

Birkbeck v Central Brooklyn Med. Group, P.C.

2011 NY Slip Op 33491(U)

August 22, 2011

Supreme Court, Kings County

Docket Number: 4598/97

Judge: Richard A. Goldberg

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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PATRICIA BIRKBECK, as Executrix of the Estate
of DONALD W. BIRKBECK, deceased, and
PATRICIA BIRKBECK, individually,

By: Hon. Richard A. Goldberg
Date: August 22, 2001

Plaintiffs,

DECISION & ORDER

- against -

Index No. 4598/97

CENTRAL BROOKLYN MEDICAL GROUP,
P.C., JACOB WEISSMAN and RUTHVEN FARRELL,
as Executrix of the Estate of BERTRAND FARRELL,

Defendants.

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Defendants Central Brooklyn Medical Group, Jacob Weissman (“Dr. Weissman”) and Ruthven Farrell as Executrix of the Estate of Bertrand Farrell (“Dr. Farrell”) move pursuant to CPLR 4404(a) after trial of this medical malpractice action both to set aside the jury verdict in favor of plaintiff as against the weight of the evidence and to vacate the jury’s damages award as excessive.

Plaintiff’s decedent, Donald Birkbeck, a former smoker, died on May 23, 1997 at age 64 from lung cancer. The admitting history taken at Brookdale Hospital on January 24, 1997 reveals that decedent acknowledged smoking two packs of cigarettes per day for 30 years. His executrix claims that Dr. Weissman, decedent’s long-time internist at Central Brooklyn Medical Group and Dr. Farrell, a radiologist there, each failed to diagnose the resulting lung cancer and thereby proximately caused injury to decedent and his demise by diminishing his chance of survival.

After a two-week trial the jury found several departures by defendants from good and accepted medical practice regarding decedent. Specifically, the jury decided that Dr. Weissman’s departures included his failure to order a chest x-ray in June, 1995 and his failure to order a CT scan of decedent in October or November, 1995 and again in May or June, 1996. Dr. Farrell’s departures, according to the jury’s special verdict, included improperly interpreting decedent’s x-ray taken on October 19, 1995 and failing to order a lateral chest x-ray in October, 1995. The jury thus assessed

60% liability against Dr. Weissman and Central Brooklyn Group, 40% liability against Dr. Farrell and Central Brooklyn Medical Group, and awarded a total of \$3.7 million: \$1 million for conscious pain and suffering, \$1 million for loss of services and \$1.7 million for wrongful death pecuniary losses over the next 17 years.

Defendants contend that no credible evidence supports the jury's verdict. They highlight decedent's medical records which show that he exhibited no lung cancer symptoms to his physicians until September, 1996, only four months before the January 7, 1997 lung cancer diagnosis. Those records also reveal that decedent himself never complained about shortness of breath to Dr. Joseph Kelter, his cardiologist, during eight visits between December 1995 and October 1996. A review of about 20 visits to the Central Brooklyn Medical Group during 1995 and 1996 reflect only two complaints of coughing, in June 1995, and on October 19, 1995 which antibiotics resolved. Both sides' medical experts agreed that coughing and shortness of breath worsen if indicative of lung cancer and that lung cancer often progresses asymptotically until well-developed.

However, plaintiff counters that the jury verdict rests upon departures even without continuous symptoms or considering only the symptoms listed in defendants' records. Plaintiff stresses, for example, that Dr. Farrell's improper x-ray interpretation simply resulted from his failure to compare the October 1995 and March 1990 x-rays. His failure to obtain a lateral x-ray view in evaluating a patient for a cough similarly constitutes a departure, plaintiff argues, whether or not the patient displays continuous symptoms. Plaintiff also cites an article from defendant's own expert, Dr. John Austin regarding the taking of lateral films as the standard of care.

In addition, plaintiff contends that the abnormalities noted in Dr. Farrell's report alone necessitated Dr. Weissman to order a CT scan and that the five year absence of a chest x-ray for decedent, a heavy smoker with rheumatoid arthritis, equally warranted concluding that Dr. Weissman departed from good and accepted medical practice irrespective of the chronic or transient nature of decedent's complaints. Plaintiff thus persuasively argues that on the basis of the evidence presented at least some valid line of reasoning and permissible inferences existed for the jury to reach its conclusion and that defendant failed to meet its burden to show otherwise, Cohen v. Hallmark Cards, 45 NY2d 493, 499 (1978).

