

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

LISA SYKES and SETH SYKES,
individually and as parents and
natural guardian of Wesley Alexander Sykes,
a minor child,

Plaintiffs,

v.

Case No. 3:07CV660

BAYER CORPORATION,

Defendant.

BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR LEAVE
TO FILE AMENDED COMPLAINT

Plaintiffs have moved for leave of Court to amend their complaint, clarifying their claims against Bayer and adding additional defendants. In support of that motion, Plaintiffs state as follows:

FACTS BEING ALLEGED

Plaintiffs allege that Wesley Sykes was mercury poisoned, resulting in neurological and other injuries that have left him developmentally delayed and autistic. Mercury is one of the most toxic poisons known to man, and since it is an element, it can be very difficult for some children (and adults) to eliminate the mercury that they inhale, ingest and have injected into their bodies. When, because of genetic susceptibility or other factors, an individual is unable to excrete the mercury they are exposed to, that mercury is deposited in various tissues in the body, including the brain, where it causes cell death and destruction.

The younger the child, the more susceptible that child is to being injured by mercury exposure, and fetal exposure is the most dangerous of all. It is for this reason that warnings have been issued telling pregnant women to limit their consumption of fish that contain high amounts of mercury.

When Wesley was a fetus, his exposure to mercury came from several sources, but the largest sources were clearly the Rhogam that was injected into Wesley's mother at 28 weeks of gestation and the mercury that Lisa was exposed to from ingesting fish, dental amalgams and breathing polluted air from the coal burning power plant operated by Dominion Resources, Inc. Lisa ate very little fish while pregnant and had only a few amalgams, so her main exposure to mercury came from breathing the pollution emitted by the Dominion Resources plant and the Rhogam injected into her.

After he was born, Wesley continued to be exposed to mercury from a limited number of sources. The main source was breathing the polluted air that contained mercury and the Thimerosal-containing childhood vaccines he received. The vaccine manufacturers have been dismissed from this case because of what Plaintiffs believe to be Judge Stengel's incorrect interpretation of federal preemption laws and the National Vaccine Injury Compensation Act.

What Plaintiffs are now seeking to do is place the blame for Thimerosal being in childhood vaccines exactly where it belongs, on Eli Lilly and any other manufacturers of Thimerosal, who, knowing that this so-called preservative was being formulated into vaccines and other products, nevertheless failed to EVER test Thimerosal and who concealed the known risks of using their product in these products.

The difficulty of a case like this is that Plaintiffs cannot leave empty chairs at the defense

table. All of the defendants who were responsible for exposing Wesley (and all of our children) to extraordinary amounts of mercury need to be held accountable for their negligence. None of them should be allowed to sit back and say someone else's mercury caused the harm, or that they didn't know about the cumulative exposures to mercury that fetuses and young children were experiencing.

MERCURY FROM POWER PLANT EMISSIONS

The evidence is now becoming overwhelming that coal burning power plants' emissions are causing neurodevelopmental problems. Attached to this brief are three studies linking mercury vapor exposure from environmental sources (i.e. power plants) with autistic disorders:

(A) Published Mercury Exposure & Autism in Texas

"Data source and sample data regarding environmentally released mercury for each county were obtained from the United State Environmental Protection Agency Toxics Release Inventory (TRI) (USEPA-TRI, 2004). TRI collects information about chemical releases and waste management reported by major industrial facilities in the US. The TRI database was established by Section 313 of the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA). Under EPCRA, industrial facilities in specific sectors are required to report their environmental releases and waste management practices annually to the EPA. Facilities covered by this act must disclose their releases to air, water, and land of approximately 650 toxic chemicals, as well as the quantities of chemicals they recycle, treat, burn, or otherwise dispose of on-site and off-site. The current analysis uses reports of pollution that industrial facilities provided to TRI for the calendar year 2001. The total number of pounds of environmentally released mercury was obtained for each county."

"There was a significant increase in the rates of special education students and autism rates associated with increases in environmentally released mercury."

(B) Published Mercury Exposure & Autism in California

This study was supported by the US Centers for Disease Control and Prevention (CDC)

"Exposure assessment: hazardous air pollutant concentrations.

The U.S. EPA estimates HAPs concentrations using a Gaussian air dispersion model that combines emissions inventories from mobile, point, and area sources with data on local meteorology, chemical decay rates, secondary formation, and deposition (Rosenbaum et al. 1999; Woodruff et al. 1998). Mobile sources include motor vehicles, airplanes, trains, and ships, whereas area sources include emissions from smaller stationary sources such as dry cleaners, gas stations, and residential use of products, and point sources are large industrial manufacturing facilities. Estimated concentrations are summed across these sources and background levels from "clean air locations" are added. Annual average HAPs concentration estimates are available at the U.S. census tract level for 1990 and 1996."

