By Carolyn Raffensperger

Toxic Tort System Fails The Basic Test

The court system has tied itself in knots by asking the wrong kind of question in toxic torts. Professor George Annas phrases that question this way: "What scientific evidence should a woman who believes she has been injured by breast implants be permitted to present in court?" According to Annas, the better question would be, "What evidence of safety should corporations be required to present in a public forum before they are permitted to put their products on the market?"

The general causation requirement in toxic torts encourages both corporate self-deception and disregard for the public interest. It encourages industry not to investigate harm resulting from its product. By predicating liability on the plaintiff's proof of causation, the tort system builds in disincentives for corporations to know and disclose information about harm.

Legal scholar Margaret Berger has proposed a creative way out of this morass. She argues that it is time to create a new toxic tort that would condition culpability on the "failure to develop and disseminate significant data." Berger says, "In order to minimize risk in the face of uncertain knowledge, the law ought to concentrate on developing the required standard of care regarding a corporation's duty to keep itself reasonably informed about the risks of its products. If a corporation fails to exercise the appropriate level of due care, it should be held liable to those put at risk by its action, without regard to injuries that eventually ensue; it is culpable because it has acted without taking into account the interests of those who will be affected by its conduct." Agent Orange, asbestos, the Dalkon Shield, thalidomide, tobacco — in each case, according to Berger, companies failed to test their products initially, failed to report problems as they emerged, and failed to do research to investigate those problems. As Berger notes, a system that encourages a "don't ask, don't tell" policy decouples liability from moral responsibility and thus threatens the basic underpinning of corrective justice.

Some might argue that current regulations, which require premarket testing for drugs and chemicals deemed potential hazards, are sufficient. Unfortunately, the regulations have loopholes that the tort system, by placing the burden of proof on the plaintiff, fails to close.

The largest loopholes are for chemicals, especially those that came on the market before the 1976 Toxic Substances Control Act. (Chemicals developed after 1976 are reported to EPA, which may require premarket testing.) In 1984, the National Research Council looked at a random sample of 100 of the 3,000 chemicals produced each year in quantities exceeding one million pounds and concluded that 78 percent lacked "minimal toxicity information." In 1997, Environmental Defense showed that minimal toxicity information was still lacking for 71 percent of these "high volume" chemicals. And the chemicals in its sample had all been identified as subjects of regulatory scrutiny — in other words, information indicating toxicity was already available to regulators.

ED's study resulted in a partnership with the American Chemistry Council to accelerate hazard screening for the 2,800 highest-volume industrial chemicals. In 2000, the two organizations announced that chemical manufacturers would do the screening and finish it by 2004. This voluntary effort has largely failed. Fewer than 70 tests have been completed and only about a third involve human health.

The delay has been encouraged by conservative think tanks who dispute the value of testing as the science currently exists. For instance, John Graham, formerly the head of the Harvard Center for Risk Analysis, which despite its university affiliation is heavily funded by industry, has said, "What constitutes basic toxicity tests has not been established; the value of testing for some types of toxicity has not been determined; and the type of toxicity that is relevant depends on the particular substance. For instance, some substances that appear harmless in basic tests may pose significant health risks, while others that show toxic effects in basic tests may pose little or no risk to people." Graham is now in charge of the Office of Information and Regulatory Affairs, which oversees the rulemaking process for the White House.

The question should be why these chemicals are in widespread use if they have not been tested, and appropriate tests do not exist. The judicial system widens this loophole by requiring those who have been injured to produce evidence from nonexistent information. And even when regulations require premarket testing, that's not always sufficient incentive to manufacturers to insure their products are safe, as the Dalkon Shield case shows. Since the burden of proof is heavily skewed toward plaintiffs, manufacturers have less incentive to test thoroughly.

A new toxic tort that shifts the burden to the producer of a chemical or drug would drive innovative science, restore the basic moral underpinnings to the law, and help protect the public from harm. A corporation ought to exercise a responsible level of due care and be held liable to those who have been put in harm's way by its action without regard to the actual harm. As Berger says, a corporation should be culpable if it has acted without taking into account the interests of those who will be affected by its conduct. This is only just.

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