Verdict for $5,000,000 for Past Pain and Suffering in Trip and Fall Back Injury Case Set Aside on Appeal - Jury's Findings Irreconcilably Inconsistent as to Fault and Illogical as to Damages

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What were they thinking? In a stairway trip and fall negligence case, the jury found:

1. plaintiff was negligent but defendant building owner was completely at fault and
2. the 35 year old plaintiff was entitled to $5,000,000 for past pain and suffering but zero for future pain and suffering

No one knows for sure what the jury was thinking but it's certain that a brand new jury will be chosen to rule on these issues because **the jurors who made these findings either were hopelessly confused, unable to understand the trial judge's instructions or acted in inexplicable, irrational ways.**

In any event, after six years of litigation, nine days of trial and countless hours of effort by lawyers for both sides, Davin Dessasore's lawsuit against the New York City Housing Authority (the "NYCHA") must now begin anew, according to a recent decision by an appeals court in **Dessasore v. NYCHA** (1st Dept. 2010).

It all began on December 11, 2003 when the then 31 year old Mr. Dessasore visited his mother at her second floor apartment located at 1085 Bruckner Boulevard in the Bronx, known as the Bronxdale Projects (an NYCHA building).

Here's one of the original 28 seven-story buildings of the **Bronxdale Projects**, built in 1955:

After his visit, Davin started to descend the stairs when he claims he **tripped and fell to the bottom because of a detached handrail lying on the top step of the dimly lit staircase**.

No one was with him or saw him fall but it was **undisputed that Dessasore had been talking on his cell phone before and after he fell**. The defense produced his cell phone records at trial

in an effort to prove that plaintiff was careless and caused his own accident. He was cross-examined extensively on the issue of when exactly he was chatting on the phone.

Do not walk down stairs talking on your cell phone:

Plaintiff admitted he either received or made a phone call as he was leaving the apartment and was walking toward the stairs but he claimed he then put the phone away a moment before he fell. The jury found otherwise and ruled that Dessasore was negligent in speaking on his cell phone while descending the stairs but the **jury ruled that his negligence was not a proximate cause of his injury and that the NYCHA was wholly at fault for the dangerous condition of the stairway**. And then the jury also awarded Dessasore $5,000,000 for his injuries (details on this unusual damages verdict below). **Here is a copy of the verdict sheet given to the the jurors in this case on which they recorded their findings.**

The appellate court stated that the jury's finding of 100% liability against the NYCHA without any reduction for plaintiff's share of the fault was "irreconcilably inconsistent." The judges noted three important pieces of evidence:

1. plaintiff was not looking down before he started to descend the stairs,
2. he wasn't paying attention to his surroundings, and
3. he was talking on his cell phone just before he fell.

Therefore, the **appeals judges concluded that it was "logically impossible" to find plaintiff was negligent without also finding that his negligence was a proximate cause** of the accident. So, the entire liability verdict was dismissed and a **new trial ordered on all issues.**

The **$5,000,000 pain and suffering damages award (all for the past five years and nothing for the future**) was also addressed by the appellate court. The judges found it to be **irrational, given the extent of plaintiff's injuries and evidence of their permanence**. Both the trial judge and the appellate bench concluded that the jury either did not understand the trial judge's instructions on damages or did not follow them. Therefore, **the new trial on damages ordered by the trial judge was appropriate.**

After he fell, Dessasore was taken by ambulance to a local hospital where he was treated and released. Within days, he was in excruciating back pain and within a month of the accident, he claimed **radiating pain down the left side to his foot** and an MRI showed **herniated discs** at L4-L5 and L5-S1.

In March 2005 Davin underwent an **endoscopic diskectomy** at L4-L5 and L5-S1 (a minimally invasive procedure, described here). Four months later, he underwent a second surgery – a **lumbar fusion** – in which a cage and six screws connected by steel bars were implanted in his back.

