 370 (1957); People v. Davis, 343 Mich. 348, 72 N.W.2d 269 (1955); *accord*, Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie Detection*, 70 YALE L.J. 694, 704 (1961); Wicker, *The Polygraph Truth Test*, 22 TENN. L. REV. 711-12 (1953).

(C) The admission of such evidence would impair the vital function of cross-examination — State v. Foye, 254 N.C. 704, 120 S.E.2d 169; United States v. Stromberg, 179 F. Supp. 278 (S.D.N.Y. 1959); Henderson v. State, 94 Okla. Crim. 45, 230 P.2d 495 (1951); Boeche v. State, 151 Neb. 368, 37 N.W.2d 593 (1949); State v. Lowry, 163 Kan. 622, 185 P.2d 147 (1947); *contra*, Belli & Streeter, *The Fourth Degree: The Lie Detector*, 5 VAND. L. REV. 549 (1953).

(D) Lie detectors are not effective on the psychologically abnormal subject — Heckel, Brokaw, Salzberg & Wiggins, *Polygraphic Variations In Reactivity Between Delusional, Non-Delusional And Control Groups In A "Crime" Situation*, 53 J. CRIM. L.C. & P.S. 380 (1962); Skolnick, *Scientific Theory And Scientific Evidence: An Analysis Of Lie Detection*, 70 YALE L.J. 694, 715 (1961); United States v. Stromberg, 179 F. Supp. 278 (S.D.N.Y. 1959); People v. Davis, 343 Mich. 348, 72 N.W.2d 269 (1955); Henderson v. State, 94 Okla. Crim. 45, 230 P.2d 495 (1951); Boeche v. State, 151 Neb. 368, 37 N.W.2d 593 (1949); F. INBAU, LIE DETECTORS AND CRIMINAL INTERROGATION 30 (2d ed. 1948); State v. Lowry, 163 Kan. 622, 185 P.2d 147 (1947); Inbau, *The Lie Detector*, 26 B.U.L. REV. 264, 269 (1946); Trovillo, *What the Lie Detector Can't Do*, 32 J. CRIM. L. 121 (1941).

(E) The use of lie detectors would lead to the abolition of the jury — Forkosch, *The Lie Detector And The Courts*, 16 N.Y.U.L.Q. REV. 202, 221 (1939); *contra*, Note, CORNELL L.Q. 535, 542 (1944).

(F) Lie detector evidence with its many ramifications and variables imposes too subtle a task of evaluation upon an untrained jury — Boeche v. State, 151 Neb. 368, 37 N.W.2d 593 (1949).

(G) Lie detectors would merely distract the jury — State v. Foye, 254 N.C. 704, 120 S.E.2d 169 (1961); State v. Cole, 354 Mo. 181, 188 S.W.2d 43 (1945).

(H) Lie detector test results are not susceptible to cross-examination — State v. Lowry, 163 Kan. 622, 185 P.2d 147 (1947); Boeche v. State, 151 Neb. 368, 37 N.W.2d 593 (1949); *contra* Belli & Streeter, *The Fourth Degree: The Lie Detector*, 5 VAND. L. REV. 549 (1953).

(I) Admitting such test results would permit the defendant to conduct extra judicial tests without the necessity of submitting to similar tests by the prosecution — State v. Foye, 254 N.C. 704, 120 S.E.2d 169 (1961); Stockwell v. State, 164 Tex. Crim. 656, 301 S.W.2d 669 (1957); Peterson v. State, 157 Tex. Crim. 255, 247

The purpose of this comment is to present an analysis of the principal cases which have followed or deviated from this theory of exclusion.[5]

S.W.2d 110 (1951); State v. Bohner, 210 Wis. 651, 246 N.W. 314 (1933).

(J) There is a lack of standardization of test procedure — Koeffler, *The Lie Detector — A Critical Appraisal of the Technique as a Potential Undermining Factor in the Judicial Process*, 3 N.Y.L.F. 123 (1957); Burack, *A Critical Analysis of the Theory, Method, and Limitations of the "Lie Detector,"* 46 J. CRIM. L. C. & P.S. 414 (1955).

(K) Lie detector results should not be allowable on both due process and moral grounds — Silving, *Testing of the Unconscious in Criminal Cases*, 69 HARV. L. REV. 683, 687-89 (1956).

(L) Lie detector results are influenced by interpretive bias (psychology of the examiner) — Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie-Detection*, 70 YALE L.J. 694, 712 (1961).

(M) There is a tendency of judges and juries to treat lie detectors as conclusive evidence of defendant's guilt — State v. Valdez, 91 Ariz. 274, 371 P.2d 894 (1962); Highleyman, *The Deceptive Certainty of the "Lie Detector,"* 10 HASTINGS L. REV. 47 (1958); Kleinfeld, *The Detection of Deception — A Resume*, 8 FED. B.J. 153 (1947); *accord*, People v. Leone, 25 N.Y.2d 511, 307 N.Y.S.2d 430, 255 N.E.2d 696 (1969).

(N) An objection not often raised by the courts, but one which perhaps underlies those listed above, is that the courts are afraid of the inherently prejudicial nature of lie detectors, People v. Leone, 25 N.Y.2d 511, 255 N.E.2d 696 (1969). Hence, while there is no question that lie detector results are relevant, there is a latent fear that once a jury is presented with the results of a lie detector test they will be unable to decide the case on the total of the merits. In other words, lie detector results would just be too prejudicial, notwithstanding their admitted probative value; "any relevant conclusions which are supported by a qualified expert witness should be received unless there are other reasons for exclusion. Particularly, its probative value may be overborne by the familiar dangers of prejudic[e] . . . ."

(O) C. MCCORMICK, LAW OF EVIDENCE §363 (1954). Trautman suggests that there can only be five reasons for excluding logically relevant evidence (time consumption, confusion of the jury, *prejudice*, surprise, embarrassment of the litigants or the public). The only one of these which would appear to apply to the exclusion of lie detectors is prejudice. Trautman, *Logical or Legal Relevancy — A Conflict in Theory*, 5 VAND. L. REV. 385, 397 (1952) (emphasis added). C. MCCORMICK, LAW OF EVIDENCE §170 (1954).

[5] The reason that lie detector tests have not gained acceptance into the courts appears to be one of *legal* theory and not lack of proof of the underlying *scientific* theory. Thus, quoting accuracy figures to the courts would not appear to solve the problem. *See, e.g.*, Henderson v. State, 94 Okla. Crim. 45, 230 P.2d 495 (1951); State v. Arnwine, 67 N.J. Super. 483, 171 A.2d 124 (1961); *contra*, People v. Kenny, 167 Misc. 51, 3 N.Y.S.2d 348 (County Ct., Queens County 1938).

For those wishing to cite accuracy figures the sources appear to be nearly inexhaustible. A partial list could include: F. INBAU & J. REID, TRUTH AND DECEPTION 110-11 (1966); Arther, *The Lie Detector — Is It of Any Value?*, 24 FED. PROBATION 36 (1960); Trovillo, *Scientific Proof of Credibility*, 22 TENN. L. REV. 743, 758 (1953); Inbau, *The Lie-Detector*, 26 B.U.L. REV. 264, 268 (1946); Summers, *Science Can Get the Confession*, 8 FORDHAM L. REV. 334, 338 (1939); Note, 16 CHI.-KENT L. REV. 269 (1938); Marston, *Psychological Possibilities in the Deception Test*, 11 J. CRIM. L. 551, 568 (1921).

An attorney wishing to gain acceptance for the lie detectors strictly on the basis of statistical studies of their accuracy must be prepared to rebut arguments that lie detector accuracy figures are tenuous at best; *see* F. INBAU & J. REID, TRUTH AND DECEPTION 234 (1966); Burkey, *The Case*

CASES WITHOUT STIPULATION

Frye v. United States,[6] the first reported case to deal with the admissibility of lie detector test results, propagated the doctrine that such results are not admissible because they lack general acceptance in the scientific community.[7] The court explained:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while many courts will go a long way in admitting expert testimony deduced from a well-recognized principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained *general acceptance in the particular field in which it belongs.* We think the systolic blood pressure test has not gained such standing and scientific recognition as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made.[8]

Frye then, indicates that lie detector tests would not be admissible until lie detectors had general scientific acceptance. General scientific acceptance would appear to be the criterion demanded by the court before it takes judicial notice. But the mere admission of scientific evidence would not seem to demand general acceptance.[9] Other types of scientific evidence are not

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Against the Polygraph, 51 A.B.A.J. 855-56 (1965); Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie Detection*, 70 YALE L.J. 694, 699 (1961).

