

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: Part 36**

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Index No. : 14559/10  
Motion Calendar No.  
Motion Sequence No.,

LEESA KEENAN, as Administratrix of the Estate of,  
VIRGINIA McKIBBIN, Deceased, and LEESA KEENAN,  
Individually,

**DECISION / ORDER**

Plaintiffs,

-against-

Present:

**Hon. Judge Bernard J. Graham**  
Acting Supreme Court Justice

DARREN MOLLOY, METROPOLITAN TRANSPORT-  
ATION AUTHORITY, METROPOLITAN TRANSPORT-  
ATION AUTHORITY BUS COMPANY, NEW YORK  
CITY TRANSIT AUTHORITY, and METROPOLITAN  
TRANSPORTATION AUTHORITY/NEW YORK CITY  
TRANSIT,

Defendant(s).

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**Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to :  
Defendants' Motion to Set Aside a Jury Verdict; Plaintiffs' Cross-Motion to Set Aside a Jury Verdict.**

<b>Papers</b>	<b>Numbered</b>
Notice of Motion and Affidavits Annexed..(Motion and Cross Motion)....	<u>1,2; 3,4</u>
Order to Show cause and Affidavits Annexed.....	<u>5</u>
Answering Affidavits.....	<u>6</u>
Replying Affidavits.....	<u>        </u>
Exhibits.....	<u>        </u>
Other: _____	<u>        </u>

**Upon the foregoing cited papers, the Decision/Order on this application is as follows:**

**Decision:**

A jury trial was conducted in Part 36 of the captioned wrongful death matter. A verdict was rendered granting an award for pecuniary loss to the plaintiff, Leesa Keenan, as Administratrix of the Estate of Virginia McKibbin and Leesa Kennan individually ("plaintiff" or the "Estate"). No

award was given for conscious pain and suffering or pre-impact terror allegedly suffered by the decedent, Virginia McKibbin.

Virginia McKibbin was killed as a result of an accident while crossing Avenue U in Brooklyn, when she was struck by a bus driven by defendant Darren Molloy ("Molloy") on behalf of defendant Metropolitan Transit Authority ("defendant " or "Transit Authority").

A unified trial was conducted in Part 36 of this Court before the undersigned judge and a jury verdict was rendered on December 20, 2012. The jury returned a verdict in which they apportioned fault against defendant as to 75%, and plaintiff, Ms. McKibbin, was found to be 25% negligent.

As to the damages awarded, the jury awarded zero dollars (\$0) for conscious pain and suffering and zero dollars (\$0) for pre-impact terror. For the wrongful death claim, the jury awarded the sum of One Million Two Hundred Thousand Dollars (\$1,200,000) to Ms. McKibbin's adult children for loss of parental supervision and guidance (due to the apportionment of damages, the pecuniary award to the Estate would be reduced to Nine Hundred Thousand Dollars (\$900,000)). Fifteen Thousand Dollars (\$15,000) was awarded to plaintiff for funeral expenses.

A motion to set aside the jury verdict pursuant to CPLR section 4404 and EPTL section 5-4.3, was brought by the defendant, Molloy and Transit Authority. Defendant seeks to set aside or reduce the award to plaintiff for pecuniary loss related to the loss of parental guidance and supervision as being excessive and/or against the weight of the evidence.

A cross-motion was filed by plaintiff pursuant to CPLR section 4111(c) and 4404, to set aside that portion of the verdict which gave no award for conscious pain and suffering and pre-impact terror, as being against the weight of the evidence and as being internally inconsistent.

### Discussion

Defendant Transit Authority has moved to set aside the pecuniary award in the amount of \$1,200,000, which the jury awarded the next-of-kin of Virginia McKibbin, as being excessive. The main argument for the motion is that Ms. McKibbin earned a modest income for her work in a title insurance office (earning approximately \$42,000 in her last full year of work in 2008) and that the award made by the jury "deviates materially from what would be reasonable compensation" (see CPLR 5501 (c); *Rubin v. Aron*, 191 AD2d 547 [2d Dept. 1993]).

Plaintiff's position is that the award is supported by the nature and the quality of the role that Ms. McKibbin played in the lives of each of her adult children and her grandchildren. Plaintiff asserts that the jury had ample evidence to make such an award (see *Facilia v. New York City*

*Health and Hospitals Corp.*, 221 AD2d 498 [2d Dept. 1995]).

