

Bringing Lawsuits for Childhood Cancer

By H. Bishop Dansby, Esquire

Childhood cancer occurs at rates that seem abnormally high. About one in six hundred children between the ages of one and fourteen will be stricken with cancer, most of which are leukemia and central nervous system (CNS) tumors. Further, the incidence rate of childhood cancer is increasing one percent per year, and even faster for CNS tumors.¹ The impact of these cancers is particularly devastating. Even when treatments prolong life, the child is usually affected in some awful way.

While it is not known specifically why the rate of childhood cancer is increasing, there is a consensus that 80 to 90 percent of cancers among people of any age are environmentally caused.² That is, they are caused by lifestyle, diet or exposure to environmental carcinogens. It is natural to suspect that toxins in our environment are contributing to the increase in childhood cancer. Always prominent in studies that identify risk factors for childhood cancer are radiation, pesticides,³ certain chemicals, and certain medications.⁴

Litigating any environmental cancer case is inherently challenging. Most toxic exposure cases involve acute injury from a short-term exposure. While the injured party might fear the possibility of getting cancer sometime later, no cancer is yet existent and in most cases very unlikely. By contrast, when suing for cancer, the cancer exists and invariably is discovered years after any environmental exposure that might have caused it. In the acute exposure case, you have relative certainty as to exposure, but much uncertainty that there will be a cancer. In the cancer case, you have certain injury, but the causative exposure will usually be difficult to ascertain. The book and movie, "A Civil Action," illustrated vividly the difficulties in bringing litigation for childhood cancer allegedly caused by environmental pollutants.⁵

Cases that have been successful are where the cancers are so-called signature cancers, that is, where the cancer is clearly

related to a given carcinogen. This is the situation with asbestos, which causes mesothelioma, and to some extent with tobacco, which always involves lung cancer. These are areas of litigation where we have seen dramatic successes. It should be said, though, that even in these cases, the road to successful litigation was long and hard.

In the case of asbestos, its dangers were known for decades before the industry and the courts really responded. A landmark study by Dr. Irving Selikoff in 1964 laid the medical and scientific basis for linking asbestos to mesothelioma.⁶ An important court opinion was *Borel v. Fiberboard Paper Products*, decided in 1973, which made the manufacturers of asbestos products liable.⁷ Eventually, asbestos litigation became relatively routine, even though to this day, the actual mechanism by which the asbestos fiber causes cancer is not well understood.⁸

The dangers of smoking and its association with lung cancer follows a history very similar to that of asbestos, except that successful litigation was even later in happening. The tobacco industry was remarkably successful in defeating lawsuits by individuals claiming their lung cancer was the fault of the tobacco companies. The tobacco industry had been required by Congress to place a warning label on their product. Although opposed by "Big Tobacco" at the time, the warning label served as an effective shield against litigation for decades.⁹

Finally, the health risks and costs from tobacco became so great that the state governments themselves stepped in with legislation and lawsuits of their own. (It is ironic that the state eventually did for itself what its laws would not permit for injured individuals.) The result was multibillion-dollar settlements that dwarfed anything in the history of personal injury litigation.¹⁰ (The history of the tobacco industry's attempt to avoid liability for their product also stands, as an example of very bad lawyering. Ultimately, the tobacco industry lawyers mis-served both



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their clients and the public by seeking to protect a defective and dangerous product.)

As the rate of childhood cancer continues to increase, parents, doctors and lawyers may begin making connections to environmental causes. Researchers will begin providing more of the answers as to risk factors. There are many medical and legal reasons to believe that it is in the area of childhood cancer that litigation might be the most successful.

Children that are diagnosed with cancer have lived fewer years than adults. It should be much easier to develop an exposure history. Children are less likely to have engaged in lifestyle choices with respect to diet, tobacco, etc. that could have increased their risk. If there is an environmental cause of a cancer in a child, it should be much easier to ascertain than in the case of an adult.