[6] 293 F. 1013 (D.C. Cir. 1923); Notes, 37 HARV. L. REV. 1138 (1924); 33 YALE L.J. 771 (1924); 24 COLUM. L. REV. 429 (1924). For an excellent discussion of all lie detector cases from *Frye* through 1951 *see* Wicker, *The Polygraphic Truth Tests and the Law of Evidence*, 22 TENN. L. REV. 711, 715-23 (1953).

[7] This proposition raises a question as to just what scientific community must recognize the efficacy of the lie detector. If medical devices are to be judged by the medical community could it not be argued that criminal investigation apparatus need only be judged by that professional community? Puhl v. Milwaukee Auto. Ins. Co., 8 Wis. 2d 343, 99 N.W.2d 163 (1960) suggests that expert testimony may be admissible when it has gained scientific acceptance in the *particular* field in which it belongs; *cf.* Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie Detection*, 70 YALE L.J. 694, 703 (1961).

[8] 293 F. at 1014 (emphasis added). Perhaps the court's decision was correct on its facts as the lie detector used in that case was far less sophisticated than those used today. Note, 46 IOWA L. REV. 651 (1961). For a description of the machine used, see Martson, *Psychological Possibilities in the Deception Tests*, 11 J. CRIM. L.C. & P.S. 551-54 (1921). Advocates of the lie detector are fond of showing that if the test results would have been admitted they would have tended to prove Frye's innocence. Without the admission of the test results he was convicted, but another person later confessed to committing the crime, see 14th ANNUAL REPORT OF THE NEW YORK JUDICIAL COUNCIL 265 (1948).

[9] Lickfett v. Jorgenson, 179 Minn. 321, 229 N.W. 138 (1930); C. MCCORMICK, LAW OF EVIDENCE §170 (1954) suggests: "General scientific acceptance is a proper condition upon the courts taking judicial notice of scientific facts, but not a criterion for the admissibility of scientific evidence." *Cf.* 9 J. WIGMORE, EVIDENCE §2567 (3d ed. 1940); 2 J. WIGMORE, EVIDENCE §663 (3d ed. 1940); *but cf.* Strong, *Questions Affecting the Admissibility of Scientific Evidence*, 1970 ILL. L.F. 9-11.

excluded because there is a lack of unanimity among the scientific community as to their accuracy and efficacy.[10]

Instead, the scientific expert in other areas is allowed to testify, and any disagreement among the scientific community effects the weight afforded the evidence by the trier of the facts and not its admissibility.[11] The standard for the admission of other types of scientific evidence is merely that it be accepted by those expected to be familiar with its use[12] and that the apparatus have a reasonable measure of precision.[13] *Frye*, however, demanded nothing less than general acceptance among the scientific community.[14]

Even if the general acceptance theory of *Frye* were taken as correct, those who advocate its use might urge that the lie detector *is* generally accepted in the scientific community and therefore its results should be admitted.[15]

In this case, counsel for Frye not only urged the admission of the test results conducted out of the court room but also made an offering to conduct a test in the presence of the jury. Even those legal scholars who would urge the admission of lie detector test results under the proper conditions would not advocate conducting a lie detector test in the presence of the jury.[16] Thus the

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[10] People v. Bobczyk, 343 Ill. App. 504, 99 N.E.2d 567 (1951); McKay v. State, 235 S.W.2d 173 (Tex. Crim. App. 1951); Hardman, *Lie Detectors: Extrajudicial Investigations and the Courts*, 48 W. VA. L.Q. 37-8 (1941); McCormick would suggest that judicial notice can be given even if scientists do not agree; C. MCCORMICK, LAW OF EVIDENCE §325 (1954); *see* Abilene v. Hall, 202 Kan. 636, 451 P.2d 188 (1969); Commonwealth v. Mummert, 183 Pa. Super. 638, 133 A.2d 301 (1957); United States v. U.S.C.M.A. 183 (1967).

[11] State v. Olwas, 77 Ariz. 118, 267 P.2d 893 (1963); People v. Williams, 6 N.Y.2d 18, 159 N.E.2d 549 (1959); People v. Bobczyk, 343 Ill. App. 504, 99 N.E.2d 567 (1951); McKay v. State, 235 S.W.2d 173 (Tex. Crim. App. 1950); *contra*, People v. Morse, 325 Mich. 270, 38 N.W.2d 322 (1949). In *Bobczyk* and *McKay* the state sought to admit results of the Harger drunkometer over the defendant's objection that there wasn't complete unanimity in the scientific community. *But cf.*, the court in State v. Lowry, 163 Kan. 622, 185 P.2d 147 (1947) felt that the analogy between lie detector admissibility and the admissibility of other types of scientific evidence is invalid because the lie detector relies upon psychological data while other types of scientific apparatus record physical data.

[12] People v. Williams, 164 Cal. App. 2d 858, 331 P.2d 251 (1958). Perhaps this is the same way of saying that the device need only be generally accepted by the professional community in which it is used. This is far less demanding than general acceptance by the scientific community.

[13] 3 J. WIGMORE, EVIDENCE §990 (3d ed. 1940).

[14] 293 F. at 1014.

[15] McCormick, *Deception Tests and the Law of Evidence*, 15 CALIF. L. REV. 484 (1927); *cf.* Wicker, *The Polygraphic Truth Test and the Law of Evidence*, 22 TENN. L. REV. 711, 723-25 (1953). It should also be noted that, "[t]he machine used in *Frye* recorded only discontinuous systolic blood pressure. This method has been found inadequate and a machine has been developed which takes continuous readings of pulse rate, pressure, respiration and perspiration." Comment, 46 IOWA L.R. 651 (1961).

[16] C. MCCORMICK, LAW OF EVIDENCE §174 (1935); Comment, CORNELL L.Q. 535, 542 (1944); McCormick, *Deception Tests and the Law of Evidence*, 15 CALIF. L. REV. 484, 501 (1927); *cf.* State v. Cole, 354 Mo. 181, 188 S.W.2d 43 (1945).

rejection of the offering to have the test conducted before the jury would appear to be accepted by the commentators as correct.[17]

While there appear to be some tenable arguments against the correctness of *Frye*, its effect was to prove false Dean Wigmore's prediction, "If there ever is devised a psychological test for the evaluation of witnesses, the law will run to meet it."[18] But, just as the holding in *Frye* proved Wigmore's prediction unwarranted, so did the subsequent case law.

The Supreme Court of Wisconsin was next to consider the admissibility of lie detector test results in *State v. Bohner*.[19] The defendant offered the results of a test conducted by Professor Keeler of Northwestern University. The trial court rejected the offer.[20] This decision, upheld on appeal, appears to rely exclusively on the rationale and precedent of *Frye*.[21] The court noted that the lie detector had not, in the ten years since *Frye*, passed from "the experimental to the demonstrable stage."[22] It can thus be inferred that when the lie detector does reach the "demonstrable" stage,[23] it will be admitted.

A secondary reason for this decision was the fact that the test had been unilaterally conducted by the defendant in *Bohner*.[24] The court indicated this was unfair since the state had no opportunity to conduct a similar examination.[25] This objection can apparently be cured by simply having both parties agree to participate in the administration of the test.

When originally decided, the language of *Bohner* seemed to suggest that the Wisconsin courts would consider the admissibility of lie detector test results in the future (1) when they

[17] It is said that the drama and tension of the courtroom coupled with the psychological strain of submitting to a lie detector test would cause the results to be erratic and inaccurate. C. MCCORMICK, LAW OF EVIDENCE §174 (1935); *see* State v. Foye, 254 N.C. 704, 120 S.E.2d 169 (1961); State v. Cole, 354 Mo. 181, 188 S.W.2d 43 (1945); these courts felt that conducting a lie detector test in the presence of a jury would merely distract the jury. *QUERY:* Does it distract a jury any time an in court demonstration is performed, although to a lesser degree? Is then it merely a matter of degree?

[18] 2 J. WIGMORE, EVIDENCE §875 (2d ed. 1923).

