Westlaw

33 A.D.3d 467
33 A.D.3d 467, 823 N.Y.S.2d 129, 213 Ed. Law Rep. 1109, 2006 N.Y. Slip Op. 07578
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Supreme Court, Appellate Division, First Department, New York.
Man-Kit LEI, Claimant-Respondent,
v.
The CITY UNIVERSITY OF NEW YORK, Defendant-Appellant.
Oct. 19, 2006.

Background: Student, who sustained serious burns while sculpting with an oxyacetylene torch in city university's metal lab, brought personal injury action against university. Following bench trial, the Court of Claims, Alan C. Marin, J., awarded student $2.5 million for past pain and suffering, $2.5 million for future pain and suffering, and $850,920 for future lost wages. University appealed.

Holdings: The Supreme Court, Appellate Division, held that:
(1) university was negligent;
(2) student was entitled to award of $5 million for past and future pain and suffering; but
(3) student was not entitled to future lost wages.

Affirmed as modified.

West Headnotes

[1] Colleges and Universities 81 ⚿5

81 Colleges and Universities
81k5 k. Powers, Franchises, and Liabilities in General. Most Cited Cases
City university breached its duty of care to student, who sustained serious burns while sculpting with an oxyacetylene torch in university's metal lab, when it deviated from good and accepted safety practices by allowing student to weld with such dangerous equipment alone, without the presence of a fire watcher and without proper protective outerwear, and by not issuing written guidelines setting forth safety procedures for students to follow; duty to student was not satisfied by equipping lab with fire extinguishers and leather aprons, and by having the lab regularly inspected by the fire department.

[2] Damages 115 ⚿127.43

115 Damages
115VII Amount Awarded
115VII(B) Injuries to the Person
115k127.43 k. Burns, Scars, and Skin Injuries. Most Cited Cases

Damages 115 ⚿140.7

115 Damages
115VII Amount Awarded
115VII(E) Mental Suffering and Emotional Distress
115k140.7 k. Particular Cases. Most Cited Cases

Award of $5 million for past and future pain and suffering to city university student, who sustained serious burns while sculpting with an oxyacetylene torch in university's metal lab, was not excessive, where as a result of his injuries student endured seven operations and numerous painful treatments, required extensive physical therapy, sustained permanent significant scarring to his upper torso, neck, lower jaw and left hand, which was gnarled and had diminished grip strength, and developed serious psychological problems, many of them permanent, including elements of post-traumatic stress disorder and severe depression.

[3] Damages 115 ⚿127.67

115 Damages
115VII Amount Awarded
115VII(B) Injuries to the Person
115k127.57 Impairment of Earning Capacity
115k127.67 k. Burns, Scars, and Skin Injuries. Most Cited Cases

Evidence 157 ⚿571(10)

157 Evidence
157XII Opinion Evidence
157XII(F) Effect of Opinion Evidence
157k569 Testimony of Experts
157k571 Nature of Subject
157k571(10) k. Damages. Most Cited Cases

City university student, who sustained serious burns while sculpting with an oxyacetylene torch in university's metal lab, did not establish his entitlement to future lost wages award of $850,920 with a reasonable degree of certainty; expert testimony offered by clinical psychologist and rehabilitation specialist, who created vocational profile of student and entered it into database of entire New York labor base, was generic to a person with a bachelor's degree and did not focus on student's goal before and after the accident to obtain position in the art world and student's efforts toward that end of completing his degree, resuming welding and displaying his sculptures in galleries.

[4] Damages 115 ⚿187

115 Damages
115IX Evidence
115k183 Weight and Sufficiency
115k187 k. Impairment of Earning Capacity. Most Cited Cases

Plaintiff seeking future lost wages bears the burden of establishing loss of wages with reasonable certainty.

**130 Eliot Spitzer, Attorney General, New York (Jeffrey P. Metzler of counsel), for appellant.
Melito & Adolfsen P.C., New York (Ignatius John Melito of counsel), for respondent.

TOM, J.P., MAZZARELLI, FRIEDMAN, CATTERSON, McGUIRE, JJ.

*467 Judgment of the Court of Claims of the State of New York (Alan C. Marin, J.), entered on or about June 14, 2004, which, after a nonjury trial, awarded claimant damages, unanimously modified, on the law, to the extent of vacating the award for future lost wages, and otherwise affirmed, without costs.

Claimant, while a student at one of defendant's colleges, sustained serious burns while sculpting with an oxyacetylene torch in the college's metal lab. The trial court found defendant 80% responsible for plaintiff's harm and, as is here relevant, awarded claimant $2.5 million for past pain and suffering, $2.5 *468 million for future pain and suffering, and $850,920 for future lost wages.