This study shows when comparing children exposed to high levels of mercury in comparison to low levels of mercury, the adjusted risk of child being diagnosed with an autistic disorders was significantly ($p < 0.05$) about doubled (adjusted odds ratio = 1.92 [95% Confidence Interval = 1.36-2.71]).

(C) Mercury Exposure & Autism in Louisiana

"Up to 75% of the mercury found in the atmosphere is from anthropogenic sources (Slemir & Langer 1992). Chan et al. (2003) lists base metal mining and smelting, gold mining, chlor-alkali production, biomedical waste incineration, fossil fuel burning, and

municipal waste incineration as some of the major point sources of mercury contamination at both local and global scales. In the United States, fossil fuel combustion, specifically coal fired power plants, are responsible for up to 54% of emissions, with other industrial activities mainly chlor-alkali plants accounting for 34% (Hylander 2001). Figure 2 illustrates the emissions attributed to major United States anthropogenic sources, as reported to the Environmental Protection Agency."

"As part of the Community Right to Know Act, the EPA collects emissions data from industries, and makes the information available through their Toxic Release Inventory (TRI) explorer, found on their website: <http://www.epa.gov/TRI>. Each facility self reports the amount of emissions of numerous hazardous chemicals in pounds for the entire year. For this study, the total air emissions within each parish were calculated by adding the individual facility emitters. The reported total is in pounds and includes mercury and mercury compounds. Forty-eight facilities in 20 parishes reported emitting mercury or mercury compounds during the year 2002."

"This study, through the use of Pearson's correlation and multiple regression, associates mercury levels in fish and air emissions, to developmental disorders such as autism, learning disabilities and developmental delays that are recorded in Louisiana's public schools (LDE 2002). Socioeconomic variables such as ethnicity, poverty levels, and population density were used as covariates with mercury to understand their potential influences on the relationship. This study found significant associations between mercury and some of the developmental disorders, specifically autism and developmental delay."

In 2002, researchers from Harvard Medical School conducted an epidemiological study of low-dose mercury (Hg) exposure and the prevalence of neuro-otological symptoms among 114 primarily school children from gold-mining areas of Ecuador. In the study areas, the sources of Hg exposure included: inhalation of Hg vapors during the burning of Hg, a process used to separate gold particulates from alluvial sediment and rock soil in the mountain, mines and rivers, and possibly, consumption of methyl-Hg contaminated fish from local rivers and domestic chickens and pigs that ate plants/products from Hg-contaminated ground soil. These researchers observed prevalent learning disabilities, attention deficits, and autism among the school children examined.

Subsequently, these researchers published in 2006, "...investigations of Hg exposure and the general neurologic status of Andean children living in gold mining settlements where Hg is used extensively in the gold amalgamation process, we have found elevated levels of Hg in blood (HgB), urine (HgU), and hair (HgH) in the children, particularly in some of the indigenous AmerIndian families who are most active in the gold mining operations. Some children had neurosensory disorders, including brainstem impairment and auditory dysfunction. Others had epileptic seizures, motoric involvement, and autism."

It is important to note that, in addition to Wesley's autistic disorder, he also suffers from profound mental retardation in many aspects of his development. Finally, Wesley has and continues to suffer from very significant motor-coordination problems. In addition to his autism, there are conditions that are well-known adverse effects of mercury exposure, whether from Thimerosal or mercury vapor from environment sources such as coal-burning power plants. For example, Eli Lilly's own Material Safety Data Sheet [MSDS] for Thimerosal, at least as early as 1993, stated that mild to severe mental retardation and motor-coordination disorders are known adverse effects in children and in animals following exposure to mercury.

Attached to this brief as Exhibit F is a very nice study that specifically calculates the neurological damage done to US children from industrial emissions of mercury in dollars. This study was published in the peer-reviewed journal of the *Annals of the New York Academy of Sciences*. The study was supported by the National Institutes of Health.

"We assessed the impact on children's health of industrial mercury emissions and found that between 316,588 and 637,233 babies are born with mercury-related losses of cognitive function ranging from 0.2 to 5.13 points. We calculated that decreased economic productivity resulting from diminished intelligence over a lifetime results in an aggregate economic cost in each annual birth cohort of \$8.7 billion annually (range: \$0.7–\$13.9 billion, 2000 dollars). \$1.3 billion (range: \$51 million–\$2.0 billion) of this cost is attributable to mercury emitted from American coal-fired power plants. Downward shifts in intellectual quotient (IQ) are also associated with 1566 (range: 115–2675) excess cases of mental retardation (MR defined as IQ<70) annually. This number accounts for 3.2% (range: 0.2–5.4%) of MR cases in the United States. If the lifetime excess cost of a case of MR (excluding individual productivity losses) is \$1,248,648 in 2000 dollars, then the cost of these excess cases of MR is \$2.0 billion annually (range: \$143 million–\$3.3 billion). Preliminary data suggest that more stringent mercury policy options would prevent thousands of cases of MR [mental retardation] and billions of dollars over the next 25 years."

