

## DEFENDANT DISCOVERY OF NON-PARTIES

Much has been written recently in medical journals and even general media about the Human Genome Project which recently identified a first, rough map of human genetic codes. Social implications arising from this type of information abound - will a company hire an individual with a propensity for heart problems or should that condition be protected as a legal right from corporate scrutiny but disclosed between people considering marriage? And there's certainly no consensus among scientists on the significance of the genetic research<sup>i</sup>, some stress the concept that a person's immutable biological qualities are determined at conception while others caution this information is generally unreliable. It's certain that information ultimately developed out of this science will have an impact on lawsuits and contribute to additional discovery between parties. Of specific legal interest to those practicing toxic torts is the extent to which non-plaintiff genetic information may properly be the subject of discovery. This trend has mostly occurred in lead paint litigation when defense attorneys have sought access to the medical and school records of non-parties such as plaintiff's family members.

A recent case illustrating this issue, *Andron v. 302-304 Mott Street Associates, et al.*,<sup>ii</sup> affirmed an intermediate appellate court's ruling<sup>iii</sup> that a mother could not be compelled to submit to IQ testing despite an alleged correlation between a mother's IQ and her child's intelligence. Plaintiff Prudencia Andron sued on behalf of herself and her son Antonio to recover for personal injuries sustained by him as a result of exposure to lead-based paint. Antonio's injuries alleged include learning disability, developmental delays in speech and language, emotional behavior problems and communication skills below his age level. The trial court granted the defendant's motion to compel an IQ examination of Antonio's mother. Defendant's relied on the expert affidavit of a board certified pediatrician who opined exposure to lead is only one of many risk factors for childhood delays such as those experienced by the infant plaintiff. The doctor additionally stated that there are no types of developmental deficits that are specific for lead exposure and that cannot be caused by other factors. The doctor concluded that the injuries claimed by Antonio could be due in whole or in part to risk factors other than exposure to lead; thus information such as maternal IQ is particularly significant in that it reflects the biological endowment of the child and the intellectual stimulation available in the home. Plaintiffs countered that defendants showed only a "hypothetical relevance" of the mother's IQ to the question of whether Antonio's cognitive deficits and emotional behavior problems are causally related to his ingestion of lead-based paint. The trial court granted the motion compelling the IQ test of the mother, reserving the admissibility of the test as an issue for trial. In reversing, the *Andon* intermediate appellate court wrote:

According to defendants, the mother's IQ is probative on the issue of whether the infant plaintiff's deficits are due entirely to exposure to lead-based paint or whether they are genetic in origin. Defendants assert that a maternal IQ test will determine whether there is any genetic similarity between the infant plaintiff's problems and those that may have been experienced by the mother.

In our view, however, since so many variables are involved, the test result will raise more questions that it will answer and hardly aid in the resolution of the question of causality. Even if maternal IQ may be a factor in determining a child's

intelligence, extending the inquiry into this area would “dramatically broaden the scope of the litigation”. . . . turning the fact-finding process into a series of mini-trials regarding, at a minimum, the factors contributing to the mother’s IQ and, possibly, that of other family members. “There is no logical end to the litigation inquiry once individual boundaries are crossed.”<sup>iv</sup>

An additional factor cited by the court of appeals decision affirming the intermediate appellate court was the undue burden on the privacy of the mother. As the court explained:

[T]he Appellate Division was entitled to consider the burden imposed by an IQ examination and the personal nature of the information sought. Although New York’s discovery provisions have been liberally construed to favor disclosure, “litigants are not without protection against [their] unnecessarily onerous application \* \* \* ‘Under our discovery statutes and case law, competing interests must always be balanced; the need for discovery must be weighed against any special burden to be borne by the opposing party’ ”.<sup>v</sup>

The court emphasized that discovery determinations are discretionary and each request must be evaluated on a case-by-case basis.

Any expansion of discovery beyond that directed to the plaintiff is a questionable practice requiring careful consideration. It’s long been a central tenet of relevance in tort law that discovery directed to a plaintiff’s case be plaintiff-centered. Broadening the scope of causation beyond the plaintiff to include family members increases cost, allows intrusion of a non-party’s rights and presently has insufficient scientific basis in the overwhelming majority of cases.<sup>vi</sup> Attorneys for injured plaintiffs should be aware of and resistant to this discovery tactic as some contend defendants will likely try to expand its application to cases that involve other toxic torts, medical malpractice, closed-head injuries and post-traumatic stress syndrome.<sup>vii</sup>

Intrusive testing of non-parties should be distinguished from discovery directed to a defendant which seeks already-existing and available information on co-workers. For example, if a chemical company has monitoring data or medical information on a fellow worker of a plaintiff this may be relevant and discoverable to prove plaintiff’s causation case. Redaction to remove the name of the co-worker can solve privacy concerns. There is no inconvenience to the non-party since the data already exists.

- i Rochelle Cooper Dreyfuss & Dorothy Welkin, *The Jurisprudence of Genetics*, 45 *Vand. L. Rev.* 313 (1992) (defining genetic essentialism as a concept that posits that personal traits are “predictable and permanent, determined at conception and hard-wired into the human constitution”). But see Ruth Hubbard, *Predictive Genetics and the Construction of the Healthy Ill*, in *Profitable Promises: Essays on Women, Science, and Health* 31, 31-53 (1995) assessing the problems resulting from genetic technology, notably using genetics and genes as predictors of health and disease and the societal implications). For law review articles trying to consider some implications of genetic research, see Roger B. Dworkin, *Medical Law and Ethics in the Post- Autonomy Age*, 68 *Ind. L.J.* 727, 738-39 (1993) (arguing that genetic medicine bolsters the arguments against the idea of individual autonomy in the medical law and ethics context); Robert Wachbroit, *Biotechnology and the Law: Making the Grade: Testing for Human Genetic Disorders*, 16 *Hofstra L. Rev.* 583 (1988) (asserting that human gene therapy is an important medical advance).
- ii 94 N.Y.2d 740, 2000 WL 571672 (N.Y.), 2000 N.Y. Slip Op. 04721 [5/11/2000].
- iii *Andron v. 302-304 Mott Street Associates, et al.*, 257 A.D.2d 37, 690 N.Y.S.2d 241 [5/20/99].
- iv *Id.*
- v *Andon v. 302-304 Mott Street Associates, et al.*, 94 N.Y.2d 740, 2000 WL 571672 (N.Y.), 2000 N.Y. Slip Op. 04721 [5/11/2000].
- vi See Wriggins, *Genetics, IQ, Determinism, and Torts: The Example of Discovery in Lead Exposure Litigation*, 77 *B.U.L. Rev.* 1025, 1060 [1997] for an exhaustive review of policy reasons why discovery of plaintiff’s family members should not occur in lead litigation.
- vii Christa Zevitas, *Should the Medical and Genetic Records of Relatives Be Available to Defense Attorneys?*, *Lawyers Weekly USA*, 99 LWUSA 1129, 12/13/99.