Because of the complexity of cancer, causative links between carcinogens and disease have generally been based on epidemiological studies, and even these are usually extrapolated from animal studies to humans. Such studies are more useful for science and even regulation than for legal action, since a general, statistical association usually is quite inconclusive as to a specific case. This may be changing. Some chemical exposures can produce an alteration of the DNA called an "adduct," which technology now can locate and identify. Such adducts can cause mutations when the DNA replicates, which may finally lead to tumors. Here we may have the "smoking gun" that will provide the kind of concrete proof favored for proving causation in particular cases.¹¹

The legal environment for children is much more favorable for litigation based on cancer than is the case for adults. Since cancer usually takes a long time to develop between exposure and diagnosis, the statute of limitations is likely to have run; that is, it may be too late to sue the negligent party. With children, the statute of limitations does not begin to run until the child is eighteen years of age. Thus, even for a cancer that may take, say, twenty years to be diagnosed, a lawsuit might still be brought. (In some states, the period of limitation begins to run only upon discovery of the can-

cer, in which case the running of the statute of limitations might no be a problem for adults either.)

If litigation of childhood cancer is more feasible than cancer litigation, in general, this fact could be fortunate, though in a dark sense. Scientists believe that increases in childhood cancers are the first indicators of the impact of the environment on human health—the canary in the mine.¹² Litigation on the childhood cancer front would at least be a way to attack environmental cancer in a relatively early and effective way.

At the same time, there are some practical matters that actually make litigation in the area of childhood cancer less likely. The stress of childhood cancer makes it unlikely that the parent will address the issue of causation. Doctors are loath to raise the issue because the burdens on all concerned are already great enough. Children appear particularly vulnerable to pesticides, and it is children that are most likely to be impacted by medicines that turn out to be carcinogenic. Both of these categories of products tend to be regulated by the federal government, which can preempt or at least impede litigation against manufacturers.

In summary, the horror of so many children getting these devastating cancers, the fact that the rate of incidence is increasing, and the apparent association with environmental factors is likely to bring pressure for litigation in this area. Continued scientific research into causation and the relatively favorable environment for litigation for children could make these suits more and more feasible over time. As in the case with asbestos and tobacco, it may well take litigation to convert sympathy for children stricken by cancer into action that will reduce their chance of getting it in the first place.

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Endnotes

- ¹ Minutes of U.S. EPA Conference on Preventable Causes of Cancer in Children, Sept, 1997, Arlington, VA.
- ² Carroquino MJ, et al., *Environ Health Perspect* 106(Suppl 3):867-873 (1998).
- ³ Zahm SH and Ward MH, Pesticides and Childhood Cancer, *Environ Health Perspect* 106(Suppl 3):893-908 (1998).
- ⁴ Zahm SH and Devesa SS, Childhood Cancer: Overview of Incidence Trends and Environmental Carcinogens, *Environ Health Perspect* 103(Suppl 6):177-184 (1995).
- ⁵ Harr, Jonathan, *A Civil Action*, Vintage Books, 1995.
- ⁶ Castleman, Barry I., *Asbestos: Medical and Legal Aspects*, 3rd Ed., Prentice Hall Law & Bus., 1990
- ⁷ *Borel v. Fiberboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), cert. Denied, 419 U.S. 869 (1974).
- ⁸ Churg, Andrew, MD, Green, Francis H.Y., MD, *Pathology of Occupational Lung Disease*, Igaku-Shoin, 1988, p. 282.
- ⁹ Kluger, Richard, *Ashes to Ashes: America's Hundred-Year Cigarette War, the Public Health, and the Unabashed Triumph of Philip Morris*, Vintage Books, 1997.
- ¹⁰ See, for example, Settlement Agreement, The State of Florida, et al., Plaintiffs, v. The American Tobacco Company, et al., Defendants. Civil Action No. 95-1466 AH, in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida.
- ¹¹ "Kids and Chemicals," NOW with Bill Moyers, PBS, May 10, 2002
- ¹² Id.