

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
SOUTHERN DIVISION

DEANE BERG,  
Plaintiff,

vs.

JOHNSON & JOHNSON CONSUMER  
COMPANIES, INC.,  
Defendant.

CIV. 09-4179-KES

**FINAL  
INSTRUCTIONS  
TO THE JURY**

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VERDICT FORM

FINAL INSTRUCTION NO. 1 – INTRODUCTION

Members of the jury, the instructions I gave at the beginning of the trial and during the trial remain in effect. I now give you some additional instructions.

You must continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because **all** are important. This is true even though some of those I gave you at the beginning of and during the trial are not repeated here.

The instructions I am about to give you, as well as the preliminary instructions given to you at the beginning of the trial, are in writing and will be available to you in the jury room. This does not mean they are more important than my oral instructions. **All** instructions, whenever given and whether in writing or not, must be followed.

Neither in these instructions nor in any ruling, action, or remark that I have made during the course of this trial have I intended to give any opinion or suggestion as to what your verdict should be.

FINAL INSTRUCTION NO. 2 – BURDEN OF PROOF

In civil actions, the party who has the burden of proving an issue must prove that issue by the greater convincing force of the evidence.

Greater convincing force means that after weighing the evidence on both sides there is enough evidence to convince you that something is more likely true than not true. In the event that the evidence is evenly balanced so that you are unable to say that the evidence on either side of an issue has the greater convincing force, then your finding upon the issue must be against the party who has the burden of proving it.

In determining whether or not an issue has been proved by the greater convincing force, you should consider all of the evidence bearing upon that issue, regardless of who produced it.

FINAL INSTRUCTION NO. 3 – IMPEACHMENT

In Preliminary Instruction No. 3, I instructed you generally on the testimony of witnesses. I now give you this further instruction on how the testimony of a witness can be “impeached” and how you may treat certain evidence.

A witness may be discredited or impeached by:

1. Contradictory evidence
2. A showing that the witness testified falsely concerning a material matter
3. Evidence that at some other time the witness said or did something, or failed to say or do something, that is inconsistent with the witness’s present testimony
  - a. If earlier statements of a witness were admitted into evidence, they were not admitted to prove that the contents of those statements were true.
  - b. You may consider those earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness, and therefore whether they affect the credibility of that witness.

If you believe that a witness has been discredited or impeached, it is your exclusive right to give that witness’s testimony whatever weight you think it deserves.

FINAL INSTRUCTION NO. 4 – CORPORATION AS PARTY

The fact that one of the parties to this action is a corporation is immaterial. In the eyes of the law, a corporation is an individual party to the lawsuit, and all parties are entitled to the same impartial treatment.

FINAL INSTRUCTION NO. 5 – LOBBYING EFFORTS

You have heard evidence of Johnson & Johnson Consumer Companies, Inc.'s lobbying efforts on scientific issues before the National Toxicology Program (NTP) and the Food and Drug Administration (FDA). You may consider that evidence only to evaluate the weight to be given to the decisions of the NTP and the FDA as to whether talc is a carcinogen. You are not allowed to consider the evidence for any other purpose, including to draw any negative inferences about Johnson & Johnson Consumer Companies, Inc., because a company is entitled under the law to use genuine efforts to influence public agencies.

FINAL INSTRUCTION NO. 6 – STRICT LIABILITY FOR FAILURE TO WARN

Berg alleges that Johnson & Johnson Consumer Companies, Inc. is liable for failure to warn under strict liability. With regard to this claim, the issue is whether Johnson & Johnson Consumer Companies, Inc. failed to provide an adequate warning of a danger related to a foreseeable use of the products and whether that failure, if it exists, rendered the products defective and unreasonably dangerous.

Johnson & Johnson Consumer Companies, Inc. cannot defend this claim on the ground that it neither knew nor could have known of the danger, because the law imputes knowledge of the danger, if it exists, to Johnson & Johnson Consumer Companies, Inc.

To establish that Johnson & Johnson Consumer Companies, Inc. is liable for failure to warn under strict liability, Berg must prove the following six elements by the greater convincing force of the evidence:

***One, that a danger existed related to a foreseeable use of the products;***

***Two, that an inadequate warning was given regarding the danger;***

***Three, that as a result of the inadequate warning, the products were rendered defective and unreasonably dangerous;***

A product is defective and unreasonably dangerous if it is not reasonably fit for the ordinary and reasonably foreseeable purposes for which it was sold or manufactured and expected to be used.

