Jones v New York City Tr. Auth.
2007 NY Slip Op 34558(U)
October 31, 2007
Supreme Court, Bronx County
Docket Number: 20150/2003
Judge: Lucy Billings

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 5

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LEONARI JONES, an infant by her Mother and Natural Guardian, BARRY ALICEA, Index No. 20150/2003

Plaintiff

- against - DECISION AND ORDER

NEW YORK CITY TRANSIT AUTHORITY,

Defendant

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APPEARANCES:

For Plaintiff
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For Defendant
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LUCY BILLINGS, J.S.C.:

I presided at the damages trial of this action before a jury August 3-4, 7- 8, and 10-11, 2006. On August 14, 2006, the jury rendered a verdict awarding plaintiff damages of $1,500,000.00 in past pain and suffering, $1,500,000.00 in future pain and suffering over 62.9 years, and $133,000.00 in medical expenses over four years. Defendant moves to set aside or reduce the verdict on past and future pain and suffering and future medical expenses on the ground that the verdict resulted from an inflammatory summation by plaintiff's attorney and is both against the weight of the evidence and excessive. After oral argument and unsuccessful attempts at settlement, for the reasons

explained below the court denies defendant's motion, except to the extent of reducing the verdict for future medical expenses. C.P.L.R. §§ 4404(a), 5501(c).

I. EVIDENCE OF DAMAGES

The testimony of plaintiff Leonari Jones, her experts, other witnesses, and defendant's experts establishes that plaintiff suffered and continued to suffer at the time of the trial, at age 15 years, a combination of injuries that diminished her enjoyment of life. On November 4, 2001, at age 10, as she was exiting a rear subway car, its door caught her right foot, and the train dragged her the length of the station and out onto the elevated tracks, when the door finally released and dropped her to a secondary platform below.

One component of plaintiff's injuries is her post-traumatic stress disorder (PTSD) from the constant, intense anguish and fear that she would perish during these several minutes and in continuing flashbacks and nightmares. The PTSD is manifested further in her ongoing, intense fear of subways, which causes her to refrain from using them almost entirely, and a continuing impairment of functioning in her social, educational, and extracurricular activities.

The further physical elements of plaintiff's pain and suffering derive from a fracture of her right ankle and second degree burns she sustained to her abdomen, left palm, left forearm, and left calf, from being dragged by the train, and the resultant scarring and leg length discrepancy. These physical

consequences in turn exacerbate her emotional anxiety, social withdrawal, and disengagement from activities she previously enjoyed.

A. Fear and Emotional Distress Surrounding the Dragging

Plaintiff testified that she was exiting the second to last subway car, when the door closed and caught her right foot, and then the train began to move. Although she attempted to hop on her left foot on the elevated subway platform, as the train gradually accelerated she soon fell and was dragged on the platform until its end. She placed heavy pressure on her hands, left forearm and leg, and abdomen, because she tried to keep her face lifted and unscathed and to grip the ground to pull herself free. Then the train slowed and opened its doors, dropping her fortuitously onto a secondary platform used for repairs several feet below. As she was being dragged over 350 feet, she felt her leg break and believed she "was gonna die." Transcript of Proceedings at 568 (Aug. 10, 2006). As she lay on the platform, covered in blood and dirt with torn clothes, she feared being electrocuted by the third rail, being run over by the train to her right, or falling from the secondary platform edge to her left 30 feet to the street below. She experienced burning pain on her hands and stomach from which the skin had been removed.

Plaintiff was admitted immediately to St. Barnabas Hospital, where she was examined and underwent excruciating debridement procedures, which removed the dead and burned skin on her abdomen, hands, left elbow, and left calf by cutting it away,

applying ointment, and bandaging the wounds. Removing the bandages to repeat the procedure tore newly formed skin and caused her such intense pain that she cried and screamed at the nurses. During her nine day hospitalization, the debridement procedures were performed four times per day, and her leg was casted. During her hospitalization and continuing for one and a half months after her discharge, she could not walk or feed, bathe, or use the toilet herself. Her relatives and a visiting nurse helped her with these tasks after she returned home.

