Amendment which places upon the prosecution the burden to prove every fact necessary to constitute the crime beyond a reasonable doubt. The Court thus concluded that it was the state's burden to prove the absence of heat of passion or sudden provocation when the issue was properly presented. In that case the defendant had entered a plea of not guilty and was entitled to the presumption of innocence.

In this case the defendant has already entered a guilty plea to murder generally. We believe the defendant did not present evidence to reduce the crime to voluntary manslaughter. In addition the Commonwealth's evidence was sufficient to show beyond a reasonable doubt that the death of the victim was a malicious killing and was the crime of murder in the third degree.

This opinion is filed in support of the Court's finding that the defendant is guilty of murder in the third degree.

SHOTTS v. KOUGH, C.P. Fulton County Branch, No. 385 - 1980-C

Trespass - Trial without jury - New Trial - Fair Trial - Conduct of Court - Amendment of Complaint

1. Only the most unusual circumstances will warrant the grant of a new trial to the verdict winner on the grounds that the verdict is inadequate and against the weight of evidence or law.

2. The verdict of a trial judge sitting without jury is entitled to great weight and a new trial will be granted only upon showing of a clear abuse of discretion.

3. Leave to amend a complaint by adding an averment of wanton conduct would be in error in that it would permit introduction of a new cause of action.

4. A verdict winner seeking a new trial due to alleged errors during the trial must show that the errors, even if proven, caused the alleged incorrect results and that the favorable verdict did not cure the errors.

Gary Deane Wilt, Esquire, Attorney for plaintiffs

George F. Douglas, Jr., Esquire, Attorney for defendant

OPINION AND ORDER

EPPINGER, P.J., July 29, 1982:

There was an automobile accident on June 26, 1979. Lois Shotts and her daughter, Mindy, were injured in the accident. They and Lois' husband, Nelson, sued the other operator, Wayne Kough. The case was tried without a jury and Lois was awarded $18,300, Nelson, $2200 [1] and Mindy, $1000. The plaintiffs filed exceptions according to the requirements of Pa. R.C.P. 1038 and asked us to set aside the verdict and grant a new trial before a jury.

Plaintiffs' first four exceptions charge that the verdict is so disproportionate to the injuries and damages proved as to be against the weight of the evidence and the law. The second set of exceptions propose that plaintiffs were denied their right to a fair trial.

The grant of a new trial is within the discretion of the trial court. New trials should be ordered only when "the judicial process has resulted in the working of an injustice upon any of the parties." *Kiser v. Schlosser*, 389 Pa. 131, 133, 132 A. 2d 344 (1957). Considering the evidence in the light most favorable to plaintiffs, the verdict winners as required by *Johnston Truck Rental Co., Inc. v. Fowler-McKee Co.*, 281 Pa. Super. 271, 422 A. 2d 164 (1980), we find that the sum of verdict is supported by the evidence.

Only the most unusual circumstances will warrant the grant of a new trial to the verdict winner on the grounds that the verdict is inadequate and against the weight of evidence or law. *Battistone v. Benedetti*, 385 Pa. 163, 122 A. 2d 536 (1956). A verdict of a trial judge sitting without a jury is entitled to great weight, and circumstances warranting a new trial must be "a clear abuse of discretion." See *Baird v. Dun & Bradstreet, Inc.*, 446 Pa. 266, 285 A 2d 166 (1971) and *Johnston*, supra.

Lois suffered a fracture of the right Tibia and Fibula and of the left elbow. She had othe minor injuries. She was cared for in the hospital but was released with a total leg cast and a cast on her left forearm. She had to use a wheelchair upon discharge. She continued under the physicians' care and reached the point where she could use crutches. She was referred to an orthopedic surgeon who recommended the

1. Defendant's carrier paid the property damage claim.

removal of the patella and it was removed. Exercise was prescribed for her further rehabilitation--a program which she did not follow. She has lost muscle mass and the physicians testified to functional loss in the use of the leg. Activities like extended walks, roller skating, dancing, hunting, tennis, snowmobiling and motorcycle riding are limited but she can do her housework. Her situation would improve with the prescribed physical therapy and exercise.

