SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. R. BRUCE COZZENS, JR.
Justice.

TRIAL/IAS PART 14
NASSAU COUNTY

JUSTIN FIRMES,

Plaintiff(s),

-against-

CHASE MANHATTAN AUTOMOTIVE FINANCE CORP., CHRISTOPHER TIETJEN and C.P. TIETJEN,

Defendant(s).

MOTION #002, 003
INDEX#16655/2002
MOTION DATE:
March 23, 2005

Defendants move pursuant to CPLR §§4401 and 4404 [a] for an order setting aside the jury verdict in this matter, on both the issue of liability as well as damages, and directing a new trial or a conditional order pursuant to CPLR §5501 [c] reducing the jury's damages award. The defendants further request a hearing to calculate collateral source setoffs and discount calculations for purposes of CPLR 50-B calculations.

The action arises from a motor vehicle accident which occurred on October 6, 2002. This accident occurred at an intersection when the motorcycle being driven by the plaintiff, Justin Firmes ("Firmes"), who was proceeding through the intersection, came into contact with a left turning Chevrolet pickup truck which was operated by defendant, Christopher Tietjen ("Tietjen"), and which was leased to Tietjen by Chase Manhattan Automotive Finance Corp. ("Chase").

A bifurcated trial was conducted. The jury found that Tietjen was 90% at fault and the plaintiff 10% at fault.

Upon the trial of damages, the jury returned the following verdict: past pain and suffering, $2,2000,000; expenses, $400,000; lost earnings, $65,000; future pain and suffering, $5,200,000; expenses, $5,475,000; lost earnings, $660,000.

LIABILITY

On the trial of liability, the defendants rely upon *Barker v Kallash*, 63 NY2d 19, 479 NYS2d 201 (1984) and *Manning v Brown*, 91 NY2d 116, 667 NYS2d 336 (1997). These two cases hold that a plaintiff's knowing participation in a criminal act precludes the plaintiff from recovering for injuries sustained in the course of that act. In *Barker*, the plaintiff was injured while in the process of constructing a pipe bomb. The Court noted that such activity had been condemned by Penal Law §265.02, a felony, and that it was the public policy of the State to deny judicial relief to those injured in the course of committing a serious criminal act. A plaintiff is to be precluded from seeking compensation where the

injuries are a direct result of a serious violation of law involving hazardous activities. Construction of a pipe bomb was found to be a dangerous activity to not only the maker but also the public at large. In *Manning*, the plaintiff participated in an activity identified as joyriding. That activity included the participation in the crime of unauthorized use of a vehicle in the third degree. This conduct was in violation of Penal Law §165.05 [a], a misdemeanor. The plaintiff's injuries occurred as a direct result of her illegal conduct. Her activities were held to be a serious violation of law which precluded her recovery. Although both plaintiff and one of the defendants, Amidon, were unlicensed drivers, that conduct is not the conduct upon which the Court focused.

Both *Barker* and *Manning* distinguish between lawful conduct that is regulated by statute and activities which are entirely prohibited. The activity engaged in by this plaintiff, riding a motorcycle, is not a hazardous, prohibited activity but a regulated activity. Thus, the defendant's motion to dismiss the complaint as a matter of law is denied. At the time of this accident, the plaintiff was not engaged in serious illegal conduct from which his injuries arose.

However, the defendants further contend that the issue of the plaintiff's lack of a valid motorcycle license and/or inadequate training was an issue that the jury should have been allowed to hear for the purposes of assessing comparative negligence. The issue in this case was the operation of the respective motor vehicles. The absence of a driver's license relates only to the authority to operate the vehicle and not to the manner of operation. *Hanley v Albano*, 20 AD2d 644, 246 NYS2d 380 [2nd Dept., 1964]. Therefore, the exclusion of such evidence was proper. Furthermore, the jury's apportionment of liability is within reason. The defendant Tietjen made a left hand turn in the intersection prior to the vehicles coming into contact. The jury, by apportioning responsibility, took into consideration the relevant evidence about the operation of the vehicles. The defendants have failed to cite one case where the absence of a license alone justified comparative fault. In *Dalal v City of New York*, 262 AD2d 596, 692 NYS2d 468 [2nd Dept., 1999], contrary to the defendants' argument, the critical issue is not the absence of a license but the absence of the glasses which the license required the defendant to wear. The Court distinguished *Hanley* for this reason.

It has long been the law of New York that a police accident report is not admissible. *Johnson v Lutz*, 253 NY 124 [1930]. For the defendants to suggest otherwise is misguided. The defendants' argument that the jury should have been allowed to hear testimony from a police officer about tickets issued to the plaintiff is also incorrect. The tickets shown on the police report (not in evidence but a copy of which was provided to the Court) states the Vehicle and Traffic Law sections violated. None relate to the operation of a vehicle. VTL§306 [b] concerns failure of a vehicle to display an inspection sticker. VTL§319.1 denotes a traffic infraction for operating a vehicle without insurance. Finally, VTL§401.1 [a] is for lack of registration. All of these infractions are irrelevant to the accident and are of no probative value.

The defendants further argue that it was error to preclude the admission of a copy of the NYS Department of Motor Vehicles Motorcycle Manual. First, it is noted that the

edition proffered during trial was not the edition in effect at the time of and prior to the accident. Second, the defendants cite no basis in law for the admission of such a document.

Contrary to the defendants' present argument with regard to the preclusion of expert witnesses, counsel for defendants at the time of the argument of the plaintiff's motion *in limine* forthrightly conceded that the delay in retaining and disclosing such witnesses resulted from an inability of the defendants' insurers to agree. Although CPLR 3101 [d] [1] [i] allows the trial court broad discretion to permit late disclosure, a good cause must be shown for the lack of timely disclosure. *Desert Storm Construction Corp. v SSSS Limited Corp.*, __ AD3d __, __ NYS2d __, 2005 NY App. Div. Lexis 4812 [2nd Dept., 2005]. A conflict between insurance companies for the payment of expenses fails to demonstrate a justification for late disclosure. Defendants, in opposition to the motion to preclude the expert witnesses, offered no other explanation why they waited two months after plaintiff's supplemental disclosure to retain experts and then did not make full disclosure until days before jury selection was scheduled. From the outset of this litigation, the defendants were aware that it arose from a motor vehicle intersection accident giving them notice of the desirability of an accident reconstruction expert. They were further aware, early on in the litigation, that the plaintiff sustained serious and disabling injuries and was alleging disability from employment and economic loss.

The defendants' motion and cross-motion to set aside the jury's verdict on the issue of liability is denied in all respects.

DAMAGES

The defendants contend that, because of plaintiff's counsel's improper summation, the damages verdict must be set aside. When plaintiff's counsel once referred to the resources of the defendant Chase, that defendant's counsel's objection to the remark was sustained and the Court admonished the jury to disregard the comment. No reference was ever made to insurance and mention of Chase in summation was not improper because Chase is a responsible defendant under Vehicle and Traffic Law §388 and *Hassan v Montuori*, 99 NY2d 348, 756 NYS2d 126 [2003]. The content of plaintiff's counsel's summation does not raise an issue justifying a new trial. This case is not similar to *Vassura v Taylor*, 117 AD2d 798, 499 NYS2d 120 [2nd Dept., 1986], relied upon by defendants, because the attorney was quickly admonished and the jury immediately instructed.

Plaintiff's counsel's request that the plaintiff award $12,125,000.00 for pain and suffering is not an improper comment. Wide latitude is permitted in closing arguments. *Gonzalez v Cheng*, 287 AD2d 595, 731 NYS2d 887 [2nd Dept., 2001]. In fact, counsel suggest figures to a jury at their own peril if the suggestion grossly offends the jury. It is the art of summation for counsel, either plaintiff or defendant, to suggest a proper verdict amount. It is for the jury to decide whether counsel's figure no matter how large or small is appropriate and to exercise their own judgment in setting an award.

CPLR §5501 [c] sets forth the standard to be applied by appellate courts in reviewing damage awards. The same standards are to be applied when the trial court reviews the

verdict on damages. *Ashton v Bobruitsky*, 214 AD2d 630, 625 NYS2d 585 [2nd Dept., 1995]. A trial court can set aside a verdict which "deviated materially from what would be reasonable compensation" (see CPLR §4404 [a]).

An award of non-economic damages is inherently subjective as there is no precise formula for assessing an individual's pain and suffering. In order to analyze a question of material deviation, it is necessary to review what other courts have done under similar circumstances. A jury verdict should be afforded deference if it is based upon evidence in the record. *Simeon v Urrey*, 278 AD2d 624, 717 NYS2d 690 [3rd Dept., 2000]. The issue of material deviation includes a mixed question of law and fact. *Donlon v City of New York*, 284 AD2d 13, 727 NYS2d 94 [1st Dept., 2001]. It is not enough that the award is supported by the evidence but a review of past cases must be conducted. *Donlon, supra.*

Following the accident, the plaintiff testified that he remained conscious at the scene. He was removed by ambulance and airlifted to Nassau University Medical Center. For treatment purposes, and to relieve his pain, he was paralyzed and sedated at the hospital. The left leg below the knee had been traumatically amputated in the accident and the leg had been extended by the force of the trauma. The initial hospital examination showed a high level of trauma and that the leg required a staged amputation. The accident had also fractured the left femur.

