



## New York State Court of Claims

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### VERZIVOLLI v. THE STATE OF NEW YORK, #2002-016-098, Claim No. 96794

#### Synopsis

#### Case Information

<b>UID:</b>	2002-016-098
<b>Claimant(s):</b>	EDUART VERZIVOLLI and MEDIHA VERZIVOLLI
<b>Claimant short name:</b>	VERZIVOLLI
<b>Footnote (claimant name) :</b>	
<b>Defendant(s):</b>	THE STATE OF NEW YORK
<b>Footnote (defendant name) :</b>	
<b>Third-party claimant(s):</b>	
<b>Third-party defendant(s):</b>	
<b>Claim number(s):</b>	96794
<b>Motion number(s):</b>	
<b>Cross-motion number(s):</b>	
<b>Judge:</b>	ALAN C. MARIN
<b>Claimant's attorney:</b>	Herbert William Fischman, P.C.By: Herbert William Fischman, Esq.
<b>Defendant's attorney:</b>	Eliot Spitzer, Attorney GeneralBy: Grace Brannigan, AAG
<b>Third-party defendant's attorney:</b>	
<b>Signature date:</b>	October 10, 2002
<b>City:</b>	New York
<b>Comments:</b>	
<b>Official citation:</b>	

**Appellate results:  
See also  
(multicaptioned case)**

#### Decision

This decision follows the trial on damages of the claim of Eduart Verzivolli.<sup>[1]</sup> By Decision filed August 22, 2000, the defendant was found 50% liable for the June 12, 1997 injury to Eduart Verzivolli and the resulting damages therefrom. At trial, Mr. Verzivolli (and his wife, Mediha) took the stand, and three physicians - - an orthopedic surgeon, a neurologist and a physiatrist- - as well as an economist testified on behalf of claimant. Defendant, for its part, rested without calling any witnesses.

Employed on a project to repair the roof of a building at Creedmoor Psychiatric Center, claimant was working on putting new rafters in an attic area that could only be reached by ladder. He had sawed half-way through a rafter using a circular power saw when the saw kicked back and hit him in the right thigh causing a severe laceration.

An aerial basket was used to lower claimant from the building, and Verzivolli was taken by ambulance to a hospital. He testified that at the time, he felt very cold, was shaking and was in considerable pain.

The hospital chart describes his right thigh as having a "deep laceration" with active bleeding. Thirty-two stitches were needed to sew up his leg. The scar, as depicted in the photograph taken a month later that became claimant's exhibit 4, is curved and goes almost half-way around the thigh. It looks to be about 5 or 6 inches above the top of the knee at the front of the thigh. Dr. Stuart Springer, the orthopedist who took the stand at trial, entered it in his notes as a ten-inch scar.

Released later the same day - - he had been admitted just before noon - - Verzivolli was given crutches to walk with and pills for pain and fever. Claimant recalled being unable to sleep that night because of "terrible pain." A week later, without an appointment, claimant went back to the hospital because the leg was getting red and he was in pain; an antibiotic was prescribed. He again returned on his own within a week in response to the pain and the fact that his leg became red when he put any pressure on it.

According to claimant, he used the crutches for about eight or nine months. The hospital recommended that claimant have physical therapy, but he could not do so because he lacked insurance coverage therefor.

#### *Dr. Springer*

Two months after the accident, on August 7, claimant saw Dr. Springer for the first time. Verzivolli complained that his knee was swollen. He told the doctor that he could not walk because he could not plant his right foot without pain. When he tried to bend his knee, he felt terrible pain.

Dr. Springer testified that claimant "certainly had a tear of the quadriceps muscle which was the muscle that was damaged as a result of the saw..." Springer explained the importance of what are really four muscles, hence the prefix. They attach from the hip area down to the kneecap. "They're antigravity muscles. So as you're walking and your heel strikes the ground, the quadriceps takes over much of the forces to prevent the knee from buckling completely."

Dr. Springer noted in his examination of the knee some loss of movement from pain, some contraction of the muscle and "exquisite tenderness" of the joint line of the inner side, known as the medial joint line. In addition, there

was significant atrophy, which comes from disuse.

Springer had appointments with claimant on November 5, 1997 and February 26, 1998. In the latter consult, Dr. Springer observed that the knee was puffy, a swelling that the doctor had not seen before, and which indicated an "inflammation, irritation going on inside the joint itself." As before, there was some restriction of movement. At the next appointment, April 13, 1998, medial joint line tenderness, limitation in the range of motion and atrophy were again noted.

