

Philly Jury Slams J&J With \$120M Award In Mesh Injury Case

By **Matt Fair**

Law360, Philadelphia (April 24, 2019, 4:48 PM EDT) -- A Philadelphia jury hammered a Johnson & Johnson unit with \$120 million in damages Wednesday after agreeing that a negligently designed pelvic mesh implant left a woman all but incontinent and suffering from chronic pain that prevented her from having sex.



A jury hit J&J unit Ethicon with a \$120 million verdict in a pelvic mesh injury suit Wednesday, marking the largest damages award against the company in such cases in Philadelphia. (Getty)

The verdict is the latest, and easily the largest, in a string of damages awards handed down by Philadelphia juries against J&J subsidiary Ethicon Inc. over injuries related to mesh implants intended to treat urinary stress incontinence in women.

Before Wednesday, the largest of the six plaintiffs' verdicts to come out of Philadelphia reached \$57.1 million.

After Wednesday's verdict, which included \$100 million in punitive damages, the total amount awarded in seven separate mesh cases in Philadelphia now tops \$270 million.

Jurors credited claims from Susan McFarland that the negligent design of a mesh implant she received in 2008 caused the product to saw through the soft tissue in her pelvis and become exposed in her vagina. She was eventually forced to undergo a second surgery to remove a portion of the implant.

The pain she's been left with as a result of the complications, she says, has prevented her from having sex with her husband for the last 10 years.

This is the second time jurors have been asked to determine whether McFarland and her husband should be awarded damages for injuries she attributes to alleged defects in a so-called TVT-O implant she received to treat urinary stress incontinence.

Ethicon managed to dodge liability in an initial trial in the case in September as a jury deadlocked over whether the device, which the panel agreed had been negligently designed, had been the cause

of McFarland's injuries.

A retrial kicked off in mid-March and wrapped up on Wednesday, following a nearly monthlong hiatus called by the presiding judge to accommodate an expert witness' recovery from a recent heart attack.

The verdict came after Tracie Palmer, an attorney with Kline & Specter PC representing McFarland, encouraged jurors during closing arguments Wednesday morning to send a clear message to Ethicon and J&J, which are valued at some \$60 billion, about their conduct in developing and selling the mesh implants.

"I can't tell you how much money to award to stop Johnson & Johnson from hurting other women, that's your decision to make, but I'd ask you to make it count, and not let Johnson & Johnson and Ethicon brush Susan off their shoulder like a piece of lint," she said.

Palmer told Law360 after the verdict was returned that she believed the jury had done its job.

"We hope that Ethicon and Johnson & Johnson start to listen," she said. "Verdict after verdict have sent the message that their behavior is unacceptable, but that message has continued to fall on deaf ears."

Palmer had told jurors that the type of complication that McFarland experienced — a result of what she said was the heavyweight mesh used in the product — was endemic with Ethicon's mesh.

"When the mesh shrinks, it becomes tense and rigid, and then this rigid mesh can cut through the vaginal wall," she said. "It's like a saw."

Palmer added that Ethicon had allowed the product to go to market in only nine months without conducting any clinical studies to determine its safety and efficacy.

Adam Spicer, an attorney with Butler Snow LLP representing Ethicon, told jurors during his closing argument Wednesday that there were other probable causes for McFarland's pain, including the natural atrophy of vaginal tissue with age.

"I'm not blaming Ms. McFarland, but the evidence — the testimony and the medical records — shows that TVT-O is not the cause of her problems," he said.

He said the TVT-O used the same mesh as a previous product that had been on the market since the 1990s, and which was considered the "gold standard" for treatment of urinary stress incontinence.

"It's the same mesh that had been used for years," he said.

But Palmer told Law360 that the jury had seen right through that argument.

"This is a product that's on the market today and has been sold for a long time, and the jury simply wasn't buying that that fact alone means that this is safe for women," she said. "They saw clearly that it hasn't been the case for Susan McFarland and that she suffered grievously as a result of defendants' irresponsible behavior."

Ethicon spokeswoman Mindy Tinsley told Law360 that the verdict was out of line both with prior precedent in mesh cases and with what the company believes is the accepted science around their products.

"While we empathize with women who experience medical complications, this verdict and the damages awarded are inconsistent with the science, Ethicon's actions, and previous verdicts related to our TVT-O product, which continues to be the gold standard of treatment for stress urinary incontinence," she said. "We believe the evidence showed Ethicon's TVT-O device was properly designed and that Ethicon acted appropriately and responsibly in the research, development and marketing of the product. We respect the legal process, but we want to reiterate that jury verdicts are not medical, scientific or regulatory conclusions about a product and Ethicon will appeal this verdict."

McFarland and her husband are represented by Tracie Palmer, Braden Lepisto, Shanin Specter and Lee Balefsky of Kline & Specter PC.

Ethicon is represented by Kate Skagerberg of Beck Redden LLP, Adam Spicer, Paul Rosenblatt and Jordan Walker of Butler Snow LLP, and D. Alicia Hickok, Kenneth Murphy and Melissa Merk of Drinker Biddle & Reath LLP.

The case is Susan McFarland et al. v. Ethicon Inc. et al., case number 130701577, in the Court of Common Pleas of Philadelphia County, Pennsylvania.

--Editing by Aaron Pelc.

Update: This story has been updated with comments on the verdict.

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