

Multiple Chemical Sensitivity: An Emerging Area of Law

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Chemicals are a part of our everyday lives, from the carpets we put in our homes to the pesticides we spray on food crops to the paints we use on buildings to the perfumes our coworkers wear. For most people, the odors these substances emit are hardly noticeable or at least are not offensive to the olfactory senses. But for some—and the number is growing—these chemicals cause violent and nearly unbearable reactions. These people suffer from multiple chemical sensitivity (MCS).

MCS suits have been brought in various contexts under a variety of legal theories, including claims under state workers' compensation, the Rehabilitation Act and the Americans with Disabilities Act,¹ the Fair Housing Amendments Act,² and as negligence or products liability actions. The results so far have been mixed.

MCS affects millions of people in this country. Although it is alleged to have existed since around 1880, only during the 1980s have health care providers and scientists started to focus on the disorder.³

MCS is a controversial subject for health care providers, scientists, and lawyers. The term itself is controversial. Many different names have been used to describe MCS, including allergic toxemia, cerebral allergy, chemical hypersensitivity syndrome, chemical-induced immune dysfunction, environment illness, environmental hypersensitivity disorder, Gulf War Syndrome, immune system dysregulation, sick building syndrome, toxic carpet syndrome, and 20th Century Disease.

Each name carries specific implications regarding either the underlying cause, mechanism, or manifestation of the disease.⁴ Because MCS is controversial, many practitioners are now avoiding the more colorful names, and often prefer to refer to MCS "not as a condition *per se*, but as a symptom complex resulting from a primary diagnosis, such as organic brain dysfunction or toxic encephalopathy."⁵

The number of names for MCS is surpassed only by the number of its definitions; medicine and science have not yet agreed on a definition. Indeed, substantial conflict remains within the scientific community as to whether MCS exists at all, and, if so, whether its origin is physiological or psychological. At this stage, health advocates and medical specialists often define MCS according to their own narrow focuses. The lack of a consistent definition has caused major problems for lawyers litigating these cases.

In 1991, the National Academy of Sciences defined MCS as follows:

Patients must have symptoms or signs related to chemical exposures at levels tolerated by the population at large. (Reactions to such well-recognized allergens as molds, dusts, and pollens are not included.) The symptoms must wax and wane with exposures and may be expressed in one or more organ systems. A chemical exposure associated with the onset of the condition doesn't have to be identified, and preexistent or concurrent conditions—such as asthma, arthritis, or depression—should not exclude patients.⁶

Mark Cullen, a professor of medicine and epidemiology at Yale University, defines the disease more restrictively:

Symptoms must be expressed in more than one organ system—that is, there must be more than one symptom—and the disorder must begin with some documentable environmental exposure, insult, or illness. . . . [T]he chemical exposures to which the patients respond must be demonstrable—in other words, people other than the patient must be able to smell the offending agent even though they are not reacting to it.⁷

In a recent Ninth Circuit case, the plaintiffs defined MCS as a

[s]yndrome where individuals experience adverse, often debilitating, acute and chronic health effects when exposed to any amount of an offending substance. Hypersensitivity describes those people whose immune systems have become highly sensitized to herbicides (or other chemicals) and who experience adverse health effect to minute amounts, even order of magnitude less than would affect the average person.⁸

The Seventh Circuit recently noted what is perhaps the most succinct definition: "MCS is a multi-symptom disorder which can be caused by exposure to chemical or environmental irritants. MCS results in a hyper-sensitivity to what would normally be acceptable doses of chemicals."⁹

Given the scientific conflict and the evolving decisional law in various jurisdictions, it becomes apparent that no uniformly accepted definition of MCS exists at present.

Symptoms

MCS can start at any age and produces a variety of symptoms. While some people exhibit only one symptom, most will suffer from more than one. MCS will often affect multiple organ systems, such as neurological, immune, respiratory, and skeletal systems.

The most common symptoms include respiratory problems; headache; fatigue; mental confusion and short-term memory loss; gastrointestinal tract difficulties; cardiovascular irregularities; skin disorders; genitourinary problems; muscle and joint pains; irritability and depression; and eye, ear, nose, and throat problems.¹⁰ MCS sufferers describe their illness as being like having the flu every day, with symptoms becoming worse when they are exposed to common substances that do not bother most healthy people.

