

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

MICHAEL ANDREWS and SUSANNE	:	CIVIL ACTION
ANDREWS	:	
	:	
v.	:	
	:	NO. 97-3414
ANNA KARRAS	:	

MEMORANDUM AND ORDER

YOHN, J. October , 1998

Plaintiffs Michael and Susanne Andrews sued defendant Anna Karras for injuries sustained in an automobile accident. At trial, the jury assigned ninety percent of the liability to defendant and ten percent to plaintiff. The jury awarded plaintiff \$35,736.28 for reasonable and necessary past medical expenses caused by the accident, \$12,000 for reasonable and necessary future medical expenses caused by the accident, but only \$2,500 for general damages that covered past and future pain and suffering, past and future embarrassment and humiliation, past and future loss of life's pleasures, past and future lost earning capacity.

Following the jury's verdict, Michael Andrews¹ brought this motion for a new trial asserting first that, considering the uncontroverted evidence, the award for general damages shocks the conscience. Plaintiff also asserted that the verdict for general damages is inconsistent

¹ The jury did not award Susanne Andrews any damages for her loss of consortium claim. Although both Michael and Susanne joined in the motion for a new trial, Susanne makes no argument in the brief that she should be awarded a new trial. Therefore, although both Michael and Susanne Andrews are named in the motion, throughout this opinion I refer only to plaintiff Michael Andrews.

with the jury's award for all past medical expenses and \$12,000 in future medical expenses. See Plaintiffs' Memorandum of Law in Support of Motion at 1-2. After hearing oral argument and reviewing the parties' submissions and the record, I agree that the jury's award for general damages of just \$2,500 shocks the conscience. Therefore, Michael Andrews's motion for a new trial will be granted.

BACKGROUND

On May 19, 1995, defendant Anna Karras's car collided with the car driven by plaintiff Michael Andrews. Plaintiff alleged at trial that Karras was driving at a high rate of speed and drove through a red light. Karras contested both allegations. From the scene of the accident, plaintiff was taken to Mercy Haverford Hospital where he remained for five days suffering from a herniated disc, an annular tear of his C4-C5 disc, and lumbar strain. At trial, Andrews claimed that since the crash he has experienced chronic pain in his back and neck. See Transcript ("Tr."), Feb. 25, 1998, at 46-47. Plaintiff stated that the pain has affected both his work and recreation -- he has difficulty sitting for long periods of time and he has had to give up physical activities such as skiing and golfing. See Id. at 29, 47.

Plaintiff also claimed that he has experienced significant cognitive problems including: difficulties processing multiple matters at one time; becoming easily distracted and then being unable to remember what he was doing before the distraction; problems with organization; mental fatigue; physical fatigue; and memory lapses. See Id. at 40-49; Tr., Feb. 24, 1998, at 138-44. Andrews is a lawyer who, before the accident, ran a two-person law firm with his partner. Because of these problems, plaintiff claimed, his law practice fell apart and he was unable to

practice law in the same manner because he can work only for short periods of time and requires the help of a cognitive therapist to help him with everyday activities. Tr., Feb. 25, 1998, at 40-49. The defendant's witnesses presented evidence that contested the existence of Andrews's claims of physical and mental impairments as well as their causal connection to the accident.

The jury returned a verdict in favor of the plaintiff and awarded him \$35,736.28 for the full amount claimed for past medical expenses and \$12,000 for future medical expenses. The jury, however, awarded plaintiff only \$2,500 in general damages as compensation for his claims of: (1) past pain and suffering; (2) future pain and suffering; (3) past embarrassment and humiliation; (4) future embarrassment and humiliation; (5) past loss of life's pleasures; (6) future loss of life's pleasures; (7) past lost earnings; and (8) future lost earning capacity (referred to collectively as "pain and suffering").² The jury awarded no damages to Susanne Andrews for her loss of consortium claim. Plaintiffs filed this motion for a new trial based on the amount of the general damages.

