

BEYOND THE HEADLINES

# What Do The Talcum Powder Cases Really Say?

---



A White Paper Presented by



The Law Offices of

**WALLACE & GRAHAM**

On October 20, 2017, a court overturned a jury award of more than \$400 million in a case involving talcum powder and its role, if any, in causing ovarian cancer. When a jury awarded more than \$400 million in damages to plaintiff Eva Echeverria for her talc-related claims against Johnson & Johnson (and the court later reversed the jury's decision),<sup>1</sup> people around America took note.

ECHEVERRIA ET AL V.  
JOHNSON & JOHNSON  
OCTOBER 2017



**\$400 MILLION**  
JURY VERDICT OVERTURNED



Not only did the case involve a staggering amount, but it also involved a common, even beloved, American household product: Johnson & Johnson's Baby Powder. Could it be true that this icon of American home life was causing ovarian cancer?

Spectacular jury awards for injury cases are often misunderstood and even unfairly characterized to further a particular viewpoint or bias. As we wait for the appeal that is sure to come, and rather than encouraging unfounded speculation, we urge you to take a

clear-eyed assessment of what the Echeverria case says as well as what it does not say.

Avoiding a "headlines only" reading of the talcum powder cases will enable you to see that the current legal dispute concerning talc relates not just to questions of causation, but also to the duties of a manufacturer to notify a prospective customer of known risks associated with the product. A more expansive approach to these cases will also provide you with an understanding of exactly how much this area of law remains in flux pending further developments in science and in the law.

That state of affairs means lawyers across the country will continue to test different legal theories of liability against the makers of talcum powder, Johnson & Johnson in particular. Legal argumentation in such a gray area will require attorneys possessing insight not just into the current state of the law, but also into trends in both science and the law.

For that reason, we at The Law Offices of Wallace & Graham offer this white paper as an initial guide to the issue. It is our intention that this white paper will serve as a resource for you and others as you discuss these issues, possibly with loved ones who have their own questions about a connection between ovarian cancer and talc-based powder products.

## THE TALCUM POWDER CASES

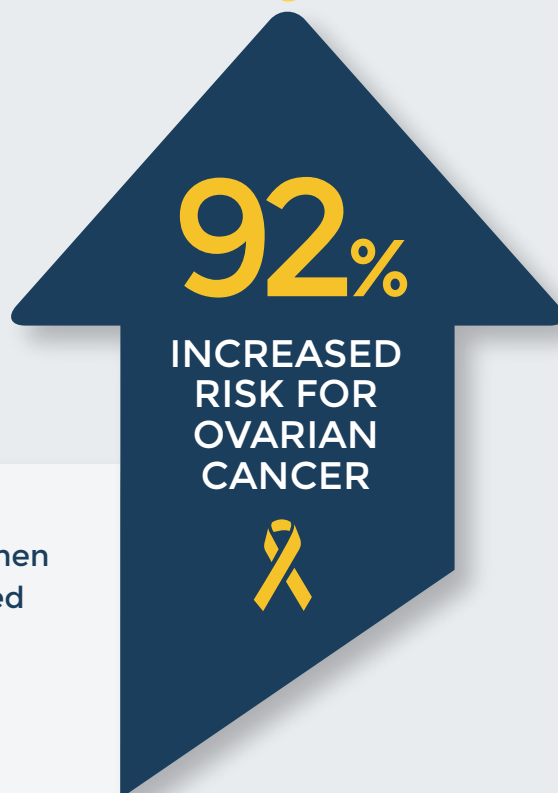
The court system currently has thousands of talcum powder cases on the dockets. For our purposes, we focus on the case most well-known for the size of its jury verdict and for the court analysis in overturning the jury verdict: Echeverria vs. Johnson & Johnson.<sup>2</sup>

According to Ms. Echeverria, she contracted ovarian cancer as the result of having used Johnson & Johnson Baby Powder and related products for decades. As a result, she was suing Johnson & Johnson for not having warned her about the cancer risks associated with their talcum products.<sup>3</sup> Studies were relied upon by both sides. Johnson & Johnson, for example, cited to a Harvard University study finding “no overall association” between talc and ovarian cancer.

