

Improper Testimony Won Pa. Mesh Case For J&J, Panel Told

By **Matt Fair**

Law360 (July 14, 2020, 7:42 PM EDT) -- A Philadelphia jury's decision to clear a Johnson & Johnson unit in a pelvic mesh injury case last year was founded on testimony from a treating doctor who was improperly allowed to opine that the implant hadn't caused her patient's injuries, a state appeals court heard on Tuesday.

Ruxandra Laidacker, an attorney with Kline & Specter PC representing plaintiff Malgorzata Krolikowski, told the Pennsylvania Superior Court that a trial judge had improperly treated her client's treating physician as an expert witness and allowed her to testify that the pelvic mesh device at issue in the lawsuit had not caused any complications for Krolikowski.

With that testimony in hand, Laidacker said that attorneys for J&J subsidiary Ethicon Inc. managed to convince jurors during closing arguments to clear the company of liability for Krolikowski's worsening incontinence and pain during sex that she blamed on the implant.

"The trial court permitted her opinion to be introduced at trial, and then the defense ran away with it in closing and presented it as causation testimony," Laidacker said.

Krolikowski filed suit after receiving a so-called TVT-Secur implant in October 2008 to treat minor urinary stress incontinence.

But she says the implant did not improve her condition and that her incontinence only worsened over the years.

In addition, she says that she began experiencing pain and urine leakage during sex — complications that have interfered with her ability to find a new romantic partner after the death of her husband in 2001.

While jurors ultimately agreed last April that Ethicon had negligently designed, marketed and sold the implant, they found that the TVT-Secur had not been the cause of any of Krolikowski's alleged injuries.

The verdict represented a rare trial victory for Ethicon, which has been saddled with nearly \$350 million in damages in mesh-related cases in the Philadelphia County courts.

Laidacker told a three-judge Superior Court panel on Tuesday that whether or not the TVT-Secur caused any of Krolikowski's alleged injuries had been a close call — at least until her treating physician, Lily Arya, was improperly allowed to add her opinion into the mix.

"This case was hotly disputed by two experts on causation, and then there's Dr. Arya," she said. "What Dr. Arya did is she added an additional data point for the jury to consider on causation, and when you add that point, you have a different balance of evidence."

Jason Zarrow, an attorney with O'Melveny & Myers LLP representing Ethicon, argued that Arya's testimony had not played a significant part in convincing the jury to clear the company of liability.

He told the panel that Arya's testimony had come up in closing arguments only twice and that one of the mentions had been a "small, brief aside."

Instead, he said there was clear testimony from experts in the case that there was no way that a mesh implant could have made Krolikowski's incontinence worse as she claimed in her lawsuit.

"It's not medically possible for it to become worse [as a result of the implant]," he said. "So plaintiff's claim, the claim that she pressed to the jury, was not medically possible at all."

The court took the case under advisement.

Krolikowski is represented by Ruxandra Laidacker, Charles "Chip" Becker, Elia Robertson, Colin Burke and Lee Balefsky of Kline & Specter PC.

Ethicon is represented by Jason Zarrow and Stephen Brody of O'Melveny & Myers LLP, Kenneth Murphy, D. Alicia Hickok, Melissa Merk and Andrew Reeve of Faegre Drinker Biddle & Reath LLP, Joe Tucker Jr. of Tucker Law Group LLC, Julie Callsen and Erica James of Tucker Ellis LLP, Andrea Edney of Butler Snow LLP, and Kate Skagerberg of Beck Redden LLP.

The case is Malgorzata Krolikowski v. Ethicon Inc. et al., case number 2023 EDA 2019, before the Pennsylvania Superior Court.

--Editing by Steven Edelstone.