



HB LEAD LITIGATION CONFERENCE

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PRE-TRIAL ISSUES

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CONFOUNDING FACTORS:

Admissible and Relevant vs. Inadmissible “Red Herrings”

Plaintiff’s Lead Is:

- A minimal overall factor
- Comes from many sources
- Not statistically significant or only slight impact
- Pales in comparison to combination of SES, smoking, drinking, lack of intellectual stimulation, etc.
- 5 tier definition
- Plaintiff in this case (is not a medical emergency)
- Class V
- No child has died since the early 1970’s in New York city from lead poisoning.
- Cases of encephalopathy (Class 5 usually over 100 ug dl are extremely rare) thankfully

Defendant’s lead is

- A Substantial Factor
- Plaintiff’s Burden is met by demonstrating “A” contributing cause
- So what if there may be others!

“The fruit does not fall very far from the tree”

Which tree? Statistics/SES

26:2-130

a)...lead poisoning leads to morbidity, mortality, mental retardation and learning disability in young children...

NJ Statute §26:2-130





THE MOST FREQUENTLY OBSERVED CONFOUNDING VARIABLES ARE AS FOLLOWS: (in no particular order)

- Birth Trauma (apgar)
- Family history of mental disorders or cognitive deficiencies
- Failure to follow prenatal advice
- Prematurity (jaundice)
- Intrauterine Growth Retarded (IUGR)
- Gestational diabetes
- Low birth weight
- Maternal smoking (1/2 PPD lowers ig. 3/5 points.

MEANINGFUL DIFFERENCES IN THE EVERYDAY EXPERIENCES OF YOUNG AMERICAN CHILDREN

Tracts welfare, working class and professional children regarding “language experience”.

- Parents – 40-70% correlation
16%-49% of variance accounted for
- Siblings – 20-50% correlation
4%-25% of variance accounted for
- Grandparents – genetics and environment

Maternal IQ predictor of 31% of IQ. Therefore 69% comes from the father and other sources including the environment.

ADHD:

- Genetic predisposition
- Malnutrition
- Neurological defects such as decreased cerebral blood flow or frontal lobe defects
- Head injury
- Encephalitis
- Medications such as phenobarbital and Dilantin
- High levels of testosterone
- Food sensitivities such as to sugar
- Antisocial family behavior
- Parental depression
- Maternal alcohol consumption during pregnancy
- Direct and passive cigarette smoke

See, Attention-Deficit Hyperactivity Disorder: A Handbook For Diagnosis and Treatment, 100 (Barkley RA ed., 1990), 100-01, 149-50.

IME...DOES NOT EXIST

Discovery Disputes

- Are inevitable
- All information specially social services records, court documents childhood welfare/protective service records

The information needed, regarding the parents, includes:

Parental Info:

- Childhood behavior problems
- Lack of attention, activity and impulse control as a child
- Learning disabilities
- Education level
- Mental retardation
- Psychological background
- Genetics
- Tics or Tourette's syndrome
- Alcohol abuse
- Substance abuse
- Smoking
- Anti-social behavior (such as assaults, thefts, intrafamilial abuse, etc.
- Depression
- Arrests
- Marital Status
- Physical abuse
- Sexual abuse



INFLUENCES WHICH AFFECT INTEL- LIGENCE AND LANGUAGE SKILLS:

- Parental IQ
- Mother-infant interaction
- Parental education
- Parental depression
- Family social support
- Stress
- Heredity
- Brain damage
- Schooling
- Educational experience

Scarr S and Yee D, "Heritability and Educational Policy: Genetic and Environmental Effects On IQ, Aptitude and Achievement" 15 Educational Psychologist, 1-22 (1980); Bee HL et al., "Prediction of IQ and Language Skill from Perinatal Status, Child Performance, Family Characteristics, and Mother-Infant Interaction" 53 Child Development 1134-56 (1982); Parker S et al., "Double Jeopardy; The Impact of Poverty on Early Child Development" 35 The pediatric Clinics of North America, 1227-40 (1988); and Gillberg C and Rasmussen P,

"Perceptual, Motor and Attentional Deficits In Seven-Year-Old Children: Background Factors" 24 Developing Medical Child Neurology, 752-70 (1982).



Demands should be served for executed authorizations allowing for the release of the following records:

- The mother's prenatal records
- The infant-plaintiff's birth records
- The treating physician's records and reports
- All records relating to discovery and treatment of the lead poisoning
- The infant-plaintiff's blood test results
- All collateral source information

HELD:

- Request for Mom's medical records denied - - her condition is not in dispute.
- No fact or expert basis to deny privilege.

PIERCE V. WHITNEY (CONN. 2000)

LANDLORDS OTHER PROPERTIES FULLY RELEVANT!

Knowledge issues vs. specific location issues

If mom and sister tell plaintiff's story, then defendant landlords other lead contaminated properties tell his story! vs. ten years of lead poisoning cases with three minor children living across from park



MOTIONS IN LIMINE

From both sides!

- Keep out family history/Let it in
- Keep out landlord history/Let it in
- Keep out other exposures/Let them in
- is opinion “generally accepted” (Frye/Daubert is Statistical sample too small)

Motion in Limine Reneuropsych Report:

- Defense neuropsych exam is predictable
- Experts prior reports should be admissible

LITTLE V. MCINTYRE

Superior Court of New Jersey Appellate DivisionA-0951-95T3

“We do not regard the mother as a party to this litigation. She claims no physical injury and seeks no damages for herself.” Little
“She is at most a nominal party.” Little
R4:19 plainly applies only to a party in the pending action. Little

HELD:

- No IQ exam of mom.
- Mom’s condition not in controversy.
- Would unduly broaden litigation.
- Would a proper expert affidavit change this since the decision states “...the expert...failed to identify those studies or attach them to his affidavit...”

ANDON V. MOTT (N.Y. ‘99)





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