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# Potential Exposure for Manufacturers and Suppliers of Talcum Powder

Looming Litigation

November 2024

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On Wednesday, 20<sup>th</sup> November 2024, the BBC published an article detailing the group action soon to be commenced in the UK against Johnson & Johnson (“J&J”) for harm allegedly caused by their talcum powder product.<sup>1</sup>

In September, KP Law, who are acting for the group, sent a pre-action letter to J&J, and court proceedings are anticipated to begin early next year.<sup>2</sup> The group is made up of 1,900 potential claimants, including cancer patients – mostly women with gynaecological cancers – as well as their families.<sup>3</sup> Notably, KP Law is made up of several US lawyers who led the US claim against J&J. The claim follows the same premise as its US counterpart – that talc products manufactured by J&J resulted in British consumers developing ovarian cancer or mesothelioma following exposure to asbestos in their talc-based powders. Currently, the firm has created a website to advertise the claim and allow British consumers to register as a potential member of the class.<sup>4</sup>

Given this emerging litigation, the current scientific position on talc powder as well as the UK regulatory framework need to be understood to situate the claim within its broader public health context. Against the backdrop of recent US talc class actions, this article examines the potential causes of action which may underpin a UK product liability group action. Finally, attention is given to the strategies for insurers to adopt to help mitigate any potential exposure.

## 1 The scientific position

The World Health Organisation’s International Agency for Research on Cancer designated talc containing fibrous particles a “carcinogen” and the genital application of any talc powder as “possibly carcinogenic”.<sup>5</sup>

The International Agency for Research on Cancer (“IARC”) has classified talcum powder as a risk factor in ovarian cancer development.<sup>6</sup> The association between talc and ovarian cancer is attributable both to the mineral talc in body powders, which some studies have shown increase ovarian cancer risks by 24-25% in women who use such powders in genital areas, and possible traces of asbestos in talc powder products due to the proximity of the two chemicals.<sup>7</sup>

Despite growing international scientific concern regarding the use of talc powder in body products, the UK scientific position remains unresolved. Cancer Research UK recognises the studies which link use of talc powder on genitals and ovarian cancer risks, but maintains that further research is needed in bigger, higher-quality studies, to test the veracity of such claims.<sup>8</sup>

## 2 UK regulations

While the scientific position is yet to be solidified, strict regulations are in place to preserve the safety of products sold in the UK. The Control of Asbestos Regulations 2012 controls the possible contamination of material with asbestos, and mitigation strategies to ensure the safety of workplaces and employees.<sup>9</sup>

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<sup>1</sup> Charlie Haynes, ‘Women plan UK legal action over talc cancer claims’ *BBC Investigations* (20 November 2024), available at: <https://www.bbc.co.uk/news/articles/c07ng47xv3go>.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> See here: <https://www.kpl.co.uk/product-liability-claims/talcum-powder-claim/#:~:text=A%20journey%20to%20get%20justice%20against%20Johnson%20%26%20Johnson&text=We%20believe%20the%20US%2Dbased,the%20UK%20up%20to%202022>.

<sup>5</sup> Casey Cep, ‘Johnson & Johnson and a New War on Consumer Protection’, *The New Yorker* (12 September 2022).

<sup>6</sup> International Agency for Research on Cancer. [List of Classifications by cancer sites with sufficient or limited evidence in humans, Volumes 1 to 122 \(link is external\)](#).

<sup>7</sup> Terry KL, Karageorgi S, Shvetsov YB, et al. [Genital powder use and risk of ovarian cancer: a pooled analysis of 8,525 cases and 9,859 controls \(link is external\)](#). *Cancer Rev Pres (Phila)* 2013;6(8):811-21.

<sup>8</sup> Cancer Research UK, ‘Can cosmetics cause cancer?’ (1 November 2022) Available at: <https://www.cancerresearchuk.org/about-cancer/causes-of-cancer/cancer-myths/cosmetics#:~:text=Can%20talcum%20powder%20cause%20cancer,causes%20ovarian%20cancer%20or%20not>.

<sup>9</sup> *Control of Asbestos Regulations 2012* (UK).

The Cosmetic Products Enforcement Regulations 2013 governs the manufacturing, importation, sale and marketing of any cosmetic products produced or sold in the UK market.<sup>10</sup> Similarly, the Good Manufacturing Practice for Cosmetics provides guidelines for the production, control, storage and shipment of cosmetic products.<sup>11</sup>

### 3 US talcum powder class actions

#### (A) Johnson & Johnson talc claims

From as early as 2009, claims have been made against J&J in the US which allege that talc products made by the company resulted in consumers developing ovarian cancer or mesothelioma following alleged exposure to asbestos in their talc products.<sup>12</sup>

Despite being unconfirmed by J&J, it remains widely reported that the company's scientists were aware of reports regarding asbestos in talcum powder ("talc") as well as independent concerns about links between talc and cancer, from as early as 1971.<sup>13</sup> In 2020, J&J ended its sale of its talc-based baby powder in the US.

