

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 5**

-----X  
TARA KELLY,

Plaintiff,

Index No. 18607 / 04

- against -

**DECISION AND ORDER**

ANITA PETERSON & THE SALVATION ARMY,  
Defendants,

-----X  
HON. SALLIE MANZANET-DANIELS:

Upon the foregoing papers Defendant's motion pursuant to CPLR §4404 for an order setting aside the damages awarded plaintiff by the jury verdict rendered on November 20, 2008 and granting a new trial, directing a collateral source hearing pursuant to CPLR §4545 and reducing the future medical expenses award to plaintiff in accord with CPLR §§4545 and 5041 is denied in part and granted in part for the reasons set forth herein.

Procedural Background

The instant action was assigned to this Court for a damages only trial on November 12, 2008, after having completed the liability trial conducted before the Hon. Geoffrey Wright on July 30, 31 and August 1, 2008, wherein the jury found the defendants 100 percent at fault for the happening of the December 26, 2003 accident. At the instant trial, after hearing the testimony of the plaintiff and expert witnesses on both sides, the jury returned a unanimous verdict in favor of plaintiff on every damage question put before them. Defendant now moves to set the verdict aside in the interest of justice, as against the weight of the evidence, as a material deviation from what is reasonable compensation under the circumstances, and granting a new trial to the defendants.

Factual Background

This matter arises from a motor vehicle accident which occurred on December 26, 2003. During the trial on damages, the plaintiff, Ms. Tara Kelly, testified credibly and in great detail describing the massive impact which caused the accident in question and totaled her car. The jury was shown photographs exhibiting the vehicles condition. (Trial Exhibits - Plaintiff's 1-4). She related how the impact was so severe that it caused her four-door Mazda to spin a complete 360 degrees. Ms. Kelly explained that despite her attempt to "lean back and brace herself", and the use of her seat belt, her body was jerked and thrown around within the car and "she could feel her body snap." Ms. Kelly testified that she immediately felt intense pain in her right arm after the hit. It was so painful she believed it was broken. She graphically described that the pain "felt like a knife twisting in her arm." A registered nurse by profession, Ms. Kelly was focusing on the most acute symptoms she was experiencing, the sharp pain in the right arm. After calling 911

she called her fiancé, who arrived and ultimately took her to the Emergency Room at Mount Sinai hospital where she is employed, rather than go to Lincoln Hospital (which was the closest facility to the accident site) as suggested and offered by the police officer and ambulance personnel who responded to the accident scene. An x-ray was taken at Mt. Sinai's Emergency Room, which was negative for fracture, she was given pain medication and sent home to rest.

Ms. Kelly testified at length and fully described her extensive treatment, pain and discomfort. She testified that despite the negative x-ray she continued to believe she had a broken arm due to the severity of the pain she was experiencing. Ms. Kelly's pain now included severe neck and back pain which caused a stiffness that significantly restricted her range of motion and caused an inability to utilize her right arm. The plaintiff also related that her back pain became so excruciating that she called her father to again take her to the hospital ER. At the hospital she conferred with a Dr. Saroda who told her to go home, rest and take pain medication and return and visit his office a few days later on December 31, 2003. By that date Ms. Kelly testified she was unable to move her head in any direction, and again had to be driven to the doctor. She was in such bad shape that the doctor immediately referred her for a neurological consult with Dr. Charney that same afternoon. The neurological exam revealed that her body was experiencing complete muscle spasm activity, and she was given two prescriptions to alleviate the discomfort and muscle spasms and was referred for an MRI study of her neck.