In order to attempt to save the soft tissue in the area of the amputation, the plaintiff underwent eleven surgical procedures during the 46 days that he was hospitalized. Because of the condition of the remaining portion of the leg, attempts to properly fit a prosthesis at the hospital were unsuccessful. Because of the condition, all subsequent attempts to fit a prosthetic device, up to the time of trial, did not succeed. The plaintiff has not been able to ambulate properly and as a result must use a wheelchair. He has not been able to be gainfully employed.

There have been five attempts to develop a proper device by plaintiff's prosthetist. Because of skin grafts, the size of the plaintiff's stump, and plaintiff's weight, none have succeeded. The stump has been found to be inadequate for ambulation.

Not only has the plaintiff experienced real pain, but after the amputation plaintiff also began and continues to experience phantom pain in the area of the missing leg. He has also developed post traumatic stress disorder and depression. He will continue to experience these conditions for the rest of his life.

The jury awarded $2,200,000 for two years of past pain and suffering. This award does not deviate materially from what would be reasonable compensation. In *Patterson v Nassau Community College*, 308 AD2d 519, 764 NYS2d 841 [2nd Dept., 2003], the plaintiff, a nineteen-year-old college student, sustained an above the knee amputation, underwent medical procedures, was hospitalized for two months, had a prosthesis successfully fitted and, like Firmes, suffered emotional trauma as a result of the loss of her leg. Although the period of time from accident to trial was longer in *Patterson*, the amount of physical difficulties, especially the eleven surgical procedures and the unsuccessful fittings of a

prosthetic device, are more extensive for Firmes. The *Patterson* Court sustained a past pain and suffering verdict of $2,000,000. In *Sladick v Hudson General Corporation*, 226 AD2d 263, 641 NYS2d 270 [1st Dept., 1996], the plaintiff sustained an above the knee amputation. The Court sustained a stipulated reduction for past pain and suffering to $2,500,000. In *Walker v Zdanowitz*, 265 AD2d 404, 696 NYS2d 509 [2nd Dept., 1999], the plaintiff had both legs amputated. A past pain and suffering verdict of $3,500,000 was reduced to $2,500,000. It is significant that that medical malpractice case did not arise from a traumatic amputation and the attendant pain and suffering as experienced by Firmes. Factually similar is *Hotaling v CSX Transportation,* 5 AD3d 964, 773 NYS2d 755 [3rd Dept., 2004]. The case was tried under the Federal Employers Liability Act. That plaintiff also suffered a traumatic amputation, remained conscious following the accident, was airlifted to a hospital, and underwent eleven surgical procedures during his almost two months in hospital. The jury awarded $6,000,000 for past pain and suffering for a period of less than two years. The Court notes that in FELA cases, the standard to be used to evaluate the verdict is whether it shocks judicial conscience. Using that standard which is less deferential to the jury, but citing cases such as *Walker, supra*, which applied the "deviates materially" standard, the award was reduced to $4,000,000. Considering the different criteria, $2,200,000 does not deviate materially from *Hotaling*.

The jury award of $400,000 for past expenses does not conform to the proof and must be set aside unless within 30 days after service of this Order with Notice of Entry the plaintiff stipulates to a reduction to $208,435. Likewise, the award for past lost earnings is excessive and is set aside unless within 30 days after service of this Order with Notice of Entry the plaintiff stipulates to a reduction to $63,299. Otherwise, there shall be a new trial on past expenses and lost earnings.

The jury, pursuant to the Court's charge, found that the plaintiff has a life expectancy of 50.1 years. Again for the future, this plaintiff will need to undergo continuing medical treatment with no reasonable guarantee that a proper prosthesis will ever be fitted nor that he will ever return to being a community ambulator. His best prognosis is that he will be a transitional ambulator only. He will be confined to a wheelchair for most of his remaining life. The jury award of $5,200,000 for future pain and suffering does not deviate materially from what would be reasonable compensation.

