

Why Talc Claimants' Experts Should Fear New Jersey Courts

By Emily Field · [Listen to article](#)

Law360 (October 12, 2023, 8:58 PM EDT) -- The New Jersey state appeals court has once again pulverized a multimillion-dollar verdict for cancer patients alleging that tainted [Johnson & Johnson's](#) talcum powder caused their illnesses, cementing the Garden State's reputation as an emerging standard-bearer for expert witness testimony.

A three-judge panel's recent decision that expert witnesses' opinions — which linked mesothelioma to a substance that's chemically similar to asbestos, but not asbestos itself — shouldn't have reached a jury's ears wasn't surprising to attorneys watching the litigation, since one of the judges had sat on a panel that found the same experts unreliable two years ago in another talc case.

However, it's a reminder that a trial win might not hold up if the underlying evidence and methodology is shaky.

"There's a lesson to be learned and that is that companies are just not going to write settlement checks," said Edward Neiger of ASK LLP. "You really need to make sure the science is strong before you invest a lot of money in bringing these litigations, which are very costly from both sides."

The appeals court in 2021 [wiped out](#) a combined \$117 million in plaintiffs' verdicts, while the most recent decision obliterated a stunning \$224 million win for four cancer patients.

The call for more judicial scrutiny of scientific evidence dates back to the [U.S. Supreme Court's](#) landmark decision in *Daubert v. Merrell Dow Pharmaceuticals Inc.* in 1993. That opinion set the standard that requires courts to consider several factors in assessing the reliability of expert testimony, including whether the scientific theory or technique behind it can be tested and whether it has been subjected to peer review and publication, said Widener University Delaware Law School professor Jean Eggen.

"The detailed level of scrutiny demanded by the appellate court here has now become a staple for admissibility of expert scientific and technical evidence," Eggen said. "The appellate court determined that the trial court had abused its discretion in admitting the evidence at trial because the testimony was conclusory."

While the plaintiffs in this case alleged that their mesothelioma was caused by asbestos in J&J talc products, the wave of litigation that prompted J&J to seek bankruptcy twice was initially brought by women who said that their use of baby powder caused them to develop cancers of the reproductive system.

The [Oct. 3 ruling](#) by Judges Michael J. Haas, Greta Gooden Brown and Lisa A. Puglisi of the Appellate Division of Superior Court of New Jersey came in consolidated lawsuits brought by Douglas Barden, David Etheridge, D'Angela

McNeill-George and Will Ronning, who alleged their exposure to talc in childhood later caused them to develop the deadly lung cancer.

Experts James Webber, Dr. Jacqueline M. Moline and William E. Longo contended that non-asbestos "cleavage fragments" caused the plaintiffs' cancer, the same argument that the experts made in a previous talc trial, *Lanzo et al. v. Cyprus Amax Minerals Co.*, that a panel reversed in 2021.

Cleavage fragments, or mineral particles that are found in rocks, can look like asbestos chemically, but they don't have the same cancer-causing fibrogenic characteristics that asbestos does, [Duane Morris LLP](#) partner Sharon Caffrey told Law360.

"It's not asbestos, and it's ... never been established as a cause of mesothelioma," Caffrey said.

At trial, Moline — who is facing a [complaint](#) from a J&J unit over her testimony in talc cases — [said](#) that the patients breathed in "clouds" of talcum powder.

But what the jury heard were opinions that weren't based on studies that the experts had conducted themselves or that were reached through reliable methodology, the panel found.

"They merely cherry-picked the work of others," said professor Richard Ausness of the University of Kentucky's J. David Rosenberg College of Law. "The plaintiffs' problem was that they had no direct or credible evidence on causation."

The appellate court also found that the trial judge, Middlesex County Superior Court Judge Ana C. Viscomi, erred in denying J&J's requests for so-called N.J.R.E. 104 hearings to determine the admissibility of the experts' testimony.

While the New Jersey state court system isn't a "pure Daubert jurisdiction," Eggen said, it does require trial judges to adopt a strong gatekeeping responsibility to vet scientific and technical evidence. The [New Jersey Supreme Court](#) in 2018 directed courts to use that standard as a guide in deciding before a trial whether the jury should hear scientific evidence. Defense attorneys said the rulings, which occurred in Accutane litigation, chipped away at what was then the Garden State's reputation for being a more plaintiff-friendly jurisdiction.

Ultimately, to meet that higher bar, what the talc plaintiffs needed were actual studies showing that their mesothelioma was caused by their talc use, particularly since mesothelioma is strongly linked to asbestos.

"Mesothelioma ... is normally associated with relatively high concentrations of asbestos in textiles and insulation. They were able to show a link 30 to 40 years ago that a large percentage of people who are in those industries develop these diseases," Ausness said. "The unfortunate situation is that, by the time they prove a link, [many of the people who were exposed to it will be dead] if indeed there is a connection."

--Editing by Jill Coffey and Dave Trumbore.