Thereafter, the MRI was taken and plaintiff was diagnosed with a cervical disc herniation at C5-C6 with impingement on the corresponding nerve root which was causing radiculopathy into the right arm. Further diagnostic testing, specifically EEG and EMG test, revealed nerve damage correlated to the C5-C6 cervical herniation. Ms. Kelly was ordered to continue with bed rest, medication, physical therapy and to refrain from work. She attested to following those orders through all of January and part of February. She described how she tried pushing herself back to work, attempting a few shifts, but was unable to do it. Ms. Kelly explained that as a right-hand dominant individual the loss of strength and control of her right hand prevented her from doing the things she had to do for her job in the same manner, if at all. For instances, she described having to draw blood from a patient from a sitting position, rather than the typical standing position. She admitted having difficulty with lifting the IV pumps (approximately 12 lbs.), oxygen tank (approximately 20 lbs.) and other medical equipment, as well as the patients themselves (which averaged about 200 lbs.). Ms. Kelly expressed gratitude to her fellow co-workers who would adjust how the work was done to accommodate her limitations. Thereafter her treating physician, again ordered bed rest, and the above described treatment regimen, which she maintained until March when she returned to work. However, since she could not function to full capacity her co-workers again made accommodations to assist her in completing the work required of an ICU nurse. In fact, she testified that she began scheduling her physical therapy appointments at her hospital to commence immediately after her end of shift in order to work and stay mobile.

By the Summer of 2004, due to continued and persistent pain and restrictions of mobility, she began to treat with Dr. Freedman, a pain management specialist. Dr. Freedman treated her

with an epidural injection series, an in-office procedure. This procedure consists of a series of three injections of a steroid injected directly into the injured area. Plaintiff recalls feeling worse for the two days immediately following the injections, until the medication kicked in. Thereafter, she admitted feeling a little better and having some hand movement return. Plaintiff maintained, however, that she never regained full strength or control of her right hand. As is expected with this procedure, which is considered a temporary measure, the relief wore off and the pain returned. Hence, in February 2005, Dr. Freedman again tried a second round of epidural injections. Unfortunately, this time the treatment provided no relief at all, and she was still experiencing a 50% restriction in her neck and back's range of motion and a complete loss of right-hand strength.

Consequently, she underwent a nerve block treatment in March 2005. The procedure was performed in an operating room at Mt. Sinai Hospital in Queens. The plaintiff testified that the procedure, which is administered under anesthesia, involved placing a needle through her throat and injecting steroids directly into the affected nerve root. She recalled that following the procedure her parents took her to their home in order to care for her. She described the post nerve block pain as "2 - 3 days of unbelievable pain" as intense as the extreme pain she felt immediately post-accident. Thereafter, Ms. Kelly again experienced another few months of improved functioning, with greater range of motion and increased hand strength. During this period she found work a little easier, however, admits that her right hand continued to feel unreliable. Additionally, she noted how fortunate she was to have undergone the nerve block procedure when she did, as she was married a month later, and was hence able to fully enjoy her wedding and honeymoon. While the nerve block procedure provided a good five to six months of relief, by the end of that time frame the pain started to come back. However, due to her desire to have a baby she was taken off all pain medications, and Mrs. Kelly simply endured the pain until after the birth of her son.

In September 2006, unable to withstand the pain any longer, she returned to Dr. Freedman and begged for another nerve block. Unfortunately, this time, plaintiff did not experience the relief she had gotten from the first nerve block treatment, nor was their any restored hand function. Having exhausted all possible treatment options, and unable to endure any more pain after the failed nerve block, Mrs. Kelly consulted with a neuro surgeon, Dr. Frank Moore.

After a full review of her medical history, records and diagnostic test results, Dr. Moore performed a disectomy at C5-C6 and a fusion of those two vertebrae by the installation of a plate and screws at Mt. Sinai hospital on November 11, 2006. The plaintiff again endured another grueling four-month period of recovery and rehabilitation. She described experiencing severe post operative pain for 2 - 3 weeks before commencing physical therapy at St. Joseph's, a new treatment facility closer to her home. After her four month recovery period she ultimately returned to work feeling greater mobility and improved hand functioning. She explained that prior to the spinal fusion her hand was numb all day, everyday. Post-surgery, she only experiences numbness or throbbing 2-3 times per week. However, plaintiff asserts that the loss

of hand strength remains the same.

