At an IAS Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of January 2008.

P R E S E N T:

HON. LARRY MARTIN,

Justice.

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CHUN CHUN LAM, et ano,

Index No. 50745/01

Plaintiffs,

- against -

TIMOTHY A. SPANN, et ano,

Defendants.

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The following papers numbered 1 to 4 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1,2
Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)	4
Affidavit (Affirmation)	
Other Papers Memo of Law	5

Upon the foregoing papers, defendants Timothy Spann (Spann) and Plastic City Bags, Inc. (Plastic) move[1] for an order, pursuant to CPLR 4404 (a) setting aside the damages

[1] By order dated March 22, 2006, this Court granted the moving defendants leave to renew their motion to set aside the verdict on the ground that relevant portions of the transcript were not attached for review. In support of the instant renewed motion, defendants have annexed the complete damages trial transcript, opening and closing statements, the jury charge and post-verdict motions made after trial.

verdict after trial on the ground that the jury's finding that plaintiff sustained an injury under the 90/180 day category of "serious injury" as defined in Insurance Law § 5102 (d)[2] was contrary to the weight of the credible evidence produced at trial and rendered in disregard of the law and the Court's instructions; or, alternatively, on the ground that the jury rendered a damage award of $80,000 for future medical expenses without a finding of permanent injury; or setting aside the damage award for future medical expense of $80,000 for 0 years.

Background

Plaintiff Chun Chun Lam (Lam) commenced this personal injury action to recover damages sustained as a result of a motor vehicle accident on November 1, 2004,[3] when she was struck by a truck owned by Plastic and operated by Spann.

According to plaintiff, she was taken by ambulance to Lutheran Medical Center, complaining of pain to her head, neck, shoulders, both arms, and lower back extending to both knees, and was treated and discharged from the emergency room the same day. She states that she was referred by an attorney to Total Care Plus where she was treated 2-3

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[2] Insurance Law § 5102 (d) defines "serious injury" as a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ or member; permanent consequential limitation of use of a body organ or member; significant limitation of the use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

[3] The derivative claim on behalf of Kar Cheung Wong, plaintiff's spouse, was discontinued.

times per week for about a year commencing a few days after the accident. She states that she received treatment from a psychiatrist, an internist, and a neurologist and received physical therapy with various modalities. Thereafter, she received treatment in China.

Plaintiff asserts that, prior to the accident, she was happily married for twenty years, had four children with her husband, was generally in good health and never suffered back and neck problems or cognitive difficulties. Previously, she worked full-time in restaurants for over fifteen years in an accounting and managerial capacity and, more recently, in the garment industry. However, plaintiff has not worked as a result of her allegedly accident-related injuries.

Following a trial on liability, the jury returned a verdict attributing 55% of the responsibility for the accident to the defendants and 45% to the plaintiff. The damages portion of the trial commenced on December 8, 2004 and concluded on December 15, 2004.

The Trial

The Pertinent Testimony

Plaintiff's 17-year old daughter, Tracy Wong, testified as to the changes in her mother's personality after the accident and to the fact that her close relationship with her mother changed as her mother became withdrawn, very forgetful and argumentative. She explained that, prior to the accident, her mother was active, talkative, outgoing, worked full-time, and did the cooking, cleaning, shopping, laundry and other household chores. However, after the accident, her mother rarely goes out and does not socialize, she forgets

to shower, leaves purchased groceries at the store and clothes at the laundry, and burns food when she cooks. She also testified that her parents' previously good relationship deteriorated after the accident, that they argued constantly and that they were divorced about a year later. Currently, she and her mother reside with a cousin and she and her cousin do a majority of the household chores because her mother cannot.

Wong Kai Cheung, plaintiff's ex-husband, testified that plaintiff's personality changed after the accident. He testified that, after the accident, she became ill-tempered, forgetful, cried and yelled a lot, stopped doing housework and preparing meals, and had no interest in a sexual relationship with him.