The Court must avoid the temptation to usurp the jury's credibility resolution and fact-finding functions. "Although there was conflicting testimony from medical experts . . . the credibility of the testimony of these witnesses, and the weight to be accorded to each, were issues which were properly left to, and resolved by, the jury." Gray v. McParland, 255 AD2d 359, 360 (2d Dept 1998). The Appellate Division, Second Department has expressed an especially heightened sensitivity for a jury's verdict in the present type of medical malpractice case involving a diminished life expectancy. In order to establish causal relationship, "[I]n cases of this nature, the plaintiff's expert need not quantify the exact extent to which a particular act or omission decreased a patient's chance of survival or cure, as long as the jury can infer that it was probable that some diminution in the chance of survival had occurred (citations omitted)." Jump v. Facelle, 275 AD2d 345, 346 (2d Dept 2000). Accordingly, the Court will not disturb the jury's findings regarding liability.

However, the Court finds that the jury's damages award materially deviated from reasonable compensation as shown in comparable cases. CPLR 5501(c) as amended by the Laws of 1986, ch. 682 specifically grants the Appellate Division this standard of review but case law also advises trial courts to utilize it, Ashton v. Bobruitsky, 214 AD2d 630, (2d Dept 1995). The Appellate Division, First Department's recent decision in Donlon v. City of New York, _____ AD2d _____, 727 NYS 2d 94, 2001 WL 722783 at *2 (1st Dept June 28, 2001) extensively analyzes CPLR 5501(c) and succinctly summarizes that the method of review involves "case comparison reasonableness."

Here, the Appellate Division, Second Department's 1999 decision in Olsen v. Burns, 267 AD2d 366 (2d Dept 1999) serves as a useful reference. There, the appellate ruling reduced a \$1,146,000 pre-death pain and suffering award to \$700,000 in a comparable medical malpractice case. Facts summarized in 9 Judicial Review of Damages (JRD) 171 disclose that plaintiff, a 56-year-old woman, endured eight months of pre-death pain and suffering resulting from a failure to diagnose lung cancer, as in this case.

A more recent Appellate Division, Second Department decision, Johnson v. Queens-Long Island Medical Group, P.C., 272 AD2d 524 (2d Dept 2000) cited Olsen v. Burns supra and reduced a \$4 million dollar pain and suffering award by 70% to \$1.2 million dollars to the estate of a 15-year-old girl. Further information in 9 JRD 63 shows that the case involved a failure to diagnose lupus and 50 days of pain and suffering.

Similarly, a failure to fully and promptly investigate the development of breast cancer which metastasized to a plaintiff's lymph nodes generated an \$800,000 verdict in Simmons v. East Nassau Medical Group, 260 AD2d 463 (2d Dept 1999) and a reduction to \$450,000 which resulted in an amended judgment of \$112,500 after apportioning 25% liability.

An earlier Appellate Division, Second Department cancer case, also involving an internist's malpractice, Donohoe v. Goldner, 168 AD2d 412 (2d Dept 1990) found \$900,000 reasonable compensation for a 50-year-old woman's pain and suffering. In Connolly v. Pastore, 203 AD2d 412 (2d Dept 1994), allowing a period of time to pass, as here, when a doctor could have successfully treated a decedent's cancer which then metastasized produced a \$500,000 jury verdict and a reduction to \$300,000. Additional facts mentioned in 4 JRD 15 reveal a 75-year-old decedent who endured three years of pain and suffering.

Here, \$750,000 represents an appropriate award given this case law and considering all relevant circumstances including decedent's age, the nature of his ailment and his period of distress. \$750,000, in other words, for the pain and suffering of a 64-year-old decedent suffering for months from belatedly diagnosed, advanced lung cancer reasonably compares with other pertinent cases.

Decedent's death on May 23, 1997 terminated plaintiff's loss of consortium claim and defendants correctly note that plaintiff proved no specific facts or special damages concerning that claim. Plaintiff, herself concedes that the Court should reduce this \$1 million dollar aspect of the jury's award to \$200,000. However, several Appellate Division, Second Department cases warrant a reduction to \$100,000. For example, the decision in Ferrari v. Lutheran Medical Center, 236 AD2d 509 (2d Dept 1997) affirmed a \$50,000 loss of services award stemming from the failure to diagnose that decedent's non-Hodgkins lymphoma; the decision last year in Damen v. North Shore University Hospital, 274 AD2d 371, 372-373 (2d Dept 2000) reduced a \$50,000 award to \$20,000 where doctors left a laparotomy pad in that plaintiff's abdomen; and the decision five years ago in Mullen v. Eswar, 233 AD2d 376, 377 (2d Dept 1996) reduced a \$75,000 award for past and future loss of services to \$25,000 where defendants' failure to manage an infection caused unsuccessful hip replacement surgery. Here, the permanent loss of consortium coupled with uncontradicted evidence

establishing the existence of a forty-year marriage exhibiting the elements of affection, companionship, society and solace central to a consortium claim, Millington v. Southeastern Elevator Co., 22 NY2d 498 (1968), make a \$100,000 award appropriate.