B. Effect on Plaintiff's Functioning

Immediately after the trauma, plaintiff missed one and a half months from school, fell behind in her classwork, and received unsatisfactory grades after previously receiving As and Bs. She also missed 15 days of school in 2005 and 43 days in 2006. Only by attending summer school and receiving tutoring did she manage to graduate from middle school on time. Conscious of her scars, plaintiff no longer wears clothing that exposes them and ceased swimming, one of the many sports activities she enthusiastically enjoyed and excelled in before her injury. Since her injury, plaintiff has refrained from going out to socialize or engage in sports with her peers, just as she had been the very day she was injured. She now has few friends, whom she contacts primarily by email or telephone. Troy Owen testified that he had been one of plaintiff's friends with her on the subway November 4, 2001, but no longer sees her since her injury.

Plaintiff experienced nightmares of her injury at first nightly and then monthly. She has ridden the subway only four times since her injury, but twice were with her mother. The only other occasion was a round trip in emergency circumstances with no alternative. Each attempt has left plaintiff nauseous, with a continuing phobia of subways and continuing anxiety and flashbacks of the injury whenever she sees the subway trains.

In November 2002, plaintiff began to suffer dislocations of her right knee that cause pain and swelling and increased in frequency to once per month. She walks with a limp and no longer roller skates, dances, or plays basketball or volleyball: all sports she previously enthusiastically enjoyed and excelled in. The evidence demonstrated that plaintiff was a particularly athletic young girl, and, before her injury, athletic activities were a central part of her life where she displayed confidence as well as ability and made friends.

C. Expert Medical Evidence

Plaintiff's experts substantiated her injuries. David Roye Jr., M.D., a pediatric orthopedist, testified that plaintiff fractured her right ankle, which caused instability in her right knee and a two centimeter discrepancy between the length of her right and left legs. Robert Grant, M.D., a plastic surgeon, testified that she sustained second degree burns to her abdomen and left palm, forearm, and calf from being dragged by the train, which have left permanent scars.

D. Expert Psychological Evidence

Lois Winston, a certified social worker and psychotherapist, began treating plaintiff in January 2005, twice a week until May 2006. Ms. Winston diagnosed plaintiff with PTSD, which diminishes her self-esteem and causes her to restrict her social, scholastic, and sports activities. Plaintiff's young age when the trauma occurred heightened its impact. Her scars and leg length discrepancy also diminish her body image, causing social withdrawal and insecurity, which in turn led to disciplinary problems, including her suspension twice from school for fighting. On cross-examination, Ms. Winston admitted that plaintiff benefitted from psychotherapy, her nightmares diminished, and she has resumed limited social and sports activities.

Robert Goldstein, M.D., plaintiff's examining psychiatrist, confirmed that plaintiff suffered PTSD. His examination showed that she suffered the disorder's symptoms: social withdrawal, hypervigilance, irritability, angry outbursts, poor concentration, and insomnia. Dr. Goldstein evaluated her social and scholastic functioning as moderately impaired and found her self-conscious of her scars and leg length discrepancy. Dr. Goldstein testified that her treatment by psychotherapy without medication did not indicate a less severe condition, but merely constituted a choice of treatment, and, in fact, because she incurred her emotional scars at an early age, their effects will last longer.

E. Medical Expenses

Dr. Roye testified that the cost of surgically correcting plaintiff's leg length discrepancy would range from $25,000.00 to $35,000.00, and the cost of repairing her knee would be $25,000.00. The parties agree that the cost of psychotherapy for plaintiff for 17 months is approximately $18,000.00.

II. DEFENDANT'S MOTION TO SET ASIDE THE VERDICT

Defendant moves 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 and materially deviates from reasonable compensation. Defendant also challenges the verdict based on improper comments by plaintiff's attorney during summation, which the court treats as seeking to set aside the verdict "in the interest of justice." C.P.L.R. § 4404(a). For the most part, defendant's claims do not support disturbing the verdict.

A. Weight of the Evidence

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 493, 499 (1978); 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 on pain and suffering, due primarily to defendant's failure to present evidence contradicting plaintiff's damages from her traumatic injury. Insofar as the opinions of the parties' experts may have conflicted, the jury was free to accept or reject all or part of

those opinions and resolve such conflicts. Id. at 207; Mejia v. JMM Audubon, 1 A.D.3d 261, 262 (1st Dep't 2003).

In fact, defendant's experts did not contradict plaintiff's evidence and expert opinions as to her pain and suffering. Menachem Epstein, M.D., defendant's examining orthopedist, disagreed with Dr. Roye's method for measuring leg length discrepancy, but Dr. Epstein did not undertake measurements of plaintiff himself. His recommendation that physical therapy precede surgical intervention did not rule out the latter treatment.

Similarly, defendant's examining psychiatrist, Solomon Miskin, M.D., did not rule out the traumatic injury's causation of plaintiff's scholastic decline and confirmed her flashbacks of the trauma, her fear of dying as a result, and her self-consciousness of negative reactions to her scars. Moreover, on cross-examination, Dr. Miskin admitted that he did not review all the records plaintiff's psychological experts reviewed and that he diagnosed her as suffering from an adjustment disorder with mixed emotional features based on an outdated version of the Diagnostic and Statistical Manual, the current version of which no longer contains such a diagnosis.

Thus, insofar as defendant's experts offered opinions contrary to plaintiff' experts, plaintiff presented grounds for the jury to disbelieve defendant's experts. Smith v. Au, 8 A.D.3d 1, 2 (1st Dep't 2004). See McDermott v. Coffee Beanery, Ltd., 9 A.D.3d at 207-208. Moreover, defendant offered no expert

to rebut plaintiff's plastic surgeon, Dr. Grant, regarding her burns, treatment for them, and scarring.

Defendant also seeks a reduction of the future medical expenses award of $133,000.00 for four years, to $18,000.00 for one and a half years of psychotherapy. C.P.L.R. § 5501(c). Defendant does not explain its basis for limiting the period of the award. The weight of the evidence in fact supports the period the jury specified, but not the $133,000.00 amount. While Dr. Roye testified that the surgeries to repair plaintiff's leg length discrepancy and her right knee instability cost as much as $60,000.00, the record does not support the remaining $73,000.00.

First, the record supports additional medical expenses only for psychotherapy. Ms. Winston's psychotherapy for 17 months costs approximately $18,000.00. Based on that measure, the cost of psychotherapy for four years (48 months) would be $50,783.00.

Although both Dr. Roye and Dr. Epstein recommended physical therapy before surgery, neither physician, nor any evidence of physical therapy plaintiff had received, assigned any cost to such therapy. Although Dr. Roye further testified to plaintiff's need for post-surgical physical therapy, again the record lacks any evidence of the cost. 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 $110,783.00. Brewster v. Prince Apts., 264 A.D.2d 611, 618 (1st Dep't 1999).

B. Interest of Justice

Defendant also moves to set aside the verdict on damages in the interest of justice, claiming comments by plaintiff's attorney during summation, encouraging the jury to "go for it" and award damages higher than he suggested, were inflammatory and thus exceeded the permissible latitude in closing arguments. Tr. at 762 (Aug. 14, 2006). The court may set aside the verdict in the interest of justice when a legal error has affected the verdict and prevented substantial justice. C.P.L.R. § 4404(a); Micallef v. Miehle Co., Div. of Miehle-Goss Dexter, 39 N.Y.2d 376, 381 (1976); Califano v. City of New York, 212 A.D.2d 146, 153 (1st Dep't 1995); Stevens v. Atwal, 30 A.D.3d 993, 994 (4th Dep't 2006); Curanovic v. New York Cent. Mut. Fire Ins. Co., 22 A.D.3d 975, 977 (3d Dep't 2005). The verdict is not to be disturbed on that ground absent a prejudicial error. Gilbert v. Luvin, 286 A.D.2d 600, 601 (1st Dep't 2001); Curanovic v. New York Cent. Mut. Fire Ins. Co., 22 A.D.3d at 977; Havens v. New York City Tr. Auth., 20 A.D.3d 391, 392 (2d Dep't 2005); Gomez v. Park Donuts, 249 A.D.2d 266, 267 (2d Dep't 1998).

While defendant claims plaintiff's attorney overstepped the bounds of fair advocacy in his summation, defendant's attorney did not object to the portions of the summation that defendant claims inflamed the jury. John v. City of New York, 235 A.D.2d 210 (1st Dep't 1997); Califano v. City of New York; 212 A.D.2d at 152-53; Murray v. Weisenfeld, 37 A.D.3d 432, 434 (2d Dep't 2007). See Mosesson v. 288/98 W. End Tenants Corp., 294 A.D.2d 283, 284

(1st Dep't 2002); Kroupova v. Hill, 242 A.D.2d 218, 220 (1st Dep't 1997). The comments defendant claims were inflammatory constituted fair argument within the wide bounds afforded to attorneys in summation, considering plaintiff's physical pain and psychological trauma, both when her injury was inflicted and first treated, and throughout its aftermath, continuing through the trial, all of which bear on her damages. Murray v. Weisenfeld, 37 A.D.3d at 434.

In sum, defendant simply has not shown that the comments by plaintiff's attorney deprived defendant of a fair trial. Smith v. Au, 8 A.D.3d 1; Califano v. City of New York, 212 A.D.2d at 153. Defendant fails to demonstrate that the jury's determination was based on misconduct by the attorney during his summation that impacted the jury's consideration of the evidence or the fairness of the outcome, such that sustaining the verdict would cause substantial injustice. C.P.L.R. § 4404(a); Gomez v. Park Donuts, 249 A.D.2d at 267; Califano v. City of New York, 212 A.D.2d at 153. See Lopez v. Kutis, 279 A.D.2d 390, 392 (1st Dep't 2001); Stevens v. Atwal, 30 A.D.3d at 994. In fact, the exhortation to the jury by plaintiff's attorney encouraged the jury to exceed his proposed $1,500,000.00 figures, but the jury did not follow his suggestion.

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).

The jury's verdict in this action is especially unsusceptible to evaluation by precise standards, not only because it involved a unique combination of injuries with reciprocal exacerbating effects, as recited above, but also because of their uniquely subjective impact on this specific plaintiff. Reed v. City of New York, 304 A.D.2d at 7; Donlon v. City of New York, 284 A.D.2d at 15; Weigl v. Quincy Specialties Co., 190 Misc. 2d 1, 7-8 (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 750, 755 (Sup. Ct. Bronx Co. 2006). Therefore it "is virtually impossible" to impose the standards of other verdicts on the verdict here or to substitute the court's judgment based on such standards. Po Yee So v. Wing Tat Realty, 259 A.D.2d at 374; Weigl v. Quincy Specialties Co., 190 Misc. 2d at 5, aff'd, 1 A.D.3d at 134; Medina v. Chile Communications, Inc., 15 Misc. 3d at 755. See Reed v. City of New York, 304 A.D.2d at 7. Evaluation of prior awards in similar personal injury actions is to ascertain a consensus of opinion among juries and courts regarding the relation between the specific injuries and the compensation awarded, to guide the court in resolving an award's disputed adequacy, and to achieve fairness and evenhandedness. Donlon v. City of New York, 284 A.D.2d at 15-16; Weigl v. Quincy Specialties Co., 190 Misc. 2d at 4, 8-9, aff'd, 1 A.D.3d at 134; Medina v. Chile Communications, Inc., 15 Misc. 3d at 755. Here, prior awards, even when closely analyzed, provide scant precedential analog or guidance, because none is based on comparable, compounding injuries that comparably impacted the plaintiff. Reed v. City of New York, 304 A.D.2d at 7; Po Yee So v. Wing Tat Realty, 259 A.D.2d at 374; Weigl v. Quincy Specialties Co., 190 Misc. 2d at 7-8, aff'd, 1 A.D.3d at 134; Medina v. Chile Communications, Inc., 15 Misc. 3d at 755.

Absent a benchmark or comparability, reduction of damages does not serve the ends of fairness and evenhandedness. Id. at 756. 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; Weigl v. Quincy Specialties Co., 190 Misc. 2d at 5, aff'd, 1 A.D.3d at 134; Medina v. Chile Communications, Inc., 15 Misc. 3d at 756. See Weigl v. Quincy Specialties Co., 190 Misc. 2d at 8-9, aff'd, 1 A.D.3d at 134.

The evidence of plaintiff's past and future pain and suffering not only concerned a unique combination of injuries with unique effects, but also uniformly weighed in her favor; defendant presented no evidence controverting plaintiff's evidence of her 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 756. 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). While the jury was well within its function to assess each expert's credentials, reject all or part of the experts' opinions, and discredit the testimony regarding the broad scope and anguishing intensity of plaintiff's injuries, People v. Miller, 91 N.Y.2d 372, 380 (1998); Mejia v. JMM Audubon, 1 A.D.3d at 262; Wiseberg v. Douglas Elliman-Gibbons & Ives, 224 A.D.2d at 362; Cavlin v. New York Med. Group, 286 A.D.2d 469, 471 (2d Dep't 2001), the jury was free instead to credit that testimony and draw every reasonable inference in her favor from the evidence. Alexander v. Eldred, 63 N.Y.2d 460, 463 (1984); Kane v.

Coundorous, 11 A.D.3d 304; Mazariegos v. New York City Tr. Auth., 230 A.D.2d at 609-610; Medina v. Chile Communications, Inc., 15 Misc. 3d at 756. Viewing the evidence in this light, few, if any, decisions provide useful benchmarks. Id.

IV. MAXIMUM REASONABLE COMPENSATION FOR PLAINTIFF'S PAIN AND SUFFERING

It is incumbent on defendant, in seeking to reduce the jury's award, to cite verdicts, including their fate on appeal, that assess injuries similar to plaintiff's, experienced for comparable periods. Id. See Donlon v. City of New York, 284 A.D.2d at 14, 18. While the awards defendant cites 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 plaintiff's suffering. None of these awards, nor any other reported awards, although they involved superficially factual similarities to plaintiff's injuries, include all or even most of plaintiff's various combined injuries, with such extensive effects on the specific individual. See Medina v. Chile Communications, Inc., 15 Misc. 3d at 756.

The decisions defendant relies on simply affirm pain and suffering awards, Rosario v. Carassone, 5 A.D.3d 295, 296 (1st Dep't 2004); involve pain and suffering for only physical injury without psychological injury, id.; Orellano v. 29 E. 37th St. Realty Corp., 4 A.D.3d 247, 248 (1st Dep't 2004); Bajwa v. Saida, Inc., 6 A.D.3d 471, 472-73 (2d Dep't 2004); Holland v. Gaden, 260 A.D.2d 604, 605 (2d Dep't 1999); Venable v. New York City Tr.

Auth., 165 A.D.2d 871, 872 (2d Dep't 1990); or fail to delineate between past and future damages. Bajwa v. Saida, Inc., 6 A.D.3d at 472-73. These awards thus are of limited utility in providing benchmarks for evaluating plaintiff's injuries. First, when an appellate court refuses to reduce and affirms an award, as in Rosario v. Carassone, 5 A.D.3d at 296, 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 758. The focus of defendant's authority on only physical injury, moreover, is all the more limited in light plaintiff's evidence regarding her agonizing second degree burns from being dragged by the train, debridement treatments, and permanent scarring, all without any rebuttal evidence. Roux v. Caiola, 254 A.D.2d 182, 183 (1st Dep't 1998).

Absent from each of the above decisions is the type of trauma occasioned by the terrifying dragging of plaintiff's body that caused long lasting fear and anxiety, including a continuing phobia of subways and continuing flashbacks and nightmares. Even disregarding the physical scarring, fracture, and leg length discrepancy, the psychological impact permeates plaintiff's condition and continues to impair her functioning.

Further, when an affirmance does not delineate between past and future damages, it may be limited to one or the other and thus may well support the award for either plaintiff's five years

of past pain and suffering or her nearly 63 years of future pain and suffering. Similarly, defendant's citation to Jackson v. Mungo One, 6 A.D.3d 236 (1st Dep't 2004), although it involved PTSD, furnishes no benchmark because the decision merely affirms an award for pain and suffering only, without even specifying the time span. Defendant's citation to Capuccio v. City of New York, 174 A.D.2d 543 (1st Dep't 1991), also involving PTSD, is to a concurring opinion. Id. at 545. Neither the majority nor the concurrence, however, finds the award excessive or delineates whether it is for past or future pain and suffering. Finally, defendant cites McKithen v. City of New York, 292 A.D.2d 352, 353-54 (2d Dep't 2002), which reduced a verdict for future pain and suffering for continuing PTSD, but that decision offers no guidance either, because the decision does not set forth the factors considered in reducing the verdict.

Although Blakesley v. State of New York, 289 A.D.2d 979 (4th Dep't 2001), not cited by defendant, reduced an award of $180,000.00 for past pain and suffering and $774,000.00 for future pain and suffering to $100,000.00 for each, due to moderate PTSD, it did not impact the plaintiff's daily activities and was at least partially attributable to noncompliance with prescribed medication. Insofar as this authority furnishes any benchmark for damages from PTSD, plaintiff's continuing psychological damages, even disregarding her physical injuries, rise well above, given the intensity of her symptoms and impact on her functioning.

Verdicts for severe PTSD accompanied by significant physical trauma are better potential benchmarks. Defendant cites Brewster v. Prince Apts., 264 A.D.2d at 617, which affirmed a $500,000.00 future pain and suffering verdict for significant physical injuries sustained in a brutal assault and PTSD. While the plaintiff's psychiatric condition was permanent like plaintiff's here, the plaintiff's life expectancy in that case was 32 years, approximately half of plaintiff's life expectancy here. Insofar as Brewster may be otherwise comparable, given plaintiff's vastly longer future pain and suffering, almost double the length in that case, it supports an award of at least $1,000,000.00 and thus suggests that the $1,500,00.00 verdict here is within the upper limit of the range of awards justified by the evidence. Medina v. Chile Communications, Inc., 15 Misc. 3d at 758.

In Weigl v. Quincy Specialties Co., 1 A.D.3d at 134, the plaintiff sustained second and third degree burns on 17% of her body, was hospitalized for a month, and underwent debridement treatment and two skin graft surgeries. The court's reduction of the verdict of $9,410,000.00 for past pain and suffering and $10,000,000,00 for future pain and suffering to $4,000,000 for each sets a far higher benchmark for burn injuries with severe and lingering psychological ramifications.

Drawing this comparison, the court must consider as well plaintiff's intense fear of subways; flashbacks; nightmares; knee and ankle injuries; hospitalization; confinement at home, with complete inability to care for her even her most basic functions

for over a month; lost time from school; functional impairment to social, scholastic, and extracurricular activities; and young age. A 10 year old does not have an adult's coping mechanisms. The terrifying physical injuries to this 10 year old, in particular, destroyed her confidence in the sphere of her life where she had demonstrated her greatest abilities. The scars impacted her at the very time when, for a pre-adolescent and adolescent girl, her appearance is most important. Although the burns eventually healed, the scars are with her for life.

Bringing all these considerations to bear, as required, plaintiff's $1,500,000.00 award for past damages is justifiable. Considering all the components of her injuries, their lasting effects, and her long life expectancy, and in comparison to her award for the past damages, the additional $1,500,000.00 for future damages is equally justifiable.

V. CONCLUSION

As set forth above, plaintiff presented evidence of her injuries and resulting pain and suffering, largely uncontroverted by defendant. The jury credited her, her mother's, and her experts' testimony. The jury also credited the testimony of defendant's experts that corroborated and supplemented the other evidence in plaintiff's favor. On these bases, the jury awarded past and future damages that do not so exceed amounts supported by a fair interpretation of the evidence as to require disturbing the jury's determination. Although defendant now characterizes plaintiff's injuries as minimal, the weight of the evidence does

not dictate that assessment.

No comments during summation adversely impacted the jury's verdict. In any event, the failure of defendant's attorney to object to any such comments leaves this issue unpreserved. Nor was the jury's $1,500,000.00 award for past pain and suffering or $1,500,000.00 award for future pain and suffering so excessive as to materially deviate from reasonable compensation. Given this plaintiff's unique combination of injuries, the jurors here were uniquely qualified to assess her damages and set their own benchmark. See Medina v. Chile Communications, Inc., 15 Misc. 3d at 760. Therefore the court denies defendant's motion to set aside or reduce the verdict as to past and future pain and suffering. C.P.L.R. §§ 4404(a), 5501(c).

The award for future medical expenses, however, is against the weight of the evidence and set aside. The court orders a new trial on those damages unless plaintiff stipulates to reduce the verdict for future medical expenses to $110,783.00. The parties shall appear for a conference in Room 402, 851 Grand Concourse, Bronx, New York, November 27, 2007, at 9:30 a.m.

This decision constitutes the court's order. The court will mail copies to the parties' attorneys.

DATED: October 31, 2007

Lucy Billings

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.