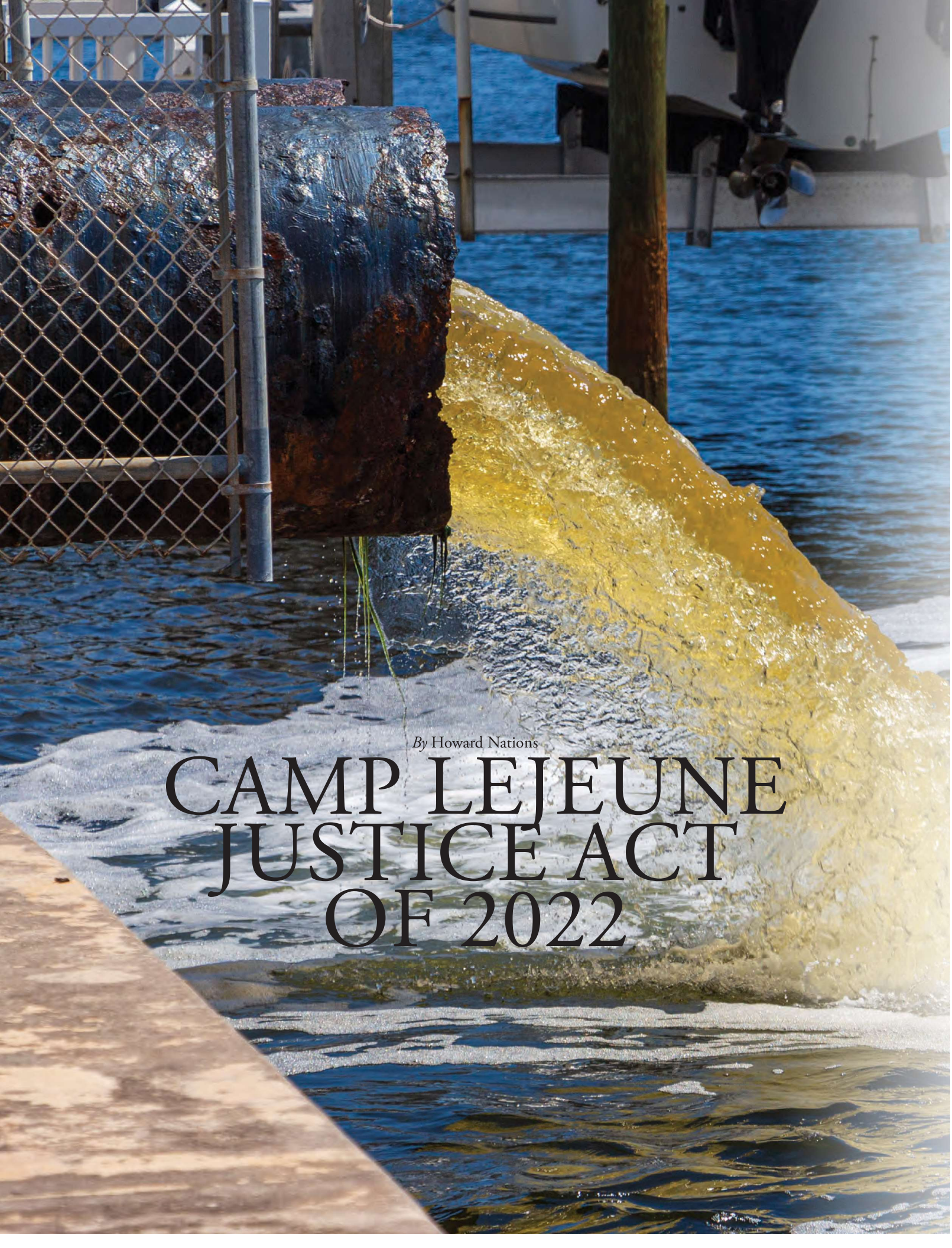

By Howard Nations

CAMP LEJEUNE JUSTICE ACT OF 2022

On August 10, 2022, President Joseph R. Biden signed the Camp Lejeune Justice Act of 2022 into law. The purpose of this long overdue law was to create a federal claim on behalf of veterans, their families, and civilian victims who developed deadly diseases after exposure to the toxic water at Camp Lejeune. The Act creates the right to trial by jury against the United States of America in the Federal District Courts of North Carolina, Eastern Division.

Hundreds of thousands of potential claimants who developed cancer and other deadly diseases after exposure to toxic water at Camp Lejeune were denied recovery for decades by the Federal Tort Claims Act. The battle to circumvent the FTCA and provide the right to seek redress for these veterans and their families has been ongoing since 2009.

The Camp Lejeune Justice Act of 2022 is neither a Federal Tort Claims Act nor a negligence case. It is a precisely identified federal claim for redress for qualifying claimants who meet the burden of proof and general and specific causation standards established in the Act. Damages are identified as "appropriate relief" and there is neither a precise adoption of a wrongful death or survival action nor a damages model.

