

Mercury Dental Fillings as an Emerging Toxic Tort

By Charles G. Brown

Author's Note: The issue of mercury in dental fillings stayed hidden for years because of extraordinary steps by organized dentistry, including use of the misnomer "silver fillings" and a gag rule prohibiting talk about mercury in the American Dental Association's code of ethics. But the secret is emerging in the Northwest: the OR Attorney General told its dental board it may not, consistent with the First Amendment, enforce that gag rule, and the Federal Trade Commission took a similar step in MT. WA's dental board now has a dentist who advocates that her profession cease using mercury amalgam.

An announcement by the U.S. Food and Drug Administration (FDA) that the mercury in amalgam dental fillings may cause neurological harm to children and fetuses may propel this device into the toxic torts arena.

On June 3, 2008, the FDA issued, via its website, this stark advisory: "Dental amalgams contain mercury, which may have neurotoxic effects on the nervous systems of developing children and fetuses." www.fda.gov/cdrh/consumer/amalgams.html

Dental amalgam – promoted under the deceptive term "silver fillings" by the American Dental Association (ADA) – is mainly mercury (43 to 54%). The fillings constantly emit toxic mercury vapors. The moniker "silver," plus a gag rule in the ADA's Code of Ethics directing dentist silence on amalgam, has largely kept organized dentistry's mercury secret under wraps; a Zogby poll in 2006 showed that three-quarters of Americans could not name the major component of amalgam. www.toxicteeth.org/natcamp_fedgovt_zogby_poll_2006.cfm

Scientists universally recognize mercury as a virulent reproductive toxin and neurological toxin. The policies of the Food and Drug Administration generally reflect that; the agency bans all mercury in animal drugs, bans topical applications in humans, limits its use in vaccines, and warns against its presence in fish.

On dental mercury, though, the agency dodged its responsibility for years, refusing to classify amalgam and leaving it in a regulatory netherworld. A lawsuit filed by several consumers groups, state officials, and injured victims, with the undersigned as counsel, changed that. In settling, FDA agreed (a) to classify mercury amalgam by July 2009, and (b) to change its website, withdrawing all claims of safety and replacing it with advisories about concerns of mercury's impact in pregnant and nursing women, children, and those already mercury toxic from other sources. www.philly.com/inquirer/world_us/19594099.html

Despite FDA's silence until June 2008, other international, U.S., and state agencies were weighing in against mercury amalgam. Canada advised its dentists way back in

1996 not to place amalgam in children, pregnant women, or those with kidney problems or mercury hypersensitivity; www.mercurypoisoned.com/health_canada.html The U.S. Public Health Service in 1999 said that amalgam is one of the two major sources of mercury (the other being fish) for Americans not occupationally exposed, and the U.S. Centers for Disease Control stated in 2007 that dental amalgam is a “major source” of mercury exposure. www.cdc.gov/exposurereport/ (at pp 45-48) and www.atsdr.cdc.gov/toxprofiles/tp46.html The State of California has warned since 2003 that exposure to dental mercury can cause birth defects, a notice that dentists are supposed to post but generally don't.

Most vulnerable to exposure are pregnant women, for the effect on the fetus, and children, whose brains are still developing. Being liquid at room temperature, mercury is the most volatile of the heavy metals. Hence, whereas exposure to lead is most acute from a child swallowing the toxin (e.g., by chewing on lead-based paint), mercury's harm is through the vapors. Mercury goes from the mother's body (including from her teeth) to the uterus, and from the lactating woman to the baby through the breast milk. Mercury toxicity is so prevalent that the Environmental Protection Agency warned in 2004 that fully one in seven women of childbearing age already has so much mercury she is at risk of having a brain-damaged child. www.treatycouncil.org/new_page_5211421311.htm

One would have thought that this summer's advisory by FDA that mercury from amalgam can cause brain damage to children and fetuses would cause a switch in dental practices, at least for children and young women. One would think, too, that dentistry's leading trade group, the American Dental Association, would urge dentists to abstain from giving these fillings to children and young women, or at least to give stark warnings – if for no other reason than to protect their legal position. Instead, the ADA has, recklessly and irresponsibly, argued with FDA, and advised dentists to treat the advisory as *obiter dictum*. Meanwhile, the ADA continues an intense lobbying campaign to get the FDA to back away from protecting consumers when it classifies the device in 2009. For a baby permanently injured in the womb from mercury exposure from its mother's amalgam, or a child suffering neurological damage via a direct exposure, waiting that year will be too late.

