

Short Form Order

## NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JOSEPH J. ESPOSITOPart 26

Justice

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ELZA GARZON,

Index  
Number: 700736/15

Plaintiff,

- against -

Motion Date: 5/4/17

STEVEN BATASH and  
STEVEN BATASH, M.D., P.C.,Motion  
Cal. Number: 37

Defendants.

Motion Seq.: 1

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The following papers numbered 1 to 3 were read on this post-trial motion by defendant to set aside the jury verdict in this action as excessive.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1
Opposition-Affirmation-Exhibits.....	2
Reply(s).....	3

**FILED**  
SEP 28 2017  
COUNTY CLERK  
QUEENS COUNTY

Upon the foregoing papers numbered 1 to 3, it is ordered that the motion pursuant to CPLR 4404(a) to set aside the jury verdict in this action as excessive and against the weight of the evidence and set this action down for a new trial on the issue of monetary damages, is decided as follows:

Plaintiff, a 49 year old female, was injured during an endoscopy performed by defendant, Dr. Steven Batash on June 29, 2014. Following the procedure, plaintiff experienced abdominal pain and discomfort, nausea, and vomiting. She was told that her post-endoscopy discomfort was normal and was sent home after the vomiting subsided. She required the assistance of her daughter and a nurse to walk out of the facility. Once plaintiff arrived home she continued to experience a burning sensation, and vomited again. After unsuccessfully attempting to contact Dr. Batash and the endoscopy facility, plaintiff's daughters brought her to the emergency room. A CT scan revealed a perforation of a duodenal diverticulum. Plaintiff required emergency surgery to repair the perforation. Plaintiff testified that after being informed she would require surgery she feared for her life. Her surgery incision was closed with eighteen staples. Following surgery, plaintiff was confined to her hospital bed and required a urinary catheter, an NG tube, and a feeding tube for approximately four to five days. She could not move at all and required injections to prevent blood clots. She remained hospitalized for nine days post-surgery. Upon discharge from the hospital she was prescribed a pain killer which she took for five days. A week later she had to return to the hospital due to nausea and vomiting. She was hospitalized for one night. Doctors removed her surgical stitches during the second hospitalization. She required assistance from her daughters to

perform basic tasks for the first month after her hospitalization. Ms. Garzon attended physical therapy sessions three times a week for approximately six to seven weeks. She was able to return to work after two and one half months but had to wear a brace and could not perform all of her former job duties such as lifting heavy objects. Plaintiff has a seven and one-half inch surgical scar. When she sees the scar it reminds her of her experience. She has also avoided getting a recommended colonoscopy because this experience had made her fear possible complications. Plaintiff currently experiences occasional pain that she testified was, "very small," "comes and goes," and is, "nothing serious now." Plaintiff also testified at her June 4, 2015 deposition that she had no physical complaints related to the perforation and that she had no loss of activities as a result of her injury.

Plaintiff's expert, Dr. Theodore Perlman testified that plaintiff's scar is permanent and that although plaintiff is not currently experiencing any pain in the area of the scar, the procedure and resulting internal scar tissue may increase plaintiff's chances of experiencing future complications such as small bowel obstruction, hernias in the area of the incision, bacterial overgrowth, and intestinal discomfort. Doctor Perlman testified that he does not know if any of these complications will occur in the future, but there is an increased risk. His statements were purely speculative and he could not specify the level of increased risk.

After the trial, the jury returned a verdict in favor of the plaintiff, finding that defendant Steven Batash had departed from good medical practice in performing the June 29, 2014 endoscopy and that the departure was a substantial factor in causing plaintiff's injuries. The jury awarded plaintiff \$1,500,000 for past pain, suffering and loss of enjoyment of life, and \$1,000,000 for future pain, suffering and loss of enjoyment of life (over 33.5 years).

Defendants now move pursuant to CPLR 4404(a) and 5501(c) to reduce or set aside the verdict as deviating materially from reasonable compensation for plaintiff's injuries. Defendants do not challenge the jury's finding of liability against defendants.

Pursuant to CPLR 4404(a), upon the motion of any party, "the court may set aside a verdict or any judgment entered thereon ...or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence, in the interest of justice...." "The amount of damages to be awarded to a plaintiff for personal injuries is a question for the jury, and the jury's determination will not be disturbed unless the award deviates materially from what would be reasonable compensation," (*Scaccia v. Bieniewicz*, 151 A.D.3d 900.) In evaluating whether an award materially deviates from what would be reasonable compensation, the court should look to the standard set forth in CPLR 5501(c). Although CPLR 5501(c) expressly addresses the Appellate Division's authority to overturn a jury's damages verdict, its "material deviation" standard has also been applied to trial courts (*see Osiecki v Olympic Regional Dev. Auth.*, 256 AD 2d 998; *see also Cochetti v Gralow*, 192 AD 2d 974).

In determining whether an award constitutes a material deviation from reasonable compensation, the Court is required to compare the jury's verdict to those verdicts resulting from factually similar situations (*see Donlon v City of New York*, 284 AD 2d 13).

Defendant cites several cases with comparable injuries.

In Greco v O'Connor, (2009 WL 9053585, 2009 WL 5667220), the 74 year old plaintiff suffered a bowel perforation during a colonoscopy. Six days later she was admitted to the hospital with a bowel perforation that required colostomy and subsequent colostomy reversal that required a nine day hospital admission as well as incision site hernias necessitating two additional surgeries. The jury awarded plaintiffs a total of \$500,000 (\$300,000 for past pain and suffering, \$150,000 for future pain and suffering and \$50,000 on husband's loss of services claim) .

