

**Rotaru v Stutman**

2010 NY Slip Op 32224(U)

August 4, 2010

Supreme Court, Queens County

Docket Number: 30265/00

Judge: Howard G. Lane

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**MEMORANDUM**

SUPREME COURT - QUEENS COUNTY  
IA PART 6

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ION ROTARU and STEPHANIE ROTARU,  
Plaintiffs,

BY: **LANE, J.**

DATED: August 4, 2010

-against-

INDEX NO.: 30265/00

MOTION DATE: July 15, 2008

DAVID STUTMAN, 47 NORTHERN BLVD.  
CORP., SENTRY DETECTION, INC.,  
SENTRY DETECTION, LLC and SENTRY  
DETECTION OF NEW YORK, INC.,  
Defendants.

MOTION SEQUENCE NO.: 3

MOTION CAL. NO.: 36

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After inquest held on March 16, 2010 and based upon the credible testimony and admissible evidence adduced therein, the court finds as follows:

**I. INTRODUCTION**

This is a personal injury action in which plaintiff Ion Rotaru (hereinafter "plaintiff") seeks money damages from David Stutman, 47 Northern Blvd. Corp., Sentry Detection, Inc., Sentry Detection, LLC, and Sentry Detection of New York, Inc. (hereinafter "defendants") for injuries plaintiff, Ion Rotaru, sustained on December 19, 2000 as a result of his being hit by the vehicle of defendant David Stutman while legally crossing the street, sustaining injury to his right leg and plaintiff Stephanie Rotaru seeks money damages for a derivative claim.

By way of procedural background, a Preliminary Conference Order dated March 13, 2002 was issued directing defendant, Sentry, to appear for examinations prior to trial and to provide copies of necessary employment documentation between them and defendant, David Stutman.

Subsequently, on October 7, 2002, a Compliance Conference Order was issued ordering the previous direction and further ordered that defendant, David Stutman, be deposed on December 5, 2002. Defendant Sentry failed to comply with the order and defendant David Stutman died on May 11, 2003, resulting in the action being stayed. Thereafter, the action against the deceased defendant was vacated. After re-serving defendants with plaintiffs' disclosure demands, the defendants still failed to comply. Thereafter plaintiffs moved to have the defendants' answer stricken, and by order dated July 18, 2008 by Justice Lawrence V. Cullen (*Pl.'s Mot. Strike, 2*), plaintiffs' motion was granted.

An inquest was ordered at which plaintiff was the sole witness. He testified and had admitted submitted into evidence the hospital records related to his alleged injuries and medical treatment. After the inquest, the court directed the plaintiff to submit a post trial memorandum of law by April 29, 2010. In addition to the memorandum of law, plaintiff submitted medical records, x-ray, and the medical affirmations of Dr. Nelson

Botwinick and Dr. Jeffrey S. Kaplan, two consulting physicians. Plaintiff demands damages in the total amount of \$800,000.00 for past and future pain and suffering.

## II. FINDINGS OF FACT

Plaintiff, who was 63 years old at the time of the accident, testified that on December 19, 2000, he was walking across the street when he was struck by defendant's vehicle approximately three steps from the curb. As he fell, he experienced pain in his right leg. Immediately after the accident, he was taken by an ambulance to Jamaica Hospital and attended to by physicians at Jamaica Hospital. At Jamaica Hospital, he was diagnosed as having a comminuted fracture of the proximal tibia and fibula and right 5th and 6th rib fractures.

The plaintiff was then placed under the care of Dr. Kenneth Egol, an orthopedic surgeon at Jamaica Hospital who on December 21, 2000, performed a surgical operation involving open reduction and internal fixation of the fractures in the right leg including repair of the right tibial plateau and tibial shaft fracture. As a result of the surgery, permanent hardware is inserted into plaintiff's leg consisting of 3.5 cortical screws as well as a 5-hole ISS Plate locked proximally and distally for the shaft fracture. Plaintiff was non-weight bearing for

approximately six (6) weeks after the operation, and required constant pain management.

After the first operation, plaintiff remained in the hospital for fifteen (15) days until January 2, 2001 when he was released. Upon discharge, the plaintiff still experienced pain and required a nurse to administer medication, assist plaintiff to go to the bathroom, and for other personal needs. In addition, plaintiff received extensive home physical therapy. On February 22, 2001, plaintiff was re-admitted to Jamaica Hospital, and underwent a second surgical operation on February 26, 2001, to repair the nonunion of the right tibia, which involved removing a bone graft from the iliac crest, and packing it into the defect in the tibia. As a result of the surgery, further permanent hardware is inserted into plaintiff's leg consisting of 3 screws and a DePui 6-hole plate. Plaintiff required further constant pain management and was non-weight bearing.

After the second operation, plaintiff remained in the hospital for four (4) days until March 2, 2002 when he was released. Plaintiff still required a nurse to assist with his personal needs, and further required in-home physical therapy that included training in ambulation, gait training and other therapeutic exercise. In addition, plaintiff required further physical therapy at the Orthopedic and Rehabilitation Center of

New York for approximately one (1) month. The plaintiff did not become fully weight bearing until almost six (6) months after the accident occurred. The surgical incisions from the operation left the plaintiff with scarring on his right leg, and decreased range of motion and flexion of the right knee.

At the time of inquest, the plaintiff testified that he still experiences pain every day, especially when the weather changes. He testified that as a result of the injury to his leg, he is not able to participate in or enjoy physical activities he engaged in prior to his injury (i.e., gardening, home repairs, kneeling in church, playing with his grandchildren, walking). Plaintiff further testified that his leg injury has limited his ability to walk and he can only walk short distances until his leg is tired and in pain.

### III. DISCUSSION

Under CPLR 4518(c), medical records are admissible as evidence as long as they are duly certified, sworn or affirmed (*Grasso v. Angerami*, 79 NY2d 813, 814 [1991]; *Laguerra v. Chavarria*, 41 AD3d 437 [2d Dept 2007]). Here, plaintiff submitted certified, affirmed or sworn medical and hospital records of consulting physicians, Dr. Nelson Botwinick and Dr. Jeffrey S. Kaplan, orthopedic surgeons.

In Dr. Botwinick's report dated July 19, 2002, which report is based on an orthopedic examination performed on July 17, 2002, he concluded that the December 19, 2000 accident caused plaintiff to sustain a severe injury to his right leg, to wit, a Schatzker Type 6 tibial plateau fracture, which caused soft tissue damage and a severe comminuted intra articular fracture of the right tibial plateau requiring open reduction internal fixation of the right tibial plateau fracture with plate and screws. He further notes that plaintiff had persistent pain in the right knee, night pain and swelling, decreased sensation, limitation of motion, and can only walk a short distance without assistance. He opines that there is a significant chance that plaintiff will suffer from degenerative arthritis and require a knee replacement and that plaintiff's prognosis is poor.

In Dr. Kaplan's report dated May 14, 2009, which report is based on an orthopedic examination performed on the same date, he concluded that the plaintiff has persistent pain in the right knee, pain with stair ascent, kneeling, pain and stiffness upon coming to a stand, pain when the weather changes, requires aspirin several time weekly, requires continued physical therapy, suffers from functional limitations of the right knee, apparent articular surface loss on the joint, and scarring. He opines that plaintiff's prognosis is poor, that post-traumatic arthritis can be expected, and that he may require a knee replacement

surgery.

Accordingly, based on plaintiff's testimony, and the admitted medical records and affirmation the court finds that plaintiff has suffered a permanent injury as a result of the accident on December 19, 2000.

#### **A. DAMAGES**

Having established that the plaintiff has suffered a permanent injury, the court must determine an appropriate measure of damages. "An unwarranted and excessive award after inquest will not be sustained, as to do otherwise 'would be tantamount of granting the plaintiff an 'open season; at the expense of a defaulting defendant' (citations omitted)" (*Newman v. Greenblatt*, 260 AD2d 616 [2d Dept 1999]).

##### **1. Damages for past and future pain and suffering**

The measure of damages for pain and suffering is the fair and reasonable compensation in light of all evidence in the case (*Tate v. Colabello*, 58 NY2d 84 [1983]). To calculate future pain and suffering, reference may be made in part to an actuarial life table<sup>1</sup>, in order to determine the estimated life span of the

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<sup>1</sup> See, *Life Expectancy Tables*, N.Y. PJI, app. A (2009) [Average life expectancy of a white male in the United States in the age range of 63-64 is 17.3 years]

plaintiff (*Bermeo v. Atakent*, 241 AD2d 235, 239 [1st Dept 1998]). A fair interpretation of the evidence presented in this case, a review of the range of damages awarded in cases in which similar or analogues injuries were sustained support a total damages award of \$750,000.00 for past and future pain and suffering, \$350,000.00 for past pain and suffering, and \$400,000.00 for future pain and suffering (see, *Orellano v. 29 East 37th Street Realty Corp.*, 4 AD3d 247 [1st Dept 2004] [jury verdict of \$2.5 million for past pain and suffering and \$3.5 million for future pain and suffering was held excessive to the extent that it exceeded \$850,000 and reduced to \$375,000 each for plaintiff, a 47 year old man who sustained a comminuted fracture of the tibia and fibula treated with several operations over a 2 month hospital admission resulting in partial permanent disability]; *Lanpont v. Savvas Cab Corp. Inc.*, 244 AD2d 208 [1997] [jury verdict of \$200,000 for past pain and suffering and \$500,000 for future pain and suffering was upheld for plaintiff who sustained injury to the medial tibial plateau of the right knee treated with surgery that required the placement of screws and metal plates, was left with scaring and abnormalities, atrophy of quadriceps, instability of medial and lateral joints, and difficulty walking]; *Ferrer v. City of New York*, 49 A.D.3d 396 [1st Dept 2008] [jury verdict of \$1,011,240 for past pain and suffering was held excessive and reduced to \$600,000 for past

pain and suffering for plaintiff, a 25 year old man who sustained a fracture to the right tibia treated with two operations and further causing complications of the lower back, and left knee requiring surgery of the left knee, resulting in permanent disability and use of a cane and leg brace to ambulate six (6) years after the accident].

**II. CONCLUSION**

Accordingly, after inquest, this court awards damages in the total amount of \$750,000.00 which represents \$350,000.00 for past pain and suffering and \$400,000.00 for future pain and suffering.

Submit order.

Counsel is directed to contact the clerk of IAS Part 6 at (718) 298-1210 for retrieval of plaintiffs' exhibits and records submitted to the court for the inquest. Any exhibits not retrieved by August 20, 2010 will be deemed abandoned and will be destroyed without further notice to the parties.

A courtesy copy of this memorandum is being mailed to counsel for plaintiffs.

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**Howard G. Lane, J.S.C.**