[19] 210 Wis. 651, 246 N.W. 314 (1933); Notes, 13 B.U.L. REV. 321 (1933); 8 WIS. L. REV. 283 (1933); 24 J. CRIM. L. 440 (1933).

[20] 210 Wis. at 657, 246 N.W. at 317.

[21] *Id.* at 657-58, 246 N.W. at 317.

[22] *Id.* at 658, 246 N.W. at 317.

[23] But nowhere does the court explain what is meant by "demonstrable stage." Subsequent case law has not picked up this phrase as a basis for their decisions.

[24] 210 Wis. at 659, 246 N.W. at 318.

[25] *Id.* at 659, 246 N.W. at 318. 3 J. WIGMORE, EVIDENCE §990 (3d ed. 1940) suggests that if an experiment is conducted out of court, basic fairness demands that any opponents be given an opportunity to be present and observe the testing technique and the results. Perhaps having the opposing party represented would also put to test doubts as to the validity and fairness of the tests.

pass into the demonstrable stage, and (2) where the tests are conducted by both parties.[26] However, later Wisconsin cases have proved any such interpretation of this case to be unwarranted.[27]

While both *Bohner* and *Frye* rejected the admission of lie detector tests, a New York court in *People v. Kenny*[28] admitted the results of a pathometer test.[29]

After the proper foundation had been laid, Professor Summers of Fordham University testified that he had achieved 100 percent accuracy in the 6,000 tests he had conducted.[30] The trial court was so impressed with this testimony that the lie detector tests were admitted even though the court was made aware of the decisions in *Frye* and *Bohner*.

The *Kenny* court indicated that the time had come to recognize the lie detector as a reliable judicial tool and said that lie detector operators should be allowed to testify even if they might disagree with one another in their conclusions.[31] Any disagreement, the court said, should go to the weight afforded the evidence and not to its admissibility.[32] Thus, while *Frye* and *Bohner* refused to admit lie detectors because they lacked general acceptance in the scientific community, *Kenny* admitted the pathometer results not only because the court felt that the lie detector had gained scientific acceptance, but because the court felt that general scientific acceptance was not a prerequisite to admissibility. Thus the court took the position commonly held regarding other

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[26] *Id.*

[27] See LeFevre v. State, 242 Wis. 410, 8 N.W.2d 288 (1943).

[28] 167 Misc. 51, 3 N.Y.S.2d 348 (County Ct. Queens County 1938); Note, 16 CHI.-KENT L. REV. 269 (1938).

[29] The device used here was different from that used in *Frye* and *Bohner*. For a detailed description see 24 J. CRIM. L.C. & P.S. 442 (1933); Forkosch, *The Lie Detector and the Courts*, 16 N.Y.U.L.Q. REV. 202, 208 (1939); Summers, *Science Can Get the Confession*, 8 FORDHAM L. REV. 334 (1939). The pathometer measures the changes in the electrical conductivity of the skin in response to emotional stimuli, Note, 29 CORNELL L.Q. 535, 537 (1944).

[30] The decision in the *Kenny* case has been criticized as being factually incorrect and historically untenable; State v. Pusch, 77 N.D. 860, 46 N.W.2d 508 (1950); *accord*, F. INBAU, LIE DETECTION AND CRIMINAL INTERROGATION 84 (2d ed. 1948).

[31] 167 Misc. at 54, 3 N.Y.S.2d at 351; Boeche v. State, 151 Neb. 368, 37 N.W.2d 593 (1949) (Chappel, J., concurring) where it was noted that the deductions of psychiatrists and handwriting experts are not uniform, yet their testimony is received by the court into evidence, the question becoming one of weight to be accorded the evidence by the jury. *QUERY:* If expert witnesses were always in agreement would there be any point for the defendant to call an expert after the plaintiff had put on his case utilizing expert witnesses?

[32] *Id.* at 54, 3 N.Y.S.2d at 351; *accord*, People v. Bobczyk, 343 Ill. App. 504, 99 N.E.2d 567 (1951); McKay v. State, 235 S.W.2d 173 (Tex. Crim. App. 1951); *cf.* Brett v. Carras, 230 F.2d 451 (3d Cir. 1953), where the court said that expert testimony did not have to amount to dogma to be admitted and if expert witnesses are willing to estimate probabilities, then it is error for the judge to exclude the evidence.

demonstrative evidence, *i.e.*, that disagreement as to its reliability should go to its weight not its admissibility.[33]

However, *People v. Forte*,[34] which was a New York case arising in a district different from *Kenny*, refused to follow *Kenny* and would not admit the results of a pathometer test.

The *Forte* decision was based upon two grounds: (1) a statement made by Dean Wigmore,[35] (2) the precedent and reasoning of *Frye*.

The court said:

> We cannot take *judicial notice* that this instrument is or is not effective for the purpose of determining the truth. . . . The record is devoid of evidence tending to show a general scientific recognition that the pathometer possesses efficacy.[36]

The *Forte* court required a greater standard for the admissibility of lie detector results than even the *Frye* and *Bohner* courts by demanding that judicial notice be taken[37] before the results would be admitted.

Forte was appealed and affirmed while *Kenny* was but a trial court decision which was never appealed because the defendant prevailed. It was thus assumed that *Forte* overruled *Kenny sub silentio*.[38] However, close analysis of the cases shows that in *Kenny* a proper foundation for the introduction of the test results was laid.[39] But in *Forte*, there was no such foundation as to the efficacy of the lie detector. Hence, it is argued that the cases were entirely reconcilable, the difference in result being due to a lack of foundation in *Forte*.[40]

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[33] 167 Misc. at 54, 3 N.Y.S.2d at 351.

[34] 279 N.Y. 204, 18 N.E.2d 31 (1938); Notes, 24 CORNELL L.Q. 434 (1939); 37 MICH. L. REV. 1141 (1939); 25 VA. L. REV. 492 (1939); 27 ILL. B.J. 308 (1939).

[35] J. WIGMORE, SCIENCE OF JUDICIAL PROOF §311-B (3d ed. 1937). Wigmore apparently favored the qualified use of lie detectors however; 29 CORNELL L.Q. 535-36 (1944).

[36] 279 N.Y. at 206, 18 N.E.2d at 32.

[37] An occasional decision is to be found suggesting that unless judicial notice will be taken of the general scientific proposition or propositions necessary to interpret the significance of offered specific data, the line of proof is inadmissible. This suggestion is clearly contrary to the overwhelming weight of authority on the subject, and reflects an erroneous view of the function of judicial notice in this area.
Strong, *Questions Affecting the Admissibility of Scientific Evidence*, 1970 U. ILL. L.F. 9. The result of *Forte* seems to contradict Wigmore's view that a scientist should be allowed to testify if the scientific process has a reasonable measure of precision. 3 J. WIGMORE, EVIDENCE §990 (3d ed. 1940).

[38] People v. Hill, 64 Ill. App. 2d 185, 212 N.E.2d 259 (1965); State v. Trimble, 68 N.M. 406, 362 P.2d 788 (1961).

[39] 167 Misc. at 52-53, 3 N.Y.S.2d at 349-50.

[40] Boeche v. State, 151 Neb. 368, 37 N.W.2d 593 (1949); (Chappel, J., concurring); Note, 29 CORNELL L.Q. 535, 537 (1944); *but see* People *ex rel.* Blackmon v. Brent, 97 Ill. App. 2d 438, 240 N.E.2d 255 (1968) where the appellant was precluded from arguing on appeal that the appellee had failed to lay a proper foundation for the admission of lie detector tests because the appellant had failed to object to the proffer at the trial. Hence, the lie detector test results were allowed to stand on appeal.

For a number of years, supporters of *Kenny* argued that in New York, at least, it was a matter of the trial court's discretion as to whether lie detector test results should be admitted, as *Forte* had not overruled *Kenny*. Whatever the merit of this argument, the question appears to now be settled in New York as a consequence of *People v. Leone*.[41] The court, in a comprehensive opinion, quoted with favor from *Forte* in excluding lie detector results.[42]

There has been no decision aside from *Kenny* which has seriously deviated from *Frye*. The impact of *Kenny* on later opinions has been small due to the fact that it was a trial court opinion and its precedent value was attenuated by *Forte*. *Frye* has continued to be followed in principle, but some decisions have held lie detector results inadmissible because there was no testimony offered to qualify either the technique or the operator.[43]

Such a case was *People v. Becker*.[44] The court, recognizing the general rule of exclusion, rejected the defendant's offer to admit the results of a lie detector test.[45] However, another reason for the court disallowing the results was that the defense attorney offered no testimony to prove the efficacy of the test.[46] Cases like this suggest that the proper foundation must be laid

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[41] 25 N.Y.2d 511, 307 N.Y.S.2d 430, 255 N.E.2d 696 (1969).