[1] We reject defendant's claim that it satisfied whatever duty it owed claimant by equipping its metal lab with fire extinguishers and leather aprons, and having the lab regularly inspected by the Fire Department. The unrebutted testimony of the claimant's experts, as credited by the trial court (*see* *Thoreson v. Penthouse Intl., Ltd.*, 80 N.Y.2d 490, 495, 591 N.Y.S.2d 978, 606 N.E.2d 1369 [1992]), fairly established that defendant deviated from good and accepted safety practices by allowing claimant, an undergraduate student, to weld with such dangerous equipment alone, without the presence of a fire watcher and without proper protective outerwear. It is undisputed that defendant issued no written guidelines setting forth safety procedures for students to follow when working with dangerous machinery and instead left the matter of safety procedures entirely to the class instructor. While leather aprons were available to the sculpting students, their use while welding was not mandated. Under these circumstances, the liability finding against defendant was sufficiently supported.

[2] With respect to damages, the evidence showed that, as a result of the accident,**131 claimant has endured seven operations and numerous painful treatments, required extensive physical therapy, and sustained permanent significant scarring to his upper torso, neck, lower jaw and left hand, which is gnarled and has diminished grip strength. Claimant's damaged skin itches persistently; heat, cold and humidity make him uncomfortable; and he has developed serious psychological problems, many of them permanent, including elements of post-traumatic stress disorder and severe depression. Under these circumstances, we reject defendant's contention that the damages awarded for past and future pain and suffering deviate materially from what is reasonable compensation (*see* *Weigl v. Quincy Specialties Co.*, 190 Misc.2d 1, 735 N.Y.S.2d 729 [2001],*affd.* 1 A.D.3d 132, 766 N.Y.S.2d 428 [2003]).

[3] Although claimant ultimately completed his education, he was, at the time of trial, earning $25,000 per year working as a security guard. The trial court credited the testimony of claimant's experts that claimant, by reason of disabilities attributable to the accident, would continue to earn at a level not commensurate with his education, and thus was entitled to an award on that basis for future lost wages. We disagree for the reasons set forth below.

[4] Claimant bore the burden of establishing loss of wages with reasonable certainty (*see* *Tassone v. Mid-Valley Oil Co., Inc.*, 5 A.D.3d 931, 932, 773 N.Y.S.2d 744 [2004],*lv. denied* 3 N.Y.3d 608, 785 N.Y.S.2d 26, 818 N.E.2d 668 [2004]). Here,

claimant's goal prior to the accident was to obtain a position in the art *469 world with an eye toward operating his own sculpture studio. Toward that objective, claimant returned to CUNY after the accident, completed his remaining course work and obtained his degree. Approximately one year after the accident, claimant resumed welding and was comfortable using a welding torch. Notwithstanding a diminished grip in his left hand, claimant believed his welding skills and ability to use the torch had not diminished as a result of the accident. Since his accident, claimant's sculptures have been displayed several times in galleries. Claimant unequivocally testified that his goal remains to be a sculptor, he continues to seek opportunities to exhibit his works, and he was working on a new sculpture at the time of the damages phase of the trial.

With respect to his post-accident employment, in the spring of 2000, claimant worked for the U.S. Census Bureau, going door-to-door and obtaining information from residents. Subsequently, claimant worked for the Chinese American Planning Council earning $26,000 a year. As of June 24, 2002, claimant held a civil service position at Bellevue Hospital earning $25,500.

Claimant presented the testimony of two experts to establish future lost wages. Dr. Richard Schuster, a clinical psychologist and rehabilitation specialist created a vocational profile of claimant and entered it into a database containing the "entire labor base [of] New York."His assessment indicated that claimant matched 57% of the jobs and that the average weekly wage of these was $996.85. Figuring in claimant's psychological ailments, Dr. Schuster ascertained that claimant matched 14.4% of the jobs in New York and that the average weekly wage of these jobs was $919. Upon reassessment in 2001, Dr. Schuster determined that claimant would suffer a 30% reduction in his work life based on his persistent and pervasive psychological problems, and that he was at risk of developing pattern of low-paying jobs. Claimant's second expert projected claimant's **132 total future economic loss based on the data generated by Dr. Schuster.

We find that claimant did not establish future lost wages with a reasonable degree of certainty. Dr. Schuster's analysis was essentially generic to a person who holds a bachelor's degree. It did not focus on claimant's interests or aptitudes. Moreover, Dr. Schuster never identified any of the occupational titles in the database. Given the complete absence of any interest by claimant in any of these unidentified positions-let alone an actual prospect of obtaining one of them-the award for future wages is speculative and should be vacated (*see* *470*Naveja v. Hillcrest Gen. Hosp.*, 148 A.D.2d 429, 430, 538 N.Y.S.2d 584 [1989]; *Marmo v. Southside Hosp.*, 143 A.D.2d 891, 893, 533 N.Y.S.2d 402 [1988]; *cf. Keefe v. E & D Specialty Stands, Inc.*, 272 A.D.2d 949, 949-950, 708 N.Y.S.2d 214 [2000]).

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