

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

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MALVINA VITENKO, as admin. of the Estate  
of BOHDAN VITENKO, and MALVINA  
VITENKO, indiv.,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY  
DEPARTMENT OF PARKS AND RECREATION  
AND JON DOE LIFEGUARDS A-F

Defendants.  
-----x

DCM 6  
Philip G. Minardo, J.S.C.

Index No.: 150106/2012  
POST-TRIAL DECISION  
AND ORDER

The following papers were marked fully submitted:

Papers	Numbered
Notice of Motion of Defendant with supporting Papers and Exhibits (dated August 31, 2017).....	1
Affirmation in Opposition of Plaintiff (dated September 21, 2017).....	2
Reply Affirmation of Defendant (dated September 27, 2017).....	3

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Defendant City of New York moves for an order (1) staying the entry of judgment until sixty (60) days after the decision on all post-trial motions; (2) dismissing the complaint alleging that plaintiff failed to prove a prima facie case of negligence; (3) setting aside the jury verdict as contrary to the weight of the evidence; (4) reapportioning liability to accord with the evidence presented at trial, or order a new trial on the apportionment of liability; or (5) granting a new trial

on the issue of damages.

In the matter herein, plaintiff brought this personal injury suit on behalf of her deceased son, Bohdan Vitenko, for pain and suffering and wrongful death plus derivative claims. On July 13, 2011, at approximately 8:30 a.m., Bohdan, along with three friends, arrived at the New York City Parks department Lyons Pool for the lap swimming session. At some point toward the end of his swim workout, Bohdan and his friend, Jonathan Proce held their breath underwater for a period of time and apparently experienced a condition called “shallow water blackout.” When this condition occurs, otherwise healthy and fit swimmers will pass out while holding their breath underwater, then start breathing and drown without any sign of distress.

None of the witnesses at the scene testified that Bohdan or Jonathan showed signs of distress. Bohdan died at the scene. Jonathan was transported to Richmond University Medical Center and was later pronounced dead.

Plaintiff alleged that Bohdan’s death was wrongful as a result of the defendant City of New York’s negligence in that the defendant failed to provide training to their lifeguards with regard to shallow water blackout, failed to assign the adequate number of lifeguards to the lap swimming session, and the lifeguards on the date of the accident were negligent in their duties. After the liability trial, the jury rendered a verdict in favor of plaintiff.

On the issue of damages, plaintiff and her husband testified when not at school, Bohdan was primarily a full-time student at John Jay College and his intent was to enter law enforcement. Plaintiff testified that her husband, Oleg Vitenko, owned a wood-working business where Bohdan would work. Bohdan did not file tax returns as a result of his employment in the family business, nor did he otherwise contribute to the household expenses. Plaintiff testified that she did not expect

that Bohdan would support his parents financially.

Oleg Vitenko testified that Bohdan Vitenko was his stepson and was listed as a dependent on the family's tax returns. He testified that Bohdan did help out with the business, and that there was a financial loss due to Bohdan's departure. He explained that after Bohdan's passing, the business loss was so great that Mrs. Vitenko sought employment outside the home. The family's tax returns were admitted into evidence in support.

After the damages trial, the jury awarded plaintiff:

\$440,000 for past monetary loss up to and including the date of the verdict;  
\$1,050,000 for future pecuniary loss over a fifteen-year time span; and  
\$40,000 for funeral and burial expenses.

Defendant challenges the liability and damages verdict as noted *supra*. This court reserved decision at the close of the damages trial.

CPLR Rule 4404(a) requires that:

After a trial of a cause of action or issue triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law 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 or where the jury cannot agree after being kept together for as long as is deemed reasonable by the court.

