NY CLS CPLR R 4404, Part 1 of 4

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Consolidated Laws Service **>**

Civil Practice Law And Rules (Arts. 1 — 100) **>**

Article 44 Trial Motions (§§ 4401 — 4406)

R 4404. Post-trial motion for judgment and new trial

(a) Motion After Trial Where Jury Required. 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.

(b) Motion After Trial Where Jury Not Required. After a trial not triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside its decision or any judgment entered thereon. It may make new findings of fact or conclusions of law, with or without taking additional testimony, render a new decision and direct entry of judgment, or it may order a new trial of a cause of action or separable issue.

History

Formerly § 4404, add, L 1962, ch 308; amd, L 1962, ch 315, § 1, eff Sept 1, 1963.

Annotations

Notes

Prior Law:

Earlier statutes: CPA §§ 457–a, 549, 552, 554; CCP §§ 999, 1002, 1005, 1185; Code Proc §§ 264, 265.

Advisory Committee Notes:

This rule and rules 4405 and 4406 are designed to unify the former motion for new trial with that for judgment notwithstanding the verdict or decision. To some extent, unification of provisions applicable to actions triable by the court and those triable by the jury has been achieved. In 1951, CPA § 549, which governed motions for new trial before the trial court, and § 550, which governed motions for new trial in the appellate court, were amended to include court trials as well as jury trials; and § 551, which governed the motion in the appellate court after an interlocutory judgment, was amended to include actions tried by a jury, as well as those tried by the court. Laws 1951, c. 218; see 17 NY Jud Council Rep 183–192 (1951). The amendment also added a provision which created a procedure in actions triable by the court analogous to judgment notwithstanding the verdict. This provision was contained in the last paragraph of § 549. Previously, a time difference between motions for judgment notwithstanding the verdict, under subd 3 of § 457-a, and motions for new trial, under § 549, had been eliminated. Laws 1949, c. 604; see RCP 60-a (added in 1951). This rule and rules 4405 and 4406 create a single motion for a new trial or judgment notwithstanding the verdict or decision, in addition to an oral motion made at the trial. All post-trial relief formerly sought by separate motions must be considered on the single motion or a cross-motion heard simultaneously. The motion for new trial in the appellate court in CPA §§ 550 and 551 was, in effect, a preliminary appeal; that procedure was seldom used and has been omitted. The motion made in the first instance at Special Term under § 552 has also been eliminated. Grounds which might formerly have been raised either before the trial court under § 549 or at Special Term, as well as those which might only have been raised at Special Term, are included in this rule. Under former practice, grounds which were urged at the trial could not be reheard at Special Term. Jacquin v Syracuse Auto R.

& T. Corp. 263 NY 53, 188 NE 154 (1933). Thus, the major effect of eliminating the motion at Special Term would be to shorten the time in which a motion may be made. It should also be noted that those grounds for the motion which might only have been raised at Special Term were to some extent available as grounds for a motion to set aside the judgment under §§ 521–529 of the civil practice act. Under this rule as well, they form a basis for relief from a judgment under provisions of article 50 on judgments. Cf. Fed R Civ P 60(b). In jury trials, a motion for judgment during trial was formerly a prerequisite for judgment notwithstanding the verdict. CPA § 457-a(3). That requirement has been abolished, eliminating a distinction between actions tried by the jury and those tried by the court. Subd (a) and (b) of this rule specifically empower the court to grant partial new trials in all actions, thus clarifying a situation created by "conflicting decisions [which render] . . . it impossible to determine with certainty the present state of the law in New York on partial new trials." 17 NY Jud Council Rep 197–98 (1951). The words "judge" and "court" in subd (b), and rule 4405 encompass a referee to determine by reason of § 4318.

Subd (a) of this rule governs the relief which may be granted by the trial court after a required trial by jury. It includes judgment notwithstanding the verdict, formerly covered by subd 3 of CPA § 457-a, and new trial, formerly covered by §§ 463, 549 and 553. See also CPLR § 4113(b). Judgment notwithstanding the verdict might formerly have been granted only upon renewal or reconsideration of a motion for judgment made at the close of all the evidence. CPA § 457-a. Failure to make or renew a motion for directed verdict at the close of all the evidence was considered to be an admission that there was a question of fact for submission to the jury, which barred a claim after verdict or on appeal that the action was improperly submitted. Gelardin v Flomarcy Co. 293 NY 217, 56 NE2d 558 (1944). The court unable to grant judgment notwithstanding the verdict for want of a motion for directed verdict made at the close of all the evidence, was compelled to direct a new trial. See Buxhoeveden v Estonian State Bank, 279 App Div 1089, 112 NYS2d 785 (2d Dept 1952). The motion at the close of the evidence was a mere formality which did not give either the court or litigants any fair notice in time to cure defects. It seemed only a trap for the unwary or inadvertent which should not be an absolute condition for judgment notwithstanding the verdict. Under this subdivision, the court is

specifically empowered to grant partial new trials after verdict. In New York, the right to grant a partial new trial was recognized by statute in actions where the parties are not entitled to trial by jury. CPA § 553; Cf. NY Surr Ct Act § 309; see Warner v State, 297 NY 395, 79 NE2d 459 (1948); Verstanding v Schlaffer, 296 NY 997, 73 NE2d 573 (1947), modifying 296 NY 62, 70 NE2d 15 (1946). In actions triable by a jury, the CPA also specifically recognized the court's power to grant a partial retrial where the jury had disagreed on some of the issues. CPA § 463. There was no other statutory provision on partial retrials. The Judicial Council, concluding that the law of New York on partial new trials was "impossible to determine" from the decisions, considered the "probable" state of the law as permitting a new trial as to separate and distinct causes of action or parties but prohibiting retrial of separable issues. 17 NY Jud Council Rep 197–98 (1951). In most other jurisdictions, retrial of one or more separable issues may be granted with or without specific statutory authorization. See, e.g., Fed RCP 59(a); NJ RCP 4:61-1(a). Legislation empowering trial and appellate courts to grant partial new trials has repeatedly been proposed in New York. Some of the proposals are summarized in 17 NY Jud Council Rep 194–95 (1951). Although the Judicial Council considered the practice to be advantageous, it did not include its own proposals to authorize partial new trials among its recommendations. Id. at 78–79. Under this subdivision, the court is given discretion to order an entire or a partial new trial where a finding respecting a cause of action or a separable issue is erroneous. Although it has been proposed (see, e.g., 1 Report of the Board of Statutory Consolidation on the Simplification of the Civil Practice of New York 134–35 (1915)), retrial limited in all cases to issues erroneously decided seems unwise. Where one or more findings are the result of prejudice, the attitude of the jury may have affected their consideration of the entire case. Thus, excessive damages may indicate that a finding of liability was influenced by undue sympathy for the plaintiff. Similarly, an inadequate verdict may be the result of a compromise by members of the jury who were convinced that there was no liability. Accordingly, the court under this subdivision may order an entire new trial where it considers that error in some findings may have tainted others or where issues are interrelated. Cf. Bernstein v Bernstein, 132 NYS2d 516 (Sup Ct 1954). Nevertheless, there remain many instances where a partial new trial would be

warranted and the power to limit retrial to one or more issues would lighten the burden on courts and litigants. It may also provide an alternative to the widely-used practice of denying a new trial on condition that the plaintiff accept smaller, or the defendant pay larger, damages. Cf. O'Connell v Papertsian, 309 NY 465, 467, 131 NE2d 883, 884 (1956). There does not appear to be a valid constitutional objection to partial new trial in cases required to be tried by jury. Prior jury trial of presumably dispositive issues—i.e., separate trials of separate issues—was authorized by CPA § 443, which has been held to be constitutional. Smith v Western Pac. R.R. 203 NY 499, 96 NE 1106 (1911). While the New York cases do not expressly discuss the constitutional issue, such procedures as jury trial of the damage issue after liability has been found on a motion for summary judgment indicate that partial new trial would be sustained. See 17 NY Jud Council Rep 201 (1951). The practice has been held to be constitutional in other jurisdictions. See Gasoline Prod. Co. v Champlin Refining Co. 283 US 494 (1931), and cases there cited.

This subdivision also broadens the power of the court to grant post-trial relief on its own initiative. While courts have inherent power to grant new trials before or after verdict (7 Carmody-Wait, Cyclopedia of New York Practice 101 (1953)), judgment notwithstanding the verdict might not have been granted on the court's own initiative unless it had expressly reserved decision on a prior motion for directed verdict. CPA § 457-a(3). The purpose of the latter rule was to avoid prejudice to the party in whose favor the verdict was rendered. If the court acts on its own initiative after having denied a motion for directed verdict at the trial, the argument goes, a party may be deprived of notice and an opportunity to present arguments in support of the verdict. See 15 NY Jud Council Rep 259–261 (1949). It seems unlikely that any court would deny such a party the right to be heard on the matter. Normally the question will be raised by motion of the party who lost on the trial (see rule 4406) and an opportunity to oppose the motion will be afforded. In any event, a motion for reconsideration is possible. The possibility of a failure of justice was greater under the former rule where the judge must have pronounced the formal words "decision reserved" or have lost his power to act on his own initiative.

Subd (b) of this rule includes all relief which might have been granted in court trials under CPA § 549. Cf. Fed R Civ P 52(b). Although § 549 provided only for a motion for new trial, it permitted the court to direct judgment for the moving party. This subdivision specifically provides, as does Federal rule 59(a), that the court may set aside a judgment if one has been entered; this power was implicit in CPA § 554.

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I. Under CPLR

A. In General

1. Generally

In determining motion for new trial because of false testimony, that such testimony relates to the merits is not determinative, but the court should weigh the likelihood and degree of the false testimony, the affront to the court, and the probability of changing the result, against the degree of diligence exercised by movant and the time and manner in which the new trial is sought. McCarthy v Port of New York Authority, 21 A.D.2d 125, 248 N.Y.S.2d 713, 1964 N.Y. App. Div. LEXIS 3974 (N.Y. App. Div. 1st Dep't 1964).

Setting aside a verdict is authorized only when the party in whose favor judgment is directed is entitled to judgment as a matter of law and such relief may not be granted where a question of

fact existed. Ryder v Cue Car Rental, Inc., 32 A.D.2d 143, 302 N.Y.S.2d 17, 1969 N.Y. App. Div. LEXIS 3978 (N.Y. App. Div. 4th Dep't 1969).

Where party fails to adequately prepare for trial, he is not entitled to another trial. Grossbaum v Dil-Hill Realty Corp., 58 A.D.2d 593, 395 N.Y.S.2d 246, 1977 N.Y. App. Div. LEXIS 12636 (N.Y. App. Div. 2d Dep't 1977).

To justify the setting aside of a jury verdict as contrary to the weight of the evidence, a finding must be made that it could not have been reached upon any fair interpretation of the evidence. Lincoln v Austic, 60 A.D.2d 487, 401 N.Y.S.2d 1020, 1978 N.Y. App. Div. LEXIS 9691 (N.Y. App. Div. 3d Dep't), app. denied, 44 N.Y.2d 644, 405 N.Y.S.2d 1028, 1978 N.Y. LEXIS 4321 (N.Y. 1978).

A motion to resettle a judgment is not untimely under CPLR 4405 as a posttrial motion under CPLR 4404 (subd [b]) to make new findings of facts or render a new decision where the defect was not substantive since the motion is more properly characterized as a motion to correct an irregularity pursuant to CPLR 5019 (subd [a]). Kay-Fries, Inc. v Martino, 73 A.D.2d 342, 426 N.Y.S.2d 304, 1980 N.Y. App. Div. LEXIS 10056 (N.Y. App. Div. 2d Dep't), app. dismissed, 50 N.Y.2d 1056, 431 N.Y.S.2d 817, 410 N.E.2d 750, 1980 N.Y. LEXIS 2570 (N.Y. 1980).

In an attorney’s action to recover legal fees, the trial court’s granting a new trial, as based on a new evaluation of the attorney’s services, would not require either new pleadings, a new note of issue, a new statement of readiness, or a jury demand, since these matters would not be appropriate to the new trial, although disclosure proceedings, on the issue of the attorney’s services alone, would be appropriate. Sassower v Barone, 92 A.D.2d 587, 459 N.Y.S.2d 474, 1983 N.Y. App. Div. LEXIS 16841 (N.Y. App. Div. 2d Dep't), app. dismissed, 59 N.Y.2d 968, 1983 N.Y. LEXIS 5249 (N.Y. 1983).

Trial Term properly refused to interfere with jury’s no cause of action verdict which was supported by evidence, even where jury registered dissatisfaction with law applied to case and

expressed desire to compensate plaintiff. Schoch v Dougherty, 122 A.D.2d 467, 504 N.Y.S.2d 855, 1986 N.Y. App. Div. LEXIS 59756 (N.Y. App. Div. 3d Dep't 1986).

