

CITATION: Hunter v. Sneyd, 2018 ONSC 4896
COURT FILE NO.: 00-CV-196563
MOTION HEARD: May 17, 2018

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Clarke-Hunter et al. Plaintiffs

-AND-

Sneyd et al. Defendants

BEFORE: Master Abrams

COUNSEL: N. Todorovic, counsel for the plaintiffs

S. Sud, counsel for the defendant Royal & Sun Alliance Canada Group

Reasons for Decision

[1] The motion brought by Royal & Sun Alliance Canada Group is granted, as it relates to Ann Clarke, with one qualification. If Ms. Clarke, on behalf of her son, wishes to have confidentiality terms imposed, failing agreement on the issue I may be spoken to.

[2] The plaintiffs suggest that I ought to give little weight to the evidence of Mr. Greenside, positing that, as a lawyer and not a medical professional, he is not qualified to conclude that the production of the documents requested is necessary to permit Dr. Kumchy to prepare an informed opinion on the issue of causation. They also suggest that by filing an affidavit from Mr. Greenside, the moving party is improperly shielding Dr. Kumchy from cross-examination. While I might be inclined to agree if Mr. Greenside's conclusions were borne of his knowledge and experience only, or informed, generally, by discussions with Dr. Kumchy to which the plaintiffs have not been made privy, here, appended as Exhibit "G" to the May 1/18 affidavit of Mr. Greenside, is a letter from Dr. Kumchy in which she, herself, says that she needs the information/documentation sought to complete her evaluation of Shanice Hunter and explains

why that is so. The plaintiffs have, thus, (effectively) heard directly from Dr. Kumchy and, if they were so inclined, could have sought to examine her, with leave.

[3] The case of *Davis (Litigation Guardian of) v. McFarlane*, 1997 CarswellOnt 3091 (Gen. Div.), on which the plaintiffs rely, is distinguishable from the case at bar. In that case, there was “no evidence as to the efficacy of [the comparator] diagnostic tool anywhere in the evidence” (para. 11(2)). In this case, there is. Dr. Kumchy writes, in her letter dated March 2/17 [*sic*] (Exhibit “G”) that “[r]elevant research in the area of heritability finds that there are familial links for intellectual characteristics including but not limited to attention capability and learning assets and deficits”. Indeed, she cites studies by Connolly *et al.* and Chen *et al.* as to “the significant influence of genetics as a basis for intellectual features within a family”.

[4] Even the plaintiffs’ own expert, Dr. Kaminska, acknowledges that, [i]n cases like [Shanice Hunter’s], there may be genetic vulnerability concerning her identified attention and learning difficulties” and says that “the role of the interplay between genetic and environmental influences on her behavioural outcome is *probably significant* [emphasis added] in view of the nonshared environmental factors related to the accident-related injuries in early childhood and any possible diagnosis of head or brain injury”. And, while she suggests that “[o]btaining academic, psychoeducational and treatment records concerning Shanice’s brother Dante is *unlikely* [emphasis added] to shed light on the degree of similarity between Shanice and Dante or the traits that may have been inherited by them from their parents”, she doesn’t say that it is impossible. She references challenges in applying heritability estimates and estimated genetic involvement in specific behavioural traits and says that she has not seen a single neuropsychological assessment report that utilizes the information that Dr. Kumchy wishes to utilize. That does not mean that such a report does not exist or that what Dr. Kumchy seeks here to do cannot be done. Dr. Kumchy’s report can be challenged, anon, if her application of research findings in a clinical setting is thought by the plaintiffs and their expert(s) to be assailable.

[5] The documents sought are relevant to a material issue in the action, on which Dr. Kumchy has been asked to opine. And, with Dr. Kumchy indicating that she needs the documents to complete her neuropsychological evaluation of Shanice Hunter, and the documents not being said by Dr. Kaminska to be irrelevant but, rather, relevant to an issue that is “probably

significant”--even if (at least until now) difficult to assess--I think that it would be unfair to require of the moving party that it proceed to trial without them.

[6] I leave it to the parties to discuss whether Ms. Clarke will provide an authorization or obtain the documents herself. An authorization, if it is to be provided, is to be provided by August 31/18. If the files are to be obtained and produced by Ms. Clarke herself, she shall have until September 15/18 to attend to doing this—on a best efforts basis.

[7] The motion was reasonably opposed, even if the moving party succeeded. The arguments made by Mr. Todorovic were neither unreasonable nor without foundation, though they did not carry sway. There shall be no costs of this motion to anyone.

Decision Released: July 31/18

“Original Signed by Master Abrams and released to counsel”
