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Personal Care Products and Chemicals of Concern: The Talc-Cancer Lawsuits

The talc-cancer link lawsuits continue and though there have been three major court findings holding *Johnson & Johnson (J&J)* responsible for producing and selling products in which the plaintiffs claim *J&J* had prior knowledge could be harmful to consumers, the entire strength of the case against them remains murky at best--which is exactly the reason attorneys for *J&J* are appealing all three lawsuits and may well win on those appeals.

There are two major reasons making the cancer-talc link lawsuits murky. The first is that scientific findings do not speak to cause-and-effect, only to the statistical likelihood that two variables are correlated or connected. And even when a study or several studies find a strong probability of a connection, even this is far from being definitive--especially in the early stages of investigation prior to multiple studies having been conducted under a variety of conditions. The reason is because changing the study design and the methodology (the methods in which data are collected and deciphered) can radically alter the final results, as can where the data are collected, who the subjects are that participate in the studies (gender, age, ethnicity, SES, and so on) and how many subjects there are, as well as how, when, and the length of time the data are collected. Such factors and more can influence the outcome of a study whether the subjects are non-human animals or human ones.

And this is where we are, scientifically-speaking, on the issue of the cancer-talc connection. There are peer-reviewed studies linking cancer to talc that date back decades and there are other studies that have failed to find a statistically-significant link. And while scientists push forward to examine the factors that may be responsible for triggering cancer in some humans who use talc, depending on what side of the issue you are on, you can either see the scientific evidence as strong enough or view the current body of scientific findings as one in which the jury is still out (or should be). Either way, however, scientific evidence does not address causation, only a

statistical probability of the likelihood that the two factors (in this case, the use of talc and contracting cancer) are related. Which brings us to the second issue...

The second issue surrounding the strength of these lawsuits concerns the way in which the U.S. court system is currently structured when it comes to toxic tort cases.

In toxic tort litigation, the plaintiff must prove that the toxic substance was both the cause-in-fact and the proximate cause of the plaintiff's disease[1]. A plaintiff establishes cause-in-fact by proving that without the defendant's act, the injury would not have occurred[2].

The short answer is that the required legal causation is a much higher bar plaintiffs are required to meet than scientific evidence can usually offer. The reason is because the legal standard of causation is much different than the standard of scientific causation.

Scientific evidence merely demonstrates a *probability* that a given chemical caused a particular individual's disease. Using inductive reasoning, scientists attempt to determine causation through the process of hypothesis building. Scientists then test the generated hypothesis repeatedly to establish a statistic or probability. Epidemiological studies, for example, can establish strong correlations between exposure to a chemical and the occurrence of disease within a certain population. Because it is difficult for toxic tort plaintiffs to meet the legal causation standard with scientific evidence, some courts have relaxed the strict legal standard of causation[3].

However, while changes are starting to occur in courts across the U.S. that lessen the burden to prove causation, "courts still expect plaintiffs to present causation evidence that meets the conventional standard of legal causation". (4)

Plaintiffs in toxic tort cases face a difficult task in attempting to prove that a particular toxic substance caused their particular injury. The etiology of many diseases is unknown and hazardous substance illnesses often lack a physical trauma that marks their onset (5). Factors *other than* the toxic substance may be the actual cause of the disease (6). If the plaintiff was exposed to more than one toxin, he or she must establish *which* toxin caused his or her illness. Second, the plaintiff must show that exposure to the toxin was the *direct cause* of the injury.
Accordingly, the traditional legal standard of causation, which requires direct proof linking the defendant to the plaintiff, can rarely be met in toxic tort cases (7).

For all of these reasons and more it is easy to see why two similar cases against *J&J* were thrown out by the judge last month. Additionally, we can expect *Johnson & Johnson*, and any future corporation selling products where the ingredients have come into question as being potentially harmful, to appeal the court's decision. And there may well be a lot of appealing going on in their future; *Johnson & Johnson* is currently facing 1,700 lawsuits in state and federal courts alleging that the company ignored research suggesting that its talc-based products increased the chance of ovarian cancer, and failed to inform consumers of those risks.

An important issue on the table for those of us who want more information to be made available to consumers about chemicals of concern in their personal care, pet care, and home care

products, as well as their food, is whether a majority of modern-day courts will prove flexible enough to forego the rigid traditional legal standard of causation and to accept sound, peer-reviewed scientific findings as evidence. If this indeed becomes the case and it stands up even in appeal, the floodgates will finally open and Big Food, Big Pharma, and other related Big Chemical companies can expect to be on the receiving end of lawsuits similar to those faced by *Johnson & Johnson*. We may not see this in our lifetime, but then again, who would have expected that so many lawsuits would be filed across the nation against drug manufacturers or that three courts in recent months would have held *J&J* responsible for consumers' health problems?

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[1] W. Keeton, et al., Prosser and Keeton on the law of torts, § 41, 263-264, 5th ed. 1984.

[2] W. Keeton, et al., Prosser and Keeton on the law of torts, § 41, 265, 5th ed. 1984.

[3] Stundtner, E., Proving Causation in Toxic Tort Cases, *Boston College Environmental Affairs Law Review* Volume 20, Issue 2

4 Parker v. Employers Mutual Liab. Ins. Co., 440 S. W.2d 43, 47 (Tex. 1969).

5 Christopher Callahan, Establishment of Causation in Toxic Tort Litigation, 23 ARIz. ST. L.J. 605, 618 (1991); Troyen Brennan, Causal Chains and Statistical Links: The Role of Scientific Uncertainty in Hazardous-Substance Litigation, 73 CORNELL L. REV., 1988.

6 Joshua Muscat & Michael Huncharek, Causation and Disease: Biomedical Science in Toxic Tort Litigation, 31 J. OF OCCUPATIONAL MED. 997, 997, 1989.

7 Stundtner, E., Proving Causation in Toxic Tort Cases, *Boston College Environmental Affairs Law Review* Volume 20, Issue 2
