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Litigation

Fashionable Genetic Explanations in the Courtroom: Litigating Personal Injuries Based on Genetic Risk

Jennifer Wriggins

ABSTRACT

New developments in molecular genetics hold much promise for society. Gene therapy research is underway with the aim of helping to fight, and perhaps even eliminate some diseases. DNA data can be used as evidence to help free innocent people and put guilty ones in jail. Agricultural biotechnology can make crops and pesticides more productive. And cloning may offer exciting potential. There is little doubt that further developments in the areas of genetics and biotechnology will change our lives in unanticipated ways.

Despite the potential benefits to society, there exist valid and serious concerns about the potential for misuse of genetic information. This article addresses new attempts to use genetic information in personal injury litigation and the unique ethical, legal, and social issues raised by the "genetic defense."

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GENETICS—PROMISE AND PROBLEMS

Accusations of insurance discrimination associated with genetic screening, and of privacy infringement

connected with DNA data banks, are on the rise.¹ Objection to the patenting of living organisms is becoming a major policy and trade issue.² Many professionals and consumers are troubled by the idea of cloning,

Genetic explanations for human behavior are becoming increasingly fashionable. Scientific "discoveries" often are hyped by the media. For example, *The New York Times* (NYT)

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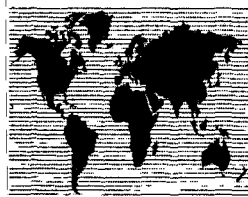
put on page one a story of the discovery of a ‘thrill-seeking gene’³ which was said to be found in people who sought novelty and thrills; when the finding was refuted a few months later, the story was on page 22.⁴ What remains in many people’s minds from media accounts is the idea that people who seek novelty and thrills are genetically “programmed” to so. The NYT has also published a story in which scientists claim that happiness is largely genetically determined, although it is acknowledged that the genes for happiness have not been found.⁵

The idea that human characteristics, specifically behavioral traits, are passed down through the generations has a racist legacy that shadows discussions about genetics.⁶ Hitler took the idea to its extreme. Early IQ researchers in the United States (US) promoted theories and “scientific facts” about race and genetic inheritance that today almost everyone would characterize as prejudiced against nonwhites.

In this delicate nature versus nurture debate, many scientists and social analysts acknowledge that humans can not be explained simply by genes. Rather, a complex relationship, not yet fully understood, between genes and environment, accounts for human characteristics. This complex relationship may never be fully understood. However,

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theories about genetic determinism are on the rise and remain extremely popular.

Some current ideas and manifestations of genetics pose a challenge, if not a threat, to basic notions of privacy, individuality, autonomy and free will. For example, consider the following question: if everything I am and do is caused by my genetic makeup, what individual responsibility do I have for my actions? In the narrower context of the personal injury lawsuit, a defendant might argue that it has no legal responsibility for the dangerous product it sold because the harm to people was caused by people's own genetic makeup, not by the dangerous product.

THE "GENETIC DEFENSE"

In personal injury litigation, people often claim to have suffered injuries which are not always apparent, and do not always have a clear cause. For example, a driver might claim a broken arm from a car accident caused by another driver's negligence. The defense lawyer, representing the allegedly negligent driver, would investigate the nature of the injury, the accuracy of the claim, whether the injury was a result of the accident, and the cause of the accident. The defense lawyer would examine medical records, and would interview the plaintiff under oath. Although medical records are highly confidential, a person bringing a personal injury lawsuit implicitly consents to having such records disclosed. Before the 1930's, in federal court, a personal injury plaintiff would produce all evidence of her injury, and a defendant had no right to have a plaintiff examined by a doctor of her own choosing. In the 1930s, a legal reform was introduced in federal court, which allowed the *defendant* to hire a doctor to examine the injured person.

While controversial at first, this practice is now widely accepted.⁷

Underlying this scheme was the basic idea, central to our culture, that each individual is distinct. Until recently, no one would have thought to examine the medical records of the plaintiff's mother, for example, to see determine whether the plaintiff may have inherited a genetic propensity to bone fracture.