Dr. Krishna, a board certified neurologist, who testified as an expert and as one of the treating physicians for the plaintiff, went through the course of extensive medical treatment she received over the three year period leading to the spinal surgery. He concluded, within a degree of medical certainty, that plaintiff had suffered a permanent injury as a result of the December 26, 2003 motor vehicle accident. Indeed he opined that the accident was a substantial factor in causing the disc herniation to C5-C6 which severely impinged on the corresponding nerve root and that such caused permanent and irreversible nerve damage. The expert noted that diagnostic testing of the plaintiff revealed a 22% loss of right arm strength as compared to the left arm, and a 50% loss of normal neck range of motion, especially in the flexion movements. Indeed a post-spinal surgery EMG performed on plaintiff revealed positive findings evidencing continued nerve damage. In light of those findings, together with all the other testing and medical treatment history, Dr. Krishna projected a guarded prognosis for plaintiff. He fully anticipates that plaintiff will have to reduce some of the activities that she currently engages in, like her duties as an ICU nurse. He unequivocally stated that she would ultimately have to transfer out of the ICU unit that she loves so much. He further anticipates that she will require future surgical procedures like epidural injections (which cost \$10 thousand per series), nerve block procedures (which cost \$125 thousand dollars) and/or the insertion of a spinal cord implantation stimulator (the latter costing approximately \$125 -150 thousand dollars).

The defendants offered expert testimony of their own. They called Dr. Ramon Valderamma, a neurologist, who examined the plaintiff on March 28, 2007 (just shy of four months post-spinal surgery) and testified out of turn. According to Dr. Valderamma, plaintiff's examination was normal. He maintained that plaintiff had no lack of mobility, had full right-hand strength and that he observed no evidence of muscle atrophy on the right arm. On cross examination he admitted that he did no formal measuring of plaintiff's range of motion, relying on his visual assessment. In other words he "eyeballed it." Most incredibly, the doctor claimed that plaintiff had full forward flexion in her neck. This latter finding, according to Dr. Krishna, is anatomically impossible for a person who has had a spinal fusion at C5-C6.

Indeed the plaintiff described the many things she can no longer do as a result of the injuries sustained in this accident. Mrs. Kelly testified that her life has been affected in a myriad of ways, from the most simple and mundane things to the more complex and integral parts of her life. She explained that since the surgery, she can never again sleep on her stomach as she is unable to turn her head and neck to the right or left, nor can she lift heavy items (i.e. her vacuum, her 3 year old son, nor the medical equipment at work). Since her accident, she has had to give up her love of Irish dancing. Prior to this injury, she not only performed publicly, but she taught children the art of Irish dancing once a week. Due to the nature of the dance, which is marked by repetitive, quick and at times intense bouncing motions, Mrs. Kelly is no longer able to do it as the movement causes severe pain. To teach she must lift the children, but due to the loss of strength and hand grip, such is too dangerous for her and the students. Her home life has likewise been affected, in that she requires assistance in heavy house hold chores, can no longer

garden or bath her son as she cannot hold the position necessary to do either activity, nor can she take their family dog for his daily walks (as he weighs 80 lbs. and requires great strength to handle). Prior to this accident she worked three jobs, now after 3 days of consecutive work, she is in pain and must rest a few days in order to be ready to return to the demands of her job.

Finally, Dr. Martin Barshie, an orthopedic surgeon testified for the defendant regarding his examinations of the plaintiff conducted on September 13, 2006 (pre-spinal surgery) and again on March 28, 2007 (post-spinal surgery). Dr. Barshie explained that since the September 13, 2006 examination was conducted after receiving an epidural injection procedure her range of motion was extremely limited. He did however find no signs of atrophy in hands and arms, no signs of carpal tunnel syndrome, and normal range of motion of elbows, wrists, hands and shoulders. The doctor, however did concede that the range of motion in the right shoulder elicited pain to the neck. The testimony concerning the second exam of March 28, 2007, however, yielded evidence devastating to the defendants position. Dr. Barshie testified that the range of motion examination he conducted revealed significant restrictions, 20% flexion, instead of 50 for normal; 30% extension, instead of 40-45% for normal; and left lateral at 50%, instead of 70-85% for normal. He also conceded that her right grip strength was weaker than her left. In so far as the final examination of the plaintiff by both of defendant's experts were conducted on the same day, Dr. Barshie's positive findings regarding the loss of range of motion and right hand strength are at complete odd's with the findings of Dr. Valderamma. On cross examination, Dr. Barshie admitted to only learning about the plaintiff's post-spinal surgery positive EMG testing, the day before his testimony, and hence was forced to admit that he had not factored that finding into his conclusion as articulated in his examination report of his second examination of Mrs. Kelly. He further conceded that the June 16, 2008 EMG test which revealed continued nerve damage to the C5-C6 nerve root "means there is damage that continues post surgery." Finally, he opined that if the history she reported was accurate, the accident of December 26, 2003 would have caused the problems she complains of.