[42] *Id.* at 513-14, 255 N.E.2d at 699-700. The New York court could have "cleared the deck" because of the *Kenny-Forte* dichotomy and looked to an entirely different standard, to wit, if the device is felt to have sufficient probative value its results should be admitted. Hadley v. Baltimore & O. R.R., 120 F.2d 993 (3d Cir. 1941); Bororad v. Kosberg, 8 A.2d 342 (D.C. Cir. 1951); Haile v. Dinnis, 184 Md. 144, 40 A.2d 363 (1944); Godsy v. Thompson, 352 Mo. 681, 179 S.W.2d 44 (1944); Trook v. Sagert, 171 Ore. 680, 138 P.2d 900 (1943). X-rays are admissible where they tend to aid the jury to understand the plaintiff's condition, Killilay v. Hawk, 250 Ill. App. 222 (1928). Commentators would appear to favor such a view, Trautman, *Logical or Legal Relevancy — A Conflict in Theory*, 5 VAND. L. REV. 385, 395 (1952): "If the test results are shown by scientific experience to render the inferences of consciousness of falsity or truth substantially more probable, then the courts should accept the evidence though the possibility of error in the inference be recognized." McCormick, *Deception Tests and the Law of Evidence*, 15 CALIF. L. REV. 484 (1927). *Contra*, Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie Detection*, 70 YALE L.J. 694, 726 (1961); Stewart v. People, 23 Mich. 63, 75 (1871): "The proper test for the admissibility of evidence . . . [is] whether it has a tendency to affect belief in the mind of a reasonably cautious person, who should weigh it with judicial fairness."

[43] Colbert v. Commonwealth, 306 S.W.2d 825 (Ky. 1957); Boeche v. State, 151 Neb. 368, 37 N.W.2d 593 (1949) (Chappell, J., concurring); *cf.* Parker v. Friendt, 99 Ohio App. 329, 118 N.E.2d 216 (1954). Other courts have emphasized the absence of a stipulation; State v. Arnwine, 67 N.J. Super. 483, 171 A.2d 124 (1961); People v. Aragon, 154 Cal. App. 2d 646, 316 P.2d 370 (1957); Commonwealth v. McKinley, 181 Pa. Super. 610, 123 A.2d 735 (1956); State v. Lowry, 163 Kan. 622, 185 P.2d 147 (1947).

[44] 300 Mich. 562, 2 N.W.2d 503 (1942).

[45] *Id.* at 565, 2 N.W.2d at 504.

[46] *Id.* at 566, 2 N.W.2d at 505. In another Michigan case, People v. Davis, 343 Mich. 348, 72 N.W.2d 269 (1955), the court excluded lie detector test results on the same grounds even after noting that the witness was an eminently qualified and world renowned scientist, lawyer and doctor.

before a court will even consider lie detector test results, but leave open the question of whether the evidence of the efficacy must satisfy the *Frye, Kenny* or *Forte* requirements.[47]

In 1949, one year after lie detector test results were first admitted in *People v. Houser,*[48] upon stipulation of the parties, there first appeared to be some softening of judicial opposition to the lie detector. This manifested itself in the concurring opinion in *Boeche v. State.*[49] In that case, after an exhaustive summary of the reported cases, the concurring opinion held that no foundation had been laid in this case, hence the results were properly excluded.[50]

The concurring opinion noted:

> However, I am convinced that if such a foundation were laid, as was done in People v. Kenny. . . then the testimony of the operator and the results obtained by the tests would be admissible in criminal cases, such as that at bar, wherein defendant had voluntarily submitted to the tests.[51]

This is the only appellate court opinion advocating that if the proper foundation is laid, the admission of lie detector test results without any limitation is proper.[52] Because the foundation in *Kenny* was cited with approval,[53] it may be assumed that the judicial notice standard of *Frye* and the general acceptance standard of *Frye* was being repudiated. No appellate cases have been found which have followed the concurring opinion in *Boeche,* however.

CASES INVOLVING STIPULATIONS

As the *Kenny* decision indicates, lie detector test results have been admitted at the trial level in some instances. However, unlike *Kenny,* most of the trial level cases have involved stipulations by the parties.[54]

One noted authority indicated that test results should be admitted *only* when a stipulation exists.[55] One of the reasons

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[47] That is, whether the scientific accuracy must be such that the court can take judicial notice (*Forte*); the device must have gained general acceptance (*Frye*); or that it should be admitted and any disagreement goes to weight, not admissibility (*Kenny*).

[48] 85 Cal. App. 2d 686, 193 P.2d 937 (1948).

[49] 151 Neb. 368, 37 N.W.2d 593 (1949); in the seven years between *Becker* and *Boeche* the only reported case appears to be State v. Cole, 354 Mo. 181, 188 S.W.2d 43 (1945).

[50] *Id.* at 384, 37 N.W.2d at 600.

[51] *Id.* at 383, 37 N.W.2d at 600.

[52] It should be remembered that *Kenny* was but a published trial court decision.

[53] 151 Neb. 381, 37 N.W.2d 593, 599 (1949).

[54] Note, 1943 WIS. L. REV. 430; Inbau, *Detection of Deception Technique Admitted as Evidence,* 26 J. CRIM. L.C. & P.S. 262 (1935). One commentator suggests that the courts are using the stipulation as a vehicle to admit lie detector tests, 15 ALA. L. REV. 248, 255 (1963).

[55] Inbau, *The Lie Detector,* 26 B.U.L. REV. 264; 20 WASH. & LEE L. REV. 173, 177 (1963). It should be noted that there is a distinction between agree-

given in support of this idea is that if the parties agree as to the identity of the operator, this in itself is an additional safeguard that the operator is competent.[56] Another reason given is that a party should not be allowed to urge unreliability on appeal because if he stipulates that a course of action should be taken at the trial court level; he should not be heard to complain because the court acted upon the stipulation.[57]

LeFevre v. State[58] was the first appellate case to deal directly with the admissibility of lie detector test results where there existed a signed stipulation. The defendant, accused of murder, agreed to take a lie detector test conducted by Professor Mathews of the University of Wisconsin. A stipulation was entered into by the state and the defendant.[59] The defendant passed the test but the state wanted further tests conducted. These tests were conducted under the direction of Professor Keeler,[60] and there was a similar stipulation with similar results. The defendant did not offer to have either Keeler or Mathews testify but offered only the test results. At the trial the state objected to the admission of the results. The trial court excluded the evidence[61] but the district attorney, who had objected to the proffer for some unexplained reason, said in rebuttal that the results were favorable to the defendant. Hence, while the results were not admissible by the defendant, the fact that they indicated that the defendant was telling the truth was admitted, the defendant making no objection. The trial court's decision was upheld on appeal, the court relying exclusively on *Bohner*,[62] even though *Bohner* did not contain a stipulation and one of the bases for the decision was that the tests had been unilaterally conducted while here the tests were not only bilaterally conducted but it

ing to take a lie detector test and agreeing to have those results admitted into evidence, State v. Arnwine, 67 N.J. Super. 483, 171 A.2d 124 (1961).

[56] Note, 20 S. CAL. L. REV. 804, 814 (1968).

[57] People v. Lehman, 5 Ill. 2d 337, 125 N.E.2d 506 (1955); People v. Anderson, 239 Ill. 168, 87 N.E. 917 (1909); evidence stipulated to will not be questioned by the supreme court; People v. LaBostru, 14 Ill. 2d 617, 153 N.E.2d 570 (1958); People v. Pierce, 387 Ill. 608, 57 N.E.2d 345 (1944).

[58] 242 Wis. 416, 8 N.W.2d 288 (1943); Note, 1943 WIS. L. REV. 430.

[59] *Id.* at 424, 8 N.W.2d at 292:

> It is further stipulated and agreed by and between the said Frank LeFevre and S. Richard Heath that any fact, matter or thing disclosed by said lie detector examination of said Frank LeFevre and the findings of Professor Mathews thereon, may be admitted in any trial or preliminary examination before any of the courts of the county of Fond du Lac or state of Wisconsin.

