

MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS : CIVIL TRIAL TERM PART 36

Carmen De La Cruz :
 : BY: GAVRIN, J.
 Plaintiff :
 :
 :
 - against- : DATE: April 25, 2006
 New York City Transit Authority and :
 Theresa McDowell :
 :
 : INDEX: NO. 17523/2002
 Defendant :

In this action to recover for personal injuries, the defendants have moved, pursuant to CPLR 4404 (a), for an Order setting aside the jury award of damages, returned on June 22, 2005, and granting a new trial in the interest of justice. The defendants contend that the following awards are excessive and not supported by the evidence: the award of damages for past pain and suffering in the amount of \$2,500,000; the award of damages for future loss of earnings in the amount of \$1,000,000 over 32 years, and the award of damages for future pain and suffering in the amount of \$12,500,000 over 52 years. After submission of the motion, several conferences were scheduled and held by the Court attempting to settle the complex damages issues and resolve this motion. However, the parties were unable to reach an agreement and the motion was submitted to this Court to decide.

The trial of the instant action was bifurcated. The Court commenced the liability portion of the trial on June 7, 2005. On June 9,

2005, the jury returned a verdict finding that the negligence of the defendants was the sole cause of the accident in which plaintiff was injured. During the liability phase of the trial, the Court heard testimony that on May 11, 2001, the plaintiff, Carmen De La Cruz, was returning home from work when she was struck by a bus as she crossed Putnam Avenue in Queens County. She fell backwards to the ground sustaining injuries to her neck and back. However, the most serious injury was to her right foot which was run over and crushed by the right front wheel of the bus.

The damages portion of the trial was begun on June 15, 2005. The undisputed evidence established that as a result of the accident, the skin and tendons of plaintiff's foot were badly damaged. Further, she suffered multiple fractures and displacements of the bones of the foot and toes. Carmen De La Cruz was removed by ambulance to Elmhurst Hospital where her wounds were irrigated and cleaned. She was then placed under general anesthesia while surgery was performed and a cast applied. After a fourteen day hospital stay, she was released in a wheelchair with her foot still in the cast.

Ms. De La Cruz testified that although she received physical therapy after the cast was removed, she continued to have unbearable pain with numbness and paresthesia in her right foot. Her ability to sleep was also compromised because she was unable to turn in bed and any object

touching her foot, even the bed sheets, would cause her pain. On January 30, 2002, she was admitted to North Shore Hospital where surgery was performed for "deep peroneal nerve entrapment." The nerve in the foot

had become entrapped in the scar tissue and adhesions that had formed as a result of the degloving injury to the foot. The surgeon released the nerve which was thickened with adhesions along its course. The cover of the nerve was then opened and the nerve fibers separated, a procedure known as “internal neurolysis.” This surgery regrettably failed to relieve the pain and numbness in plaintiff’s foot. She continued to be in constant pain and was unable to stand or ambulate without the use of a cane to support her weight. On February 20, 2004, she was admitted to Bellevue Hospital for surgery on an infected varicose vein in her left leg. This surgery was made necessary by her favoring that leg because of the injury to her right foot. All hospital records were introduced into evidence by the plaintiff and considered by the jury.

According to plaintiff’s medical expert, Dr. Enrique Ergas, an orthopedic surgeon, the pain and numbness in plaintiff’s right foot is a permanent condition resulting from the nerve damage caused by the crush injury to her foot. The consequential limited mobility of the foot, which hampers Ms. De La Cruz’s ability to walk, is also permanent. This restriction contributes to her lower back pain and has caused the muscles in her right leg to atrophy. Moreover, the plaintiff can expect to develop traumatic arthritis in the injured foot in eight to twelve years. While this condition initially can be treated with medication, it may ultimately require surgery to fuse the joint and alleviate the pain caused by the arthritis. The scar tissue from this surgery can increase the numbness and loss of mobility of her foot. The medical experts called to testify on defendants’ behalf were Dr. Burton Diamond, a retired neurologist and Dr. Robert Israel, an orthopedic surgeon. They agreed that the numbness in plaintiff’s foot and resultant discomfort and limited mobility were

permanent, although they disagreed with the extent and effect of plaintiff's disability.