Plaintiff's cross-motion finds fault with the jury's decision to decline an award for conscious pain and suffering and pre-impact terror. Plaintiff's attorneys point to testimony in the record of Darren Molloy, the bus driver, who stated that he heard a scream and then he felt the bus hit something. Mr. Molloy also stated in his testimony that Ms. McKibbin was moving and appeared to be alive after the impact. Plaintiff's position is that the jury was inconsistent in rendering a verdict which made no award for pre-impact terror and no award for pain and suffering because it appears that Ms. McKibbin first screamed before impact and then was alive after the impact.

In opposition to the plaintiff's cross-motion, defendant Transit Authority points to the testimony of defendant's medical expert, Dr. J. Kurtz, who testified that the force of the impact and the damages suffered to Ms. McKibbin's body led him to conclude that Ms. McKibbin was unconscious upon impact, and that while she may have lived for a short period, she was unconscious and could have experienced conscious pain and suffering.

Both parties in this trial seek to set aside a portion of the verdict as being against the weight of the evidence. It is the accepted rule that motions to set aside a jury verdict "should be exercised with considerable caution, for in the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict". *Nicastro v. Park*, 113 AD2d 129, 133 (2d Dept. 1985). The jury in this case was presented with conflicting evidence and offered different expert opinions and chose to make the findings which they presented to the Court.

In reviewing the instant motions, the Court must exercise a discretionary function and a balancing of many factors (see *Cohen v. Hallmark Cards, Inc.*, 45 NY2d 493 [1978]; *Exarhoulaeas v. Green 317 Madison, LLC*, 46 AD3d 854 [2d Dept. 2007]). On the issue of the economic loss to Ms. McKibbin's family, the jury heard testimony from each of her three adult daughters, Leesa Keenan, Robin McKibbin and Tracey McKibbin. Tracey McKibbin and Leesa Keenan are both single mothers who testified to extensive involvement of their mother in the care and assistance she provided to her grandchildren. Virginia McKibbin provided child care and financial assistance to her daughters. The family had dinner together every week and lived in close proximity to each other. The nature and the quality of the relationship between Ms. McKibbin and her family was exceptional and significant. The every day involvement by Ms. McKibbin with her family could easily support the amount of the award that the jury chose to give for loss of parental guidance and support. To reject the jury's decision as to the pecuniary damages solely in light of Ms. McKibbin's employment earnings would be a substantial injustice given the nature of the testimony heard by the Court and the jury.

In exercising their fact finding role as to the question of pre-impact terror and pain and suffering, the jury chose to render a verdict in which no award was given for these items. The plaintiff argues that such a verdict is the product of substantial confusion by the jurors (in light of

the evidence indicating the Ms. McKibbin may have screamed before the impact) and that the Court should exercise its discretion and set aside that portion of the verdict (see *Provenzano v. Peters*, 242 AD2d 266 [2d Dept. 1997]). Based on these facts, the plaintiff argues that the only conclusion that could be reached is that Ms. McKibbin suffered pre-impact terror and pain and suffering prior to her death. Notwithstanding the possibility of a scream being heard before impact, the jury was given testimony by defendant's expert (Dr. Kurtz) that Ms. McKibbin was likely rendered unconscious immediately on impact. It is also not proven that there was any real time between the scream and the impact which would support a finding of pre-impact terror. To now find that the jury was in error as to this aspect of the verdict would require the Court to improperly engage in "mere speculation" (see *Phiri v. Joseph*, 32 AD3d 922 [2d Dept. 2006]).

**Conclusion**

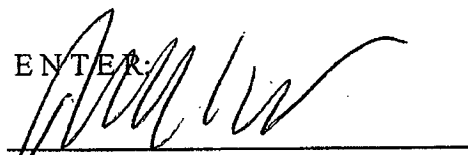
For the reasons stated above, the Court finds that both motions must be denied. Only when a jury could not have reached the verdict on any fair interpretation of the evidence should a verdict be set aside (*Nicastro v. Park*, 113 AD2d at 134). This case involved difficult emotional testimony which was heard by a jury who clearly considered the evidence in a logical manner and rendered a verdict which is not inconsistent or in obvious error. Conflicting testimony supported the decision to make no award for pain and suffering or pre-impact terror, and, as to the wrongful death claim, the jury was offered uncontested testimony as to the importance of the role played by Ms. McKibbin with her children and grandchildren for which the jury made a fair award.

In conclusion, the jury award in all respects was supported by the available evidence. On balance, the jury rendered what this Court considers to be a fair and just award given the evidence in the case. As a result, both defendant's motion to set aside the pecuniary damages award, and plaintiff's motion to set aside the portion of the verdict which made no award for non-economic loss should be denied.

This shall constitute the decision and order of this Court.

Dated: September 23, 2013

ENTER:



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Bernard J. Graham, Acting Justice  
Supreme Court, Kings County

HON. BERNARD J. GRAHAM