In Arasin v Mehlman, (2007 WL 7952740), the 45 year old plaintiff sustained a rectal tear during a colonoscopy. She experienced pain in the buttocks, nausea, vomiting and dry-heaves. She was forced to undergo surgery to repair the rectal tear which necessitated a five day hospital stay. Following surgery, plaintiff required the assistance of family members to perform household duties. She missed three weeks from work and was forced to limit her activities when she returned to work. The jury awarded her \$475,000 for past pain and suffering. Defendant's motion to set aside or reduce the verdict was denied by the trial court.

In DeRosa v Kaali, (240 A.D.2d 534 [1997]), the plaintiff sustained a perforated bowel during tubal ligation surgery. Plaintiff required a second surgery to repair the perforation. The jury awarded plaintiff \$300,000 for past pain and suffering and \$680,000 for future pain and suffering. On appeal, the Appellate Division 2<sup>nd</sup> Dept. reduced the award for future pain and suffering to \$150,000.

Plaintiff also cites past cases in support of their contention that the jury award does not deviate materially from a reasonable award

In Pizarro v Mendelsohn and Katz, (2013 WL 3214182), the plaintiff suffered four perforations of his colon and small intestine following a colonoscopy performed by co-defendant, Dr. Mendelsohn. Three of the perforations were surgically repaired by co-defendant, Dr. Katz. Following the repair surgery, plaintiff was hospitalized for several days and continued to experience severe abdominal pain. A second surgery was required to repair a fourth perforation in plaintiff's small intestine that Dr. Katz had failed to discover during the first surgery. Plaintiff was unable to return to work for six months and experienced an open abdominal surgical wound that did not heal for over six months and required cleaning multiple times per day. Plaintiff also continued to experience pain three to four times a week through the time of trial nearly six years later. The jury split liability 60/40 between the two doctors, and awarded plaintiff a total of \$1,500,000 in damages. The case later settled for \$1,350,000.

In Lee as Administratrix of Lee v New York Hospital Queens, (118 A.D.3d 750 [2014]), the plaintiff's decedent was admitted to the defendant hospital with a diagnosis of gallstones and an inflamed gallbladder. He was scheduled for surgery the day after he was admitted to the hospital, however the surgery was repeatedly delayed. Plaintiff's decedent was kept in the hospital for four days without being provided food or drink by mouth in preparation for the surgery. Four days after being admitted to the hospital, he developed systemic sepsis and while being intubated, suffered full cardiac arrest and died 48 minutes later. During his hospital stay the decedent complained of increasingly sharp pain, discomfort, hunger, difficulty breathing, and a sense of impending death. The jury awarded \$5,000,000 for plaintiff's decedent's conscious pain and suffering. Upon post trial

motion, the trial judge granted a new trial unless plaintiff agreed to a reduction of that portion of the jury's verdict to \$3,750,000. The Appellate Division Second Department affirmed the trial court on that issue, finding that the award of \$3,750,000 for decedent's conscious pain and suffering did not deviate materially from what would be reasonable compensation.


In Pavlovich v Wycoff Heights Medical Center and Blank, M.D. (2002 WL 6759690), the plaintiff suffered a perforation of the sigmoid colon during a procedure performed by defendant Blank. The perforation necessitated further surgeries to correct the perforation, a colostomy and colostomy reversal. During the colostomy reversal, plaintiff suffered nerve injury in her right leg which required physical therapy. Following the surgeries, plaintiff suffered deep depression, anxiety, psychotic behavior, low self esteem and hallucinations and loss of independence; all symptoms she had not previously experienced. Her psychiatric symptoms necessitated individual and group psychotherapy and medication. The therapy sessions were initially three times per week. She was still receiving twice weekly psychotherapy and taking antidepressants and anti anxiety medication at the time of trial, over five years later. The jury awarded plaintiff \$3,250,000 for her pain and suffering.

After reviewing the trial testimony and the cases cited by the parties it is the Court's opinion that the amounts awarded by the jury for past pain and suffering and for future pain and suffering both materially deviate from reasonable compensation for plaintiff's injuries in this action. Upon review of the cases cited, the Court finds that the injuries suffered by the plaintiff in this action more closely resemble those suffered by the plaintiffs in the cases cited by defendant than those suffered by the plaintiffs in the cases cited by plaintiff. The injuries suffered by the plaintiffs in the cases cited by plaintiff, including colostomies, years of physical pain, a wound that remained open for six months, a lifetime of psychiatric therapy, and three days of starvation in anticipation of a surgery that ultimately did not occur due to plaintiff's death, were all far more serious than plaintiff's injuries in this action.

In view of the foregoing, defendant's motion to set aside the damages verdict for past and future pain and suffering in this action is granted and a new trial ordered solely on the issues of damages for plaintiff's past and future pain and suffering, unless within 20 days of service of a copy of this order with notice of entry by defendant upon plaintiff, plaintiff serves and files with the Clerk of the Court, a written stipulation consenting to a reduction of the damages awards from \$1,500,000 for past pain and suffering to \$550,000 and from \$1,000,000 for future pain and suffering to \$100,000.

The foregoing constitutes the decision and order of the court.

Dated: September 25, 2017

  
HON. JOSEPH J. ESPOSITO, J.S.C  
SEP 28 2017  
COUNTY CLERK  
QUEENS COUNTY