Triggering agents include pesticides; vehicle exhaust; cleaning products; perfumes; deodorants; scented hair products; cigarette smoke; formaldehyde; off-gassing of paints, glues, and carpets; and emissions from carbonless copy paper, inks, laser printers, and newsprint. Many affected people believe they can identify the major precipitating exposure that led to their chemical sensitivity.

In 1989, the National Foundation for the Chemically Hypersensitive surveyed 6,800 people claiming to be chemically sensitive: 80 percent said they knew "when, where, with what, and how they were made ill." Of this group, 60 percent blamed pesticides.¹¹

The most seriously affected people are housebound, unable to physically interact with the rest of the world for fear of being exposed to the common chemicals that adversely affect them. Brief contact with pesticides, insecticides, herbicides, and other chemically-based plant and lawn-care products can cause prolonged illnesses, as can contact with many chemically-based building and construction products, such as paint, solvent, stain, and glue.

People unable to go outside also guard against outside contaminants coming into their homes. Some victims weatherproof their windows and doors year round to keep out undesirable contaminants. Some install high-powered air filters and fans to filter the air flow into the residence. If these MCS sufferers come in contact with the outside, it is usually only with a respirator on. In some cases, family members will leave their "outside" shoes and clothing in a designated room, and shower after coming into the house. One's residence becomes one's only refuge.

Those with milder cases attempt to maintain a semblance of a normal lifestyle by trying to identify and then avoid chemically-based products that have adversely affected them. They will seek accommodations at work, such as avoiding inks and carbonless paper, or relocating to an area with fewer items that might cause them to become ill.

Some employers have installed air filters to help disabled employees, and others have permitted employees to work at home as an accommodation to their condition. If they are able to avoid exposure to substances that make them ill, some people with MCS can continue to work and maintain general routines.

Causes

Scientists are divided over whether MCS is caused by chemicals or whether its source is psychological. Traditional allergists and psychiatrists tend to believe that MCS is psychological. Some doctors consider it to be a variant of somatoform disorder, which is the conversion of mental experiences into bodily symptoms. Others think it is a variant of post-traumatic stress disorder. Still others say sufferers hold the irrational belief that chemicals are making them ill.

On the other end of the spectrum are physicians who practice clinical ecology or occupational medicine.¹² They base their practices, in part, on the belief that chemicals are causing sickness, because of the common threads they see in their patients' clinical histories.¹³

Research into the etiology of MCS continues, not just by clinical ecologists, but also by more mainstream doctors and scientists. MCS advocates are quick to point out that for many conditions accepted as illnesses, the etiology is yet unknown. Even allergy shots, a well-recognized treatment for preventing allergic reactions, were once dimly viewed and even called "witchcraft" or "voodoo medicine" by some medical practitioners.

MCS and the Law

By the time a lawyer is contacted, a person with MCS has probably experienced frustration, fear, and anger about the condition.

The person has probably already been involved in one or more conflicts arising from the illness. Not many lawyers have had experience in working with MCS victims and will often lack sufficient understanding of their needs, their rights as disabled people, and the great difficulty MCS patients face in enforcing their rights.

Below are discussions of several cases in different forums where MCS sufferers have sought relief from the courts or from administrative agencies.

Workers' Compensation Statutes

One of the first MCS cases was in the area of workers' compensation law. In *In re Robinson*, a 55-year-old furniture store employee was deemed eligible for workers' compensation benefits as a result of increased sensitivity to chemicals.¹⁴ The difficulty in this case was that the claimant had been exposed to chemicals not only at work but also at home, where she had had new carpeting installed.

In reaching its decision and in determining compensability, the court took into account the degree of exposure to the offending chemicals on and off the job.¹⁵ The claimant's off-the-job exposure was different from her on-the-job exposure. At her job, chemicals were off-gassed from furniture continuously received and uncrated in her work area. The constant fumes combined with the warm temperature and lack of ventilation to make her sick. Also persuasive was the fact that she felt better when she was at home, away from the fumes. The court ultimately decided in her favor.