Verzivolli was then seen May 27, 1998. Dr. Springer reported claimant had pain when he walked one or two blocks, puffiness was still present and the knee cap was becoming more sensitive. The doctor explained that his patient's pain was in two places, at the end of the scar created by the cut and on the inner side of the knee.

By the time of the next appointment, August 27, 1998, Verzivolli's condition had not improved, but an MRI had finally been approved, the results of which showed cartilage damage inside the knee. Consequently, Dr. Springer performed arthroscopic surgery on October 16, 1998. The surgery revealed damage to the cartilage covering the kneecap:

"[s]o you're looking at a half to two-thirds of damage of cartilage in the areas that we described." There were also loose fragments of cartilage floating within the joint. The cartilage was removed, various edges and surfaces were smoothed, and the loose fragments were cleaned out. Furthermore, Verzivolli had inflammation of the lining of the joint, a condition known as synovitis.

Dr. Springer pointed to two indications that claimant's condition was caused by injury, not by wear: an area of the cartilage was fragmented and hanging down, in what is known as a "crabmeat" configuration in appearance, and the existence of a fissure in the cartilage underneath the kneecap. (See the color photos that are cl exh 7).

Claimant had three appointments with Dr. Springer over the next eighteen months.

In the first appointment after the operation, on February 18, 1999, his patient "was feeling pretty good from the surgery." At the last appointment in March of 2001, as Springer expected, claimant had some knee pain and occasionally "felt some localized swelling in the knee."

In Dr. Springer's opinion, the subject injury was the competent producing cause of the above condition, which is permanent in nature. With weakness in his right leg, claimant will have problems walking, including negotiating stairs, especially coming down them. Sitting for long periods will cause pain. The doctor went on to say that, given the loss of cartilage, certain angles taken with the right leg may cause an acute tooth-ache type pain, although no testimony was elicited as to that specific complaint.

#### *Dr. Younger*

Dr. David Younger, a neurologist, examined claimant some three-and-a-half years after his accident, on December 21, 2000.

He administered an electromyography test (EMG) which involves inserting a needle into a particular muscle in order to transmit a live signal. This painful procedure was done a number of times as different muscles were sampled both within and without the vicinity of the injured area.

The saphenous nerve, which branches off from the femoral nerve, provides sensation to the middle and front part of the thigh. Dr. Younger testified that the incision of the saw caused damage to the saphenous nerve, and the damage is evidenced by painful sensation on the skin when it is stroked - - a condition known as causalgia.

Dr. Younger also noted weakness in the bending of the knee, and its neurological source - - an injury to the femoral nerve. A test of sensation in his thigh done by running a pin down its length showed a loss of sensation , indicating damage to the sensory branches of the femoral nerve (the saphenous

nerve).

The EMG, and nerve conduction study which he also performed that day, showed chronic lesions not only to sensory nerve branches of the femoral nerve, but motor nerve branches as well, which in Younger's opinion could only have been caused by an injury. The nerve damage is permanent; unlike the larger nerves of the wrist, nerves of this width cannot be repaired.

As to Mr. Verzivolli's day-to-day life, "he wouldn't be able to walk well... sleeping might be a problem if causaglia were to occur... [N]erve pain is a very serious and disabling injury."

*Dr. Brown*

Andrew Brown, an M.D., whose specialty is physiatry, examined Verzivolli's right knee and thigh on January 13, 2000, and found significant atrophy and chronic weakness. Claimant's gait was antalgic, *i.e.*, he limped. Verzivolli could only squat 75 degrees of the normal 120 degrees. Dr. Brown found a wearing away of the kneecap on the underside, which will produce pain. Brown also reported that claimant suffered from crepitus: when the doctor put his hand over the knee and gently moved the joint, a sound like rubbing sandpaper together was produced. It is indicative of arthritis, in this instance arthritis caused by a trauma that disrupted the joint surface; this did not arise from the normal aging process. The weakness in the thigh "places more stress on the joint, more than it's usually used to handling."

Dr. Brown concluded that the injury was permanent, the patient will continue to have pain, may suffer sleep disruptions and could be affected on days when the barometric pressure drops below 30 mm. Because Verzivolli's quadriceps is weak, he will have difficulty with prolonged walking, sitting and climbing or descending stairs. Claimant lives on the second floor of a building without an elevator.

Dr. Brown added, which I find too speculative to be part of the award that: "I suspect" Verzivolli will get worse; he may need intermittent courses of therapy, another arthroscopic surgery, and may require total knee replacement. Similarly, Dr. Springer's opinion that claimant's condition will worsen over time is not backed by sufficient evidence to be persuasive.

