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Determining paternity before DNA – the significance of pregnancy duration

MEDICAL HISTORY

PER E. BØRDAHL

Author contribution: concept, design, literature search, drafting/revision of the manuscript and approval of the submitted version
Per E. Børdahl, specialist in obstetrics and gynaecology, retired senior consultant and professor
The author has completed the ICMJE form and declares no conflicts of interest.

ERLEND HEM

erlend.hem@medisin.uio.no
Institute for Studies of the Medical Profession
and
University of Oslo
Author contribution: concept, design, literature search, drafting/revision of the manuscript and approval of the submitted version
Erlend Hem, head of the Institute for Studies of the Medical Profession, professor at the University of Oslo and chairman of the Health History Forum
The author has completed the ICMJE form and declares no conflicts of interest.

Background

Questions concerning paternity have been of major interest over the centuries. Issues such as legitimacy, fidelity, inheritance and child maintenance have been central. Maternity was unequivocal, but paternity could be uncertain. A key issue in paternity cases was whether the mother's account of sexual intercourse was consistent with the timing of the birth. This required an understanding of

the possible duration of pregnancy. We examined how law and forensic medicine assessed the significance of pregnancy duration in establishing paternity throughout the 20th century.

Material and method

The study is based on a review of paternity case judgments by the Norwegian Supreme Court in the 20th century with regard to pregnancy duration in the context of historical obstetric literature.

Results and interpretation

Well into the 20th century, knowledge of pregnancy duration was primarily of interest in forensic medicine. Paternity could be ruled out but not established. In 1914, the Norwegian Forensic Medicine Commission defined pregnancy duration as 240–320 days, and this became the standard in Norwegian law for much of the 20th century. The courts made an overall assessment in which pregnancy duration and the mother's credibility, conduct and sexual morality were taken into account. Around 1990, DNA typing replaced blood group testing and discretionary assessments, and paternity disputes largely disappeared from the courts.

Main findings

In 1914, the Norwegian Forensic Medicine Commission defined pregnancy duration as 240–320 days, which informed legal practice in Norway until the 1970s.

Well into the 20th century, knowledge of pregnancy duration was primarily relevant to forensic medicine and of limited practical importance in obstetrics.

Den førstefødde (not dated), Anne Grimdalen (1899–1961). Photo: Sondre Ellefsen / Vest-Telemark Museum

As late as the 1980s, some maternity wards still hung a board above mothers' beds, with a chart showing the patient's temperature, pulse and the letter V or S. V stood for *vera* (true), indicating that the child was born in wedlock, while S for *spuria* (false) meant that the child had been born out of wedlock (1). Particular attention was drawn to unmarried mothers because they and their children were considered high risk groups for complications (1). This practice illustrates how social and legal perceptions could influence medical care, and how certain observations, such as the mother's marital status, could affect clinical judgment of the pregnancy.

For children born in wedlock, paternity was governed by the *pater est* principle of Roman tradition: *the father is he to whom the marriage points*. Rebuttal of this presumption required a court judgment or credible declaration from the husband, the mother, the child or another party.

Where paternity was uncertain, calculations of when the child was conceived and debates about the limits of pregnancy duration could have legal implications. Did the woman know when conception occurred? Could she recall the date of her last menstrual period? Had she any incentive to provide inaccurate information? To what extent could her account be trusted? Questions about paternity were of considerable social and legal importance, centring on issues of legitimacy, fidelity and infidelity, inheritance and child maintenance.

In 1822, the German obstetrician Carl Gustav Carus (1789–1869) argued that knowledge of pregnancy duration was important both in obstetrics and forensic medicine, a claim that was not entirely accurate (2). For more than a century thereafter, such knowledge was primarily of significance in forensic medicine (3–5). In his textbook on midwifery, Professor Kristian Brandt (1859–1932) therefore distinguished between 'everyday needs' and 'forensic cases' (5).

We examined how law and forensic medicine assessed the significance of pregnancy duration in establishing paternity throughout the 20th century, with a particular focus on the contribution of medical experts.

Material and method

We reviewed the indexes of the Norwegian Bar Association's periodical, *Norsk Retstidende* (Rt.), throughout the 20th century and examined Norwegian Supreme Court judgments classified as paternity cases, with a particular focus on assessments of pregnancy duration. We also searched the National Library of Norway's digital archive, bokhylla.no. We attempted to identify all relevant cases, but cannot be certain that the material is exhaustive. The cases are therefore presented as illustrative examples rather than quantitative analyses. In practice, the study covers the period up to the 1980s, when paternity cases largely disappeared from the Norwegian Supreme Court.

