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Pelvic Mesh and Risperdal Trials Show Punitive Damages Impact

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During closing arguments in the latest pelvic mesh trial in Philadelphia, plaintiffs attorney **Shanin Specter** called the conduct of the defendant company heads "beyond reckless," saying it made him want to throw his lectern out the courtroom window.

He asked the jurors to look beyond his client's injuries and consider all the potential harm the device may have caused others, before he asked the jury to send a message to the defendant, Johnson & Johnson subsidiary Ethicon.

"I could feel the hair standing up on my neck," Specter recently said about going over the evidence during his closing in *Carlino v. Ethicon*.

That jury came back with a \$13.5 million verdict, including \$10 million in punitive damages.

Roughly two months before that verdict, when **Thomas R. Kline**, who, along with Specter, heads Kline & Specter, had made his closing argument in the same courtroom before the same judge in the latest Risperdal-related trial, he similarly assailed a Johnson & Johnson subsidiary, Janssen, over its conduct.

But Kline was prohibited from asking the jury to consider other potential victims, or to send the company a message, because the judge supervising the Risperdal mass tort previ-

ously barred the plaintiffs from seeking punitive damages in those cases.

"I was only allowed to ask for -compensation," Kline said.

The jury in that case, *Stange v. Janssen*, returned a \$500,000 plaintiffs award. According to attorneys, the punitive damages issue in the two mass tort programs is one of the key factors that have led the pelvic mesh litigation to two large plaintiffs' victories, while the Risperdal litigation has resulted in more of a mixed bag for plaintiffs.

"An early ruling that takes punitive damages out of the case is a very large step for the court and the litigants, because it removes a significant risk for the defendant, especially in the face of conduct which is egregious," Kline said.

Both pelvic mesh cases have resulted in more than eight-figure awards. While the *Carlino* case resulted in \$13.5 million, the first case, *Hammons v. Ethicon*, ended with a \$12.5 million verdict, including \$5.5 million in compensatory damages and \$7 million in punitives.

Before the \$500,000 award in *Stange*, the Risperdal cases resulted in a \$2.5 million and a \$1.75 million award, as well as a settlement. A jury also handed up a defense verdict in the second Risperdal case to go to trial, although it found Janssen negligent in failing to warn about the potential risks of Risperdal.

Cozen O'Connor attorney James H. Heller said a ruling on the availability of punitive damages changes the standard for introducing prior-incidents evidence. Although it's not supposed to, Heller said, this can potentially lead juries to increase awards when considering liability and compensatory damages.

"The thought and fear is that the jury will instead use it to decide liability," Heller said. "Pain and suffering is subjective, and so being that it's so subjective, the jury has got a lot of leeway. If they get angry for lack of evidence on the defense side, or the amount of evidence of misconduct on the other side, the way they can show it is to use that subjectivity to increase the amount of the verdict."

He said the significant split between the \$3.5 million in compensatory damages and the \$10 million in punitives in the *Carlino* case indicates that the jury got mad at Ethicon.

Defense tactics like challenging the cause of the alleged injuries or arguing plaintiff Sharon Carlino's suit was motivated by litigation may have backfired in the face of evidence about similar results in other women, Heller said.

"The jury is typically open to defense evidence and testimony that there are other potential causes out there," Heller said. "If they don't see that link, they get skeptical of the motivation of the argument."

Punitive damages rulings can also factor heavily in cases where there are less "blackboard" damages, for objective categories like future medical expenses, or lost wages.

In the case Stange, for example, the plaintiff's injuries consisted mainly of humiliation. The plaintiff, a 20-year-old suffering from Tourette syndrome, allegedly developed enlarged breasts as a result of Risperdal. He had the excess tissue removed, which left no scarring, except for allegedly traumatic memories.

"I'm left with, in terms of physical injury, nothing to argue," Kline said. "I would have if I had punitive damages. I would have argued, don't let this happen to any other child ever again."

The punitive damages issue is on appeal in the Risperdal cases.

According to Specter, the conduct underpinning the pelvic mesh cases is the driving force behind the wins in that litigation.

Specter said the mass tort is not only the largest nationally after asbestos—there are more than 74,000 cases pending in seven federal multidistrict litigations—but is also the most difficult for defendants in terms of amounts awarded and number of wins, with one jury recently slamming a mesh maker with a \$100 million verdict.

"The conduct of the company was and continues to be terrible in my opinion," Specter said. He said he did not think the punitive damages went far enough in terms of punishing the company. "They have a health and safety issue, and they have to get their heads out of the sand."

Along with the punitive damages ruling, decisions about allowing U.S. Food and Drug Administration-related evidence, and the facts about

the nature of the injuries have also weighed heavily in the outcomes of the trials, attorneys said.

Duane Morris attorney Alan Klein, who represents both plaintiffs and defendants in products liability cases, said the injuries in the pelvic mesh cases are more significant than those in the Risperdal cases.

Plaintiffs in the pelvic mesh cases have alleged the device, which is implanted to handle medical issues like urinary incontinence and pelvic floor prolapse, bunches up in the abdomen because of a defective design, and then begins to erode the surrounding tissue. The plaintiffs all claim to suffer permanent pain during sex as a result.

The Risperdal cases focus on breast tissue that adolescent boys grow as a result of the drug. Not all of the plaintiffs undergo surgery to remove the excess tissue, so the injuries mostly involve humiliation.

"It's hard to quantify the humiliation factor. You can't take your shirt off when you go swimming. It's a much more indirect kind of damage," Klein said, noting that plaintiffs in pelvic mesh cases often undergo multiple surgeries to try to remove the mesh. "It's an injury that's easily and dramatically communicated."

Also, since Risperdal is an antipsychotic medication, some of the plaintiffs have psychological difficulties and cannot testify on their own behalf about their injuries.

But, despite the differences in the litigations, it is anybody's guess as to what impact they will have in terms on when or if a global settlement might occur in either case.

Kline said there are no settlement talks involving the Risperdal mass tort.

Although J&J recently paid \$120 million to settle 2,000 to 3,000 pelvic mesh cases, those do not involve

the mass tort in Philadelphia, Specter said. He declined to comment about whether any settlement talks are ongoing.

Heller said the defense will be looking for some leverage, such as a defense win or a favorable ruling affecting numerous cases, before making attempts to settle the cases. He said he didn't expect either mass tort to settle soon.

Klein said every mass tort is different, so there's no telling when or if a global settlement might come.

"They're all so fact-specific. There are so many variables on whether they're readying to fold the tent," Klein said. "I don't envision at this point J&J folding the tent [in the pelvic mesh cases]. You have an awful lot of cases."

A spokesman for Ethicon declined to comment about the company's litigation strategy in the pelvic mesh cases. A spokeswoman for Janssen said the company believed the trial court correctly decided the issue of punitive damages in the Risperdal litigation, and the company plans to continue defending the litigation.