Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **20th day of October, 2023** are as follows:

BY McCallum, J.:

2023-C-00170 *HENRY PETE VS. BOLAND MARINE AND MANUFACTURING COMPANY, LLC, ET AL.* *(Parish of Orleans Civil)*

AFFIRMED AS AMENDED. SEE OPINION.

Hughes, J., concurs in part, dissents in part for reasons assigned by Griffin, J.
Crichton, J., concurs in part, dissents in part, and assigns reasons.
Griffin, J., concurs in part, dissents in part and assigns reasons.

SUPREME COURT OF LOUISIANA

No. 2023-C-00170

HENRY PETE

VS.

BOLAND MARINE AND MANUFACTURING COMPANY, LLC, ET AL.

On Writ of Certiorari to the Court of Appeal, Fourth Circuit, Parish of Orleans Civil

McCALLUM, J.

We granted certiorari in this case to address the issue of quantum. More specifically, we are called upon to decide whether the court of appeal properly found no abuse of discretion in the jury's award of approximately $10 million in general damages to plaintiff, Henry Pete, who developed mesothelioma as a result of his exposure to asbestos.[1] Intertwined with this issue is the fundamental question of the manner by which appellate courts are to review damage awards for excessiveness; necessarily, the same rules would apply in determining whether an award is too low.

Our jurisprudence has a long-standing general principle, most recently reiterated by this Court in *Jones v. Mkt. Basket Stores, Inc*., 22-00841, p. 16 (La. 3/17/23), 359 So. 3d 452, 464 (citation omitted), that, in reviewing a general damage award, the "initial inquiry . . . is whether the trier of fact abused its discretion in assessing the amount of damages." Thereafter, and only when a determination has been made that the "trier of fact has abused its 'much discretion,'" will a court "resort to prior awards . . . and then only for the purpose of determining the highest or lowest point which is reasonably within that discretion." *Id*.

[1] Shortly after the trial of this matter, Mr. Pete succumbed to the disease and his son, Tyrone Pete, was substituted as plaintiff under La. C.C.P. art. 801 and La. C.C. art. 2315.1.

We have carefully considered whether it remains a sound practice to allow consideration of prior awards only after finding an "abuse of discretion," or whether those awards are a relevant factor to be considered in determining whether there has been an abuse of discretion at the outset. There are no specific parameters by which an "abuse of discretion" is measured, nor a meaningful definition of this phrase. Such determinations are not subject to mathematical exactitude or scientific precision. Indeed, as this Court has recognized, "[t]he standard for appellate review for abuse of discretion in the award of general damages is difficult to express and is necessarily non-specific." *Cone v. Nat'l Emergency Servs., Inc*., 99-0934, p. 8 (La. 10/29/99), 747 So. 2d 1085, 1089 (citing *Youn v. Mar. Overseas Corp*., 623 So. 2d 1257, 1261 (La.1993)).

The inherently subjective nature of the abuse of discretion standard in the context of reviewing general damage awards compels that some measure of objectivity be incorporated into the determination of an award's reasonableness, so that there is some standard for comparison.[2] We now hold that an appellate court must consider relevant prior general damage awards as guidance in determining whether a trier of fact's award is an abuse of discretion. Applying this principle to the instant matter, we find that the jury abused its discretion in awarding $9,800,00.00 in general damages. The evidence presented at trial does not support an award that far exceeds the highest reasonable awards in cases involving similar injuries. Accordingly, based on the evidence adduced at trial, we find $5,000,000.00 to be the highest amount that could reasonably be awarded.

[2] We recognize that there can be no completely objective standard for reviewing general damage awards; however, this is no impediment. As lexicographer Samuel Johnson aptly stated: "The fact that there is such a thing as twilight does not mean that we cannot distinguish between day and night."

FACTS AND PROCEDURAL BACKGROUND

After finishing high school, Henry Pete, who later became a chiropractor, began his work life at the Port of New Orleans ("the Port"), where he worked as a longshoreman from 1964-1968. Decades later, in 2019, Mr. Pete was diagnosed with malignant mesothelioma.

Mr. Pete timely instituted this lawsuit in 2020, alleging that his mesothelioma was caused by exposure to asbestos when he worked at the Port.[3] Numerous parties were named as defendants, but by the time of trial, three defendants remained: Ports America Gulfport, Inc. ("Ports America"), SSA Gulf, Inc. ("SSA"), and James J. Flanagan Shipping Corporation ("JFSC"). A jury trial was held in October and November, 2020, resulting in a verdict in Mr. Pete's favor and against Ports America; SSA and JFSC were found to be free of fault.[4] With respect to damages, the jury awarded the total sum of $10,351,020.70, as follows:

Past and future physical pain and suffering:	$2,000,000.00
Past and future mental pain and suffering:	$2,300,000.00
Past and future physical disability:	$3,000,000.00
Past and future loss of enjoyment of life:	$2,500,000.00
Past medical expenses:	$551,020.70[5]

The trial court then signed a judgment conforming to the jury's verdict.[6] After its motion for judgment notwithstanding the verdict was denied, Ports America

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[3] Mr. Pete also alleged exposure to asbestos through personal contact with his father who also worked at the Port.

[4] Two parties who had either settled or were dismissed prior to trial (Cooper T. Smith Stevedoring, Co., Inc. and South African Marine Corp.) were found to bear fault as well. Each defendant was cast in judgment for its virile share.

[5] The total amount of general damages was $9,800,000.00.

[6] The trial court's judgment was $.70 off; the judgment was rendered in the amount of $10,351,020.00. The judgment contains another error. Although the judgment recites the various itemized general damage awards, there is no specific mention of an award for past medical expenses. The total amount of damages, however, includes the $551,020.00 in past medical expenses awarded by the jury. No party objected to this oversight nor moved to amend the

appealed, raising three assignments of error, including the excessiveness of the general damage award. The court of appeal affirmed. As to the general damage award, the court of appeal cited general case law and acknowledged that the initial inquiry is "whether the award for the particular injuries and their effects under the particular circumstances on the particular injured person is a clear 'abuse of discretion' of the trier of fact." *Pete v. Boland Marine & Mfg. Co., LLC*, 21-0626, pp. 25-26 (La. App. 4 Cir. 1/5/23), 356 So. 3d 1147, 1164 (quoting *Copell v. Arceneaux Ford, Inc*., 20-299, p. 12 (La. App. 3 Cir. 6/9/21), 322 So. 3d 886, 895). Without a discussion of the evidence in the record, the court of appeal simply found:

> Ports America has failed to demonstrate that based on the evidence in this case that the general damages awarded to Henry Pete, relevant to the pain and suffering attributable to ultimate [sic] his inevitable death from mesothelioma[,] shock the conscience. Thus, we do not find that the jury abused its discretion when it awarded Henry Pete $10.5 million in general damages and decline to disturb the jury's award.

Id. Judge Dysart dissented, writing:

> . . . This amount shocks the conscience and in my opinion is an abuse of discretion. *See Romano v. Metropolitan Life Ins. Co.*, 16-0954 (La. App. 4 Cir. 5/24/17), 221 So.3d 176; *see also Zimko v. American Cyanimid*, 03-0658 (La. App. 4 Cir. 6/8/05), 905 So.2d 465. Recent awards for the particular type of damages suffered by plaintiffs in cases similar to the instant case would suggest that a general damage award should be somewhere in the neighborhood of half of what was awarded to Mr. Pete. *See Lege v. Union Carbide Corp.*, 20-0252 (La. App. 4 Cir. 5/12/21), [366] So.3d [75]; *Terrance v. Dow Chemical Co*., 06-2234 (La. App. 1 Cir. 9/14/07), 971 So.2d 1058. Accordingly, I would reduce the damages awarded to Mr. Pete by one-half.

Id., 21-026, p. 1, 356 So. 3d at 1164-65.

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judgment under La. C.C.P. art. 1951 (allowing a judgment to be amended "to correct deficiencies in the decretal language or errors of calculation."). Because the judgment accurately reflects the jury's award (with the exception of the omitted $.70), we need not address this discrepancy.

We granted Ports America's writ application and ordered briefing limited to the issue of quantum. *Pete v. Boland Marine & Mfg. Co., LLC*, 23-00170, p. 1 (La. 4/18/23), 359 So. 3d 498.

LAW AND DISCUSSION

We have long recognized that a jury has great discretion in awarding general damages. As this Court observed in *Thibodeaux v. Donnell*, 16-0570, p. 7 (La. 1/20/17), 219 So. 3d 274, 278 (quoting *Gaspard v. LeMaire*, 158 So. 2d 149, 160 (1963)), "[s]ince an award of damages for personal injuries is of necessity somewhat arbitrary and also must vary greatly with the facts and circumstances of each case, the trial court is entrusted with large discretion [in] making such awards . . . ." *See also*, *CD v. SC*, 22-00961, p. 4 (La. 6/1/23), 366 So. 3d 1245, 1249 ("[v]ast discretion is accorded to the trier of fact in fixing general damage awards."). The importance of the trier of fact's discretion in awarding damages was made clear by the Louisiana legislature with the enactment in 1984 of La. C.C. art. 2324.1, providing that, "[i]n the assessment of damages in cases of offenses . . ., much discretion must be left to the judge or jury."

The discretion afforded to the trier of fact in awarding general damages is not, however, unfettered. *See*, *e.g.*, *McFarland v. Illinois Cent. R. Co.*, 127 So. 2d 183, 187 (La. 1961) ("While much discretion is vested in the trial judge or jury in awarding damages, . . . the award is always subject to review by an appellate court."). Our jurisprudence instructs us that a general damage award may be modified, and an appellate court's role is to review the exercise of discretion by the trial court in making the award. *See Youn*, 623 So. 2d at 1260; *see also*, *Guillory v. Lee*, 09-0075, pp. 14-15 (La. 6/26/09), 16 So. 3d 1104, 1117 ("[t]he role of an appellate court in reviewing a general damage award, one which may not be fixed with pecuniary exactitude, is not to decide what it considers to be an appropriate award, but rather to review the exercise of discretion by the trier of fact.").

Historically, courts have employed a two-step analysis in evaluating general damage awards. As enunciated in *Reck v. Stevens*, 373 So. 2d 498, 501 (La. 1979), "the initial inquiry must always be directed at whether the trier court's award for the particular injuries and their effects upon this particular injured person is[] a clear abuse of the trier of fact's '[m]uch discretion.'" *See also*, *Jones*, 22-00841, p. 16, 359 So. 3d 452, 464; *CD v. SC*, 22-00961, p. 5, 366 So. 3d at 1249; *Rando v. Anco Insulations Inc*., 08-1163, pp. 40-41 (La. 5/22/09), 16 So. 3d 1065, 1094. Once an "articulated analysis of the facts discloses an abuse of discretion, [an] award may on appellate review, for articulated reason, be considered either excessive . . . or insufficient" and a "resort to prior awards [be made] . . . for purposes of then determining what would be an appropriate award for the present case." *Reck*, 373 So. 2d at 501.