In 2022, J&J announced it would be ending the sale of this product worldwide, despite maintaining that its talc-based product is safe, asbestos-free and does not cause cancer.<sup>14</sup> In 2023, J&J began transitioning its baby powder products in the UK from talc-based to cornstarch.

Currently, there are more than 59,000 pending talc cases against Johnson & Johnson, and the numbers keep growing. To curb this, J&J recently offered \$6.475bn over 25 years to settle all outstanding ovarian cancer talc suits. If accepted, this would resolve most of the claims, but importantly would not apply to the claims of mesothelioma allegedly caused by talc products. The BBC reported the company has set aside \$1bn to address the US talc litigation.<sup>15</sup>

#### (B) Litigation timeline

Johnson & Johnson US talc litigation – recent updates	
May 2024	J&J proposed \$6.475bn settlement for lawsuits claiming talc powder products caused ovarian cancer to be paid out over 25 years and funded by a subsidiary.
December 2023	After litigation resumed in July 2023, J&J settled numerous cases, however the total number of claims continues to grow. By the end of 2023, there were over 50,000 outstanding claims against J&J regarding the alleged link between talcum powder and cancer.
January 2024	J&J agreed to pay more than \$700m to resolve an investigation by more than 40 states into the marketing of talcum powder products. This agreement settles all current and pending state-level suits accusing J&J of concealing the cancer risk of talcum powder products. This does not impact the other 50,000 or so cases consolidated in the federal multidistrict litigation ("MDL").
May 2024	J&J agree to settle almost all outstanding ovarian cancer talcum powder suits for \$6.5bn over the next 25 years. This settlement does not address the claims of mesothelioma allegedly caused by using J&J talcum powder products. A study by the Journal of Clinical Oncology (US) supported a positive connection between the use of powder on the genitals and ovarian cancer.
June 2024	J&J agree to \$700m settlement with coalition of 43 US States over claims that the company misled consumers about the safety of its talcum powder products.

<sup>10</sup> *Cosmetic Products Enforcement Regulations 2013* (UK).

<sup>11</sup> ISO22716:2007 Good Manufacturing Practice for Cosmetics.

<sup>12</sup> Lisa Girion, 'Johnson & Johnson knew for decades that asbestos lurked in its Baby Powder' *Reuters* (14 December 2018).

<sup>13</sup> Casey Cep, 'Johnson & Johnson and a New War on Consumer Protection', *The New Yorker* (12 September 2022).

<sup>14</sup> Clare Ruel, 'Johnson and Johnson end all UK baby powder sales as ovarian cancer claims escalate,' *Insurance Times* (15 August 2022).

<sup>15</sup> Natalie Sherman, 'J&J hopes for deal with third talc settlement' (1 May 2024) *BBC News*, available at:

<https://www.bbc.co.uk/news/articles/cz74jnwk80yo>.

#### 4 Back to Britain – product liability litigation

Given the success of US claimants, there have long been questions about the possibility of replicating these claims in the UK jurisdiction. With the announcement from KP Law that litigation against J&J (UK) is expected to commence at the beginning of 2025, this question has now been answered.<sup>16</sup>

Given the claim is in its infancy, it is useful to illustrate the possible ways in which the claim may be put in UK courts. In the UK, the three main causes of action that underpin a product liability claim are negligence, breach of contract and breach of statutory duty. These three causes of action are set out below.

##### (A) Negligence

An action in negligence is brought by a claimant who must establish that the defendant owed them a duty of care, which they then breached by failing to take reasonable care, which resulted the claimant suffering a loss. In the product liability context, the duty to take reasonable care covers the manufacturing process, undertaking reasonable testing of the product prior to it being sold and implementing appropriate consumer warnings of associated risks.

Traditionally, the ‘but for’ test is used to prove that the defendant’s actions directly resulted in the claimant’s harm. However, in cases where the harm suffered is an ‘indivisible illness’, i.e., an illness which scientists cannot determine the exact cause of, this test does not apply. Instead, the test of causation becomes whether the defendant’s breach of duty materially increased, rather than caused, the claimant’s risk of suffering harm.<sup>17</sup> Both ovarian cancer and mesothelioma are indivisible illnesses, and were described by a UK court in the following terms:

“...all defendants exposed the deceased to the same agency that was implicated in causation (asbestos fibres); but medical science is unable to determine to which (if any) of the defendants there should be attributed the exposure which actually caused the cell changes which initiated the genetic changes culminating in the cancer” (Heneghan v Manchester Dry Docks Ltd [2016] 1 WLR 2036).

If the UK claim is brought as a negligence action, the claimants bear the burden of proving that their use of J&J talc-based powder materially increased their risk of developing mesothelioma or ovarian cancer.