In order for the court to set aside a determination of damages made by a jury, the record must indicate that the verdict could not have been reached on any fair interpretation of the evidence and, in this regard, considerable deference is to be accorded to the interpretation of the evidence by the jury. (Simeon v. Urrey, 278 AD2d 624; Britvan v. Plaza at Latham, 266 AD2d 799). An award to an injured person is only considered excessive if it deviates materially from what would be reasonable compensation. (CPLR 5501 [c]; also see, Harvey v. Mazal American Partners, 79 NY2d 218, 225; Sandy v. New York City Transit Authority, 297 AD2d 667; Holland v. Gaden, 260 AD2d 604). In this case, the plaintiff concedes that the amount awarded by the jury for pain and suffering is excessive and suggests a reduced award of \$1,500,000 for past pain and suffering and \$3,500,000 for future pain and suffering.

The court has reviewed past decisions for guidance as to the appropriate damages award in the instant case. One of the highest reported awards to a plaintiff incapacitated by a leg injury, recently upheld on appeal, was for \$9,750,000. The plaintiff was an active thirty-five year old woman, who “ lost part of her leg in the accident, underwent nine surgeries prior to trial, including some very painful skin grafts as well as two surgeries that required the removal and relocation of muscle tissue, and was left with pervasive scarring and a wound at the area of amputation that may never heal.” (Bondi v. Bambrick, 308 AD2d 330, 331). In another recent decision, the Appellate Division reduced a verdict for past pain and suffering from \$5,000,000 to \$2,000,000 and for future

pain and suffering from \$10,000,000 to \$1,750,000. The plaintiff, whose age is not indicated, suffered serious injuries which ultimately necessitated an above the knee amputation of his right leg, as the result of being pinned between two vehicles. (Kovit v. Estate of Hallums, 307 AD2d 336). A decision rendered in 2004 reduced a verdict for past pain and suffering, covering a period of less than two years, from \$6,000,000 to \$4,000,000, although the plaintiff had suffered horrific agony during his protracted rescue from a train wreck, had multiple operations and ultimately lost his leg. After comparing recent awards in cases involving leg amputations, the court therein concluded that \$4,000,000 was the highest award for past pain and suffering that could be justified. (Hotaling v. CSX Transportation, 5 AD3rd 964).

While the injuries sustained by Carmen De La Cruz cannot be equated with the leg amputations in the cases recently reviewed by the Appellate Division, she was left with a useless foot. A case involving injuries that more closely resembled those of Carmen De La Cruz was reviewed by the Second Department in 1990. Therein, the plaintiff “suffered, inter alia, a fractured tibia and degloving injury of the ankle, requiring substantial hospitalization and rehabilitation, and possibly necessitating amputation in the future.” The appellate court reduced an award of \$2,000,000 for past pain and suffering and \$2,030,000 for future pain and suffering to a total sum of \$1,500,000 for pain and suffering. (Venable v. New York City Transit Authority, 165 AD2d 871). Nevertheless, the amount of the reduced award for pain and suffering, approved by the Appellate Division in that fifteen year old case, supports this Court’s conclusion that a substantial award for the pain and suffering of plaintiff, Carmen De La Cruz, is appropriate.

Carmen De La Cruz suffered an extremely painful degloving injury to her right foot, with multiple fractures, and has undergone three major surgical procedures to date. At the time of the accident, she was twenty-nine years old and lived in an apartment with her six year old son. She is a simple, unsophisticated woman who had only completed the second grade in her native Santo Domingo. Almost immediately after emigrating to the United States in 1992, she began working full time. When the accident happened, she was employed as a stock and sales clerk at Gem Stores where she had been working since 1993. The plaintiff was well treated at her job and the customers liked her. The work she performed at Gem Stores was gratifying to Carmen and her success there made her feel very good about herself. When not working, she cared for her son and did the household chores. She took pride in her appearance, enjoyed shopping and loved dancing. Carmen De La Cruz was living the American dream when suddenly her life was shattered by the accident of May 11, 2001.