On motion to set aside verdict on ground of alleged jury confusion, use of affidavits of 3 jurors stating that they had misunderstood court's charge, and, on reargument, use of affidavits of 2 jurors stating that they were not motivated by sympathy in submitting their prior affidavits, did not fall within exception to general rule against use of juror affidavits for posttrial impeachment of verdict. Wylder v Viccari, 138 A.D.2d 482, 525 N.Y.S.2d 882, 1988 N.Y. App. Div. LEXIS 2916 (N.Y. App. Div. 2d Dep't 1988).

Whether to set aside jury verdict as against weight of evidence is essentially factual determination and standard to be applied is whether jury could have reached its decision on any fair interpretation of evidence. Frances G. v Vincent G., 145 A.D.2d 599, 536 N.Y.S.2d 138, 1988 N.Y. App. Div. LEXIS 13831 (N.Y. App. Div. 2d Dep't 1988).

In personal injury action in which defendant made motion, supported by affidavit and videotape, to set aside judgment on basis that plaintiff obtained grossly excessive damages, court improperly refused to consider merits of motion on basis that issue might be rendered academic by defendant's appeal from judgment; court was obligated to decide application and acted improperly in denying it without prejudice to renewal after resolution of appeal. Berry v Jewish Bd. of Family & Children's Services, 173 A.D.2d 668, 570 N.Y.S.2d 588, 1991 N.Y. App. Div. LEXIS 7827 (N.Y. App. Div. 2d Dep't 1991).

Where jury's apportionment of fault in negligence case was against weight of evidence, proper remedy under CLS CPLR § 4404 was grant of new trial, not judgment as matter of law. Wasserman v Wong, 181 A.D.2d 672, 581 N.Y.S.2d 221, 1992 N.Y. App. Div. LEXIS 3005 (N.Y. App. Div. 2d Dep't 1992).

Court properly set aside verdict and directed new trial on issues of liability and damages in light of, inter alia, court's charge, interrogatories that instructed jury to consider periods of time that it

should not have considered, and inconsistency of verdict. Bethea v Marcus, 224 A.D.2d 380, 638 N.Y.S.2d 318, 1996 N.Y. App. Div. LEXIS 857 (N.Y. App. Div. 2d Dep't 1996).

Plaintiffs' motion to set aside verdict under CLS CPLR § 4404(a) was properly denied where plaintiffs expressly stated that they did not want to move for mistrial in advance of verdict, thereby waiving their current objection to comment in question. Bonilla v New York City Health & Hosps. Corp., 229 A.D.2d 371, 644 N.Y.S.2d 655, 1996 N.Y. App. Div. LEXIS 7580 (N.Y. App. Div. 2d Dep't 1996).

Plaintiff's claims of juror misconduct and error in court's method of investigating whether such misconduct had in fact occurred were waived when counsel expressly declined to move for mistrial on ground of juror misconduct, and thus those claims were not appropriately raised on CLS CPLR § 4404(a) posttrial motion to set aside verdict. Kraemer by Kraemer v Zimmerman, 249 A.D.2d 159, 672 N.Y.S.2d 58, 1998 N.Y. App. Div. LEXIS 4421 (N.Y. App. Div. 1st Dep't 1998).

Where error was fundamental, it would be gross injustice to allow verdict to stand, and thus Appellate Division would order new trial even in absence of motion for mistrial. Heller v Louis Provenzano, Inc., 257 A.D.2d 378, 683 N.Y.S.2d 92, 1999 N.Y. App. Div. LEXIS 30 (N.Y. App. Div. 1st Dep't 1999), app. denied, 1999 N.Y. App. Div. LEXIS 5214 (N.Y. App. Div. 1st Dep't Apr. 22, 1999).

In insured's action on fire insurance policy, insured was not entitled to compel further discovery in preparation for new trial where note of issue and statement of readiness had been issued before original trial, and no timely motion to strike them was made; neither lack of diligence in conducting discovery nor remittal for new trial on ground that judgment was unsupported by adequate proof is extraordinary circumstance warranting belated discovery. 10 Park Square Assocs. v The Travelers, 266 A.D.2d 859, 698 N.Y.S.2d 196, 1999 N.Y. App. Div. LEXIS 11689 (N.Y. App. Div. 4th Dep't 1999).

New trial should be granted where record indicates substantial confusion among jurors in reaching their verdict. Clarke v Order of the Sisters of St. Dominic, 273 A.D.2d 431, 710 N.Y.S.2d 108, 2000 N.Y. App. Div. LEXIS 7372 (N.Y. App. Div. 2d Dep't 2000).

Trial court properly denied plaintiffs' motion pursuant to CPLR 4404(a) to set aside a jury verdict in favor of a doctor in a medical malpractice action, and the trial court properly granted judgment as a matter of law to a hospital and another doctor pursuant to CPLR 4404(a); the evidence similarly established that the doctor who ordered an emergency caesarean section was notified of the mother's condition only after an inordinate delay, and the evidence was insufficient for the jury to conclude that the hospital and the other doctor contributed to the child's injuries during birth. Castillo v Zargaroff, 299 A.D.2d 512, 750 N.Y.S.2d 631, 2002 N.Y. App. Div. LEXIS 11417 (N.Y. App. Div. 2d Dep't 2002).

In an administrator's wrongful death suit against a gynecologist, the misconduct of the administrator's counsel throughout the trial in persistently exceeding the limitations of a trial court's ruling limiting certain evidence in his questioning of witnesses warranted reversal in the interests of justice of the judgment in favor of the administrator because the misconduct of the attorney was a continual and deliberate effort to divert the jurors' attention from the issues to be determined. Stewart v Olean Med. Group, P.C., 17 A.D.3d 1094, 795 N.Y.S.2d 420, 2005 N.Y. App. Div. LEXIS 4578 (N.Y. App. Div. 4th Dep't), app. denied, 19 A.D.3d 1185, 796 N.Y.S.2d 567, 2005 N.Y. App. Div. LEXIS 6398 (N.Y. App. Div. 4th Dep't 2005).

Because defense counsel made improper, inflammatory remarks during the cross-examination and summation, and because the trial court erred in curtailing the testimony of a fact witness under N.Y. C.P.L.R. 3101(d)(1), and improperly permitted the defense counsel to utilize the patient's bill of particulars to suggest that the patient was litigious, the trial court erred in denying the patient's N.Y. C.P.L.R. 4404(a) motion to set aside the jury verdict and for a new trial. O'Neil v Klass, 36 A.D.3d 677, 829 N.Y.S.2d 144, 2007 N.Y. App. Div. LEXIS 430 (N.Y. App. Div. 2d Dep't 2007).

Subd b, of this rule governs an application to reopen a habeas corpus proceeding for further testimony and for reconsideration of a decision theretofore made. Schmidt v Schmidt, 44 Misc. 2d 661, 254 N.Y.S.2d 663, 1964 N.Y. Misc. LEXIS 1193 (N.Y. Fam. Ct. 1964).

Jury verdict was permitted to stand, even though defense counsel was cited for criminal contempt for misconduct which was obviously intended to create an atmosphere of such confusion, uncertainty, and anger as to make it impossible for jury to properly perform its function, where court was convinced from demeanor of jury and evidence sufficient to support verdict that jury performed their task fairly and thoroughly, and that jury had followed court's instruction to disregard bickering of counsel. Reilly v Wright, 73 Misc. 2d 801, 343 N.Y.S.2d 639, 1973 N.Y. Misc. LEXIS 2127 (N.Y. Sup. Ct. 1973), aff'd, 55 A.D.2d 544, 390 N.Y.S.2d 1, 1976 N.Y. App. Div. LEXIS 15222 (N.Y. App. Div. 1st Dep't 1976).

Hearing held by Special Term toward ultimate disposition of motion to stay arbitration under uninsured motorist provision of automobile policy was not a "trial" as contemplated by rule governing posttrial motions for judgment and new trial; however, since matter was one in nature of a "special proceeding" instituted by a motion, within meaning of arbitration statutes, court would treat it as application for leave to reargue. Nassau Ins. Co. v Newsome, 86 Misc. 2d 942, 383 N.Y.S.2d 514, 1976 N.Y. Misc. LEXIS 2549 (N.Y. Sup. Ct. 1976).

In a medical malpractice action against both a doctor and a hospital, where the jury's verdict that both defendants were separately liable to the plaintiff in a specific amount was formerly sufficient in that five jurors concurred, but where the verdict as to apportionment was not formerly sufficient, in that there were only four concurring votes, the verdict as to liability was allowed to stand but a new trial was ordered as to the issue of apportionment. Cohen v Levin, 110 Misc. 2d 464, 442 N.Y.S.2d 851, 1981 N.Y. Misc. LEXIS 3108 (N.Y. Sup. Ct. 1981), disapproved, Schabe v Hampton Bays Union Free School Dist., 103 A.D.2d 418, 480 N.Y.S.2d 328, 1984 N.Y. App. Div. LEXIS 19766 (N.Y. App. Div. 2d Dep't 1984).

On plaintiffs' posttrial motion to set aside jury verdict and for new trial, court permitted surreply to be submitted, with consent of both sides, to address newly advanced arguments where plaintiffs

had initially made their motion pro se, then hired appellate counsel who submitted reply affirmation which improperly raised new arguments. Afshari v Barer, 186 Misc. 2d 165, 715 N.Y.S.2d 297, 2000 N.Y. Misc. LEXIS 448 (N.Y. Civ. Ct. 2000).

Inmate's motion for reconsideration of the dismissal of his claim against the State, which sought damages due to the imposition of a disciplinary measure whereby he was only allowed to have no-contact visitation due to an assault upon a prison staff member, was not procedurally flawed because after trial, such motion was governed by N.Y. C.P.L.R. 4404(b), rather than N.Y. C.P.L.R. 2221, which applied only to reargument after a prior order. Dawes v State, 194 Misc. 2d 617, 755 N.Y.S.2d 221, 2003 N.Y. Misc. LEXIS 68 (N.Y. Ct. Cl. 2003).

Where plaintiff filed a motion under N.Y. C.P.L.R. 5229 to restrain defendant from disposing of or transferring any of his personal or real property in order to avoid satisfying a verdict that plaintiff obtained in his favor, but there was still a motion for relief from judgment pending by defendant under N.Y. C.P.L.R. 4404(a) and plaintiff had not yet had an opportunity to offer evidence that defendant had engaged in financial activities that appeared to be for the purpose of avoiding satisfaction of the judgment, the matter required a hearing on the outstanding issues. Laruffa v Yui Ming Lau, 798 N.Y.S.2d 710, 5 Misc. 3d 1013(A), 2004 N.Y. Misc. LEXIS 2118 (N.Y. Sup. Ct. 2004).

2. Appeal and review

Plaintiff, having stipulated to reduction in amount of damages award, was not "aggrieved," and thus his motion for leave to appeal to Court of Appeals would be denied. Zhagnay v Royal Realty Co., 87 N.Y.2d 954, 641 N.Y.S.2d 828, 664 N.E.2d 894, 1996 N.Y. LEXIS 251 (N.Y. 1996).

In personal injury action wherein jury returned verdict in defendants' favor and trial court denied plaintiff's motion under CLS CPLR § 4404(a) to set aside verdict as against weight of evidence, Appellate Division erred in curtailing its review of trial court's ruling after simply finding sufficient evidence to support jury's verdict; having found evidence to support verdict in favor of

defendant, Appellate Division was then required to determine whether conflicting medical evidence presented by plaintiff so preponderated in plaintiff's favor that verdict could not have been reached on any fair interpretation thereof. Grassi v Ulrich, 87 N.Y.2d 954, 641 N.Y.S.2d 588, 664 N.E.2d 499, 1996 N.Y. LEXIS 114 (N.Y. 1996).

Where a court orders a trial of the issues of liability prior to a trial on the issue of damages and there is a finding in favor of the plaintiff, the Appellate Division will entertain an appeal from the determination, whether the split trial determination was by the court or a jury and whether the appeal is from an order or an interlocutory judgment entered on the determination. However, where a motion is made to set aside such determination or for a judgment notwithstanding the verdict, and that motion is denied, an appeal will not lie from an order entered on the decision upon the motion. Fortgang v Chase Manhattan Bank, 29 A.D.2d 41, 285 N.Y.S.2d 110, 1967 N.Y. App. Div. LEXIS 2864 (N.Y. App. Div. 2d Dep't 1967).

Surety was liable on undertaking, which defendant had obtained to stay execution of judgment pending appeal, past date of remand by Court of Appeals for new trial on issue of liability where said court made no specific directions that judgment should be reversed or vacated, but accepted money damages as final on condition that plaintiff prevail in new trial. La Rocco v Federal Ins. Co., 42 A.D.2d 475, 349 N.Y.S.2d 135, 1973 N.Y. App. Div. LEXIS 4579 (N.Y. App. Div. 3d Dep't 1973), rev'd, 35 N.Y.2d 806, 362 N.Y.S.2d 461, 321 N.E.2d 551, 1974 N.Y. LEXIS 1206 (N.Y. 1974).