DISCUSSION

In support of his motion for a new trial, plaintiff contends that the jury's award of only \$2,500 in general damages is so inadequate given the uncontroverted evidence of Andrews's pain and suffering that it shocks the conscience. See Plaintiffs' Memorandum of Law in Support of Motion at 4-6. Plaintiff also argues that the jury award is inherently inconsistent in that Andrews received full compensation for his past medical expenses but received "virtually no award at all"

² The total damage award of \$50,236.28 was molded to \$40,213 to reflect plaintiff's contributory negligence and the \$5,000 in first party benefits previously paid to plaintiff by his insurance carrier.

for his pain and suffering. See Id. at 6-7. In response, defendant contends that plaintiff waived his right to raise the issue of inconsistency in the verdict when he failed to object to the verdict prior to the court's discharge of the jury. Even if plaintiff has not waived the claim, defendant asserts that no inconsistency exists and that the evidence in the record supports the jury's verdict.³

When determining whether to grant a new trial in a diversity case, the district court must evaluate the excessiveness or inadequacy of damages in light of state law standards. See Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 438-39 (1996) (instructing court of appeals to remand case so that district court could evaluate jury's award using New York standard for excessive damages); Kerzner v. Global Upholstery Co., Ltd., 1997 WL727692 *1 n.3 (E.D. Pa. Nov. 19, 1997) ("Federal courts sitting in diversity look to state law to determine the adequacy of damages.").

Under Pennsylvania law, [a] trial court may only grant a new trial when the jury's verdict is so contrary to the evidence that it 'shocks one's sense of justice.'" Neison v. Hines, 653 A.2d 634, 636 (Pa. 1995) (quoting Kiser v. Schulte, 648 A.2d 1, 4 (Pa. 1993)). Thus, to warrant a new

³ Because I have determined that the inadequacy of the verdict warrants a new trial, I need not address the issue of inconsistency of the verdict. Consequently, the question of whether a plaintiff has waived that issue is irrelevant. I note, however, that the issue of whether a party has waived the right to raise claims regarding the consistency of the verdict in a post-trial motion is a procedural matter governed by Rule 49 of the Federal Rules of Civil procedure. See Malley-Duff & Assocs., Inc. v. Crown Life Ins. Co., 734 F.2d 133, 144-45 (3d Cir.), cert. denied, 469 U.S. 1072 (1984) (holding that issue of whether waiver of claims based on inconsistent answers in verdict has occurred depends on which type of verdict form, special or general, court gave to jury). Like the verdict forms used in Malley-Duff and Simmons v. City of Philadelphia, 947 F.2d 1042 (3d Cir. 1991), cert. denied, 503 U.S. 985 (1992), the jury form in this case appears to be a special verdict form governed by Rule 49(a) which does not require a party to raise the inconsistency claim prior to the discharge of the jury. See Id.; Fed. R. Civ. P. 49(a).

trial based on the inadequacy of the damages, when viewed in the context of the evidence, the amount of the award must “shock the conscience” of the court. See Id. at 636.

This “shocks the conscience” standard strikes a balance between two competing principles: first that the jury as fact finder “is free to believe all, some, or none of the testimony presented by a witness,” and second, that the court has a duty to ensure that the verdict is not “a product of passion, prejudice, partiality, or corruption” and that it “bear[s] some reasonable relation to the loss suffered by the plaintiff as demonstrated by uncontroverted evidence presented at trial.” Id. The Pennsylvania Supreme Court has expressed “the synthesis” of these principles as follows: “[A] jury is entitled to reject any and all evidence up until the point at which the verdict is so disproportionate to the uncontested evidence as to defy common sense and logic.” Id. at 637.

A review of the record here reveals the following uncontroverted evidence with regard to damages. Following the accident, Andrews was taken to the hospital where he remained for five days. While at the hospital, plaintiff was treated for bruising of the left parietal area, soft tissue damage, a herniated disc, an annular tear of C4-C5, lumbar strain, and blurred vision. See Tr. Mar. 4, 1998, at 72-77; Tr., Feb. 26, 1998, 117; Mercy Haverford Hospital Records. To combat his pain, plaintiff was given various drugs including Demoral, Flexeril, Decadron, Percocet, Vicodin, and Tylenol. See Medication Administration Record and Nursing Progress Notes in Mercy Haverford Hospital Records. When questioned by plaintiff’s counsel, defense witness Dr. Kathleen Maloney, a clinical neurologist, did not dispute that the treatment plaintiff received at the hospital for these injuries was appropriate. See Tr., Feb. 26, 1998, at 138. Dr. Maloney also acknowledged that the time spent at the hospital after the accident was attributable to pain

caused by the accident.⁴ See Id. at 153. Additionally, no witnesses disputed the fact that, from the time he was taken to the hospital, various doctors have treated Andrews for pain in his back and neck and placed him on prescription pain medication such as Percodan, Relafen, and Daypro. See Tr. Feb. 24, 1998 at 57-59. Another treatment, the fact of which was not contested, involved cervical and lumbar blocking procedures (spinal injections). See Tr. Feb. 24, 1998 at 62. These treatments served to alleviate pain as well as to help the doctors diagnose the source of the pain. See Id. Dr. Maloney agreed with plaintiff's attorney that spinal injections are uncomfortable procedures. See Tr., Feb. 26, 1998, at 152. Both Dr. Maloney and Dr. Michaels, a forensic psychiatrist who testified for the defendant, agreed that no evidence existed that Andrews had experienced any neck or back pain before the accident. See Id. at 138; Tr., Mar. 4, 1998, at 89.

While at the hospital, plaintiff also was diagnosed with a cerebral concussion. Whether Andrews actually suffered from a concussion was hotly contested during the trial. The defendant did not dispute, however, that Dr. Michael Thomas evaluated plaintiff and diagnosed him as having sustained a cerebral concussion. Also, it is undisputed that plaintiff has been treated for post-concussive syndrome and various cognitive problems. See Id. at 150. As part of his treatment for post-concussive syndrome, plaintiff's doctor placed him on Ridalin. See Tr., Feb. 24, 1998, at 59-60. Dr. Michaels conceded on cross-examination that nothing appeared in any of the medical records that showed that Andrews had anything wrong with or had ever injured his head before the accident. See Tr., Mar. 4, 1998, at 89. Finally, defendant's vocational expert,

⁴ It should be noted that the Pennsylvania Supreme Court has held that, when proven to exist, soft tissue damage and herniated discs are "obvious injuries" the pain from which cannot be ignored by a jury. See Neison, 653 A.2d at 638-639.

Marc Lukas, stated on cross that if the diagnosis contained in the reports of plaintiff's treating physicians and therapists was correct, plaintiff's earning potential was lower after the accident than it was before. See Tr., Feb. 27, 1998, at 22.

The Pennsylvania Supreme Court directs the court to examine the verdict in light of uncontroverted evidence, see Neison, 653 A.2d at 637, and the overall "atmosphere" of the case. Catalano v. Bujak, 642 A.2d 448, 450 (Pa. 1994) ("It is the duty of the lower Court to control the amount of the verdict; it is in possession of all the facts as well as the atmosphere of the case which will enable it to do more evenhanded justice between the parties than can an appellate court."). Logic dictates that this court also examine that evidence necessarily designated fact by the jury in light of its verdict to ensure that the award complies with the instructions of the court and the dictates of the law. See Boggavarapu v. Ponist, 542 A.2d 516, 518 (Pa. 1988) (stating that "[a]s a general proposition victims indeed must be compensated for all that they lose and all that they suffer from the tort of another."); see also Kerzner, 1997 WL727692 at *3 (noting that a verdict that "reflects a failure of a jury to follow instructions of the court or to decide the questions submitted on the merits is a miscarriage of justice").