[60] Keeler is an early associate of Fred Inbau who distinguished himself as a teacher and improvisor. Many of the improvements Keeler made to early polygraphs are still used today. For a discussion of some of Keeler's contributions, see Trovillo, *A History of Lie Detection*, 29 AM. J. P. S. 848, 877-82 (1939).

[61] However, Wigmore states that a party may stipulate as to what a witness would say if he were present. 9 J. WIGMORE, EVIDENCE §2595 (3d ed. 1940).

[62] For a discussion, see text at note 19 *supra*.

was stipulated that the results would be admitted. The court did not disqualify the stipulation nor mention it nor did it distinguish *Bohner*.

Legal scholars have attempted to justify that decision on one of two grounds. The first is that because the testimony of the operators was not offered, the results were properly excluded under the hearsay rule[63] because neither expert was called to testify and only the reports of the experts were sought to be admitted. But, there seems to be no reason why the parties to a lawsuit cannot stipulate to the suspension of a rule of evidence.[64] Nevertheless, this indicates that whatever effect a stipulation might have in other areas, in lie detector cases the operator must be called to testify.[65]

Another justification offered is that because the district attorney testified that the results were favorable, the defendant obtained all the benefit he would have obtained had the results been admitted.[66] Notwithstanding these attempts at justification, this decision would not appear to be followed in the jurisdictions which have considered this question.

In *State v. Lowry*,[67] at the Kansas court's suggestion, the defendant and the complaining witness agreed to take a Keeler Polygraph Test.[68] On appeal, the test results were disallowed even though a foundation was laid and the operator was called to testify.[69] The appellate court went to great pains to note that there existed *no stipulation* that the test results should be admitted. The court quoted with favor a law review article by Professor Inbau[70] predicting the admissibility of lie detector results if there existed a properly executed stipulation. Thus the mere fact that both parties to an action voluntarily submit to take a lie detector test does not mean that the court

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[63] 29 CORNELL L.Q. 535, 538 (1944). *But cf.* "Whether *by contract* before litigation arisen a party may provide for the *non-enforcement* of a rule of Evidence, or for its *waiver*. . . ." 9 J. WIGMORE, EVIDENCE at 593 §2592 (3d ed. 1940); Wright Lumber Co. v. Ripley Co., 270 Mo. 121, 192 S.W. 996 (1917).

[64] 9 J. WIGMORE, EVIDENCE §2592 (3d ed. 1940).

[65] Perhaps this is a manifestation of a fear that lie detector results if admitted without any checks would in certain cases be extremely prejudicial. How does this result square with People v. Pierce, 387 Ill. 608, 57 N.E.2d 345 (1944), where the court said the accused may by stipulation waive the necessity of proof of any part of the case against him? *But cf.* People *ex rel.* Blackmon v. Brent, 97 Ill. App. 2d 438, 240 N.E.2d 255 (1968) when the operator was not called to testify yet the lie detector results were admitted and upheld on appeal. Perhaps the explanation lies in the fact that the appellant never complained at the trial level to the proffer.

[66] C. MCCORMICK, EVIDENCE §174, n. 6 (1954). This appears, however, to be but an application of the old saw "The end justifies the means."

[67] 163 Kan. 622, 185 P.2d 147 (1947).

[68] The Keeler Polygraph is described at note 2 *supra*.

[69] 163 Kan. at 625-27, 185 P.2d at 149-50.

[70] Inbau, *The Lie Detector*, 26 B.U.L. REV. 264, 271 (1946); the court also cited to 29 CORNELL L.Q. 535 (1944).

will treat this submission with the same respect it will afford a written stipulation.[71] Indeed, it would appear that there must be a written stipulation signed by all parties and their attorneys. The court strengthened any arguments for future admissibility of the lie detector by noting success in out of court uses.[72] This was the first appellate decision speaking for a majority,[73] to indicate that lie detector test results could be admitted under the proper circumstances. More specifically, this court indicated that, had the state and the defendant entered into a stipulation as to the admission of the test results, they might have been admitted.

In *People v. Houser*,[74] lie detector test results were admitted where there existed a signed, written stipulation.[75] The stipulation provided that the test results might be used by either the defendant or the state. The results proved to be unfavorable to the defendant. The state after laying the proper foundation[76] introduced the test results.

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[71] Several cases have emphasized the absence of a stipulation, including: State v. Arnwine, 67 N.J. Super. 483, 171 A.2d 124 (1961); People v. Aragon, 154 Cal. App. 2d 646, 316 P.2d 370 (1957); Commonwealth v. McKinley, 181 Pa. Super. 610, 123 A.2d 735 (1956); State v. Lowry, 163 Kan. 622, 185 P.2d 147 (1947). In *Arnwine*, the court specifically noted that there is a difference between agreeing to take a test [and make the results available to other parties] and agreeing to have the results admitted into evidence.

[72] However, even for extra judicial purposes the lie detector has been met with less than boundless enthusiasm. In 1965 there were six states which forbid the imposition of polygraph tests as a condition of employment, Burkey, *The Case Against the Polygraph*, 51 A.B.A.J. 855-56 (1965); labor arbitrators have held that employees need not submit to lie detector tests, Dayton Steel Foundry, 39 Lab. Arb. 745 (1962); Wilkof Steel Supply Co., 39 Lab. Arb. 883 (1962), 13 DEPAUL L. REV. 287 (1964). Labor does not like lie detectors because employers might fire an employee without other evidence, Burkey, *The Case Against the Polygraph*, 51 A.B.A.J. 855-56 (1965). Some lawyers now give clients a lie detector test before taking a case on a contingency basis, 30 MICH. ST. B.J. 12, 28 (1951); lie detectors have found various industrial applications, Note 29, CORNELL L.Q. 535, 539-40 (1944).

[73] People v. Kenny, 167 Misc. 51, 3 N.Y.S.2d 348 (1938) was a trial court report and was not the report of an appellate court case.

[74] 85 Cal. App. 2d 686, 193 P.2d 937 (1948).

[75] The stipulation provided in part:

> . . . the question propounded by said operator and the answers given by said defendant and the recordings of said defendant's reactions thereto and everything appertaining to said test and the entire results of said tests including the opinions of said operator be received in evidence either on behalf of the people or on behalf of the defendant . . . and that said defendant hereby waives his constitutional privilege against self-incrimination to the extent that the same may be involved in the presentation in evidence of the foregoing matters.

Id. at 695, 193 P.2d at 942.

[76] The machine was displayed to the jury and its mechanism and the manner in which the test was given was explained and interpreted to the jury. He explained that he asked the defendant a series of ten questions to be answered by 'yes' or 'no.' Some questions related to matters immaterial to the charge and others were directly pertinent to it. The graph was introduced in evidence. The expert concluded and stated that he was of the opinion from the test given defendant that defendant Houser was not telling the truth in respect to the accusations made.

Id. at 691, 193 P.2d at 940.

The defendant on appeal urged the exclusionary doctrine of *Frye*. The court, unlike the court in *Bohner*, held that the stipulation made a difference and that such a stipulation would be binding upon the parties. The court said:

> It would be difficult to hold that defendant should now be permitted on this appeal to take advantage of any claim that such operator was not an expert and that as to the results of the test such evidence was inadmissible, merely because it happened to indicate that he was not telling the truth. . . .[77]

The opinion does not indicate that the defendant objected at the trial level to the admission of this evidence. Apparently, the first time defendant objected was on appeal. It is said that this fact considerably weakens the decision[78] because as a general rule a fact not urged at the trial level cannot be raised on appeal.[79]

This case did, then, allow lie detector test results to be admitted where there existed a written, signed stipulation. But, the failure of the defendant to object to the offer at the trial level attenuates the impact of this case.

Stone v. Earp,[80] a Michigan case, was the first civil action to deal with the admissibility of lie detector test results on appeal. After the plaintiff and defendant had given conflicting stories, the trial judge said he was not going to decide the case until the parties submitted to a lie detector test.[81] Both parties stipulated that the test results could be admitted.

On appeal, the court held that it was error[82] to admit the results of the lie detector test. The court relied upon *People v. Becker*[83] which held that the tests were still only experimental and could not be approved for general use.[84] In neither Michigan

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[77] 85 Cal. App. 2d at 695, 193 P.2d at 942.

[78] 15 ALA. L. REV. 248, 252 (1962).

[79] "It is a rule of universal application that the reversal of a judgement cannot be urged upon a ground not submitted to the trial court and upon which it did not and was not asked to decide." People v. Brand, 415 Ill. 329, 337, 114 N.E.2d 370, 374 (1953). *See also* People *ex rel.* Blackmon v. Brent, 97 Ill. App. 2d 438, 240 N.E.2d 255 (1968) where lie detector test results were admitted after the parties had executed a written stipulation. The appellant objected to the admission of a carbon copy of the test results (the original having been lost). The court held that an objection to evidence on a specific ground constitutes a waiver to object on other grounds. It is noteworthy that in this case the operator was not called to testify and this was, of course, urged as reversible error. But, the court felt the appellant was precluded from raising the question, not having raised it at the trial level.

[80] 331 Mich. 606, 50 N.W.2d 172 (1951).

[81] The court held this was merely *non* reversible error as it appears that even without the test results, the evidence was heavily in favor of defendant. One commentator suggested that if the judge instructs the parties to take a lie detector test, failure to comply is contemptuous, Note, 29 CORNELL L.Q. 535, 543-44 (1944).

[82] 331 Mich. at 610, 50 N.W.2d at 174.

[83] 300 Mich. 562, 2 N.W.2d 503 (1942).

[84] The Michigan courts appear to be hesitant to give recognition to any scientific evidence. For example in People v. Morse, 325 Mich. 270, 38 N.W.2d 322 (1949), the Michigan courts refused to admit the results of the Harger drunkometer test. The Michigan view appears to be a minority one,

case was there any attempt to lay a foundation as to the qualifications of the operator, the technique used, or as to the effectiveness of the machine.[85] While none of the courts have decided the issue, it does not appear that the parties will be allowed to stipulate away the foundation even though the right to object on other grounds may be lost through stipulation.

The *Stone* court did not discuss the effect that the stipulation played in this decision. Indeed it would appear that the court did not give the stipulation any consideration. The court further indicated that for these purposes the standard of admissibility would be the same for civil cases as for criminal cases.[86] The opinion conspicuously lacks any indication of an attempt by the defendant to lay a foundation as to the reliability of the test there used. Absent such a showing, this decision seems justified in light of *People v. Becker*,[87] as in that case the court felt that the lie detector had not passed from the experimental stage.[88] Hence, there was no Michigan decision where the court had recognized the efficacy of the lie detector. Even if there had been a line of decisions admitting lie detector test results, it would still seem only prudent to deal with it in each trial court as though it were a case of first impression. This case should be taken for the proposition that stipulations as to the admission of lie detector test results will be given no effect as to the foundation of the efficacy of the machine or the qualifications of the operator.

In *State v. McNamara*,[89] an Iowa case, a murder conviction was upheld despite the introduction, by the state, of lie detector test results. As in *Houser*,[90] the defendant signed a stipulation that the test results could be admitted by either party.[91] On

People v. Bobczyk, 343 Ill. App. 504, 99 N.E.2d 567 (1951); McKay v. State, 235 S.W.2d 173 (Tex. Crim. App. 1950).

[85] People v. Morse, 325 Mich. 270, 38 N.W.2d 322 (1949); People v. Becker, 300 Mich. 562, 2 N.W.2d 503 (1942); but in People v. Davis, 343 Mich. 348, 72 N.W.2d 269 (1955), the Michigan court rejected lie detector test results where the operator was shown to be qualified because lie detectors had not gained general scientific acceptance.

[86] 331 Mich. at 610, 50 N.W.2d at 174 (1951); *contra*, Wicker, *The Polygraphic Truth Test and the Law of Evidence*, 22 TENN. L. REV. 711, 720 (1953).

[87] 300 Mich. 562, 2 N.W.2d 503 (1942).

[88] *Id.* at 565-66, 2 N.W.2d at 505.

[89] 252 Iowa 19, 104 N.W.2d 568 (1960); Note, 6 S.D.L. REV. 136 (1961).

[90] See text at note 74 *supra*.

[91] January 30, 1959 I, Darlene McNamara, do hereby voluntarily, without duress, coercion, promise of reward or immunity, submit to examination by the polygraph (lie detector) detection of deception technique. The examiner may give his professional opinion as to the results of said examination, to law enforcement and judicial officers and other appropriate officials, and that said examiner may testify in a Court of Law as to his opinion as to the results of said examination. Francis J. Pruss, Phil Hoover, witnesses; s/ Darlene McNamara.
252 Iowa at 27, 104 N.W.2d at 573.

appeal, the defendant urged the exclusionary rule despite the stipulation. The court, however, followed *Houser* and held that the defendant was bound by her stipulation.[92]

Unlike the defendant in *Houser*, the defendant in *McNamara* "strenuously objected" to any evidence regarding the tests on the ground that they were "unreliable and prejudicial".[93] This then firmly established the fact that stipulated lie detector test results would stand up on appeal even where the defendant validly urged the question in the trial court.

In *State v. Freeland*,[94] the Iowa Supreme Court, just four years after *McNamara*, refused to extend the rule of that case to unstipulated results. Indeed, the court held that the agreement of both parties was necessary.[95] The supreme court also held that the trial judge could not compel the state to furnish the test.[96] Thus it appears that even those jurisdictions which now allow stipulated lie detector test results to be admitted still follow the general rule of exclusion where no stipulation is found to exist. This is a trap that unwary counsel may easily fall into after a few cases have allowed admission upon stipulation. If he fails to execute a stipulation or executes a faulty one[97] he will find that the results are inadmissible.

In *Freeland* the state resisted the motion to compel the administration of the test as not being presented in a timely manner. From this it seems likely that the state will agree to a stipulation only if the offer is made within a short time after arrest. The court cannot and should not compel the parties to take a lie detector test, nor can the court require a party to stipulate to the admission of evidence of this nature.[98] As a practical matter, it would appear that if timely notice is given the state may be willing to administer the test and to stipulate as to the result.

The New Mexico case of *State v. Trimble*[99] is the only recent case which invokes the exclusionary doctrine where the parties executed a signed stipulation. The results were excluded despite the presence of the stipulation and what would appear

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[92] *Id.* at 29, 104 N.W.2d at 574.
[93] *Id.* at 28, 104 N.W.2d at 573.
[94] 255 Iowa 1334, 125 N.W.2d 825 (1964).
[95] *Id.* at 1339, 125 N.W.2d at 828.
[96] Note there is little trouble getting approval of the defendant because if he wants the test administered there is no problem and if he does not want it administered it is impossible to do it without his cooperation. *Contra*, one commentator suggests that the trial judge should be able to compel the parties to take a lie detector test [in the absence of a contrary statute] and that failure to comply should result in contempt sanctions, Note 29 CORNELL L.Q. 535, 544 (1944).
[97] See text at note 120 *infra*.
[98] For the Illinois view, see note 3 *supra*.
[99] 68 N.M. 406, 362 P.2d 788 (1961).

to be a properly laid foundation.[100] The case is apparently distinguishable, however, because, while basing its reasoning on *LeFevre v. State*,[101] the court shows a conspicuous lack of recognition of either *Houser* or *McNamara*.[102] Hence, the court may have thought that *LeFevre* was the only case to have dealt with the subject. *LeFevre* did not give the stipulation any effect nor did *Trimble*. *Trimble* would appear to be doubtful authority for the proposition that lie detectors are properly excluded even where there exists a valid stipulation.

The most enlightening decision involving the admissibility of stipulated lie detector test results is the Arizona decision of *State v. Valdez*.[103] The defendant, his counsel and the county attorney entered into a written stipulation that the test results would be admissible at the request of any party. At the trial, the defendant objected to the admission of the results. Because of the importance of the subject, the state trial court certified the question to the supreme court.[104]

The court, after a review of cases both with and without stipulations, held that it would not admit lie detector test results absent a stipulation.[105] The court indicated that it would admit stipulated lie detector test results subject to the following limitations:

(1) That the county attorney, defendant and his counsel all sign a written stipulation providing for defendant's submission to the test and for the subsequent admission at trial of the graphs and the examiner's opinion thereon on behalf of either defendant or the state.

(2) That notwithstanding the stipulation the admissibility of the test results is subject to the discretion of the trial judge, i.e. if the trial judge is not convinced that the examiner is qualified or that the test was conducted under proper conditions he may refuse to accept such evidence.