We also drew on literature in the field and historical sources relating to pregnancy and childbirth in order to place the legal material in a medical context.

Determining paternity

Maternal testimony

Questions of legitimacy were a major concern in earlier European political history. Who had royal or noble blood? In such cases, neither paternity exclusion (NN could not be the father) nor paternity establishment (NN must be the father) had to be proved. One of the best-known examples in Norwegian history is Sverre Sigurdsson's (c. 1150–1202) bid for the throne. When Sverre, who had trained for the priesthood, arrived in Norway from the Faroe Islands in 1177, his mother's assertion that his father was Sigurd Munn (1133–55) formed the basis of his claim to royal lineage. There is little to suggest that his mother was correct, and it is unclear whether Sverre himself believed her. What mattered was that others wanted to believe it. The Birkebeiner rebels needed a pretender to the throne, and paternity was key to this. The mother's testimony was therefore accorded decisive weight (6).

Maternal testimony was not always viewed so favourably, however, and the evidential value attached to a mother's claim regarding paternity has varied considerably. In Norway, such testimony carried far greater weight before the 17th century than it did subsequently. Under the French Civil Code of 1804, searching for the father was prohibited (*La recherche de la paternité est interdite*). The responsibility for children born out of wedlock rested entirely with the woman.

Paternity exclusion

Blood group testing was first used as evidence in paternity cases in Germany in 1924 and in Norway from the early 1930s (7). Until the late 1980s, paternity testing only had the capability for paternity exclusion. DNA testing was introduced in Norway in 1989, and serological testing was not fully replaced until 1992 (7).

The capability for paternity exclusion was strengthened following Karl Landsteiner's (1868–1943) discovery of the ABO blood group system in 1901 and his and Alexander Wiener's (1907–76) work on the Rhesus system around 1940. The issue was no longer simply whether intercourse had occurred within a given timeframe. Over time, additional blood group systems were introduced as exclusion markers. In a 1962 paternity case, ABO, MN, Rh, S, Kell, Duffy and Hp typing were used, alongside an assessment of pregnancy duration and an assessment of physical similarities between the alleged father and the child (Rt. 1962, p. 1023). HLA typing was introduced in the 1970s (8).

In the 1950s and 60s, the child's length and weight were considered crucial factors when assessing pregnancy duration, and in the late 1950s, the assessment of physical similarities was introduced, initially described as a 'new

and largely untested method' (Rt., 1959, p. 625). This involved a subjective comparison of external characteristics such as hair and eye colour, nose and ear shape, fingerprints etc., between parent and child, and had relatively limited evidential value.

Law or medicine

The overriding question in paternity cases prior to the introduction of DNA testing was whether the mother's account of possible conception could be reconciled with the timing of the birth. In clinical medicine, pregnancy duration was calculated from the first day of the last menstrual period, whereas in paternity cases the key issue was whether the interval between the alleged conception and the birth fell within a plausible range (9).

Law and child maintenance obligations

Legislation on paternity issues has a long history. Several Old Norse laws included provisions on inheritance and paternity (10). King Valdemar II's Jutland Law of 1241, which was never in force in Norway, included provisions on which child should inherit, and stipulated that a widow who claimed to be pregnant at the time of her husband's death should retain control of the undivided estate for 20 weeks. She was then to be examined to determine whether she was actually pregnant. If she was, she would retain the estate until the child was born. If the timing of the birth meant her husband could not be the father, there would be financial consequences (11).

Until the mid-18th century in Denmark–Norway, unmarried mothers bore sole responsibility for the upkeep of their children, and the children only had inheritance rights through her (12). In 1892, the Act on Maintenance for Children whose Parents are not a Married Couple was introduced. Each parent had a duty to contribute to the child's maintenance according to their financial means. The provision for financial support was dependent on paternity being established. The problem, however, was that it was up to the mother to assert her legal rights (12). The Castberg laws passed in Norway in 1915 established a legal relationship between children born out of wedlock and their father and paternal family, with associated rights to the name and inheritance.

Folklore and legal practice

It was once widely believed that pregnancy could be artificially prolonged, although excessively long pregnancies were dangerous for the mother. In the medieval ballad *Hustru og Mands Moder* (wife and mother-in-law), the mother-in-law cast a spell on her daughter-in-law to prolong her pregnancy beyond its proper term: 'Forty weeks and no longer: if she goes beyond, it will be her death' (13). The common belief was probably that the fetus continued to grow, whereby the fetal head became too big to pass through the birth canal (14). Some cultures believe that a fetus can remain in the womb for a long time

without growing – effectively 'asleep' – sometimes for several months. Thus, pregnancy might be considered to extend beyond nine months. Such accounts are not only found in folklore, but also in scientific literature.