##### (B) Breach of contract

To prove breach of contract, the buyer must establish that the seller breached the contract by supplying a product which did not meet its terms, whether express or implied by the Consumer Rights Act 2015 (“CRA”)<sup>18</sup> – or the Sale of Goods Act 1979 for contracts entered into before 1 October 2015.<sup>19</sup>

These terms include:

- The product is of satisfactory quality (CRA, s9)
- The product is fit for purpose (CRA, s10)
- The product is as described (CRA, s11)
- The product is the same quality as a sample, if the product was sold by sample (CRA, s13).

In business-to-consumer contracts, liability for these terms cannot be excluded, nor can liability be excluded for death or personal injury. The CRA also incorporates implied terms into consumer contracts and consolidates consumer’s statutory rights to sue for a breach of implied terms for loss caused by a particular product which does not comply with the terms of the contract.

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<sup>16</sup> Charlie Haynes, ‘Women plan UK legal action over talc cancer claims’ *BBC Investigations* (20 November 2024), available at: <https://www.bbc.co.uk/news/articles/c07ng47xv3go>.

<sup>17</sup> *Fairchild v Glenhaven Funeral Services Ltd and Others* [2002] 3 All ER 305; *Sienkiewicz v Grief (UK) Ltd* [2011] 2 AC 229.

<sup>18</sup> *Consumer Rights Act 2015* (UK).

<sup>19</sup> *Sale of Goods Act 1979* (UK).

It also provides that implied terms cannot be limited or excluded from contracts, nor can exclusion or restriction of liability for death or personal injury occur. If the UK claim is brought as a breach of contract action, the claimants must prove that either an express or implied contractual term was breached by J&J.

### (C) Breach of statutory duty

The Consumer Protection Act 1987 (“CPA”) imposes strict liability on a manufacturer of products for damage caused to consumers from the use of a defective product, or component of a product.<sup>20</sup>

In claims brought under the CPA, liability is imputed on the ‘producer’ of the defective product. This could be a manufacturer, an entity which held itself out to be the producer of a product through the use of a name or trademark, or an importer of the product to the UK.

For a product to be considered ‘defective’ it must fall below the standard of safety consumers are entitled to expect. This involves the court considering all relevant circumstances, including what is reasonably expected to be done with the product, and the way in which it was marketed to consumers. In *Gee v DePuy International Ltd [2018] EWHC 1208*, the court determined that a defect is the ‘abnormal potential for harm’.

In cases where a batch of products have been found to be defective, claimants do not need to demonstrate the defect in each specific product, but just that batch itself was defective by falling below the safety standards of consumers.<sup>21</sup>

If the UK claim is brought as a breach of statutory duty under the CPA, the claimants must prove that the product had a defect, and the claimant suffered loss as a result of the defective product.

A defence potentially available to J&J under the CPA is the ‘development risks’ defence.<sup>22</sup> This defence protects the producer of a product from being liable for defects where the scientific knowledge at the time did not enable the existence of the defect to be discovered.

Importantly, this defence does not appear to be available where there is any scientific knowledge that the product could have harmful consequences.<sup>23</sup> The barometer of ‘scientific knowledge’ is the most advanced knowledge available, not simply what is known to the producer.<sup>24</sup> This might be a difficult one for J&J to rely upon, given it is alleged that their scientists had knowledge of the potential harms of talc-based products from the early 1970s.

## 5 Strategies for talc suppliers and their insurers

Given the emerging UK group action, there are a number of strategies that may be implemented by talc suppliers and their insurers to help limit the potential exposure of such claims. These include, but are not limited to, the following:

- i. Manufacturers and producers investing in tracking and analysing data generated about their products, both to ensure their products’ safe performance is monitored, but also to be prepared to discuss and explain any evidence with consumers
- ii. Regular review of labels to ensure they are updated to be consistent with the latest UK scientific evidence and product warning regulations and guidance
- iii. Engage with independent testing labs, like the Health and Safety Laboratory (“HSL”) and the British Occupational Hygiene Society (“BOHS”) to maintain highest safety standards

<sup>20</sup> *Consumer Protection Act 1987 (UK) (CPA)*.

<sup>21</sup> *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt—Die Gesundheitskasse and Betriebskrankenkasse* (Cases C 503/13 and C 504/13).

<sup>22</sup> CPA, s4(e).

<sup>23</sup> *A v National Blood Authority (No 1)* [2001] 3 All ER 289.

<sup>24</sup> *Ibid.*

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- iv. Invest in research into talc-powder alternates like cornstarch
- v. Develop a centralised data collection system with manufacturers of talc-powder products to share results of asbestos testing
- vi. Make the company Good Manufacturing Practice (“GMP”) certified.

This article was authored by Polly Sayers, with guidance provided by Jonathan Edwards.

### **For further information**



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