To recover, a claimant must prove that the conditions at work were the major contributing cause of the disability. Although the specific chemical cause of claimant's sensitivity is not conclusively established, she has shown by a preponderance of the evidence that the major contributing cause was her work environment . . . which exposed her to concentrations of chemicals much greater than she was ordinarily exposed to outside the course of employment.¹⁶

A recent decision by the New Hampshire Supreme Court firmly supports workers suffering from MCS. In *In re Kehoe*, a Lockheed-Sanders employee filed for workers' compensation benefits when she was disabled by chemicals she had been exposed to on the job.¹⁷ Denise Kehoe's symptoms included severe headaches, difficulty breathing, and allergies. The court used strong language in its opinion, stating that "[l]ittle doubt exists that multiple chemical sensitivity syndrome due to workplace exposure to chemicals is an occupational disease compensable under our workers' compensation statute."¹⁸

However, cases have not always resulted in favorable decisions for employees. In *McCreary v. Industrial Commission of Arizona*, a computer worker was initially denied benefits for symptoms that were exacerbated after she was relocated to a new building.¹⁹ The administrative law judge held in favor of the employer because there was evidence that the workplace was well ventilated, and under Arizona's occupational disease statute, any exposure to chemicals there would be no greater than exposure in the general non-work environment.²⁰

The court of appeals vacated the award. Since the claimant's chemical sensitivity condition was unexpected and accidental—the claimant did not expect that moving to a new building would result in injury—Arizona's accidental injury statute should have applied instead of the occupational disease statute.

Also, the court held that where the claimant's injury resulted from preexisting allergies and exposure to chemicals from construction of the new building, to establish causation the work-related exposure need only have "contributed" to the claimant's condition.²¹

An employer prevailed in *Weekley v. Industrial Commission*.²² The court found the employee's ailments were long-

term and preexisted her employment.²³ It also held that the risk from the work environment was no greater than any risk the general public is exposed to.

Rehabilitation Act; Americans with Disabilities Act

To date, two cases have been reported that were brought under the Rehabilitation Act²⁴ and the Americans with Disabilities Act (ADA).²⁵

In *Texler v. County of Summit Board of Mental Retardation & Developmental Disabilities*, the court of appeals upheld the district court's finding that the plaintiff did not establish that she was disabled as that term is defined in the Rehabilitation Act.²⁶ The plaintiff suffered from MCS and experienced headaches and abdominal pains while working at a plastics factory. On appeal, she argued that she qualified as a person with a disability because her employer regarded her as disabled.

The Rehabilitation Act defines a person with handicaps as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."²⁷ The court held that because reasonable minds could differ over whether the employer regarded the employee as disabled, the district court could not rule she was disabled as a matter of law.²⁸

In *Southeast Human Services Center v. Eiseman*, the North Dakota Supreme Court held that the employer had cause for terminating its employee. The court never seriously addressed whether it considered MCS to be a disability under the Rehabilitation Act and the ADA.²⁹

In addition, several state court decisions have found MCS-type conditions to be handicaps for purposes of state employment discrimination statutes. In *Kallas Enterprises v. Ohio Civil Rights Commission*, the Ohio Court of Appeals ruled that "occupational asthma" and "hypersensitivity to [rust proofing] chemicals" are handicaps within the meaning of the Ohio civil rights statutes. The court affirmed the lower court's determination that the plaintiff had been illegally discharged because of his disability.³⁰

< P> In *County of Fresno v. Fair Employment and Housing Commission of the State of California*, the court of appeals upheld the state human relations commission's determination that hypersensitivity to tobacco smoke was a handicap under the California Fair Employment and Housing Act.³¹

In *Kouril v. Bowen*,³² the Eighth Circuit held that a woman with MCS was disabled under the Social Security Act.³³ The court found that her complex allergic response (she became ill around many common chemicals such as ink, perfume, tobacco smoke, and photocopier odors) required substantial restrictions in her daily activities and interfered with her ability to engage in substantial gainful employment.³⁴

Negligence

MCS litigation based on negligence clearly has its difficulties. Perhaps the greatest hurdle is proving that an MCS injury was either proximately caused or exacerbated by some breach of duty by a defendant. Generally, a plaintiff must prove a reasonable connection between a defendant's conduct and the injuries the plaintiff claims to suffer. "Drawing this connection is particularly difficult in the growing field of hazardous-substance litigation, where the causal relationship between exposure to a hazardous substance and subsequent symptoms may be hypothesized, but not yet tested and proven to the legally required degree of certitude."³⁵

In *Bahura v. S.E.W. Investors*, the plaintiffs, who were employees of the EPA, obtained substantial jury verdicts against the owners and managers of the EPA headquarters building.³⁶ The plaintiffs claimed they became chemically sensitized as a result of contaminants released during building renovation.