It is the initial inquiry – determining whether there has been an abuse of discretion in an award for general damages – that is problematic, as "[g]eneral damages . . . are inherently speculative in nature and cannot be fixed with mathematical certainty." *Wainwright v. Fontenot*, 00-0492, p. 6 (La. 10/17/00), 774 So. 2d 70, 74. (Citation omitted). There are no objective guidelines to assess the monetary "value" of a general damages claim, and as this Court has observed, "'no bright line rule at work' [exists] to define when a trier of fact's damages award is an abuse of discretion." *Thibodeaux*, 16-0570, p. 9, 219 So. 3d at 280 (quoting *Wainwright*, p. 9, 774 So. 2d at 77).

The amorphous, subjective nature of awards for general damages was recognized by Judge Schott in his concurrence in *Sanders v. Hall*, 345 So. 2d 590, 593-94 (La. App. 4 Cir. 1977):

> One definition of the word 'discretion' is the 'Power or privilege of the court to act unhampered by legal rule.' Black's Law Dictionary revised 4th ed. 1968. Another is 'Freedom to act or judge on one's own.' The American Heritage Dictionary of the English Language, 1969. One

> definition of the word 'abuse' is 'to make an extravagant or excessive use, as to abuse one's authority.' Black's Law Dictionary, revised 4th ed. Another is 'to use wrongly or improperly.' The American Heritage Dictionary of the English Language, 1969. Thus, when we speak of abuse of discretion we are in a sense using a phrase which is inherently self[-]contradictory. If a trial court's discretion under C.C. Art. 1934 [now, La. C.C. 2324.1] means that he can set awards for general damages 'unhampered,' how can it ever be said that he has made extravagant or excessive use of that discretion. If it means that he is free to make awards on his own, how can it be said that he has misused his authority even though everyone else considers the award he made to be excessive. Furthermore, under the definitions given for discretion it would seem that the use of the word 'much' preceding 'discretion' in Art. 1934 is a redundancy. If the trial judge is to act unhampered and if he has the freedom to act on his own in making general damage awards[,] these expressions are absolute, and the word 'much' does no more than emphasize what is said by the word 'discretion.'

To state it bluntly, if a trial court has absolute discretion in determining the amount of general damages, then the appellate review process is redundant and unnecessary. We agree that, in the context of a review of a general damage award, the abuse of discretion standard lacks parameters and, for that reason, we are compelled to find an approach that includes an element of objectivity.

Our case law indicates that, before an award "may be questioned as inadequate or excessive, the reviewing court must look first, not to prior awards, but to the individual circumstances of the . . . case." *Reck*, 373 So. 2d at 501. Courts have applied this principle to the actual evaluation of an award; it is not directed to the abuse of discretion standard of review. As to the latter, our case law is inconsistent. Some cases explicitly reject the principle that a review of awards in similar cases is appropriate in determining whether there has been an abuse of discretion. *See Duncan v. Kansas City S. Ry. Co*., 00-0066, p. 14 (La. 10/30/00), 773 So. 2d 670, 683 ("[o]nly after a determination that the trier of fact has abused its 'much discretion' is a resort to prior awards appropriate . . . ."); *See also*, *Cone*, 99-0934, p. 8, 747 So. 2d at 1089 ("[r]esorting to a comparison of prior awards is only

appropriate after the reviewing court has concluded that an abuse of discretion has occurred."); *Youn*, 623 So. 2d at 1260; *Rando*, 08-1163, p. 41, 16 So. 3d at 1094.[7]

However, language from other cases suggests that a court *may* consider prior awards in the abuse of discretion phase of a challenge to a general damage award. In *Dimarco*, the court of appeal applied the rule that a review of other cases is appropriate only after an abuse of discretion is found, but also stated: "The reviewing court may not merely look at past awards for similar injuries *in the determination of whether the trier of fact abused its much discretion*." *Dimarco*, 21-530, p. 16, 345 So.3d 1087. (Emphasis added). Other decisions have made virtually identical statements.[8]

This implication – that a court may consider past awards in evaluating whether an award is an abuse of discretion – is incompatible with the rules set forth in *Youn*, *Rando*, *Duncan* and *Cone.* Nevertheless, we find that this principle provides a reasonable criterion by which courts can evaluate awards for general damages, whether for excessiveness or insufficiency. Without an examination of other general damage awards in similar cases, appellate courts have no objective, neutral, or equitable way to measure whether a general damage award is, in fact, an abuse of discretion. Moreover, the "abuse of discretion" standard of review, absent a study of prior awards, is overly subjective and, consequently, meaningless. As Judge Schott intimated, such an approach is entirely intuitive, based completely on the trier of fact's whim, and divorced, almost entirely, from empirical considerations. We

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[7] All courts of appeal have followed this principle. *See*, *e.g.*, *Dimarco v. Jackson Indus. Serv. Inc*., 21-530, p. 16 (La. App. 5 Cir. 6/15/22), 345 So. 3d 1072, 1087; *Watson v. Hicks*, 15-0046, p. 29 (La. App. 4 Cir. 5/27/15), 172 So. 3d 655, 676; *Burtner v. Lafayette Par. Consol. Gov't*, 14-1180, p. 9 (La. App. 3 Cir. 4/15/15), 176 So. 3d 1056, 1063; *Falcon v. Louisiana Dep't of Transp*., 13-1404, p. 16 (La. App. 1 Cir. 12/19/14), 168 So. 3d 476, 489; *Nestor v. Louisiana State Univ. Health Scis. Ctr. In Shreveport*, 40,378, p. 7 (La. App. 2 Cir. 12/30/05), 917 So. 2d 1273, 1279.

