

## [Products Liability Law Daily Wrap Up, DAMAGES—MEDICAL DEVICES—Pa. Super.: \\$26.6 M jury verdict in favor of knee implant patient shocks the conscience of the court, \(Jun. 7, 2016\)](#)

Products Liability Law Daily Wrap Up

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By Pamela C. Maloney, J.D.

A jury's \$26.6 million dollar award for non-economic compensatory damages to a patient who was injured following knee replacement surgery was excessive and "shock[ed] the conscience," the Pennsylvania Superior Court stated in a divided non-precedential ruling that vacated the award and remanded the case for a new trial. The \$1 million awarded to the patient's spouse on his derivative loss of consortium claim also was vacated (*Polett v. Public Communications, Inc.*, June 6, 2016, Shogan, J.).

The patient had filed a negligence action against Zimmer Inc., the manufacturer of the artificial knee implanted during her surgery, and Public Communications Inc. (PCI), the company that produced and filmed a promotional video for Zimmer in which the patient was featured riding a stationary bicycle and walking on a treadmill one month after her surgery. According to the patient's complaint, shortly after the video was filmed, she developed synovitis, which compromised the mobility and stability of her knee, resulting in falls, a patellar fracture, and additional surgeries. After trial, the jury awarded the patient a lump sum verdict in the amount of \$26,600,000 and a lump sum verdict for the patient's husband in the amount of \$1 million. The jury also found the patient 30 percent contributorily negligent and the trial court reduced both awards by that amount.

Motions for remittitur filed by both Zimmer and PCI were denied by the trial court. On appeal, the superior court vacated the judgment on other grounds without addressing the remitter issue. The Pennsylvania Supreme Court [reversed and remanded](#) that order for consideration of the remitter issue. The sole issue pending before the superior court was whether the trial court erred in refusing to remit the jury's compensatory damage awards to the patient and her husband.

**Remittitur.** According to Zimmer and PCI, the trial court cited the factors relevant to a remittitur analysis, but failed to apply those factors properly. Noting that the patient sought only non-economic damages for pain and suffering rather than compensatory damages for medical expenses, lost wages, or out-of-pocket costs, the court reminded the parties that damages for pain and suffering could not be arbitrary, speculative, or punitive, and must be reasonable.

A review of evidence in this case established that the patient, a 67-year-old charity volunteer with rheumatoid arthritis and a medical history of knee problems, suffered an injury to her right knee as a result of PCI and Zimmer's negligence. The injury led to loss of motion, falls, a patellar fracture, ruptured tendons, and three additional surgeries. As a result, the patient needed a walker and had a fear of falling. She could no longer drive, required assistance standing and sitting, and experiences pain in her knee. The evidence also showed that the condition of the knee would not improve and that the patient had lost her independence.

Based on this evidence, the court found that although the patient clearly was entitled to compensatory damages, the jury's award of \$26.6 million for non-economic losses deviated substantially from the "uncertain limits" of what could be considered fair and reasonable compensation, was excessive, if not punitive, and was clearly beyond what was warranted by the evidence. As such, the jury's award "shock[ed] the sense of justice." Similarly, the \$1 million awarded to the husband on his derivative claim was also excessive based on the evidence presented.

**Concurring opinion.** In [concurring](#) with the majority's conclusion, Judge Bowes—writing on behalf of himself and Judge Gantman—expressed his concern that the Pennsylvania courts have yet to provide sufficient

guidance for trial courts facing remittitur decisions. The trial court had cited the factors set forth *Kemp v. Philadelphia Transportation Co.*, 3621 A.2d 362 (Pa.Super. 1976) as its basis for evaluating whether the verdict was excessive and had referenced the elements laid out in the jury instructions on non-economic damages. However, according to Judge Bowes, the trial court had failed to perform an even-handed assessment of the uncontroverted damages evidence, choosing instead to recap only the evidence that tended to support the jury's award of non-compensatory damages and in a light most favorable to the patient.

As a result, the \$26.6 million compensatory damage award, including the \$1 million award for loss of consortium, was startling and excessive, in Judge Bowe's opinion. It represented the single largest compensatory damages award in Philadelphia, the eighth largest total verdict awarded in Pennsylvania, and the seventy-fifth largest total verdict awarded in the country. It also far exceeded other verdicts rendered in Philadelphia County in 2010, despite the fact that the patient's injuries were less severe, she had pre-existing medical conditions, she sought no economic damages, and she was older than the other plaintiffs at the time of her injury.

To avoid such results in the future, Judge Bowes encouraged trial courts to apply both the *Kemp* factors and the elements of non-economic damages to their remittitur determinations, and to set forth their analysis of these factors in order to assist the appellate court during its review. He also advised the trial courts to perform a balanced assessment of the proven damages, giving full weight to any uncontradicted evidence that tended to mitigate damages. Doing so would permit both the trial and appellate courts to ascertain whether the amount of the verdict bore a rational relationship to the loss suffered.

The case is No. [1865 EDA 2011](#).

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Companies: Public Communications Inc.; Zimmer, Inc.; Zimmer USA, Inc.

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