

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ADAM JOHNSTON, a minor,)
by SUSAN JOHNSTON, his mother)
and next friend, and SUSAN)
JOHNSTON and GARNETT)
JOHNSTON,)

PLAINTIFFS)

v.)

DEERE & COMPANY,)
)
DEFENDANT)

CIVIL No. 96-192-P-H

ORDER ON MOTIONS IN LIMINE

1. Free Care at the Shriners' Hospital. The plaintiff Adam Johnston has received free medical care at the Shriners' Hospital for Crippled Children in Springfield, Massachusetts, and apparently may be eligible to obtain continuing free treatment in the future. The sensible rule would be that since the plaintiff has in no way been responsible for the cost of that care (neither through insurance premiums nor through legal obligation that was subsequently waived) he should not recover any damages for the cost of such care in the past; but that as to the future, since he is not obliged to seek free care but entitled to obtain ordinary paid-for care, he should be able to introduce the reasonable cost of such future services. Here, however, the defendant wants exclusion of all evidence concerning the cost of care, past or future, and the plaintiff wants introduction of all such costs, past and future.

Maine law is clear. In Werner v. Lane, 393 A.2d 1329 (Me. 1978), accord Maine Human Rights Comm'n v. Department of Corrections, 474 A.2d 860, 870 (Me. 1984), the Law Court held that the collateral source rule applies regardless of the availability of free care. It is true that in that case (as the defendant points out) the facts indicate that the plaintiff was legally liable for his support at a state hospital under state statutes and that the state had simply waived recovery because of financial status. The court spoke much more broadly, however, describing the collateral source rule as including the situation where “necessary medical and nursing services are rendered gratuitously to one who is injured” and entitling such a person to recover the reasonable value of those services. Werner, 393 A.2d at 1335. The court pointed out that “[t]he rule has been extended to cases where the gratuitous services were furnished by a state supported agency or public charity.” Id. at 1336 (citations omitted). The “most persuasive” rationale of the collateral source rule, according to the Law Court, is that one or another of the two parties to a lawsuit will receive a windfall by virtue of the free services and it is better that the windfall go to the injured plaintiff than to the tortfeasor. Id. at 1335-36 (quoting Olivas v. United States, 506 F.2d 1158, 1163-64 (9th Cir. 1974)).

This is not an evidentiary rule but a rule of damages. I am accordingly bound by the law of Maine in this diversity case. Consequently, the plaintiff is entitled to place in evidence the reasonable value of the past and future services reasonably required for the plaintiff, irrespective of the fact that these services have been or may be provided free. How the amounts assigned for such services can be determined and whether in fact they are reasonable can, of course, be challenged by the defendant and I will have to wait to determine what evidence the parties seek to introduce on the reasonableness of any such services and their value. The defendant is precluded from referring to the fact that the services are free. See Werner, 393 A.2d at 1336. If the defendant’s lawyer believes

that evidence concerning the fact that they are free is essential to any attack on the reasonableness of the services, he or she shall first approach the court outside the presence of the jury to be heard on that issue.¹

2. Testimony of Experts.

A. Bertram Strauss and John Severt. The defendant seeks to exclude these two individuals' testimony as experts because they were never designated as experts. The plaintiffs reply that they will testify only as fact witnesses concerning information given to and admissions made by the defendant. Obviously, I cannot make a ruling until I hear the testimony. I note, however, that the parties appear to be in agreement that they cannot testify as experts, but only as fact witnesses.²

B. John Paul Donovan. Although the parties dispute whether this witness was unavailable for deposition or whether the deposition was continued by agreement of the lawyers, the plaintiffs apparently intend to offer him only to "identify and display prosthetic equipment which other witnesses will testify will be necessary for Adam Johnston in the future." Pls.' Mem. Opp'n Def.'s Mot. in Limine at 4-5. If the purpose of his testimony is only identification and display of equipment specified by other admissible testimony, I expect the parties to stipulate to the identification of the equipment without the need for calling any such witness. Its admissibility, of course, will depend on other testimony.

¹ There may be an issue as well whether the plaintiffs can recover the cost of travel to the Springfield facility if appropriate care is available closer to their residence. In other words, the incentive they have to seek free care would not justify the decision to travel if they are to be compensated for that free care.

² The defendant also argues that these two witnesses have no relevant factual testimony to give because the defendant admits all the knowledge in question. Whether that is so I will determine at trial.

C. Thomas Bohan. The motion to exclude the testimony is **GRANTED**. Dr. Bohan was withdrawn as an expert witness before the defendant could take his deposition. No adequate ground is presented for renaming him at this late date on the eve of trial.