[8] *See*, *e.g.*, *Harris v. State, Dep't of Transp. & Dev.*, 16-524, p. 18 (La. App. 5 Cir. 6/15/17), 223 So. 3d 695, 708; *Harvey v. Traylor*, 96-1321, p. 15 (La. App. 4 Cir. 2/5/97), 688 So. 2d 1324, 1333 (citing *Reck*); *Abadie v. Metro. Life Ins. Co*., 00-344, p. 92 (La. App. 5 Cir. 3/28/01), 784 So. 2d 46, 106; *Page v. Gilbert*, 598 So. 2d 1110 (La. App. 4 Cir. 1992).

therefore adopt this approach, and now hold that appellate courts must look at past general damage awards for similar injuries in determining whether the trier of fact "abused its much discretion."

Counsel for Mr. Pete suggests that a review of prior awards will "become not only the overarching consideration but a rigid preordained scale, rather than guideposts for context." Counsel further argues that such a decision would "change Louisiana law and make facile comparisons to prior awards the primary – if not exclusive – consideration in every step for reviewing juries' quantum determinations." We disagree.

To be clear, a review of prior awards is not the only factor to be considered in evaluating whether a general damage award is an abuse of discretion; it is a starting point. No two cases will be identical. The review of prior awards will simply serve to illustrate and supply guidance in the determination of damages. Other factors are to be considered as well. We explained in *Youn* that:

> [r]easonable persons frequently disagree about the measure of general damages in a particular case. It is only when the award is, in either direction, beyond that which a reasonable trier of fact could assess for the effects of the particular injury to the particular plaintiff under the particular circumstances that the appellate court should increase or reduce the award.

Youn, 623 So. 2d at 1261. *Youn* is consistent with this Court's earlier statement in *Reck*, that "prior awards may serve as an aid in [the] determination [of excessiveness or insufficiency] only where, on an articulated basis, the present award is shown to be greatly disproportionate to past awards (not selected past awards, but the mass of them) for (truly) 'similar' injuries." *Reck*, 373 So. 2d at 501 (citing *Coco v. Winston Indus., Inc.*, 341 So. 2d 332, 334 (La.1976)).

We also recently reiterated that "the adequacy or inadequacy of the award should be determined by the facts or circumstances particular to the case under consideration." *Malta v. Herbert S. Hiller Corp*., 21-00209, p. 32 (La. 10/10/21),

333 So. 3d 384, 408; *see also*, *CD*, 22-00961, p. 5, 366 So. 3d at 1249 (citing *Coco*, 341 So. 2d at 334) ("the question is whether the award of the trial court can be reasonably supported by the evidence and justifiable inferences from the evidence before it."). Thus, to determine whether a trier of fact abused its discretion in its award for general damages, an appellate court is to consider the particular facts and circumstances of a case, in conjunction with a review of prior awards. This applies to claims of excessiveness as well as insufficiency in an award.

We do not abandon the two-step analysis for the appellate review of a general damage award but modify the analysis as follows. The question of whether the trier of fact abused its discretion in assessing the amount of damages remains the initial inquiry. However, to evaluate this issue, an appellate court is to include a consideration of prior awards in similar cases, as well as the particular facts and circumstances of the case under review. If an abuse of discretion is found, the court is to then also consider those prior awards to determine "the highest or lowest point which is reasonably within that discretion." *Jones*, 22-00841, p. 16, 359 So. 3d at 464.

With these principles in mind, we first address whether the general damage award in this case is an abuse of discretion; and, if so, determine the highest amount of general damages reasonable under the evidence presented at trial. In each of these tasks, we include a consideration of prior awards.

Importantly, we note that the court of appeal cited no testimony or record evidence on which it relied in affirming the general damage award. It simply found that, "based on the record," Ports America failed to demonstrate that the general damage award "shock[ed] the conscience." To determine whether an award is an abuse of discretion or "can be reasonably supported by the evidence," *some* discussion of the "particular injuries and their effects upon this particular injured

person" is warranted.[9] *See*, *e.g.*, *Miller v. LAMMICO*, 07-1352, p. 29 (La. 1/16/08), 973 So. 2d 693, 712 (observing that the "Court of Appeal thoroughly reviewed and found adequate support for each item of damages" in determining "that the jury did not abuse its great discretion in making its damage award;" we found "that the articulated analysis employed by the Court of Appeal satisf[ied] the applicable standard of review."); *see also*, *Coleman v. Deno*, 01-1517, pp. 27-28 (La. 1/25/02), 813 So. 2d 303, 321 (in affirming the trial court's judgment on a general damage award, "[t]he appellate court's one paragraph analysis of this sizeable general damage award was not sufficient to constitute a meaningful review of general damages. Indeed, the appellate court failed to make even the initial inquiry required for a meaningful review of a general damage award of 'whether the particular effects of the particular injuries to the particular plaintiff are such that there has been an abuse of the 'much discretion' vested in the judge or jury.") (Citation omitted).

We further note that appellate courts "have a constitutional duty to review the law and facts and thereafter render a judgment on quantum based on the merits," including "determining whether the jury has abused its 'much discretion' . . . in awarding damages." *Carollo v. Wilson*, 353 So. 2d 249, 252 (La. 1977) (citing La. Const. art. V, 10 §(B), which provides, in pertinent part, that "appellate jurisdiction of a court of appeal extends to law and facts.").[10] On this basis, and as instructed by *Carollo* and *Bouquet*, we first examine the facts and circumstances of this case and

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[9] *See Bolton v. Nagalla*, 609 So. 2d 1134, 1139 (La. App. 2 Cir. 1992) (citing *Reck*) (finding no abuse of the trial court's discretion in a general damage award, the court observed that "[i]n [its] review of general damage awards for excessiveness, the threshold inquiry is whether the trial court's award for the particular injuries and their effects upon this particular plaintiff is a clear abuse of discretion, *for reasons that can be articulated from the facts in the appellate record*.") (Emphasis added).

[10] *See also*, *Coco*, 341 So. 2d at 335 ("The Court of Appeal's conclusion that this Court intends for the appellate courts to continue to review quantum awards, is correct as is shown by all of the cases previously cited, as well as by our recent decisions in *Gonzales v. Xerox Corporation*, 320 So.2d 163 (La. 1975) and *Temple v. Liberty Mutual Ins. Co*., 330 So. 2d 891 (La. 1976), wherein we reaffirmed the constitutional authority of appellate courts to review and render quantum awards.").

the record "to determine whether the record clearly reveals that the jury abused its discretion" in awarding general damages in the amount $9,800,000.00. *Carollo*, 353 So.2d at 252.[11] Our review of the record, coupled with a study of prior awards in truly similar cases, leads us to the conclusion that the jury abused its discretion in this award.

The record reflects that much of the evidence at trial was directed at determining where and to what extent Mr. Pete was exposed to asbestos while working at the Port. The evidence as to damages was rather limited and consisted of Mr. Pete's testimony, that of his wife and his children, and general testimony regarding the disease of mesothelioma. As to the disease process, the testimony included that of Dr. Richard Cohen, an occupational medicine doctor, Dr. John Maddox, a pathologist, and Dr. Arnold Brody, a former professor of pathology at Tulane Medical School.[12]

The nature of the disease of mesothelioma was described mostly in general terms, as it pertains to patients in general. Dr. Cohen did, however, testify that, although Mr. Pete had some health problems, none posed an "imminent cause of death" and "the mesothelioma . . . is far and away the most likely future cause of his death." Dr. Cohen indicated that "these tumors are almost always fatal." Dr. Maddox, too, testified that mesothelioma is considered a "fatal disease" and, while sometimes the progression of the disease can be delayed, "eventually it will kill the patient." Dr. Maddox further indicated that, as the disease progresses, "the involved

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[11] We are not persuaded by the suggestion by Mr. Pete's counsel that Ports America essentially waived the issue of quantum because it did not sufficiently address that issue in the court of appeal insofar as "it made no reference to any damages-related evidence." Ports of America clearly raised the excessiveness of the award issue in the court of appeal and we consider it here, in accordance with our grant of Ports America's writ application.

[12] Dr. Cohen was accepted by the trial court as an expert in preventive medicine, occupational medicine, public health, toxicology and epidemiology, and occupational illness "including asbestos [sic]." Dr. Maddox was accepted by the trial court as an expert in pathology and asbestos-related pathology, while Dr. Brody was accepted as an expert in cell biology and "experimental pathology as it related to asbestos and the diseases it causes."

lung becomes nonfunctional." Dr. Brody also described the manner by which asbestos affects the lungs and causes mesothelioma. According to Dr. Brody, after a latency period following exposure to asbestos (sometimes decades), some persons will develop a mesothelial tumor. Eventually, the tumor will grow and "keep growing and cause fluid to build up in a person's lung and start getting uncomfortable, lots of pain."

Much of Mr. Pete's testimony was directed at issues concerning his exposure to asbestos, although he did provide testimony tending to support his general damages claim. Mr. Pete, 74 years old at the time of trial, testified that he was diagnosed with mesothelioma after seeking treatment for a kidney stone. Testing at that time (March 1, 2019) revealed pleural effusion. Mr. Pete underwent two thoracenteses, which he described as procedures whereby a needle is inserted between the ribs to drain fluid from the lungs. Despite the area having been "deadened," the procedure was painful. The results of the test were "suspicious of tumor cells" and a later biopsy confirmed that Mr. Pete had mesothelioma.

Mr. Pete testified that it was devastating to receive the diagnosis. He was told there is no cure, which was "depressing, heartbreaking," but he was not informed as to how long he might expect to live. He did not initially disclose this diagnosis to his wife because of his depression. At trial, he indicated: "[i]t still has me depressed, . . . not a suicidal thing, but it was depressing to know that I was supposedly in good health and all of a sudden I got this diagnosis." Mr. Pete worried about his wife and children and how they would handle learning of the diagnosis and later, his death. His resilient nature was clear when he stated: "I just decided, hey, we got to live with it, so just let them [his family] know what's going on" and "sometimes I do get depressed, but I keep on going and trying, I'm hoping things will get better."

Mr. Pete underwent chemotherapy, and other forms of treatment, which were "very rough on the body and mind." The treatment left him tired, listless and with

shortness of breath. His first two treatments "just burned through both of [his] arms." Mr. Pete also experienced nausea, difficulty swallowing, joint pain and weakness, shoulder pain, as well as difficulty sleeping. He ultimately had a port placed in his chest for treatments so that he would not have to be "stuck" with a needle each time. This allowed him to "receive [his] treatments without a lot of pain now." Mr. Pete indicated that he felt tired "a lot of the time" but that if he "got to bed early and rest, [he'd] be good the next day," although he had to "prop [himself] up with pillows" and slept on the sofa.

As to how his condition impacted his life, Mr. Pete testified that he could no longer do what he wants, or used, to do. He had to rely on his children to take him places and do things for him and he could no longer treat his grandchildren to outings as he once did. He did try to "get out each day to get out in the sun and rest." His biggest fear was that he "might go to sleep one day and not wake up."

Mr. Pete's children, Kenneth Pete, Tyrone Pete and Gail Pete testified about their father's condition and its effect on him. Kenneth testified that his father went "through a lot," including chest pain following the thoracenteses. Kenneth, a physical therapy assistant, would help his father but he remained functionally limited. Kenneth indicated that, in the last year, he witnessed his father try to "give it his all," but the diagnosis took "a toll on his psyche." He further testified:

> Some days he's up. Some days he's down. Some days he's energetic. Some days he's lethargic. So, I've just noticed a change from the person that he was, the vigor that he had, of course, the strength and mobility.

Tyrone noticed that his father seemed to be "withering away somewhat," and had shortness of breath and heavy coughing. Tyrone further testified as to his father's sleepless nights on the sofa, and an energy level that is "up and down." He also testified about his father's depression, although his father tried to hide it. He recalled his father being active, traveling and driving around, all of which has "kind

of been curtailed due to his diagnosis;" his father no longer even had the energy to "so much as go get a newspaper and go to McDonald's and get coffee."

Gail testified as to her father's weight loss, fatigue, rashes and a discoloration to his skin. He had once been instrumental in helping with her children, but was no longer able to pick them up or take them to school. Gail further testified that her father suffered difficulty breathing and seemed "down;" and, while he "trie[d] to save face," it affected him emotionally and had "taken a real toll on him physically."

Mr. Pete's wife, Rosalie, testified that Mr. Pete, who was always on the "go," and would frequently visit family in Louisiana, no longer had the same activity level, as he tired easily, was in pain and no longer had energy. She indicated that he was no longer able to "lend[] a helping hand" or do for others as he once was. Mrs. Pete explained that Mr. Pete was sometimes unable to do anything for two to three days after he had undergone chemotherapy treatments. Mrs. Pete further testified that she saw fear, pain and discomfort in her husband's eyes. She no longer saw "a happy Henry like [she] used to have. He's a changed person."

With this evidence in support of Mr. Pete's general damage award, we now review general damage awards in similar cases, keeping in mind, as we previously noted, that no two cases are alike. We consider the following cases, as they are the most recent and authoritative, in determining whether the award is so excessive as to constitute an abuse of discretion.

Most recently, survival damages of $4,851,034.31 were awarded in *Stauder v. Shell Oil Co*., 22-0593 (La. App. 4 Cir. 2/15/23), --- So.3d ----, 02023 WL 2009251. The case, however, focused on the wrongful death damages awarded to the decedent's two daughters and consequently, the damages testimony centered on their relationship with their father. No appeal was taken of the award for survival damages. Similarly, in *Berry v. Anco Insulations*, 52,671, p. 16 (La. App. 2 Cir. 5/22/19), 273 So. 3d 595, $3,000,000.00 in general damages was awarded to a

woman who contracted mesothelioma from her exposure to asbestos on the clothing of her husband. There, too, the general damage award was not raised on appeal. These awards are, nevertheless, material to our consideration.

A recent comparable decision in which a general damage award of $4 million to a former insulator was closely examined was *Lege v. Union Carbide Corp*., 20-0252 (La. App. 4 Cir. 4/1/21), 365 So. 3d 617, 624, *as clarified on reh'g*, 20-0252 (La. App. 4 Cir. 5/12/21), 366 So.3d 75, *writ denied*, 21-00792 (La. 10/1/21), 324 So. 3d 1054, and *writ denied*, 21-00775 (La. 10/1/21), 324 So. 3d 1059. In *Lege*, the decedent, like Mr. Pete, lived for two years following his diagnosis,[13] suffered shortness of breath and had fluid drained from his lungs. He, too, underwent chemotherapy which ultimately was unsuccessful. Mr. Lege was mostly confined to his bed for the last four months of his life and, eventually, could neither eat nor speak. His hospice nurse testified that strong pain medications were used to control his pain, which "never fully resolved, . . . , and. . . he suffered from delusions, which necessitated his being given anti-psychotic medication." *Id*., p. 25, 365 So. 3d at 636. His treating physician testified as to Mr. Lege's difficulty breathing which eventually led to lung failure. Witnesses testified as to his being a "tough man" who struggled with his diagnosis and impending death and who suffered from depression. Although he was in a "great deal of pain," his hospice nurse testified, Mr. Lege only sought medication as a last resort. *Id*. He was "quite distressed at not being able to maintain his independence or continue the role of being head of his family." *Id*.

