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EVIDENCE — ADMISSIBILITY OF LIE DETECTOR TESTS

In the recent Nebraska decision of *Boeche v. State*¹ the defendant was tried and convicted of the crime of uttering and publishing two forged bank checks. A defense witness, a criminal investigator for the Nebraska Safety Patrol working in the capacity of polygraph (lie-detector) operator, testified that the defendant had voluntarily submitted to certain lie-detector tests. The defendant then offered the witness to testify to and prove the results of the tests. The trial court sustained an objection to the competency of such evidence, and the defendant appealed *inter alia* on the ground of the exclusion of this evidence. The Supreme Court of Nebraska upheld the trial court's ruling, relying on an unbroken line of decisions holding that "as a matter of law" the results and interpretations of lie-detector tests are inadmissible as evidence. The concurring opinion by Justice Chappell, though agreeing with the majority of the court as to the correctness of the conclusion reached on the facts in this case, disagreed with that part of the opinion holding that "as a matter of law" the lie-detector "used for determining the truthfulness of testimony has not yet gained such standing and scientific recognition as to justify the admission of expert testimony deduced from tests made under such theory."² This opinion admitted that, on the facts of this case a sufficient foundation had not been laid to qualify the operator of the machine as an expert nor to submit the results of the tests as showing that the defendant was telling the truth when denying her guilt. But, the concurring opinion concludes, the results of the lie-detector test upon the defendant should not be excluded "if a proper foundation is laid whereby it would be established that the operator was an expert in that field, and that the apparatus used and the tests made thereunder have been given general scientific recognition as having efficacy."³

This is the first opinion on an appellate level in which a justice has expressly favored the admissibility of lie-detector evidence. It turns the key to the door which, if opened, will admit a long proposed, but consistently rejected, innovation

1. 37 N.W.2d 593 (Neb. 1949).

2. *Id.* at 597.

3. *Id.* at 598.

into the field of evidence. But the question of the admissibility of evidence "derived from" lie-detector tests is by no means a novel one. Text writers have pointed out that such evidence has been admitted in a number of unreported trial court cases where a proper foundation had been laid.⁴ An instance has been reported in which the results of a lie-detector test were admitted without objection on the part of the party adversely affected thereby where, prior to the tests, counsel for both litigants agreed and stipulated that the results and the testimony of the examiner as to their interpretations could be used in evidence.⁵ In an early Wisconsin case such an agreement was the basis for the admission of test results into evidence. The tests were given and expert testimony concerning the interpretation of the results was presented by Mr. Leonarde Keeler, one of the inventors of the instrument. The pertinent sections of the stipulation took the following form:

2. That the State of Wisconsin and each of the defendants hereby waive any objection which they might have to the admissibility in evidence of the results of such tests and the methods used in the administering of such tests and the experience with respect thereto.

3. That evidence so taken may be used by either party to be considered by the jury, together with all evidence in the case against each of such defendants upon trial of the charges against each of them.

5. That in addition to the graphs showing the results of such tests, it is expressly agreed that said Leonarde Keeler may testify as an expert as to the conclusions reached by him in the interpretations of such graphs.⁶

Where admissions and confessions were obtained in consequence of the use of lie-detectors, the courts have rejected any objection to the use of the instrument as a means of inducing such admissions and confessions.⁷

The opinion of Mr. Justice Chappell in the principal case relies heavily on the only other reported case favoring the admissibility of lie-detector evidence, *People v. Kenny*.⁸ Though

4. See Note, [1943] WIS. L. REV. 430.

5. 26 J. CRIM. L. & CRIMINOLOGY 262-270 (1935).

6. *State v. Loniello and Grignano*, an unreported trial court case discussed in 26 J. CRIM. L. & CRIMINOLOGY 262 (1935).

7. *Commonwealth v. Hipple*, 3 A.2d 353 (Pa. 1939); *Commonwealth v. Jones*, 19 A.2d 389 (Pa. 1941); *De Hart v. State*, 8 N.W.2d 360 (Wis. 1943).

