Beyond Paternity, the Future of Genetic Testing in Personal Injury Litigation

Although defense counsel can chose from an array of experts to dispute a claim of permanent injury, there are few effective ways to challenge a plaintiff's claim of work and life expectancy. While economists and vocational rehabilitation experts are useful, they are as equally wed to the actuarial tables as plaintiff's own experts. Actuarial tables merely provide a statistical average and you may believe the plaintiff is not average.

A potential emerging tool in this area is DNA testing. A plaintiff's genome, like his smoking habit, can undermine the actuarial assumptions related to life and work expectancy, and provide a powerful and non-speculative basis to limit future damage awards. While there never has been doubt as to DNA's power with regard establishing a person's identity in paternity and criminal prosecutions, DNA has similar potential with respect to work and life expectancy.

DNA testing has likely remained in the shadows because it is perceived as too costly and unlikely to be compelled by a court. This article proposes that these perceptions may be faulty and DNA testing should be considered by defense counsel in the appropriate case.

With respect to DNA, science is way ahead of the courts. In 2011 a company introduced a DNA kit that identifies key markers for susceptibility to 25 diseases including heart disease, breast cancer, Alzheimer and diabetes.[1] The New York Times reported in 2011 that low priced DNA testing ($290) reveals the length of a person's telomeres, structures that regulate longevity at the cellular level.[2] In April 2012, the NYT also reported on a study that concluded "gene sequencing could, in theory…identify as many as 75 percent of those who

[1] http://healthcarestock.net/2011/01/inolife-technologies-launches-dna-predisposition-.
[2] http://www.nytimes.com/2011/05/19/business/19life.html?_r=1&scp=1&sq=telomere%20length&st=cse

will develop Alzheimer's disease, autoimmune thyroid disease, Type 1 diabetes and, for men, heart disease."[3]

DNA also has the potential to be useful in disputing medical causation. A National Institute of Health study identifies the first gene forms associated with disc degeneration.[4] If plaintiff has a genetic marker for early onset arthritis, arguably the arthritis was not traumatically induced, and knee replacement surgery was inevitable.[5]

DNA testing has been long recognized as useful and reliable scientific evidence. Since 1994, New York statutory law has provided for DNA testing to establish paternity[6] and allows a convicted felon to utilize DNA to obtain a retrial.[7] In the civil area, a handful of courts have compelled involuntary DNA testing to determining paternity and inheritance rights.[8]

DNA testing is minimally invasive since it can be performed with a cheek swab. "Minimally invasive" may not however, be an apt description for DNA's potential to reveal private health information which may not be in controversy and which may not even be known to the examinee. Nevertheless, courts thus far have not been overly concerned with privacy.

The idea that DNA testing could be utilized for any relevant and material purpose was first considered in 2002 in McGrath v. Nassau Health Care Corp.[9]. In McGrath, Magistrate Judge William Wall concluded that DNA could be compelled in a civil lawsuit for *any* relevant and material reason, as long as certain elements were satisfied. Judge Wall rejected the assertion that DNA was somehow extraordinary evidence that could only be utilized to "demonstrate liability".

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[3] http://www.nytimes.com/2012/04/03/health/research/dnas-power-to-predict-is-limited-study-finds.html?_r=1&hpw
[4] http://www.ncbi.nlm.nih.gov/pubmed/1911
[5] http://arthritis.about.com/od/arthqa/f/HLAB27.htm.
[6] People v. Wesley, 83 N.Y. 2d 417, 426 (N.Y. 1994); See EPTL 4–1.2(a)(2)(C); Family Ct. Act §§ 418(a), 532(a); CPLR 4518(d).
[7] CPL 440.30(1–a).
[8] In re Abramaitis, No. 2010-360166/A 2011 WL 6738952 (N.Y. Sur. 2011)(paternity); In re Estate of Gaynor, 13 Misc.3d 331, 333 (N.Y. Sur. 2006) (paternity); Andres v. Judith, 156 Misc.2d 65, 71 (N.Y. Fam. Ct. 1992) (*maternity*); In re Poldrugovas, 50 A.D.3d 117, 130 (2d Dept. 2008) (inheritance rights).
[9] 209 F.R.D. 55, 58 (E.D.N.Y. 2002).

McGrath involved a claim of workplace sexual harassment. The defendant claimed he and the plaintiff had regular consensual intercourse prior to the alleged harassment, which the plaintiff denied. The intercourse was an important collateral issue of credibility.

Defendant sought a DNA sample from plaintiff to compare it to genetic material from a blanket in his possession allegedly stained with her menstrual blood. Plaintiff moved for a protective order and defendant cross-moved to compel her DNA, pursuant to FRCP 35(a), which authorizes a physical examination if the party's physical condition is "in controversy" and for "good cause." At an evidentiary hearing, defendant presented test evidence of a DNA profile consistent with a male and female source and blood. Defendant also established the profile could be compared to any reference sample.

Judge Wall reviewed the relevant case law around the county[10] and extrapolated three "general principles regarding the standards applicable to demands for a DNA sample." The first being whether there exists "general authority . . . in the jurisdiction to order a DNA sample and testing" which would be satisfied by FRCP 35(a) or its state court equivalent such as CPLR §3121(a). Second, "the privacy interests of the party from whom the DNA sample would come" should not outweigh the "State's interest in providing a reasonable means or forum for its citizens to resolve disputes, [and in] regulating litigation in . . . [its] courts…." Third, whether there was a "sufficient factual basis for finding that production of a DNA sample is warranted."

With regard to the second element, none of the courts surveyed appeared too concerned with the potential for the DNA to reveal confidential information beyond what was at issue in the lawsuit. Although Judge Wall noted "[t]here are, no doubt, privacy issues inherent in the DNA context that go beyond the actual taking of the sample" he threw such concerns aside stating "[n]onetheless such samples can be extremely relevant to the lawsuit, and the

[10] Id. at at 59-61 (citing LaVallee v. State, 182 Misc.2d 58, 60 (N.Y. Sup. Ct. 1999); Hargrave v. Brown, 783 So.2d 497, 499, 501 (La. Ct. App. 2001); Harris v. Athol-Royalston, 206 F.R.D. 30, 34 (D. Mass. 2002)).

imposition of appropriate protections that limit the use of the DNA information [is] sufficient [to] address those privacy concerns." In Hargrave v. Brown, a Louisiana Court of Appeals felt the issuance of "a protective order prohibiting the distribution or use of the results outside of the lawsuit and requiring that the results be filed under seal" was sufficient protection.[11] Given the protective order and the State's interest in resolving the dispute, the Hargrave Court found the intrusion on the defendant's privacy rights to be "minimal".

The opposite view was expressed in 2002 by a Massachusetts Federal District Court in Harris v. Athol-Royalston Regional Sch. Dist. Comm.,[12] where the court noted that "DNA testing is an extreme discovery tool which is very intrusive to the targets of such discovery…"

Judge Wall dismissed Harris noting the court left it unclear what was intrusive, "the method by which the sample is taken, or to the larger non-physical ramifications of a person's being ordered to produce such intimate information about themselves…"[13] While privacy is a concern, it has not seemed to have resonated with the courts.

The third element, a "sufficient factual basis" warranting the sampling appears the more substantive challenge. "The burden of proving that the party's mental or physical condition is in controversy is on the party seeking the examination..."[14] A protective order pursuant to CPLR §3103(a) may be obtained by showing the examination will cause "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice". Upon a sufficient showing, the burden shifts back to the proponent to prove "the necessity for such examination, the details of the procedure employed in making it, the frequency with which it has been done, together with the experience and observations which have been made by physicians as to pain, harm, or after results of any nature."[15]

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[11] Hargrave, 783 So.2d at 500.
[12] 206 F.R.D. 30, 35 (D. Mass. 2002)
[13] McGrath, 209 F.R.D. at 61.
[14] In re Love Canal, 112 Misc.2d 861, 864 (N.Y. Sup. 1982).
[15] Lefkowitz v. Nassau, 94 A.D.2d 18, 21 (2d Dept. 1983).

In LaVallee v. State, the plaintiff failed to establish the third element based on her bare claim the defendant ejaculated on her shoe, since she failed to preserve the evidence. The court would not compel DNA testing merely on her "*strong belief*" that semen was on the carpet where she wiped her shoe in the absence of proof the semen existed. The court provided her with an opportunity show that DNA testing would lead to a tangible result and not merely be "an academic exercise" which would result in an unnecessary invasion of the defendant's privacy.[16]

Unlike, LaVallee, the defendant in McGrath made a showing that the blanket actually contained genetic material and blood which could be matched to the plaintiff's own and thus Judge Wall was satisfied there was "a reasonable possibility . . . a match m[ight] be found."

Since 2002, McGrath has not been criticized for its conclusion that DNA testing can be used for any relevant and material purpose. In 2008, it was cited with approval by the Appellate Division Second Department in In re Poldrugovaz, as well as by the Surrogates Court in In re Estate of Gaynor.[17]

Notwithstanding technological advancement, the courts and the bar have barely begun to embrace DNA testing as a broad based litigation tool.