For her part, Ms. Echeverria cited, among other studies, a 1982 study showing that women who had regularly applied talc to their genital area were at a 92% increased risk for ovarian cancer. Ms. Echeverria further noted that the lead researcher on

that case had recommended to Johnson & Johnson to “put a warning label on the product.” Ms. Echeverria characterized Johnson & Johnson as being akin to the Big Tobacco executives who continued to promote their product despite knowing of its links to cancer.<sup>4</sup>

Other cases around the country have ranged in awards exceeding \$100 million to cases dismissed because the court found the evidence linking talc to ovarian cancer unreliable.<sup>5</sup> Cases filed in St. Louis have been dismissed for procedural reasons.<sup>6</sup>



## 1982 STUDY

A 1982 study showed that women who had regularly applied talc to their genital area were at a 92% increased risk for ovarian cancer.



## WHAT DOES THE FDA SAY?

Most Americans would view the FDA as a reliable source for objective information regarding the safety of a product such as baby powder. For that reason, our analysis of the recent talc cases begins with the FDA's own assessment of any connection between talc and ovarian cancer.<sup>7</sup>

The FDA notes that talc and asbestos are naturally occurring minerals that may be found in close proximity to one another. The FDA further notes that it does not allow asbestos-contaminated talc to be used in consumer products. In fact, the FDA emphasizes the importance of selecting talc mines with those issues in mind and purifying the talc ore "sufficiently."

With that said, the FDA also observes that scientific studies going back to the 1960s have explored the possible connection of talc and ovarian cancer. The FDA further observes that the concerns about talc being contaminated with asbestos go back to the 1970s.

As for the FDA's own inquiry, it has not found that talc causes cancer. Nor has it found asbestos in the talc products it has tested.

The FDA, however, notes that its inquiry continues, thereby leaving open the possibility that it could find such a causal connection in the future.

## A CERTAIN AND SIMPLE ONE-TO-ONE CAUSATION IS NOT THE ONLY PROBLEM

For the layperson, the FDA's current inability to find a certain one-to-one causal connection between talc and ovarian cancer understandably would seem to preclude any finding of liability against Johnson & Johnson. A simple causation between talc and ovarian cancer, however, is not the only way for the law to impose liability on Johnson & Johnson, nor does it entirely encompass the point of Ms. Echeverria's complaint. Let us take a look at a few scenarios in which liability could be imposed upon Johnson & Johnson.

### Probability, But Not Mere Possibility

Even without a certainty of causation, liability could still be imposed upon Johnson & Johnson if it could be shown that it is probable (not merely possible) that its talc caused the ovarian cancer. In its order overturning the verdict,<sup>8</sup> the court echoed this point, observing "[i]n an action alleging that a product causes cancer, giving rise to a duty to warn, causation must be proven with a reasonable medical probability based upon competent expert testimony. Mere possibility alone is insufficient to establish a prima facie case."

### Asbestos Contamination And Certainty Of Causation

The analyses above ask whether talc, in and of itself, can be shown with certainty

to cause ovarian cancer. Let us assume that a showing of such certainty cannot be made with respect to talc by itself.

With that assumption in mind, we can then move to another possibility: What if the talc at issue were contaminated with asbestos? Could certainty of causation then be established between a product made with asbestos-contaminated talc and the occurrence of ovarian cancer?

In support of this possibility, consider that Johnson & Johnson may have used asbestos-contaminated talc in its baby powder product. Some talc mines (including an Italian talc mine used by Johnson & Johnson to produce its baby powder) can be shown to have been contaminated with asbestos.<sup>9</sup>

In this scenario, therefore, the question is not whether talc in and of itself causes ovarian cancer. With asbestos contamination involved, the question becomes, instead, whether or not the baby powder product, considered in its entirety with asbestos-contaminated talc and as marketed by Johnson & Johnson, caused ovarian cancer. The causal link between the product and ovarian cancer becomes easier to make because the link between asbestos and cancer is already conclusively established scientifically and legally. Causation therefore can more likely be established at least with a probability.

