

Litigating Claims for Lead Poisoned Children

10 Lessons From Virginia's Second Million Dollar Lead Poisoning Verdict

On October 14th, 2007, Judge John Morrison of the Norfolk Circuit Court awarded Chauncey Freeman \$1,500,000 following a bench trial. This was only the second verdict for a lead poisoning victim in Virginia¹. This case brought together a microcosm of the issues faced by litigators evaluating and representing victims in lead poisoning cases. This paper presents 10 key lessons that are essential to success in this specialized type of litigation.

Lesson One:

Don't Judge A Case Solely By How Much Lead Is In the Child's Blood

Lawyers frequently attempt to equate the amount of lead in a child's blood with case value. Blood lead is typically measured in micro grams per deciliter. In 1991, a federal standard of 10 was set by the Center for Disease Control (CDC). However, most health departments would not begin to investigate cases until a child's level hit 20, and would not give a child medication to lower their lead levels (which medication has its own risks) until levels reached the 40's or above (these cases are referred to in the field as "chelation cases", a reference to the type of medication that is administered). The higher the blood lead level, the greater the risk of severe injury, including brain swelling, coma, and death.

The question then arises as to whether there is some sort of fixed relationship between blood lead level and case value. There is no clear association. Chauncey Freeman's one and only blood test was 26 micrograms per deciliter, a modestly high level, but one that did not justify chelation therapy. Far more important are the problems that a child has developed as a result of lead.

So, how low can you go and still prevail? Look at the absolute lead level as one, and not a definitive factor.

Lesson Two:

You Can Not Rule Out Every Other Source of Lead, Nor Should You Try

Typically your lead case will involve an obvious source of lead that resulted in the exposure that caused the lead poisoning. In most cases, this will be the target of your investigation and, with liability, the named defendant in your case. Almost invariably, the defendant in the case will point to the ubiquitous nature of lead in an effort to spread the blame. How should you respond?

¹ Small v. Rich, Portsmouth Circuit Court, At Law No. L97-1097.

See article which appeared in *Virginia Lawyers Weekly* at

http://www.virginialawyersweekly.com/subscriber/archives_FTS.cfm?page=va/03/428031.htm&recID=301094&QueryText=serpe

Proving exposure can be expensive and hard work. If you have done your job on the defendant's property or product, turn the tables on them. Ask pointed discovery to see what sources of lead they intend to establish as the alternative source of poisoning. Make them jump through the same hoops you have to get through.

Also, know your law. What is the standard for joint tortfeasors and what level of proof do you (and the defendant) need to establish to go to the jury on source of exposure? Once you are there, block the defendant from establishing other possible speculative sources, and other sources that do not render your exposure as "insubstantial". Finally, get your hands on the robust literature that demonstrates the extreme risk of exposure from lead paint (or other key sources). This puts the defendant on the horns of a dilemma: by proving alternative sources, they are opening themselves to literature that also establishes the extreme risks to children.

In Chauncey's case, the defendant "suggested" that lead comes from many possible sources, including the former use of lead in gasoline and toys from China. But against the compelling and detailed proof of lead paint hazards, including graphic representation and references to the key literature, these suggestions fell flat.

Lesson Three:

Proving Lead Poisoning Damage Requires Solid Experts, Testing, and Argument

Make no mistake: lead poisoning cases are time consuming and expensive to handle. This is true, most importantly, in the proof of lead poisoning injury. If you do not have the right data, the right expert, and the right presentation, it is likely that your efforts will be for naught.

Early investigation regarding your client and his or her family should help you screen out cases that can not be won, regardless of how well they are worked up. Do this preliminary investigative work before you spend the \$15,000 to work the case up medically.

Careful review of ALL of the medical records for your child can also avoid a costly mistake. Has there been some severe medical problem which also impacted the child's development? Ask your expert about these BEFORE your exhaustive and expensive neuropsychological testing. But do not run from issues like pre-maturity and fetal distress. Although these are risk factors for developmental problems, it is often possible to demonstrate that they had no effect on the child in his or her early development. That is, UNTIL they were poisoned by the defendant's negligence.

One key injury that is now a lot easier to prove is ADHD. Cutting edge research has shown that children (especially boys) with lead poisoning are FOUR times more likely to develop ADHD.



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Recent publications from the CDC establish a profound gap in knowledge for treating doctors of lead poisoned children who stop scheduling follow-up once the child's lead levels come down. This results in children who are lost to follow-up. Since lead poisoning injuries do not typically manifest themselves until a child is in school, many children do not get the attention for lead poisoning as they get older. In Chauncey's case, no doctor considered lead poisoning as a source of significant school and behavioral problems until his forensic evaluation for the case.

Make sure your expert understands this "lost victim" problem and is prepared with the right tests and literature to re-establish the link between the lead poisoning and the real world problems these children are suffering from.

Lesson Four: **Tailor Your Liability Claims To Your Defendant**

A major verdict in a lead poisoning case requires a compelling theme. Themes are not compelling unless they take into account all the facts about the defendant that the jury will likely conclude are true. There is a tendency in lead cases to develop a theme of righteous indignation against the slum lord defendant. In many cases, this theme does not fit the facts, and will leave the jury wondering whether you have really proved your case.

The evolution of your theme over time is crucial. Start with your best argument, but be flexible. Do a lot of discovery and embrace the answers that you don't like as the ones that MUST be incorporated into your evolving theme.

In Chauncey's case, it appeared as though the two landlord defendants refused to accept certified mail from the health department. Those letters contained the results of the lead paint investigations by the City. They also contained orders to the defendants to correct the problems. Early on, the theme of the recalcitrant slum lord seemed good.

On further discovery, it turned out that the defendants were retired master chiefs in the Navy. What's more, they seemed like decent men, who had done as good a job as possible on most issues for their apartments. Chauncey's mom described the house as having fresh interior paint and good carpets. We retooled the theme to account for these facts beyond dispute. In the end, we selected an aggressive legal argument on the existence of building and housing codes as establishing negligence per se, without banking on a type of "traditional duty and breach" argument. The added bonus was the ability to present the evidence of certified letters that were declined as icing on the liability cake, not a hard-to-sell primary grounds of recovery.



Lesson Five:

Spend As Much Time Anticipating Defenses As You Do Assembling Your Case

Defense counsel in lead paint cases are good, and getting better. They have refined sophisticated arguments which play to widespread prejudice such as “the apple does not fall far from the tree”. Understanding these typical defenses, and planning on proof to short circuit them, is an essential key to success.

The most frequent defense tactic is to point to parents or siblings with any perceived difficulty as a marker that the lead poisoned child “is just the same as them”. Fight this tactic early and stay focused. Quash subpoenas, challenge the rules for direct medical examinations, and attempt to exclude or limit defense experts who attempt to express these types of opinions.

However, stay focused on the specific arguments that defense counsel is (which become apparent in your experts’ depositions and in their experts’ disclosures). Try and take the argument away or turn it to your advantage. In Chauncey’s case, it became apparent that the defendants would argue that Chauncey’s level of IQ testing was SO LOW, that the lead could not have accounted for all of the change. In other words, he was “cooked to begin with”. Careful work with the neuro-psychologist allowed us to demonstrate that the IQ testing could not be subject to such over-simplification, and that it was the extreme variance between high and low scores that held the secret to seeing the client’s disability.

Lesson Six:

Expertise In Insurance Law and Practice Is Essential

Many solid lead paint cases have resulted in ZERO recovery because of a lack of insurance coverage. Express lead exclusions and, in some states, pollution exclusions may seem to be insurmountable barriers. Do not give up, as there have been successful challenges factually and legally to these defenses. If you are not strong in this area, strongly consider co-counsel on declaratory judgment actions. These issues make for strange bedfellows and you will likely find yourself fighting shoulder to shoulder with the landlord or lead manufacturer.

Also consider the offensive use of insurance issues to augment discovery. Was there exposure over two separate policy periods? Was more than one child poisoned? Do not assume they were the same “occurrence.” Is there coverage available through a property or management company?

In Chauncey’s case, the carrier was able to locate only an excess policy with no underlying policy every having been found. Through research and investigation, we were able to establish that the carrier would have required the underlying coverage to



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have been with them, and ultimately succeed in recovery the full verdict, despite the absence of the underlying policies.

Lesson Seven:
Take Into Account the Possibility of Other Children Being Poisoned At the Property

Lead is a remarkably potent neurotoxin. Very small amounts of lead can cause long term permanent brain damage. If your client lived in a home with a source of lead exposure, most typically deteriorating lead based paint, look hard at the issue of whether other children did or did not have lead poisoning at the same time as your client.

Not all children living in a home develop identical amounts of lead in their bodies. Differences in age, mobility, behavior, and nutrition can all result in one child being severely poisoned and a sibling escaping unharmed.

If blood tests of the other children in the house have been taken by the health department, be prepared to explain any differences in blood lead level between them and the client.

Note in the section above that these siblings may have their own case, and may trigger additional insurance coverage.

In Chauncey's case, several siblings were checked and found NOT to have elevated blood lead levels. This included a young sibling who was captured in a picture sitting on the porch that contained the lead paint hazards. Careful explanation of the absence of lead poisoning for this child was essential to proving that the same paint COULD, and did, result in exposure to Chauncey.