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Verzivolli was 39 years old when injured and in excellent health; he currently takes pills on a daily basis for pain. When claimant got off the crutches after 8 or 9 months, he went to a cane which he still uses. Concluding from the credible testimony - - the doctors were in agreement - - that his condition is permanent, I conclude, therefore, so is his need for the cane.

In the initial 9 months after the injury, he and his wife engaged in no marital relations. Thereafter, they resumed relations, but the frequency was less than before. Eduart Verzivolli said sexual relations were "a lot rarer now"; Mediha Verzivolli testified to a specific weekly, lessened average.

For those first 9 months Verzivolli needed his wife's assistance to dress, shower and use the toilet. His wife still helps him to take a bath because "I can't be there with both of my legs by myself."

Presumably he can take a shower because prolonged standing is not required. He mentioned having wrestled and had been in a "soccer" league (football in the European terminology) in Albania before he came to the United States in 1995. But there was no evidence he participated in sports in the year or two before his injury, hence they will not be viewed as activities lost due to the subject accident.

Claimant testified that he tires easily. The medical testimony suggests he has and will continue to have a general difficulty in sleeping. Claimant's perhaps too-precise testimony - that he wakes up twice a night from the pain - - may be an exaggeration. He indicated he needs to go to the bathroom more, but there was no medical testimony so this item will not be factored into damages. As of

the date of the trial, the Verzivollis' two daughters were ages 11 and 4. It became more difficult for him to hold the younger one, or to play with either daughter. But I will disregard testimony that has no basis in his physical injury (and the medical testimony only related to his corporeal condition), for example, that he no longer likes to read to them. Neither in the spousal action, nor in Mr. Verzivolli's direct claim, will any part of the recovery be based upon his starting to smoke, complaining about food or having less of an appetite and other testimony suggesting impact on his mood and so forth.

Add to these lost daily activities: the undisputed medical opinion of pain, weakness in the right leg, the antalgic walk and difficulty using stairs and sitting for a prolonged time, none of which is expected to improve.

In view of the foregoing: I find Eduart Verzivolli's past pain and suffering to be \$175,000; as to the future pain and suffering for the 43-year old claimant, who has a life expectancy of 33 years, [2] the amount is \$500,000.

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Detailed above are the effects on the marital relations and the assistance Mrs. Verzivolli gave her husband in bathing and dressing. She testified "in the beginning when he came home from the emergency room...I did everything for him."  
" She also testified that she still assists in his dressing, especially for example, to tie his shoes. Mrs. Verzivolli added that she helps her husband at night when he awakes to go to the bathroom, because "he and I am also afraid that he might fall."

Skilled with his hands, Eduart Verzivolli performed various tasks around the house. The Verzivollis expended no money for the things he did like plumbing, but they tend to get done less slowly or not at all. Claimant also had done some vacuuming and other heavy cleaning.

His wife testified that before the accident, "He helped me with [the] children. He helped me with shopping, and he would pick up the kids..."

In sum, I find that Mrs. Mediha Verzivolli is entitled to recover \$100,000 for her derivative action ( *PJI* 2:315).

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As a roofer and carpenter, Mr. Verzivolli had to, among other things, handle large beams and squat for long periods in confined places. Given his injuries and the effects described above, it is clear that claimant cannot engage in the type of work he was doing at the time of his accident. The defendant maintains that he can do some work from this response of Dr. Brown:

"I do not think that he could return to the work force, manual labor, meaning eight hours a day, five days a week, 48 weeks a year." (See def brief, p 6). However, no evidence was adduced at trial on alternate employment or a reduced work week; there was nothing that would support the mitigation of his loss of earnings in this matter.

The information introduced into evidence on claimant's earnings history was fairly limited. Eduart Verzivolli came to the United States from his native Albania in December of 1995. As to actual documentation, claimant submitted four pay stubs from 1997 for a job working at Police Plaza and his tax returns for that year, but nothing for the calendar year before his injury (cl exhs 1 and 5).

Claimant called an economist as an expert witness, Matityahu Marcus. Mr. Marcus displayed some circumspection as to claimant's work prospects. Granted claimant is working in construction, a cyclical and seasonal industry, but Marcus did assume that claimant would work only eight months a year, past and future, and no evidence has been adduced for me to depart from that yearly work schedule. Secondly, claimant's exhibit 5, his tax return for calendar year 1997, shows that he earned \$11,736 for slightly less than half the year; Marcus testified that claimant's actual income was \$9,547, and that there was \$2,000 in additional income for which he had no source.

