

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 16

-----x

CARMEN VALDEZ, individually and as
mother and natural guardian of CEASAR
MARTI and ARIEL MARTI,

Index No. 16507/1997

Plaintiffs

- against -

DECISION AND ORDER

CITY OF NEW YORK and JOSE TORRES,

Defendants

-----x

APPEARANCES:

For Plaintiffs

Edward Sivin Esq. and Glenn Miller Esq.
Sivin & Miller, L.L.P.
170 Broadway, New York, NY 10038

For Defendants

Lavanya Pisupati, Assistant Corporation Counsel
198 East 161st Street, Bronx, NY 10451

LUCY BILLINGS, J.S.C.:

I presided at the trial of this action before a jury March 15-27, 2006. On March 28, 2006, the jury rendered a verdict awarding plaintiff Valdez \$3,000,000.00 for past pain and suffering, \$250,000.00 for past medical expenses, \$5,000,000.00 for future pain and suffering over 40 years, and \$180,000.00 for future medical expenses over five years and awarding plaintiffs Ceasar and Ariel Marti \$750,000.00 each for past pain and suffering. Defendants move to set aside or reduce the verdict on past and future pain and suffering and future medical expenses on the ground that the verdict is unsupported by legally sufficient evidence, against the weight of the evidence, and excessive.

valdez.109

1

After oral argument and unsuccessful attempts at settlement, for the reasons explained below the court denies defendants' motion, except to the extent of reducing the verdict for future medical expenses. C.P.L.R. §§ 4404(a), 5501(c).

I. SUMMARY OF THE EVIDENCE

The testimony of plaintiffs, their experts, and other witnesses established that plaintiffs suffered and plaintiff Valdez continued to suffer at the time of the trial a combination of injuries that diminished their enjoyment of life. On July 20, 1996, as Valdez exited her apartment, her ex-boyfriend, Felix Perez, pushed her back into the apartment and shot her three times, striking her face and arm, and then shot himself, all in view of her sons Ceasar and Ariel Marti, who were five years old at the time. Miraculously, Valdez survived, but could not speak because one of the gunshots had destroyed her mouth and jaw. Neighbors summoned the police and an ambulance.

The day before the shooting, Valdez had reported to Officer Jose Torres of the New York City Police Department Domestic Violence Unit in Valdez's precinct that Perez had threatened to kill her in violation of an order of protection. She informed Officer Torres that out of fear for her family's safety in her apartment where Perez could find her, she was relocating with her sons to her grandmother's apartment. Officer Torres advised Valdez instead to remain in her home, assuring her that the police were proceeding to arrest Perez right away.

A. PLAINTIFF VALDEZ'S INJURIES

In addition to the testimony regarding the shooting, plaintiffs presented evidence of the numerous successive reconstructive surgeries Valdez underwent. During her long recovery, she could not open her mouth and suffered excruciating pain in her face and head. Her functioning was limited further by an inability to eat or shower, difficulty sleeping, persistent facial muscle spasms and headaches, hearing loss in the right ear, memory loss, and lack of concentration. She also testified as to her mental anguish over being separated from her children, her physical condition, and even Perez's death.

Harvey Plasse M.D., plaintiffs' expert otolaryngologist, examined Valdez April 17, 2000, reviewed her medical records, and testified that she sustained three gunshot wounds from Perez's attack, one traveling from her cheekbone to her ear, another from her cheekbone to her hard palate, and the third through her forearm. The bullets injured blood vessels in her head and neck, lacerated her right inner ear, destroyed most of her soft palate, and caused abnormal involuntary movements and dizziness. Valdez underwent surgery to repair her mouth, which required mechanical ventilation for several days, when she was sedated, fed intravenously, and received blood transfusions. During her recovery, Valdez could not ingest food or liquid orally because a fistula between her nose and throat allowed food to pass through her nose. She wore a prosthesis to cover her fistula until its repair in April 2000 after several surgeries. Eventually, she

was able to whisper to communicate, but traumatic arthritis restricted her ability to open and close her mouth. She also has permanent pain in her right ear, cheekbone, and jaw and positional vertigo, which prevents her from avoiding everyday hazards.