FACTS ABOUT DOMINION RESOURCES' POWER PLANT

Plaintiffs' believe and allege that Dominion Resources has been grossly negligent in failing to control the levels of pollution, particularly mercury vapors that have been emitted from their plant in Richmond. Exhibits G, H and I attached to this brief address the huge amounts of emissions that have been coming from this plant.

FACTS REGARDING ELI LILLY (AND OTHER THIMEROSAL DEFENDANTS)

Although Eli Lilly has not yet been joined and no discovery has been conducted in this case, a great deal is known about the many years of actions and inactions on the part of Eli Lilly. Attached as Exhibit J is a pleading from another case that illustrates the history of Eli Lilly's negligence, and Plaintiffs would maintain that this potential defendant owed a duty to Wesley and all children receiving Thimerosal-containing products, including those received by Wesley Sykes; they breached their duties; and their breaches were a proximate cause of Wesley's injuries.

THE LAW REGARDING ALLOWING AMENDMENTS BEFORE TRIAL

FRCP 15 addresses the issue of amending pleadings:

Rule 15. Amended and Supplemental Pleadings

(a) Amendments Before Trial.

(1) *Amending as a Matter of Course.* A party may amend its pleading once as a matter of course:

(A) before being served with a responsive pleading; or

(B) within 20 days after serving the pleading if a responsive pleading is not allowed and the action is not yet on the trial calendar.

(2) *Other Amendments.* In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave [emphasis added]. The court should freely give leave when justice so requires.

(3) *Time to Respond.* Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 10 days after service of the amended pleading, whichever is later.

This case was recently transferred to this Court from Pennsylvania, and Defendant Bayer has moved to dismiss the remaining claims that are based on Virginia law. The primary purpose of amending the complaint as to Bayer is to make sure that the complaint does not misstate Virginia law. For instance, in its Rebuttal Brief, counsel for Bayer stated that Virginia does not

recognize strict liability. That is precisely one of the reasons for seeking leave of court to amend the complaint, so that the claims are properly made under Virginia law, alleging negligence and breach of warranty claims.

With regard to adding other defendants, FRCP 20 provides for permissive joinder of parties:

Rule 20. Permissive Joinder of Parties

(a) Persons Who May Join or Be Joined.

.....

(2) Defendants.

Persons — as well as a vessel, cargo, or other property subject to admiralty process in rem — may be joined in one action as defendants if:

(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all defendants will arise in the action.

The Court has the authority to allow or deny Plaintiffs' request to add other defendants at this time. There is no statute of limitations issue involved here, and clearly Plaintiffs could file a separate action against these other defendants, either in federal or state court. Plaintiffs would urge that, in the interests of justice, the Court allow the joinder of these additional parties at this time so that the cumulative effect of their negligence in exposing Wesley to mercury from a variety of sources can be litigated together.

Counsel for plaintiffs would like to make it clear, however, that adding these defendants will make this litigation even more protracted, requiring more discovery and more time before

Plaintiffs will be prepared to move this case to trial. If Plaintiffs are not going to be allowed adequate time to conduct such discovery that is necessary, then Plaintiffs would prefer that their motion to add defendants not be granted, and they will pursue these defendants in other litigation.

Plaintiffs are seeking recovery for the terrible injuries suffered by Wesley Sykes, but they also believe that they are pursuing justice on behalf of the staggering number of children who have been afflicted over the last decade and a half with neurodevelopmental disorders, including autism. Plaintiffs firmly believe that reasonable discovery will allow them to make it clear that all of these defendants were grossly negligent in exposing Wesley and all American children to intolerable levels of mercury. The CDC has issued an alarm notice advising that 1 in 166 children are autistic and 1 in 6 suffer from some neurodevelopmental delay or disorder. These figures are staggering, and yet we continue to inject pregnant women and children with Thimerosal-containing flu vaccines, and we continue to allow mercury to be spewed into the air, and now we are being mandated to use mercury containing light bulbs that will be finding their way into our landfills and water and fish. This insanity has to stop, and if Wesley's case will help to stop it, then these Plaintiffs will have some consolation for the nightmare they have gone through.

Respectfully submitted
this 31st day of January, 2008.

LISA SYKES, et al.

/s/Clifford J. Shoemaker
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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of January, 2008, I will electronically file the foregoing with the Clerk of Court using the *CMIECF* system, which will then send notification of such filing to the following:

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