8. 167 Misc. 51, 3 N.Y.S.2d 348 (County Court 1938). It should be noted that this was a trial court decision which never reached an appellate juris-

other cases have intimated that such evidence might have been admitted had a "proper foundation" been established these scattered decisions could hardly be regarded as a precedent or stepping stone toward the result which this opinion advocates.⁹ The *Kenny* case is an unusual one, not only in that it is the only reported case in which polygraph evidence was actually admitted, and further, was a substantial factor in securing the conviction of the defendant, but also in that the controversial "proper foundation" which was laid in the case was of such nature that, if used as a norm, it would defeat the practicality of the use of lie-detectors in obtaining evidence which could be admitted at the trial stage. The court in that case overruled the defendant's objection to the admission of the evidence after the State had established the following: (1) that the witness-examiner was head of the Department of Psychology of the Graduate School of Fordham University and that his education included a doctorate in both physics and philosophy; (2) that the witness had been a professor of Psychology at a medical school for several years, and that he had undertaken extensive research and private study in Europe; (3) that, basing his opinion on his vast experience, the witness claimed scientific accuracy and reliability for the testing apparatus and tests resulting therefrom, and that this conclusion was further based on a study which covered more than 6,000 tests; (4) that the witness expressed a firm conviction, based upon evidence and investigations, that the tests, when properly employed upon those actually charged with crime, would prove 100 per cent efficient and accurate in the detection of deception.¹⁰ If, in any given jurisdiction, polygraph evidence were not excluded as a matter of law, but the courts were willing to admit such evidence if a "proper foundation" had been laid, then surely the facts established in the *Kenny* case would adequately meet the requirements of a proper foundation. A better qualified expert could not have been found. On the other hand, if that same jurisdiction were to hold that the *Kenny* case had set a standard, a minimum requirement, for the admission of such

diction. See 16 N. Y. U. L. Q. REV. 202 (1938) for criticism of *People v. Kenny*.

9. See *People v. Forte*, 279 N.Y. 204, 18 N.E.2d 31 (1938); *People v. Becker*, 300 Mich. 562, 2 N.W.2d 503 (1942).

10. *People v. Kenny*, 167 Misc. 51, 3 N.Y.S.2d 348 (County Court 1938).

evidence, then the use of polygraph tests for evidentiary purposes would become almost prohibitory. The number of polygraph operators who would be able to qualify as experts is too small and the cost of obtaining such experts for the purpose of supervising the examinations and testifying to the results would be too high to make the use of the polygraph practical. Nearly all of the polygraph operators are merely trained technicians who are familiar with the functions of the instrument and are able to apply their knowledge and skill to obtain the maximum efficiency. The operator for the Nebraska Safety Patrol whose testimony was offered in the *Boeche* case is the type of witness which, if regarded as a qualified expert in that field, would solve the problem that Justice Chappell's opinion has left unanswered.

An examination of the other reported cases indicates an almost dogmatic objection to the use of lie-detector evidence. Why have the courts consistently rejected this type of scientific evidence when they have been willing to accept the testimony of experts in the fields of psychiatry, ballistics, handwriting analysis, x-rays, and others too numerous to mention? An unequivocal answer to this question might enable the legal profession to find a solution to the problem of laying a "proper foundation" for the admission of such evidence. But the answers which some of the courts have given have merely been a form of "begging the question." Shortly after the *Kenny* case the New York Court of Appeals handed down a decision refusing the admission in evidence of the results of polygraph tests.¹¹ The decision does not reveal an intention by the court to overrule the result of the *Kenny* case.¹² But, the court states, it could not, in the absence of a competent foundation, take judicial notice that the lie-detector did or did not possess such general scientific recognition as to justify the admission of testimony deduced from tests made. Four years later the Supreme Court of Michigan in an opinion upholding the exclusion of lie-detector evidence, stated that, had a "proper foundation" been laid, the problem would have received greater consideration from them and possible recognition of such evidence.¹³

11. *People v. Forte*, 279 N.Y. 204, 18 N.E.2d 31 (1938).

12. See Note, 139 A.L.R. 1174 (1942).

13. *People v. Becker*, 300 Mich. 562, 2 N.W.2d 503 (1942).

A thorough review of all cases since the earliest decision in *Frye v. United States*¹⁴ reveals that none but the already cited decisions have as much as permitted any variations from the established doctrine of the inadmissibility of lie-detector evidence. In *Frye v. United States*, decided in the District of Columbia more than a quarter of a century ago, expert testimony explaining systolic blood pressure deception tests was excluded on the ground that this type of scientific evidence had not yet been sufficiently established to gain general acceptance in the field in which it belongs. In *State v. Bohner*,¹⁵ ten years later, the offer of lie-detector evidence was again refused, the Supreme Court of Wisconsin relying almost exclusively on the decision in the *Frye* case. This result was obtained in spite of the fact that the expert witness was Prof. Leonarde Keeler, the leading authority in the field of lie-detection, who was ready to offer testimony as to the substantial accuracy of the apparatus. The court felt that the instrument had not yet progressed from the experimental to the demonstrable stage. The same result was reached by the same court in 1943, stating no further grounds than the authority of its previous decision.¹⁶ The Supreme Court of Missouri in 1945 joined the ranks of opponents to the use of lie-detectors for the purpose of producing evidence, basing its decision primarily on precedent and further stating that although the lie-detector may be useful in the investigation of crime, and may point to evidence which is competent, "it has no place in the court room."¹⁷ By 1947 scientific advancements and improvements had apparently not yet overcome the effect of the shadow which the 1923 decision had cast upon this type of scientific evidence. In *State v. Lowry*¹⁸ a trial court verdict was reversed on the ground that it was prejudicial to permit lie-detector evidence to be weighed by the jury in determining the guilt or innocence of the defendant. The court based its objection on the fact that the "practical effect of the admission of this testimony was to constitute a mechanical device * * * a sort of witness *in absentia* on the question of the defendant's guilt or innocence."¹⁹