Plaintiff's evidence established that as a result of the injuries Carmen De La Cruz sustained in the accident, her right foot is disfigured, virtually useless, and extremely painful. The plaintiff cannot endure any weight on the foot and must continually elevate her leg to obtain relief from the constant pain and burning sensation. Her ability to ambulate, even with the use of a cane, is severely restricted. The injury will result in atrophy of her right leg and contributes to her lower back pain. Because of her limitations, she is no longer able to shop or help with the household chores. Since the accident, she has not been employed in any capacity. The plaintiff gave birth to a second son on November 10, 2004, but is unable to care for her children, without assistance, and was compelled to move in with her boyfriend's family. Now she spends most of the day

watching television. Sometimes, she is so depressed that she just remains in bed all day.

The lifestyle the plaintiff worked so hard to achieve, when she came to the United States from Santo Domingo, was destroyed as a result of the accident of May 11, 2001 and there is no reason to anticipate that her previous life will ever be restored. In fact, the medical outlook is that the condition of her foot will deteriorate with the onset of traumatic arthritis, and the pain and restricted mobility will increase. These factors, along with the length of her life expectancy, must be considered in determining the amount to be awarded her for pain and suffering. (See, Sladick v. Hudson General Corp., 226 AD2d 263). After due consideration, the Court finds that an award of \$1,000,000 for past pain and suffering and of \$2,000,000 for future pain and suffering is reasonable compensation based on a fair interpretation of the evidence in this case.

The award of \$70,000 for past loss of earnings was not included in defendants' notice of motion to set aside the damages award in this action. Assuming arguendo, that the defendants did challenge the jury award for past loss of earnings, this award was supported by the testimony of plaintiff's economist, Dr. Edmund Mantell, and the records of plaintiff's earnings before the accident. According to this evidence, the plaintiff would have earned \$25,000 had she worked for the full year in 2001. Therefore, the award of \$70,000 for lost earnings for the four year period from May 11, 2001 to June 22, 2005 was not excessive and will not be disturbed by the Court.

The plaintiff, Carmen De La Cruz, was awarded \$1,000,000 for

future loss of earnings over thirty- two years, which the defendants contend is excessive. The medical experts, who testified on behalf of the defendants, agreed with plaintiff's medical expert that Ms. De La Cruz is now capable of performing only sedentary work. Therefore, she is clearly unable to engage in the type of employment she had at Gem Stores where she was required to bring up stock from the basement and to climb a ladder in order to stock the higher shelves.

Carmen De La Cruz has only a second grade education and is not fluent in English. A vocational rehabilitation expert, Dr. Richard Schuster, who had interviewed and tested her, testified that because of her low educational level and lack of English language skills, her ability to obtain employment in a sedentary position was severely limited even before the accident. He concluded that with her current physical limitations and resulting depression, which negatively impacted on her cognitive function, it was highly improbable that she would be able to obtain employment, in any capacity, in the future. Even if she were to find employment in a sedentary position, her chronic pain and depression would affect her reliability and lead to dismissal. According to the economist called on her behalf, the plaintiff had a work life expectancy of 30.2 years and had she worked from the date of accident through March 31, 2035, she would have earned \$1,015,000 . This calculation was based on a wage rate increase of four percent per year, which was in keeping with the yearly increases plaintiff had been receiving at Gem Stores. The jury was entitled to discount the speculative opinion of defendants' expert, Sharon Levine, an employability specialist, that there were positions available which the plaintiff could obtain and perform despite her disability. (See, Simeon v. Urrey, supra).

The jury awarded the plaintiff damages of \$1,000,000 over 32 years for future lost earnings. This award, which was supported by the testimony of the vocational expert and the calculations of the economist, was reasonable compensation and not excessive. In determining the number of years which the award covered, the jury was not bound by either the work life expectancy tables used by the expert or charged by the Court. (See, PJI 2:290). The finding that the plaintiff would have worked to age sixty-five was supported by the evidence of her steady work history before the accident and by the fact that her low economic status would have required her to work as long as possible. Therefore, the Court will not disturb the jury's award for future lost earnings.

Accordingly, the motion is granted to the extent that the awards for past and future pain and suffering are set aside and a new trial is granted as to these items of damages unless, the plaintiff, Carmen De La Cruz, serves and files a written stipulation consenting to reduce the verdict as to past pain and suffering from \$2,500,000 to \$1,000,000, and as to future pain and suffering from \$12,500,000 to \$2,000,000, in accordance with the Order dated March 20, 2006. The defendants' remaining contentions are either without merit or have been rendered academic in light of the above determination.

Dated: April 25, 2006

A.J.S.C.