Dr. Philip Harvey, plaintiffs' clinical psychologist, examined Valdez in 2002 and again in 2006 and found she regularly experiences nightmares and flashbacks, is stressed easily, becomes distressed when discussing trauma, cannot form bonds with men, and experiences excessive sensitivity to loss. Dr. Harvey diagnosed Valdez with post-traumatic stress disorder and major depression from the shooting and concluded that she requires at least five years of further psychiatric treatment.

B. PLAINTIFF CHILDREN'S INJURIES

Plaintiffs' testimony establishes that Ceasar and Ariel Marti remember Valdez's shooting and Perez's suicide and suffered graphic nightmares of those horrifying events. During their mother's hospitalization, they were placed in foster care and separated from their family. Since then, the boys have encountered academic difficulties, Ceasar has experienced difficulty interacting with other children in his school and neighborhood, and Ariel remains reluctant to venture outside the family's apartment. Dr. Harvey examined Ceasar and Ariel in 2002 and found they exhibited deteriorated social interaction since the shooting. Dr. Harvey diagnosed each with an anxiety disorder.

II. DEFENDANTS' MOTION TO SET ASIDE THE VERDICT

Defendants move to set aside the verdict pursuant to C.P.L.R. §§ 4404(a) and 5501(c), on the grounds that it is unsupported by the record, against the weight of the evidence, and materially deviates from reasonable compensation. For the most part, defendants' claims do not dictate disturbing the verdict.

A. LEGAL SUFFICIENCY OF THE EVIDENCE REGARDING DEFENDANTS' LIABILITY

Defendants claim that plaintiffs failed to prove defendants' liability. The court may not set aside the verdict based on legal insufficiency of the evidence unless no valid line of reasoning and permissible inferences would lead rational jurors to the conclusion they reached. Stephenson v. Hotel Empls. & Rest. Empls. Union Local 100 of AFL-CIO, 6 N.Y.3d 265, 271-72 (2006); Cohen v. Hallmark Cards, 45 N.Y.2d 493, 499 (1978); Sow v. Arias, 21 A.D.3d 317 (1st Dep't 2005). Legal sufficiency of the evidence is a question of law for the court. See Cohen v. Hallmark Cards, 45 N.Y.2d at 498; Sow v. Arias, 21 A.D.3d 317. Setting aside a verdict based on legal insufficiency of evidence results in a judgment of dismissal. Cohen v. Hallmark Cards, 45 N.Y.2d at 498; Smith v. Au, 8 A.D.3d 1, 2 (1st Dep't 2004).

1. An Assumed Duty Arising from a Special Relationship

Defendants contend that none of plaintiffs may recover under any theory because a municipality ordinarily is not liable for injuries sustained from its failure to provide police protection.

Laratro v. City of New York, 8 N.Y.3d 79, 81-82 (2006);
Mastroianni v. County of Suffolk, 91 N.Y.2d 198, 203 (1997);
Balsam v. Delma Eng'g Corp., 90 N.Y.2d 966, 967 (1997); Kircher
v. City of Jamestown, 74 N.Y.2d 251, 255 (1989). Defendants may
be liable, however, for failing to provide police protection if
they previously formed a special relationship with plaintiffs.
Laratro v. City of New York, 8 N.Y.3d at 83; Mastroianni v.
County of Suffolk, 91 N.Y.2d at 203; Kircher v. City of
Jamestown, 74 N.Y.2d at 256-57; Cuffy v. City of New York, 69
N.Y.2d 255, 260 (1987).

Here, plaintiffs' evidence established defendants' duty to
the children as well as their mother even though the order of
protection did not cover the children. A special relationship
between plaintiffs and defendants formed when (1) the police
assumed a duty to act on plaintiffs' behalf and (2) knew that
police inaction posed a risk of harm, (3) the police and
plaintiffs had direct contact, and (4) plaintiffs justifiably
relied on the police performing the assumed duty. Laratro v.
City of New York, 8 N.Y.3d at 83; Pelaez v. Seide, 2 N.Y.3d 186,
202 (2004); Cuffy v. City of New York, 69 N.Y.2d at 260; France
v. New York City Bd. of Educ., 40 A.D.3d 268 (1st Dep't 2007).
The police then were obligated to perform the assumed duty non-
negligently. Lee v. New York City Tr. Auth., 249 A.D.2d 93, 94
(1st Dep't 1998).