Ms. Lam testified that, before the accident, she was in good health and without cognitive or memory problems. She cared for her family, managed the household chores and could handle the tasks of daily living. She explained that for about ten years she owned and operated a series of restaurants with her husband and, when the restaurant was sold, she worked in her brother's garment factory. She testified that she had no memory of the accident, but recalled waking up in an ambulance and being taken to the hospital where she was released the same day after stitches were put in her head. She further testified that she treated at Total Care Plus for about a year and complained of head pain, concentration problems, deteriorating memory, insomnia, nausea and vomiting. She went to China for further medical treatment and has continued with physical therapy in the United States when she could afford it. Ms. Lam testified that her marriage deteriorated due to her short temper, impaired cognition, and lack of sexual drive. She also testified that she remarried

in China in 2003, that she expects her husband to join her here in about a year, and that currently, she lives with her daughter and her niece. She added that she twice attempted to return to work about two or three months after the accident, but explained that because of her injuries she could not handle herself or the tasks of her job.

Plaintiff was cross-examined with respect to her no-fault benefits application which she signed, under penalty of perjury, 85 days after the accident, where she answered "N/A" in response to the question: "Have you returned to work?" Plaintiff explained that, because she does not read or speak English, she relied on her prior attorney to fill it out the application and she reiterated that she did not return to work.

Plaintiff's neurologist, Dr. Irving Friedman, testified that plaintiff was referred to him by her attorney about two and one-half years after the accident and has treated her for the past year and one-half. He reviewed plaintiff's prior medical records, the hospital and ambulance chart from the day of the accident and noted that the Lutheran Hospital[4] trauma evaluation indicated that plaintiff had LOC (loss of consciousness) and amnesia, as a result of the accident. He also testified about previous medical reports, as well as his own findings. Dr. Friedman conducted a physical examination of plaintiff which revealed tightness or spasm of her cervical and lumbar paraspinal muscles, with measurable restrictions in her lumbar and cervical ranges of motion,[5] and percussion pain and tenderness in the back of her

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[4] The Lutheran Hospital record was admitted into evidence.

[5] He found restricted ranges of motion of plaintiff's cervical spine of 30/45° in forward flexion, 30/45° in extension and 60/90° in rotation. With respect to the lumbar spine, he found that plaintiff was only able to bend forward 30/90°, with a similar restriction demonstrated on the straight leg raising test.

head, as well as a bump where stitches were put in. Dr. Friedman also found that plaintiff had significant memory and cognitive problems.[6] Dr. Friedman testified that, subsequent to his first examination of the plaintiff, he reviewed an August 1, 2002 MRI of plaintiff's head taken in China and noted that plaintiff had a benign tumor, a meningioma, in the portion of the brain called the cerebello pontine angle.[7] He explained that, although the tumor can cause facial paralysis and deafness, it does not cause memory deficits since it is not located in the cortex, the part of the brain involved in speech and memory calculations. He consequently diagnosed Ms. Lam with traumatic brain injury based upon head trauma causally related to the accident of November 1, 2000. With respect to plaintiff's ability to perform her ordinary daily activities for 90 out of the first 180 days following the accident, Dr. Friedman testified that:

> "[Plaintiff] has not worked since the accident. She attempted twice to go back to work for shorter periods of time. Could not physically and emotionally do it. This is work that she had done routinely in the past."

On cross-examination, Dr. Friedman reiterated that plaintiff's medical history was very important in making a diagnosis. When cross-examined as to the inconsistencies in the

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[6] He noted that she was able to do simple calculations, but was unable to do serial sevens (where the patient is asked to subtract 7 from 100, then 7 from 93 etc.) and that she was not able to name the President of the United States.

[7] Dr. Friedman explained that the cerebello pontine angle is located in the back of the head where the brain condenses to form the spinal cord. The area called the pons is part of the brain stem and plaintiff had a tumor on the left side of her brain between the cerebellum and the pons.