#### Conclusions of Law

CPLR§4404(a) provides in pertinent part that "the Court in its discretion may set aside a verdict and order a new trial in the interests of justice". Both counsel accurately state the standard of review that must be applied in determining a motion to set aside a verdict as contrary to the weight of the evidence citing *Nicastro v. Park*, 113 AD2d 129; *McDermott v. Coffee Beanery, Ltd.*, 777 N.Y.S.2d 103 (1<sup>st</sup> Dept. 2004). It has been held that "To set aside a jury verdict as against the weight of the evidence, it must be concluded that the evidence so preponderated in favor of the movant that the verdict could not have been reached on any fair interpretation of the evidence. *Id.*, 134. Courts have repeatedly been warned that in considering whether the verdict fairly reflects the evidence in the case that the trial Court not substitute its own decision and assessment of the facts for that of the jury. It is well settled law that great deference is to be afforded to the fact-finding function of the jury, and that their determinations should be disturbed

sparingly. Id. A court may grant judgment notwithstanding the verdict only where there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury.” Cohen v. Hallmark Cards, 45 N.Y.2d 493 (1978).

The defendant asserts that “the jury clearly had no rational basis for its verdict” as evidenced by the Two million dollar future medical expenses award, even though the plaintiff only asked for the sum of \$285,000. While defendant accurately notes that significant disparity, this Court does not agree with the defendants point that such discredits the entirety of the jury’s verdict. The jury heard the credible and compelling story of a young woman whose life was unquestionably altered for the worse, and for life, due to the sole negligence of the defendants. Her six year journey, since that fateful day has been marked by significant periods of excruciating and debilitating pain and physical restrictions never before experienced. She related her extensive course of medical treatment and surgical intervention in her attempt to restore her pre-accident functioning. Finally she described what her current condition and level of functioning is and the adjustments and sacrifices she has had to implement and endure in order to live a normal life.

The defendant has failed to satisfy the requisite standard set forth for granting the relief of setting the verdict aside. The defendant was permitted to fully contest and lay out to the jury their contentions, and such arguments were clearly and unanimously rejected by the jury. Consistent with this Court’s charge regarding assessing the credibility of the parties, the jury is free to reject the testimony of any witness, even if not directly contradicted. It is abundantly clear that this jury rejected the defendant’s expert testimony and chose to follow the testimony and arguments of the plaintiff.

Furthermore, the credibility of defendant’s experts were damaged in that their testimony during the trial contradicted each other, and in part supported plaintiff’s claims. Defendant also neglects to adequately weigh the impact that plaintiff’s credibility had on the jury. However, this Court cannot. This Court observed a young woman relate years of excruciating pain and extensive treatment which so clearly was caused by the complete negligence of the defendants in this case. The testimony of these experts is premised on the completeness of the medical history provided to the examining doctor. The fact that Dr. Barshie had not been provided with the results of positive EMG testing post-spinal surgery was damaging to the defendants and the weight of the doctors opinion. It is this critical factor that is at the crux of the issue presented to this Court. Despite defendant’s protestations to the contrary, the plaintiff was able to put forth a completely credible account of her injury and its extent. Unlike defendant, this Court cannot summarily dismiss the significance of those points, and the cumulative effect those areas of questioning had in destroying the defense’s contentions.

Defendant’s failure to provide full and accurate information to all of the experts who testified bares directly on the permissible conclusions and reasonable inferences the jury could reach. After all the PJI 1:91 charge on expert testimony, which was given in this case, specifically instructs the jury (in pertinent part) that “[T]he opinion(s) stated by (the, each) expert

who testified before you (was,were) based on particular facts, as the expert obtained knowledge of them and testified to them before you, or as the attorney(s) who questioned the expert asked the expert to assume. You may reject an expert's opinion if you find the facts to be different from those which formed the basis for the opinion. You may also reject the opinion if, after careful consideration of all the evidence in the case, expert and other, you disagree with the opinion....." (Emphasis added). It is obvious that the jury likewise utilized this charge in reaching their ultimate conclusion.