An award of $1,450,000 in survival damages was made to a 57-year-old man who developed mesothelioma and died three years later in *Bagwell v. Union Carbide*

[13] We note that the court of appeal's opinion contains some discrepancies as to the length of time between diagnosis and death. It states: "Mr. Lege was then admitted to hospice care in December 2016, before he passed away in March 2017, two years after his diagnosis," *Lege*, p. 25, 365 So. 3d at 636, and "we note that Mr. Lege suffered for two years following his diagnosis," *Id*., p. 26, 365 So.3d at 637. The opinion elsewhere states: "Mr. Lege was diagnosed with mesothelioma in March 2016. Mr. Lege died from mesothelioma in March 2017." *Id.*, p. 2, 365 So. 3d at 624.

Corp., 2019-0414 (La. App. 4 Cir. 12/11/19), 364 So. 3d 378, *writ granted*, *decision rev'd*, 20-01242 (La. 1/12/21) 308 So. 3d 289.[14] The evidence at trial reflected that he:

> . . . he suffered immensely from the time of his diagnosis. During the three years leading up to his passing, his breathing and overall condition worsened to the point that he could no longer care for himself, eventually ending up in hospice care. He testified about enduring numerous painful and uncomfortable procedures including, but not limited to: thoracic cavity incisions to have drain tubes inserted in his right lung to drain over 3 liters of fluid from his chest; several biopsies and surgeries on his thoracic cavity; pleural effusion and fluid in the lungs causing lung collapse; intravenous chemo treatments with chemicals that burned his hand; chemo-treatment cycles that led to debilitating after-effects of oral lesions, nosebleeds, rectal bleeding, rashes, and a super flu or super pneumonia like sickness; shortness of breath requiring oxygen; and, an unsuccessful cytoreductive surgery including thoracotomy that resulted in the removal of a rib.

Id., pp. 19-20, 364 So. 3d at 389. The evidence also included his testimony that "he was at the pinnacle of his career as an aerospace welder when he physically became unable to work. Expecting to live into his eighties based upon family history, [his] condition deteriorated to the point that his wife had to retire early to care for him and he was later removed to hospice care prior to his death." *Id*., p. 20, 364 So. 3d at 389.

Other recent reported mesothelioma cases include: (1) *Craft v. Ports Am. Gulfport, Inc*., 18-0814, p. 4 (La. App. 4 Cir. 5/8/19) 273 So. 3d 517, 522, *writ denied*, 19-00940 (La. 10/15/19), 280 So.3d 587, where the court of appeal found that an award of $1,600.000.00 was not "grossly inadequate;" the evidence reflected that the plaintiff was no longer active and able to engage in activities, his mesothelioma "significantly impacted his enjoyment of life," and he underwent

[14] The jury awarded only $750,000.00 in general damages and the court of appeal, finding the award to be an abuse of discretion, increased the award to $1,450,000.00. On rehearing, the court of appeal affirmed the trial court's determination of liability; however, it concluded that the jury's verdict was internally inconsistent and granted a new trial. This Court reversed and reinstated the court of appeal's original judgment on the merits.

invasive surgeries and painful procedures; (2) *Romano*, 16-0954, p. 11, 221 So. 3d at 183, where an award of $500,000.00 in general damages was increased by the court of appeal to $1,500,000.00; there, the plaintiff endured numerous invasive surgeries, had a catheter placed to periodically drain fluid from his lungs, underwent a radical procedure to remove part of the lung lining, and two years later, he continued to be in pain and "ha[d] to live with the knowledge that there is no cure for mesothelioma;" (3) *Williams v. Placid Oil Co*., 2016-839, p. 20 (La. App. 3 Cir. 8/2/17), 224 So. 3d 1101, 1113, *writ denied*, 17-1501 (La. 11/17/17), 229 So. 3d 929, affirming an award of $3,000,000.00 in damages to a wife who developed mesothelioma after being exposed to asbestos from her husband's clothing; the evidence included testimony that her "last few months were extremely painful as tumors ravaged her body, breaking through her rib cage and encasing her heart" and she went "from an energetic, healthy woman to someone bedridden and in such excruciating pain that even Oxycontin provided no relief."[15]

Earlier decisions include: *Oddo v. Asbestos Corp. Ltd*., 14-0004, p. 5 (La. App. 4 Cir. 8/20/15); 173 So. 3d 1192, 1199, affirming an award for damages and medical expenses of $2,301,393.15 for an 81-year-old man who was diagnosed with mesothelioma and died two months later; quantum was not raised on appeal; *White v. Entergy Gulf States Louisiana, L.L.C.*, 13-1608, p. 9 (La. App. 1 Cir. 11/10/14), 167 So. 3d 764, 771, affirming an award of $3,800,000.00 where the decedent lived

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[15] In a recent federal court decision involving a mesothelioma claim, an award of $7,500,000.000 was found to be excessive and was reduced to $3,000,000.00. *See Gaddy v. Taylor Seidenbach, Inc*., 446 F.Supp.3d 140, 162 (E.D. La. 2020), *aff'd sub nom. Adams v. Ethyl Corp*., 838 Fed.Appx. 822 (5th Cir.2020). We note, however, that a different review process is employed by this court:

> Courts in the Fifth Circuit apply the "maximum recovery rule" to determine whether an award is excessive. . . Under the maximum recovery rule, "the verdict must be reduced to the maximum amount the jury could properly have awarded . . . . " However, courts "will decline to reduce damages where the amount awarded is not disproportionate to at least one factually similar case from the relevant jurisdiction."