***Four, that the defective and unreasonably dangerous condition existed at the time the products left the control of Johnson & Johnson Consumer Companies, Inc.;***

***Five, that the products were expected to and did reach Berg without a substantial unforeseeable change in the condition that they were in when they left Johnson & Johnson Consumer Companies, Inc.'s control;***

***And six, that the defective condition was a legal cause of Berg's injuries.***

The term "legal cause" means an immediate cause which, in the natural or probable sequence, produces the injury complained of. For legal cause to exist, the harm suffered must be a foreseeable consequence of the act complained of. In other words, liability cannot be based on mere speculative possibilities or circumstances and conditions remotely connected to the events leading up to an injury. Defendant's conduct must have such an effect in producing the harm as to lead reasonable people to regard it as a cause of Berg's injury.

A legal cause is a cause that produces a result in a natural and probable sequence, and without which the result would not have occurred.

A legal cause does not need to be the only cause of a result. A legal cause may act in combination with other causes to produce a result.

If Berg proves the elements of this strict liability claim, then Johnson & Johnson Consumer Companies, Inc. is liable. If, on the other hand, any of these elements has not been proved by the greater convincing force of the evidence, then your verdict must be for Johnson & Johnson Consumer Companies, Inc. on this claim.



FINAL INSTRUCTION NO. 7 – COMPLIANCE WITH INDUSTRY STANDARDS  
(STRICT LIABILITY)

In determining whether Johnson & Johnson Consumer Companies, Inc.'s products were defective and unreasonably dangerous, you may consider whether it complied with the generally recognized state of the art existing at the time its products were first sold to any person not engaged in the business of selling the products. But compliance with such standards, customs, or state of the art is not controlling and does not prevent you from finding in favor of Berg.

FINAL INSTRUCTION NO. 8 – NEGLIGENCE

Berg also claims that Johnson & Johnson Consumer Companies, Inc. is liable because it acted negligently in failing to warn with respect to its products. To establish that Johnson & Johnson Consumer Companies, Inc. is liable for negligence, Berg must prove the following two elements by the greater convincing force of the evidence:

**One, that Johnson & Johnson Consumer Companies, Inc. was negligent;**

Negligence is the failure to use reasonable care. It is the doing of something which a reasonable manufacturer would not do, or the failure to do something which a reasonable manufacturer would do, under facts similar to those shown by the evidence. The law does not say how a reasonable manufacturer would act under the facts similar to those shown by the evidence. That is for you to decide.

(A) A manufacturer of a product has a duty to give adequate warning of such known or reasonably anticipated dangers of the product where injury to a user can be reasonably anticipated if an adequate warning is not given for a reasonably foreseeable use of the product.

(B) A manufacturer of a product has a duty to give adequate instructions as to the use of the product where injury to the user can be reasonably anticipated if adequate instruction is not given for a reasonably foreseeable use of the product.

A failure to fulfill either (A) or (B) is negligence.

**And two, that the negligence was a legal cause of Berg's injuries.**

The term "legal cause" means an immediate cause which, in the natural or probable sequence, produces the injury complained of. For legal cause to exist, the

harm suffered must be a foreseeable consequence of the act complained of. In other words, liability cannot be based on mere speculative possibilities or circumstances and conditions remotely connected to the events leading up to an injury. Defendant's conduct must have such an effect in producing the harm as to lead reasonable people to regard it as a cause of Berg's injury.

A legal cause is a cause that produces a result in a natural and probable sequence, and without which the result would not have occurred.

A legal cause does not need to be the only cause of a result. A legal cause may act in combination with other causes to produce a result.

If either of these elements has not been proved by the greater convincing force of the evidence, then your verdict must be for Johnson & Johnson Consumer Companies, Inc. on this claim.

FINAL INSTRUCTION NO. 9 – COMPLIANCE WITH INDUSTRY STANDARDS  
(NEGLIGENCE)

In determining whether Johnson & Johnson Consumer Companies, Inc. was negligent, you may consider whether it complied with the standards and customs of its own industry and with the generally recognized state of the art existing at the time its products were first sold to any person not engaged in the business of selling the products. But compliance with such standards, customs, or state of the art is not controlling and does not prevent you from finding in favor of Berg if you conclude that a reasonable manufacturer in Johnson & Johnson Consumer Companies, Inc.'s position would have taken additional precautions.

FINAL INSTRUCTION NO. 10 – CONTRIBUTORY NEGLIGENCE

Johnson & Johnson Consumer Companies, Inc. is not claiming that Berg engaged in contributory negligence regarding Berg's use of its products. You should not consider the issue of contributory negligence on the part of Berg in any manner regarding either her strict liability for failure to warn or negligence claims.

FINAL INSTRUCTION NO. 11 – DAMAGES

If you decide for Berg on the question of liability you must then fix the amount of money which will reasonably and fairly compensate Berg for any of the following elements of loss or harm suffered in person or property and proved by the evidence to have been legally caused by Johnson & Johnson Consumer Companies, Inc.'s conduct, taking into consideration the nature, extent, and duration of the injury, whether such loss or harm could have been anticipated or not, namely:

- (1) The disability and disfigurement;
- (2) The pain and suffering, mental anguish, and loss of capacity of the enjoyment of life experienced in the past and reasonably certain to be experienced in the future as a result of the injury; and
- (3) The reasonable value of necessary medical care, treatment, and services received, and the reasonable value of the necessary expense of medical care, treatment, and services reasonably certain to be received in the future.

Whether any of these elements of damages has been proved by the evidence is for you to determine. Your verdict must be based on evidence and not upon speculation, guesswork, or conjecture.

FINAL INSTRUCTION NO. 12 – PRESENT VALUE

The law allows damages for detriment reasonably certain to result in the future. By their nature, all future happenings are somewhat uncertain. The fact and cause of the loss must be established with reasonable certainty. Once future detriment is established, the law does not require certainty as to the amount of such damages. Thus, once the existence of such damages is established, recovery is not barred by uncertainty as to the measure or extent of damages, or the fact that they cannot be measured with exactness. On the other hand, an award of future damages cannot be based on conjecture, speculation, or mere possibility.

If you find that Berg is entitled to a verdict, and further find that the evidence in the case establishes a reasonable likelihood of future medical expenses, then you must ascertain the present value in dollars of such future damage, because the award of future damages necessarily requires that payment be made now for a loss that will not be sustained until some future date.

Under these circumstances, the result is that Berg will in effect be reimbursed in advance of the loss, and so will have the use of money that she would not have received until some future date, but for the verdict.

In order to make a reasonable adjustment for the present use of money representing a lump-sum payment of anticipated future loss, the law requires that you discount, or reduce to its present value, the amount of the anticipated future loss, by considering (a) the interest rate of return which Berg could reasonably be expected to receive on an investment of the lump-sum payments together with (b) the period of time over which the future loss is reasonably certain to be sustained; and then reduce, or in effect deduct from, the total amount of future loss whatever that amount would be reasonably certain to earn or return, if invested at such rate of interest over such period of time; and

include in the verdict an award for only the present worth—the reduced amount of anticipated future loss.

This computation is made by using the so-called “present value” table which is attached to Final Instruction No. 13.

Bear in mind that your duty to discount to present value applies only to loss of future medical expenses. Damages for future pain and suffering, future mental anguish, disability, and disfigurement are not subject to any reduction for the present value of such money.

Finally, in determining the present value of future damages, you may also take into consideration the effect of inflation or deflation on the future damages.



### FINAL INSTRUCTION NO. 13 – PRESENT VALUE CALCULATION

The attached tables may be used to calculate the present value of future expenses. This calculation requires that you make three determinations.

First, determine the number of years that the future expenses will be incurred. That number is designated as “n” in the attached tables.

Then, determine the net discount rate. That net discount rate is the interest rate which Berg could reasonably expect to receive on an investment of the lump-sum payment minus the inflation rate.

Finally, determine the annual amount of the future expenses to be incurred, without consideration of inflation.

Using the number of years (n value) and the net discount rate, ascertain the factor from the table. Multiply the annual amount of the future expenses by the appropriate factor from the table to calculate the present value of those future expenses.

INSERT PRESENT VALUE TABLE

TABLE

FINAL INSTRUCTION NO. 14 – MORTALITY TABLE

According to the mortality table, Berg's life expectancy, as a 56-year old female is 82.4 years of age, or 26.4 more years.

The court takes judicial notice of this fact, which is now evidence for you to consider.

You should note the restricted significance of this evidence. Life expectancy shown by the mortality table is merely an estimate of the probable average length of life of all persons of a given age in the United States. It is an estimate because it is based on a limited record of experience. Because it reflects averages, the table applies only to one who has the same health and exposure to danger as the average person that age.

Therefore, in connection with the mortality table evidence, you should also consider other evidence bearing on life expectancy. For example, you should consider the occupation, health, habits, and activities of the person whose life expectancy is in question.

FINAL INSTRUCTION NO. 15 – PREJUDGMENT INTEREST

Any person who is entitled to recover damages is entitled to recover interest thereon from the day that the loss or damage occurred except:

1. During a period of time, the person liable for the damages was prevented by law, or an act of the person entitled to recover the damages from paying the damages, or
2. Interest is not recoverable on damages that will occur in the future, punitive damages, or intangible damages such as pain and suffering, emotional distress, loss of consortium, injury to credit, reputation or financial standing, loss of enjoyment of life, or loss of society and companionship.