The \$1.7 million wrongful death pecuniary damages award also merits reduction. “[T]he determination of pecuniary damages in [a wrongful death] action is peculiarly within the province of the jury [citations omitted] and its determination will generally not be disturbed unless the award deviates materially from what is reasonable under the circumstances [citations omitted].” Altmajer v. Morley, 274 AD2d 364 (2d Dept 2000). Combining decedent’s \$1,288.60 monthly police pension benefit with his \$1,227.80 monthly Social Security benefit creates a \$30,196.80 annual loss attributable to his death. Multiplying this figure by decedent’s 17-year life expectancy produces an overall quantifiable loss of \$513,345.60. However, the Court recognizes that adult children suffer recoverable “pecuniary loss” from the death of a parent and that plaintiff, as decedent’s spouse, also can seek recovery for personal compensable losses such as loss of advice and guidance. Gonzales v. New York City Housing Authority, 77 NY2d 663 (1991)

Indeed, the Appellate Division, Second Department’s aforementioned decision in Olsen v. Burns, supra considered the “pecuniary loss” of adult children and reduced various awards to \$25,000 to each of the seven adult offspring. However, the decisions in Loehner v. Simons, 239 AD2d 468, 469 (2d Dept 1997) and Baranowitz v. New York City Transit Authority, 243 AD2d 521 (2d Dept 1997) cautioned that the absence of evidence about economic injury or pecuniary loss to an adult child negates wrongful death recovery by such financially independent adults.

Here, only minimal evidence was proffered to indicate that decedent provided guidance or services to his wife or to his six adult children although one of them and her two children resided with him and his wife for a while. Hence, a composite award of \$70,000 to all decedent’s distributees, Adamy v. Ziriakus, 92 NY2d 396, 404 (1998) should supplement the quantifiable loss.

There was testimony from plaintiff’s expert oncologist, Dr. Gregory Berk that decedent would have benefitted from a 60 to 80 percent cure rate if timely diagnosed with Stage I or Stage II lung cancer in June, October, or November 1995 and from a 25 to 60 percent cure rate if timely diagnosed with Stage II or Stage IIIA lung cancer in May or June 1996. Defendants’ own expert oncologist, Dr. Paul Feffer acknowledged that an earlier diagnosis of decedent’s condition impacted

his chances for a cure. Averaging the most favorable cure rate testimony of plaintiff's expert results in a cure rate of 70%.

Such considerations necessarily affect evaluating a jury's verdict. The Appellate Division, First Department's decision in Kallenberg v. Beth Israel Hosp., 45 AD2d 177 (1st Dept 1974) aff'd 37 NY2d 719 (1975) discussed survival percentages and permitted recovery where expert medical testimony indicated a 20 to 40 percent chance of survival if defendants had properly administered a medication thereby allowing surgery to proceed. A decade later the decision in Schneider v. Memorial Hospital for Cancer and Allied Diseases, 100 AD2d 583, 584 (2d Dept 1984) reduced \$580,000 in wage and services losses to \$200,000 after considering Kallenberg and that decedent's diminished condition. There, as here, cancer metastasized following a delay in diagnosis and the decision noted that "The size of the verdict fails to reflect [decedent's] poor prognosis and reduced life expectancy as well as the likelihood of a shortened work life brought about by the incurable nature of her underlying disease, not caused by any negligence of defendants, and the debilitating side effects of its treatment." The more recent decision in Forrester v. Zwanger - Pesiri Radiology Group, 274 AD2d 374 (2d Dept 2000) equally emphasized the importance of considering and contrasting 60 to 70 percent cure rates for earlier diagnosing lung cancer with the less than 5 percent cure rate resulting after belatedly discovering a large, inoperable tumor that precipitated death 11 months later.