The plaintiffs said they were exposed to numerous dangerous chemicals, toxins, and contaminants because the defendants negligently renovated the building, redesigned the space without a proper ventilation system, negligently managed the building during renovations, and failed to adequately maintain the ventilation system.³⁷

In *Bradley v. Brown*, the plaintiffs were coworkers who became ill at work when the defendant fumigated a United States Steel plant with Pyrtox to kill insects. After the spraying, the plant was not ventilated. Instead, the contaminated air was recirculated through the building, spreading rather than removing the Pyrtox fog. When employees arrived at work, many became ill, and 33, including the plaintiffs, were taken to the hospital.

Several clinical ecologists diagnosed the plaintiffs as suffering from MCS, which they alleged was caused by the Pyrtox. Invoking diversity jurisdiction, they filed suit against the exterminator, alleging negligence. At a bench trial, the district court ruled for the plaintiffs, but during trial, the court excluded expert witness testimony from two clinical ecologists on the plaintiffs' claim that the Pyrtox caused their MCS damages.

Applying the test for the admissibility of scientific evidence and expert testimony under Rule 702 of the Federal Rules of Evidence, as construed by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,³⁸ the court said, "The plaintiffs' own evidence clearly establishes that the 'science' of MCS's etiology has not progressed from the plausible, that is, the hypothetical, to knowledge capable of assisting a fact finder, jury or judge."³⁹ The district court noted the Supreme Court's observation in *Daubert* that in performing its gatekeeping function, a court will occasionally prevent a trier of fact "from learning of authentic insights and innovations," but the court had to decide these issues "based on current knowledge."⁴⁰

The district court concluded that the doctors' "opinions regarding whether the plaintiffs' exposure caused their symptoms would be entirely too subjective and speculative [and] . . . a far cry from the tested hypothesis foreseen as the basis of 'scientific knowledge' testified to under rule 702."⁴¹

On appeal, the Seventh Circuit determined that the district court had adhered to the analytical framework set forth in *Daubert* and concluded that the trial court's findings were "not manifestly erroneous."⁴²

Although clearly a potential problem for MCS litigants, the *Bradley* decision should not be considered a death warrant for future MCS litigation.

- First, *Bradley* involves only the issue of medical causation, not whether a patient has MCS. Much of the litigation that might involve MCS does not necessarily require proof of its medical cause, but only proof that the plaintiff is disabled or handicapped (or regarded as such), and that some act of the defendant violates the plaintiff's protected rights as a handicapped or disabled person.⁴³ Exacerbation of a preexisting MCS condition will not always require proof that MCS was originally caused by a defendant's breach of duty.
- Second, *Bradley* only excluded the testimony of two particular experts who are "among a group of doctors and scientists known as clinical ecologists."⁴⁴ The field of clinical ecology is a controversial one. More mainstream physicians and health care providers may not face the same degree of scrutiny from the courts as the *Bradley* experts did.
- Third, it can be argued that the courts in *Bradley* have attached far too much importance to the science of MCS's etiology. There are many other well-recognized disorders that do not have a known accepted cause, although the specific mechanisms of the disease are known. For instance, the cause of multiple sclerosis is not known, yet research has shown that age, sex, genetic and environmental factors, and viral agents have given scientists insight into the specific mechanisms of the disease.⁴⁵
- Last, and most important, *Bradley* was based only on the evidence submitted to the trial court in that case. Even if comprehensive at the time, the research into MCS and the understanding of MCS-related illnesses continue to grow daily. New medical insights will likely lead to improved judicial acceptance of the disorder and testimony regarding its causes.

Fair Housing Amendments Act

On April 14, 1992, the Department of Housing and Urban Development (HUD) accepted MCS as a handicap within the meaning of §3602(h) of the Fair Housing Amendments Act (FHA)⁴⁶ and the department's implementing regulation.⁴⁷ In taking this position, HUD analyzed the nature of the conditions and reviewed the relevant case precedent, legislative history, and prior HUD decisions. The department's Office of General Counsel stated that its

conclusion is consistent with the weight of both federal and state judicial authority construing the Act and comparable legislation, the Act's legislative history, as well as the interpretation of other federal agencies, such as the Social Security Administration and the Department of Education, construing legislation within their respective domains. . . .⁴⁸

The conclusion that MCS can be a handicap under the FHA greatly helps people with MCS. The act provides them with a right not to be discriminated against because of their handicap when buying or renting housing. It also provides them with the right to an equal opportunity to use and enjoy their dwellings.

