NEW YORK SUPREME COURT - COUNTY OF BRONX
PART IA-25

MIGUEL EROSA and MARIE EROSA,

Plaintiffs,

-against-

MICHAEL COOMARASWAMY, M.D., ALAN ZEITLIN, M.D., MICHAEL REICH, M.D., ALAN ZEITLIN & MICHAEL REICH, M.D., LLPC, JEFFREY STEIN, M.D., and THE PARKWAY HOSPITAL,

Defendants.

MEMORANDUM DECISION/ ORDER
Index No. 14247/05

HON. MARK FRIEDLANDER:

Defendant Michael Coomaraswamy, M.D. ("MC") moves, pursuant to CPLR 4404, for an order setting aside the jury verdict rendered in this medical malpractice action as legally unsustainable; or, in the alternative, for an order directing a new trial as to the claims against MC on the ground that the jury verdict was against the weight of the credible evidence, and on the further ground that the jury was prejudiced by the improper admission of certain evidence and/or an improper charge given to the jury; or, in the further alternative, for an order directing a new trial as to damages, on the ground that the jury's award was excessive and contrary to the weight of the evidence.

This matter was tried before the undersigned in April and May 2013. The action arose out of injuries allegedly sustained by plaintiff Miguel Erosa ("plaintiff"), during and following an appendix removal performed by MC at Parkway Hospital, a facility which was closed at the time of trial. The jury heard testimony from plaintiff, from his wife Marife Erosa ("Marife"), who had a claim for loss of consortium, from MC, from a medical expert called by plaintiff, and from two medical experts called by defendant. The injuries claimed by plaintiff involved post-operative pain, a subsequent surgery, a large scar, embarrassment at his alleged disfigurement and attendant issues. After deliberations, the jury awarded plaintiff $950,000 in damages for past

pain and suffering ("PPS"), and $250,000 in damages for future pain and suffering ("FPS"). The FPS award was intended to cover a period of 26 years. The jury also awarded Plaintiff Marife $100,000 in damages for past loss of consortium ("PLC"), and $ 25,000 in damages for future loss of consortium ("FLC"), with the duration of the FLC also intended to cover 26 years. Pursuant to a stipulation between counsel, if liability were to be found, the sum of $30,000 was to be added to any jury award, to cover plaintiff's medical costs.

Defendant now moves to set aside the verdict as to liability, asserting that the uncertified medical records of Parkway Hospital were admitted over his objection; that such records, for some reason, did not include MC's operative report, which therefore was not before the jury; and that the Court subsequently included in its jury instructions a tailored charge which improperly permitted the jury to draw a negative inference as to MC's possible departure from proper medical practice. For the reasons set forth hereinafter, the Court declines to disturb the jury's verdict as to liability, and finds no basis to do so in the issues raised by movant, as summarized above.

The issues raised are rather straightforward, and involve only a very small aspect of the seven day trial herein, and the Court will consequently endeavor to keep this decision brief and concise. There was no dispute that the hospital at which MC performed surgery on plaintiff, and at which the records of such treatment had been maintained, had been closed for years before the trial began, and its records had been disposed of pursuant to permission from a bankruptcy court. As such, the only records available were the copies which had been used before trial, and which had been submitted to the Court by defendant himself as part of motion papers in the course of pre-trial litigation. No party disputed the accuracy of such records as were available at trial.

The underlying complaint which defendant had with regard to admission of the records was that MC's operative report was not included with the package. No one disputed that such report would normally have been a part of the record. No one had any idea why it was not present. MC testified at trial that he, as a matter of practice, always dictated his report on the day of surgery. It was also acknowledged by all at trial, and told to

the jury, that MC was not responsible for maintaining the hospital's records. On the other hand, MC and the independent medical experts agreed that it was proper and accepted practice to prepare an operative report.

Defendant now complains that, because the surgery occurred a decade before trial, MC had no independent memory of the event and, deprived of his operative report, could only testify based on his usual custom and practice. However, that is not the fault of plaintiff, or of the Court. MC was aware of this proceeding as of its initiation, which was necessarily less than three years after the event. At that time, the hospital was open and would remain open for many more years. MC could have searched to determine if he retained his own copy of the operative report, and, if he found that he had not, could have had years to elicit a copy from the hospital. Failing that, he could have made notes at that time as to what he recalled of the surgery, then at least somewhat fresher in his mind than eight years later, during trial. The jury's verdict cannot be attacked now because MC failed to properly protect his interests in the early years of this action.