3. Bifurcation. In light of the very serious injuries to this young child and their likely emotional effect upon the jury, the motion to bifurcate the issue of liability from damages is **GRANTED**. See McKellar v. Clark Equip. Co., 101 F.R.D. 93 (D. Me. 1984).

4. Request to Take Judicial Notice. In light of the fact that I have granted summary judgment to the defendant on punitive damages, this motion by the plaintiffs is **MOOT**.

5. Defendant's Lay Witnesses Regarding Mower Operation. The plaintiffs' motion to exclude this testimony is **GRANTED**. What is relevant here is Deere's knowledge and information, not the testimony of actual users of the lawn mower.

6. Safety Testimony. I am unclear as to what the dispute is here. Certainly, Deere's "reputation" for safety would appear to be irrelevant. On the other hand, in response to the plaintiffs' claim that Deere behaved negligently, the defendant is entitled to show what steps it took to make the lawn mower safe. Whether testimony on Deere's concern for safety should extend to other products will require a Rule 403 evaluation and I cannot make that evaluation until I see the breadth or narrowness of the plaintiffs' case.

7. East Report. Mr. East has not been designated as an expert witness by the plaintiffs and the issue here is whether a report he issued early in the life of the case can be introduced into evidence by the defendant through the testimony of other of the plaintiffs' experts. The plaintiffs contend that their experts did not rely upon the report and it is therefore excludable. The defendant argues that the experts certainly considered and used the report and in some cases discussed the

matter with Mr. East. I will have to hear how the testimony comes in at trial before I can determine whether the report is admissible under Fed. R. Evid. 702 and 705. Clearly, however, the defendant shall not reveal the contents of the report to the jury directly or indirectly without first approaching the bench and seeking a ruling.

8. Exclusion of Post-Manufacture Information. The plaintiffs seeks to exclude certain post-manufacture information that became available. The defendant is agreeable but only if all post-manufacture information is excluded. The plaintiffs resist that proposal.

Since the plaintiffs are pursuing a cause of action based on post-sale duty to warn, information that later became available to Deere is certainly relevant on that duty.

9. Other Backover Occurrences. I cannot tell from the briefing on this issue how many of these there are, their dates or their comparability. Therefore, I will reserve judgment until a hearing to be scheduled by the Clerk's Office.

10. Pre-1982 Surveys and Data. The defendant's motion to exclude this evidence is **DENIED**. I will, of course, have to hear a foundation laid at trial for its admissibility.

11. OPEI Activities in the Fifth Circuit. The plaintiffs agree that this should be excluded. Accordingly, the motion is **GRANTED**.

12. Other Litigation. The plaintiffs contend that they should be able to prove that Deere had notice of certain things. If Deere is concerned about reference to lawsuits, Deere can enter into a stipulation with the plaintiffs about what Deere had received notice of without specifying that the notice took the form of lawsuits.

13. Photographs. I have not seen the photographs in question. Counsel shall provide them. It is my assumption that these photographs will be introduced in any event only at the damages phase of the trial.

14. Accident Reconstruction Experts. These witnesses will be *voir dire*d at a hearing to be set by the Clerk's Office in advance of trial.

15. Chain Marks. Testimony from witnesses about marks they observed on the plaintiff's leg is admissible, with the proper foundation, as lay opinion testimony pursuant to Fed. R. Evid. 701. The witnesses may describe the pattern the marks formed, and in their description they may reference the chains on the tires of the mower (provided, of course, they saw the chains). If the witnesses say the pattern of the marks on the plaintiff's leg visually matched the pattern of the chains, the defendant's concerns as to the validity of this lay opinion go to the weight of the testimony, and not its admissibility.

16. Miscellaneous. It is apparent that this case has gone out of control since the final pretrial conference. Two dispositive summary judgment motions and a motion to dismiss were filed. These motions, supporting memoranda and oppositions consumed over 300 pages. In addition, nineteen motions in limine have been filed which, together with their responses consumed over 650 pages. Although I have ruled on all but a handful,³ the filings still have not stopped.

Accordingly, at this time I **ORDER** that no further motions or filings shall be made in this case. Instead, the Clerk's Office shall set aside a day at the conclusion of the case over which I am

³ The pending motions are not yet ripe for ruling. They include: a motion by the defendant to exclude former deposition testimony, three motions by the defendant to exclude or limit the testimony of three of the plaintiffs' experts (Copp, Kitzes and Reed), two motions by the plaintiff to exclude or limit the testimony of two of the defendant's experts (McCausland and Robinson), and a motion by the plaintiff for reconsideration, with an accompanying motion for leave to file "voluminous" attachments.

now presiding and before the beginning of the trial in Johnston v. Deere. At that time in open court I will hear any remaining issues, including the *voir dire* of the experts referred to above.

SO ORDERED.

DATED THIS 23RD DAY OF APRIL, 1997.

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE