

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

★ APR 10 2009 ★

BROOKLYN OFFICE

**MEMORANDUM
DECISION AND ORDER**

05 Civ. 5911 (BMC)

----- X
:
MIKHAIL NISANOV and MARGARITA
NISANOV, :
:
Plaintiffs, :
:
-against- :
:
BLACK & DECKER (U.S.) INC., :
:
Defendant. :
:
----- X

COGAN, District Judge.

This case is before me on plaintiffs' motion to amend the judgment or for a new trial. The motion challenges the jury's determination with respect to comparative negligence, and the adequacy and exclusion of various elements of damages. For the reasons set forth below, the motion is granted in part and denied in part.

BACKGROUND

This is a products liability and negligence case arising out of plaintiff Mikhail Nisanov's use of a lawnmower manufactured by the defendant. The lawnmower was powered through an electric cord that plugged into a wall outlet. In an attempt to clean the lawnmower blades when he had finished using it, Mr. Nisanov turned the lawnmower upside down on his lawn so that he could reach the blades. However, he did not unplug the mower, despite a warning on it, of which he was aware, warning him of the danger of not doing so. In its upside down position, the switch located on the top part of the handle of the mower impacted something on the ground, perhaps a protruding stick, which caused it to activate. Mr. Nisanov lost the three middle fingers, part of the pinkie, and part of the palm on his dominant hand.

After a five day jury trial, the jury found for Mr. Nisanov on his negligence claim and for defendant on Mr. Nisanov's strict products liability claim.¹ It fixed damages in the amount of \$600,000 for past pain and suffering and \$1.4 million for future pain and suffering. However, it also found that Mr. Nisanov was 90% at fault, which meant that his net award was \$200,000. The jury also awarded nothing to Mrs. Nisanov on her loss of services claim.

In this motion, plaintiffs challenge the \$600,000 for past pain and suffering and the failure to award anything to Mrs. Nisanov as inadequate. They also challenge the jury's apportionment of 90% fault to Mr. Nisanov. Finally, they contend that the judgment should be increased by the amount of the New York City Department of Social Services' lien on Mr. Nisanov's recovery.

DISCUSSION

I. Past Pain and Suffering

In reviewing a jury's damage award on a state law claim, federal district courts in New York must apply New York law. Patterson v. Balsamico, 440 F.3d 104, 119 (2d Cir. 2006) (citing Gasperini v. Ctr. for the Humanities, 518 U.S. 415, 430-31, 116 S. Ct. 2221 (1996), and Cross v. N.Y. City Transit Auth., 417 F.3d 241, 258 (2d Cir. 2005)). Under New York Civil Practice Law and Rules 5501(c), the Appellate Division of the Supreme Court of New York determines whether an itemized jury verdict like this one "deviates materially from what would be reasonable compensation." Although CPLR 5501 is phrased as a direction to the Appellate

¹ In that respect, the jury's verdict was inconsistent, as a strict products liability claim is a subset of a negligence claim. See Kosmyinka v. Polaris Indus., Inc., 462 F.3d 74, 87 (2d Cir. 2006). However, neither party objected to the inconsistency prior to the jury's discharge, and thus both parties waived any objection to the inconsistent verdict. See id. at 83 ("It is well established that a party waives its objection to any inconsistency in a jury verdict if it fails to object to the verdict prior to the excusing of the jury.").

Division, New York trial courts apply the same standard in reviewing motions challenging a jury's damage award, and thus I must apply that same standard as well. See Gasperini, 518 U.S. at 430, 116 S.Ct. at 2221. In determining whether an award materially deviates from what would be reasonable compensation, courts consider a range of awards for similar injuries. See id. at 425, 116 S.Ct. at 2218.

Plaintiffs' contention in their moving brief that \$600,000 is a "material deviation" from "reasonable compensation" is based entirely on one case, McKeon v. Sears Roebuck & Co., 262 A.D.2d 7, 690 N.Y.S.2d 566 (1st Dep't 1996), in which the plaintiff had four fingers amputated but reattached (although it seems likely, based on the future damages award, that full functionality was not restored), and the jury awarded \$810,000 for past pain and suffering. By applying the increase in the consumer price index since this decision, plaintiffs present-value that award at over \$1 million. They argue that since the injury was less severe although comparable in McKeon, Mr. Nisanov's pain and suffering has to be worth at least that much.²

Although there are cases to the contrary, see, e.g., Sundbom v. Erik Riebling Co., Inc., No. 89 Civ. 4660, 1991 WL 12116 (S.D.N.Y. Jan. 24, 1991); Robinson v. Shapiro, 484 F. Supp.

² The parties debate whether the consumer price index should be used to increase comparable awards from previously decided cases. Defendants are wrong that no reported cases have used that method, as there are a handful of federal district court decisions in this Circuit that have assumed, without discussion, that such a method is proper. See, e.g., Brady v. Wal-Mart Stores, Inc., 455 F. Supp. 2d 157, 200 (E.D.N.Y. 2006); Sundbom, 1991 WL 12116, at *3. However, I am highly skeptical that such a method is appropriate. I note that there appear to be no state cases applying this methodology in reviewing jury verdicts, and Gasperini makes it clear that federal district courts should consider challenges to jury awards under the same standard that state trial courts apply. See Gasperini, 518 U.S. at 430-31, 116 S.Ct. at 2221. In that regard, it also is noteworthy that the few federal cases in this Circuit applying this method arise under federal law, not New York law, with the exception of Sundbom, where the district judge acknowledged he had only recently been appointed and had no experience with personal injury litigation. Moreover, even in the federal law cases using this methodology, it is universally in the context of requiring a remittitur, not determining insufficiency of the award, so that the effect of using the consumer price index is only to decrease the amount by which the award gets reduced, never to increase the award itself. See, e.g., Brady, 455 F. Supp. 2d at 200; Ruhlmann v. Smith, 323 F. Supp. 2d 356 (N.D.N.Y. 2004). More fundamentally, jury verdicts are not a consumer good subject to a market, and in the absence of empirical evidence showing that jury awards move like consumer prices, the assumption that they do is speculative. There is an inherent element of judgment in reviewing a jury's award, and I do not believe that attempts to remove or reduce the range of that judgment through the use of mathematical calculations, as was done in Ruhlmann, are persuasive. Rather, the Court should generally consider the age of prior awards as one factor bearing on comparability.

91 (S.D.N.Y. 1980), my view is that it is inappropriate to rely on a single case in determining whether there has been a material deviation from reasonable compensation. Even assuming a similar injury in another case, the jury in each case has to focus on the plaintiff's own testimony concerning his individual pain and suffering and the circumstances of the injury that demonstrate it. Under plaintiffs' theory, one case that is deemed comparable by reason of the nature of the injury would constitute both the floor and the ceiling, or at least something close to them, against which awards in all subsequent cases would have to be measured. Yet just as the top of an award range for comparable injuries may be moved up if a higher award is sustained, the bottom may be moved lower if a second, lower award is sustained.

That is why the law requires consideration of a range of cases to determine whether a deviation has occurred. See Gasperini, 518 U.S. at 425, 116 S.Ct. at 2218. It may be that McKeon constitutes the top of the reasonable compensation range and this case will form the bottom, if one considers only these two cases, and if so, there would be nothing improper about that. McKeon simply may have had more pain and suffering than Mr. Nisanov, or at least a reasonable jury thought so. Only by considering a range of cases can a court determine whether there in fact is a deviation from the norm in the case before it, whether that deviation is "material," and what compensation would be "reasonable."

Of course, there is almost always more than one comparable case if one expands the definition of comparability. Defendant, in opposing plaintiffs' motion, has cited numerous cases involving limb, hand and foot injuries, based upon which it urges that the jury award in this case does not constitute a material deviation from reasonable compensation. Plaintiffs attempt to turn the tables by replying that these cases actually support their material deviation argument, but that assertion is undercut by the fact that plaintiffs chose to cite none of them in their moving brief.

Plaintiffs are correct that the cases defendant cites are distinguishable from the instant case, occasionally in ways that do help plaintiffs' argument, but more often in ways that are immaterial in comparison to their support for the reasonableness of the award here. For example, plaintiffs attempt to distinguish Valentine v. Lopez, 283 A.D.2d 739, 725 N.Y.S.2d 714 (3d Dep't 2001), where the plaintiff suffered 100% impairment of her dominant hand and arm, and the Appellate Division sustained a combined award of \$750,000 for both past and future pain and suffering. Plaintiffs point out that in Valentine, there was no amputation, no extended hospitalization, and no reference to pain killers. I agree that the lack of amputation is a distinguishing factor in plaintiffs' favor. However, Valentine had 100% loss of use of her entire arm and hand through a botched surgery, at least some hospitalization and, although the decision does not mention it, undoubtedly some painkillers after the botched surgery. I would not minimize Mr. Nisanov's injury, which is undeniably severe, but Valentine's reflex sympathetic disorder, totally incapacitating the entire appendage, is also extremely severe, as it often brings unrelenting tactile pain, and the case thus provides some basis to make a comparison that supports the jury's award here.

Similarly, plaintiffs attempt to distinguish Hudson v. Lansingburgh Central School Dist., 27 A.D.3d 1027, 812 N.Y.S. 2d 678 (3d Dep't 2006), on the ground that the amputation was only a portion of the middle finger on the non-dominant hand, an obviously less severe injury than that of Mr. Nisanov. Again, this is a valid distinction, but the jury in that case awarded only \$90,000 for past pain and suffering as compared to the \$600,000 awarded here. The same conclusion can be reached with regard to plaintiffs' attempt to distinguish Leon v. J&M Peppe Realty Corp., 190 A.D.2d 400, 596 N.Y.S.2d 380 (1st Dep't 1999), where the jury awarded \$100,000 for past pain and suffering but the injury was only a "partial amputation" of three

fingers on the non-dominant hand. (I also would note that although the Appellate Division at one point referred to the amputation as “partial,” its description of the injury and reconstructive surgery prior to trial is quite horrendous, certainly comparable to Mr. Nisanov’s.) Indeed, I note that both Leon and the plaintiff in McKcon, the sole case on which plaintiff relies, involved carpenters, which conceivably could increase past as well as future pain and suffering, unlike Mr. Nisanov, where plaintiffs do not contend that the injury impacted his occupation.

I could continue to draw comparisons between each of the cases and verdict reports cited by defendant that plaintiffs attempt to distinguish, but the discussion above adequately presents the landscape. Having considered it, I cannot say that the jury’s award here materially deviated from what would be reasonable compensation. It may be that the award is somewhat less than the “average” award in comparable injury cases – assuming the concept of an average is relevant in comparing a collection of cases in which no two injuries are identical – but \$600,000 is in the range of reasonableness established by these cases and will not be an outlier among this sample. Plaintiffs’ motion in this respect is therefore denied.

II. Loss of Services

Plaintiffs challenge the award of zero damages on Mrs. Nisanov’s claim for loss of services. They point to their testimony that Mr. Nisanov cannot help his wife around the house anymore, and that they no longer play pool and socialize as much as they did. Defendant responds that the award of zero damages was proper, and points to the fact that the family took a two-week trip to Israel shortly after Mr. Nisanov’s discharge from the hospital for a family wedding; that they also have gone to the Bahamas and Atlantic City; that they go to synagogue two days a week as a family; that they continue to see friends; that they have had a third child;

and that Mr. Nisanov is employed. It is clear that the jury viewed the claim for loss of services as too de minimis to support an award.

In challenging that analysis, plaintiffs on this motion have ignored the fact that they must make the same showing that they attempted to make in challenging the award of \$600,000 for past pain and suffering to Mr. Nisanov, that is, they must show that the zero damages award deviates materially from what would be reasonable compensation. Like the past pain and suffering award, this can only be determined by reference to comparable cases. Yet plaintiffs have cited no cases against which this Court could measure the instant case to determine if there is a deviation and, if so, whether it is material. It is plaintiffs' burden to show a material deviation. The failure to cite a single case is itself sufficient grounds to deny plaintiffs' motion.

In any event, while recognizing the danger of relying upon too limited a review of comparable cases as discussed above, there is support in the case law to sustain a jury verdict of zero or minimal damages for loss of services where the testimony is general, contradicted by objective manifestations of continuing companionship and services, and the loss is not momentous. See, e.g., Batts v. Rutrick, 298 A.D.2d 417, 748 N.Y.S.2d 770 (2d Dep't 2002), leave to app. den., 99 N.Y.2d 508, 787 N.E.2d 1164, 757 N.Y.S.2d 818, reargument den., 100 N.Y.2d 556, 795 N.E.2d 40, 763 N.Y.S.2d 814 (2003) (affirming award of zero damages for loss of services despite testimony that injured plaintiff could no longer go dancing and that his wife mows the lawn). I have been unable to find any case where the evidence showed that shortly post-injury, the family engaged in extensive international travel and conceived an additional child. There was thus sufficient evidence in the record for the jury to conclude that no award for loss of services was appropriate, especially in the absence of any effort by plaintiffs to show a material deviation from reasonable compensation by comparison to other awards.

III. Comparative Negligence

In order to grant a motion for a new trial on the ground that the jury misallocated the parties' respective degrees of negligence that led to this accident, I would have to find that the jury reached a seriously erroneous result or that the verdict is a miscarriage of justice. See Atkins v. New York City, 143 F.3d 100 (2d Cir. 1998).³ Having heard the testimony and reviewed the record, I cannot find any error or a miscarriage of justice in regard to the jury's determination. Plaintiffs conceded Mr. Nisanov's negligence, a concession, which on these facts, was clearly prudent. The question of allocation presented a pure question of fact.

Indeed, the only basis on which any percentage of negligence could be attributed to defendant had to be based on the stipulated fact that a "deadman's switch," which would have prevented this accident, was feasible, coupled with plaintiffs' expert testimony that defendant did not comply with applicable ANSI and Underwriters' Laboratories standards for the design of this product. As to the former, the failure to test and market a feasible alternative does not equate to negligence, see Colon ex rel. Molina v. BIC USA, Inc., 199 F. Supp. 2d 53, 83 (S.D.N.Y. 2001), especially where plaintiff failed to show that any manufacturer in the industry had such an alternative design at the time of this product's manufacture. As to the latter, I believe that the testimony of defendants' witnesses that there was no violation of those standards was more convincing, as plaintiffs' expert, in my view, removed the language of the standards from their respective contexts to support plaintiffs' claim. The jury must not have agreed with my

³ Plaintiffs embrace this federal standard of review, which derives from Fed. R. Civ. P. 59. However, the proper standard is not free from doubt. See Mono v. Peter Pan Bus Lines, Inc., 13 F. Supp. 2d 471, 475 n 2 (S.D.N.Y. 1998). Gasperini held that in reviewing the adequacy of damage awards, federal district courts sitting in diversity must apply the state law standard of review. It is at least arguable that, based on Gasperini's reasoning, the same rule should apply in reviewing the liability aspect of awards rendered under state law. CPLR 4404(a) allows for a new trial if the verdict is "contrary to the weight of the evidence" or "in the interest of justice," an arguably broader standard than the one used in federal court generally. Since plaintiffs have not argued that CPLR 4404(a) should apply and instead urge that the verdict is subject to a new trial under the federal standard, I also will assume that the federal standard applies.

evaluation of the testimony on that issue, but in finding that defendant had some degree of negligence, the jury did not reach an erroneous result in viewing that degree of negligence as minor compared to that of Mr. Nisanov.

Simply because plaintiffs were able to raise an issue of fact concerning defendant's negligence does not mean that the jury misallocated the parties' respective degrees of negligence once they found that defendant was negligent to some degree. From the day they commenced this case, plaintiffs had a very difficult hurdle to overcome: Mr. Nisanov disregarded a warning, which he fully understood, and put his hand into an electric, sharp-bladed machine without disconnecting the power source, which could have been done either at the machine itself or at the wall jack.⁴ I cannot find a serious error or miscarriage of justice in the jury's determination that Mr. Nisanov's negligence, not that of defendant, was the overwhelming factor in causing his injury. Accordingly, plaintiffs' motion in this respect is denied.

IV. Medical Expenses

There was clearly a failure to communicate concerning what plaintiffs refer to on this motion as "the Medicaid lien." At the outset, my understanding is that they are referring to medical expenses funded by Medicaid, which then has a lien against plaintiff's recovery. In other words, the problem that plaintiffs face now is that they have to pay Medicaid the amount of unreimbursed medical expenses out of the net \$200,000 that they have received. To avoid that, they want the judgment amended to add that amount, effectively requiring defendant to pay that additional amount to them, so that they can forward it on to Medicaid without diminution of the

⁴ Defendant urges that Mr. Nisanov was also negligent in not obtaining a copy of the owners' manual for the lawnmower once it bought it used, and in failing to check the area for sticks or other protruding objects that might have activated the mower when it was upside down, which the manual advised the user to do. I am not sure a reasonable consumer should be expected to obtain an owners' manual for a used product he purchased for \$25, but neither party requested a special interrogatory on this issue, so it may have factored into the jury's deliberation, and I again think it would be within the province of the jury to so find.

\$200,000 net judgment. This motion is the first time they have mentioned the amount, at least to the Court, which they place at \$13,342. They prove that amount by submitting with their motion a letter from the New York City Human Resources Administration advising plaintiffs' attorneys that the Department of Social Services (which I assume is the agency responsible for collecting the "Medicaid lien") has a lien on the recovery in this lawsuit in that amount.

In the usual course of a personal injury trial, a plaintiff will offer evidence of unreimbursed medical expenses to the jury; the defendant can either challenge or not challenge the reasonableness of those expenses; the jury will then receive instructions that it is to award reasonable medical expenses if it finds in favor of the plaintiff; and the jury, again if it finds in favor of the plaintiff, will make a specific finding as to the amount of medical expenses and add that amount to its award. Alternatively, and not uncommonly, the parties may stipulate to the amount of reasonable, unreimbursed medical expenses, and the jury is then instructed that the plaintiff is entitled to recover the stipulated amount, in addition to any other damages, if it finds in favor of the plaintiff. By proceeding in one of these two fashions, a plaintiff is able to satisfy any lien on his recovery, whether from Medicaid or any other medical provider or insurance company.

For reasons that are not clear to me, plaintiffs here contemplated a different procedure. The trial transcript reveals only one reference to it. They submitted no evidence of medical expenses to the jury, neither stipulated nor contested. Instead, after both sides had rested, but before I had instructed the jury, the following exchange took place:

MR. FUCHSBERG: Your Honor, one other matter is, I believe, we have a stipulation on the -- we're going to look at the Medicaid lien. If we agree that that is the lien, we'll stipulate it.

MR. PINO: Well, that's between us. I mean, it doesn't -- that's not a matter for the Court and jury.

MR. FUCHSBERG: Only in that we purposely did not prove the medical bills because the only thing that's really relevant would be the lien amount since he's not out-of-pocket for his medical care. Just that we have that, I'm just putting it on the record that we're -- we'll look at it --

MR. PINO: Right.

MR. FUCHSBERG: -- while the jury's out and that will be a collateral matter.

THE COURT: I see. That will be a matter for me to decide.

MR. PINO: Yes, Your Honor.

THE COURT: Depending if the jury finds in plaintiffs' favor.

MR. FUCHSBERG: Correct.

THE COURT: Okay. That's fine.

I will confess to not fully understanding what the parties had in mind through this exchange. However, it was my understanding that in the event the jury returned a verdict in plaintiffs' favor, the parties had agreed that some unspecified amount, of which they were aware but I was not, would be added to the judgment. Nevertheless, plaintiffs did not ask me to do this when the jury returned its verdict, and I heard no more about it until this motion, well after judgment had been entered.

Defendant's position is that while it had stipulated with plaintiffs that there was a Medicaid lien in the amount of \$13,342, it never stipulated that the lien accurately reflected out-of-pocket medical expenses, and thus plaintiffs have failed to establish any right to such medical expenses.

Plaintiffs' counsel obviously could have been more precise in explaining what he had in mind. Defendants are correct that the mere existence of the lien does not in itself conclusively

establish the right to recover medical expenses in like amount. Nevertheless, defendant was not entirely forthcoming either. It acknowledged in open court that the Court was supposed to do *something* if the jury returned a verdict in plaintiffs' favor, and the implication from the colloquy is that this something would be in the nature of some form of stipulated additur.

At the very least, there was a lack of meeting of the minds on the nature and effect of the stipulation. As a result, the issue was not properly tried, and a new trial solely on the issue of Mr. Nisanov's medical expenses is appropriate unless defendant stipulates to amending the judgment to include those medical expenses. However, as defendant points out, the jury's 90/10 allocation of fault is just as applicable to medical expenses as it is to the other elements of the damage award. Accordingly, defendant shall advise the Court within one week of the entry of this decision whether it stipulates to amend the judgment to add the net amount of \$1,334.20, failing which the Court shall order a new trial solely on the issue of reasonable medical expenses.

CONCLUSION

Plaintiffs' motion is granted in part and denied in part as set forth above.

SO ORDERED.

/s/(BMC)

U.S.D.J.

Dated: Brooklyn, New York
April 9, 2009