That the ADA seems wedded to mercury fillings is more than illusory. Mercury amalgam was the foundation-stone of this trade group, who broke from medicine over this issue in the middle of the previous century. Hence, when dentists praise amalgam because “it's been used for 150 years,” a commonplace defense, dentistry stands out as the only branch of health care endorsing pre-Civil War medicine. The ADA acquired patents on amalgam, an oddity for a professional health group, and for many years received cash from the amalgam manufacturers as part of its lucrative “Seal of Acceptance” program, a system where the ADA acts as the gatekeeper for oral health products and is paid accordingly. By contrast, the American *Medical* Association refuses to take fees for endorsing products, considering the practice to be highly unethical.

Modern dentists increasingly have turned their back on the ADA's pro-amalgam

position. Polling shows that up to one-half, and certainly over one-third, of dentists never place amalgam any longer. That's the good news, and it is to the credit of those dentists. It is also good news for trial lawyers, because as the pro-mercury dentists dwindle, their courtroom defense of "standard in the community" is withering away.

Those of us in the upper-middle-class rarely see a mercury filling today; many think this archaic device is already in the dustbins of history. Nothing could be further from the truth. Mercury is still the device of choice for assembly-line clinics and by cut-rate or lazy dentists. The losers are institutional recipients (e.g., soldiers and sailors, prisoners, Native American reservations, working families with limited or no insurance, and Medicaid recipients. NAACP witness Emmitt Carlton, a Washington lawyer, testified before Congress that American dental care is "choice for the rich, mercury for the poor." www.mercurypoisoned.com/hearings/carlton_statement.html That the class and race aspect of the problem is increasingly stark is highlighted in resolutions by both the NAACP and the National Black Caucus of State Legislators.

The mercury secret was maintained with full government acquiescence. The ADA's best friend in Washington, until 2008, was the FDA, which, in defiance of its duty to classify all devices, simply refused to classify mercury amalgam. Ordered to classify all devices by Congress after the Dalkon Shield disaster of the 1970s, FDA duly classified (among many others) every single dental material, except the one it found too hot to handle. Through petitions, Congressional hearings, and media rants, FDA refused to budge. So a coalition of consumers groups, state officials, and injured individuals sued FDA in December 2007, with the resultant settlement discussed above.

According to filings with the states' mercury consortium, NEWMOA, the five major manufacturers of mercury amalgam in the U.S. market are Danaher (through its Kerr subsidiary), Dentsply, Ivoclar, Goldsmith & Revere, and SDI Ltd. (the latter based in Australia, the others being American companies). The U.S.-based companies all make the other filling materials, including composite resin, which is interchangeable with mercury amalgam – hence could stop making amalgam and still have plenty of devices to sell to dentists. Wall Street firms increasingly are noticing the issue, and signaling danger for Danaher and Dentsply if they persist in selling amalgam. A report by J.P. Morgan predicts class-action lawsuits. www.toxicteeth.org/jpmorgam-2008.pdf

Among those most harmed by mercury exposure are dental workers in offices of dentists who continue to place amalgam. A real opportunity exists for worker third-party lawsuits against the manufacturers; an analogy is flight attendants forced to breathe second-hand smoke in the pre no-smoking days.

A pair of recent cases from the Third and Sixth Circuits opens the door to sue amalgam manufacturers and dentists, respectively.

Fellner v. Tri-Union Seafoods, ___ F.2d ___ (3d Cir. 2008) held that a class-action suit on behalf of victims of mercury in tuna may proceed, overturning a District Court opinion that FDA had pre-empted private tort cases. The Court of Appeals found that FDA

lacked a “pervasive regulatory scheme” regarding mercury in tuna. Since FDA hasn’t even classified mercury amalgam, it clearly has no “pervasive regulatory scheme” for mercury amalgam.

Barnes v. Kerr Corp., 418 F.3d 583 (6th Cir. 2005) disallowed a claim by a dentist severely harmed by years of mercury exposure because he had been repeatedly warned by the manufacturer. The case opens up, rather than closes off, causes of action by consumers, for two reasons. First, dentists clearly should pass those warnings onto consumers, but most are not doing so. Second, manufacturers know or should know that dentists are not apprising consumers. Surely no pregnant woman warned about fatal harm to her baby, and apprised of the resin alternative, would knowingly accept a mercury filling!

The best analogy may be asbestos litigation. For existing asbestos, whether to remove it or encapsulate it was debatable; what was not debatable was that its continued use in new buildings must stop. Likewise, whether to remove the amalgam or leave it implanted in the mouth is a judgment (both have risks, one from the continued emission of mercury, the other from acute emissions when being removed). But for dentists to continue to implant it in young women and children, when alternatives like resin are interchangeable, is unacceptable.

Ed. Note: Charles G. Brown is National Counsel for Consumers for Dental Choice, Washington, D.C. www.toxicteeth.org