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# TRANSPORTATION LAW UPDATE



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Volume XI, No. 7

## Commercial Motor Vehicle Section:

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## NEW YORK EXCESSIVE VERDICT



**Diane B. Carvell**

Generally, the amount of damages awarded for personal injury is a question for the jury. In New York, the judgment of a jury is entitled to great deference based upon its evaluation of the evidence, including conflicting expert testimony. While the jury system was designed to render fair and impartial verdicts based upon the evidence presented, sometimes one of the parties may feel a jury did not get it right. Defendants often feel this was way when there is an excessive verdict.

Prior to 1986, the New York courts could set aside a verdict only if it “shocked the conscience” of the court. The New York State Legislature changed that standard when it passed a statute which provides a remedy if the award “materially deviates from reasonable compensation.” The statute provides in pertinent part:

In reviewing a money judgment in an action in which an itemized verdict is required ... in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award ... the Appellate Division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation. N.Y.C.P.L.R. § 5501(c).

The overall intent of this statute was to promote stricter scrutiny of jury awards and ensure greater fairness for similarly situated defendants throughout the state. Fortunately, it applies to all cases - even those involving the transportation industry.

The statute which applies to trial courts, appellate courts, and federal courts requires the court to state the reasons for its rulings on the amounts of verdicts and the factors the court considered in complying with this new standard. In reviewing a case for possibly setting aside a verdict, it is necessary for the court to review other cases with the same or similar injuries to determine the amount that is “reasonable compensation” in the State of New York.

In New York, a jury generally does not award one lump sum. Rather, a jury will give specific

amounts to each item, such as past lost earnings, future lost earnings, past pain and suffering, future pain and suffering, etc. This method allows the parties to see how the award was divided and possibly seek to set aside the verdict in whole or in part. The courts, when applying the “material deviation” standard, will look at each item awarded separately.

Recently in Vukovich v. 1345 Fee LLC, 2010 NY Slip OP 02986 (1st Dept. April 13, 2010), a 49 year-old man received an electrical shock from uncapped electrical wires protruding from an open junction box, causing him to fall from a ladder. He sustained head, neck, and back injuries. A New York City jury awarded him \$1,661,000 for future pain and suffering. The trial court ordered a new trial unless the plaintiff accepted, *inter alia*, \$1 million for future pain and suffering. The Appellate Division agreed. The evidence presented at trial revealed that this accident aggravated the plaintiff’s preexisting degenerative conditions. Two surgical procedures performed within a week of each other to minimize recovery time were largely successful in alleviating, if not eliminating, his symptoms. The plaintiff would still need physical therapy, anti-inflammatories and pain medication in the future. A third surgery was contemplated for the future. Although he could not return to work performing manual labor, he could work in a sedentary position. Taking into account all of those factors, the Appellate Division believed that the jury award for future pain and suffer-

ing materially deviated from reasonable compensation under the circumstances.

In Zimonch v. Bridge View Palace, 69 A.D.3d 928 (2d Dept. 2010), the plaintiff fell from a height of two feet onto a concrete floor while cutting away concrete and brick to create a larger window. Zimonch sustained herniated discs at L4-5 and L5-S1, and a bulging disc at L3-4. A Kings County (Brooklyn) jury awarded the plaintiff \$300,000 for past pain and suffering and \$850,000 for future pain and suffering. The Appellate Division found the pain and suffering awards excessive. A new trial on damages was ordered unless the plaintiff accepted a written stipulation consenting to an award of \$150,000 for past pain and suffering and \$300,000 for future pain and suffering.

Defendants use this statute to seek reduction of excessive verdicts, which is often called remittitur. However, this statute can also be used for additur (increase jury verdict) by the plaintiffs. In Sanchez v. Morrisania II Assoc., 63 A.D.3d 605 (1st Dept. 2009), a 32 year-old sustained an ankle fracture and a right rotator cuff tear requiring surgery. A Bronx jury awarded \$100,000 for past pain and suffering. The Appellate Division ordered a new trial on pain and suffering unless the defendants stipulated to increase the award to \$250,000.

Many clients have reported that in this current economy, jury awards are coming in at two extremes – either

unusually low or excessively high. If or when an excessive New York verdict occurs in New York, there is a means by which one can seek a reduction of the award if it “materially deviates” from an amount that would be reasonable compensation in the State of New York.

**Diane B. Carvell** is an associate in Rawle & Henderson’s Harrisburg office and concentrates her practice in the area of commercial motor vehicle defense. She practices in both New York and Pennsylvania.

Diane received her law degree in 1996 from Dickinson School of Law where she was the recipient of the Golub Foundation Graduate Scholarship and the Sandor Yelon Award. In addition, she was a member of the *Dickinson Journal of International Law*. She graduated, *magna cum laude*, from Elmira College in 1993 where she was Phi Beta Kappa and the recipient of the Iris Leadership award.

Diane served as a legal intern for the Honorable John P. Callanan, Schuyler County Court, Watkins Glen, NY and in the Chemung County Public Defender’s Office in Elmira, NY. In addition, she is an accomplished writer and frequent contributor on legal issues.

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