Federal appellate courts have traditionally held that in the circumstance where there is no applicable federal statute on damages, the Courts will apply the state law of the venue in which the Court sits.

With respect to wrongful death and survival statutes, there is neither a federal statute, nor a common law remedy, leaving North Carolina statutes as the logical choice of law. However, a cautionary tale, in pleading a wrongful death or survival action in a CLJA pleading, do not adopt the North Carolina wrongful death or survival statute in your complaint; adopt only the elements of damages set out therein. The North Carolina wrongful death and survival statutes are negligence-based and adopting a negligence-based statute may carry with it the North Carolina negligence-based defense of contributory negligence.

The only portion of the Federal Tort Claims Act adopted in the Camp Lejeune Justice Act is the requirement that a claimant follow 28 US § 2675 for filing an Administrative Claim with the Department of Navy JAG. This section was intended to provide the U.S. government the opportunity to settle thousands of CLJA claims at the administrative level without formal litigation, thereby providing our aging veterans with a measure of justice and the financial recovery to which they are entitled while reducing the case load in the Federal Courts.

In discussions with the Navy JAG administrative claims team before the passage of CLJA, we advised that thousands of claims would be filed immediately after passage of the Act. At that time the claims review team consisted of ten civilian attorneys with no method for large batch filing and no plans to add either personnel or technology. Department of Navy (DON) seemed to be unaware of CLJA and unprepared for the coming onslaught of claims and failed to make budgetary allocations needed for the personnel, training and technology required to meet the challenges of CLJA.

Confronted with the filing of as many as 250,000 administrative claims and with the inadequacies of staff, technology, and budget, it was obvious that DON had no plan to settle claims. Consequently, there have been no claim evaluations, negotiations, or settlements by Navy JAG, and it is not foreseeable that such a process will be instituted in the future, considering how far behind Navy JAG is in the routine processing of claims.

On April 5, 2023, the Honorable U.S. District Judge James C. Dever III held an initial status conference with counsel to discuss numerous topics involved in initiating CLJA litigation. Judge Dever's command of the facts and plans for expediting cases indicated that the Eastern District of North Carolina Judges have devoted considerable time to developing a strategy for managing these cases. Judge Dever left no doubt that this docket will be efficiently run by the Judges with the intent of administering justice to both the federal government and the victims in these cases.

In a joint order, the judges solved the limitation on out-of-state attorneys practicing in the Eastern District in the number of cases they can prosecute, by permitting pro hac vice appearances in each case when accompanied by a special appearance and a $100 fee for each plaintiff.

Currently those who are seeking leadership are offering suggestions to the court, from the plaintiffs' viewpoint, as to how to proceed most efficiently with the leadership structure, discovery protocols, stipulations with the DOJ, common benefit considerations, trial tracks for bellwether cases, and a settlement track, which could expedite mediation and resolution of these cases.

Judge Dever was concerned by the estimate that one million people were exposed to toxins between August 1, 1953, and December 31, 1987. Fortunately, statistics suggest that a comparatively small percentage (15%) of the million who were exposed have developed a qualifying disease as a result of such exposure.

There are an estimated 350,000 to 400,000 CLJA claims under contract. It is likely that less than half of those potential claimants will have a qualifying injury that is supported by the requisite scientific proof of causation. This would make the number of qualified claims closer to 150,000 to 200,000. Judge Dever will be pleased to know that, with the cooperation of all parties, in the spirit of compensating those who qualify, it will take less time than the duration of the Roman Empire to conclude this litigation.

The Department of Justice defense team, headed by Senior Trial Counsel Adam Bain, will defend The United States of America in cases filed in federal court. Mr. Bain's experience and in-depth knowledge of these cases should help in creating stipulations, precise pleadings, discovery protocols and other agreements to expedite the Tier One cases through the bellwether and the matrix processes to achieve resolution.

Since many of the Federal Tort Claims Act defenses

are removed by the CLJA, the defense will focus on lack of scientific support on general and specific causation, multiple other potential sources of the specific disease in question, failure of proof on water modeling, and a plaintiff's inherent difficulty in proving factual events that occurred between 36 and 70 years ago. This will be particularly challenging in death cases.

CLJA has a unique burden of proof. The plaintiff must produce evidence that it is as likely as not that one or more causal relationships exist between exposure to the water at Camp Lejeune and harm to the plaintiff.

It is important to note that since this is not a negligence case, the defenses of comparative fault and contributory negligence do not apply. For example, if a plaintiff proves and the jury believes the causal relationship between exposure to the benzene in the Camp Lejeune water and his harm, and the defense produces evidence that the plaintiff had multiple exposures to benzene after retirement, the plaintiff will prevail unless the jury finds that the subsequent post- retirement exposures were the sole producing cause of the harm.