Here is what the spine looks like after a lumbar fusion with six screws implanted:

Unfortunately, the surgeries were unsuccessful, Dessasore's condition worsened and by the time of trial he described nearly five years of unremitting pain, the **lack of any feeling in his left arm and hand** (except his thumb), the inability to talk even short distances without literally dragging his left leg to move and daily reliance on a powerful prescription pain drug (Oxycontin). His doctors diagnosed him as suffering from **hemiparesis** (partial paralysis affecting one side of the body).

People afflicted with hemiparesis usually have a flexed elbow, stiff knee and an inverted ankle, with the lower limb swinging forward in a semicircular fashion and often require assistive devices like this:

The **defense doctors disputed the finding of hemiparesis (it's most often caused by a stroke or cerebral palsy, not trauma)** testifying that there was no evidence of a spinal cord injury and no anatomical basis for many of plaintiff's complaints. Essentially, while conceding that the MRI studies showed the presence of herniated discs, **they concluded that plaintiff has preexisting degenerative disc disease** because of the presence of **osteophytes** and that his symptoms and neurological findings were way out of proportion to the findings in his imaging studies.

The jury apparently rejected the defense doctors' conclusions because they awarded plaintiff $5,000,000 for his past pain and suffering.

Defense counsel attacked the $5,000,000 awarded for past damages as wildly excessive to the extent it exceeded $900,000. Given recent appellate court decisions ruling on multi-million dollar past pain and suffering awards, it appears there is merit to the defense position. **Awards for 5-10 years of past pain and suffering in the range of $1,000,000 to $3,000,000 tend to be upheld on appeal only for persons with catastrophic physical and brain injuries such as:**

- **Smith v. Au** (1st. Dept. 2005) - **$1,000,000** for past pain and suffering (6 years) upheld for a 37 year old man who, due to medical malpractice, sustained a stroke with permanent brain damage and right-sided paralysis
- **Reed v. City of New York** (1st. Dept. 2003) - **$2,500,000** for past pain and suffering (7 years) upheld for a 43 year old woman in a pedestrian knockdown car accident who sustained several skull fractures and significant and progressive brain damage that left her permanently demented
- **Weinstein v. New York Hospital** (1st. Dept. 2001) - **$2,000,000** for past pain and suffering (9 years) for a 22 year old college student who, due to medical malpractice, sustained brain damage with a permanent seizure disorder, memory deficits and loss of balance

The appellate court did not adjust the $5,000,000 award for past pain and suffering because of its rulings that the liability verdict was to be set aside and that the failure to award future damages may have been because the jury meant to include such damages in the $5,000,000 it did award (but denominated for past damages only). Since the appellate judges properly declined to speculate why or how the jury reached such an odd result, **they simply ordered a new trial on all issues.**

Inside Information:

- Defense counsel attacked plaintiff's credibility at trial and on appeal – plaintiff was a prior convicted felon who spent 4 ½ years in jail for drug dealing.
- The jury also declined to make any award for medical expenses (past or future) despite evidence that plaintiff incurred past expenses of about $160,000 and would require lifelong medical care that his attorneys suggested would amount to about $800,000.
- After a nine day trial and the start of deliberations at the end of the day, the jury deliberated for a mere one hour (one juror had said he had a personal problem necessitating his travel out of town and would not return to court the next day). Clearly, they rushed and wanted to be done quickly.

Shortly after trial, the **defendant offered $2,000,000 to settle** but it was rejected. On appeal, plaintiff's attorney asked the court to uphold the $5,000,000 for past damages and award an additional $2,000,000 for future damages. The court declined to do either and **now, plaintiff has received nothing and faces a new trial on all issues.**

To recover any damages whatsoever at the new trial, plaintiff will have to prevail on liability and the **defense will surely argue that Dessasore was so careless that the jury should find he completely caused his own accident and injuries and should recover nothing at all.** We will follow this case and report on developments.