Verzivolli testified that at the time of his injury, Valor Roofing was paying him \$400 a week, although the pay stubs submitted for the job at Police Plaza in the City Hall area of Manhattan showed an hourly rate of \$34.07 which generates a weekly gross of \$1,192 (a 35-hour workweek), but, as noted, I found no basis to conclude that the job lasted more than four weeks, and as such it is unrepresentative. Marcus submitted the U.S. Bureau of Labor Statistics earnings reports for roofers in New York City, namely, \$22.87 an hour. The economist did not supply a year, but the year 2000 was the last full year before his testimony. Using a 35-hour workweek, the \$22.87 rate translates to \$800.45 per week. Given his scant earnings history, I will not rely on a statistical average for past earnings. For the four years from his June of 1997 injury to the June, 2001 trial, I shall use \$400 a week for 8 months a year, which generates \$55,500 for the four-year period (rounded from \$55,467).

Marcus testified that fringe benefits for such a job are 15-20% of salary for non-union jobs and 35-40% for union workers. Claimant was not represented by a union, and offered no evidence that he was at any point going to attempt to move into the latter category.

Verzivolli testified he had no benefits with Valor Roofing, but had intended to look for employment with a decent fringe package. (Some things are required by law, so it is unlikely that this percentage is ever zero.) Therefore, 15% for the past fringe benefits will be used here, but then for future fringes, the mid-point for non-union benefits, or 17.5% of payroll, will be the multiplier. Claimant's past lost fringe benefits amount to \$8,325. His past lost earnings, wages and benefits, are thus \$55,500 added to \$8,325 which equals \$63, 825.

Claimant's expert, relying upon economic data for 1997 wage increases in New York City, uses 4% as an annual escalator for both past and future lost earnings. A more specific benchmark could have been obtained for the past, and annual increases were thus not included in the above calculation. For the future, 2.0% is a more realistic figure, especially given claimant's lack of any history on annual salary improvements.

For the future weekly rate, a reasonable use of the evidence is \$600 - - the midpoint of \$400 that was the evidence on his earnings with Valor Roofing and the \$800 BLS weekly average for roofers. Note that the Labor Department's \$22.87 average most probably includes unionized roofers, and also may refer to a title which, given the testimony, may be more specialized than Verzivolli's typical work.

Mr. Marcus asserted that if we look to the statistical tables, then claimant has 17.4 more years of working life remaining. Marcus relied upon a table that covers all working males; another table for men with less formal education yields a figure closer to 15 years

. [3] There was also a reference to working until 65, the historical Social Security age, although for an individual born in 1958 as claimant was, the age at which he can retire with full social security benefits is 66 years, 8 months. A reasonable view of the evidence is that Verzivolli would work another 18 years, until age 62.

Hence, the future earnings are the total of the annual earnings for 18 years (wages plus benefits), with the year one amount increased by 2% a year. The year one earnings are \$600 a week with 17.5% added for benefits for 8 months, or \$24,440.

Increasing the \$24,440 at 2% a year for 17 years more yields a total for the eighteen future years of work of \$523,270.

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In sum, the claimants' damages are as follows:

*Eduart Verzivolli*

Past Pain & Suffering \$175,000

Future Pain & Suffering 500,000

Past Lost Earnings 63, 825

Future Lost Earnings  
523,270

Total \$1,262,095

*Mediha Verzivolli*

Loss of Services \$100,000

Claimants' proportionate share of the liability was fifty (50) %, and accordingly, the damages award in favor of Eduart Verzivolli is \$631,048; and the award for Mediha Verzivolli is \$50,000.

The Chief Clerk is directed to enter a judgment for claimant Eduart Verzivolli in the amount of \$631,048 to be held in abeyance pending a CPLR Article 50-B hearing which the Court will schedule.

The Chief Clerk is further directed to enter a judgment for claimant Mediha Verzivolli in the amount of \$50,000.

Interest is to accrue on each amount from August 10, 2000, the date the liability decision was signed. All motions not previously ruled upon are deemed denied.

October 10, 2002  
New York, New York

HON. ALAN C. MARIN  
Judge of the Court of Claims

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**[1]** Mediha, Mr. Verzivolli's wife, has a derivative claim which will be discussed below. For ease of reference herein, "claimant" and "Verzivolli" shall mean Mr. Verzivolli, except where the context indicates otherwise.

**[2]** Claimant's date of birth is January 10, 1958; and he was 43 years old at trial. Using the tables, the life expectancy of a male at the beginning of the 43 - 44 age interval is 33.5 years, and at the beginning of the 44 - 45 age interval is 32.7 years. See Appendix A of Volume 1B of the 2002 *PJI*, the expectancies; and see *PJI* 2:281. No reason obtains to vary from the actuarial numbers.

**[3]** *PJI*, App B, tables 1 & 2.