This loss of chance approach attributed to Restatement (Second) of Torts, § 323a and advocated by Professor Joseph H. King, Jr. in Causation, Valuation and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences, 90 Yale L.J. 1353 (1981) repeatedly generates debate. See, Darrell L. Keith, Loss of Chance: A Modern Proportional Approach to Damages in Texas, 44 Baylor L. Rev. 759 (1992); Margaret T. Mangan, The Loss of Chance Doctrine: A Small Price to Pay for Human Life, 42 S.D.L. Rev. 279 (1997); Christopher Paul Reuscher, McMullen v. Ohio State University Hospitals: This Isn't Vegas, But Don't Tell The Courts - Playing with Percentages and the Loss-of-Chance Doctrine, 34 Akron L. Rev. 767 (2001). The South Dakota Supreme Court's decision last year in Jorgenson v. Vener, 616 NW2d 366 (2000), which recognized the loss of chance doctrine, noted that 19 states have accepted and 15 states have rejected the doctrine. Supra 616 NW2d at 369, fns. 3 and 6. That court's comprehensive opinion

recognized that “. . . a physician should be subject to liability only to the extent that he contributed to the harm. Therefore, the amount of damages recoverable should be equal to the percent of chance lost multiplied by the total value of a complete recovery.” Supra, 616 NW2d at 372.

The previously cited Appellate Division, decisions in Kallenberg, Schneider, Forrester and Jump all recognize the loss-of-chance doctrine and Kallenberg enjoys the distinction, according to one source, as the first case to expressly authorize recovery for loss of less than a 50 percent chance of survival. Keith, supra, p. 765, n. 20. Proportionate recovery or calculating damages in accordance with the value of the lost chance represents a logical, equitable corollary to these decisions and the loss-of-chance doctrine, itself. Indeed, limiting plaintiff’s recovery in this case to the loss of her decedent’s 70% chance of survival simply follows the principle illustrated by Professor King’s reference to a doctor misdiagnosing the condition of a patient with only a 40 percent chance of survival. Defendants in that illustration faced liability for only 40 percent of the victim’s loss. King, supra at 1382.

Discounting the \$513,345.60 quantifiable pecuniary damages proportionately with decedent’s loss of a 70% chance of overcoming his lung cancer reflects the present state of this area of the law. Indeed, evidence from plaintiff’s experts regarding decedent’s diminished opportunity for a cure coupled with decisions from the Appellate Division, Second Department and other jurisdictions, as well as scholarly consideration of legal principles applicable to damages, cure rates, and reduced chances of survival, strongly suggest a proportionate recovery standard to utilize for quantifiable pecuniary damages in a medical malpractice case: the percent of chance lost multiplied by the readily quantifiable damages over the decedent’s actuarial life expectancy. Applying such an approach in this case allows recovery of \$359,341.92 or 70% of decedent’s \$513,345.60 quantifiable benefits over his 17-year life expectancy. A total wrongful death pecuniary loss of \$429,341.92 thus results (i.e., \$359,341.92 + \$70,000 for the distributees’ pecuniary loss).

The “loss of chance” doctrine is analogous to a finding of comparative negligence in a standard negligence case. In that situation a plaintiff’s award of damages would be reduced by his percentage of comparative fault. In the instant case, however, the Court is limiting the applicability of the doctrine to reduce only the quantifiable pecuniary damages, since the jury was never charged to specifically find the percentage of loss of chance nor was it advised to render a verdict for full

damages which the Court would then reduce by the percentage of loss of chance found by the jury.

Proper procedure therefore requires that the Court direct a new trial on the issue of damages unless plaintiff stipulates to reduce the verdict in accordance with this Court's excessiveness determination. (CPLR 4404 [a]; Tri-State Aluminum Products, Inc. v. Paramount Macaroni Mfg. Co., Inc., 247 AD2d 606 [2d Dept 1998]). Accordingly, it is

ORDERED that the branch of defendants' motion to set aside the jury verdict as against the weight of the evidence is denied; and it is further

ORDERED that the remaining portion of defendant's motion to vacate the jury's damage award as excessive is granted to the extent that this matter is set down for a new trial upon the issue of damages only unless plaintiff shall stipulate in writing to reduce her award as to damages from the sum of \$3,700,000 to \$1,279,341.92: \$750,000 for past pain and suffering; \$429,341.92 for wrongful death pecuniary loss, and \$100,000 for plaintiff's loss of consortium. The stipulation shall be served and filed with the Clerk of the Court within 30 days after the date of this order.

Settle structured judgment pursuant to CPLR Articles 50-A and 50-B in accordance with this order.

The foregoing constitutes the decision and order of the Court.

ENTER :


J.S.C.