### Duty To Warn (Knew Or Should Have Known)

In light of the possibility of contamination, consider reframing the question of the case yet again in terms of Johnson & Johnson at least having known of a risk (not necessarily a certainty) that their product caused ovarian cancer. If they knew of this risk, yet failed to warn their consumers, then Johnson & Johnson can be said to have violated its duty to warn its customers.

Certainty of causation, under this scenario, is not required; probability (but not mere possibility) will suffice. In overturning the verdict for Ms. Echeverria, the court echoed this analysis, stating, “No evidence was admitted, however, as to . . . whether the . . . industry ceased to use talc because the available science supported a conclusion that talc was a probable cause of ovarian cancer or because the concerns surrounded publicity of the possibility of such a link.”



## WHAT CONCLUSIONS CAN WE DRAW?

It is, of course, tempting to draw definite conclusions. Talc causes cancer. Talc does not cause cancer. Johnson & Johnson violated its duty to notify. Johnson & Johnson had no duty to notify.

To draw a definite conclusion here, however, would be to overlook the actual state of affairs. Whether you look at the law or the science, both areas indicate uncertainty.

At this point, the scientific community continues to investigate any causal relationship between talc and ovarian cancer. While the current consensus appears to be that, at best, there is a possible connection, you can be sure that observers will keep an eye on the development of any studies and any case law making the legally significant shift from “possible” to “probable.”

Ultimately, a successful case will have to convince a court and a jury that Johnson

& Johnson had known or should have known about the probability (more than a mere possibility) that talc or asbestos-contaminated talc used in their powder product carried the risk of causing ovarian cancer. The court would then also need to find that Johnson & Johnson, despite that knowledge, sold its product without warning its consumers about the risks associated with the use of the product.

The Echeverria case is sure to be appealed, so no final answer even exists on that one case, let alone the entire area of law and science. If you have questions regarding the ongoing development of the science and the law in this area, we recommend you discuss matters with your attorney. This important controversy continues to develop, and you will want to stay informed by considering reliable information instead of sensational speculation that can be engendered by difficult product injury situations.





## SOURCE INFORMATION

<sup>1</sup> CNN: <http://www.cnn.com/2017/10/23/health/johnson-and-johnson-talcum-powder-trial-verdict-overturned/index.html>

<sup>2</sup> Echeverria et al v. Johnson & Johnson, Los Angeles Superior Court, No. BC628228. Outside the scope of this white paper is the court's analysis of liability concerning theories of agency and alter ego.

<sup>3</sup> <https://www.reuters.com/article/us-johnson-johnson-cancer-lawsuit/jj-ordered-to-pay-417-million-in-trial-over-talc-cancer-risks-idUSKCN1B121D>

<sup>4</sup> <http://www.latimes.com/local/lanow/la-me-ln-cancer-talc-verdict-20170821-story.html>

<sup>5</sup> <http://www.chicagotribune.com/business/ct-johnson-johnson-talcum-cancer-lawsuit-20170821-story.html>

<sup>6</sup> <https://www.bna.com/jj-wins-dismissal-n73014464038/>

<sup>7</sup> <https://www.fda.gov/Cosmetics/ProductsIngredients/Ingredients/ucm293184.htm>

<sup>8</sup> Court Order entering judgment notwithstanding the verdict in favor of Johnson & Johnson.

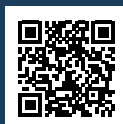
<sup>9</sup> <http://www.chicagotribune.com/business/ct-johnson-johnson-talc-asbestos-warning-20170922-story.html>

<sup>10</sup> Court Order entering judgment notwithstanding the verdict in favor of Johnson & Johnson.

Visit our site: [www.usmesotheliomalaw.com](http://www.usmesotheliomalaw.com)

Call our firm: 888.698.9975

SHARE THE WHITE PAPER:



The content of this paper is provided for informational purposes only and does not constitute legal advice.

© 2018 The Law Offices of Wallace & Graham. All rights reserved. Design and editorial services by FindLaw, a part of Thomson Reuters.