Jury's verdict favoring defendant in personal injury action for damages could only have been set aside if it could not have been reached on any fair interpretation of evidence. Donigi v American Cyanamid Co., 57 A.D.2d 760, 394 N.Y.S.2d 422, 1977 N.Y. App. Div. LEXIS 11911 (N.Y. App. Div. 1st Dep't 1977), aff'd, 43 N.Y.2d 935, 403 N.Y.S.2d 894, 374 N.E.2d 1245, 1978 N.Y. LEXIS 1832 (N.Y. 1978).

Appellate court, in reviewing decision setting aside verdict and ordering new trial, will reverse trial court's order when review of evidence establishes that order is unreasonable. Boyle v

Gretch, 57 A.D.2d 1047, 395 N.Y.S.2d 797, 1977 N.Y. App. Div. LEXIS 12350 (N.Y. App. Div. 4th Dep't 1977).

Plaintiff in a medical malpractice action was entitled to a new trial, where the jury's repeated requests that the charge on negligence and malpractice be reread indicated that they were having difficulty understanding the law to be applied to the facts of the case, which were complicated and had taken several days to present, where it was manifest from one juror's question that he was confused as to the fundamental theory of the plaintiffs' case, and where, under the circumstances, the court had an obligation to instruct the jury not only as to the law, but also as to the application of the factual contentions of the parties to the legal principles charged. Bender v Nassau Hospital, 99 A.D.2d 744, 471 N.Y.S.2d 657, 1984 N.Y. App. Div. LEXIS 17109 (N.Y. App. Div. 2d Dep't 1984).

Whether to set aside verdict is within sound discretion of trial court, and court's decision should not be disturbed absent showing of abuse of discretion. Osborne v Schoenborn, 216 A.D.2d 810, 628 N.Y.S.2d 886, 1995 N.Y. App. Div. LEXIS 7468 (N.Y. App. Div. 3d Dep't 1995).

Court erred in striking from record juror affidavits submitted by plaintiffs in support of their motion to set aside verdict on comparative negligence, for judgment notwithstanding verdict on liability, and for new trial on comparative negligence and damages where court considered those affidavits in denying motion and thus should have settled record to include them; however, error would be disregarded as harmless. Smith v Monro Muffler Brake, Inc., 275 A.D.2d 1028, 713 N.Y.S.2d 581, 2000 N.Y. App. Div. LEXIS 9630 (N.Y. App. Div. 4th Dep't 2000), app. denied, 96 N.Y.2d 710, 726 N.Y.S.2d 373, 750 N.E.2d 75, 2001 N.Y. LEXIS 949 (N.Y. 2001).

In personal injury action against operator of car repair shop for negligent repairs allegedly causing brakes to fail and plaintiff to swerve off road and hit stanchion in median, Appellate Division would hear plaintiff's appeal from denial of new trial sought on ground of erroneous admission of police officer's testimony where (1) plaintiff's argument was at least partly preserved for appellate review by his counsel's objection based on officer's lack of expertise as soon as defense counsel began to address that subject, and (2) error created basis on which

jury might have concluded that plaintiff's brakes did not fail, for which hypothesis there was otherwise no evidence, and (3) thus, error was fundamental and would be reviewed in interest of justice. Schembre v Atomic Spring & Alignment Co., 281 A.D.2d 531, 722 N.Y.S.2d 64, 2001 N.Y. App. Div. LEXIS 2614 (N.Y. App. Div. 2d Dep't 2001).

Record on appeal from order granting plaintiff's motion under CLS CPLR § 4404 to set aside jury verdict should have included papers and other exhibits on which order was founded. Appeal from order granting plaintiff's motion under CLS CPLR § 4404 to set aside jury verdict would be dismissed where appellant failed to include in record papers and other exhibits on which order was founded, and exhibits that were introduced at trial. Riverso v Allstate Ins. Co., 282 A.D.2d 663, 723 N.Y.S.2d 413, 2001 N.Y. App. Div. LEXIS 3980 (N.Y. App. Div. 2d Dep't 2001).

Appellate court dismissed defendants' appeal from order of trial court which denied their post-judgment motion to set aside verdict in plaintiff's favor on ground that plaintiff did not sustain serious injury under CLS Ins § 5102, where defendants argued on appeal that record did not support jury's findings of permanent consequential limitation of use, but they did not challenge jury's 90/180-day finding, thereby eliminating that issue from case and allowing plaintiff to recover any damages proximately caused by accident. Deyo v Laidlaw Transit Inc., 285 A.D.2d 853, 727 N.Y.S.2d 797, 2001 N.Y. App. Div. LEXIS 7507 (N.Y. App. Div. 3d Dep't 2001).

On appeal from a judgment against personal injury plaintiffs on the issue of liability for an automobile accident, from a denial of plaintiffs' N.Y. C.P.L.R. 4404(a) to set aside the verdict and to order a new trial, and from an order dismissing the complaint, the court exercised its discretion in reversing that judgment by granting the N.Y. C.P.L.R. 4404(a) motion by setting aside the verdict, and by ordering a new trial on liability. Since the supreme court erred in several evidentiary rulings, including failing to admit a certified accident report into evidence and failing to allow plaintiffs to treat a defendant driver as a hostile witness, plaintiffs were denied a fair trial. Fox v Tedesco, 15 A.D.3d 538, 789 N.Y.S.2d 742, 2005 N.Y. App. Div. LEXIS 1850 (N.Y. App. Div. 2d Dep't 2005).

In a defamation action, the trial court properly denied that branch of defendant's motion to set aside so much of the verdict as was in favor of plaintiff and against defendant as related to the third allegedly defamatory statement. Contrary to defendant's contention, the record demonstrated, by clear and convincing evidence, that the third statement was made with actual malice. Eastwood v Hoefer, 136 A.D.3d 655, 24 N.Y.S.3d 391, 2016 N.Y. App. Div. LEXIS 672 (N.Y. App. Div. 2d Dep't 2016).

Trial court did not err in granting those branches of defendant's motion to set aside so much of the verdict as was in favor of plaintiff and against defendant as related to two allegedly defamatory statements. The evidence did not establish, with convincing clarity, that defendant published these statements with actual malice. Eastwood v Hoefer, 136 A.D.3d 655, 24 N.Y.S.3d 391, 2016 N.Y. App. Div. LEXIS 672 (N.Y. App. Div. 2d Dep't 2016).

In a personal injury action, the trial court properly denied defendant's motion pursuant to N.Y. C.P.L.R. 4404(a) to set aside the jury verdict on the issue of liability and for a new trial, as the jury's verdict was supported by a fair interpretation of the evidence. Hernandez v Pappco Holding Co., Ltd., 136 A.D.3d 981, 26 N.Y.S.3d 312, 2016 N.Y. App. Div. LEXIS 1287 (N.Y. App. Div. 2d Dep't 2016).

Court joined its colleagues in sister departments in concluding that plaintiffs were not required to preserve their weight of the evidence contention by moving to set aside the verdict upon that basis; the court is fully empowered to order a new trial where the appellant made no motion for that relief in the trial court and to the extent that the court’s prior decisions had suggested otherwise, they should no longer be followed. Fitzpatrick v Tvetenstrand, 228 A.D.3d 7, 209 N.Y.S.3d 204, 2024 N.Y. App. Div. LEXIS 1997 (N.Y. App. Div. 3d Dep't 2024).

Trial court should have denied that branch of plaintiff’s motion to set aside the jury verdict in favor of defendants on the issue of liability as contrary to the weight of the evidence and for a new trial, as the record was not replete with evidence of negligence. The jury could reasonably have concluded that plaintiff failed to establish that defendants created or had actual or constructive notice of a puddle on the floor of the emergency room at the hospital. Thompson v

Northwell Health, Inc., 234 A.D.3d 1006, 226 N.Y.S.3d 281, 2025 N.Y. App. Div. LEXIS 412 (N.Y. App. Div. 2d Dep't 2025).

On a motion to “correct an arithmetical mistake in findings of fact and judgment” the court may invoke its inherent powers of equity and discretion, but, under this Rule, once the appeal has been argued prior to the hearing of such a motion it deprives the court of power to grant relief, and rationalization of the facts are not permitted once the appeal has been argued. Kogut v State, 48 Misc. 2d 93, 264 N.Y.S.2d 283, 1965 N.Y. Misc. LEXIS 1363 (N.Y. Ct. Cl.), aff'd, 24 A.D.2d 928, 264 N.Y.S.2d 852, 1965 N.Y. App. Div. LEXIS 2938 (N.Y. App. Div. 3d Dep't 1965).

3. —Denial of appeal and review

Section 5701 of the CPLR authorizes an appeal as of right where the order involves some part of the merits or affects a substantial right, but the trial court’s orders denying defendant’s oral motions to dismiss the complaint made at the end of plaintiff’s case and at the close of the entire case, and defendant’s motions made pursuant to Rule 4401 and Rule 4404[a] of the CPLR did not involve some part of the merits and did not affect a substantial right, as such right had been defined by the courts. Covell v H.R.H. Constr. Corp., 24 A.D.2d 566, 262 N.Y.S.2d 370, 1965 N.Y. App. Div. LEXIS 3691 (N.Y. App. Div. 2d Dep't 1965), aff'd, 17 N.Y.2d 709, 269 N.Y.S.2d 718, 216 N.E.2d 710, 1966 N.Y. LEXIS 1477 (N.Y. 1966).

No appeal lies from an order denying a motion for a new trial made on the trial minutes, or to set aside a determination in favor of a plaintiff upon a trial limited to issues of liability, or for judgment notwithstanding such determination. Leis v Estate of Morris B. Baer, Inc., 29 A.D.2d 547, 285 N.Y.S.2d 548, 1967 N.Y. App. Div. LEXIS 2803 (N.Y. App. Div. 2d Dep't 1967).

No appeal lies from an order denying a motion to set aside a decision after trial based on the trial minutes. Psaroudis v Psaroudis, 30 A.D.2d 841, 293 N.Y.S.2d 24, 1968 N.Y. App. Div. LEXIS 3399 (N.Y. App. Div. 2d Dep't 1968), aff'd, 27 N.Y.2d 527, 312 N.Y.S.2d 998, 261 N.E.2d 108, 1970 N.Y. LEXIS 1307 (N.Y. 1970).

No appeal lies from an order denying a motion pursuant to CPLR 4404 to set aside a verdict following a trial limited to the issue of liability. Tierno v Brennie, 32 A.D.2d 641, 300 N.Y.S.2d 23, 1969 N.Y. App. Div. LEXIS 4069 (N.Y. App. Div. 2d Dep't 1969).

Defendant’s appeal, in personal injury action, from intermediate order would be dismissed, because right of direct appeal therefrom terminated on entry of judgment in action, where defendant did not stipulate to increased award, new trial was held on issue of damages for past pain and suffering, and judgment on that issue was entered. DePasquale v Klenetsky, 255 A.D.2d 545, 682 N.Y.S.2d 600, 1998 N.Y. App. Div. LEXIS 12940 (N.Y. App. Div. 2d Dep't 1998).

Right of appeal from an intermediate order which denied appellant’s motion to set aside a jury verdict terminated with the entry of the interlocutory judgments on the verdicts; the issue raised on the appeal from that order was brought up for review and was considered on the appeal from the interlocutory judgments. Pressley v DePalma, 39 A.D.3d 732, 833 N.Y.S.2d 650, 2007 N.Y. App. Div. LEXIS 4768 (N.Y. App. Div. 2d Dep't 2007).

Patient’s appeal from a N.Y. C.P.L.R. 4404 order setting aside a jury verdict had to be dismissed because the right of direct appeal therefrom terminated with the entry of a judgment in the action. Romano v Colen, 305 A.D.2d 575, 759 N.Y.S.2d 353, 2003 N.Y. App. Div. LEXIS 5629 (N.Y. App. Div. 2d Dep't 2003).

Where the injured party argued that the trial court erred in denying the injured party’s motion pursuant to N.Y. C.P.L.R. 4404(a) to set aside the verdict as to future pain and suffering as against the weight of the evidence, as the injured party argued that the jury’s failure to award the injured party any damages for future pain and suffering could not be reconciled with its finding that the injured party sustained a permanent consequential limitation of use of a body organ or member pursuant to N.Y. Ins. Law § 5102(d), the argument was not preserved for appellate review; the injured party failed to raise the issue before the jury’s discharge. Sotomayor v Enter. Packaging Corp., 10 A.D.3d 603, 781 N.Y.S.2d 455, 2004 N.Y. App. Div. LEXIS 10589 (N.Y. App. Div. 2d Dep't 2004).

Appeal from an intermediate order denying a motion to set aside a jury verdict and enter judgment as a matter of law under N.Y. C.P.L.R. 4404(a) was dismissed because the right of direct appeal therefrom terminated with the entry of a judgment on the jury's verdict in the action. The issues raised on appeal from the order were brought up for review and were considered on appeal from the judgment under N.Y. C.P.L.R. 5501(a)(1). Harris v Marlow, 18 A.D.3d 608, 795 N.Y.S.2d 608, 2005 N.Y. App. Div. LEXIS 5349 (N.Y. App. Div. 2d Dep't 2005).

Because appellees did not request a mistrial before the jury rendered a verdict, appellee's postverdict motion for an order setting the verdict aside on the ground of misconduct by appellant's counsel should have been denied. Moreover, the alleged misconduct of counsel was not so wrongful and pervasive as to warrant the exercise of the trial court's discretionary power to set aside the verdict in the interest of justice. Lisa I. v Manikas, 2024 N.Y. App. Div. LEXIS 3159 (N.Y. App. Div. 3d Dep't), vacated, 211 N.Y.S.3d 633, 2024 N.Y. App. Div. LEXIS 3399 (N.Y. App. Div. 3d Dep't 2024).

4. Compromise verdicts

It is only when it can be demonstrated that an inadequate verdict could only have resulted from a compromise on the liability issue that the trial court must revert to former rule requiring retrial on all issues when it finds the verdict to be inadequate. Figliomeni v Board of Education, 38 N.Y.2d 178, 379 N.Y.S.2d 45, 341 N.E.2d 557, 1975 N.Y. LEXIS 2304 (N.Y. 1975), reh'g denied, 39 N.Y.2d 743, 1976 N.Y. LEXIS 3487 (N.Y. 1976).

Impermissible compromise verdict in products liability case was not demonstrated by one juror's use of word "compromise" in describing course jury followed during its deliberations where, considering context, that word was not used as term of art with specific legal meaning. Manchester v Bankhead Corp., Div. of Bankhead Enterprises, Inc., 125 A.D.2d 740, 509 N.Y.S.2d 434, 1986 N.Y. App. Div. LEXIS 62981 (N.Y. App. Div. 3d Dep't 1986).

Court properly set aside verdict awarding plaintiff $6,000,000 for future pain and suffering and nothing for approximately 11 years of past pain and suffering. Torres v City of New York, 226 A.D.2d 701, 641 N.Y.S.2d 402, 1996 N.Y. App. Div. LEXIS 4566 (N.Y. App. Div. 2d Dep't 1996).

Court properly granted plaintiffs' motion to set aside verdict, and properly directed new trial on all issues, where compromise verdict was highly likely in view of sharply conflicting evidence on issue of causation, plaintiff's serious injury, and jury's inexplicably low award. Moreno v Thaler, 255 A.D.2d 195, 679 N.Y.S.2d 814, 1998 N.Y. App. Div. LEXIS 12429 (N.Y. App. Div. 1st Dep't 1998).

In action to recover on insurance contract for damages to speedboat, new trial would be ordered on issue of damages, because jury apparently submitted compromise verdict, where plaintiffs' experts testified that boat could not be repaired and had to be completely replaced, invoice price of boat was $140,493.75, defendant's experts testified that boat could be restored to its original condition for between $25,000 and $30,000, which testimony was not incredible, and jury awarded plaintiffs $50,000. Stachnik Marina, Ltd. v Commercial Union Ins. Co., 263 A.D.2d 479, 692 N.Y.S.2d 727, 1999 N.Y. App. Div. LEXIS 7896 (N.Y. App. Div. 2d Dep't 1999).

A compromise verdict can be detected when it is irreconcilably inconsistent, or where the amounts awarded are highly disproportionate. Honigsberg v New York City Transit Authority, 43 Misc. 2d 1, 249 N.Y.S.2d 296, 1964 N.Y. Misc. LEXIS 1817 (N.Y. Civ. Ct. 1964).

Defendant's motion for leave to depose two jurors, on the ground that their verdict in a prior case relied upon by plaintiff to provide collateral estoppel effect against defendant on plaintiff's motion for partial summary judgment was reached by compromise and thus could not be used for purposes of collateral estoppel, would be denied since there was an absolute prohibition against the use of a juror's testimony to impeach his verdict with respect to testimony concerning events inside the jury room whether the purpose was to set the verdict aside or prevent its use for collateral estoppel purposes, and since the determination of whether or not there had been a compromise verdict is made by drawing inferences from external factors, not by deposing the jurors themselves. In addition, even if the rule against deposing jurors

concerning their deliberations was not applicable to the instant case, the motion would be denied since it was based solely upon a hearsay affidavit of an attorney who stated what one juror he interviewed allegedly told him, which did not meet the rigorous standard for evidence required by the court to permit an involuntary deposition of a juror. Kaufman v Eli Lilly & Co., 116 Misc. 2d 351, 455 N.Y.S.2d 329, 1982 N.Y. Misc. LEXIS 3882 (N.Y. Sup. Ct. 1982), aff'd, 99 A.D.2d 695, 471 N.Y.S.2d 830, 1984 N.Y. App. Div. LEXIS 17046 (N.Y. App. Div. 1st Dep't 1984).

Enormous jury award for medical expenses combined with almost no award for pain and suffering, in a case where causation of a worker's injury was clear but liability was sharply contested, indicated to a near certainty that the jury verdict was the result of an impermissible compromise; under binding precedent of the Supreme Court, Appellate Division, First Department, such a situation required a grant of a complete new trial, not merely a new trial on damages. Guarneros v Green 286 Madison, LLC, 791 N.Y.S.2d 332, 6 Misc. 3d 704, 233 N.Y.L.J. 1, 2004 N.Y. Misc. LEXIS 2849 (N.Y. Sup. Ct. 2004).

In a breach of contract action, the jury's damages award, which awarded an employee damages for lost compensation before he was terminated but not for compensation owed for the unexpired part of the minimum one-year term of the contract, reflected an apparant compromise verdict; thus, the court reversed the amended judgment entered upon the jury's verdict and ordered a new trial, N.Y. C.P.L.R. 4404. Siegel v Laric Entm't Corp., 307 A.D.2d 861, 763 N.Y.S.2d 607, 2003 N.Y. App. Div. LEXIS 9011 (N.Y. App. Div. 1st Dep't 2003).

5. Inherent powers of court in non-jury cases

CLS CPLR § 4404(b) did not authorize judge to admit into evidence after conclusion of nonjury trial liability insurer's entire claim file (which was conditionally immune from discovery as material prepared for litigation), under premise that he would disregard matters which would not survive hearsay challenge, since such practice raised "substantial probability of irreparable prejudice" to party's case because "there is simply no way of gauging the subtle impact of

inadmissible hearsay on even the most objective trier of fact." Sofio v Hughes, 148 A.D.2d 439, 538 N.Y.S.2d 591, 1989 N.Y. App. Div. LEXIS 2469 (N.Y. App. Div. 2d Dep't 1989).

After nonjury trial, court properly awarded wife ½ of husband's pension payment on ground that entire payment was marital property, where husband failed to present expert evidence as to disability portion of pension; however, trial could be reopened under CLS CPLR § 4404(b) to allow husband present expert evidence on pension issue, where court implicitly concluded that deficiency of proof on pension issue deprived husband of substantial justice. Carney v Carney, 236 A.D.2d 574, 653 N.Y.S.2d 696, 1997 N.Y. App. Div. LEXIS 1609 (N.Y. App. Div. 2d Dep't 1997).

Court properly denied plaintiff's motion to set aside court's prior decision dismissing her fraud claim, even if real estate contract's "as it is" merger clause was inapplicable, where facts regarding quality of water supply to house purchased by plaintiff were not particularly within defendant's decedent's knowledge, and plaintiff could have discovered truth of alleged representations by conducting water flow test prior to taking title. In re Estate of Hickey, 252 A.D.2d 763, 676 N.Y.S.2d 277, 1998 N.Y. App. Div. LEXIS 8293 (N.Y. App. Div. 3d Dep't 1998).

The court in a non-jury trial has the power to set aside a decision on its own initiative under the provisions of subd (b) of this section, and this discretionary power is not controlled by the 15-day limitation set forth in CPLR § 4405, but there must be an overriding and persuasive reason before such power is exercised. Moore v State, 45 Misc. 2d 1060, 258 N.Y.S.2d 655, 1965 N.Y. Misc. LEXIS 2032 (N.Y. Ct. Cl. 1965).

New York City Civil Court has power under this Rule to set aside its decisions in non-jury cases. Marluted Realty Corp. v Decker, 46 Misc. 2d 736, 260 N.Y.S.2d 988, 1965 N.Y. Misc. LEXIS 1749 (N.Y. Civ. Ct. 1965).

Amendment to successor executor's account which stated that his account was amended to "reflect the existence of a conditional contingent asset consisting of a claim against deceased executrix for surcharges in respect of her conduct as executrix of estate of deceased" was not

tantamount to filing objections on behalf of all residuary legatees and other interested parties and, thus, court could consider the issue, raised for first time, as to whether amount of surcharges imposed against estate of deceased executrix should have been limited to the interest of the objecting parties. In re Estate of Zalaznick, 90 Misc. 2d 113, 394 N.Y.S.2d 347, 1977 N.Y. Misc. LEXIS 2001 (N.Y. Sur. Ct. 1977).

6. Inherent powers of trial court; new trial

Power of trial court to order new trial in interest of justice either by motion of any party, or on its own initiative, is predicated on assumption that judge who presides at trial is in best position to evaluate errors therein. Power conferred upon trial court to order new trial is discretionary in nature and trial judge must decide whether substantial justice has been done, whether it is likely that verdict has been affected, and judge must look to his own common sense, experience and sense of fairness rather than to precedents. Micallef v Miehle Co., Div. of Miehle-Goss Dexter, Inc., 39 N.Y.2d 376, 384 N.Y.S.2d 115, 348 N.E.2d 571, 1976 N.Y. LEXIS 2623 (N.Y. 1976).

The inherent power of the court to set aside a verdict or vacate a judgment and direct a new trial in the interests of justice is codified by this section. McCarthy v Port of New York Authority, 21 A.D.2d 125, 248 N.Y.S.2d 713, 1964 N.Y. App. Div. LEXIS 3974 (N.Y. App. Div. 1st Dep't 1964).

Where there was some evidence tending to establish negligence on the part of the city and the manufacturer either in a defect in the particular nozzle of a fire fighting apparatus or in its improper use, the circumstances were such that the administratrix in an action for wrongful death should be afforded the benefit of an opportunity of a new trial to establish her allegations of negligence as to both defendants and the granting of a new trial in the interests of justice is well within the broad powers of the Appellate Division, which in this regard, possesses the same powers as the trial court. Cady v New York, 35 A.D.2d 202, 315 N.Y.S.2d 360, 1970 N.Y. App. Div. LEXIS 3558 (N.Y. App. Div. 1st Dep't 1970).

In an action for damages to property caused when a water main broke during a project to construct a new subway entrance under a contract with the City Transit Authority, the trial court

erred in setting aside the jury's verdict in favor of the defendants on the issue of negligence of the contractor since the defendants introduced testimony of several expert witnesses whose credibility was an issue of fact for the jury, and the court could not substitute its personal judgment based on accepting as true the testimony of the plaintiffs' experts and rejecting as untrue the testimony of the defendants' experts. The city was not liable on the theory that the contractor had undertaken a "dangerous or imminently dangerous" activity requiring the city to inspect the work being done, since the jury found no negligence by the contractor; nor was the city liable on the theory that it delayed in shutting off the water flow through the break after being notified, since there was uncontradicted evidence that the water flowing after the valve was shut off was run off water already in the main. Dobess Realty Corp. v New York, 79 A.D.2d 348, 436 N.Y.S.2d 296, 1981 N.Y. App. Div. LEXIS 9712 (N.Y. App. Div. 1st Dep't), app. dismissed, 54 N.Y.2d 754, 1981 N.Y. LEXIS 4935 (N.Y. 1981).

In a negligence action to recover damages for personal injuries, the trial court acted properly within its discretion in setting aside the verdict on the issue of damages as contrary to the weight of the evidence. In addition, plaintiffs were entitled to a new trial on the issue of damages where the trial court had refused to permit them to voir dire the jury on the question of damages prior to the phase of the trial on the issue of damages. Pavis v Scott, 82 A.D.2d 800, 439 N.Y.S.2d 215, 1981 N.Y. App. Div. LEXIS 14455 (N.Y. App. Div. 2d Dep't 1981).

Trial court properly set aside the verdict and ordered a new trial since the jury obviously was confused in its attempts to determine the negligence of defendants in that the jury sent a note to the court during its deliberations stating that it felt that defendant was at fault, but later returned a finding that defendant had not been negligent. Golden v Transport Taxi & Limousine Service, Ltd., 92 A.D.2d 882, 459 N.Y.S.2d 867, 1983 N.Y. App. Div. LEXIS 17269 (N.Y. App. Div. 2d Dep't 1983).

