2014 WL 7715425 (N.Y.Sup.) (Trial Order)
Supreme Court, New York.
Queens County

Gajendra SAWH, as natural father and legal guardian of Rajendra Sawh, a minor child, Plaintiff,
v.
BALLY CONTRACTING CORP. and Amarnauth Surujbhan, Defendants.

No. 167892010.
November 7, 2014.

Short form Order

Leonard Livote, Judge.

*1 Trial Motion-Post Verdict

Submitted: Aug. 8,2014

The following papers numbered 1 to 7 read on this trial motion, post-jury verdict, by plaintiff, pursuant to CPLR §4404(a) for an order: (1) setting aside the jury's verdict with regard to past and future pain and suffering damages as contrary to the weight of the evidence and in the interests of justice, and ordering a new trial on the issue of past and future pain and suffering damages; or in the alternative, (2)setting aside the jury's verdict as contrary to the weight of the evidence, and in the interests of justice, and granting additur with regard to past pain and suffering damages and a new trial on the issues of future pain and suffering damages.

	PAPERS NUMBERED
Notice of Motion, Affirmation, Affidavits and Exhibits.....	1 - 3
Answering Affirmations, Affidavits and Exhibits.....	4 - 5
Reply Affirmations, Affidavits and Exhibits.....	6 - 7
Other	

Upon the foregoing papers it is ordered that this motion is denied in part and granted in part as set forth below.

The court conducted a damages only jury trial in the within matter on June 9, 11 and 12, 2014. Liability was conceded. On June 12, 2014, the jury rendered a verdict of $100,000 for past and present pain and suffering and $0 for future pain and suffering.

Rajendra Sawh (D/B 10/13/1996), 12 years old at the time, was injured on October 3, 2009 when he was in the area of a construction site and was called over to assist a construction worker recover his hard hat. While complying with the worker's request to fetch and hand over his hat, roofing shingles fell from the roof of the construction site onto the plaintiff's right leg and ankle.

Rajendra Sawh sustained a bimalleolar ankle fracture. The injury consisted of comminuted fractures of his right fibula and right tibia and a Salter- Harris II fracture of his right tibia which damaged the epiphyseal plate (a/k/a "growth plate") in the infant's right tibia. As a result, the infant plaintiff underwent three surgeries, to wit: a closed reduction and then and open reduction internal fixation (ORIF) procedure during which two screws were implanted in plaintiff's right ankle, and finally another surgery to remove the hardware from plaintiff's ankle.

*2 Both plaintiff's and defendant's medical experts testified at trial that the infant plaintiff will need an additional surgery in the future called an opening wedge osteotomy. This future operation is an additional ORIF procedure requiring screws and an external fixator. The future surgery is necessary to correct a tibial-fibular synostosis (a bone fusion of the tibia and fibula that the plaintiff has developed.) Finally, there was expert testimony that even after the opening wedge osteotomy, it was possible he could face further surgeries in the future and that he suffered a permanent disability and a permanent loss of range of motion of his right ankle.

Trial courts should sparingly exercise their discretion in overturning jury awards (*Hurgan v. Tedesco,* 179 AD2d 805 [2d Dept. 1992]). As a general rule, when considering motions to set aside a jury verdict pursuant to CPLR §4404, said jury verdicts are granted considerable deference, and relief is granted only when it is shown that the award deviates materially from what would be reasonable compensation (See, *Matter of State v. Edison G.,* 107 AD3d 723 [2d Dept. 2013]). The court when deciding to exercise its broad discretionary power must also consider whether or not substantial justice has been done (*Schafrann v. N.V. Famka, Inc.,14 AD3d 363,* [1st Dept. 2005]).

In the within matter the jury reached a verdict of $100,000 compensation for past and present pain and suffering. Courts turn to guidance from similar cases, ever cognizant that when comparing said cases the fact patterns and injuries and circumstances are never identical and ever cognizant that it is the jurors' primary function, not the court's, to assess damages. (*see, Po Yee So v. Wing Tat Realty Inc.* 259 AD2d 373 [1st Dept. 1999]). A similar verdict for past and present pain and suffering involving a fractured ankle with open reduction and internal fixation involving plates and screws, was reduced from $350,00.00 to $100,00.00 (*see, Ruiz v, New York City Transit Authority,* 44 AD3d 331 [1st Dept. 2007]). A jury verdict for past and present pain and suffering of $5,000.00 for a fractured ankle involving two operations and future surgery was increased from $5,000.00 to $100,000.00 (*see,* Grant v. City of New York a 4 AD3d 158 [1st Dept. 2004]).

Accordingly, considering the due deference accorded jury verdicts, the motion to set aside that portion of the verdict concerning past and present pain and suffering, as materially deviating from what would be considered just and reasonable compensation under the circumstances, is denied.

In the within matter, the jury reached a verdict of $0 compensation for future pain and suffering. It is clear that both plaintiff's and defendants experts agreed at trial that Rajendra Sawh requires future surgery and has permanent loss of range of motion in his right ankle. The failure of the jury to award any money damages at all for future pain and suffering, in the interests of justice, materially deviates from what would be reasonable compensation under the circumstances. Defendant conceding this issue suggests to the court that $250,000.00 would constitute just and fair compensation. Plaintiff, prefers a new trial but argues that just compensation for future pain and suffering is $862,500.00.

*3 Comparing similar verdicts involving a jury verdict of future pain and suffering for an ankle fracture: A jury verdict in a trimalleolar ankle fracture requiring pinning of $300,000 was reduced to $200,000 (*see, Fishbane v. Chelsea Hall LLC,* 65 AD3d 1079 [2d Dept. 2009]); and a jury verdict of $700,000.00 for future pain and suffering concerning a trimalleolar fracture requiring surgery was reduced to $225,00.00 (*see, Clark v N-H Farms. Inc.,* 15 AD3d 605 [2d Dept. 2005]). Furthermore, in a case very similar to the medical history at bar, an award of $782,800 for future pain and suffering for a bimalleolar ankle fracture involving three surgeries and requiring a future surgery was not deemed excessive (*Alicea v. City of New York,* 85 AD3d 585, [1st Dept. 2011]).

Based on these cases, an appropriate award for future pain and suffering is $400,000. Accordingly, it is

Ordered, that the plaintiff's motion to set aside the verdict is granted to the extent that the jury's award of $0 for future loss of earnings is set aside, and a new trial granted on that element of damages only, unless, within 30 days after service upon him of a copy of this decision and order, Defendant shall serve and file with the Clerk of the Supreme Court, Queens County, a written stipulation consenting to increase the verdict for future pain and suffering to the principal sum of $400,000, and to entry of a judgment in that amount.

This constitutes the Order of the Court.

Dated: November 7, 2014

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Leonard Livote, A.J.S.C.

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