On the issues of general and specific causation, the plaintiff has the reduced burden of proving that it is as likely as not that there was a connection between the plaintiff's exposure to the toxins in the water at Camp Lejeune and the resulting harm. By adopting the epidemiological standard "as likely as not" into the burden of proof, numerous diseases fit within the lesser burden of proof, which would not have been covered under the traditional requirement of "more likely than not."

Presumptive causation: the oft-repeated statement that Tier One cases have a presumption of causation which negates the necessity of expert testimony is a myth. There is nothing in the Camp Lejeune Justice Act of 2022 which provides the basis for presumptive causation for Tier One or any other case. The confusion arises from the VA presumptive causation in application for either healthcare benefits or disability. Obviously, the causation standard to qualify for VA health or disability benefits is not the same causation as the standard to recover damages from the United States government in a CLJA case.

The absence of presumptive causation is not a hindrance to the plaintiff because we will elicit expert testimony regarding the nature and extent of plaintiff's injuries as an important part of damages proof. Proving causation gives medical and epidemiological experts the opportunity to expound on the extraordinarily dangerous toxins and their adverse medical effects on the human body.

The Agency for Toxic Substances and Disease Registry is a federal agency under the Center for Disease Control, which is within the Department of Health and Human Services. ATSDR has responsibilities for management of toxicological databases.

ATSDR is not the final word on causation primarily because the studies that it cites are comparatively old and many have been replaced by newer studies that ATSDR did not consider when they published their ratings in 2017.

ATSDR often did not rate a disease because the number of studies at the time were insufficient. ATSDR often chose not to review a disease, including some that are currently relevant. ATSDR is expected to issue an updated version of its findings in 2023.

We will see clients with a good case, and a good story to tell, who are in need of justice but don't qualify under ATSDR standards. We owe it to them to do an independent scientific update, and if warranted by the facts, treat the case as a one-off, hire an epidemiologist, and an appropriate expert and prepare the case for trial.

Additional sources for scientific research that will help our experts get past Daubert are IARC, The International Association for Research on Cancer; EPA, National Toxicology Program, Institute of Medicine, CERCLA, and The National Priorities List. These organizations are also excellent sources for state-of-the-art researchers, and expert witnesses. While ATSDR is important, it is a good starting point rather than a stopping point for scientific research to support our clients' cases. Tier One is not the definitive dividing line for presenting a qualifying case for our clients.

Tier One for our purposes refers to bladder cancer, cardiac birth defects, kidney cancer, kidney disease, leukemia, liver cancer, multiple myeloma, Non-Hodgkin lymphoma, Parkinson's disease, and systemic sclerosis/scleroderma.

The Camp Lejeune Justice Act of 2022, prosecuted in the Federal District Courts of EDNC before a jury of our clients' peers is complex litigation at its highest level, with justice for our most deserving Americans, riding on the skills of our top plaintiffs' lawyers, pitted against DOJ's finest, highly skilled attorneys. Additionally, the plaintiffs' attorneys will have to risk millions of dollars of their own money to prosecute these cases, and if they don't win, they get no fee and lose the money and valuable time that they invested in the case.

This is important because in the legislation currently pending before the United States Congress, the underlying premise to putting a cap on attorney's fees is that these are very simple cases; that the plaintiff need only file a claim to receive a check and that the attorneys should be minimally compensated, if at all, for setting aside large portions of their practice in order to focus on these cases.

The United States Congress, on a bipartisan basis, overwhelmingly passed the Camp Lejeune Justice Act of 2022 without a cap on attorney's fees. The issue of attorney's fees was discussed in committee where the same frivolous arguments that are made for the current legislation were summarily defeated.

Despite the bipartisan support of this bill in both houses of Congress (Senate vote: 84-16) one Senator saw this as an opportunity to attack trial lawyers and he introduced legislation to put a cap on attorney's fees on the premise that there was no work for lawyers to perform since this was a simple settlement. In fact, he argued, military servicemembers can make these claims on their own without a lawyer. His assumption that this was a simple "fill out a form and get

a check settlement" is belied by the fact that to date, there have been more than 60,000 Administrative claims filed with Navy JAG and not one penny has been paid in settlement, nor is there a mechanism in place to accommodate settlement negotiations.

The real purpose of the current proposed fee cap legislation is to reduce fees to trial lawyers out of the fear that those fees will lead to substantial contributions to the Democratic Party. This is not true because it took the support of 34 Republican Senators to pass this legislation and our clients and attorneys will fully support each fine politician, Republican or Democrat, who supported this important legislation for our veterans and their families and for civilian plaintiffs.

The claims supporting caps are without merit and that is unfortunate that the CLJA, which was promulgated by trial lawyers for the benefit of our clients and passed by truly patriotic Congressmen, has become a political football in an effort to reduce contributions to the Democratic Party. Fortunately, there are numerous Republican and Democratic members of Congress who put the best interests of the veterans ahead of the political ambitions of a few congressmen.