# The DePuy ASR Hip Litigation

I have been fortunate to be instructed by a firm of San Francisco Attorneys, Walkup, Melodia, Kelly & Schoenberger, led in this action by Michael Kelly (a leading litigation lawyer in California) in the De Puy litigation.

The DePuy ASR (hip replacement) was developed in the UK by DePuy Orthopaedics in Leeds. This is a hip replacement device which was placed on the market in 2004. DePuy Orthopaedics is a wholly owned subsidiary of Johnson & Johnson, the second largest pharmaceutical firm in the world. Johnson & Johnson's net profits for the period up to December 2010, for that financial year, were $13.5 billion.

On 26th August 2010 the DePuy ASR was withdrawn from the market on the ground that its failure rate was, then, about 12%. The final failure rate is likely to be 50% or more. (The normal failure rate for a hip operation is between 2% to 3%). By that time DePuy had sold more than 93,000 hip replacement devices throughout the world. Every person who has received one of these hips should have received a letter from their Doctor or Hospital advising them to go in and have medical tests.

The numbers are such that it is one of the larger mass tort actions in the United States, and there are more than 20 pages of American lawyers on Google advertising their services to those who have had such a device fitted.

DePuy had no pre-sale clinical trials. They developed the device in an engineering Laboratory. It was introduced onto the market in the UK in 2004.

1. In 2005 they were publicly warned by an English Specialist Hip Surgeon that the device was defective.

2. In 2007 they were warned by the Australian National Orthopaedic Registry that there was an unacceptable failure rate. In fact, they were warned by the senior surgeon running that site a total of 17 times before they recalled the device on 26th August 2010.

3. They were told about the failures by surgeons in the UK well before August 2010. The surgeons using this device simply stopped using or recommending it.

4. Other expert bodies such as the British Orthopaedic Association and the British Hip Society sent out Notices warning against its use and the failure rates that had been discovered.

**The device**

As it is a 'metal on metal' (MOM) device, with inherent design defects, forged with chromium and cobalt, the problem has arisen with small particles (ions) of metal rubbing off the two metal surfaces and entering the blood stream. This has led to pseudotumours, hip and groin pain, destruction of the flesh, muscle and bone in and around the hip, pelvis and groin. There are other deeply unpleasant problems associated with the metallosis in the blood stream.

**The damage**

What the long term consequences for the effects of the metallosis in the blood are unclear. It now appears that the only measurable indicator of these consequences (absent pain in the hip and groin) is the presence of high levels of chrome and cobalt in the blood readings. Once these levels have risen, whether there is pain or not, the indication is that there should be immediate revision of the hip and replacement of the DePuy ASR device. This is known 'the silent injury', for there are a significant number of cases where only high readings of chrome and cobalt in the blood are found and then, consequent on revision, substantial metallosis is found of the flesh, muscles, ligament and bone in and around the hip.

For each person the result is likely to be different. Each person's claim will be dependent on their personal circumstances, their age and employment and need for subsequent care, just as in a normal personal injury action.

There is, now, an enormous amount of information in the public domain. In fact, any person who has had one of the devices inserted should go and see a personal injury lawyer as well as immediately attending their treating surgeon.

For a full and detailed explanation, you should look at www.walkuplawoffice.com and click on that site where you will find videos and details as to what is happening in the United States. Michael Kelly, who has been instructing me for work in the UK, is the lead litigation lawyer in the actions being brought in San Francisco at the California State Supreme Court. They have more than 300 plaintiffs (claimants) in San Francisco, with others waiting to join in the litigation. There is also a Federal action being co-ordinated by a Federal Judge in Toledo, Ohio. There are more than 600 plaintiffs in the Federal action, though it is likely that the San Francisco State Court action is likely to be heard first for procedural reasons.

**Punitive Damages**

In the United States a claim for punitive damages is being made in both actions on the basis that DePuy knew about the problems from as early as 2005 and then

continued to market the appliances, despite a growing and damning amount of evidence about the defects, purely for profit, until the recall in August 2010.

In England and Wales we would describe such a claim as being for aggravated and exemplary damages. It is not often used here, but when the relevant authorities are examined, such a claim would appear to be justified on the facts so far available.

Discovery has begun in the United States. Compared to our system, it is a much more exhaustive and wide ranging process than anything we have in the UK. What remains to be discovered remains unknown.

There is, also, in the United States some significant evidence of breaches of the Regulations of the Federal Drugs Administration (FDA) by failing to follow proper procedures, in that Johnson & Johnson made a claim that that this was a mere variant of another appliance already on the market and approved by the FDA. It is also alleged the they did not disclose the quantity of adverse evidence which was and had been appearing. If these breaches are proved, it is regarded as a very serious matter in the United States. Unfortunately for them, Johnson & Johnson (the owners of DePuy Orthopaedics) have an unhappy record for failure to make such disclosures. A recent case in a South Carolina Court was concluded by the Judge awarding a fine by way of penalty against Johnson & Johnson in the sum of $370 million against them. This was for flagrant acts of deception as to their knowledge as well as the suppression of vital documents and medical reports.

**Conclusion**

Anyone who has trouble with these devices (there are other types also made by DePuy causing trouble) should do the following:

1. Consult their surgeon if they have not already done so.
2. Consult a personal injury lawyer (this is a 'defective medical device case') and consider their position in respect of future litigation.
3. There are three firms presently with significant numbers of clients in England and Wales. There is no reason why any other competent personal injury lawyer should not be consulted.
4. Anyone who has problems with the DePuy ASR hip should appreciate that if the device was inserted in England and Wales, as DePuy Orthopaedics is a company registered within the UK, who manufactured the device in the UK, any action will have to be brought against them here within our jurisdiction. The English Courts have jurisdiction here for claims arising here.
5. No one knows what all the answers are. There are now sufficient numbers of medical and other specialists who understand the nature of the problems and who are willing to give advice in England and Wales.

It is technical. It has the capacity to appear more complicated than it is. The faults in the device are apparent. It would not have been withdrawn from the market if they were not. Anyone who has had a DePuy ASR device or similar product from DePuy Orthopaedics should not only see the relevant doctor who inserted it, but also take legal advice as quickly as possible.

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