At the time of the accident she was delivering newspapers and has not gone back to that work. She says she feels sensitive about the scar on her knee though it is not unusually disfiguring. The knee joint is stable and does not lock. She has suffered back pains and headaches, but medical testimony cannot relate these to the accident. However, since the accident she has gained weight.

When Mindy was brought to the emergency room she had facial lacerations, which seem to be well healed. One of these, in the opinion of the physician, was not a severe comestic disfigurement, while the other, a ¾ inch scar on the inside of the nose, might be. There was no evidence of what would be involved in cosmetic surgery or what the cost of it would be, if required.

Nelson Shotts was not injured in the accident. He was, however, inconvenienced and partially lost the services and companionship of his wife following the accident.

After considering all of the evidence presented and accepted that which we found to be credible, we believe all three plaintiffs were amply compensated for their damages. Therefore, it cannot be said that the verdict is without support in the record and against the evidence or the law. "It is well-settled that error in the abstract is not sufficient to warrant a retrial." *Siegfried v. Lehigh Valley Transit Co.*, 334 Pa., 346, 349, 6 A2d 97 (1939). A verdict winner complaining of trial errors in order to secure a new trial, must convince the trial court that the verdict in his favor did not cure the errors and that the errors produced an unjust result." *Granowitz v. Erie Redevelopment Authority*, 432 Pa. 243, 245, 247 A.2d 623 (1968). See also *Gombar v. Shaeffer*, 202 Pa. Super 282, 195 A.2d 527 (1963).

The second set of exceptions filed by the plaintiffs go to the conduct of the trial, saying that actions and rulings of the court denied the plaintiffs their right to a fair trial.

We refused to grant an untimely demand for a jury trial. Pa. R.C.P. 1007.1(a) provides that the right to jury trial is waived "unless a party files and serves a written demand for a jury trial not later than twenty (20) days after service of the last permissible pleading." Since counsel failed to meet the deadline, the jury trial was waived. [2]

It is true that Pa. R.C.P. 126 and 248 permit a trial court to disregard or extend such limitations. However, since no substantial purpose would have been served by granting counsel's untimely application, it was not appropriate to grant the request. Therefore, no error resulted which would require a new trial.

Next, at trial, counsel moved to amend plaintiffs' complaint to present evidence of driving under the influence of intoxicants to support punitive damages. Prior to trial the defendant had stipulated that he was negligent and the case proceeded on the issue of damages alone. Pa. R.C.P. 1033 permits a party to amend a complaint at any time but leave to do so is left to the court's sound discretion.

In addition, granting leave to amend the complaint in this case to add an averment of wanton conduct would be in error since it would permit the introduction of a new cause of action. Wanton misconduct is something different from negligence, evincing a different state of mind. It exists where the danger to the plaintff, though realized, is so reckless that, even though there was no actual intent, there is a willingness to inflict injury and a conscious indifference to the perpetration of the wrong. *Jackson v. Waddle*, 11 D & C 3d 59, 60, 61 (Phila. 1979) and cases cited.

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2. The sequence of events from the filing of the complaint to the time of trial are as follows:
Complaint filed December 18, 1980, served December 27, 1980;
Appearance by counsel for defendant entered January 15, 1981;
Certificate of readiness for trial filed May 19, 1981;
Case placed on trial list first time July 13, 1981;
Pretrial conference held October 21, 1981 at which time it was noted the case was for trial without a jury;
Demand for jury trial filed November 16, 1981 and docketed November 18, 1981, more than 20 days after pretrial conference;
Application for jury trial denied, December 28, 1982;
No exception taken to court's order denying jury trial.

