

SUPREME COURT OF LOUISIANA

No. 99-C-0934

JOSHUA N. CONE ET AL.

Versus

NATIONAL EMERGENCY SERVICES, INC. ET AL.

KNOLL, Justice, dissenting in part.

I agree that the jury abused its discretion in awarding plaintiff \$5,500,000. However, I disagree with the majority's conclusion that \$1,750,000 is the highest amount reasonably within the range of discretion of the trier of fact. Accordingly, I respectfully dissent from the majority disturbing the quantum award to a low amount.

Before an appellate court can disturb the factfinder's award, the record must clearly reveal that the trier of fact abused its discretion in making the award. *Youn v. Maritime Overseas Corp.*, 623 So. 2d 1257, 1261 (La. 1993), *cert. denied*, 510 U.S. 1114 (1994); *Coco v. Winston Indus., Inc.*, 341 So. 2d 332, 334 (La. 1976). The task of the appellate court then, however, is not simply to determine what it believes to be the appropriate award based on the evidence. *Coco*, 341 So. 2d at 335. Instead, the reviewing court is limited to disturbing the award only to the extent of lowering it (or raising it) to the highest (or lowest) point reasonably within the wide discretion afforded the factfinder. *Id.* (citations omitted). Further, while resorting to the awards in other cases is appropriate for the appellate court, such awards can only serve as an aid. Prior awards should not and cannot be used to provide uniformity of damages to all similar cases. *Id.* To hold otherwise materially weakens and fails to appreciate the respect reviewing courts owe the factfinder. Ultimately, the adequacy or inadequacy of any award can only be determined by a complete consideration of the facts and circumstances peculiar to each case.

Because of the defendant's negligence, the plaintiff sustained injury to his only remaining testicle, resulting in its removal, his sterility, and his diminished hormonal development as a man. This loss was especially significant to plaintiff as it occurred just as he was entering puberty and substantially interrupted and diminished his normal development. The jury's award of damages to Josh included damages for his permanent disfigurement, mental anguish, embarrassment, humiliation, and medical expenses. Although the majority concedes that the injury was traumatic, that Josh suffered and continues to suffer humiliation from peers, and that Josh suffered and will continue to suffer mental anguish in losing the opportunity to pursue his lifetime career and never having the opportunity to have children of his own, I believe that the majority fails to fully appreciate the extent of the psychological injuries this particular injury has had on this young man. The plaintiff suffered and will, unfortunately, continue to suffer emotional injuries incapable of exact mathematical calculation for the rest of his life. In every aspect of his social, work, and romantic relations, plaintiff must learn to face, deal with, and explain an aspect of life more personal than any other. Without argument, this tragic injury will forever negatively impact his self-esteem in every aspect of his life as he attempts to cope with life's crises as they occur.

Finally, I believe the majority fails to appreciate the obvious distinctions in *Felice* and *Wisner* and the individual circumstances of the case before us, making the substantial reduction in the jury's award incorrect. In *Felice*, a twelve-year-old case, a two-year-old child's penis was accidentally burned off during a circumcision. 520 So. 2d at 922. On appeal, the court affirmed the jury's award of \$2,750,000 as the more reasonable total damage award and rejected the trial judge's award of \$1,730,000. *Id.* at 930. While the injuries and resulting damages in *Felice* and the case *sub judice* are similar, noticeably absent from the child's award in *Felice* was the inability to have

children. In the case *sub judice*, perhaps the single greatest loss plaintiff suffered and to which uncontradicted evidence was present was this loss. In *Wisner*, an eleven-year-old case, a thirty-five-year-old state trooper was awarded \$2,794,000 in total damages after being exposed to toxic chemicals release from a train derailment. 537 So. 2d at 743. The plaintiff's injuries included damage to his lungs, pituitary gland, and testicles, exercise intolerance, depression, impotence, and loss of vision. The award, however, did not include evidence of humiliation, teasing, taunting, ridicule for others, or loss of ability to have children. Further, there was no evidence as to the impact on his prospect of marital relations. Finally, the plaintiff was a fully grown man well into the prime of his life.

Considering the staleness of the quantum awards in *Felice* and *Wisner*, the jury's award in this case, the full extent of and the circumstances resulting from plaintiff's horrific injury, and the limitation of *Youn*, I cannot agree that \$1,750,000 is lowering the abusive award to the highest point reasonably within the wide discretion afforded the factfinder. For these reason, I respectfully dissent.