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COMMENTARY

Justices' Remittitur Ruling Creates Problems in the Trenches

BY MICHAEL BROOKE FISHER

Seven months have passed since the New Jersey Supreme Court made its unfortunate ruling in *He v. Miller*, affirming a trial court's remittitur of a $1 million pain-and-suffering award to $200,000.

The decision was intellectually flawed and impractical and a disservice to the trial bar on both sides because the same flawed rationale supports the granting of an additur. As a retired, and now unfettered, judge who presided over jury trials for a decade, I can refrain from commenting no more.

In the short space allotted, I will not parse the majority's decision. Moreover, I could not improve on Justice Barry Albin's blunt and brilliant dissent.

He chides the majority for not paying "proper deference to the judgment of the jury." He accuses the Court of substituting itself "as the decisive juror" and of only paying "lip service" to the deferential standard of review governing remittitur, while noting that the judge's "feel of the case" improperly trumps the jury's own judgment. He is critical of the trial judge's use of personal experiences and superficial comparisons to dissimilar cases to overturn a jury's award. The dissent is so compelling that it beggars the imagination that the majority did not surrender to its logic and affirm the Appellate Division decision.

While I totally agree with that analysis, I want to comment on the "in the trenches" practical problems this ruling creates. Perhaps my personal experiences as a civil trial judge are germane. I always engaged in efforts to settle cases before and during trials, but sharing my thoughts in attempting to settle a case is a far cry from disturbing a jury's verdict through remittitur or additur.

The comparative analysis the Supreme Court now requires of judges is illusory. I have read synopses of cases I presided over that I barely recognized. There are so many intangibles that get lost in the summarizations, and an omission of a single fact can distort them. In truth, the trial judge's analysis in *He* appears to simply be an imperfect justification for his personal decision to become the decisive juror.

As for the judge's feel of the case, it was wrong to reduce an award by 80 percent because the plaintiff did not fidget uncomfortably or grimace in pain to the judge's satisfaction. The jury had the same opportunity to observe the plaintiff.

One of the highest personal injury jury awards I presided over was one where the plaintiff did not exhibit obvious discomfort and barely articulated her complaints. In that case, the jury awarded her stoicism with a large verdict.

Ordering an additur or remittitur is an arrogant act that should rarely occur. It is not enough that the verdict shocks in the sense of merely surprising the judge. It must shock the "conscience" of the judge. There was nothing manifestly or grossly unjust about the amount of the *He* verdict that would shock one's conscience.

To reach a verdict, a judge charges the jury on awarding damages for pain and suffering. To their dismay, jurors are told the law provides them no table, schedule or formula. They are left to use their sound discretion, and told there is no better yardstick than their own impartial judgment. With no real guidance, we tell them to do their best, and they do.

While I think using comparable jury verdicts is a worthless exercise that attempts to objectify a subjective decision, if there is any value to the process, shouldn't the jury have that information? I make that comment not to recommend it, but to point out the illogic of a judge using a yardstick, albeit a false one, to undo a verdict and a jury being denied that very same information to render one. In addition, each time a judge disturbs a verdict through remittitur or additur, he or she distorts the edges of awards, small or large, and removes them from consideration as a comparable in future cases.

The author, a former Cumberland County Superior Court judge, is a mediator/arbitrator throughout New Jersey. He may be contacted at mbfmediation@mbfmediation.com.

Ignoring intellectual arguments, the greater sin is that a judge's disturbance of a verdict is impractical and counterproductive. Before this ruling, the potential jury verdict was a sword of Damocles. It propelled settlements, neither side wanting to risk the unknown and both wanting to control the case's outcome. If parties proceed to trial, absent some truly egregious circumstance requiring a new trial, they should have to live with it. There is a certain rough justice to that. For in truth, the ultimate value of a case is the number arrived at through settlement or determined by a jury.

Unfortunately, it appears that the *He* decision will not be reconsidered. Trial judges should, then, exercise restraint and avoid cavalierly becoming a decisive juror. What cannot be disturbed can be ignored. ■