Id., 446 F.Supp.3d at 159. (Citations omitted).

less than six weeks after his mesothelioma diagnosis, prior to which he led an active life; he experienced chest pain, shortness of breath, fatigue, coughing, and other breathing problems and his physician testified that he was "miserable at the end of his life as he lay dying of mesothelioma and 'starving for breath' due to the lack of oxygen in his body, despite being on an oxygen machine."[16]

There can be no doubt that Mr. Pete suffered physically and mentally because of his mesothelioma and the record supports a substantial award of general damages. Ports America even admits in its brief that "[u]ndoubtedly, this supports a large damage award." We agree with Ports America, however, that the award of almost $10 million is "greatly disproportionate to the mass of past awards for truly similar injuries." *Bouquet*, 08-0309, p. 5, 979 So.2d at 459. We further find that the record evidence of Mr. Pete's injuries is not so dissimilar to these other cases to warrant an award so greatly exceeding the range of these cases. We thus find that the jury abused its discretion in its general damage award.

Having found that the trial court abused its much discretion, "damages should [now] be set in accordance with *Coco* . . . 341 So. 2d [at] 335 . . . that is, lower[ed] . . . to the highest point which is reasonably within the discretion afforded to the trial court." *Malta*, 21-00209, p. 35, 333 So. 3d at 409. Our goal is not to balance the number of high and low awards and arbitrarily adjust the jury's award to an average of these awards but to determine the highest reasonable award. Considering the record before us, coupled with prior awards for similar injuries, we find that the highest award reasonably within the jury's discretion for general damages in this

[16] The parties point to a recent Fourth Circuit decision in which a general damage award of $35,750,000.00 to a pipefitter/welder who developed mesothelioma was affirmed. *Walker v. Anco Insulations, Inc*., 2022-0763, p. 4 (La. App. 4 Cir. 5/3/23), --- So.3d ----, 2023 WL 3237690. While a writ application was filed in connection with that decision, it was later dismissed following settlement. Accordingly, that matter is not before this Court and we decline to consider it among our review of other cases as it is clearly an outlier. We also decline to consider district court decisions cited by plaintiffs which were not appealed, or cases cited in the amici briefs from other jurisdictions. We need not resort to damages awarded in other states when there is relevant case law in Louisiana.

matter is $5,000,000.00. We therefore reduce the general damage award from $9,800,000.00 to $5,000,000.00 and, together with the past medical expenses, render judgment in the sum of $5,551,020.70.

DECREE

Based on the foregoing, the judgment in this matter is amended to reduce the general damage award from $9,800,000.00 to $5,000,000.00, and enter judgment in the total amount of $5,551,020.70. In all other respects, the judgment is affirmed.

AFFIRMED AS AMENDED.

SUPREME COURT OF LOUISIANA

No. 2023-C-00170

HENRY PETE

VS.

BOLAND MARINE AND MANUFACTURING COMPANY, LLC, ET AL.

On Writ of Certiorari to the Court of Appeal,
Fourth Circuit, Parish of Orleans Civil

Crichton, J., concurs in part, dissents in part, and assigns reasons.

I agree with the majority's reasoning, analysis, and the determination that the trial court abused its discretion in this matter. I disagree solely with the majority's finding that the highest award reasonably within the jury's discretion for general damages in this matter is $5,000,000. In my view, the highest award reasonably within the jury's discretion in this matter is $4,000,000. *See Lege v. Union Carbide Corp*., 20-0252 (La. App. 4 Cir. 4/1/21), 365 So. 3d 617, 624, *as clarified on reh'g*, 20-0252 (La. App. 4 Cir. 5/12/21), 366 So. 3d 75 (awarding $4,000,000 in general damages with much more significant record evidence to support high general damages award).

SUPREME COURT OF LOUISIANA

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GRIFFIN, J., concurs in part, dissents in part and assigns reasons.

I concur in part with the majority's decision that, to introduce a measure of objectivity, relevant prior awards may serve as a factor in determining the reasonableness of a general damages award. I write separately, however, to emphasize the overriding factor must always be the individualized circumstances of the particular case lest the guideposts provided by prior awards devolve into the substitution of an individual's unique injuries and suffering in favor of a spreadsheet of numbers. *See Coco v. Winston*, 341 So.2d 332, 335 (La. 1976) (admonishing the overemphasis on prior awards and observing that "whether two cases are so similar as to produce like quantum judgments is hardly discernible by gleaning the facts of the comparable decision from simply a written opinion of an appellate tribunal"). I would further overtly acknowledge the reality that general damages awards will fluctuate and increase over time given changes in economic conditions, including inflation. *Walker v. Anco Insulations, Inc.*, 22-0763, p. 8 (La.App. 4 Cir. 5/3/23), --- So.3d ----, 2023 WL 3237690 (citing *Coco*, 341 So.2d at 335-36).

In light of the above considerations, I respectfully dissent in part with the majority's finding that the jury abused its discretion and would affirm the amount awarded. Although the majority extensively surveys the record evidence, appellate jurists must be mindful that testimony related to general damages invariably contains

an emotional component best evaluated by a jury. *See Rosell v. ESCO*, 549 So.2d 840, 844 (La. 1989) ("only the factfinder can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said").