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[100] Preliminarily, Hathaway testified that he had conducted approximately 3,000 polygraph tests and, of those found necessary to verify for accuracy, approximately 100, none were found to be wrong. From there the witness proceeded to fully explain to the jury the working of the machine and how it was attached to the person of the defendant. The witness further related to the jury a list of questions propounded by him to the defendant concerning the alleged offense and his answers thereto while undergoing the test. The witness then testified that the reaction of the machine indicated that the defendant had given false answers concerning his guilt, from which the witness concluded that the defendant was guilty of the crime charged.
Id. at 406-07, 362 P.2d at 788.

[101] See note 58 *supra*.

[102] *Cf.* State v. Valdez, 91 Ariz. 274, 371 P.2d 894 (1962). This perhaps emphasizes the importance of distinguishing for the trial court the stipulation cases from those without a stipulation. It seems quite probable that if the court is not made aware of this distinction it will not admit the lie detector test under the authority of the *Frye* line of cases.

[103] 91 Ariz. 274, 371 P.2d 894 (1962); 5 ARIZ. L. REV. 76 (1963); 20 WASH. & LEE L. REV. 173 (1963).

[104] *Id.* at 276, 371 P.2d at 895.

[105] *Id.* at 283, 371 P.2d at 900.

(3) That if the graphs and examiner's opinion are offered in evidence the opposing party shall have the right to cross-examine the examiner respecting:
   a. the examiner's qualifications and training;
   b. The conditions under which the test was administered;
   c. the limitations of and possibilities for error in the technique of polygraphic interrogation; and
   d. at the discretion of the trial judge, any other matter deemed pertinent to the inquiry.

(4) That if such evidence is admitted the trial judge should instruct the jury that the examiner's testimony does not tend to prove or disprove any element of the crime with which a defendant is charged but at most tends only to indicate that at the time of the examination defendant was not telling the truth. Further, the jury members should be instructed that is for them what corroborative weight and effect such testimony should be given.[106]

The importance of these qualifications is that they are the only definitive court-made limitations on how and under what conditions stipulated lie detector results should be admitted. It is most significant that even if these qualifications are met, the trial judge still retains discretion as to whether the test results should be admitted or excluded.[107]

Herman v. Eagle Star Insurance Company[108] involved a fact situation where the plaintiff was suing the defendant insurance company for the value of some expensive jewelry insured by the defendant. The plaintiff agreed to take a lie detector test and it was stipulated[109] by the parties that the test results would be admissible into evidence.

The federal district court, applying California law and the rationale of *Houser*,[110] admitted the lie detector test results. This case, a civil action, completed the spectrum of possible cases where lie detector results were stipulated to, and admitted. In a civil case the burden of proof is by a preponderance of the evidence, however slight.[111] The burden of proof in a criminal

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[106] *Id.* at 283-84, 371 P.2d at 900-01.

[107] It is generally accepted that the trial judge should exclude circumstantial evidence even though logically relevant, if its probative value is 'out weighed' by the risk that the admission will . . . tend to excite the emotions of the jury to the undue prejudice of the opponent. . . . "; H. Trautman, *Logical or Legal Relevancy — A Conflict in Theory*, 5 VAND. L. REV. 385, 392 (1952).

[108] 283 F. Supp. 33 (C.D. Cal. 1966).

[109] This case presented a fact question whether there was a validly executed stipulation as the plaintiffs claimed incorrectness of the date of the signature. The question certain to be argued often in the future can be avoided by careful draftsmanship and the use of witnesses.

[110] See text at note 74 *supra*.

[111] Abhau v. Grassie, 262 Ill. 636, 104 N.E. 1020 (1914); Vischer v. Northwestern Elevated R.R., 256 Ill. 572, 100 N.E. 270 (1912); *cf.* C. MCCORMICK, LAW OF EVIDENCE §319 (1954) suggests that it might be more acceptable to speak in terms of preponderance of *probability* as to the existence of a contested act.

case is "beyond a reasonable doubt."[112] From this has been suggested, somewhat questionably, that lie detector tests should have an easier burden in civil than in criminal cases[113] in view of the "general acceptance argument" as espoused in *Frye*.[114] Perhaps, however, this view confuses the ultimate weighing test[115] with the test of admissibility. However, this has not appeared to be the case where no stipulation exists and no such argument is needed when a stipulation exists.

The future of lie detectors does, however, appear to be brighter in civil cases[116] because there is less chance of constitutional or procedural problems. Possibility of admission is particularly bright where both parties agree to take the test and stipulate that the results may be admitted. In such a case the argument that lie detector results should be inadmissible seems less viable because the possibility of error would seem to be diminished.[117] This reduction of possible error, coupled with the parties' stipulation, would seem to emasculate the application of *Frye* to those cases, and in such a case the admission or exclusion of the lie detector should be a matter of trial court discretion, not law.

Two of the principal cases dealing with the validity of stipulations to admissibility of lie detector test results have arisen in Illinois. Neither court was forced to decide the question of admissibility of lie detectors, as the stipulations were both disqualified.

The first of the cases, *People v. Zazzetta*,[118] is cited for the proposition that lie detector results are not admissible in Illinois.[119] However, this is incorrect, as the case stands for a

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[112] 9 J. WIGMORE, EVIDENCE §2497 (3d ed. 1940).

[113] Wicker, *The Polygraphic Truth Test and the Law of Evidence*, 22 TENN. L. REV. 711, 720 (1953).

[114] See text at note 6 *supra*.

[115] It would be clearly erroneous to assume that because the burden of proof were different that the rules of evidence would be different in civil and criminal cases. Indeed, no opinions can be found which even suggest such a rule.

[116] *Contra*, other civil cases where lie detector results have been excluded include: California Ins. Co. v. Allen, 235 F.2d 178 (5th Cir. 1956); Gideon v. Gideon, 150 Cal. App. 2d 541, 314 P.2d 1011 (1957); Commonwealth *ex rel.* Hunter v. Banmiller, 194 Pa. Super. 448, 169 A.2d 347 (1961); Fernandez v. Security-First Nat'l Bank, 206 Cal. App. 2d 676, 24 Cal. Rptr. 25 (1962).

[117] If, for instance, it be conceded that lie detectors would be accurate on 9 out of 10 subjects, (a figure which would probably be grudgingly granted by advocates and those opposed) and each party took the test, the odds are that out of 81 tests there would be 1 incorrect result, 18 inconclusive results and 72 correct results, *i.e.*, the percentage of error would then drop to 1.24%.

[118] 27 Ill. 2d 302, 189 N.E.2d 260 (1963).

[119] People v. Nicholls, 42 Ill. 2d 91, 97, 245 N.E.2d 771, 775-76 (1969); People v. Boney, 28 Ill. 2d 505, 192 N.E.2d 920 (1963). *Contra*, People *ex rel.* Blackmon v. Brent, 97 Ill. App. 2d 438, 240 N.E.2d 255 (1968), where lie detector test results were admitted pursuant to a written stipulation.

much narrower proposition and should be confined to its facts.[120] While there existed in *Zazzetta* a stipulation, it proved to be ineffective. Only because the stipulation was disqualified were the test results held to be inadmissible. An invalid stipulation should, of course, be treated as though there was no stipulation at all. All this case indicates is that absent a stipulation, the Illinois courts will not allow lie detector test results to be admitted.

The *Zazzetta* court gave four reasons for the disqualification of the stipulation without saying which, if any, of the four was most compelling.

The first reason given was that there was no foundation laid as to the qualifications of the operator. Hence, it appears that although Illinois has a statute setting forth the minimum requirements for licensed polygraph operators,[121] the fact that the act is regarded as a model act does not make it immune to criticism.[122] Meeting the requirements of the act is not sufficient to qualify an operator to testify, and the proper foundation must be laid.[123] In any case, even where the stipulation is valid, the court will require that a foundation be laid as to the qualification of the operator.

The second point disqualifying the stipulation was that it was stipulated that the operator need not be available for cross-examination. This problem first arose in *State v. Bohner*.[124] Commentators have long maintained that to admit the report

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But the appellant did not object to the admission of the lie detector test until the case was taken up on appeal. For a further discussion see text at note 79 *supra*.