Defendants' service of the order of protection for Valdez
satisfies the first two elements by showing defendants'

assumption of a duty and knowledge that plaintiffs were at risk of harm. Mastroianni v. County of Suffolk, 91 N.Y.2d at 204. While the order did not specifically cover the children, and they were not in direct contact with the police, Valdez's contacts sufficed, as the children were members of her household, and she acted on their behalf. Laratro v. City of New York, 8 N.Y.3d at 84; Cuffy v. City of New York, 69 N.Y.2d at 261-62; Sorichetti v. City of New York, 65 N.Y.2d 461, 471 (1985); Harris v. City of New York, 147 A.D.2d 186, 191 (1st Dep't 1989). See Kircher v. City of Jamestown, 74 N.Y.2d at 256-57. Moreover, while Valdez reported that Perez threatened only her, Officer Torres knew she had two young children totally dependent on her care and support, and thus any such threat obviously endangered them as well. Kircher v. City of Jamestown, 74 N.Y.2d at 258 n.2; Cuffy v. City of New York, 69 N.Y.2d at 261-62; Sorichetti v. City of New York, 65 N.Y.2d at 469.

Finally, Officer Torres's assurances to Valdez, that the police were going to arrest Perez "immediately" due to his threat to Valdez, furnished a basis for justifiable reliance on the police performing that duty. Transcript of Proceedings at 142 (Mar. 15, 2006). See Mastroianni v. County of Suffolk, 91 N.Y.2d at 205; Levy v. City of New York, 232 A.D.2d 160, 161-62 (1st Dep't 1996); Harris v. City of New York, 147 A.D.2d at 191. In particular, when she reported the threat, she further reported to Officer Torres that she intended to relocate to her grandmother's home, but he advised her to remain at her home. Defendants

presented evidence controverting plaintiffs' justifiable reliance, through Officer Torres's denial of any telephone calls received from Valdez July 19, 1996, but, because plaintiffs' evidence raised a factual question to be resolved by the jury, the jury was free to reject defendants' evidence and accept plaintiffs' evidence as to their justifiable reliance. Kimmell v. Schaefer, 89 N.Y.2d 257, 264 (1996); Joseph v. NRT Inc., 43 A.D.3d 312, 313 (1st Dep't 2007); Steinhardt Group v. Citicorp, 272 A.D.2d 255, 257 (1st Dep't 2000). See Matter of Veski, 29 A.D.3d 250, 251 (1st Dep't 2006).

2. The Children's Claim for Negligent Infliction of Emotional Distress

Since plaintiff children claim only mental and emotional injuries, they bore the burden to prove the elements for infliction of emotional distress. Plaintiff children may recover for negligent infliction of emotional distress, upon a showing that they suffered emotional injury from observing their immediate family member's injury caused by defendants' negligence that exposed the children as well as their family member to an unreasonable risk of bodily harm. Trombetta v. Conkling, 82 N.Y.2d 549, 552 (1993); Bovsun v. Sanperi, 61 N.Y.2d 219, 230-31 (1984); Stamm v. PHH Veh. Mgt. Servs., LLC, 32 A.D.3d 784, 786 (1st Dep't 2006); Hass v. Manhattan & Bronx Surface Tr. Operating Auth., 204 A.D.2d 208 (1st Dep't 1994). See DeCintio v. Lawrence Hosp., 299 A.D.2d 165, 166 (1st Dep't 2002); Pizarro v. 421 Port Assoc., 292 A.D.2d 259, 260 (1st Dep't 2002).

Defendants contend that plaintiff children may not recover

valdez.109

because they failed to present evidence that they were in the zone of danger. The zone of danger requirement is premised on the concept of negligence that, by unreasonably endangering plaintiffs' physical safety, defendants have breached a duty owed to plaintiffs for which they may recover all damages sustained, including damages occasioned by witnessing the suffering of an immediate family member whom defendants' conduct also injured. Trombetta v. Conkling, 82 N.Y.2d at 552; Bovsun v. Sanperi, 61 N.Y.2d at 229; DeCintio v. Lawrence Hosp., 299 A.D.2d at 166; Pizarro v. 421 Port Assoc., 292 A.D.2d at 260.

Plaintiffs contend that, (1) if they have proved defendants' breach of a duty arising from a special relationship to the children as well as their mother, the children need not meet the zone of danger requirement, and, (2) conversely, if they prove this and the other elements of negligent infliction of emotional distress, the children need not prove a special relationship with defendants. The zone of danger requirement applies, however, even where defendants breach a duty arising from a special relationship, because the zone of danger defines not a zone where a duty is owed, but, once a duty is established, the zone where that duty is breached. Trombetta v. Conkling, 82 N.Y.2d at 552-53; Bovsun v. Sanperi, 61 N.Y.2d at 232-33; DeCintio v. Lawrence Hosp., 299 A.D.2d at 166.

In the more common situation, where defendants endanger plaintiffs by negligently wielding a dangerous instrument, for example, defendants owe a duty under all circumstances not to

engage in such conduct. Here, where defendants endangered plaintiffs by failing to provide police protection, defendants owed no duty to provide that protection until they created a special relationship. The zone of danger is a requirement independent of defendants' breach of a duty of care; limits who may recover for emotional trauma from that breach, to other persons closest to the one who suffered physical injury from the breach; and thus assures that the emotional trauma is legitimate. Trombetta v. Conkling, 82 N.Y.2d at 552-53; Bovsun v. Sanperi, 61 N.Y.2d at 232-33; Pizarro v. 421 Port Assoc., 292 A.D.2d at 260.

In any event, the evidence here met the independent zone of danger requirement. Since plaintiffs' testimony disclosed that the children were near their mother when they observed Perez shoot her three times, they were in the zone of danger when Perez shot her. Bovsun v. Sanperi, 61 N.Y.2d at 230; Hass v. Manhattan & Bronx Surface Tr. Operating Auth., 204 A.D.2d 208; Maney v. Maloney, 101 A.D.2d 403, 405 (3d Dep't 1984). Given his violent, erratic, if not irrational, conduct, a bullet could have struck them as well. Plaintiffs' testimony further established that the children, while witnessing the shooting in the zone of danger, feared for their safety, Hass v. Manhattan & Bronx Surface Tr. Operating Auth., 204 A.D.2d at 209, despite the lack of evidence Perez pointed his gun directly at them. Lubecki v. City of New York, 304 A.D.2d 224, 238 (1st Dep't 2003); Allinger v. City of Utica, 226 A.D.2d 1118, 1120 (4th Dep't 1996).

Moreover, the children unquestionably feared for their

mother's safety. As long as they were in the zone of danger, they need not have feared for their own safety, too, even though, at their age, their own safety depended on their mother's well-being. Bovsun v. Sanperi, 61 N.Y.2d at 230 n.8, 231 n.10, 232; Hass v. Manhattan & Bronx Surface Tr. Operating Auth., 204 A.D.2d at 208-209.

3. Recklessness

Defendants further contend that the evidence is insufficient to demonstrate their recklessness. Proof of defendants' recklessness is inconsequential regarding their liability for breach of a duty arising from a special relationship. Although the authority cited above does not refer directly to recklessness, a special relationship still is required even where plaintiffs prove defendants' recklessness in failing to protect plaintiffs. Kromer v. City of Onondaga, 26 A.D.3d 792 (4th Dep't 2006); Page v. City of Niagara Falls, 277 A.D.2d 1047 (4th Dep't 2000). See Pelaez v. Seide, 2 N.Y.3d at 203-204.

This requirement stems from the principle that defendants owe a duty to provide police protection to specific persons only when defendants by their conduct have determined how they are to allocate their resources in particular circumstances, created a special relationship with plaintiffs who were seeking protection, and limited the duty to protect to those individuals. E.g., Pelaez v. Seide, 2 N.Y.3d at 198-99, 202-203; Kircher v. Carlson, 74 N.Y.2d at 256-57; Sorichetti v. City of New Ycrk, 65 N.Y.2d at 469-70. Defendants then incur liability because, having induced

plaintiffs' justifiable reliance, defendants' failure to provide the promised protection, whether negligently or recklessly, amounts to more than withholding a benefit and instead to active infliction of injury through their affirmative conduct--whether negligent or reckless. E.g., Kircher v. Carlson, 74 N.Y.2d at 256, 259; Cuffy v. City of New York, 69 N.Y.2d at 258; Sorichetti v. City of New York, 65 N.Y.2d at 470; Lee v. New York City Tr. Auth., 249 A.D.2d at 94.

