Brain Damage Verdict: $800,000 for Future Pain and Suffering Upheld for Two Children Poisoned by Lead Paint despite Award of Zero for Past Pain and Suffering

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In August 2000, **when they were two and five years old, Wendy Solis-Vicuna and her sister Yessenia moved with their father to an apartment at 6823 Ridge Boulevard, a 20 unit building in Brooklyn, New York** built in the 1900's.

The **apartment was full of peeling and chipped lead paint**, **a well-known hazard to children** who play around it and put it in their mouths, like this:

Within two months, both had **elevated blood lead levels** and on January 18, 2001 the New York City Department of Health (the DOH) inspected the apartment with an x-ray fluoroscopy and found **illegal levels of lead on 45 painted surfaces**.

Here's what the DOH used to inspect the apartment:

An order was issued requiring the landlord to abate the lead-based paint hazard within five days. Despite additional inspections and orders, there was **no abatement** until months later on April 6, 2001(and even then the hazard was not fully removed).

The girls' mother, Julia Vicuna, on behalf of her daughters, sued the landlord claiming that the **elevated blood levels poisoned the children resulting in brain damage**. Specifically, she claimed that Wendy and Yessenia had cognitive and developmental deficits of their mental and intellectual capacities.

Since 1982, New York City law placed a duty on landlords to abate lead paint in leased apartments where children under seven years of age live. The law was enacted to protect little kids who are susceptible to the very real dangers of lead poisoning (from dust and paint chips) mainly from peeling and cracking paint in older, dilapidated apartment buildings. Lead based paint is rarely if ever used any more (except to the extent it exists in old buildings).

When the **case came to trial in June 2007**, it had been seven years since the girls had been tested with elevated blood lead, they were in age appropriate grades at school, had normal IQs and had not displayed any behavioral problems. Accordingly, the jury found that the girls were not entitled to any award for past pain and suffering.

Despite the absence of any pain and suffering to date, the **jury awarded future pain and suffering verdicts as follows:**

- **to Yessenia $380,000 (57 years)**
- **to Wendy $420,000 (62 years).**

The jurors clearly believed **plaintiffs' medical experts** (a neuropsychologist and a neurologist) who testified that the poisonous blood levels established years earlier had caused **permanent brain damage** (i.e., central nervous system dysfunction) which, in this case, did not yet result in apparent mental deficits but would in the future result in significant, very apparent debilitating mental deficits. The experts called this a **"lag effect"** – meaning that **it may take years for developmental deficits to turn up**. They testified that school work will become harder, the plaintiffs' motivation will decrease, there will be behavioral problems and the kids will not be able to succeed.

The **defense experts** (same specialties) testified to the contrary but the jury – as was within its purview – rejected their opinions and accepted the conclusions of the plaintiffs' experts.

The **defendants appealed claiming it was irrational and illogical for the jury to conclude**

that plaintiffs sustained no past pain and suffering during the seven years prior to trial but would in the future sustain $800,000 worth of pain and suffering.

The **appellate court has now ruled** on this case. In **Solis-Vicuna v. Notias** (2nd Dept. 2010), the future **pain and suffering verdicts for $800,000 were affirmed** and the judges stated specifically that in this case the award of future damages without any past damages award is not an indication that the jurors were confused or issued a compromise verdict.

I**t is unusual for a jury to conclude that a plaintiff has not suffered any past pain and suffering – i.e., from the date of an incident to the date of trial – but will suffer future pain and suffering**. In the typical trauma case, there is usually tremendous pain and suffering associated with the initial event (for example, the car crash or the construction site fall from a scaffold) along with the soon ensuing surgery and painful rehabilitation. The plaintiff testifies as to exactly what he's gone through and the pain he's endured so far. When the defendant is found to be at fault, an award for past pain and suffering typically follows.

The difficult issue in most injury cases is future pain and suffering. That's for the medical experts to say and it's always based upon their opinion as to what is likely to happen in the future. And usually there will be – as there were here – **competing medical opinions**:

- Plaintiffs' experts often opine that the outlook is grim and full of a lifetime of pain and suffering.
- Defendants' experts often counter that the plaintiff is fine, fully recovered and will never again suffer from the injuries involved in the trial.

In Solis-Vicuna v. Notias, the plaintiffs acknowledged that the girls had manifested little or no brain damage deficits so far but, as described in the **trial judge's post-trial decision upholding the verdict**, there was **expert testimony (from the plaintiff's neuropsychologist) that:**

- lead intoxication manifests as children grow older and the work expected of them as a result of the lead poisoning becomes more difficult at higher grades and the children have to work harder to keep up
- it takes a while for a developmental deficit to turn up
- **Yessenia** is expected to have some major problems such as language
- **Wendy** will not be able to keep up with her peers, may develop behavioral issues and have difficulties academically

The measure of proof offered by the plaintiffs as to future damages appears to have been modest; however, the jury was obviously impressed and judges are hesitant to reject verdicts and are only allowed by law to do so when the verdict is clearly against the weight of the evidence or the amount is unreasonably excessive (or minimal).