[120] "Reversal was granted on these narrow grounds and apparently limited to these specific facts"; People v. Hill, 64 Ill. App. 2d 185, 192, 212 N.E.2d 259, 262 (1965).

[121] ILL. REV. STAT. ch. 38, §202-11 (1967). The court did not even mention the existence of the statute. The statute requires that a qualified practitioner be: (1) 21 years of age; (2) a citizen of the U.S.; (3) possess the requisite moral character; (4) never have been convicted of a crime involving moral turpitude; (5) pass an examination; (6) have received a college degree; (7) have completed a six month internship. One commentator has suggested that to insure continuity of results the state require one standard machine, standard methods of testing and a standard method of interpretation, Note, 29 CORNELL L.Q. 535, 543-44 (1944).

[122] (1) The act allows those who were already practitioners to continue regardless of their qualifications. (2) The requirement of a college degree is meaningless unless the degree is in physiological or psychological fields; Burkey, *The Case Against the Polygraph*, 51 A.B.A.J. 855-56 (1965). The American Polygraphic Association requires (1) a college degree, (2) training in an approved school, (3) 200 examinations; AMERICAN POLYGRAPHIC ASSOCIATION CONSTITUTION, ART. III, §1; Prof. F. Inbau of Northwestern University in 1964 estimated 80% of operators are not qualified to interpret results; *Hearings Before the Subcommittee of the House Committee on Government Operations* ("use of Polygraphs as 'Lie Detectors" by the Federal Government") 88 M. Cong., 1st Sess. Pt. 1 at 8 (1964).

[123] See for example the sample foundation laid for medical experts by 2 GOLDSTEIN, TRIAL TECHNIQUE §15.21 (2d. ed. 1969). Adaptation of these questions would appear to be simple and quite satisfactory.

[124] See text at note 19 *supra*.

in that case would have been a violation of the hearsay rule.[125]

But because a party can stipulate as to the non-enforcement of a rule of evidence,[126] it would seem that this objection could have been avoided had the stipulation been explicit enough. The argument is further weakened because parties may stipulate as to what a person, if present, would say.[127]

Despite the correctness of these arguments on pure legal theory, it seems unlikely, as a practical matter, that any court of review will allow the admission of lie detector test results where the operator is not available to be cross-examined.[128]

The *Zazzetta* court's third objection to the stipulation was that the stipulation was oral and not written. No compelling reason can be found for this rule, especially if the stipulation is made in open court. However, this requirement seems to be supported by case law[129] and by Dean Wigmore [130] and will probably be followed.

The court then noted that the defendant appeared without counsel prior to trial. In light of recent Supreme Court[131] cases making it mandatory that the defendant in a criminal case be afforded the privilege of an attorney, this problem is not likely to reappear. Several of the cases which have admitted lie detector test results have taken particular notice of the fact that the stipulation was signed not only by the defendant but also by his attorney.[132] From this it would appear that the defendant's attorney should take part in any stipulations effected.

The last and least curable problem with which the *Zazzetta* court dealt was the fact that the defendant had but an eighth grade education and that the situation was perhaps beyond his comprehension.[133] Perhaps this could have been cured by fully

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[125] See text at note 25 *supra.*

[126] Note 64 *supra.*

[127] 9 J. WIGMORE, EVIDENCE §2595 (3d. ed. 1940).

[128] Making the operator available for cross-examination would seem to silence those who argue a lie detector cannot be cross-examined (note 4 *supra*) especially when it is remembered that other scientific data is admitted, the only requirement being that the operator be available for cross-examination.

[129] Farmers State Sav. Bank v. Miles, 206 Ia. 766, 221 N.W. 449 (1928); Prudential Ins. Co. v. Kantrowitz, 120 N.J. Eq. 549, 188 A. 73 (1936); *contra,* St. Louis , I.M. & S.Ry. v. Webster, 99 Ark. 265, 137 S.W. 1103, 1199 (1911); *see* Colbert v. Commonwealth, 306 S.W.2d 825 (Ky. Ct. App. 1957) where the court said the stipulation must be written *and* entered in the record, when made.

[130] 9 J. WIGMORE, EVIDENCE §2594 (3d. ed. 1940).

[131] Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963).

[132] People v. Houser, 85 Cal. App. 2d 686, 193 P.2d 937 (1948); State v. McNamara, 252 Ia. 19, 104 N.W.2d 568 (1960).

[133] 27 Ill. 2d 302, 309, 189 N.E.2d 260, 264 (1963).

explaining to him, in layman's terms, all of the implications and only then having him and his attorney sign. In such a case the stipulation should properly describe whether the defendant has been informed as to the workings of the lie detector, the type of questions which will be asked, the manner in which deception is detected, the fact that error exists and the possible percentage of error.

Hence, while *Zazzetta* would, at first blush, appear to be a formidable obstacle to overcome in the admission of the lie detector, it would seem that all but the possible ineptitude of the defendant can be avoided by careful planning by counsel.

The only other Illinois case to involve the validity of a stipulation was *People v. Potts*.[134] The defendant, his attorney and the State in open court agreed to have a lie detector test given with the operator's written report being admissible.

The court struck the evidence because there was no foundation laid as to the method of testing, no foundation as to the qualifications of the operator, and the operator was not available for cross-examination. Hence, the evidence was excluded under two of the most easily cured objections in *Zazzetta*.

Without evincing any approval or disapproval, the *Potts* court quoted in toto the *Valdez*[135] qualifications. From this recognition, it appears that the Illinois courts will be amenable to stipulated lie detector test results, but only if the *Valdez* qualifications are met.[136]

SUMMARY

In cases where no stipulation has been effected, it seems that the rule of *Frye* is still controlling. Hence, the only way in which lie detector tests can presumably be admitted in the near future is where there exists a properly executed stipulation.

The stipulated lie detector test results will be admissable only after the proper foundation has been laid as to the qualifications of the operator. Unlike other areas of scientific evidence, the stipulation goes only to admissability and has no effect on the need to lay a proper foundation.

The operator must then be called to testify with opposing counsel being given an opportunity for cross-examination. Ordinarily, of course, a party can stipulate as to what a witness would say, if present. But because of judicial suspicion of the lie detector tests, the right to confront the operator at trial will be required.

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[134] 74 Ill. App. 2d 301, 220 N.E. 251 (1966).
[135] See text at note 103 *supra*.
[136] See text at note 106 *supra*.

Case law does not indicate that any special foundation is necessary when qualifying a lie detector operator, but this could be a source of trouble for the unprepared attorney.

Any stipulation must be in writing. Perhaps the stipulation should be effected in open court. At any rate, the stipulation must be properly signed, dated and witnessed to avoid judicial repudiation.

In criminal proceedings, the stipulation must be signed by the prosecuting attorney, the defense attorney and by the defendant. Logically then, in civil cases the stipulation should be signed by the attorneys for the parties and the parties themselves.

No one format for the stipulation would appear to fit every factual situation. However, the stipulation should indicate whether and to what degree the workings, accuracy and probable jury impact of the lie detector have been described to the stipulating party. The particulars of these explanations should perhaps be explained definitively to avoid future problems, especially where there could be some doubt as to the parties' mental capacities.

The trial court cannot compel unwilling parties to agree to a stipulation. But, it is quite likely that in criminal cases, at least, the state will agree to a stipulation if the offer is made in a timely manner.

Naturally, just because one or two courts in a jurisdiction have admitted stipulated lie detector tests, this does not mean that either the stipulation, foundation or cross-examination requirements will be dispensed with. Hence, in each case a properly executed stipulation and a proper foundation must precede each admission, notwithstanding prior continuous admission.

The attorney seeking to have the test results admitted must, of course, bring to the court's attention, citations of cases in which stipulated lie detector test results have been admitted. The attorney seeking admission must also be prepared to show that there are two distinct lines of cases. The first not involving stipulations; the latter involving stipulations. Counsel should be prepared to instruct the court as to recent admissibility in the latter group of cases.

The jury should be instructed as to the weight and effect they may give to the lie detector. Here is the area in which many future reversals will be grounded. Two reasons appear: (1) there have been no cases dealing with the subject, hence no judi-

cial guidelines; (2) only properly given instructions can limit the inherently prejudicial potential of lie detectors. The jury should be instructed to consider the lie detector test result only in determining whether the subject was telling the truth when asked certain questions.

Within this framework, lie detectors may soon find widespread judicial recognition.

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