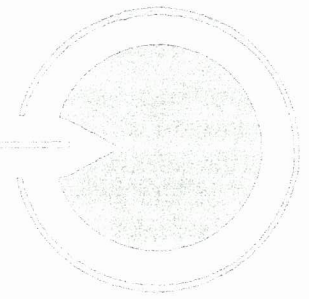


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CALIFORNIA JUDGE THROWS OUT AMALGAM SUIT!

After considering evidence and extensive arguments from attorneys for the plaintiff and defendants, the judge in the California case of *Tolhurst v. Johnson & Johnson Consumer Products, Inc.* ruled that it is *not* generally accepted in the scientific community that mercury from amalgam dental fillings is capable of causing Guillain-Barre' Syndrome (GBS), the affliction allegedly suffered by plaintiff Tolhurst. The judge therefore suppressed any evidence at trial demonstrating that mercury was the cause of the plaintiff's illness. The evidentiary hearing was held in response to a defense motion based on the *Frye* rule. This rule requires a plaintiff to demonstrate that the scientific tests, techniques, and methods on which he/she intends to rely at trial are "sufficiently established to have gained general acceptance in the particular field in which it belongs." The test emphasizes a comparison of the members of the relevant

scientific community who do or do not consider the proposed scientific test, method, or technique as valid and reliable.

At the *Tolhurst* evidentiary hearing, the defendants produced seven expert witnesses who testified there was not "general acceptance" in the scientific community that mercury could precipitate a case of GBS. They uniformly testified that only the existence of repetitive epidemiological human studies could confirm the existence of such a causal relationship. No epidemiological study has considered this issue.

The plaintiff countered that prospective epidemiological studies demonstrating a statistical correlation between mercury exposure and GBS were impossible to conduct, and that existing published animal studies and human case reports demonstrated the causal relationship. The plaintiff's attorneys, James M. Love and Robert E. Reeves, argued that a proper epidemiological study replicating the plaintiff's exposure to mercury would require the administration of up to 19 milligrams of mercury vapor to a human cohort in order to prove that such a causal relationship existed. Of course, such a study would be unethical and illegal. One defense expert ignored the ethical and legal considerations and proposed the administration of varying doses of mercury vapor to a human cohort followed by an investigation of whether statistically significant incidents of GBS ensued! This approach would not only be unethical, but the extremely low incidence of GBS would necessitate the use of a huge cohort of human study subjects to achieve epidemiologic accuracy.

The plaintiff's case was supported by two expert witnesses who testified that the medical literature supported the generally accepted view that mercury could cause GBS. At the invitation of the court, the plaintiff also submitted several affidavits ("declarations") from board certified toxicologists and neurologists who adhered to the view that such a causal relationship existed. The

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plaintiff's limited funding precluded the personal appearances of these witnesses at the evidentiary hearing.

The judge was apparently influenced by the sheer number of expert witnesses produced by the defendants, as well as the defense arguments that only epidemiological studies should be considered. The judge's written opinion closely tracked language reflected in the defendants' legal briefs, which asserted that only statistical correlations demonstrated in repetitive human epidemiological studies could confirm the existence of a causal relationship. He apparently ignored that animal studies and numerous published case reports demonstrating that mercury could induce GBS. He also apparently ignored the numerous declarations signed by toxicologists and neurologists supporting the plaintiff's position.

The *Frye* rule presents a substantial obstacle for plaintiff's seeking redress from harm caused by amalgam mercury. The rule requires the litigants to present a "nose count" of adherents to a particular scientific position. The rule de-emphasizes consideration of the quality of the scientific evidence on which those expert witnesses base their opinion. Of course, wealthy amalgam manufacturers will always be able to afford the retention of numerous expert witnesses to testify in support of their position on the amalgam issue.

In the relatively recent case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993), the U.S. Supreme Court rejected the rigid *Frye* rule on the ground that the test was at odds with the "liberal thrust of the Federal Rules of Evidence and "their general approach of relaxing traditional barriers to opinion testimony." "That austere standard," said the court, "absent from and incompatible with the Federal Rules of Evidence, should not be applied in Federal trials." Several states have followed suit and chosen to abandon the *Frye* test. One state that abandoned the *Frye* rule stated that "[w]e recognize, too, that because of the extremely high level of proof required before scientists will accept a new theory... plaintiffs in toxic-tort litigation, despite strong and indeed compelling indicators that they have been tortiously harmed by toxic exposure, may never recover if required to await general acceptance by the scientific community of a reasonable, but as yet not certain, theory of causation." *Rubanick v. Witco Corp.*, 593 A.2d 733, 739 (N.J. 1991). Unfortunately for plaintiff Tolhurst, the California Supreme Court confirmed in 1994 that it would continue to adhere to the *Frye* rule.

Increasing numbers of dental patients are expressing the desire to file lawsuits based on injuries that they feel are caused by exposure to the mercury contained in dental amalgam. These patients should be made aware of the difficulties in doing so. At the very least, a fair

amount of funding must be available, even if attorneys willing to take on these difficult cases on a contingency basis are available. It is absolutely essential that plaintiff attorneys are very familiar with the scientific and regulatory information on dental amalgam and amalgam mercury. Further, the proper expert witnesses must be available and well prepared to testify.

The good news is that there is increasing scientific documentation challenging the safety of amalgam mercury, convincing a widening segment of the medical scientific community that amalgam mercury presents a potential for harm to the patient. Additionally, the recent federal court decision that FDA classification of dental mercury and amalgam alloy does not preempt state court actions seeking redress for personal injuries resulting from exposure to amalgam mercury eliminates an important defense that was previously available to the amalgam manufacturers.

PUBLIC INCREASINGLY AROUSED ON DENTAL AMALGAM!

In recent months, increased public activity on the dental amalgam controversy has appeared. An organizational meeting of the "Consumer Dental Choice Project (CDCP)" was held in August. This group consists of a coalition of a number of concerned citizens organizations, along with a prestigious Washington, DC law firm. The citizens groups include the long-standing "Defense Against Mystery Syndromes (DAMS)", the large and influential "Citizens for Health", and the effective "Citizen Advocacy Center." Attorneys Charlie Brown, Jim Turner and David Swankin of the Swankin and Turner law firm provide extensive expertise in dealing with state Attorneys General and government agencies. These attorneys have stated that their intention is to work with and assist other attorneys in local situations, as well as with attorneys having special expertise and experience in the dental amalgam issue.

The CDCP has outlined a broad plan to address the problems involved with the dental amalgam controversy. Their first goal is to try to convince the state Boards of Dentistry to cease their attacks on mercury-free dentists. This initiative has already begun by providing pertinent information on the subject to the Anti-Trust divisions of the State Attorney General Offices.

Financing of the project is through individual contributions from concerned citizens and health professionals, as well as grants from foundations. Anyone interested in participating may contact: Consumer Dental Choice Project, c/o Swankin & Turner, 1424 Sixteenth St., NW, Suite 105, Washington, DC, 20036. Fax: 202-265-6564.