Insofar as plaintiff successfully casted doubt on defendants's experts's credibility, the opinions and conclusions of those experts were thus rendered equally questionable. Therefore, this Court cannot say that the jury had no basis to reach the decision they rendered, a conclusion that is required to grant the instant motion. Accordingly, plaintiff's motion to set aside the jury verdict as against the weight of the evidence and in the interest of justice and granting a new trial is denied.

This Court likewise denies the motion to set aside the jury verdict on the grounds that the award materially deviates from what is reasonable compensation under the circumstances. This Court does not consider the Two million dollar award for past pain and suffering for the six years of post-accident pain, treatment and surgical intervention and the significant permanent restrictions and limitations that plaintiff endured to materially deviates from what is a reasonable compensation under the circumstances. See Suria v. Shiffman, 107 AD2d 309, 314 (1<sup>st</sup> Dept 1985). Similarly this Court does not consider the Three million dollar award for future pain and suffering, in light of her guarded prognosis, her probable need for multiple future and her life expectancy of an additional 48 years of life.

After a careful review of the defendants cited cases regarding the jury award herein, this Court finds that they are distinguishable in that they are not sufficiently on point with the extent of the injury and the resulting permanent effects to the plaintiff in the case. See Donlon v. The City of New York, 284 AD2d 13, 727 NYS2d 94 (1<sup>st</sup> Dept. 2001); and Cruz v. Bridge Harbor Heights Association, 274 AD2d 309, 710 NYS2d 361 (1<sup>st</sup> Dept 2000). As aptly pointed out by plaintiff, many of the cases cited by defendant did not reveal the nature and extent of injuries. The majority of the cases that did relate the nature of the injuries, were not as severe in terms of extent of treatment, and did not project the need for future surgical intervention, as is the case in the instant matter. Additionally, few of the plaintiff's in the defendant's cases had permanent nerve damage that was clearly and progressively limiting the movement and use of her dominant right arm. On the other hand, the cases cited by the plaintiff more closely resonate with the testimony adduced in the instant matter, and provide support for the denial of the motion presented. See Serrano v. 432 Park South Realty Co., LLC, 59 AD3d 242, 873 NYS2d 567 (1<sup>st</sup> Dep't 2009); Balbuena v. IDR Realty LLC, 6 NY3d 338, 845 NE2d 1246, 812 NYS2d 416 (2006); Kirby v. Turner Construction Co., 286 AD2d 618, 730 NYS2d 314 (1<sup>st</sup> Dep't 2001). Accordingly the motion to set the verdict aside on the grounds that the award materially deviates from what is reasonable compensation under the circumstances is denied in its entirety.

The Court likewise denies defendants motion for a collateral source hearing. As was aptly set forth in plaintiff's papers, defendant's moving papers simply fail to satisfy the requisite "clear and convincing" standard of proof burden for obtaining the relief requested. See Young v. Knickerbocker Arena, 281 AD2d 761, 722 NYS2d 596 (3d Dep't 2001); Ruby v Budget Rent A Car Corp., 23 AD3d 257, 806 NYS2d (1<sup>st</sup> Dep't 2005). This standard has been interpreted to mean something capable of being measured based upon reliable factors free of undue speculation. Ashland Mgt. V. Janien, 82 NY2d 395, 403, 604 NYS2d 912 (1993). In light of Dr. Krishna's prognosis that the plaintiff will ultimately have to stop working as an ICU nurse, this Court rejects defendants argument as speculative and supported by any documentary evidence.

Finally, In light of the evidenced receive concerning the extensive treatment Mrs. Kelly received throughout the last six years since the instant accident, the Court can understand how jurors might conclude that the estimate of future medical expenses of \$285,000 was conservative. However, the Court finds no evidence in the record that would support a Two million dollar award. Accordingly, this Court hereby grants that portion of defendants motion (item 3) which seeks to reduce the future medical expenses award, from the Two million dollars awarded to the \$285,000 requested and supported by the evidence presented at trial.

This constitutes the decision and Order of the Court.

Dated: October 5, 2009

  
Salie Manzanet-Daniel, J.S.C.