The next exception is that the judge actively participated in the trial rather than assuming the rule of an objective observer, thereby demonstrating sympathy to defendant's cause. Participation by the court in the trial of a particular case is always within its discretion to the extent that it aids in the disposition of the case. *Garrett v. Faust*, 9 F.R.D. 482 (D.C. Pa. 1958) vacated 183 F.2d 625, cert. denied 340 U.S. 931, 71 S. Ct. 493, 95 L. Ed. 672, reharing denied, 341 U. S. 917, 71 S. Ct. 801, 95 L. Ed. 1362. Only when the participation becomes "undue influence" or "undue emphasis of one side of the case" which interferes with the "interest of justice" will such participation be grounds for a new trial.

Keating v. Belcher, 384 Pa. 129, 119 A.2d 535 (1956). In this case our participation was minimal and used primarily to prevent error by counsel in redirect questioning which exceeded the scope of cross examination.

The eighth exception is that it was error for us to interrupt counsel's questioning and description of plaintiff's scars. It is not error for a judge to interrupt an improper or unnecessary line of questioning. *Happel v. Johnson*, 62 D & C 2d 587 (1972). Accordingly, it was not error to prevent the unnecessary description of scars which were clearly visible.

Further it was not improper for us to explain at the conclusion of trial that we were not bound by the testimony of plaintiffs' expert witnesses. In a trial without a jury, the judge as fact-finder is required to determine the weight to be given the testimony of a particular witness and he alone must evaluate the demeanor and evidence presented by experts. *Stauffer v. Stauffer*, 465 Pa. 558, 351 A.2d 236 (1976). See also *Baltimore & Ohio Railroad Co. v. Langenfelder*, 120 Pitt. L.J. 162, affd. 222 Pa. Super 138, 292 A.2d 415 (1972).

The tenth exception is that our comment at the conclusion of trial that athletes recover from the type of knee injury and surgery, suffered by plaintiff/wife, was inappropriate. Such comment was not improper here as it was being made in reference to a claim that she did not follow her doctor's exercise prescription and thereby mitigate her damages. A judge, like a jury, is entitled to appraise testimony in the light of his common knowledge or experience as to matters with which he has had every-day common experience. *Hrabak v. Hummel*, 55 F. Supp. 775 (D.C. Pa. 1944), affd. 143 F.2d 594, cert. denied, 323 U. S. 724, 65 S. Ct. 57, 89 L.Ed. 582. What is more pervasive in American life than the conduct of athletes, their ups and downs, their victories and defeats, their injuries

and recovery from injuries? Even if the comment was deemed improper, which it is not, it did not control the outcome of the case as would be necessary for a new trial. *Gildston v. Martin*, 29 Monroe L.J. 191 (1973), and could be said to be nothing more than an observation.

For a verdict winner to be successful in a request for a new trial, it must be demonstrated that the errors, even if proven, caused the alleged incorrect results and that the favorable verdict did not cure the errors. See *Nebel v. Mauk*, 434 Pa. 315, 253 A.2d 249 (1969) and *Granowitz v. Erie Redevelopment Authority*, supra. We are not convinced there were any errors, but even if there were, they did not affect the outcome and the verdict cured any defect. Plaintiffs' dissatisfaction with the outcome is an insufficient reason to sustain the exceptions and grant a new trial. *Reedy v. Brown*, 395 Pa. 382, 150 A.2d 717 (1959).

ORDER OF COURT

July 29, 1982, the plaintiffs' exceptions to the verdict are dismissed and the application for a new trial is denied.

COMMONWEALTH v. JOHNS, C.P. Franklin County Branch, Misc. Docket Vol. Y, Page 103

Vehicle Code - Section 1542A - Habitual Offender

1. To be deemed an habitual offender, a person need only commit three of the offenses enumerated in Section 1532, withint a 5 year period.

2. There is no requirement that the three offenses arise out of three separate incidents.

Jay H. Gingrich, Esq., Counsel for Appellant

Frank P. Bach, Esq., Counsel for Department of Transportation, Bureau of Traffic Safety

OPINION AND ORDER

KELLER, J., August 5, 1982: