

Adams v Genie Indus., Inc.

2007 NY Slip Op 34459(U)

January 8, 2007

Sup Ct, NY County

Docket Number: 116382/2000

Judge: Marilyn Shafer

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SCANNED ON 1/17/2007

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

DECENT.

PART 62

Index Number : 116382/2000

ADAMS, WALTER

vs

GENIE INDUSTRIES, INC

Sequence Number : 005

OTHER RELIEFS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

decided
 pursuant to attached return

FILED
JAN 17 2007
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 1/8/07

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MARILYN SHAFER PART 62
Justice

WALTER ADAMS, INDEX NO. 116382/2000
Plaintiff, MOTION DATE
-against- MOTION SEQ. NO. 005
GENIE INDUSTRIES, INC., and
Defendant.

The following papers, numbered 1 to 7, were read on this motion for judgment nov:

	<u>PAPERS NUMBERED</u>
Notice of Motion (Defendant) — Exhibits	1
Affirmation in Opposition — Exhibits	2
Memorandum of Law In Opposition	3
Reply Memorandum of Law	4
Notice of Motion (Plaintiff) — Exhibits	5
Affirmation in Opposition	6
Reply Memorandum of Law	7

FILED
JAN 17 2007
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that the defendant's post-trial motion to set aside the verdict and ordering a new trial pursuant to Rule 4404(a) or, in the alternative, entering judgment in favor of defendant as a matter of law is denied; and it is further ordered that plaintiff's post-

005

trial motion to set aside the verdict and ordering a new trial pursuant to Rule 4404(a) as to past and future pain and suffering only is granted for the reasons set forth below.

Background

Following a jury trial, which found the defendant manufacturer negligent and awarded damages to the plaintiff of over \$2 million, both sides submit post trial motions seeking to set the verdict aside. Defendant seeks to set the entire verdict aside on the ground that it was tainted by erroneous *in limine* decisions. Plaintiff seeks to set aside only those portions of the verdict which assessed \$100,000 for past pain and suffering and \$400,000 for future pain and suffering, on the ground that they materially deviate from reasonable compensation, given the severity of plaintiff's injuries. The defendant's motion is denied and the plaintiff's motion is granted for the reasons set forth below.

The plaintiff, Walter Adams, a 24 year old construction worker, was seriously injured and permanently disabled in a 12 foot fall from the platform of a lift. The lift was manufactured by the defendant, Genie Industries, Inc., and sold to Adams' employer 10 years earlier. It was equipped with 4 detachable "outriggers" which prevented it from tipping. Although mobility, an essential factor in the lift's utilization, required removal of the outriggers, it was fully operable without them and provided no storage for them. A warning label and the operator's manual cautioned that "all outriggers must be installed before using."

The lift was sold to Adams' employer, Rathe Productions, Inc., who fabricated museum displays, in 1986. In 1992, Genie began manufacturing an improved lift equipped with an "interlock system" which prevented the lift platform from rising if the outriggers were not

installed. In 1993, Genie issued a safety bulletin to its distributors, and updated decals.

Adams was operating the lift without the outriggers when it tipped. He had never seen the outriggers, which had been lost or misplaced, and was unaware that he was using the lift improperly. He initiated an action against Genie alleging various theories of negligence. Genie moved for summary judgment and Judge Walter B. Tolub dismissed Adams' claims for (1) breach of implied warranty of merchantability, since the lift fulfilled the function for which was sold; and (2) failure to warn at the time of sale, since the lift contained a decal advising that it should not be used without outriggers. However, Judge Tolub found that "Triable issues of fact are presented on these papers, including whether a safer design was available in 1986 when the lift was manufactured, and whether it was feasible to retrofit the lift with an interlock system."¹ (Decision, Walter B. Tolub, J.S.C., July 5, 2005)

A two week trial resulted in the jury answering affirmatively interrogatories asking: (1) Whether the defendant's product was defective and whether the defect was a substantial factor in causing plaintiff's injury (Questions 1A and 1B); (2) Whether the defendant was negligent by putting the lift on the market in June 1986 and whether that negligence was a substantial factor in causing injury to the plaintiff (Question 2A and 2B); and (3) Whether the defendant was negligent from June 1986 until the plaintiff's accident in July 1997 and whether that negligence was a substantial factor in causing injury to the plaintiff (Question 7A and 7B)(Transcript, p. 1543). The Interrogatories "tracked", in that if the jury had answered the first question in the

¹Both sides seek to magnify the scope of Judge Tolub's ruling. Adams argues that the finding of questions of fact as to the feasibility of retrofit is the law of the case. It is not, for the reasons set forth in Genie's opposition memorandum. Gene argues that dismissal of Adams' claim for failure to warn at the time of sale also dismissed any claim for Genie's on-going duty to warn post-sale. It did not for the reasons set forth below.

negative, deliberations would have ceased and a verdict would have been rendered in favor of the defendant. The Court included the following charge, over Genie's objection:

Questions 7A and 7B ask if the defendant was negligent from June 1986 until plaintiff's accident in July 1997; and if the answer is yes, whether that negligence was a substantial factor in causing injury to the plaintiff.

To answer questions 7A and 7B, you must determine if it was feasible to retrofit the PLC 24 with an interlock on the outrigger and, if it was feasible, if the defendant negligently failed to retrofit the PLC 24 from July of 1986 until plaintiff's accident in July of 1997; and if the answer is yes, whether that negligence was a substantial factor in causing injury to the plaintiff. (Transcript pp. 1543 - 1544).²

Genie argues on this motion that the charge regarding post-sale negligence was improper as a matter of law, since the laws of New York do not impose upon manufacturers "a duty to retrofit." Genie further argues that inclusion of this charge was so prejudicial that it tainted the jury's finding of negligence on two other bases, for which reason the entire verdict must be set aside.

Discussion

It is well-settled that a motion to set aside a jury verdict shall not be granted unless the preponderance of the evidence in favor of the moving party is so great that the verdict could not have been reached upon any fair interpretation of the evidence. (*Baker v Turner*, 200 AD2d 525 [1st Dept 1994]; *Lolik v Big V Supermarkets*, 86 NY2d 744[1995]). There must be simply "no valid line of reasoning and permissible inferences" which could possibly lead rational persons to

² The jury would not reach this Interrogatory unless it had already found that the product was defectively designed and negligently sold. This fact is ignored by defendant in its argument that inclusion of a reference to the feasibility of retrofitting implied that the lift was defective when marketed.

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the conclusion reached by the jury on the basis of the evidence at trial. (*Cohen v Hallmark Cards, Inc*, 45 NY2d 493 [1978]). In reviewing the jury verdict for sufficiency, the evidence is examined in the light most favorable to the prevailing party, that is, the plaintiff in this case. (*Baker v Turner, supra*). If there was conflicting evidence, the Court may not substitute its own, or the moving party's, judgment in place of the verdict if the verdict was one in which reasonable people could have rendered after reviewing the conflicting evidence in favor of one party (*Dobess Realty Corp v City of New York*, 79 AD2d 348 [1st Dept 1981]). The trial court must avoid unnecessary interference with the fact-finding function of the jury to a degree that amounts to usurpation of the jury's duty. (*Nicastro v Park*, 113 AD2d 129 [2d Dept 1985]). 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, supra*).

Genie has not alleged that any aspect of the jury's verdict is unsupported by, or contrary to, the evidence adduced at trial. Instead, it seeks to eliminate the evidence upon which the verdict was based by rearguing motions denied by the trial court. Implicitly conceding that the verdict is based upon a fair interpretation of the evidence, the question presented is not whether the verdict is contrary to the weight of the evidence, but whether it is contrary to the weight of legally permissible evidence.

Genie's Pre-Sale Negligence

This Court finds that there was sufficient evidence to uphold the jury finding that Genie was negligent in the design and sale of the lift. The law is clear that a plaintiff may assert that a product is defective because of a mistake in manufacturing, because of improper design, or because of the manufacturer's failure to provide adequate warnings regarding the use of the

product. (*Voss v Black & Decker Manufacturing Company*, 59 NY2d 102, 107 [1983]).

When a design defect is asserted, the focus of the court is on whether the product, as designed, was safe or presented an unreasonable risk of harm to the user. (*Voss, supra*). Whether a product is unreasonably dangerous is a question of fact, depending upon issues such as the potential for alternative designs, the costs of alternative designs, and the product's usefulness as designed. (*Voss, supra*). The plaintiff has the burden of presenting evidence that the product, as designed, presented a substantial likelihood of harm and could have been designed more safely. (*Voss, supra*).

A manufacturer may be held liable under a design defect theory where the product is designed to permit its use without its safety features. (*Ayala v V & O Press Company*, 126 AD2d 229 [2d Dept 1987]). Where a product is purposefully manufactured to permit its use without a key safety feature, it is for the jury to determine the scope of the product's intended purposes and whether the product was reasonably safe when placed in the stream of commerce. (*O'Bara v Piekos*, 161 AD2d 1118 [4th Dept 1990]).

It is undisputed that the lift was sold with neither an interlock device nor any provision for outrigger storage, although it was foreseeable that (1) outriggers would be removed; (2) outriggers would be misplaced; and (3) the lift would tip when used without outriggers. On these facts alone, it cannot be said that the jury's finding of negligence in the design and sale of the lift was against the weight of the evidence. Genic argues that these findings were tainted by (1) the erroneous admission of the testimony of plaintiff's expert, Russ Rasnic; and (2) the erroneous inclusion of the charge regarding post sale negligence. These claims are without merit.

This Court did not err in admitting Rasnic's testimony. In determining whether to admit

expert testimony for a particular purpose, the guiding principle is that expert testimony should be received “when it would help clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror.” De Long v County of Erie, 60 NY2d 296 [1983]. The admissibility of expert testimony is within the discretion of the trial court. Dufely v Green, 84 NY2d 795 [1995]. The objections to Rasnic’s credentials and testimony made on this motion were raised twice below. Extensive *voir dire* was conducted into Rasnic’s qualifications which were found sufficient for him to discuss the pre-sale feasibility of an interlock system. Rasnic’s testimony that (1) the technology required to create an interlock device existed pre-sale; and (2) the patented interlock device was an “interlock plus” device, dealt with subjects which were outside of the typical knowledge of the jury and were based upon sound and generally accepted scientific principles. The testimony was then properly admitted under the standards enunciated in *Frye v United States*, 293 F 1013 [DC Cir. 1923]; *People v Wesley*, 83 NY 2d 417 [1994].

Following this Court’s denial of defendant’s motion to preclude Rasnic’s testimony as a matter of law, defendant raised these issues with the jury creating factual questions as to the weight and credibility of his testimony. The jury could have resolved these issues in the defendant’s favor. On the record, the jury may or may not have resolved these issues in plaintiff’s favor, since (1) the verdict is supportable without them; and (2) even if an interlock device was not feasible at the time of sale, a storage provision was certainly feasible.³

This Court did not err in admitting testimony regarding Genie’s post-sale modifications.

³ The evidence showed that the operator’s manual, for which storage was provided, was not lost or misplaced prior to the accident.

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Evidence of post sale modification in a design defect claim is admissible where a plaintiff seeks to establish the feasibility of design alternatives. (*Power v Crown Equipment Corporation*, 189 AD 2d 310 [1st Dept 1993]). Because witnesses for the defendant contended that an interlock device was not feasible prior to 1992, plaintiff was entitled to impeach their testimony with evidence that the technology for creating an interlock device was available at the time of sale and that the device patented in 1993 was an “interlock plus,” more complex and with more functions than a simple interlock device.