Nor does proof of defendants' recklessness relieve plaintiff children from proving all the elements of negligent infliction of emotional distress, including the children's presence in the zone of danger. While proof of all the elements of reckless infliction of emotional distress would provide the children a substitute basis for recovery, plaintiffs never claimed nor proved these elements. Howell v. New York Post Co., 81 N.Y.2d 115, 122 (1993); Gross v. Empire State Bldg. Assoc., 4 A.D.3d 49, 58 (1st Dep't 2004). Defendants' reckless infliction of emotional distress would not require the children's presence in the zone of danger, but instead would require defendants' extreme, outrageous, and reprehensible conduct, involving "a campaign of harassment": an almost unattainable level of proof that plaintiffs never attempted to mount. Id. at 56. See, e.g., Howell v. New York Post Co., 81 N.Y.2d at 122; Khan v. Duane Reade, 7 A.D.3d 311, 312 (1st Dep't 2004).

Proof of defendants' recklessness nonetheless renders defendants fully liable for the judgment despite the jury's

apportionment of 50% liability to Perez. C.P.L.R. § 1602(7); Lubecki v. City of New York, 304 A.D.2d at 226, 235-36; Spatz v. Riverdale Greentree Rest., 256 A.D.2d 207, 208 (1st Dep't 1998). To establish defendants' liability for recklessness, plaintiffs must show that defendants intentionally acted unreasonably by disregarding, with conscious indifference, a known risk that raised a high probability of harm. Matter of New York City Asbestos Litig., 89 N.Y.2d 955, 956 (1997); Saarinen v. Kerr, 84 N.Y.2d 494, 501 (1994). Given Valdez's report that Perez threatened to kill her, Officer Torres's knowledge that Perez was on parole for a felony conviction and had been violent in the past, and Officer Torres's advice that Valdez remain at her apartment, defendants' failure even to attempt to arrest Perez reasonably may be viewed as recklessness. Hanover Ins. Co. v. D & W Cent. Sta. Alarm Co., 164 A.D.2d 112, 115 (1st Dep't 1990). See Hartford Ins. Co. v. Holmes Protection Group, 250 A.D.2d 526, 527-28 (1st Dep't 1998); Guston Furs v. Comet Realty Corp., 225 A.D.2d 417 (1st Dep't 1996).

B. WEIGHT OF THE EVIDENCE REGARDING DAMAGES

The court may not set aside the jury's verdict as against the weight of the evidence if the verdict was based on a fair interpretation of the evidence. Cohen v. Hallmark Cards, 45 N.Y.2d at 499; McDermott v. Coffee Beanery, Ltd., 9 A.D.3d 195, 206 (1st Dep't 2004). Here, a fair interpretation of the trial evidence supports the verdict for pain and suffering experienced by Valdez due to her extensive physical and mental injuries and

by Ceasar and Ariel Marti due to their mental trauma from witnessing the shooting. Insofar as the testimony of the parties' witnesses may have conflicted, the jury was free to resolve such conflicts. Rivera v. 4064 Realty Co., 17 A.D.3d 201, 203 (1st Dep't 2005); Bota v. Kaminsky, 299 A.D.2d 259 (1st Dep't 2002).

Defendants also seek to reduce the future medical expenses award of \$180,000.00 for five years, to between \$48,300.00 and \$95,500.00 for five years. C.P.L.R. § 4404(a). The weight of the evidence supports the period the jury specified, but not the \$180,000.00 amount. Dr. Harvey testified that Valdez required at least five years of therapy by both a psychiatrist, costing \$125-250 per month, and a psychotherapist, costing \$125-250 per week. Based on that testimony, the cost of Valdez's treatment by a psychiatrist for five years (60 months) would be \$15,000.00, and the additional cost of treatment by a psychotherapist for five years (260 weeks) would be \$65,000.00. Therefore the court sets aside the verdict for future medical expenses and orders a new trial on these damages only, unless plaintiff stipulates to reduce the verdict for this component of damages to \$80,000.00. Brewster v. Prince Apts., 264 A.D.2d 611, 618 (1st Dep't 1999). While defendants also sought to reduce the \$250,000.00 award to Valdez for past medical expenses, on March 22, 2006, the parties stipulated on the record to reduce the award for Valdez's past medical expenses to \$40,866.00.