In malicious prosecution action, County Court properly set aside verdict against town constable as being against weight of evidence, and ordered new trial, despite evidence of some malice exhibited by constable in underlying action, since mere existence of factual issue of malice did

not deprive court of power to intervene in appropriate case. Arnold v Wilton, 126 A.D.2d 135, 512 N.Y.S.2d 741, 1987 N.Y. App. Div. LEXIS 41135 (N.Y. App. Div. 3d Dep't 1987).

New trial was not necessary under CLS CPLR § 4404 following trial court's order setting aside jury verdict for plaintiff as against weight of evidence, where trial court then properly dismissed complaint on basis that plaintiff failed to state cause of action. Labriola v New York, 129 A.D.2d 505, 514 N.Y.S.2d 345, 1987 N.Y. App. Div. LEXIS 45180 (N.Y. App. Div. 1st Dep't), app. denied, 70 N.Y.2d 604, 519 N.Y.S.2d 1027, 513 N.E.2d 1307, 1987 N.Y. LEXIS 18198 (N.Y. 1987).

In action to recover legal fees, Supreme Court, after remittitur from Court of Appeals, properly denied defendants' motion to vacate judgment against them and for leave to amend their answer to assert affirmative defense of usury where Court of Appeals limited issues to be determined on remittitur to amount which defendants owed to plaintiff under original retainer agreement. Eikenberry v Adirondack Spring Water Co., 148 A.D.2d 664, 539 N.Y.S.2d 413, 1989 N.Y. App. Div. LEXIS 4209 (N.Y. App. Div. 2d Dep't 1989), app. dismissed, 74 N.Y.2d 842, 546 N.Y.S.2d 558, 545 N.E.2d 872, 1989 N.Y. LEXIS 2848 (N.Y. 1989), app. dismissed, 76 N.Y.2d 935, 563 N.Y.S.2d 63, 564 N.E.2d 673, 1990 N.Y. LEXIS 3314 (N.Y. 1990).

Although court in personal injury action properly set aside jury verdict in favor of defendants as against weight of evidence, court erred in granting plaintiff's motion for directed verdict and awarding plaintiff judgment notwithstanding verdict on issue of liability, instead of granting new trial on that issue; determination setting aside jury verdict as against weight of evidence results only in new trial and does not deprive parties of their right to ultimately have all disputed issues of fact resolved by jury. Harrison v Harrison, 199 A.D.2d 1091, 607 N.Y.S.2d 204 (N.Y. App. Div. 4th Dep't 1993).

It was error to set aside jury verdict in plaintiff's favor and dismiss complaint where he established prima facie case of liability; however, since defendant's evidence was of such quality and quantity as to render verdict contrary to weight of credible evidence, proper remedy

was to award new trial. Gomez v Doe, 230 A.D.2d 892, 647 N.Y.S.2d 27, 1996 N.Y. App. Div. LEXIS 8683 (N.Y. App. Div. 2d Dep't 1996).

It was improper for court to enter judgment reducing damage award without ordering new trial on issue of damages unless plaintiffs stipulated to reduce verdict. Tri-State Aluminum Prods. v Paramount Macaroni Mfg. Co., 247 A.D.2d 606, 669 N.Y.S.2d 229, 1998 N.Y. App. Div. LEXIS 1735 (N.Y. App. Div. 2d Dep't 1998).

Order would be reversed in interest of justice and new trial granted due to obvious difficulty that counsel and court had as to interpretation of parties' stipulation and obvious confusion of jury over issues submitted. Myrick v Bonter, 249 A.D.2d 906, 672 N.Y.S.2d 193, 1998 N.Y. App. Div. LEXIS 4983 (N.Y. App. Div. 4th Dep't 1998).

Court did not abuse its discretion in denying plaintiff's posttrial motion for judgment on liability and new trial as to damages where jury did not announce its verdict in open court, members of jury were not polled, and plaintiff did not show that verdict was entered in minutes by Clerk; under circumstances, there was no jury verdict on which court could grant judgment. Ricchueto v County of Monroe, 267 A.D.2d 1012, 701 N.Y.S.2d 550, 1999 N.Y. App. Div. LEXIS 13758 (N.Y. App. Div. 4th Dep't 1999).

Brevity of jury deliberations alone provided no basis to declare mistrial or set aside verdict in personal injury action. Young v Tops Mkts., Inc., 283 A.D.2d 923, 725 N.Y.S.2d 489, 2001 N.Y. App. Div. LEXIS 4433 (N.Y. App. Div. 4th Dep't 2001).

On appeal from an order in a pedestrian's personal injury action denying her motions to set aside the jury verdict against her and for a new trial, said order was reversed, and a new trial was ordered on remittal, as the jury's finding that an opposing driver was free from negligence was against any fair interpretation of the evidence, given her common law duty to see that which she should have seen through the proper use of her senses, and because the fact that she never saw the pedestrian did not excuse her conduct, and a fact issue remained as to whether

the pedestrian was also at fault in causing the accident. Larsen v Spano, 35 A.D.3d 820, 827 N.Y.S.2d 276, 2006 N.Y. App. Div. LEXIS 15830 (N.Y. App. Div. 2d Dep't 2006).

Lower court improvidently exercised its discretion in ordering a new trial; some of the challenged conduct by defense counsel was certainly improper, but viewing defense counsel's conduct in the context of the entire trial, it was not pervasive or prejudicial, or so inflammatory as to have deprived plaintiffs of a fair trial; the jury's damages award was based on a fair interpretation of the evidence and thus was not contrary to the weight of the evidence. Lariviere v New York City Tr. Auth., 131 A.D.3d 1130, 17 N.Y.S.3d 153, 2015 N.Y. App. Div. LEXIS 6800 (N.Y. App. Div. 2d Dep't 2015).

Trial court has the power to review its own charge, even if not objected to, and to order a new trial in the event an error in the charge is determined to be fundamental to the outcome of the case. Hutchinson v Petropoulos, 119 Misc. 2d 1024, 465 N.Y.S.2d 110, 1983 N.Y. Misc. LEXIS 3639 (N.Y. Civ. Ct. 1983).

7. —Power to set aside verdict

Trial justice who heard testimony at inquest relative to reargument of motion to vacate default judgment had statutory and inherent power to modify damages previously awarded as real estate brokerage commission. Oppenheim v Melnick, 34 A.D.2d 784, 311 N.Y.S.2d 63, 1970 N.Y. App. Div. LEXIS 4982 (N.Y. App. Div. 2d Dep't), app. denied, 27 N.Y.2d 484, 1970 N.Y. LEXIS 2027 (N.Y. 1970).

In action brought by passenger who was injured when driver lost control of the automobile and crashed, trial judge did not abuse his discretion in setting aside jury verdict in favor of defendant in view of trial judge’s error in failing to admit certified copy of medical examiner’s autopsy report to rebut defense of heart attack and in view of error in giving instruction concerning contributory negligence. Nau v Ferrante, 52 A.D.2d 523, 381 N.Y.S.2d 512, 1976 N.Y. App. Div. LEXIS 12051 (N.Y. App. Div. 1st Dep't 1976).

Trial court in informed consent action against physician erred when, after setting aside jury's verdict in plaintiff's favor, it dismissed complaint rather than ordering new trial. Valenti v Prudden, 58 A.D.2d 956, 397 N.Y.S.2d 181, 1977 N.Y. App. Div. LEXIS 13158 (N.Y. App. Div. 3d Dep't 1977).

Although, generally, newly discovered evidence going only to credibility is not a basis for setting aside a verdict, a court has inherent power to set aside a verdict or vacate a judgment and order a new trial in the interests of justice. Trapp v American Trading & Production Corp., 66 A.D.2d 515, 414 N.Y.S.2d 11, 1979 N.Y. App. Div. LEXIS 10050 (N.Y. App. Div. 1st Dep't 1979).

In an action for personal injuries arising out of an accident between a motorcyclist and the driver of an automobile, the trial court correctly set aside the verdict in favor of the motorcyclist and granted a new trial where the court recognized that it had erred in instructing the jury on the "emergency doctrine" in that there was no physical or testimonial evidence to support the inference that an unexpected emergency situation existed; the setting aside of the verdict was clearly within the trial court's discretion and would not be disturbed absent a finding that it was unreasonable or that the court had impermissibly interferred with the jury's fact finding function. Facteau v Wenz, 78 A.D.2d 931, 433 N.Y.S.2d 238, 1980 N.Y. App. Div. LEXIS 13696 (N.Y. App. Div. 3d Dep't 1980).

In action by customer against store, for store's conduct during detention of customer for alleged shoplifting, court may not set aside verdict in favor of store and grant judgment to customer as matter of law, directing new trial on issue of damages, on ground that store's conduct was improper as matter of law, where reasonableness of store's conduct was submitted without objection to jury as question of fact. Johnson v Bloomingdale's, 79 A.D.2d 580, 434 N.Y.S.2d 351, 1980 N.Y. App. Div. LEXIS 13909 (N.Y. App. Div. 1st Dep't 1980), app. dismissed, 54 N.Y.2d 601, 1981 N.Y. LEXIS 4319 (N.Y. 1981).

In a wrongful death action a trial court erred in entering judgment against one defendant for an increased amount absent a written stipulation by defendant, especially where notice of plaintiff's motion to set aside the verdict as inadequate was only given to one defendant, in that the proper

procedure would have been for the trial court to direct a new trial on the issue of damages alone unless defendant stipulated in writing to an increased award. Ladd v Parkhurst, 87 A.D.2d 971, 450 N.Y.S.2d 92, 1982 N.Y. App. Div. LEXIS 16503 (N.Y. App. Div. 4th Dep't 1982).

In deciding motion to set aside verdict in favor of defendant, motion should not be granted unless evidence preponderates so greatly in plaintiff's favor that jury could not have reached its conclusions on any fair interpretation of evidence. Landry v A. Di Sarro Constr. Co., 149 A.D.2d 859, 540 N.Y.S.2d 549, 1989 N.Y. App. Div. LEXIS 5007 (N.Y. App. Div. 3d Dep't), aff'd, 74 N.Y.2d 940, 550 N.Y.S.2d 274, 549 N.E.2d 476, 1989 N.Y. LEXIS 3349 (N.Y. 1989).

Verdict should not be set aside unless jury could not have reached it on any fair interpretation of evidence, and trial court's simple disagreement with verdict or dissatisfaction with harsh result faced by unsuccessful party will not justify disturbing verdict in interest of justice. Durkin v Peluso, 184 A.D.2d 940, 585 N.Y.S.2d 137, 1992 N.Y. App. Div. LEXIS 8531 (N.Y. App. Div. 3d Dep't 1992).

In personal injury action against city, court improperly set aside verdict in favor of city on its own motion on ground that plaintiff was deprived of fair trial by defense counsel's summation that jury should draw inference adverse to plaintiff on basis of refusal of alleged eyewitness to testify under Fifth Amendment where inference was justified by evidence that witness did not observe accident and had been asked by plaintiff to give false testimony. Califano v City of New York, 212 A.D.2d 146, 627 N.Y.S.2d 1008, 1995 N.Y. App. Div. LEXIS 6104 (N.Y. App. Div. 1st Dep't 1995).

Court may not set aside verdict merely because it disagrees with result; court's power must be exercised with caution since, in absence of indication that substantial justice has not been done, litigant is entitled to benefit of favorable verdict. People v Brown, 221 A.D.2d 208, 633 N.Y.S.2d 171, 1995 N.Y. App. Div. LEXIS 11619 (N.Y. App. Div. 1st Dep't), app. dismissed, 87 N.Y.2d 898, 641 N.Y.S.2d 228, 663 N.E.2d 1258, 1995 N.Y. LEXIS 5352 (N.Y. 1995).

For court to conclude as matter of law that jury verdict is not supported by sufficient evidence, it is necessary to conclude that there is no valid line of reasoning and permissible inferences which could possibly lead rational persons to conclusion reached by jury on basis of evidence presented at trial; criteria to be applied in making such assessment are essentially those required of trial judge asked to direct verdict. In any case in which it can be said that evidence is such that it would not be utterly irrational for jury to reach result it has determined upon, and thus valid fact question exists, court may not conclude that verdict is as matter of law not supported by evidence. Liberman v Riverside Mem. Chapel, 225 A.D.2d 283, 650 N.Y.S.2d 194, 1996 N.Y. App. Div. LEXIS 12299 (N.Y. App. Div. 1st Dep't 1996).