Genie’s Post-sale Negligence

This Court finds that there was sufficient evidence to support the jury’s finding that Genie was negligent during the 11 years following sale of the lift and prior to Adam’s accident. While there is no single standard for post-sale duty, (*Cover v Cohen*, 61 NY2d 261 [1984]), the law recognizes that after a product involving human safety has been sold, and dangerous defects in design come to the manufacturer’s attention, the manufacturer has a duty to either remedy the defects or to give users adequate warnings and instructions for minimizing the danger. (*Braniff Airways, Incorporated v Curtis Wright Corporation*, 411 F2d 451 [2d Cir 1969]).⁴ Risks revealed by user operation and brought to the attention of the manufacturer may impose a duty to warn. (*Cover v Cohen, supra*). Genie argued, at trial and on this motion, that by allowing the jury to consider the issue of its post-trial negligence, this Court created a “duty to retrofit,” which duty is not recognized under the laws of the State of New York or any other jurisdictions. This

⁴ Our research does not support defendant’s challenge to the validity of the *Braniff* decision which has been frequently and positively referenced. However, *Frank v DaimlerChrysler*, 292 AD2d 118 (1st Dept 2002) is clearly inapposite since the dismissal of the complaint in that case was based upon the fact that, unlike here, the plaintiffs in *Frank* had suffered no injury.

Court rejects Genie's argument as a misrepresentation of both the charge and the law.

The question presented, rather than narrowly termed "a duty to retrofit", is more properly stated as whether Genie's post-sale behavior was reasonable in response to the known dangers inherent in its product. (*Powers, supra*). Rather than being "new law," the question was simply one of negligence, requiring a factual inquiry into a manufacturer's post-sale conduct. (*Cover, supra*) The inquiry considered such factors as (1) the public safety; (2) the number of units sold; (3) the manufacturer's knowledge of the existence of a safety problem; (4) the seriousness of the defect; (5) the feasibility of modification; and (5) the lack of systematic effort to warn or to retrofit.⁵ Since a manufacturer's post-sale responsibility is a question of fact, there neither is nor is not a "duty to retrofit" as a matter of law. Upon the appropriate facts, many courts, in many jurisdictions, have found manufacturers negligent for failing to recall or retrofit an inherently dangerous product: *O'Keefe v Boeing Company*, 411 F2d 451 [2d Cir 1969] *cert den* 396 US 959 [1969][jury can find manufacturer negligent for failure to remedy defectively designed product]; *Noel v United Aircraft Corporation*, 342 F2d 232 [3d Cir 1964], *appeal after remand* 359 F2d 671 [3d Cir 1964][manufacturer has continuing duty to improve product where human safety is involved]; *Burke v Deere & Company*, 780 F Supp 1225 [Iowa 1991][jury could impose liability on manufacturer for its post-sale conduct in the absence of any statutory duty to recall or modify product]; *Downing v Overhead Door Corporation*, 707 P2d 1027 [Colo App 1985][manufacturer has post-sale duty to remedy any dangerous latent defect which comes to its attention]; *WM*

⁵ Genie properly points out that there are public policy concerns raised in the consideration of post-sale negligence. As set forth below, this verdict is not at variance with other jurisdictions and will likely have no adverse impact on interstate commerce. Moreover, safety standards already differ considerably from jurisdiction to jurisdiction. Finally, any impact on interstate commerce must be weighed against concerns for public safety.