As recently as the 1990s, a court case in Libya was reported in the journal of the British Academy of Forensic Sciences (15). Sexual intercourse between unmarried couples was illegal in Libya, even when consensual. During the trial, the defendant, a divorced woman, argued that her former husband was the father of a child born 29 months after their divorce. She claimed the baby was conceived three months prior to divorce, but that the fetus had stopped growing for a period, a so-called 'sleeping fetus'. The court did not believe her, and she was convicted of unlawful sexual intercourse.

For the purposes of paternity cases, legislators in several European countries attempted to define the possible duration of a pregnancy resulting in a live birth (16). In France (under the Napoleonic Code), it was determined that pregnancy could last up to 300 days after conception, in Prussia 302 days and in Switzerland 308 days (17). England had no fixed limit, preferring instead to assess each case individually. However, this is where some of the more curious rulings originated, including several court cases with distinctly Dickensian overtones. In Gaskell v Gaskell (1921), Judge Birkenhead (1872–1930) accepted a pregnancy duration of 331 days as credible, corresponding to 48 weeks and 5 days from the first day of the last menstrual period. This was 61 days longer than average (18).

Asger Stadfeldt (1830–1896), a professor in Copenhagen, expressed a less pragmatic view of the duration of pregnancy in his 1891 textbook: 'Post-term births, in which delivery is assumed to have occurred 4–6–8 weeks after the normal end of pregnancy, are almost always due to miscalculation or deception' (19). Identifying the correct father could have major consequences (20).

Interest in pregnancy duration and its legal implications increased in the United Kingdom in the years following World War II, partly because the social father may have been absent for a considerable time, and partly due to new knowledge on reproductive medicine. However, it took some time for these research findings to be applied in the courtroom (18). Gestational periods of 346 days (Wood v Wood, 1947) and 349 days (Hadlum v Hadlum, 1948) after conception were accepted. In 1948, The Lancet observed that, while medical science can define the normal duration of pregnancy, it is reluctant to rule out the possibility of abnormal gestational periods (21). But there was a limit. The court did not accept a duration of 360 days (Preston Jones v Preston Jones, 1950) (18).

The Norwegian Forensic Medicine Commission and Norwegian practice

The issue was also of concern to the Norwegian judicial authorities (Table 1) (22–25). Scientific journals frequently cited international studies and debates. There was considerable uncertainty. In 1907, the Norwegian Forensic Medicine

Commission stated that the average duration of pregnancy was 280 days from the first day of the last menstrual period, or 270 days from the date of conception (23).

Table 1

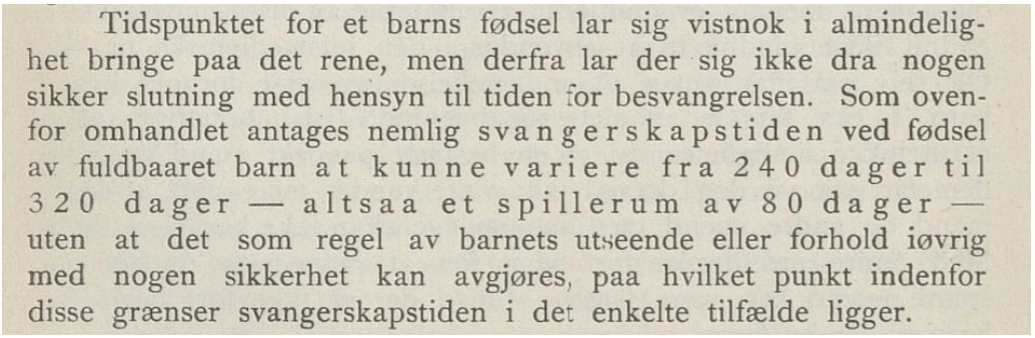
Limits for pregnancies resulting in live birth. Official Norwegian recommendations, 1823–1932.

Date	Lower limit	Upper limit
Circular from the Ministry of Justice and Police, 1823 (17) Based on the Faculty of Medicine's opinion	The fetus is viable ('vitalis') when born after the 31st week	40 weeks after conception [...] certain legal systems, in order to accommodate rare observations, have set the longest possible duration of pregnancy at 43 weeks and 1 day
Circular from the Ministry of Justice and Police, 1850 (17) Based on the Faculty of Medicine's statement	31 weeks (unchanged from 1823)	Four weeks beyond term; [...] where all circumstances point to a post-term birth, the Faculty does not deny that it may occur 4–5 weeks after the normal due date
Circular from the Ministry of Justice and Police, 1851 (17) Based on the Faculty of Medicine's opinion	Lower limit 210 days (30 weeks), on the basis that a fetus under favourable circumstances may be considered capable of [...] independent life [...] experience appears to show that, in some very rare cases, children born a couple of weeks before the 30th week may continue to live independently	Not specified
Circular from the Ministry of Justice, 1894 (22) Based on the Faculty of Medicine's statement	The Faculty [must] emphasise the possibility that a fetus born between the 26th and 30th week, under very favourable conditions, may continue to live	The longest pregnancy duration is considered by the Faculty to be 310 days
The Forensic Medical Commission, 1907 (23)	[...] the birth of a full-term child may occur after a gestational period of as little as 240–245 days following conception.	
The Forensic Medical Commission, 1913 (24)		Pregnancy may last 315 days after conception
The Forensic Medical Commission, 1914 (25)	A fully mature child: 240 days after conception	320 days counted from conception

Date	Lower limit	Upper limit
The Forensic Medical Commission's report, 1932 (Rt. 1932, p. 324)	Pregnancy is calculated from the date of conception. 'The assumed delivery of a full-term child is an average of 270 days (precisely 274 days).' It recommends 240–320 days, as in 1914, 'essentially in agreement with circumstances in other countries'.	

The Commission commented in its 1907 report that determining whether a child was full term involved considerable uncertainty. 'For experts, it is among the more difficult questions to determine with certainty whether a child is full term or not. There are, in fact, no reliable signs by which it can be established whether a child is born one month prematurely or not. Weight and especially fetal length are among the best indicators' (23).

In 1914, the Commission revisited the issue (Figure 1). While maternity could virtually always be established medically, there was no capability to produce corresponding medical proof of paternity, and the legal evidence of paternity exclusion 'rests on a fact of natural science' (25). Given the variability in possible pregnancy duration and the uncertainty of neonatal indicators, the Commission recommended abandoning the need to prove paternity. In order to secure financial support for mother and child, it instead proposed replacing proof of paternity with proof of cohabitation, i.e. evidence of sexual intercourse between the man and woman during the possible period of conception. In some cases, under the 1892 law, several men were required to pay child maintenance as putative fathers of the same child. However, the cohabitation approach became a historical interlude.



Tidspunktet for et barns fødsel lar sig vistnok i almindelighet bringe paa det rene, men derfra lar der sig ikke dra nogen sikker slutning med hensyn til tiden for besvangrelsen. Som ovenfor omhandlet antages nemlig svangerskapstiden ved fødsel av fuldbaaret barn at kunne variere fra 240 dager til 320 dager — altsaa et spillerum av 80 dager — uten at det som regel av barnets utseende eller forhold iøvrig med nogen sikkerhet kan avgjøres, paa hvilket punkt indenfor disse grænser svangerskapstiden i det enkelte tilfælde ligger.

Figure 1 Excerpt from the statement by the Norwegian Forensic Medicine Commission in 1914 (25).

Public interest in the presentation of evidence in paternity cases is reflected in the numerous cases reported in *Norsk Retstidende* throughout the 20th century. Establishing paternity could entail a considerable amount of legal work, and cases involving up to 50 witnesses have been reported (Rt. 1950, p. 537).

The core issue in these cases was whether the mother had had sexual intercourse with the alleged father at a time that could have resulted in the birth of the child. In 1914, the Norwegian Forensic Medical Commission set the lower limit for pregnancy duration in a full-term birth at 240 days after conception. A child could survive after a shorter gestational period but would not present as a full-term infant; however, such signs were difficult to determine. The upper limit was set at 320 days after conception. The lower and

upper limits were thus 35 weeks and 5 days to 47 weeks and 1 day from the first day of the last menstrual period. This statement from 1914 carried considerable weight and was cited in numerous judgments up to the 1970s.

Leading obstetricians were used as expert witnesses in paternity cases throughout much of the 20th century, in the same way that expert witnesses have been used since the early 1980s in cases involving birth injuries. In 1920, Professor Brandt stated in his role as expert witness that 'these outer limits [240–320 days after conception] are so rare that only a handful of cases have been reported in the entire world literature, and I personally have never observed anything similar. Even time spans of 250–310 days are seldom encountered by obstetricians'. In one case, the court rejected the claim that a child had been born after 221–225 days, based on '[...] information concerning the child's stage of development at birth' (Rt. 1922, p. 55).

In his final statement as an expert witness in 1930, Brandt wrote: '[...] as I have repeatedly highlighted in several statements, if an unusually long gestational period is to be assumed, exceptionally strong evidence is required to rule out other opportunities for conception. It is for the court to decide whether such evidence exists [...] The possibility is there; no one denies it, but it is unlikely' (Rt. 1930, p. 809).

Nevertheless, the time frame of 240–320 days remained applicable. A midwifery textbook from 1959 states: 'There is evidence that such short and such long gestational periods [240–320 days from the first day of the last menstrual period] can occur' (26). In contrast, the Norwegian Forensic Medicine Commission stated in 1914 that the relevant interval should be calculated from 'the time of conception'. It maintained this position when it revisited the issue in 1932. The framework was based on a series of assessments spanning nearly a century (Table 1).

In a 1967 judgment by the Norwegian Supreme Court, Professor Ernst Schjøtt-Rivers (1901–82), acting as an expert witness, argued that a child weighing just under 3600 grams, with a gestational age of 253 days from the alleged conception to birth, lay at the boundary between what was probable and what was improbable.

Referring to 'the usual theoretical outer limits of 240 and 320 days', the Supreme Court found (1–4) that the alleged father had 'had intercourse with the mother at a time when she could have conceived' (Rt. 1967, p. 1540). There was often doubt. Many judgments were delivered under dissent, and case reports from the 1960s frequently contained formulations such as 'a distinctly borderline case between the probable and the improbable' (Rt. 1968, p. 231), 'I concur, albeit with reservations' (Rt. 1968, p. 607), etc.

In a 1968 Supreme Court judgment, a man was found by a 3–2 majority to be the father of a full-term child born 306 days after conception (clinically 45 weeks + 1 day) (Rt. 1968, p. 442). Once again, the expert Schjøtt-Rivers considered that a gestational period exceeding 300 days after conception was unlikely. He further noted that the child's size and weight indicated that it had probably been born at term. Once again, the court adhered to 'the outer limits established in this country for pregnancy duration in cases of full-term birth,

namely 240 to 320 days'. It was argued, and taken into account in the ruling, that an individual case could not always be decided 'on the basis of gestational age alone.'

However, the divergence between forensic medicine and clinical practice continued to emerge. In 1968, Schjøtt-Rivers stated 'I have always regarded these 240 days as a purely theoretical possibility, and there are no observed cases that can be accepted. It is assumed that reports of such short gestational periods resulting in full-term births are erroneous observations' (Rt. 1968, p. 231).

The annotated edition of the Norwegian Children Act rather dryly notes 'We are dealing with an extensive body of case law which is far from consistent in all details'. All the judgments illustrate the importance of an overall assessment (27). Before the era of DNA testing, paternity cases often involved considerable uncertainty. In 13 cases between 1950 and 1990, the Norwegian Supreme Court found the defendant to be the father by a 3–2 majority (28).

The end of the story

These outer limits for how long a woman could remain pregnant beyond term seem remarkable nowadays. In a statistical analysis of births from 1967–68, Tor Bjerkedal et al. found that 4.5 % of all pregnancies lasted 43 weeks or more, and 1.8 % lasted 44 weeks or more (29). In 2010, the Medical Birth Registry of Norway reported that 0.1 % of pregnancies lasted 43 weeks or more. The difference between the 1960s and today is primarily due to the use of ultrasound for dating pregnancy, rather than calculating dates based on the first day of the last menstrual period.

The capability for paternity exclusion was strengthened by the increasing use of blood tests and assessments of neonatal maturity. These entailed evaluating length, weight, lanugo hair on the forehead and elsewhere on the body, soft ears lying close to the head, short and soft fingernails, exposed labia, undescended testes, etc. The limitations of such assessments had, however, already been recognised in the early 20th century (Rt. 1927, p. 257). Nevertheless, even in the early 1980s, the senior registrar at the Department of Obstetrics and Gynaecology in Norway's National Hospital (Rikshospitalet) was still required to assess neonatal maturity on the basis of these signs when the mother was unmarried, as the first author also experienced during his time in the role. The form used in such cases had not changed since the 1930s.

The main indexes of *Norsk Retstidende* from the late 20th century show that the number of paternity cases heard by the higher courts dropped considerably and that, from the late 1980s, almost all such cases were limited to applications to reopen proceedings. It was not until the introduction of DNA typing in the early 1990s that paternity could be determined. However, technological advances did not automatically entitle a man previously declared to be the father to have his case reopened (30), although there are examples of judgments being overturned decades later following DNA testing. In one case from 1959, a gestational period of 226–228 days was accepted for paternity (by

a 3–2 majority) in relation to a preterm infant, even though the expert witness, Schjøtt-Rivers, had considered it unlikely. When the case was reopened in 1994 with DNA analysis, the man was acquitted. '[...] The majority in the Supreme Court should have listened to the expert witness in 1959' (27).

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