Court erred in granting defendant’s motion to set aside verdict against it where, by granting such relief, court improperly overruled prior order of judge of coordinate jurisdiction that granted summary judgment to plaintiffs. Krencik v Towne Red Hots, 225 A.D.2d 1038, 639 N.Y.S.2d 770, 1996 N.Y. App. Div. LEXIS 2860 (N.Y. App. Div. 4th Dep't), app. denied, 88 N.Y.2d 805, 646 N.Y.S.2d 985, 670 N.E.2d 226, 1996 N.Y. LEXIS 1702 (N.Y. 1996).

Court improperly set aside jury’s verdict on issue of liability where jury was presented with sharp issues of credibility, and apportionment of liability was based on fair interpretation of evidence. Pomaro v McKeon, 228 A.D.2d 572, 644 N.Y.S.2d 638, 1996 N.Y. App. Div. LEXIS 7097 (N.Y. App. Div. 2d Dep't 1996).

Trial court may not set aside jury’s verdict simply because it disagrees with result; absent indication of substantial injustice, litigant is entitled to benefit of favorable verdict. Credibility of witnesses and resolution of conflicting proofs are matters properly for determination by jury; only if jury’s verdict could not have been reached on any fair interpretation of evidence should it be set aside as contrary to weight of evidence. Mazariegos v New York City Transit Auth., 230 A.D.2d 608, 645 N.Y.S.2d 802, 1996 N.Y. App. Div. LEXIS 8024 (N.Y. App. Div. 1st Dep't 1996).

Court properly directed new trial where, despite efforts by court to allow jury to alter its original statement so as to conform to its real intention, jury never made its intention plane on record, and court, then fearing that repeated resubmission of proximate cause issue had irremediably

confused jury, and not out of simple disagreement with verdict, properly set aside jury's verdict. Sreedharan v Bronx Westchester Radiology, P.C., 252 A.D.2d 354, 675 N.Y.S.2d 534, 1998 N.Y. App. Div. LEXIS 7893 (N.Y. App. Div. 1st Dep't 1998).

Court erred in setting aside verdict based on defense of governmental community where city defendant never raised such defense in its answer and it was not submitted to jury, and defense was not applicable to plaintiffs' claims, which were based on negligent maintenance. Vasquez v Figueroa, 262 A.D.2d 179, 694 N.Y.S.2d 6, 1999 N.Y. App. Div. LEXIS 7465 (N.Y. App. Div. 1st Dep't 1999).

Test to set aside jury's verdict was not whether it was not supported by legally sufficient evidence as a matter of law and not whether it was against the weight of the credible evidence. The test was whether there was no valid line of reasoning and permissible inferences which could have possibly led rational people to the conclusion reached by the jury on the basis of the evidence presented at trial. Sow v Arias, 21 A.D.3d 317, 800 N.Y.S.2d 150, 2005 N.Y. App. Div. LEXIS 8654 (N.Y. App. Div. 1st Dep't, app. denied, 5 N.Y.3d 716, 840 N.E.2d 1031, 2005 N.Y. LEXIS 3280 (N.Y. 2005), app. denied, 2005 N.Y. LEXIS 3238 (N.Y. Nov. 17, 2005).

Because a jury was entitled to resolve the issues about the nature and foreseeability of a medical emergency that resulted in a bus accident and the bus authorities' compliance with N.Y. Veh. & Traf. Law art. 19-A in favor of the authorities, the passengers' N.Y. C.P.L.R. § 4404 motion to set aside the verdict should have been denied. Romero v Metropolitan Suburban Bus Auth., 25 A.D.3d 683, 811 N.Y.S.2d 692, 2006 N.Y. App. Div. LEXIS 736 (N.Y. App. Div. 2d Dep't 2006).

Because the plaintiff's testimony concerning statements that the decedent made regarding communications with the police department was admitted not for its truth, but rather as relevant to the decedent's state of mind at the time the statements were made, the trial court properly declined to set aside the verdict under N.Y. C.P.L.R. 4404(a). Taino v City of Yonkers, 43 A.D.3d 401, 840 N.Y.S.2d 419, 2007 N.Y. App. Div. LEXIS 9040 (N.Y. App. Div. 2d Dep't 2007).

Because no valid line of reasoning and permissible inferences could possibly lead rational persons to conclude that an injured plaintiff's accident was within the reasonably foreseeable risks of the lessor's and the owner's alleged negligence, the trial court should have granted their N.Y. C.P.L.R. 4404(a) motion to set aside the verdict and for a judgment as a matter of law. Lafontant v U-Haul Co. of Fla., 48 A.D.3d 757, 854 N.Y.S.2d 405, 2008 N.Y. App. Div. LEXIS 1695 (N.Y. App. Div. 2d Dep't 2008).

Trial court erred in denying a mother's N.Y. C.P.L.R. 4404 motion to set aside the jury verdict because the jury had no reasonable basis to deprive the mother of an award for her decedent's conscious pain and suffering or to completely deprive her of past lost earnings or loss of household services. Sanchez v City of New York, 97 A.D.3d 501, 949 N.Y.S.2d 368, 2012 N.Y. App. Div. LEXIS 5718 (N.Y. App. Div. 1st Dep't 2012).

Trial court properly denied the owners' motion to set aside the verdict and the award for past pain and suffering because the jury's apportionment of fault was not against the weight of the evidence, which supported a finding that the owners were aware of the dangerous condition in a tenant's apartment even before they purchased the building and could reasonably have cured it within six days of their ownership, and, while the award for past pain and suffering was not excessive and was supported by the evidence, the awards for future medical expenses and future pain and suffering were excessive. Register v SAS Morrison LLC, 189 A.D.3d 591, 139 N.Y.S.3d 134, 2020 N.Y. App. Div. LEXIS 7866 (N.Y. App. Div. 1st Dep't 2020).

Although it is unnecessary because the court may dismiss a cause of action "on its own motion," nevertheless it is a good practice for defendant's attorney to move for dismissal at the close of plaintiff's evidence and for the court to reserve decision, because it gives plaintiff's counsel notice that he should be prepared to argue the motion after the verdict; but whether or not a motion to dismiss is made the court may set aside a verdict and direct judgment for any party entitled to it as a matter of law. Muszynski v Buffalo, 49 Misc. 2d 957, 268 N.Y.S.2d 753, 1966 N.Y. Misc. LEXIS 1976 (N.Y. Sup. Ct. 1966), rev'd, 33 A.D.2d 648, 305 N.Y.S.2d 163, 1969 N.Y. App. Div. LEXIS 2941 (N.Y. App. Div. 4th Dep't 1969).

Although broad discretionary powers to set aside a verdict or decision are granted by CPLR 4404, they are not unlimited. The alleged mistake or neglect of counsel resulting in a statutorily imposed waiver followed by a trial of the issues is not a situation in which such relief may be granted. Engelbrechten v Galvanoni & Nevy Bros., Inc., 60 Misc. 2d 419, 302 N.Y.S.2d 691, 1969 N.Y. Misc. LEXIS 1342 (N.Y. Civ. Ct. 1969).

In an action filed by a person who was crossing a street and was injured when two cars collided in an intersection, the trial court correctly rejected the jury's first verdict finding one motorist 90 percent at fault, the other motorist 5 percent at fault, and the injured party 5 percent at fault because the verdict was internally inconsistent, and the court also providently exercised its discretion in setting aside the jury's second verdict and ordering a new trial because the second verdict was inconsistent with the first verdict and was also internally inconsistent. Borovskaya v Herskovic, 300 A.D.2d 331, 751 N.Y.S.2d 312, 2002 N.Y. App. Div. LEXIS 12001 (N.Y. App. Div. 2d Dep't 2002).

Trial court properly set aside jury verdict in favor of injured plaintiffs who had commenced a personal injury action and wrongful death action against various defendants, including a fire apparatus company, based on their claims of defective design and negligent failure to warn of the load limit for a fire rescue ladder, where the jury found that the company had complied with the specifications of a city in manufacturing the fire apparatus; accordingly, the verdict was set aside pursuant to N.Y. C.P.L.R. 4404(a). Santana v Seagrave Fire Apparatus Corp., 305 A.D.2d 395, 759 N.Y.S.2d 509, 2003 N.Y. App. Div. LEXIS 5142 (N.Y. App. Div. 2d Dep't), app. denied, 1 N.Y.3d 502, 775 N.Y.S.2d 239, 807 N.E.2d 289, 2003 N.Y. LEXIS 3960 (N.Y. 2003).

Trial court was authorized to set aside verdict rendered in allegedly injured party's favor against the alleged tortfeasors on her personal injury complaint as rational people could not be led to the the conclusion reached by the jury that the allegedly injured party was entitled to recover since the evidence did not show that she suffered a serious injury as defined by N.Y. Ins. Law § 5102(d); indeed, the evidence showed that the allegedly injured party failed to establish a prima facie case of serious injury since she did not miss any time from work, she did not show that any

injuries kept her from performing substantially all of the material acts constituting her customary daily activities for at least 90 days out of the 180 days following the accident, and she did not show that she suffered a permanent loss of use of a body organ, member, function, or system as a result of her accident. Raugalas v Chase Manhattan Corp., 305 A.D.2d 654, 760 N.Y.S.2d 204, 2003 N.Y. App. Div. LEXIS 5969 (N.Y. App. Div. 2d Dep't 2003).

Trial court properly denied plaintiffs' motion pursuant to N.Y. C.P.L.R. 4404(a) seeking to set aside a jury verdict of no cause of action in an action arising from an auto accident, because defendants rebutted the presumption of negligence that arose from the rear-end collision in question, and the jury's fact-finding determination that neither driver was negligent was entitled to great deference. Stalikas v United Materials, L.L.C., 306 A.D.2d 810, 760 N.Y.S.2d 804, 2003 N.Y. App. Div. LEXIS 6801 (N.Y. App. Div. 4th Dep't), aff'd, 100 N.Y.2d 626, 769 N.Y.S.2d 191, 801 N.E.2d 411, 2003 N.Y. LEXIS 3358 (N.Y. 2003).

Trial court properly denied defendants' motion to set aside the verdict as to most of the claims in a medical malpractice action by a patient; the jury's finding that defendants' malpractice cause numerous post-operative complications was supported by sufficient evidence and was not against the weight of the evidence, and the testimony of the patient's subsequent treating physician did not advance a new theory of liability, and the treating physician's observations as to the surgical field were not expert opinion requiring notice pursuant to N.Y. C.P.L.R. 3101(d)(1)(i). Finger v Brande, 306 A.D.2d 104, 762 N.Y.S.2d 50, 2003 N.Y. App. Div. LEXIS 6649 (N.Y. App. Div. 1st Dep't 2003).

Trial court's order setting aside a jury verdict and granting judgment for the patient in a medical malpractice case was improper as there existed a valid line of reasoning for the jury's determination that the doctor did not depart from good and accepted medical practice in the performance of the surgery; however, the verdict was against the weight of the evidence, was set aside and a new trial was granted where the weight of the credible evidence suggested that the doctor departed from good and accepted medical practice by, inter alia, improperly positioning a graft in the initial surgery, thereby hindering the mobility of the patient's knee, and

causing the patient to suffer from a condition known as “patella baja” by improperly placing the patella tendon and patella during a Trillat procedure, causing severe pain in the plaintiff’s knee. Schwartz v Minkoff, 308 A.D.2d 484, 764 N.Y.S.2d 285, 2003 N.Y. App. Div. LEXIS 9379 (N.Y. App. Div. 2d Dep't 2003).

Trial court’s award finding a non-party defendant 10 percent at fault and defendant premises owners 90 percent at fault, awarding damages for past and future pain and suffering and lost earnings was upheld, where sufficient evidence supported the conclusion that the injuries were caused by a heavy metal door slamming into the injured party’s right hand, and that such was a dangerous condition which the premises owners had a duty to maintain in a reasonably safe condition. Brown v City of New York, 309 A.D.2d 778, 765 N.Y.S.2d 803, 2003 N.Y. App. Div. LEXIS 10638 (N.Y. App. Div. 2d Dep't 2003).

Appeals court reversed and remanded an elderly man’s suit against a city housing authority and a railing installer; a jury had found the authority and installer were negligent but no causation, but the preponderance of the evidence supported the conclusion that the loose and unsecured railing, and nothing else, caused his fall. Haut v N.Y. City Hous. Auth., 2 A.D.3d 492, 768 N.Y.S.2d 497, 2003 N.Y. App. Div. LEXIS 13086 (N.Y. App. Div. 2d Dep't 2003).

Where the driver failed to stop at a stop sign in violation of N.Y. Veh. & Traf. Law §§ 1142(a), 1172(a) at an intersection at which the injured party had a right of way and struck the injured party’s vehicle, the trial court properly properly set aside the jury verdict in favor of the driver in the negligence action as contrary to the weight of the evidence and granted a new trial pursuant to N.Y. C.P.L.R. 4404(a); because the injured party was permitted to anticipate that the driver was going to obey the traffic laws requiring the driver to stop, no fair interpretation of the evidence could have yielded a verdict that the driver was not negligent, even though there was testimony that the left signal of the injured party’s vehicle was flashing while it approached the intersection. Rossani v Rana, 8 A.D.3d 548, 779 N.Y.S.2d 211, 2004 N.Y. App. Div. LEXIS 8743 (N.Y. App. Div. 2d Dep't 2004).

Where the parties agreed if a jury determined that a contractor was entitled to an award, once the jury found a breach of a fiduciary duty, it was required by N.Y. C.P.L.R. 4404(a) to award the stipulated amount of damages; the trial court properly set aside the verdict when the jury made no award for damages. SCC Assocs. v Mfrs. & Traders Trust Co., 9 A.D.3d 809, 780 N.Y.S.2d 445, 2004 N.Y. App. Div. LEXIS 10032 (N.Y. App. Div. 3d Dep't 2004).

Defendant’s claim that judgment as a matter of law should have been awarded in his favor and the complaint should have been dismissed due to plaintiff’s attorney’s conduct in eliciting testimony and making references regarding an alleged previous battery purportedly committed by defendant was without merit. While plaintiff’s attorney acted improperly, the errors did not provide a sufficient basis for the dismissal of the complaint. Rodriguez v Valentine, 20 A.D.3d 558, 799 N.Y.S.2d 566, 2005 N.Y. App. Div. LEXIS 8068 (N.Y. App. Div. 2d Dep't 2005).

New trial was not warranted in the interest of justice as a claimed error in a jury charge in failing to charge the jury to consider defendant’s past practices in determining whether knowledge of the true facts would have led an insurer to refuse to issue a policy was not so significant that the jury was prevented from fairly considering the issues at trial; the instructions properly set forth the applicable law with respect to both burden of proof and materiality and there was no indication of juror confusion. Curanovic v New York Cent. Mut. Fire Ins. Co., 22 A.D.3d 975, 803 N.Y.S.2d 234, 2005 N.Y. App. Div. LEXIS 11388 (N.Y. App. Div. 3d Dep't 2005).

8. Judicial misconduct, generally

In action by bus passenger who was injured when bus driver abruptly applied brakes in unsuccessful attempt to avoid collision with car that unexpectedly appeared on left of bus and turned right in front of it, court should have granted defense motion to set aside verdict under CLS CPLR § 4404(a), and new trial was warranted, where court erred by refusing requested instruction on emergency doctrine. Kuci v Manhattan & Bronx Surface Transit Operating Auth., 88 N.Y.2d 923, 646 N.Y.S.2d 788, 669 N.E.2d 1110, 1996 N.Y. LEXIS 1511 (N.Y. 1996).

In medical malpractice action arising from discovery of laparotomy pad in abdomen of plaintiffs' decedent following surgery, plaintiffs' motion to set aside verdict in favor of defendants should have been granted where trial court refused to instruct jury regarding res ipsa loquitur, as rational basis existed for jury to conclude that it was more likely than not that injury was caused by defendants' negligence, and defendants' evidence of due care and alternative causes of injury did not remove res ipsa loquitur doctrine from case. Kambat v St. Francis Hosp., 89 N.Y.2d 489, 655 N.Y.S.2d 844, 678 N.E.2d 456, 1997 N.Y. LEXIS 95 (N.Y. 1997).

In wrongful death action, new trial would be granted where it was apparent that repeated conflict between court and counsel over acceptance of settlement offer as well as irregular practice of polling jury during trial to ascertain whether jurors believed that court had been fair and impartial unnecessarily injected into case personality issues that might have militated against fair trial. Wingate v Long Island Railroad, 95 A.D.2d 671, 1983 N.Y. App. Div. LEXIS 18568 (N.Y. App. Div. 1st Dep't 1983).

Trial judge properly exercised his discretion in denying plaintiff's motion for mistrial in medical malpractice case based on judge's comments concerning existence of "epidermoid tumor" where court's comprehensive curative instructions—to which plaintiff registered no objection—served to dissipate any alleged prejudice engendered by comments. Mulle v Weinstein, 141 A.D.2d 517, 529 N.Y.S.2d 136, 1988 N.Y. App. Div. LEXIS 6337 (N.Y. App. Div. 2d Dep't), app. denied, 73 N.Y.2d 701, 535 N.Y.S.2d 595, 532 N.E.2d 101 (N.Y. 1988).

In action wherein exact location of slip-and-fall accident constituted important factual question as to liability, plaintiff was not entitled to order setting aside jury verdict on ground that certain close-up photograph, had it been admitted into evidence, "would have shown blood on the rail where the plaintiff's foot was severed," since photograph, considered in isolation, would not have assisted jury because location of stain could not be determined with reference to any "existing identifiable fixed object"; also, although photograph might have had some significance if considered in tandem with long-range photograph, there was nothing significant for jury to learn from excluded photograph that it would not also have been able to learn from long-range

photograph, which was admitted and marked by witness as to indicate accident location. Tannen v Long Island R.R., 215 A.D.2d 745, 627 N.Y.S.2d 417, 1995 N.Y. App. Div. LEXIS 5775 (N.Y. App. Div. 2d Dep't 1995).

Plaintiff in wrongful death action was not deprived of fair trial by court's conduct with respect to his attorney where court acted in even-handed manner and properly exercised its discretion in limiting testimony that was repetitive, irrelevant, or improper. Driscoll v Akron Fire Co., 251 A.D.2d 1042, 675 N.Y.S.2d 264, 1998 N.Y. App. Div. LEXIS 7115 (N.Y. App. Div. 4th Dep't 1998), app. denied, 92 N.Y.2d 819, 685 N.Y.S.2d 421, 708 N.E.2d 178, 1999 N.Y. LEXIS 2046 (N.Y. 1999).

In action arising from head-on collision of car and van on lower roadway of Manhattan Bridge, court erred in admitting into evidence "Manhattan Bridge Rehabilitation Project Report," which was specifically prepared for state by consulting firm to develop highway safety construction project to be implemented through use of federal funds, and it was undisputed that Manhattan Bridge rehabilitation project had been and continued to be recipient of federal highway funding under 23 USC §§ 103 and 130, 135, 151, 152, 153, 156, and 219; thus, it was error to deny city's motion for new trial on issue of liability. Reynolds v City of New York, 254 A.D.2d 159, 679 N.Y.S.2d 372, 1998 N.Y. App. Div. LEXIS 11172 (N.Y. App. Div. 1st Dep't 1998).

In action for injuries sustained by severely disabled child while in care of school employee who served as child's personal aide during school hours, court properly denied plaintiffs' motion to set aside jury verdict based on court's alleged error in not including on verdict sheet question relating to school district's negligence on theory of res ipsa loquitur, where proof of negligence centered primarily on aide's conduct vis-a-vis child, which negated inference of negligence against any other school employee, making res ipsa charge against school district inappropriate. Rossetti v Board of Educ., 277 A.D.2d 668, 716 N.Y.S.2d 460, 2000 N.Y. App. Div. LEXIS 12026 (N.Y. App. Div. 3d Dep't 2000).

Husband in divorce action did not show judicial bias or hostility affecting his due process right to fair trial or requiring new trial where court's pretrial rulings, comments during trial, and final

decision reflected, instead, busy court's attempts to keep parties focused on succinct presentation of relevant evidence in order to ensure orderly and expeditious trial, and husband did not specifically appeal substance of any ruling or request that court recuse itself during proceedings. Douglas v Douglas, 281 A.D.2d 709, 722 N.Y.S.2d 87, 2001 N.Y. App. Div. LEXIS 2317 (N.Y. App. Div. 3d Dep't 2001).

Error, if any, in allowing evidence of plaintiff's operation of motorcycle with permit, was harmless where there were very few references to permit issue and, in response to jury question seeking clarification whether plaintiff had been riding with permit or license, court cautioned jury that operation with permit was to be considered only on issue of plaintiff's experience and ability to operate motorcycle; moreover, even if jury erroneously considered lack of license to be indicative of plaintiff's negligence, that would not have accounted for its finding of no negligence by defendant. But, it was reversible error to exclude evidence of defendant's guilty plea, even though plea involved improper right turn as opposed to improper left turn, where police accident report noted that violation of CLS Veh & Tr § 1141 was charged, defendant conceded that her turn was to left, and there was no intersecting roadway to right. Miszko v Luma, 284 A.D.2d 641, 725 N.Y.S.2d 459, 2001 N.Y. App. Div. LEXIS 5980 (N.Y. App. Div. 3d Dep't 2001).

Trial court properly granted plaintiff's motion pursuant to N.Y. C.P.L.R. 4404(a) to set aside a jury verdict for a corporation in plaintiff's action alleging a violation of N.Y. Lab. Law § 240, because on reconsideration the trial court properly found that it erred in admitting evidence, as the corporation did not present sufficient evidence to establish that plaintiff was the source of an entry in medical records that his injuries were not caused by a fall from a ladder, and the admission of the evidence was not harmless, because the entry related to the very issue to be determined by the jury, how the accident happened. Berrios v TEG Mgt. Corp., 35 A.D.3d 775, 826 N.Y.S.2d 740, 2006 N.Y. App. Div. LEXIS 15907 (N.Y. App. Div. 2d Dep't 2006).

Denial of worker's N.Y. C.P.L.R. 4404(a) motion to set aside the jury verdict in his personal injury case was error because comments made by defense counsel, comments made by the trial court, the trial court's improper evidentiary ruling, and its refusal to allow the worker's

counsel to use the word “disability” in front of the jury while permitting defense counsel to use that word in front of the jury with seeming impunity all deprived the worker of a fair trial. Rodriguez v City of New York, 67 A.D.3d 884, 889 N.Y.S.2d 220, 2009 N.Y. App. Div. LEXIS 8441 (N.Y. App. Div. 2d Dep't 2009).

Consumers who defended a merchant’s claim that they did not pay for a rug provided no explanation why they failed to dispute the merchant’s testimony that the rug was delivered to them, and the trial court held that the consumers could not avoid the strictures of N.Y. C.P.L.R. 5015(a)(2), which allowed them to seek an order vacating the court’s award on the basis of newly discovered evidence, by alleging that the merchant committed perjury when he testified. Cohen v Marshall, 767 N.Y.S.2d 195, 1 Misc. 3d 867, 2003 N.Y. Misc. LEXIS 1380 (N.Y. Civ. Ct. 2003).

In an administrator’s wrongful death suit against a gynecologist, the verdict in favor of the administrator was set aside on appeal because the trial court erred in charging the jury that the administrator was held to a lesser burden of proof in establishing the gynecologist’s negligence because, at the very least, the trial court should have instructed the jury that the standard applied only to such testimony as the decedent might have testified to, had she lived. Further, the trial court also erred in declining the gynecologist’s request that it instruct the jury to award only those damages proximately caused by the gynecologist’s negligence and not by the illness itself. Stewart v Olean Med. Group, P.C., 17 A.D.3d 1094, 795 N.Y.S.2d 420, 2005 N.Y. App. Div. LEXIS 4578 (N.Y. App. Div. 4th Dep't), app. denied, 19 A.D.3d 1185, 796 N.Y.S.2d 567, 2005 N.Y. App. Div. LEXIS 6398 (N.Y. App. Div. 4th Dep't 2005).

Because the occurrence of an injured party’s accident, even though unexplained, failed to create the unescapable inference that a management company was negligent, the jury verdict had a rational basis, and the trial court erred in setting it aside under N.Y. C.P.L.R. § 4404(a), and awarding judgment to the injured party as a matter of law. Crockett v Mid-City Mgt. Corp., 27 A.D.3d 611, 812 N.Y.S.2d 600, 2006 N.Y. App. Div. LEXIS 3489 (N.Y. App. Div. 2d Dep't), app.

dismissed, 7 N.Y.3d 864, 824 N.Y.S.2d 609, 857 N.E.2d 1140, 2006 N.Y. LEXIS 3317 (N.Y. 2006).

9. —Instructions

In complex medical malpractice action, new trial was required where court's marshaling of facts was confusing and inaccurate with regard to certain details, including inaccuracies in statements by court that defendant's chief medical expert witness admitted that fact that blood gas studies were not performed during last 16 hours of decedent's life and that x-rays were not taken of endotracheal tube in situ constituted departures from proper medical standards of practice, when in fact physician testified directly to contrary, record manifested mistrust, skepticism, and bias on part of court as to credibility of decedent's treating physician and with regard to testimony of defendant's 2 other medical witnesses and where court's instructions as to treating physician were susceptible to interpretation that court was of opinion that this particular treating physician was incompetent practitioner. Theodoropoulos v New York City Health & Hospitals Corp., 90 A.D.2d 792, 455 N.Y.S.2d 401, 1982 N.Y. App. Div. LEXIS 19007 (N.Y. App. Div. 2d Dep't 1982).