hospital and ambulance reports as to plaintiff's loss of conciousness,[8] he conceded that the hospital report indicated that plaintiff was alert, aware, had normal motor and verbal skills, and received the highest score, 15 (normal), on the Glasgow Coma scale. However, he explained that the areas of trauma were to the left parietal area of the skull and the right rib area. He testified that, although plaintiff's cerebello pontine angle tumor can cause problems with gait, he directly attributed plaintiff's antalgia to her spinal condition. In diagnosing plaintiff with gait problems and relating them to the accident, Dr. Friedman testified that he relied on other physicians' medical reports. Dr. Friedman also conceded that memory loss, vertigo, personality changes, headaches and tinnitus can be symptoms of a brain tumor and can affect cognitive function. However, on re-direct, Dr. Friedman testified that plaintiff's tumor does not affect cognitive or executive function. He repeated that plaintiff's cognitive deficits are indications of classic traumatic brain injury and noted that the ambulance call report indicated that plaintiff had "altered mental" (abnormal mental status), CNS (central nervous system) trauma, head trauma, hemorrhaging, blunt trauma, and seeming inability to answer basic questions. Dr. Friedman also noted that eight days after the accident, plaintiff complained of dizziness, nausea, insomnia, memory problems, fatigue, and anxiety. Similarly, he referred to Dr. Cheng's July 19, 2001 report which noted plaintiff's complaints of forgetfulness, neck and lower back pain and a cerebral concussion with loss of

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[8] The hospital report noted "positive LOC" (loss of consciousness), but also noted "denied loss of consciousness." The ambulance report stated that plaintiff did not lose consciousness as a result of the accident and indicated that plaintiff's mental status was alert, with her pupils normal.

consciousness, post-concussion syndrome with headache and cognitive dysfunction, and cervical and lumbar strain.

Dr. Mary Hibbard, a clinical neuropsychologist, testified that she first saw plaintiff about three years after the accident. Dr. Hibbard took a history of plaintiff's symptoms and complaints, and conducted a neuropsychiatric evaluation of plaintiff which included tests, computer evaluations, and clinical interviewing in order to assess plaintiff's intellectual functioning, mood and depression. Dr. Hibbard administered IQ and other tests which demonstrated plaintiff's diminished processing speed, reduced intellectual functioning and difficulty with visual memory and executive functioning. She testifed that plaintiff was suffering from severe depression and required sleep medication for chronic sleep impairment, psychotherapy and pain management. She also testified that plaintiff was totally disabled, and that her conditions were permanent and causally related to the accident of November 1, 2000. She opined that plaintiff would be unable to engage in any competitive employment in the future, given her cognitive, emotional and physical symptoms. She also noted that, following traumatic brain injury, plaintiff's cognitive problems, mood and anxiety disorders interacted to create a marked change in a person's personality. Dr. Hibbard further testified that plaintiff's future medical costs (including psychiatric treatment and medication for first year alone of $39,284.00), would aggregate to over $350,000 during her lifespan.

After denial of defendants' motion for a directed verdict and dismissal, defendants presented their direct case, which consisted of the testimony of their medical experts,

Dr. Marlon Seliger, a neurologist, Dr. Solomon Mishkin, a psychiatrist, and defendant Spann, who testified that plaintiff did not lose consciousness following the accident.

Dr. Seliger testified that, when he saw plaintiff on April 17, 2003, she did not have complaints of depression, memory loss or lack of concentration. He found that she had a normal neurologic examination, and full ranges of motion in her neck and back, with normal straight leg raising and no abnormalities in gait. He opined that there was no need for further medical treatment that could be causally related to the accident, and that plaintiff had no disability. He also testified that plaintiff, in relating her medical history, did not tell him that she had been diagnosed with a brain tumor.

Dr. Mishkin testified that he performed a neuropsychiatric examination of plaintiff on July 16, 2004 at which time plaintiff denied any history of illness and did not mention her tumor, which he did not learn of until the trial. He found that plaintiff was cooperative, not depressed, able to recall details of activities for the last 24 hours and give particulars of her personal history and family life. She was able to perform simple arithmetic computations and her abstract ability and judgment were normal. He concluded that there was no need for future psychiatric care, and opined that she had no disability.

The Verdict

At the conclusion of the trial, the jury rendered a verdict finding, *inter alia*, that plaintiff had not suffered an injury which resulted in a significant limitation of use of a body function or system or a permanent consequential loss of use of a body organ or member. The jury did, however, find that plaintiff had sustained a medically determined injury or

impairment of a non-permanent nature that prevented her from performing substantially all of her material acts that constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident. They awarded plaintiff damages in the amount of $70,000 for past pain and suffering, and $80,000 for future medical expenses payable over a period of 0 years.

The Instant Application

Defendants move for an order, pursuant to CPLR 4404(a), vacating and setting aside the jury's verdict on multiple grounds, they point out that:

1. After about three hours of deliberation, the jury returned to the Court with a question: "If questions 1, 2 and 3 are 'No,' does that result in no compensation?" and was informed that the answer would be "Yes." Defendants contend that the jury was searching for a way to change one of their answers to Questions 1, 2 and 3 in order to award compensation.[9] Defendants also argue that the jury should have been directed not to consider past medical expenses because plaintiff received compensation for those expenses in the form of no-fault benefit. Defendants cite to the jury's specific request for an explanation with regard to the Court's statement to the jury - "not taking into account any medical expenses from the date of the accident to the present regarding question number 4."

2. The jury's finding that plaintiff was prevented from performing substantially all of her material acts that constituted her usual and customary daily activities for not less than

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[9] About an hour later, defendants requested that further instructions be given to the jury - that they may not change their answers for the sole purpose of being permitted to award the plaintiff compensation. The Court declined to give further instructions at that time.

90 days during the 180 days immediately following the injury was against the weight of the evidence presented at trial. They argue that neither of plaintiff's experts saw plaintiff until two and one-half or three years after the accident and there was no testimony from any medical experts who treated or examined plaintiff immediately after the accident. Defendants assert that there were no employment or financial records produced to show that she did not work for 90 of the first 180 days following the accident and that her no-fault benefits application indicated that plaintiff did not miss time from work.

3. Defendants argue that the jury's award for future medical expenses for a "non-permanent injury" is in direct contradiction of the Court's specific instructions to award future damages only if plaintiff's injuries were found to be permanent. Moreover, they argue the jury's award of future medical expenses is inconsistent with the finding of no award for future pain and suffering.

4. Finally, defendants contend that the jury's award of future medical expenses ($80,000) over a period of zero years is inconsistent with the Court's instructions that the jury should only write the word "none" for the amount of years for the future award where *no* future award is given.

The Applicable Standards

Pursuant to CPLR 4404(a), a trial court has broad discretionary authority to set aside a jury verdict. Courts are cautioned to exercise such discretion sparingly, so as to avoid usurping the jury's function and unjustly depriving the successful litigant of the benefits of a favorable verdict (*see Nicastro v Park*, 113 AD2d 129 [1985]; *see also Pickering v New*

York City Transit Authority, 299 AD2d 402, 403 [2002]; *Schray v Amerada Hess Corp.*, 297 AD2d 339 [2002]; *Gallagher v Sosa*, 293 AD2d 710 [2002].

It is axiomatic that, to sustain a determination that a jury verdict is not supported by sufficient evidence as a matter of law, or to set aside such verdict as against the weight of the evidence, the verdict must be palpably wrong and there must be no basis upon which the jury could have reached the verdict upon any fair interpretation of the evidence (*see Kimberly-Clark Corp. v Power Authority of the State of New York*, 35 AD2d 330 [1970]; *see also Miftari v Klobucista,* 284 AD2d 634 [2001]; *Sperduti v Mezger*, 283 AD2d 1018 [2001]). Stated differently, the court must find that "there is simply no valid line of reasoning and permissible inference which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence at trial" (*Nicastro*, 113 AD2d at 132, *quoting Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 498 [1978]; *accord Mazza v O'Keefe*, 275 AD2d 696 [2000]; *see also Lolik v Big V Supermarkets, Inc.,* 86 NY2d 744 [1995]; *Kiley v Almar*, 1 AD3d 570 [2003]; *Raugalas v Chase Manhattan Corp.*, 305 AD2d 654, 655 [2003]; *Schray*, 297 AD2d at 339).

In addition to the "fair interpretation" and "valid line of reasoning" analyses, the court may ask whether a reasonable person could have rendered the judgment after receiving conflicting evidence (*see generally Harris v Armstrong*, 97 AD2d 947 [1983]). In making its determination, the court must afford the party opposing the motion the benefit of every inference that may be drawn from the facts presented and evaluate the facts in the light most favorable to the nonmoving party (*see Parkin v Cornell University, Inc.*, 78 NY2d 523

[1991]; *Hanley v St. Charles Hosp. and Rehab. Ctr*, 307 AD2d 274 [2003]; *Calafiore v Kiley,* 303 AD2d 816, 817 [2003]). Thus, the court should deny the motion "where different inferences may be drawn from undisputed facts or where an issue depends upon the credibility of witnesses (*Calafiore,* 303 AD2d at 817, *quoting* 8A Carmody-Wait 2d, NY Prac §59:26).

Discussion

It is well settled that speculation is an insufficient basis upon which a motion to set aside a verdict will be granted (*see People v Simon*, 178 AD2d 447 [1991]). At the outset, contrary to the defendants' first contention, there is no evidence that the jury had completed its deliberations and specifically changed its verdict to award compensation to the plaintiff regardless of the facts of the case. Such argument is "based on little more than speculation as to the possibility of prejudice" (*Snediker v Orange County*, 58 NY2d 647, 649 [1982]; *People v Rhodes*, 92 AD2d 744, 745 [1983]).

To establish a prima facie case that plaintiff suffered a medically-determined injury which prevented her from performing substantially all of the material acts which constituted her usual and customary activities for at least 90 of the first 180 days following the accident (Insurance Law § 5102 [d]), there must be evidence that plaintiff's activities were curtailed "to a great extent rather than some slight curtailment" (*Licari v Elliott*, 57 NY2d 230, 236 [1982]) and evidence of objective medical findings of a medically-determined injury or impairment of a nonpermanent nature which caused the alleged limitations on her daily activities (*see Monk v Dupuis*, 287 AD2d 187, 191 [2001]; *see also Nitti v Clerrico*, 98 NY2d

345, 357 [2002]). Further, plaintiff must submit medical evidence supporting the disability for the requisite period of time (*see Lanuto v Constantine*, 192 AD2d 989 [1993]).

At trial, Dr. Friedman found, *inter alia*, that plaintiff had significant memory and cognitive problems and he noted her difficulties with simple arithmetic. He also diagnosed her with post-traumatic syndrome and persistent anxiety and depression which have been recognized as evidence of a "serious injury" (*see Quaglio v Tomaselli*, 99 AD2d 487, 488 [1984]; *see also Jackson v Mungo One, Inc.*, 6 AD3d 236, 236 [2004]). His findings of traumatic brain injury causally related to the accident are based on: (1) multiple examinations; (2) indications of "altered mental" state and probable loss of consciousness in the ambulance and hospital records; (3) and a review of the records of physicians who treated her in the years since the accident. His findings were confirmed by the results of the extensive neuropsychiatric testing performed by Dr. Hibbard. Dr. Hibbard's testimony also causally linked plaintiff's traumatic brain injury to the subject accident and she concluded that plaintiff has remained totally disabled and unable to perform any competitive type of work. Accordingly, plaintiff's evidence was sufficient to constitute the requisite objective medical proof upon which a fact finder could base a finding in favor of the plaintiff as to the nature and extent of plaintiff's alleged serious injury under the 90/180 day category.

Plaintiff's proof at trial was also sufficient for the fact finder to determine that, as a result of plaintiff's medically determined impairment, her usual and customary daily activities were extensively curtailed. Such proof consisted of plaintiff's testimony regarding her inability to work, as well as Dr. Hibbard's testimony that plaintiff has cognitive deficits

causally related to the accident, which are permanent and debilitating. Furthermore, the testimony of plaintiff, her daughter, and her ex-husband, all demonstrate plaintiff's inability to independently maintain her usual household duties for up to one year following the accident, personality changes, depression, anxiety, forgetfulness, social withdrawal, and lack of sexual drive. As a result, the Court finds that plaintiff was able to demonstrate that she was restricted in her household and recreational activities and that such activities constituted substantially all of her usual and customary daily activities (*see Judd v Walton*, 259 AD2d 1016, 1017 [1999]). Such limitations could be found to constitute more than a "slight curtailment" of plaintiff's activities (*see Licari*, 57 NY2d at 236). The Court notes that plaintiff presented no direct evidence indicating that she was instructed by a medical practitioner to limit her activities; however, the absence of such evidence is reasonable in light of plaintiff's already imposed appropriate restrictions upon herself (*see e.g. Van De Bogart v Vanderpool*, 215 AD2d 915, 916 [1995]; *Cammarere v Villanova,* 166 AD2d 760, 761-762 [1990]).