The availability of hospital records which had been used previously and therefore effectively adopted by defendant meant that relevant evidence was available to the jury, and it would have been improper practice to deny the jury the benefit of such records. There is no indication and no logical inference that it was plaintiff who somehow deleted the operative report from the records, and, therefore, defendant had the opportunity at all times to obtain as full a record as was available to anyone. The absence of the operative report was as likely to have been MC's failure to get it into the records in the first place, as it was the fault of anyone later handling the record to keep the whole record together. Further, the available record, taken as a whole, was not made less comprehensible or more confusing by the missing component, as if it included some days and not others. It was, in short, what it purported to be: a record of what the hospital recorded in its chart, which did not include what the surgeon dictated at or after surgery.

Therefore, the Court continues to believe that it was proper to admit the record into evidence. The remaining issue raised by MC relates to the charge given to the jury. That charge is repeated here:

> "Now, you have heard that the original records of Parkway Hospital are not available. That includes a formal typed operative report. You have already heard that the defendant, Dr. Michael Coomaraswamy, was not an employee of the hospital, nor was he a custodian of the records. As such he would not be the person responsible for any incomplete or missing records. Now, if you choose, you may draw an inference that no operative report was ever done from the fact from the fact that none can be found at this time, or you may decide to draw no such conclusion. Similarly, if you so choose, you may draw the inference that an operative report was done from the fact that Dr. Coomaraswamy testified that it was his practice and procedure to always do an operative report, or you may decide to draw no such conclusion. In either case, it's your choice." (Emphasis as spoken at the time).

The Court rejected the request of defendant's counsel for a more sweeping direction to the jury, to the effect that: "You may...not draw any inferences against Dr. Coomaraswamy based on these records or the absence of a formal typed operative report." In the Court's view, it is clear that the language demanded by defendant is and was too broad. Further, the language actually used in the jury charge was carefully calibrated to be balanced and neutral.

Defendant has attempted to argue that the instruction effectively invited the jury to find malpractice on the part of MC, based merely on the lack of an operative report, but, as the above language makes clear, that is not the case. The charge related only to the absence of a report, not to what MC did or did not do to plaintiff. There was in fact no explanation for the report's absence, and any possible reason for such absence could have been considered by the jury. Whether the report's absence influenced the jury's result is an open question, about which one can speculate endlessly.

What is known is that the jury had much more specific evidence on which to base any conclusion it reached. The subsequent surgery which plaintiff underwent, allegedly to correct the improper appendix removal by MC, resulted in a hospital record from the VA Hospital, which was admitted into evidence. All of the medical witnesses commented on it, and discussed the findings that were placed into that hospital record. When plaintiff's abdomen was opened at the VA Hospital, the area of the previous appendix removal was visualized and its appearance was recorded in the hospital record. Those observations may or may not have evidenced malpractice on the part of MC, depending on which expert the jury believed. But it cannot be denied that such

evidence should have had, and probably did have, a far more profound effect on the jury's findings as to MC's possible departures, than the mere fact that MC's operative report was not available.

Defendant's argument that the Court effectively permitted the jury to consider MC to have despoiled evidence is without foundation. The Court permitted the jury to accept MC's testimony as to his custom and practice, and therefore to consider the evidence as showing that an operative report was prepared. However, as a fair balance, the Court also permitted the jury to weigh the unexplained absence of the report as possibly reflecting that somehow the report was never prepared. The latter option is far removed from any suggestion or implication that MC destroyed, despoiled or removed any existing evidence, and should not be equated with so derogatory a charge. (Incidentally, based on the entire record before the Court, the Court rejects plaintiff's contention that defendant's counsel, at some point in the trial, waived defendant's objection to the jury charge considered above).

In sum, movant has failed to show that the totality of the evidence could not or should not support the jury's findings as to liability, and has failed entirely to show that any ruling or charge by the Court would reasonably have had such impact on the jury as to directly cause a finding of liability which the jury would not otherwise have chosen. For these reasons such part of defendant's motion as seeks a setting aside of the verdict as to liability is denied in all respects.