CASE STUDY: DES

Today, car accident cases like the above example still arise, but different types of injury claims are now also brought, spurred on by technological developments and scientific discoveries. The example of DES (diethylstilbestrol) is instructive. DES was a drug prescribed to pregnant women for morning sickness. Children of women who took DES were found to have increased incidence of reproductive problems as adults.⁸ A class of female children of DES mothers sued the manufacturers of the drug. In the early 1990s, in a little-noted development in the DES cases, the DES manufacturers attempted to obtain the medical records of the mothers of the DES plaintiffs, claiming that such records were necessary to determine whether the plaintiffs' injuries were caused by genetic abnormalities or by DES.⁹ The plaintiffs objected to this tactic, claiming that since the mothers were not parties to the lawsuit and had not consented to the public disclosure of their medical records, the manufacturers were not entitled to the records. The court ultimately agreed with this position and denied the drug manufacturers access to the mothers' medical records.¹⁰

CASE STUDY: LEAD PAINT

In recent years, another example of the "genetic defense" has arisen.

It has been known for decades that ingesting lead paint can cause cognitive problems and low IQ in children. For this reason, lead paint has been banned for residential use since the 1970s. A landlord who rents a property containing lead paint to a family with children is considered negligent. In a number of states, landlords are strictly liable for harm suffered by children residing in buildings containing lead paint. The typical lead paint case involves a child who lives in a low-rent apartment containing lead paint, whose medical records show that he has ingested lead, and who has cognitive problems and/or a low IQ. While there are many causes of cognitive disorders and causes of low IQ, and there are no known genes for intelligence,¹¹ landlords have argued that they should be allowed to see the educational and medical records, not just of the injured child, but of the child's siblings, parents, half-siblings, and even grandparents.¹² Lawyers representing landlords have also requested that IQ and other cognitive tests be performed on the mother and siblings of the child, even if these individuals do not want these tests. This argument is based on the theory that IQ and learning disabilities are genetically and/or environmentally determined.¹³

Courts in Massachusetts, Pennsylvania, Louisiana, Minnesota, Maryland, New York, and Washington D.C. have faced these issues in recent years, and have reached different outcomes.¹⁴ It is disturbing to note that in the few cases where a non-party parent has been ordered to have an IQ test, that parent has been a black woman. There could be several reasons for this, such as the facts that a higher proportion of black children suffer lead poisoning than white children, and most lead poisoning claims seem to be brought on behalf of black children. How-

ever, given the racist legacy of IQ testing and of genetic research in general, it is a noteworthy phenomenon.

CASE STUDY: ENVIRONMENTAL INJURY

In another kind of case, a plaintiff may claim that her illness is the result of a genetic abnormality caused by exposure to environmental chemicals. The plaintiff may want to obtain the medical records or genetic information of neighbors to show that the neighbors had the same genetic aberration. In this way the plaintiff hopes to prove that the genetic problem is caused by an environmental exposure. Without the genetic information of other people in the same geographic area, the plaintiff may be unable to prove the environmental link to his injury. The neighbors, however, may be reluctant to release their medical records or subject themselves to genetic tests.

LEGAL INTERESTS AT STAKE IN THE GENETIC DEFENSE

The above examples of DES, lead, and environmental claims, are the tip of a developing litigation iceberg. They illustrate competing legal interests and ethical conflicts which are new to the American legal system. There is pressure on the legal community to develop a systematic approach for resolving such conflicts. At the same time there is an interest in the legal community in developing a valid method for using genetic information in personal injury litigation.

One legal interest, which permeates these cases, is the privacy interest of the individuals about whom medical or other information is sought. Such individuals may in-

clude the parties to the case, and/or individuals not named in the case. As the above examples illustrate, litigants may want to obtain records and/or tests of family members or neighbors who are not even parties to the suit. Individuals who are not parties to the litigation have not claimed any injury and have not put their condition at issue. They may want to have nothing to do with the litigation. American adults consider the decision of whether or not to seek medical services a basic freedom, as long as one's condition is not endangering others. Compelling someone who is not a party to a lawsuit, to have an IQ test or psychological examination against her will, goes against the grain. Most Americans also take for granted the right to keep private one's medical and academic records.¹⁵ Few of us would voluntarily disclose such documents, particularly if our interests would not be served by doing so.

A competing interest is that of litigators and decision-makers who need access to accurate information to develop and decide cases. A defendant should have access to information that exonerates him from liability. Decision-makers need access to information that is relevant to a case even if the information is considered private. If in fact genetic heritage determines human characteristics, the parties and the judge should have access to all conceivably relevant information. Further, it is inefficient for companies to pay for damages that they did not cause.

An additional interest is that of the legal system, and of society as a whole, in resolving legal disputes. In contrast to scientific research, which is continually evolving, legal evidence must be developed and used within a narrow timeframe. The judicial system works by disposing of cases, each based on a finite body of evidence. Legal adjudication often has an ad hoc quality that scientists

may find unsatisfactory. To quote Justice Blackmun, "law...must resolve disputes finally and quickly ... [T]he Rules of Evidence [are] designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes."¹⁶

Another difference between scientific and legal inquiry is the different "burden of proof" required by law versus science. In civil cases such as personal injury claims, the plaintiff must show that the injuries 'more likely than not' were caused 'in significant part' by the defendant's actions. Scientific proof is far more rigorous.

SCIENCE AND THE LAW: RECONCILING DIVERGENT INTERESTS

Can we reconcile these interests? How? Where does our law stand now? Currently, individuals who are parties to personal injury litigation must produce medical records and often must submit to medical tests, by a doctor hired by opposing counsel. At present, there is no legal justification for courts to force people to undergo medical examinations or tests or produce medical records when they are *not* parties to litigation.¹⁷ Given that our legal system is built on the principle that individuals are autonomous, and have the capacity to make decisions for themselves, we are repelled by the notion that anyone could force us to submit to physical examination or to release our medical records. Implicit in a decision to litigate a dispute is the decision to forgo certain privileges of privacy and autonomy. Individuals who are not parties to a lawsuit have not made such a sacrifice. Current law reflects the distinction between parties and non-parties in allowing examination of parties in some circumstances while not allowing

examination of non-parties.¹⁸ The few judges that have ordered such examinations exceed the scope of their authority. Medical records of non-parties are privileged and should not be released.

Some might advocate that these rules be broadened so that non-parties can be required to release personal records and undergo medical and genetic testing. They might reason that litigants should have the opportunity to employ the new scientific tools for explaining behavior. For several critical reasons, I believe that lawmakers should be very cautious before broadening the rules in that way.

First, there is a danger that once we breach the boundary of the individual, there will be no other logical boundary. Litigants will seek to examine records of individuals far removed from the circumstances at issue. Some will argue that numerous and distant relatives should be subject to medical examinations. Others may seek DNA information of dead people. Potential plaintiffs may enlist distant neighbors in environmental claims. These practices challenge basic principles of ethics, drive up the cost of litigation, and may traumatize the affected individuals.

Second, numerous questions exist regarding the accuracy of many ge-

netic tests. A New York court recently reversed a trial court's order which had allowed an IQ test of a mother, saying "since so many variables are involved, the test result will raise more questions than it will answer and hardly aid in the resolution of the question of causality."¹⁹ Questionable evidence does not serve the interest of justice. Indeed, questionable evidence may undermine that interest if it reflects and reinforces racial stereotypes, as may be the case in the lead cases.

The third reason for lawmakers to be cautious about broadening evidentiary rules pertaining to medical evidence, is the paramount right to privacy of individuals. Defining privacy is notoriously difficult. According to Professor Charles Fried privacy is defined as "control we have over information about ourselves."²⁰ Requiring individuals to produce personal medical or educational information in lawsuits, in which they have no personal stake, is to usurp such control and ignores the right to privacy. Some individuals may learn medical or psychological information about themselves, which they had not wanted to know. The disclosure of certain medical information has the further risk of jeopardizing insur-

ance coverage and employment status for individuals. The loss of privacy sacrifices too much.

Fourth, the risk that extended family members may be subject to invasive medical tests or to other losses of privacy, could inhibit potential plaintiffs from filing claims. A potential plaintiff's relative might have a condition that he/she wants to conceal. Fear of losing one's job or of insurance discrimination are just two reasons why individuals may be reluctant to disclose certain health conditions. The loss to society is significant if victims are inhibited from filing valid claims, and responsible parties escape liability for loss and injury.

CONCLUSION

Prohibiting litigants from compelling third persons to produce personal medical information may increase the difficulty of pursuing certain claims, such as environmental exposure claims mentioned above. However, I believe that the interests of privacy, efficient disposal of lawsuits, and accurate evidence still outweigh the need for such information. Powerful pragmatic and philosophical reasons counsel that we should not rush to go beyond the boundaries of the individual. ■

END NOTES

- 1 See Mark Hanson, *Banking on DNA: Prosecutors hail broadening collections; others see privacy violations*, ABA Journal, August 1999 at 26.
- 2 See *Genewatch v. 11 n. 3*, p. 1 (July 1998), *Interview, Chimera Patent Application Holds Mirror to Biotech Society*.
- 3 Natalie Angier, *Variant Gene Tied to a Love of New Thrills*, N.Y. TIMES, Jan. 2, 1996, at A1.
- 4 Natalie Angier, *Maybe It's Not a Gene Behind a Person's Thrill-Seeking Ways*, N.Y. TIMES, Nov. 1, 1996 at A22.
- 5 Daniel Goleman, *Forget Money: Nothing Can Buy Happiness, Some Researchers Say*, N.Y. TIMES, July 16, 1996, at C1.
- 6 See generally, STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* (1981).
- 7 *Sibbach v. Wilson*, 312 U.S. 1, 17-18 (1941) (5-4 decision upholding power to enact Fed. R. Civ. P. 35(a)).
- 8 See *in re New York County D.E.S. Litig.*, 570 N.Y.S.2d 804 (App. Div. 1991).
- 9 See *in re New York County D.E.S. Litig.*, 570 N.Y.S.2d 804, 804-05 (App. Div. 1991). It apparently had been established that the mothers actually took the drug D.E.S.; the defendants wanted the records to challenge the idea that D.E.S. caused the daughters' problems.
- 10 See *in re New York County D.E.S. Litig.*, 570 N.Y.S.2d 804, 804-05 (App. Div. 1991).
- 11 However, the New York Times recently reported that researchers were able to make mice smarter through manipulation of genetic material. N.Y. TIMES, Sept. 2, 1999, at A1. Nicholas Wade, *Smarter Mouse Is Created in Hope of Helping People*.
- 12 See Jennifer Wriggins, *Genetics, IQ, Determinism, and Torts: The Example of Discovery in Lead Exposure Litigation*, 77 B.U.L. L. REV. 1025 (Dec. 1997).
- 13 See HOPE VINER SANBORN, *BLAME IT ON THE BLOODLINE*, ABA JOURNAL, Sept. 99 at 28 (stating that defendants often argue that a learning disability is the result of plaintiffs' environment and heredity rather than lead paint ingestion).
- 14 See, e.g. *Andon v. 302-304 Mott Street Associates*, No. 437N, N.Y. Sup., 1st Dept. App. Div., May 20, 1999 (order forbidding IQ test of non-party mother of lead-exposed child), *Campbell v. Bonner*, No. 92-7771, D.C. Super. Ct., Jan. 7, 1994 (order granting defendant's motions to conduct clinical interview and intelligence testing on mother and sibling of minor plaintiff).
- 15 Even prominent critics of certain aspects of privacy rights strongly endorse privacy of medical records. See, AMITAI ETZIONI, *THE LIMITS OF PRIVACY* 139-182 (1999).
- 16 *Daubert v. Merrell Dow Pharms., Inc.* 509 U.S. 579, 597 (1993).
- 17 See Wriggins, *supra* note 12.
- 18 See Fed. R. Civ. P. 35(a) and its state-law correlates. CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2231 n. 16 (1994).
- 19 *Andon v. 302-304 Mott St. Associates*, No. 437N, N.Y. Sup., 1st Dept. App. Div., May 20, 1999, at 6.
- 20 CHARLES FRIED, *AN ANATOMY OF VALUES* 140 (1970).