

May 16, 2011

United States District Court for the Northern District of Indiana

R.S. et. al. vs. United States of America

Civil No. 2:09-cv-00089-JVB-PRC

Settlement: R.S., cash and structured settlement valued at \$2,714,000.00; mother \$137,000.00

Facts: On February 16, 2007, R.S., a civilian two year old child living in the household of a United States Army Serviceman, was exposed to and contracted the vaccinia virus. As a result of exposure to the vaccinia virus, R.S. developed eczema vaccinatum. He was hospitalized for an extensive period of time in intensive care on mechanical ventilation, and eventually overcame acute respiratory distress syndrome, bacteraemia, renal failure, and associated ailments.

The vaccinia virus is a "live virus" administered as a smallpox vaccine to encourage the body to develop immunity to smallpox. Candidates must be carefully screened before a medical decision is made to give the vaccine.

The plaintiffs alleged that the vaccination was given despite a medical screening (of which there persists a written record) that determined two clear and well recognized contraindications: a) the serviceman had a prior medical history of a skin ailment consistent with being eczema or atopic dermatitis, and b) members of the serviceman's household (in particular R.S., and another child of the serviceman) at the time of the vaccination had a history of suffering with eczema. In particular, R.S. had been hospitalized due to the severity of his eczema before the serviceman's screening and was receiving ongoing treatment for the condition. In sum, the plaintiffs claimed that the serviceman should not have received the vaccine based on his own history, nor should the serviceman have been given the vaccine based on his report of the medical history of the members of his household with whom he was likely to come into contact.

A consequence of giving the vaccine to a person with a history of eczema or atopic dermatitis is that there is a well-recognized likelihood that such a person may develop eczema vaccinatum, which can lead to severe illness or death. Giving the vaccine to a person who has someone living in their household who has eczema or atopic dermatitis is also well recognized to pose a serious risk that the household member will develop eczema vaccinatum. The danger was so well known that the medical personnel at Fort Bliss, where the vaccine was administered, had PowerPoint displays available to present to service personnel and medical staff that clearly discussed the danger. The vaccine manufacturer also provided a clear warning of the danger.

The defendant contended that the serviceman interacted with his family before his scab fell off, or otherwise did not follow specified protocols in interacting with his family.

According to plaintiffs' expert S. Michael Phillips, M.D., FACP, the serviceman likely developed a lesion on some part of his body that he did not know about, such as on his scalp, due to his having a history of eczema related skin problems. In such a case he could transfer the virus to others even though his vaccination site healed.

Injuries to R.S. and his mother: As a result of contracting the vaccinia virus, R.S. developed open sores all over his body, and was hospitalized in intensive care for weeks in a medically induced coma. As a result of the administration of an untried test drug, R.S. miraculously recovered from a condition which otherwise would have certainly ended in death. R.S. has largely recovered, though he still is a year behind developmentally, and is lightly scarred over the majority of his body. Following his release from the hospital, R.S. was in physical and speech therapy for 7-8 months. At present, R.S. is doing well in school.

As a result of contracting the vaccinia virus, R.S.'s mother also became ill, developed sores on her body, was hospitalized, and suffered mild scarring. The horror of what happened to her son caused R.S.'s mother to develop post-traumatic stress disorder, from which she has recovered. As an example of what she went through, after she and R.S. were diagnosed with the vaccinia virus, the two of them were locked together in pediatric isolation for weeks. She could not get away from the smells, the feeling of confinement, the sounds of the life support machinery, or the thought that her son was likely to die.

Medical expenses for R.S. totaled \$639,279.71, and his mother's medical expenses totaled \$44,598.78. All expenses were paid under a military insurance plan and subrogation claims were waived. Choice of law principles required application of the Indiana Medical Malpractice Act and the applicable caps. Pursuant to the Federal Tort Claim Act no jury trial was available to the parties.

Plaintiff Expert: S. Michael Phillips, M.D., FACP, Philadelphia, PA
Defendant Expert: None

Plaintiff Attorney: David W. Holub, Law Offices of David W. Holub, P.C., 8403 Merrillville Road, Merrillville, IN 46410

Defense Attorney: U.S. Attorney Office, 5400 Federal Plaza, Hammond, IN 46320