The damage award, however, seems clearly out of line, in view of the nature and extent of the injuries described by plaintiff, and the testimony as to loss of consortium described by Marife. In his opposition papers, even plaintiff has difficulty finding precedent which sustains an award of the magnitude selected by the jury, other than cases which describe injuries very clearly far in excess of those suffered here.

Plaintiff has had no medical treatment to speak of since his VA Hospital surgery, and displays only an abdominal scar, which, while far from pleasant looking or desirable, falls significantly short of the description in the opposition papers as "horrific." Plaintiff could only describe very modest limitations of his activities,

mostly stemming from his purported embarrassment at displaying his scar, should it be visible at all (depending on his choice of clothes). Neither plaintiff's testimony nor his wife's was particularly convincing as to the supposed deleterious effect on their lives together. In short, while the evidence supports an award for PPS, which could rise into the six figures, based on plaintiff's pain following the first surgery, and his undergoing a second surgery and recovery period, there is little more in the record that could support the very high sums awarded by the jury.

Most of the decisions cited by both sides relate to injuries which have little in common with those involved here, and therefore cannot provide guidance in this matter. Interestingly, movant has had the "wisdom" to cite one case of appendix removal which is not only relevant by reason of the body part involved, but also was tried before the undersigned and resulted in a damage award which, inter alia, was reduced by the undersigned. Rivera v. Jothianandan, 38 Misc.3d 1216; affirmed, 100 A.D.3d 542. While the facts in the two cases are not identical, in both cases the actions of the physician were alleged to have ultimately necessitated an open incision, leading to a larger abdominal scar than might have been necessary otherwise, and the possibility, although perhaps remote, of the threat of adhesions in the future. The Court there reduced the PPS award to $250,000 and the FPS award to $50,000. The plaintiff in that case was much younger, and also, as an unmarried young woman, was likely to be more sensitive to the effect of the scar on finding a mate.

Supreme Court Justice Oliver Wendell Holmes, Jr., is often quoted as having said "Consistency is the hobgoblin of small minds," but the justice was actually quoting Ralph Waldo Emerson, and the precise quote was, "A foolish consistency is the hobgoblin of little minds..." In the instant case, it seems far from foolish to allow the Rivera case to influence the proper damage award here, in that the major purpose of raising or lowering awards is, in itself, to achieve consistency in what might otherwise be wide-ranging jury awards. Adjusting for the differences in the two cases, and for the different stages in life occupied at the time by the two plaintiffs, the Court finds that the appropriate levels for the awards in the instant case would be $250,000 in PPS

and $25,000 in FPS. Furthermore, although the testimony as to loss of consortium was far from compelling, and the jury award of $100,000 for PLC cannot be defended in any way, the Court will afford deference to the jury's finding, to the extent permissible in this circumstance, and permit a damage award of $ 30,000 for PLC, and of $20,000 for FLC.

It is perhaps noteworthy, although not relevant to the result reached here, that, in conferences before and during trial, the Court made prodigious efforts to settle this matter, and sought to impress upon defendant the risks attendant to proceeding with trial. Plaintiff's counsel made it clear to the Court that the matter could be settled for less than $150,000, and the Court had the distinct impression that settlement could be reached at just under $100,000. This was intimated to defendant's counsel, who understood the implications of the situation, but whose hands were apparently tied by an insurance adjuster working for the Federation of Jewish Philanthropies. The adjuster was of the belief that the case was worth only "costs of trial" and would offer no more than $25,000-$30,000. Thus, all of the time spent on trial, and on this motion, as well as on whatever appellate practice might follow, has been over a difference of perhaps $60,000, and the stubbornness of non-lawyers who do not understand how to properly evaluate an action. Settlements are usually better for all concerned, and certainly for the court system. It is sincerely hoped that a lesson may be drawn from what has so far transpired in this case.

Accordingly, the Court orders a new trial as to damages, unless plaintiff, within 45 days of the date of this Order, agrees to a reduction in the jury's award to the amounts of: $250,000 for past pain and suffering, and $25,000 for future pain and suffering, awarded to plaintiff Miguel Erosa; and $30,000 for past loss of consortium and $20,000 for future loss of consortium, awarded to plaintiff Marife Erosa.

This constitutes the Decision and Order of the Court.

Dated: 3/31/14

MARK FRIEDLANDER, J.S.C.