

TESTING ATTESTING: THE POLYGRAPH, DNA & BLOOD TESTS IN HALACHA

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What Kinds of Tests are Accepted in Bais Din?

Based on an audio presentation given by Rabbi Yaakov Rappaport

There are a variety of methods which can be used to determine if a person is telling the truth. Blood tests, DNA tests and polygraphs can all be used as proof in court cases. There is a question in Halacha, on the kinds of tests which may be used to determine certain kinds of cases.

Are DNA Tests Reliable?

In discussions of *p'seulei eidos*, there is a question if DNA is considered reliable *eidus* in *bais din*. According to most rabbinical courts in *Eretz Yisroel*, blood tests are not accepted as reliable testimony. DNA tests fall into the same category, and in most cases, are not considered proof.

The Gemara in *Sotah*, 27A, says that if there is a question regarding a baby's paternity, we assume that the husband is the father of the baby. This is due to the *chazaka*, "*Rov b'ilos achar habaal*," a wife will have most (if not all) of her relations with her husband.

This same rule is used in the Shulchan Aruch, *Even Ha'ezer*, 4:14, where the *Mechaber paskens* a case regarding paternity. If a husband travels overseas for a year, and in the twelfth month, the wife gives birth, who is the father of the child? Scientifically, it may be impossible to say that the husband had impregnated his wife twelve months earlier. It may be more logical to assume that the wife had an affair, and the baby's father is someone else. However, we still have the *chazaka*, "*Rov b'ilos achar habaal*." Therefore, we assume that the husband is the father of the baby. It may seem illogical, and there is a .1 % chance that this can physically happen, for a woman to give birth twelve months after last seeing her husband, but this *chazaka* is still *machria*.

Establishing Paternity:

Following the same *chazaka* of "*Rov b'ilos achar habaal*," many *poskim* agree that DNA tests and blood tests cannot be relied upon to establish the baby's father.

Another proof is found in the Gemara in *Rosh Hashana*, 21B. It says in *Koheles*, 12 and 14, that *Shlomo Hamelech* wanted to judge all court cases in his heart. He wanted to listen to the testimony and make logical assumptions, without any witnesses. The Gemara says that a heavenly voice came to him and said, "Find righteousness." In order to make a righteous and truthful ruling you need two witnesses.

The Rambam says that the reason we need two witnesses is a *g'zeiras hakosuv*. Therefore, it would seem that anything less than two witnesses is unacceptable in *bais din*.

However, we do have the halachic concept of *anan sahadi*, when something is a given fact, *umdena d'muchak*, as per the Gemara in *Bava Metziah*, Daf

2. One could argue that blood tests and DNA tests have the same rule as *anan sahad*, and we can assume that the results are a known fact. Blood tests and DNA tests are generally used to determine the paternity of a child. The results of these tests may be used to prove that a wife cheated, and the child is a *mamzer*. In general, we don't seek to reveal *mamzerus* and we don't get involved in tests which may prove this.

Does the Polygraph Test Lie?

The Halacha regarding polygraph tests is different, because these tests will not always reveal *mamzerim*. One could argue, that perhaps every *Bais Din* should use a polygraph test to determine who is telling the truth and who is lying.

Harav Shapiro, who sits in the *Bais Din* of the *Rabbanut* in *Yerusahalayim*, brings a strong argument against using polygraph tests.

The Gemara in *Sotah*, 19B, says that one of the reasons why a suspected adulterer, a *sotah*, may refuse to drink the bitter waters is because of trepidation. Rashi explains that she may be scared of drinking the water, and it appears that she thinks the water will harm her. Perhaps she thinks that the test won't work, and the water will harm her even if she is innocent. There is no proof that a woman who does not drink the bitter water is lying. Perhaps she did not sin, and she is only frightened that there will be a mistake and the bitter waters will kill her anyway. Not drinking the water is not proof of guilt, since it may just be proof of fright.

The same reasoning could apply to a polygraph test. A polygraph test shows a person's fear. When a person lies, he becomes fearful and his heart rate changes. According to secular law, if a person is scared and the polygraph shows he is nervous, then he must be lying. But the Gemara says the opposite; people became fearful even when they are telling the truth. They may just be afraid that the test won't work.

Therefore, it would seem that a polygraph test should not be accepted in *Bais Din* as an indicator of guilt or innocence.

According to tests conducted by Oxford University, there is a different statistic for the way a polygraph machine works on fear of lying and fear of the test itself. There are different vibrations for the two types of fear, one for fear of lying and for fear of the test.

This correlates with the Gemara in *Sotah*, where we cannot distinguish if the *sotah* is afraid of lying about her sin, or afraid of the test of bitter waters.

It is worth noting that a polygraph test has an accuracy rate of approximately 90%. Meanwhile, blood tests and DNA tests have a 99% accuracy rate. This leaves room for the argument that if blood tests and DNA tests are a *sofek*, then certainly polygraph tests should not be used.

Most *poskim* conclude that a polygraph test is not acceptable in *Bais Din*. It is also not accepted to threaten the use of a polygraph.

Exceptions for Agunos

When it comes to deciding *agunah* cases, there is a consensus among all of

the poskim that blood tests and DNA tests are acceptable in *Bais Din*. After the World Trade Center collapsed, blood tests were used to *matir* the *agunos*.

The Gemara in *Even Haezer, Hilchos Yibum* says that we can be *matir* a woman based upon the fact that we see the husband's clothing with a dead body. Just as the clothing is considered proof, so is a blood test or DNA test considered proof of the husband's identity.