Lesson Eight:
Be Thorough In Proving That the Paint Was Peeling Or Otherwise Accessible

Proof of deteriorated paint, where available, is helpful on a number of important topics, not the least of which is the jury's sense that the landlord was not keeping up his end of the deal. Be creative and work hard to fully develop this proof. Some proof is available from the records of the health department, but requires technical expertise to be able to demonstrate that certain terms of art in hazard assessment clearly establish that the paint was failing. Conversely, some inspections may call paint condition FAIR, which with careful presentation, documents that up to 10% of the paint had already failed.



Do not forget to search for disinterested witnesses who can establish the fact that the paint was peeling.

Do not take “I don’t have any old photographs of the house” as a final answer. In Chauncey’s case, his mom had to be reminded many times to roll up her sleeves and get through the photographs before she finally found a key photo of the front porch which showed peeling paint.

Finally, do not assume that paint has to peel or chip for children to get poisoned. In an important national research paper in 2002, it was documented that there are still 22,000,000 homes in the United States that have lead based paint. One-third of them, over 7,000,000, had dangerous amounts of lead dust in them, despite that fact that the paint on the houses was found to be intact. How can this be? Friction and impact on lead painted doors, windows, floors, etc. can generate huge amounts of lead dust. Know this science and be ready to use it.

Lesson Nine:
Be Ready To Prove Your Damages Case Through Lay Witnesses

As lead poisoned children age, those who have been injured begin to show significant problems in school and home. These problems typically become worse as the child ages. It is not difficult to find teachers, friends, church members, and eventually employers who can provide powerful testimony about how this child struggles.

Expert testimony in this area is essential, most importantly because it answers the question of “what was this child’s potential if he had not been lead poisoned?”. In its own right this testimony can be powerful. However, your expert will probably only have seen this child a couple of times, and lacks the “living with the problem” aspect that lay witnesses can offer. Moms are also essential in this area, but do not put too much on them alone.

In Chauncey’s case, a minister at his church provided Chauncey with a job doing landscaping. His description of Chauncey’s struggles was unassailable and potent. It served as a perfect compliment to the expert and maternal testimony to fill out the big picture of this young man’s profound problems.

Lesson Ten:
Be Passionate About Lead Poisoning or Get Help From Someone Who Is!

Lead poisoning has dominated much of the press in 2007, with concerns about lead painted toys from China. At the same time, multiple long term research programs on lead generate almost daily advancements of our knowledge of lead and its effect on



children. A huge debate rages on lowering the definition of lead poisoning below 10 micrograms per deciliter. Several suits against the lead paint industry have been won or lost recently. What is your state's law? This area is a hard one in which to stay current.

Several important conduits of information about lead poisoning exist that can keep you current and informed. *Mealey's Lead Litigation Journal* provides an excellent monthly national recap, as well as e-mail alerts and a stellar annual conference on lead issues. Public health advocates add to their list serves and blog lead poisoning every single day. Google alerts and PUBMED alert bulletins are all available.

What you do not know can hurt you. Advocates in this field have much important work yet to do and must stay current in order to succeed. To attorneys who do not have the time, understand that there is a network of excellent and dedicated lawyers who do the heavy lifting and can help get the lead poisoned victim some "recovery" from this preventable, but all too frequent, disease.

Mr. Serpe has represented victims of toxic torts and environmental contamination across the country. He has successfully tried lawsuits in state and federal courts. He has resolved lead poisoning cases for victims in Georgia, Missouri, North Carolina, Ohio, and Virginia, and has secured over \$50,000,000 in verdicts and settlements for these clients.

In 1999, he concluded actions for 90 families poisoned at the Abex Superfund site.

Mr. Serpe represents the victims of brain damage from toxic and traumatic injuries. He has commissioned over 200 neuropsychological assessments to document the extent of brain injury and is an expert in demonstrating the extent of a victim's loss.

Mr. Serpe obtained a masters degree in Maritime law from Tulane University. He has been awarded Proctor status from the Maritime Law Association of the United States. He has successfully represented clients under the Jones Act and under the general maritime law.

Mr. Serpe is frequently associated in complex litigation, managing cases with difficult scientific and medical issues. He has experience managing large case cohorts, including the extensive use of database and litigation support software.

He is listed in The Best Lawyers in America ®, and has received an AV rating from Martindale-Hubbell law directory, which is the highest given. He has been named a "Super Lawyer" – among the top 5 percent of lawyers in Virginia- by Virginia Super Lawyers Magazine.

Mr. Serpe is admitted to practice in Virginia, Texas and Louisiana. Mr Serpe has represented clients before the Louisiana and Virginia Supreme courts, and appeared before the Fourth, Fifth and Sixth Circuits of the US Court of Appeals. Mr. Serpe is a frequent lecturer speaking nationally on environmental and personal injury law. Mr. Serpe also serves as a Committee chair, and board member of Lynnhaven River 2007, assisting in Oyster Restoration for the Lynnhaven River.

