

J&J Talc Suits Show Evidence Standards Vary Among Courts

By **Emily Field**

Law360, New York (September 7, 2016, 5:49 PM ET) -- A New Jersey state judge's decision to toss two suits alleging that Johnson & Johnson's talcum-based products caused ovarian cancer on the heels of two major trial losses for the company in similar cases highlights the different views courts have taken on the validity of scientific evidence linking talc to the disease.

Months after Missouri state juries slammed J&J with \$55 million and \$72 million verdicts in suits claiming that the company's talc products caused two women to develop ovarian cancer, a New Jersey state judge found on Friday that expert witnesses offered by women with similar claims were rife with gaps and didn't even explain how the presence of talc in the ovaries could cause cancer.

Litigation over claims that talc products can cause ovarian cancer is relatively young, but the results from different jurisdictions highlights how judges take varying approaches to their roles as gatekeepers in deciding whether to let scientific testimony reach a jury, attorneys said.

"In science, the general causation question of whether talc can cause ovarian cancer — that same answer ought to be forthcoming in Missouri, New Jersey, California," said David Faigman, acting chancellor and dean of the University of California Hastings College of the Law. "Science is kind of unusual in it presents questions that transcend the individual case, and the courts should be concerned about a perception that justice is not fair and equal and consistent across the country."

In his detailed ruling granting summary judgment to J&J on Friday, Atlantic County Judge Nelson C. Johnson said that although Dr. Graham Colditz and Dr. Daniel Cramer were qualified, their areas of scientific inquiry, reasoning and methodology skewed more toward advocacy than from objective science.

"As these proceedings drew to a close, two words reverberated in the court's thinking: narrow and shallow," Judge Nelson said. "It was almost as if counsel and the expert witnesses were saying, 'Look at this, and forget everything else science has to teach us.'"

However, Judge Johnson's biggest problem was their failure to coherently explain how talc-based powder can cause cancer in the ovaries.

"No witness for the plaintiffs ventured to articulate just how it is that talc in the ovaries — or what it is about talc in the ovaries — that sets off a chain of events which purportedly causes ovarian cancer," the judge said.

Notably, one of the causation witnesses in the New Jersey case, Dr. Cramer, had testified in the Missouri trial over Gloria Ristesund's ovarian cancer claims. He had offered testimony on both specific and general causation of ovarian cancer.

While the majority of states have adopted the federal Daubert standard to evaluate whether scientific expert testimony should be presented to a jury, both Missouri and New Jersey are among the few outliers that have not.

New Jersey courts rely on the Kemp standard, which is based on the state Supreme Court's 2002 ruling in *Kemp v. State of New Jersey*. Traditionally, the New Jersey state standard for expert testimony is considered more lenient than the federal Daubert standard, Daniel Eichhorn of Cullen and Dyckman LLP noted.

For its part, Missouri's standard is set by state statute, which attorneys said takes more of a "hands-off" approach to evaluating the reliability of an expert's methods.

Despite New Jersey's more lenient standard for expert testimony, experts said that Judge Johnson undertook a fairly rigorous analysis of the experts' testimony.

Peter Goss of Blackwell Burke PA noted that the judge used the federal manual on scientific evidence to aid in his analysis.

"Even though New Jersey has its own standards, the court really pursued the sort of analysis typical of a Daubert hearing and a Daubert ruling," Goss said. "Missouri law does not empower trial judges to the same degree to really dive in and attack the science."

In particular, the judge said that the two key causation witnesses for plaintiffs Brandi Carl and Diana Balderrama kept their analysis limited to smaller kinds of studies that can introduce bias while seeming skeptical of larger studies pointed out by J&J.

"If a judge takes that gatekeeping role as seriously as this judge did, it really has a significant effect on the outcome," Adrienne Franco Busby of Faegre Baker Daniels said.

Another discrepancy between the New Jersey and Missouri cases is found in the J&J internal documents. At the most recent trial in that state, a 1986 J&J internal document noting "retrospective studies have implicated talc use in the vaginal area with the incidence of ovarian cancer" was presented to the jury.

But Jere Beasley, one of the attorneys for Carl and Balderrama, said that Judge Johnson's decision on Friday fails to take into account those internal documents from J&J that show that the company recognized that there was a risk of ovarian cancer but failed to warn consumers for decades.

Beyond state level, there's a circuit split even within the federal judiciary on the question of how aggressively judges ought to pursue the gatekeeping role, Faigman said. In the Second and Ninth circuits, there's a more hands-off view, but in others, such as the Third, Fourth and Sixth, judges take the opposite tack, according to Faigman.

The problem goes back to the Daubert opinion itself, as both types of approach can be supported in the opinion, he said.

"The Supreme Court is going to revisit this question [of a judge's approach to expert opinions] since there's just so much variability regarding what evidence comes in and what comes out," Faigman said.

The cases are Brandi Carl v. Johnson & Johnson et al., suit number ATL-L-6546-14, and Diana Balderrama v. Johnson & Johnson et al., suit number ALT-L-6540-14, in the Superior Court of New Jersey Law Division, Atlantic County.

--Editing by Christine Chun and Katherine Rautenberg.

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