The interests of justice require that a new trial only be ordered if substantial justice has not been done. *Schafrann v. N.V. Famka, Inc.*, 14 A.D.3d 363, 787 N.Y.S.2d 315 (1 Dept. 2005); *Gomez v. Park Donuts, Inc.*, 249 A.D.2d 266, 671 N.Y.S.2d 103 (2 Dept. 1998); *Pitts v. Columbus McKinnon Corp.*, 75 A.D.2d 1002, 429 N.Y.S.2d 124 (4 Dept. 1980); *Delagi v. Delagi*, 34 A.D.2d 1005, 313 N.Y.S.2d 265 (2 Dept. 1970). To set aside a verdict, this court must conclude that there

is “simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence at trial.” *Cohen v. Hallmark Cards*, 45 N.Y.2d 493, 499, 410 N.Y.S.2d 282, 382 N.E.2d 1145 (1978); *see also Roman v. I. Gold Corp.*, 35 A.D.3d 833, 834, 826 N.Y.S.2d 902 (2 Dept. 2006); *Robinson v. City of New York*, 300 A.D.2d 384, 751 N.Y.S.2d 533 (2 Dept. 2002); *Firmes v. Chase Manhattan Automotive Finance Corp.*, 50 A.D.3d 18, 852 N.Y.S.2d 148 (2 Dept. 2008).

This Court is quite resistant to disrupting the verdict of any jury. The function of the jury as fact-finder is sacrosanct and should be disturbed only in rare instances. However, this is one of those instances. The issue of liability was determined and based upon proper evidence. The liability motions were decided by this Court at the close the liability trial and will not be disturbed. On the other hand, the damages award was not as clear.

The branch of defendant’s motion pursuant to CPLR 4404(a) which was to set aside the jury verdict as to damages for past monetary and future pecuniary loss must be granted as “such damages, to the extent indicated, deviate materially from what would be reasonable compensation under the circumstances of this case.” *Beck v. Northside Medical*, 46 A.D.3d 499, 846 N.Y.S.2d 662, 2007 N.Y. Slip Op. 09547 (2d dept. 2007); *see* CPLR 5501 [c]; *Biejanov v. Guttman*, 34 A.D.3d 710, 826 N.Y.S.2d 111(2d dept. 2007); *c.f. Araujo v. Marion Mixers*, 289 A.D.2d 428, 735 N.Y.S.2d 402 (2d Dept. 2001); *Charles v. Day*, 289 A.D.2d 190, 733 N.Y.S.2d 690 (2d Dept. 2001) (finding a new trial warranted where the infant plaintiff who suffered from Erb’s palsy was able to participate in his gym classes, and perform normal tasks, therefore indicating that the award for past and future pain and suffering was excessive in light of the evidence).

Plaintiff presented scant evidence of the decedent's contribution to the household and the possibility of any future contribution. This court finds that the jury's determination that the plaintiff would have contributed to the household for fifteen (15) years is against the weight of the evidence. The evidence relating to the plaintiff's current employment, education, employment prospects and plans, and other evidence, was simply insufficient, to justify the jury's verdict with respect to the monetary loss. Plaintiff was a young college student who aspired to enter law enforcement. He was not contributing to the household in a manner which would support the decision of this jury.

This Court therefore modifies the judgment affirmatively exercising its discretion as detailed *infra*. See *Khulaqi v. Sea-Land Services, Inc.*, 185 A.D.2d 973587 N.Y.S.2d 412 (2d Dept. 1992); see, CPLR 4404[a]; *Cohen v. Hallmark Cards*, 45 N.Y.2d 493, 498–499, 410 N.Y.S.2d 282, 382 N.E.2d 1145; *Nicastro v. Park*, 113 A.D.2d 129, 132–133, 495 N.Y.S.2d 184.

This decision is not intended to state that the decedent's life did not have value. As a young man with so many possibilities and important goals ahead of him, his life was invaluable to his family and those whose lives he had impacted and would impact in the future. Unfortunately, the letter of the law cannot measure that type of loss appropriately.

Accordingly, it is hereby

ORDERED, that the motion of plaintiff to set aside the jury verdict is granted to the extent that the damages are reduced as follows:

Past monetary loss is reduced to \$308,000;  
Future pecuniary loss is reduced to \$210,000 for a duration of three years;  
Funeral expenses remain \$40,000;

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