The **"weight of the evidence" argument by the defense** in this case addressed not only whether there was enough evidence of any future damages at all (that argument was summarily rejected by the courts) but also whether the award of substantial future damages accompanied by a finding that there was no past pain and suffering **indicated that the verdict reflected a compromise or substantial confusion.**

In a case we discussed recently, **here**, Mitchell v. Port Authority of New York (1st Dept. 2009), a jury's $500,000 pain and suffering damages verdict in a trimalleolar fracture case was held to be an **impermissible compromise** because of (a) the unusual apportionment of the $500,000 between damages for the past ($20,000 for 10 years) and the future ($480,000 for 24 years) and (b) the sharply contested issue of proximate cause.

In Solis-Vicuna v. Notias, though, the issue was whether the jury was warranted in awarding any future damages at all when they had already determined there was no pain and suffering for the seven years to date. Two **prior cases were addressed by the parties and cited by the judges** (but without any discussion or explanation at all by the appellate judges), each case involving verdicts of substantial future damages but no past damages.

In **Cadet v. City of New York** (2nd Dept. 1997), a new trial on damages was ordered because the jury awarded $200,000 to a young woman claiming a lumbar fracture and post-traumatic stress disorder after a subway train accident in which she suffered from smoke inhalation and had been thrown to the ground and trampled on after the train stopped. After five years of medical treatment, back pain and breathing difficulties, she was awarded no damages at all for past pain and suffering.

In **Torres v. City of New York** (2nd Dept. 1996), plaintiff was shot and rendered paraplegic. The jury awarded $6,000,000 for future pain and suffering but nothing at all for the past 11 years up to the date of trial. The court held this was irreconcilably inconsistent and an impermissible compromise based on sympathy for the plaintiff and a new trial was warranted.

Neither Cadet v. City of New York nor Torres v. City of New York supports the defense contention that the verdict in Solis-Vicuna v. Notias should have been overturned. Those cases are distinguishable on their facts in view of the manifest past pain and suffering due to a lunbar fracture and a spinal cord injury resulting in paraplegia.

The only other case mentioned by the appellate court in Solis-Vicuna v. Notias is **Balmaceda v. Perez** (3rd Dept. 1992) and that case appears to me to have been wrongly decided. In a pedestrian knockdown accident, the plaintiff sustained a herniated disc in his back that was surgically removed before trial giving him temporary relief from his back pain. By the time of trial three years after the accident, plaintiff's back pain resumed. The jury awarded him $500 for

past pain and suffering and $199,500 for the future (25 years). **On appeal, the verdict was deemed reasonable** because there was medical testimony that plaintiff's condition would worsen over time.

In my view, the future worsening in Balmaceda v. Perez justified the $199,500 future damages award (and that part of the decision that was relied upon to justify the future damages award in Solis-Vicuna v. Notias); however, given that Mr. Balmaceda underwent back surgery and had substantial back pain during the three years before trial there was no justification to award him only $500 for past pain and suffering. That jury was confused and the appellate court wrong.

It appears to me that t**here was sparse authority at best to justify the decision in Solis-Vicuna v. Notias;** however, the judges obviously concluded that the overall result was fair. When ruling on the propriety of pain and suffering jury verdicts, **appellate judges will sometimes reach a result that they deem fair, even when their reasoning appears to lack judicial precedent. And that's just what happened here.**

Inside Information:

- The jury also assessed $260,000 in punitive damages, a rare award in a negligence case. Apparently, the jurors were angered that the landlord knew of the lead paint in her building for years and did nothing about it. Here is the charge the judge gave to the jury. It instructed the jury as to what they had to find factually before they could award any punitive damages.
- As to Wendy, the jury found defendant only 40% at fault because she had pre-existing lead poisoning (from an unrelated party that happens to be financially unable to pay). Under New York's CPLR Section 1602, though, the punitive damages award means that Wendy's entire verdict (not just 40%) may be collected from Notias.
- In closing arguments, plaintiffs' attorney asked the jury to award Yessenia $1,250,000 for pain and suffering ($500,000 past and $750,000 future) and for Wendy he asked for $2,000,000 ($750,000 past and $1,250,000 future). The defense argued there was no liability at all but if the jury found any fault then there were no damages at all.