III. MATERIAL DEVIATION FROM REASONABLE COMPENSATION

To set aside the jury's verdict as excessive, the court must conclude that the jury's award materially deviates from reasonable compensation, C.P.L.R. § 5501(c), by analyzing awards at the appellate level based on analogous evidence and determining that the current award departs substantially from those benchmarks. Donlon v. City of New York, 284 A.D.2d 13, 14-15, 18 (1st Dep't 2001). Nonetheless, in no two actions are "the quality and quantity" of damages, particularly for pain and suffering, identical. Reed v. City of New York, 304 A.D.2d 1, 7 (1st Dep't 2003). Their "evaluation does not lend itself to neat mathematical calculation." Id. See Donlon v. City of New York, 284 A.D.2d at 15. The court must exercise caution and not simply substitute the court's view of the evidence for the six fact finders' judgment or modify the harshness of a verdict the court disagrees with, particularly on damages, when the jury's peculiar function is to evaluate damages. Po Yee So v. Wing Tat Realty, 259 A.D.2d 373, 374 (1st Dep't 1999). See Mazariegos v. New York City Tr. Auth., 230 A.D.2d 608, 609 (1st Dep't 1996); Brown v. Taylor, 221 A.D.2d 208, 209 (1st Dep't 1995); Evans v. St. Mary's Hosp. of Brooklyn, 1 A.D.3d 314, 315 (2d Dep't 2003).

Absent a benchmark or comparability, reduction of damages does not serve the ends of fairness and evenhandedness. Medina v. Chile Communications, Inc., 15 Misc. 3d 525, 531 (Sup. Ct. Bronx Co. 2006). In such circumstances, tinkering with the award only flaunts the deference due the jury's assessment of damages

and eliminates the factfinders' "peculiar function." Po Yee So v. Wing Tat Realty, 259 A.D.2d at 374; Weiql v. Quincy Specialties Co., 190 Misc. 2d 1, 5 (Sup. Ct. N.Y. Co. 2001), aff'd, 1 A.D.3d 132, 134 (1st Dep't 2003); Medina v. Chile Communications, Inc., 15 Misc. 3d at 531. See Weiql v. Quincy Specialties Co., 190 Misc. 2d at 8-9, aff'd, 1 A.D.3d at 134.

The evidence of Valdez's past and future pain and suffering displayed a unique, almost unimaginable combination of injuries with similarly unique, unimaginably unbearable effects. Although the psychological effects on her children were not so unusual, the horror of the precipitating event, especially to five year olds, was equally unimaginable and unique. For all three plaintiffs, the evidence also uniformly weighed in their favor; defendants presented no evidence controverting plaintiffs' evidence of their pain and suffering. Kane v. Coundorous, 11 A.D.3d 304, 305 (1st Dep't 2004); Reed v. City of New York, 304 A.D.2d at 9-10; Martelly v. New York City Health & Hosps. Corp., 276 A.D.2d 373, 374 (1st Dep't 2000); Medina v. Chile Communications, Inc., 15 Misc. 3d at 531. See Mazariegos v. New York City Tr. Auth., 230 A.D.2d at 609; Wiseberg v. Douglas Elliman-Gibbons & Ives, 224 A.D.2d 361, 362 (1st Dep't 1996). Viewing the evidence in this light, few, if any, decisions provide useful benchmarks. Medina v. Chile Communications, Inc., 15 Misc. 3d at 532.

IV. MAXIMUM REASONABLE COMPENSATION FOR PLAINTIFFS' PAIN AND SUFFERING

It is incumbent on defendants, in seeking to reduce the jury's award, to cite verdicts, including their fate on appeal, that assess injuries similar to plaintiffs', experienced for comparable periods. Id. See Donlon v. City of New York, 284 A.D.2d at 14, 18. While the awards defendants cite may shed further light on the factors to be considered in assessing reasonable compensation, the circumstances producing these awards do not delineate the limits of compensation for injuries that parallel plaintiffs' suffering. None of these awards, nor any other reported awards, although they involved superficially factual similarities to plaintiffs' injuries, include all or even most of plaintiffs' various combined injuries, with such extensive effects on the specific individuals. See Medina v. Chile Communications, Inc., 15 Misc. 3d at 532.