The trial court is limited in what it can do with a damages verdict. It can rule that the verdict does not materially deviate or it can set the verdict aside and order a new trial on that issue. The trial court cannot substitute its own evaluation and unconditionally amend the verdict. *Bensalen v Royal-Pak Systems, Inc.*, 228 AD2d 363, 644 NYS2d 271 [1st Dept., 1996]. *Ashton, supra*. Again considering *Paterson, supra*, the award for future pain and suffering of fifty-four years of $2,500,000 was affirmed. In *Patterson*, the plaintiff had successfully been fitted with a prosthesis which was demonstrated to the jury. It was well within the jury's discretion to find that plaintiff Fimes has not yet, and with present technology will never, overcome this hurdle of procuring a proper replacement for his leg.

The award for future pain and suffering in *Hotaling*, *supra*, for a man approximately fifteen years younger than Firmes was $2,000,000. The decision does not address that award where the plaintiff had been fitted for a prosthetic leg. In *Sladick, supra*, an award of $5,000,000 for future pain and suffering was sustained. The *Sladick* plaintiff had a 42-year life expectancy. Considering the difficulty in fitting a prosthetic device because of the size and configuration of the Firmes' stump, the difference between an above the knee and below the knee amputation is not significant.

The total pain and suffering award of $7,400,000.00 is less than the $9,750,000.00 awarded to a 35-year old woman in *Bondi v Bambrick*, 308 AD2d 330, 764 NYS2d 674 [1st Dept., 2003]. That plaintiff lost part of her left leg and underwent nine surgeries, including skin grafts, before trial.

The award of $660,000 for future lost earnings is sustained. The jury found a work life expectancy of 33 years. Based upon the plaintiff's testimony about his earnings history, the award conforms with the proof.

The defendants' argument regarding the necessity of future medical care is misplaced. Dr. Edwin Richter of the Rusk Institute testified about the plaintiff's disabilities and future medical needs. He also detailed the cost of these future needs. However, the award of $5,475,000 does not conform to the proof. This award is vacated and a new trial ordered unless within 30 days after service of this Order with Notice of Entry plaintiff shall serve and file in the office of the Clerk of the Supreme Court a written stipulation consenting to a reduction to $2,872,400.00 of the award for future expenses and the entry of an amended judgment.

Finally, defendants' argument that a judgment has not been signed and entered contradicts the record. A judgment, on consent of all parties, has been signed by this Court.

No hearing for the purpose of establishing any collateral source reductions was demanded prior to the entry of the consent judgment. The burden is on the defendant to establish its entitlement to a reduction in the judgment for collateral source payments. There has been no showing that the plaintiff received such benefits. *Jenkins v Meredith Avenue Associates*, 238 AD2d 477, 657 NYS2d 916 [2nd Dept., 1997]. A motion to request a collateral source hearing is untimely if not made before judgment is entered. *Wooten v State*, 302 AD2d 70, 753 NYS2d 266 [4th Dept., 2002]. Here, the request was not submitted until the judgment had been signed. *Wooten* further holds that the collateral source offset must be pleaded as an affirmative defense. Exhibit A, to Chase's motion, includes its answer dated January 31, 2003. This answer does not contain the required affirmative defense. No application to amend the answer was made. Therefore, defendants' argument that it is entitled to a hearing pursuant to CPLR §4545 [c] because no judgment has been entered is not supported by the record. Likewise, because a judgment on consent has been entered and the parties having agreed to the discount rates necessary for Article 50-B calculations, the only issue remaining is a determination of the present value of the reduced future damages. For the purposes of Article 50-B this calculation can

be done based upon the previously agreed rates.

The defendants' motions to set aside the jury verdict is denied except as set forth herein. The verdict for past expenses, past lost wages, and future expenses is vacated unless within 30 days after service of this Order with Notice of Entry plaintiff shall serve and file in the Office of the Clerk of the Supreme Court a written stipulation consenting to a reduction to $63,299 for past lost wages, $208,435 for past expenses and $2,872,400 for future expenses and entry of an amended judgment. Plaintiff may elect to enter a stipulation as to one or more of the reduced items of specified damages. If the plaintiff elects not to stipulate to a specific reduction, the judgment as to that component of damages is vacated and a new trial is ordered as to that component.

Submit Amended Judgment on notice.

The foregoing constitutes the Court's decision and Order.

Dated: JUN 2 2005

J.S.C.

ENTERED

JUN 07 2005

NASSAU COUNTY
COUNTY CLERK'S OFFICE