You must decide:

1. the amount of damages (if any), and
2. the amount of damages subject to prejudgment interest (if any), and
3. the date or dates on which the damages occurred.

If you return a verdict for Berg, you must indicate on the verdict form whether you find Berg is entitled to prejudgment interest, and if so, the amount of damages upon which interest is granted and the beginning date of such interest. Based upon your findings, the court will calculate the amount of interest Berg is entitled to recover.

FINAL INSTRUCTION NO. 16 – PUNITIVE DAMAGES

In addition to any actual damages that you may award to Berg, you may also, in your discretion, award punitive damages if you find that Berg suffered injury to person as a result of the malice, intentional misconduct, or willful and wanton misconduct of Johnson & Johnson Consumer Companies, Inc. Berg has the burden of proof on the issue of punitive damages. The purpose of awarding punitive damages is to set an example and to punish Johnson & Johnson Consumer Companies, Inc.

“Malice” is not simply the doing of an unlawful or injurious act; it implies that the act complained of was conceived in the spirit of mischief or of criminal indifference to civil obligations. Malice may be inferred from the surrounding facts and circumstances.

Presumed, or legal, malice is malice which the law infers from or imputes to certain acts. Legal malice may be imputed to an act if the person acts willfully or wantonly to the injury of the other in reckless disregard of the other’s rights. Hatred or ill will is not always necessary.

Conduct is “intentional” when a person acts or fails to act for the purpose of causing injury or knowing that injury is substantially certain to occur.

“Willful and wanton” misconduct is more than negligent conduct, but less than intentional conduct. Conduct is willful and wanton when a person acts or fails to act when the person knows, or should have known, that injury is likely to occur.

If you find that punitive damages should be awarded, then in determining the amount, you must consider the following five factors:

- (1) The intent of Johnson & Johnson Consumer Companies, Inc.

In considering Johnson & Johnson Consumer Companies, Inc.'s intent, you should examine the degree of reprehensibility of its misconduct, including, but not limited to, the following factors:

- (a) Whether the harm caused was physical as opposed to economic;
- (b) Whether the tortious conduct evinced an indifference to, or reckless disregard of, the health or safety of others, but you may not award Berg punitive damages for any injuries that defendant may have inflicted to any other individual;
- (c) Whether the target of the conduct was vulnerable financially;
- (d) Whether the conduct involved repeated actions or was an isolated incident; and
- (e) Whether the harm was the result of intentional malice, trickery or deceit, or mere accident.

- (2) The amount awarded in actual damages.

In considering this factor, you should consider:

- (a) Whether Berg has been completely compensated for the economic harm caused by defendant;
- (b) The relationship between the harm (or potential harm) suffered by Berg and the punitive damages award;
- (c) The magnitude of the potential harm, if any, that defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded; and
- (d) The possible harm to other victims that might have resulted if similar future behavior were not deterred.

The amount of punitive damages must bear a reasonable relationship to the actual damages.

- (3) The nature and enormity of the wrong.
- (4) Johnson & Johnson Consumer Companies, Inc.'s financial condition.
- (5) All of the circumstances concerning defendant's actions, including any mitigating circumstances which may operate to reduce, without wholly defeating, punitive damages.

You may not consider any one factor alone, but should consider all five factors in determining the amount, if any, of an award.



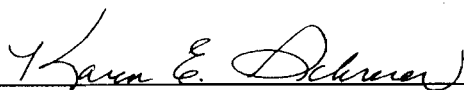
FINAL INSTRUCTION NO. 17 – DUTIES DURING DELIBERATIONS

You must follow certain rules while conducting your deliberations and returning your verdict:

1. Select a foreperson to preside over your discussions and to speak for you here in court.
2. Discuss this case with one another in the jury room. You should try to reach an agreement if you can do so without violence to individual judgment, because a verdict must be unanimous.
3. Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.
4. Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict. Remember at all times that you are not partisans. You are judges—judges of the facts. Your sole interest is to seek the truth from the evidence in the case.
5. If you need to communicate with me during your deliberations, you may send a note to me through the marshal or court security officer, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. **Remember that you should not tell anyone—including me—how your votes stand numerically.**
6. Your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. The verdict must be unanimous. Nothing I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.

7. The verdict form is simply the written notice of the decision that you reach in this case. You will take this form to the jury room, and when each of you has agreed on the verdict, your foreperson will fill in the form, sign and date it, and advise the marshal or court security officer that you are ready to return to the courtroom.

Dated October 3<sup>rd</sup>, 2013.

  
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KAREN E. SCHREIER  
UNITED STATES DISTRICT JUDGE