Bashlin Company v Smith, 277 Ark 406 [1982][manufacturer may be found negligent for failure to institute a recall of its non-defectively designed product if it becomes aware of safety problem]; *Lally v Printing Machinery Sales and Service Company, Incorporated*, 240 NJ Super 181 [1990][manufacturer has continuing duty to provide safety devices]; *Smith v Selco Products, Incorporated*, 96 NC App 151 [1989] *rev den* 326 NC 598 [1989][manufacturer has continuing duty to guard against hidden defects even if discovered post-sale]; *Gracyalny v Westinghouse Electric Corporation*, 723 F2d 1311 [7th Cir 1983][manufacturer may have duty to install safety devices post-sale]; *Kozlowski v John E Smith's Sons Company*, 87 Wis2d 882 [1979] [manufacturer has duty to advise users of new safety devices]; *Kociemba v GD Searle & Company*, 707 F Supp 1517 [DC Minn 1989][manufacturer has continuing duty to protect users of its product by way of warning or recall]; *Reed v Ford Motor Company*, 679 F Supp 873 [SD Ind 1988][claim for failure to recall upheld in support of punitive damage claim]; *Bastian v TPI Corporation*, 663 F Supp 474 [ND Ill 1987][jury could find manufacturer liable for punitive damages if the manufacturer had knowledge of a serious defect yet failed to recall product]; *State ex rel Stephan v GAF Corporation*, 242 Kan 152 [1987][manufacturer had duty to take corrective action post-sale]; *Lanclos v Rockwell International Corporation*, 470 So2d 924 [3d Cir 1985] *cert den* 477 So2d 87 [La 1985][manufacturer of a product that presents unreasonable hazards has a continuing duty to provide consumers with safety devices as they become available].⁶

⁶ Our research has discovered two cases concerning lifts in which the manufacturer was not held to have a post-sale duty to retrofit, both of which are distinguished. In *Wallace v Dorsey Trailers Southeast, Incorporated*, 849 F341 [8th Cir 1988], the court found that a successor corporation, which purchased some the assets of the bankrupt manufacturer, did not assume its liabilities. In *Ellis v HS Finke, Incorporated*, 278 F2d 54 [6th Cir 1960] the court found there was no causal connection between the accident and the defect.

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This Court properly permitted the jury to consider whether Genie was negligent after the sale based upon, *inter alia*, its failure to remedy the defects, by recall or retrofit.⁷ The undisputed facts showed that Genie had absolutely no post-sale contact or communication with Adams' employer, notwithstanding that: (1) in 1992, Genie began manufacturing an improved lift equipped with an interlock system; and (2) in 1993, Genie issued a safety bulletin to its distributors and updated warning decals which were never delivered to Adams' employer. From this evidence, the jury could reasonably infer that Genie had been negligent post-sale.

Moreover, as set forth in the *Restatement (Third) of Torts*:

(a) One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to provide a warning after the time of sale or distribution of a product if a reasonable person in the seller's position would provide such a warning. *Restatement (Third) of Torts*, Chapter 2, Prod. Liab. § 10 (1998)

Genie argues that Judge Tolub's dismissal of plaintiff's claim for failure to warn encompassed its on-going duty to warn post-sale. Plaintiff apparently concedes this point, notwithstanding that it is a complete misreading. Judge Tolub's decision is unambiguously limited, by its terms, to Genie's duty to warn pre-sale:

Adams' failure to warn claim is not based on any alleged deficiency in the instruction manual, which Adams did not read, but on the alleged failure of the defendant Genie to provide any warning on the lift itself. However, Genie has submitted a photograph of the actual label on the particular lift, which specifically advises that "all outriggers must be installed before using" and also states, "study and understand the operating manual before using." The operator's manual was

⁷ A jury instruction similar to the one given here, incorporating into the general negligence concept of due care the duty to recall or retrofit, has been used in other cases. (*Johnson v Colt Industries Operating Corporation*, 609 F2d 1530 [Kan 1985], *affd.* 797 F2d 1530 [10th Cir. 1985]; *Gracyalny v Westinghouse Electric Corporation*, 723 F2d 1311 [7th Cir 1983]).

stored in a plastic tube attached to the lift's operator station. In light of this submission, and Adams' failure to provide any evidentiary support for his contention that the lift bore inadequate warnings, a finding of summary judgment is warranted, in Genie's favor, on the question of failure to warn. (Decision, p.7,8)(emphasis supplied)

Genie's post-sale activities, or absence thereof, were not before Judge Tolub. Therefore, the jury could properly consider Genie's failure to warn as part of its post-sale negligence, especially in light of the safety bulletin of 1993 prepared by Genie and forwarded to all of its distributors. Genie opposed admission of the safety bulletin on two grounds: (1) Judge Tolub ruled that Genie had not breached its post-sale duty to warn; and (2) the bulletin warned against a known, not a newly discovered, risk. This Court has already rejected the first ground. Insofar as the second ground is concerned, although it was also conceded by Adams, it is also based upon a complete misreading of the bulletin, which provides:

Urgent. Immediate action required.

Dear Genie Dealer:

In our letter of October 1, 1993, we requested your help in providing important safety information to the users of Genie Personnel Lifts. Most of our dealers have responded promptly and completely to that letter. However [all in caps] we have not heard from you.

We need your help. We continue to receive reports of certain operators of Genie Personnel Lifts either not using outriggers in direct violation of the operating instructions and warning decals or failing to install all the necessary outriggers properly. This irresponsible misuse of the product continues unfortunately to lead to injuries and even deaths. ...

We are again requesting that you search your records and provide us with a list of all PLMs, PLPs, PLCs and Easy-Ups which you have sold over the years, their serial numbers, the name and address of the purchaser and the present address of the present user if they are different. In addition, we are asking that you provide similar information for all units which you own or rent or hold in your inventory, as well as all other Genie Personnel about which you have any ownership information. We recognize that this may not be an easy task.

Please call us at 800 536-1825 if you have questions or if we may assist you in any way. ...

Your failure to respond to Genie's request is preventing your customers from receiving this important safety information. By not responding you are jeopardizing a critically important safety program unnecessarily risking the personal safety of many operators and creating potential legal liability for your company. More importantly, if this safety campaign prevents even one accident, it will have been worthwhile. (Transcript, p. 508 - 510)

The bulletin explicitly creates a post-sale duty to warn with which Genie failed to comply. It wholly undercuts several of Genie's arguments:

- Genie objects to the introduction of a prior accident on the ground that it was prejudicial. The bulletin appears to reference a number of accidents which lead to "injuries and even deaths."
- Genie objects to the introduction of a prior accident on the ground that it involved a different lift. The bulletin makes no distinction among 4 different models of lift as to the risk involved.
- Genie has defended its nonfeasance on the ground that it did not have the address of Adams' employer.⁸ The bulletin requires Genie to provide the address of every "user", including entities with which it had not dealt directly and for whom it would have no address.

Genie's remaining arguments have been reviewed and are denied as without merit.

Plaintiff's Request for Additur

The jury awarded the following damages:

\$100,000 for past pain and suffering;

\$338,634 for past earnings;

⁸ There was no evidence of any attempt by Genie to locate Rathe. There was evidence that Rathe was a sizable company which could have been readily located.

15] \$400,000 for future pain and suffering (40 years); and

\$1,423,386 for future loss of earnings (40 years).

Adams moves to set aside the awards for past and future suffering. Pursuant to CPLR 4404(a), the Court is empowered to set aside the verdict on damages on the ground that the verdict deviates 'materially from what would be reasonable compensation.' In making a determination of what is a material deviation, the courts regularly compare the jury's damages award to the awards in other cases of similarly injured persons (*Rountree v Manhattan and Bronx Surface Transit Operating Authority*, 261 AD2d 324, 328 [1st Dept 1999]; *Adams v Georgian Motel*, 291 AD2d 760, 762 [3rd Dept 2002]). Because reasonable compensation is an approximation of community standards and the community in this case is Manhattan, this Court will follow the decisions of the Appellate Division, First Department.

The record shows that Adams was a 28 year old husband and father when he was thrown 12 feet onto a concrete floor. He suffered a concussion, a triple fracture of the right knee and a severe Colles fracture of the right wrist. By the time of trial, 9 years after the accident, he had undergone six serious surgeries, including wrist fusion, during 5 hospitalizations. He will require more than one knee replacement surgeries in the future. Adams has not been pain free since the time of the accident, and he never will be. He requires continuous pain medication and there have been periods when the pain was excruciating. Each of Adams' injuries are devastating and disabling, rendering performance of the simplest tasks a challenge. This is especially true since the wrist injury is to Adams' dominant hand and, without wrist movement or full grip strength, he is incapable of performing the manual work which was both his livelihood and his recreation.

In light of the above, the jury' award of \$100,000 for past pain and suffering and

\$400,000 for future pain and suffering, based upon a projected life expectancy of 40 years, deviates materially from reasonable compensation. It is not in accord with the other awards to plaintiffs who suffered injuries comparable to either of Adams' two injuries: See, *Bridges v City of New York*, 18 AD3d [1st Dept 2005][\$300,000 for past pain and suffering and \$50,000 for future pain and suffering where plaintiff sustained a fractured knee requiring 3 days of hospitalization, a 4-inch scar and an interruption to her college education]; *Kelly v City of New York*, 6 AD3d 188 [1st Dept 2004][\$600,000 for past pain and suffering where plaintiff required two reconstructive surgeries, required further knee surgery, was disabled from his job and unable to perform any activities requiring knee movement; *Osoria v Marlo Equities, Incorporated*, 225 AD2d 132 [1st Dept 1998][\$317,500 for past pain and suffering and \$500,00 for future pain and suffering where 61 year old plaintiff sustained comminuted fracture of the knee requiring a cast for a month and a half, resulting in atrophy of the thigh and calf, was on crutches for 6 months, had an arthroscopic surgery and would eventually need knee replacement.]; *Cruz v MABSTOA*, 259 AD2d 432 [1st Dept 1999][\$375,000 for past pain and suffering and \$650,000 for future pain and suffering where 30 year old plaintiff had three arthroscopic surgeries on his knee, walked with a limp and might need later knee replacement]; *Cabezas v City of New York*, 303 AD2d 307 [1st Dept 2003][\$450,000 for past pain and suffering and \$450,000 for future pain and suffering where right handed plaintiff suffered a comminuted intra-articular distal radius fracture and displaced styloid fracture of his right wrist, has limited wrist motion and grip strength and suffers constant pain; *Hayes v Normandie LLC*, 306 AD2d 133 [1st Dept 2003][\$750,000 for future pain and suffering for plaintiff who sustained a comminuted fracture of the right radius extending into

the wrist requiring insertion of metal plate and screws that will have to be replaced⁹]; *Bingham v New York City Transit Authority*, 25 AD3d 433 [1st Dept 2006][$\$1$ million for past pain and suffering and $\$750,000$ for future pain and suffering where plaintiff suffered substantial wrist, ankle and leg injuries].

Upon comparison with other verdicts in this jurisdiction, and based on the uncontroverted record of Adams' injuries, this Court finds that the jury's award of $\$100,000$ for past pain and suffering and $\$400,000$ for future pain and suffering is against the weight of the credible evidence and is not rationally based on the record.

Accordingly, the award for plaintiff's past pain and suffering should be increased from $\$100,000$ to $\$500,000$ and plaintiff's award for future pain and suffering should be increased from $\$400,000$ to $\$750,000$.

50A Hearing

There is a curious illogic to Genie's request for a 50A hearing within a motion to set the verdict aside. If and when the verdict becomes final, appropriate 50A proceedings may be scheduled.

Conclusion

Accordingly, it is hereby

ORDERED that defendant's motion to set aside the verdict and order a new trial pursuant to Rule 4404(a) or, in the alternative, entering judgment in favor of defendant as a matter of law is denied; and it is further

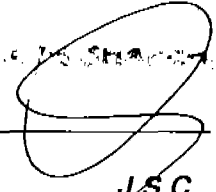
ORDERED that the jury award for past and future loss of pain and suffering is vacated

⁹ Adams had a similar procedure.

and a new trial on the issue of past and future pain and suffering is directed, unless the defendant stipulates to increase the award as follows: \$500,000 for past pain and suffering and \$750,000 for future pain and suffering.

This reflects the decision and order of this Court.

Dated: 1/8/07



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

FILED
JAN 17 2007
CLERK OF COURT
COUNTY CLERK'S OFFICE