14. 54 App. D.C. 46, 293 Fed. 1013 (1923).

15. 210 Wis. 651, 246 N.W. 314 (1933).

16. *La Fevre v. State*, 242 Wis. 416, 8 N.W.2d 288 (1943).

17. *State v. Cole*, 354 Mo. 181, 188 S.W.2d 43 (1945).

18. *State v. Lowry*, 163 Kan. 622, 185 P.2d 147 (1947).

19. *Id.* at 627, 185 P.2d at 150.

The court felt that such testimony, if permitted, would impair the vital function of cross examination. But it is apparent that the court found a welcome crutch in the long line of decisions cited above, from which it did not seem willing to depart. "We are not ready to say that the lie-detector has attained such scientific and psychological accuracy . . ." or words to that effect have become almost standardized dicta in the decisions of the past twenty-seven years. The overwhelming majority of courts have closed their eyes and ears to the admissibility of lie-detector evidence.

In the light of these decisions, what solution may be suggested to the problem of laying a foundation for the admission of lie-detector evidence? The *Kenny* case offers one possible answer. But, as has been pointed out, the application of the standards set in that case would make the use of the lie-detector impractical in the field of evidence. On the other hand, courts will not permit this type of evidence unless it can be clearly proved to them that the test results are accurate and that its operator has the scientific background and the technological ability accurately to interpret the instrument. The *Boeche* case is significant in that the concurring judge advocates the admission of lie-detector evidence if the witness through whom the testimony is offered is properly qualified as a polygraph operator. This is an implied indication that he had enough confidence in the instrument itself to have accepted its results if the other requirements had been met. There is no doubt that the stringency of the requirements for a "proper foundation" will vary inversely with the degree of acceptance the instrument itself has gained as one of scientific and psychological accuracy.

No doubt, the day has not yet arrived on which the polygraph is to take its place among the many other scientific devices which are playing so important a role in the proper administration of justice. But there are steps which may be taken to hasten that day, to strengthen the small foothold which such decisions as the *Kenny* case and the *Boeche* case have given the polygraph in the field of evidence. While the scientists and technical experts are developing new improvements and increasing the efficiency of the instrument, its legal advocates can devise new methods and techniques of impressing

upon the courts not only the tremendous advances which have been made in the science of lie-detection but also the great social and practical value which may be derived from its application for the purpose of obtaining evidence admissible at the trial stage. In criminal cases both the prosecution and the defense have sought to apply lie-detector evidence. In *State v. Loniello and Grignano*²⁰ the parties were successful in their attempt to do so by a stipulation for admission of the evidence prior to the taking of the tests.²¹ This is an ample indication that the parties to an action have recognized the value as evidence of the results of lie-detector tests. One of the major barriers to the admission of such evidence has been the lack of availability of experts whom the courts will recognize as qualified to give the tests and testify to the results. This barrier could probably be overcome if the appropriate departments of the states would undertake to give special training to qualified persons and license them as operators. Surely the courts would not then require the witness to be a leading authority in the fields of psychiatry and physiology in addition to being an expert in the operation of lie-detectors. Compilations of data showing the high percentage of accuracy of these tests should be available and discretion should be used in applying the tests only to those subjects where accurate results can be obtained. Once the basic objections to the use of lie-detector evidence, as brought out by the decisions cited in this note, have been overcome and such evidence is admitted by the courts for some purposes, then the "foothold" will have become sufficiently secure to establish the polygraph as one of the scientific devices in the field of evidence whose universal application will be justified. Mr. Inbau, a noted authority on scientific lie-detection, clearly summarized this conclusion by stating that "in due course of time, . . . the judiciary will absorb it [lie-detector evidence] as it has accepted other scientific developments—but not without the same degree of caution."²²

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20. See note 6 *supra*.

21. 26 J. CRIM. L. & CRIMINOLOGY 262-270 (1935).

22. *Ibid.*