The decisions defendants rely on simply affirm pain and suffering awards, Chianese v. Meier, 285 A.D.2d 315, 323 (1st Dep't 2001); Brewster v. Prince Apts., 264 A.D.2d at 617; Small v. Zelin, 152 A.D.2d 690, 691 (2d Dep't 1989); as applicable to Valdez, involve pain and suffering for only physical injury or psychological injury, not both, McKithen v. City of New York, 292 A.D.2d 352, 353 (2d Dep't 2002); Lauter v. Village of Great Neck, 231 A.D.2d 553, 554 (2d Dep't 1996); fail to delineate between past and future damages, Small v. Zelin, 152 A.D.2d at 691; or omit the facts the court considered in reducing the awards. Angerome v. City of New York, 300 A.D.2d 423 (2d Dep't 2002);

Regis v. City of New York, 269 A.D.2d 515, 516 (2d Dep't 2000); Gomez v. City of New York, 260 A.D.2d 598 (2d Dep't 1999). These awards thus are of limited utility in providing benchmarks for evaluating plaintiffs' injuries. First, when an appellate court refuses to reduce and affirms an award, as in Chianese v. Meier, 285 A.D.2d at 323; Brewster v. Prince Apts., 264 A.D.2d at 617; and Small v. Zelin, 152 A.D.2d at 691, it stands only as a determination that the award fell somewhere within the range of awards justified by the evidence. The affirmance does not indicate that a considerably higher verdict is not within the upper limit of that range. Medina v. Chile Communications, Inc., 15 Misc. 3d at 532. Defendants' authority focusing on only physical injury, moreover, is all the more limited in light of plaintiffs' evidence regarding Valdez's bullet wounds to her face, jaw, ear, and skull, reconstructive surgeries, and permanent pain and limitations from vertigo and arthritis, all without any rebuttal evidence. Lauter v. Village of Great Neck, 231 A.D.2d at 554.

Decisions dealing with damage awards to plaintiffs who suffer a combination of severe physical injuries with lingering psychological disorders requiring lengthy treatment demonstrate that the awards to Valdez are within a reasonable range of awards for past pain and suffering, Man-Kit Lei v. City Univ. of N.Y., 33 A.D.3d 467, 468 (1st Dep't 2006); Weigl v. Quincy Specialties Co., 1 A.D.3d at 134, Lubecki v. City of New York, 304 A.D.2d at 238; Hotaling v. CSX Transp., 5 A.D.3d 964, 971 (3d Dep't 2004),

and future pain and suffering. Man-Kit Lei v. City Univ. of N.Y., 33 A.D.3d at 468; Paek v. City of New York, 28 A.D.3d 307, 308 (1st Dep't 2006); Weiql v. Quincy Specialties Co., 1 A.D.3d at 134. See Brewster v. Prince Apts., 264 A.D.2d at 617.

Similarly, the award for past pain and suffering to plaintiff children is not excessive. Lubecki v. City of New York, 304 A.D.2d at 232, 238.

V. CONCLUSION

In sum, the jury awarded past and future damages based on plaintiffs' largely uncontroverted evidence of those damages that do not so exceed amounts supported by a fair interpretation of the evidence as to require disturbing the jury's determination. Nor was the jury's \$3,000,000.00 award for past pain and suffering or \$5,000,000.00 award for future pain and suffering to Valdez or \$750,000.00 award for past pain and suffering to each of her sons, Ceasar and Ariel Marti, so excessive as to materially deviate from reasonable compensation. Given Valdez's unique combination of injuries and the children's uniquely horrifying experience, the jury here was uniquely qualified to assess their damages and set its own benchmarks. See Medina v. Chile Communications, Inc., 15 Misc. 3d at 537. Therefore the court denies defendants' motion to set aside or reduce the verdict as to past and future pain and suffering for plaintiffs. C.P.L.R. §§ 4404(a), 5501(c).

The award for Valdez's future medical expenses, however, is against the weight of the evidence and set aside. The court

orders a new trial on those damages unless plaintiffs stipulate to reduce the verdict for future medical expenses for Valdez to \$80,000.00. The award for Valdez's past medical expenses is reduced to \$40,866.00 based on the parties' stipulation.

The parties shall appear for a conference in Room 402, 851 Grand Concourse, Bronx, New York, March 26, 2008, at 9:30 a.m. This decision constitutes the court's order. The court will mail copies to the parties' attorneys.

DATED: February 22, 2008

Lucy Billings

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.