Can DNA Testing be Used to Defend Damages?

Typically, to obtain a physical examination, the physical condition of the party must be in controversy. In the appropriate case it should be easy to establish that plaintiff's longevity is in controversy where there is a claim for future pain and economic damages (or that plaintiff's injuries have a genetic rather than a traumatic origin). A plaintiff might argue his life expectancy is not at issue since he is merely claiming average longevity pursuant to the actuarial tables.

[16] 182 Misc.2d at 60.
[17] 13 Misc.3d 331 (N.Y.Sur., 2006)(paternity); 50 A.D.3d 117 (2d Dept., 2008)(inheritance).

While New York Pattern Jury Instruction 2:281 refers to the actuarial tables, it notes the tables are nothing more than a "statistical average" and instructs the jury to use its own experience as well as the evidence of the plaintiff's habits, employment and activities to determine life expectancy. Thus, the PJI establishes that life expectancy is very much "in controversy" regardless of whether plaintiff relies on the actuarial tables.

Recently in Doe v. Sutlinger Realty Corp., HIV related information was sought for the purpose of disputing life expectancy. In construing Public Health Law § 2785 which requires the showing of a "compelling need" for HIV related records, the Second Department held that "plaintiff put his HIV status in issue by…alleging…a total disability as a result of the accident" and further noted that "ignoring the plaintiff's HIV status would violate the defendant's right to a fair trial by seriously hindering the defendant's ability to mount a defense based on a claimed shortened life expectancy."[18]

Sutlinger however, is in direct conflict with a recent decision from the First Department, Del Terzo v. Hospital for Special Surgery,[19] where the court concluded that contesting life expectancy was not sufficiently "compelling" to satisfy the statute. Although they seem to be irreconcilable, Del Terzo might be distinguished on the grounds defendants failed to establish any actual history of HIV and "seem[ed] to be engaged in a fishing expedition." It should be noted that both Sutlinger and Del Terzo involve a statute that protects HIV records from discovery, which does not exist with regard to DNA information. Del Terzo underlines the importance of having a solid evidentiary basis of the underlying condition prior to making the application. The charge of "fishing expedition" may be particularly potent when seeking DNA testing given the potential emotional impact if the test reveals bad news.

[18] Doe v. Sutlinger, 2012 WL 2330560 (2d Dept., 2012).
[19] 95 A.D.3d 551, (1st Dept. 2012).

Even in the absence of a statute, judges have shown deference to plaintiffs with HIV. In Sacramona v. Bridgestone/Firestone, Inc.[20] a Massachusetts District Court went as far as to say that the plaintiff had not placed is life expectancy in controversy despite claiming permanent disability. Although the court acknowledged that plaintiff's life expectancy would "likely" be shorter if he had HIV/AIDS, it held that the "relevance of the results from a compelled blood test…is too attenuated." It is hard to accept such conclusion. Evidence of a potentially terminal illness should not be kept from a jury charged with determining life expectancy. Even with today's anti-viral medications, a diagnosis of HIV has a negative impact on life expectancy.[21]

At around the same time as Sacramona, a Pennsylvania federal judge decided Pettyjohn v. Goodyear Tire[22] which came to the opposite conclusion. The district judge ordered the plaintiff to either submit to a blood test for purposes of determining HIV status or be precluded from claiming future damages. The Sacaromona court admitted it could not distinguish Pettyjohn, and declined to follow it merely on the grounds "it was outside th[e] district." Not surprisingly, Sacramona has not been adopted in New York or elsewhere. Judge Wall in McGrath was critical of it and noted it was limited to "the record before it."

The Future of Involuntary Genetic Testing

As more and more people obtain DNA testing as part of their regular health maintenance, it seems certain that DNA will become an available tool for defense counsel. In some situations, a plaintiff might already have obtained a diagnostic DNA test with several pre-dispositions noted in their chart. An indication in a chart of such a pre-disposition, might provide the basis for more comprehensive testing.

[20] 152 F.R.D. 428 (D.Mass).
[21] http://journals.lww.com/jaids/Fulltext/2010/01010/Life_Expectancy_After_HIV_Diagnosis_Based_on.19.aspx
[22] 1992 WL 105162 at *1 (E.D.PA.1992).

Barring this, practitioners faced with cases with large potential future damages awards, should carefully question plaintiffs as to family mortality including early onset arthritis, Alzheimer's and knee and other joint replacements. In the appropriate case, defense counsel may, in the not too distant future, find DNA to be a valuable tool in the continuing struggle against escalating jury verdicts.