In the charge, the jury was instructed that if it found the defendant liable it must compensate the plaintiff for all medical expenses reasonably incurred for the diagnosis, treatment, and cure of plaintiff's injuries in the past. The jury awarded plaintiff the full amount of his past medical expenses from the day of the accident on May 19, 1995, through September 25, 1997. These expenses consisted not only of the \$11,166.28 hospital bill but also \$24,570 for the costs of plaintiff's medical treatment for the two years following the accident. Plaintiff's treatment included: visits to his general practitioner for various ailments; a neurological

examination at the University of Pennsylvania Medical Center; diagnostic procedures at Haverford MRI Center; treatment for lumbar and thoracic strain/sprain at Bryn Mawr Rehabilitation Hospital; a consultation with a neurosurgeon at Presbyterian Medical Center of Philadelphia; over two years of neurological and cognitive evaluation and therapy at HUP/Department of Rehabilitation Medicine; a consultation and examination at HUP/Neurological Institute; physical therapy at Penn Sports Rehabilitation; psychological testing at HUP/Department of Rehabilitation Medicine; a year and one-half of cognitive therapy at Beechwood Center of New Jersey; X-rays taken at Lankenau Hospital; physical therapy at King of Prussia Physical Therapy and Sports Injury Center; and a neuropsychological evaluation performed at Presbyterian Medical Center of Philadelphia.

In addition to the charge regarding past medical expenses, the court also instructed the jury that the plaintiff was entitled to be compensated for all medical expenses that the jury found he will reasonable incur in the future for the treatment and care of his continuing injuries. The jury awarded plaintiff \$12,000 for reasonable and necessary future medical expenses.

By awarding Andrews past and future medical expenses, the jury determined that the expenses were attributable to defendant's negligence -- any other interpretation would mean that the jury had ignored the clear mandate of the court's instructions.⁵ See Dougherty v.

⁵ In his response opposing plaintiff's motion for a new trial, defendant included an affidavit containing information about the jury's deliberations that he obtained during post-trial juror interviews. See Defendant's Supplemental Memorandum of Law in Opposition to Plaintiff's Motion for a New Trial, Exhibit C. A trial court may not consider statements from jurors regarding their "decisional process" when deciding a motion to grant a new trial. See Domeracki v. Humble Oil & Refining Co., 443 F.2d 1245, 1247-48 (3d Cir. 1971). As the information contained in the affidavit was not properly before the court, I have not considered it in deciding this motion.

McLaughlin, 637 A.2d 1017, 1020 (Pa. Super. Ct. 1994) (stating that “[w]here a jury awards a plaintiff his medical expenses, they make a finding that the expenses were related to the defendant’s actions in injuring the plaintiff”). With regard to future medical costs, the jury had to accept as fact plaintiff’s reasonable and ongoing need for medical care as a result of the accident. Having accepted this as true, it defies logic and common sense that the jury would withhold from the plaintiff compensation for general damages that are so severe that they warrant future medical treatment.⁶ As the Pennsylvania Supreme Court aptly stated in Todd v. Bercini, 92 A.2d 538, 608 (Pa. 1952), “[w]hen it is apparent that a jury by its verdict holds the defendant responsible for a whole loaf of bread, it may not then capriciously cut off a portion of that loaf as it hands it to the plaintiff.”⁷

To support his claim that the award is so inadequate as to shock the conscience and require a new trial, plaintiff cites Neison v. Hines, 653 A.2d 634 (Pa. 1995). Like the case at bar, the plaintiff in Neison sustained various injuries in an automobile accident. Id. at 635. Because

⁶ At oral argument, defendant’s counsel asserted that the jury’s award of future medical costs constituted a mercy verdict given out of sympathy for the plaintiff. Tape of Oral Argument, Mar. 29, 1998. A random award of future medical damages made because the jury pitied the plaintiff no more serves as a just verdict than an award that is so inadequate in light of the evidence as to shock the conscience.

⁷ One example of the jury “capriciously cutting off a portion” of plaintiff’s loaf of bread is with regard to plaintiff’s claim of cognitive problems. Defendant’s vocational expert testified that, based on reports from plaintiff’s treating physicians and cognitive therapists, he would have to conclude that Andrews’s cognitive difficulties would have an impact on his earning potential. Lukas Tr. at 22. Having concluded that plaintiff’s cognitive therapy, was a reasonable medical expense and having awarded plaintiff future medical expenses, the jury obviously accepted as fact the testimony of plaintiff’s doctors that such treatment was necessary and related to defendant’s negligence, at least in part. The jury cannot, having made such a determination, turn around and totally disregard the underlying mental difficulties and their impact on plaintiff’s life.

she admitted liability, however, the only issue at trial was the amount of plaintiff's pain and suffering. Id. at 636. Similar to the instant case, the defendant in Neison contested both the severity of plaintiff's injuries and their causal connection to the accident. Id. at 636, 638. The jury awarded no damages to the plaintiff. Id. The supreme court agreed with the court of common pleas that the uncontroverted evidence produced at trial did not support the jury's verdict. Neison, 653 A.2d at 522-23. In so deciding, the supreme court stated that soft tissue damage and a herniated disk are the type of objective injuries "to which human experience teaches there is accompanying pain." Id. at 638 (quoting Boggavarapu v. Ponist, 542 A.2d 516, 518 (Pa. 1988)). Consequently, the jury's failure to apply common sense and award any damages for pain and suffering was shocking to the court's conscience and justified a new trial. Id.

Like the plaintiff in Neison, Andrews also suffered from a herniated disk and soft tissue damage -- objective injuries justifying damages for pain and suffering. Defendant tries to distinguish Neison on the ground that Neison received no damages at all for pain and suffering whereas plaintiff's damage award included a small amount for pain and suffering.⁸ Nothing in the case law, however, leads me to the conclusion that an award of essentially nominal general damages precludes a determination that the award shocks the conscience.⁹ Surely when the jury

⁸ Defendant also argues that the fact that the defendant in Neison admitted liability distinguishes it from the instant case. While the parties here did contest liability, that was a minimal portion of the trial and I believe the issues of liability and damages are easily differentiated. Furthermore, neither party is challenging the liability aspect of the jury's verdict. Therefore, I find argument regarding contested liability to be without merit.

⁹ The commonwealth court has stated that there is no "particular ratio of pain and suffering damages to special damages or any particular dollar figure [that] automatically constitut[es] inadequacy. Each case must be examined in the light of its unique facts. . . . [A]n award for pain and suffering with respect to obviously serious injuries need not be zero or nominal or a trivialization of the plaintiff's injury to be inadequate." Hill v. Bureau of

has awarded \$35,736.28 for past medical expenses resulting from the accident and \$12,000 for future medical expenses, an award of \$2,500 for past and future pain and suffering, past and future embarrassment and humiliation, past and future loss of life's pleasures, and past and future lost earning capacity is the functional equivalent of no general damages.

Defendant argues that the supreme court's decision in Catalano, 642 A.2d 448 (Pa. 1994), is sufficiently similar to this case to compel the same result -- i.e. no new trial. In Catalano, a case decided prior to Neison, the plaintiff brought suit for injuries to his wrist allegedly sustained during his arrest for driving under the influence. Catalano, 642 A.2d at 449. At trial, the defendant disputed both liability and damages. Id. at 450. The jury found in favor of the plaintiff and awarded him his medical expenses of \$1,210.94, incidental costs of \$332.50, and zero damages for pain and suffering. Id. at 449. Catalano contended that he should have received damages for pain and suffering and lost wages that he claimed resulted from the surgery performed on his injured wrist. Id. at 450. The supreme court, upholding the trial court's denial of a new trial, stated that no inadequacy existed just because the verdict awarded medical expenses but no pain and suffering. Id. at 451. In that case, the court stated, "[i]t . . . appear[ed] that the jury simply disbelieved evidence of damages in excess of what it awarded." Id.

Defendant contends that, given the contested nature of liability and plaintiff's injuries, the damages awarded in this case also resulted from the jury "simply disbeliev[ing] the evidence of damages in excess of what it awarded." But the jury's exceedingly low verdict with respect to general damages cannot be so easily dismissed. Despite what defendant might wish, Catalano

Corrections, 555 A.2d 1362, 1368 (Pa. Commw. Ct. 1989) (granting new trial where jury awarded \$1800 in addition to medical costs).

did not establish jury awards as inviolable.

First, the difference in the appellate role of the supreme court in Catalano and role of this trial court cannot be ignored. In Catalano, the supreme court reinstated the decision of the trial court not to grant a new trial. Id. In so doing, the court acknowledged that the trial court is in the best position to determine, given all of the circumstances of the case, whether the jury verdict shocks the conscience. See Catalano, 642 A.2d at 450 (distinguishing role of trial court from appellate court in regard to claims of inadequate verdicts); see also Matheny v. West Shore Country Club, 648 A.2d 24-25 (Pa. Super. Ct. 1994), allocatur denied, 655 A.2d 990 (Pa. 1995)(stating that “the trial court is at least in a position to make an informed judgment to overturn a jury verdict, since it had an opportunity to observe the witnesses and evaluate credibility”). Absent abuse of discretion, the Pennsylvania Supreme Court will not interfere with a trial court’s decision. Id. at 450. In contrast to Catalano, in the case at bar, the trial court is deciding to grant a new trial, and that decision is based not on a cold record but on the facts and impressions obtained first-hand throughout the course of the trial.

Moreover, the supreme court in Catalano did not reduce the trial court’s discretion to grant a new trial but instead reiterated the bases on which a court might find it necessary to disturb a jury’s verdict. These grounds consist of the following: “evidence of unfairness, mistake, partiality, prejudice, corruption, exorbitance, excessiveness, or a result that is offensive to the conscience and judgment of the court.” Id. at 451. The general damages award given to Andrews in this case fall into this last category -- it is “offensive to the conscience and judgment” of this court.

As both Neison and Catalano demonstrate, these cases and others relied on by both sides

in their briefs can be instructive but are not dispositive. Not only are many factually distinguishable on paper from the case at a bar, but every trial is unique in its proceedings as well: and those unique characteristics must be taken into account. As one court stated, “this area is particularly ill-suited for reasoning by analogy. Every accident victim suffers unique injuries and responds differently to them. Also, a jury may be influenced by the way a case is presented.” Matheny, 648 A.2d at 25. Consequently, I must rely most heavily on the facts and “atmosphere” of this particular case in order to “control the amount of the verdict” and ensure justice for the parties. See Catalano, 642 A.2d at 450 (describing role of trial court as compared to appellate court in regard to deciding claims of inadequate verdicts).

Although conflicting evidence existed as to liability, causation, and severity of the injuries, in light of the evidence that was uncontested and the jury’s implicit factual findings, I conclude that the jury’s verdict of \$2,500 for general damages shocks my conscience and that justice requires that the motion for a new trial of plaintiff Michael Andrews be granted.¹⁰

¹⁰ The liability portion of this case was very limited and the parties will have to retry most of it in order to explain to the jury the mechanics of how plaintiff’s injury occurred. Consequently, unless the parties stipulate otherwise, I will grant a new trial as to both liability and damages.

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MICHAEL ANDREWS and SUSANNE	:	CIVIL ACTION
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	:	
v.	:	
	:	NO. 97-3414
ANNA KARRAS	:	

ORDER

AND NOW, this day of October, 1998, upon consideration of plaintiffs' motion for a new trial and the defendant's response thereto, I find that the general damages awarded to plaintiff Michael Andrews shock the conscience of the court and IT IS HEREBY ORDERED that the motion for a new trial is GRANTED.

The trial is scheduled for January 11, 1999, at 10 A.M.

William H. Yohn, Jr., J.