Moreover, the Court finds the award of $70,000 for past pain and suffering did not materially deviate from what would be reasonable compensation based on a fair interpretation of the evidence (*see e.g. Semple v New York City Tr. Auth.*, 301 AD2d 514 [2003]). A jury verdict should not be set aside as against the weight of the evidence unless the jury could not have reached its verdict on any fair interpretation of the evidence (*Lolik*, 86 NY2d at 746). The amount of compensation to be awarded to an injured person is a question of fact to be resolved by the trier of fact and will only be disturbed when it deviates

materially from what would be reasonable compensation (*see* CPLR 5501[c]; *Britvan v. Plaza At Latham*, 266 AD2d 799, 800 [1999]).

Accordingly, that branch of defendants' motion to set aside the verdict as against the weight of the evidence is denied. In light of the foregoing, the Court notes that, although there was extensive testimony regarding injuries to plaintiff's neck and back, these injuries are not addressed herein.

The Court also rejects defendants' contention that an award for future medical expenses cannot be sustained in light of the jury's determination that plaintiff suffered only "a medically determined injury or impairment of a non-permanent nature" and the jury instruction that future damages could be awarded only "if [it found] that any of plaintiff's injuries are permanent" (*see Wymer v National Fuel Gas Distrib. Corp.*, 217 AD2d 920, 921 [1995]). "Once a prima facie case of serious injury has been established and the trier of fact determines that a serious injury has been sustained, plaintiff is entitled to recover for all injuries incurred as a result of the accident" (*Rizzo v DeSimone,* 6 AD3d 600, 601 [2004]; *see also Gallagher v Samples*, 6 AD3d 659 [2004]; *Deyo v Laidlaw Transit, Inc.,* 285 AD2d 853 [2001]). Plaintiff was not foreclosed from recovering for future medical expenses on the ground that she did not sustain a serious injury under the significant limitation or permanent consequential injury categories. Accordingly, an award of $80,000 for future medical expenses was not inconsistent with a finding that plaintiff sustained a "non-permanent" injury and was supported by the evidence presented by plaintiff.

The jury award for future medical expenses, however, was rendered in contravention of the Court's instructions. Although the plaintiff failed to object to the charge and it became the law of the case (*see Harris v Armstrong*, 64 NY2d 700, 702 [1984]), the court concludes that the error was fundamental (*see Gallagher*, 6 AD3d at 659). Accordingly, the Court will consider the issue in the exercise of its discretion (*see Decker v Rassaert*, 131 AD2d 626, 627 [1987]). Furthermore, the jury's award of medical expenses for a period of zero years is inconsistent with an award for future medical expenses, where the jury was instructed to write the word "none" if they made *no* award for future medical expenses.

CPLR 4404(a) authorizes the court in its discretion to order a new trial "in the interest of justice" upon a motion of either party or on its own initiative. The court may grant a new trial in the interest of justice "if there is evidence that substantial justice has not been done" (*Gomez v Park Donuts, Inc.* 249 AD2d 266, 267 [1998]). The power of a trial court to exercise its discretion and set aside a verdict is a broad one (*see Salazar by Quesnay v Fisher*, 147 AD2d 470, 471 [1989]) and the trial judge must look to his or her own common sense, experience and sense of fairness when arriving at a decision (*see e.g. Micallef v Miehle Co.*, 39 NY2d 376 [1976]).

Here, there is compelling evidence that substantial justice was not done in this case. The jury's award for future medical expenses was rendered in contravention of this Court's instruction, coupled with the inconsistency presented by the jury's determination that "none" was the period of years over which such award was to be made. Accordingly, the

award for future medical expenses is set aside and a new trial is directed as to future medical expenses. The parties shall appear in Part 41 for jury selection on March 25, 2008

This constitutes the decision and order of this court.

E N T E R,

J. S. C.

HON. LARRY D. MARTIN
Justice of the Supreme Court