In civil action, defendant was entitled to new trial where court forced defense counsel to make her objections to instructions in presence of jury in violation of CLS CPLR § 4110-b, particularly in light of court's course of conduct in making numerous hostile and demeaning comments in jury's presence in response to counsel's requests for additional charges, chastising her for "wasting a lot of time," accusing her unfairly of opening court's mail, and stating that there was no need for her to make record unless she challenged accuracy of court's record that had already been made. Cummings v Consolidated Edison Co., 125 A.D.2d 224, 509 N.Y.S.2d 29, 1986 N.Y. App. Div. LEXIS 62495 (N.Y. App. Div. 1st Dep't 1986).

In action for injuries sustained by airline employee in accident on airplane during course of his employment, wherein employer was subject to liability as corporate successor of prior owner of defective airplane, new trial was mandated where (1) court failed to clearly advise jury that

employer could not be held liable for any negligence it may have committed during postmerger period when it maintained and owned airplane, (2) court refused to instruct jury that employer's post-merger negligence would diminish its successor liability for prior owner's pre-merger negligence, and (3) court's errors were compounded by instruction that prior owner was chargeable with foreseeable negligence of third parties, inasmuch as there was no evidence of negligence by any third party other than employer, against which recovery was barred by exclusivity provisions of Workers' Compensation Law. Lynn v McDonnell Douglas Corp., 134 A.D.2d 328, 520 N.Y.S.2d 804, 1987 N.Y. App. Div. LEXIS 50511 (N.Y. App. Div. 2d Dep't 1987).

Plaintiff was entitled to new trial of negligence action where (1) court failed to give specific charge on comparative negligence, intermingled principles of comparative negligence and proximate cause, and interjected elements of contributory negligence into charge, thereby implying to jury that, if plaintiff's decedent had been negligent in any way, there could be no recovery, and (2) it was doubtful that jury gave fair consideration to plaintiff's claims. Becker v New York Tel. Co., 172 A.D.2d 1058, 569 N.Y.S.2d 315, 1991 N.Y. App. Div. LEXIS 6335 (N.Y. App. Div. 4th Dep't 1991).

Defendant was not entitled to new trial based on judge's conduct where (1) judge criticized defense counsel for interrupting beginning of its charge to jury, but criticism was warranted given that counsel's interjection at that point was improper and he had repeatedly failed to comply with court's instructions to provide timely written requests to charge, (2) judge made inappropriate comments in presence of jury to defense's expert witness, who was being difficult, and (3) judge gave curative instructions to jury specifically addressed to these problems. Thoda v Arcoleo, 179 A.D.2d 508, 579 N.Y.S.2d 30, 1992 N.Y. App. Div. LEXIS 474 (N.Y. App. Div. 1st Dep't 1992).

In wrongful death actions arising from exposure to asbestos, court erred in sua sponte setting aside verdict for defendants on ground that it had failed to charge jury, as requested by plaintiffs, that adherence to governmental standards by defendants did not relieve them of their obligation to make their products reasonably safe and would not preclude findings of negligence and

liability, since (1) although plaintiffs requested such charge, they failed to preserve alleged error as they took no exception when court neglected to give charge to jury, and (2) error was not fundamental as it did relate to state of the art defense put forth by defendants. Kilburn v Acands, Inc., 187 A.D.2d 988, 590 N.Y.S.2d 611, 1992 N.Y. App. Div. LEXIS 14004 (N.Y. App. Div. 4th Dep't 1992).

Court erred in setting aside jury verdict on ground that it failed to give expansive charge on issue of concurrent causes where plaintiffs did not make timely request that such instruction be included in original charge and did not object to charge as given, there was no support for plaintiffs' claim that jury expressed confusion warranting additional instruction, and charge as given clearly informed jury that it could find either or both defendants negligent and that either or both defendants proximately caused accident. Doyle v Seney, 221 A.D.2d 828, 633 N.Y.S.2d 886, 1995 N.Y. App. Div. LEXIS 12300 (N.Y. App. Div. 3d Dep't 1995).

Court erred in setting aside jury verdict of no cause of action in medical malpractice action based on alleged errors in court's "recap" charge and recharge on proximate cause where those instructions were not erroneous; even if court erred in including "requisite knowledge" language, language was charged in disjunctive that "defendant failed to exercise the required degree of care...or that he lacked the requisite knowledge," and thus charge imposed no greater burden on plaintiff. Brazie v Williams, 221 A.D.2d 993, 634 N.Y.S.2d 274, 1995 N.Y. App. Div. LEXIS 13492 (N.Y. App. Div. 4th Dep't 1995).

In action involving CLS Gen Mun § 205-e claim, court erred in setting aside jury verdict in favor of Emergency Medical Service (EMS) defendants based on purported jury confusion caused by use of term "proximate cause" on verdict sheet, where court's instructions properly conveyed to jury that "proximate cause" in this case required reasonable connection between violation and injury, rather than more stringent substantial connection required in general negligence case; as jury could reasonably have found, on trial evidence and consistent with court's charge as delivered, that violation of EMS guidelines was not reasonably connected to collision that took place, EMS defendants were entitled to presumption that jury adopted that view. Plunkett v

Emergency Medical Serv., 234 A.D.2d 162, 651 N.Y.S.2d 462, 1996 N.Y. App. Div. LEXIS 12572 (N.Y. App. Div. 1st Dep't 1996).

In action arising from alleged negligence of 2 nuns, plaintiffs were not entitled to order setting aside verdict in favor of defendant church on basis that court's jury instruction prejudiced their case by compelling jury to return verdict against 2 nuns in order to find in their favor, where court had charged jury that, because named defendants (church and diocese) were corporate entities, they necessarily acted through and were responsible for acts and admissions of their agents and employees. Dillman by Dillman v Albany Roman Catholic Diocese, 237 A.D.2d 767, 655 N.Y.S.2d 133, 1997 N.Y. App. Div. LEXIS 2459 (N.Y. App. Div. 3d Dep't 1997).

Jury verdict would not be set aside on basis of court's erroneous jury instruction as to jury's responsibility to interpret insurance policy terms "medically necessary" and "mainly custodial" where such terms were ambiguous, terms were not defined in policy, and court had afforded insurer opportunity to submit extrinsic evidence, consisting of policy guidelines and testimony, to aid jury in constructing those terms. D'Angelo v Blue Cross & Blue Shield, 252 A.D.2d 886, 676 N.Y.S.2d 315, 1998 N.Y. App. Div. LEXIS 8700 (N.Y. App. Div. 3d Dep't 1998).

Missing witness charge was warranted in personal injury action where defendants did not show that physicians who had examined plaintiffs on defendants' behalf were unavailable or that their testimony would be cumulative. Jordan v Donat, 255 A.D.2d 242, 680 N.Y.S.2d 501, 1998 N.Y. App. Div. LEXIS 12717 (N.Y. App. Div. 1st Dep't 1998).

Personal injury plaintiffs were entitled to new trial on issue of damages where (1) court erred in failing to instruct jury that "[y]ou must now decide from the evidence before you the total amount of damages suffered by the plaintiff[s]...in accordance with the rules that I am about to explain to you. In arriving at the total, you must not consider the percentages of negligence but must simply report the total amount of the plaintiff[s'] damages," (2) error was compounded by confusing instructions on that issue, and (3) combined errors created question as to whether verdict sheet accurately reflected total amount of damages determined by jury. Heath v Makita

Corp., 255 A.D.2d 419, 681 N.Y.S.2d 289, 1998 N.Y. App. Div. LEXIS 11993 (N.Y. App. Div. 2d Dep't 1998).

In automobile accident case, trial judge erred in instructing jury in accordance with PJI 1:62, which pertains to lesser degree of proof in certain circumstances for those with amnesia, absent medical evidence concerning plaintiff's claimed inability to remember accident itself or events immediately before or after it; thus, motion to set aside jury verdict in favor of plaintiff, and for new trial, was improperly denied. Nahvi v Urban, 259 A.D.2d 740, 687 N.Y.S.2d 398, 1999 N.Y. App. Div. LEXIS 3188 (N.Y. App. Div. 2d Dep't 1999).

In medical malpractice action arising from anesthesiologist's failure to remove guide wire after inserting central line catheter into chest of plaintiff's decedent, plaintiff was not entitled to judgment notwithstanding verdict and new trial on ground that court erred in giving "error in judgment" charge with regard to anesthesiologist because, although it was unlikely that guide wire would have been left in decedent's body had anesthesiologist constantly remained at insertion site while inserting catheter, he had to stop insertion process several times to adjust decedent's intravenous medications in response to decedent's dangerously low blood pressure, and since alternative of removing catheter each time entailed risk of being unable to reestablish access to decedent's vein, he was confronted with 2 alternatives requiring exercise of his judgment. Marion Dolan v Jaeger, 285 A.D.2d 844, 727 N.Y.S.2d 784, 2001 N.Y. App. Div. LEXIS 7509 (N.Y. App. Div. 3d Dep't 2001).

Court improperly granted plaintiffs' motion to set aside jury verdict on ground that court erroneously failed to give requested charge on raise ipsa loquitur where plaintiff did not show that her facial burns and scars, complications suffered after undergoing chemical facial peel, were injuries that would not normally have occurred in absence of negligence. Seung Ja Cho v In-Chul Song, 286 A.D.2d 248, 729 N.Y.S.2d 117, 2001 N.Y. App. Div. LEXIS 8052 (N.Y. App. Div. 1st Dep't 2001), app. denied, 97 N.Y.2d 610, 739 N.Y.S.2d 357, 765 N.E.2d 853, 2002 N.Y. LEXIS 579 (N.Y. 2002).

New trial would be ordered in action under CLS Gen Mun § 205-e where trial court erred in charging jury by employing term “proximate cause” to signify both common-law standard which applied in third-party action as well as that of “practical or reasonable connection” applicable under § 205-e. Plunkett v Emergency Medical Serv., 165 Misc. 2d 418, 627 N.Y.S.2d 237, 1995 N.Y. Misc. LEXIS 240 (N.Y. Sup. Ct. 1995), rev'd, 234 A.D.2d 162, 651 N.Y.S.2d 462, 1996 N.Y. App. Div. LEXIS 12572 (N.Y. App. Div. 1st Dep't 1996).

In a breach of contract action, the trial court’s failure to issue a pattern jury instruction informing the jury of the proper measure of damages for the breach of an employment contract warranted a new trial, N.Y. C.P.L.R. 4404. Siegel v Laric Entm't Corp., 307 A.D.2d 861, 763 N.Y.S.2d 607, 2003 N.Y. App. Div. LEXIS 9011 (N.Y. App. Div. 1st Dep't 2003).

Evidence supported the jury’s finding that a construction company violated 12 NYCRR § 23-1.7(f) by failing to provide an employee who worked as a mason’s helper with a safe means of access to his working level on a scaffold, and the trial court properly denied the company’s motion to set aside that portion of the jury’s verdict which found the company liable for injuries the employee sustained while lifting cinder blocks and placing them on a scaffold; but a vocational rehabilitation expert who was called by the employee was not qualified to express an opinion on the employee’s loss of earnings, loss of household services, and future medical expenses, and the trial court abused its discretion by allowing the expert to testify about those damages and by denying that part of the company’s motion which sought to set aside the verdict awarding damages for lost earnings, lost household services, and future medical expenses. Smith v M.V. Woods Constr. Co., 309 A.D.2d 1155, 764 N.Y.S.2d 749, 2003 N.Y. App. Div. LEXIS 10026 (N.Y. App. Div. 4th Dep't 2003).

In a wrongful death action against a transit authority, the authority’s motion to set aside an award of damages was properly denied because it was shown that the decedent was conscious for at least some period of time after being struck by the authority’s bus, which justified the jury’s award of damages for pain and suffering. Fa-Shun Ou v N.Y. City Transit Auth., 309 A.D.2d 781, 765 N.Y.S.2d 801, 2003 N.Y. App. Div. LEXIS 10629 (N.Y. App. Div. 2d Dep't 2003).

Victim's motion to set aside the verdict as to damages, which awarded the victim $10,000 for past pain and suffering, but nothing for future pain and suffering, should have been granted; the jury's determination that the victim was not entitled to any damages for future pain and suffering was inconsistent with its finding that her injuries, which were permanent in nature, were proximately caused by the accident. Ciatto v Lieberman, 1 A.D.3d 553, 769 N.Y.S.2d 48, 2003 N.Y. App. Div. LEXIS 12479 (N.Y. App. Div. 2d Dep't 2003).

Where a trial court instructed jurors in a window repairer's personal injury trial, arising from a fall off of a ladder that occurred while he was working on an owner's premises, that there was a violation of N.Y. Lab. Law § 240(1) as a matter of law, and the trial court then provided additional confusing instructions with respect to causation of the injury, such misstatement of law prejudiced the repairer's case, and the jury verdict which was rendered in favor of the property owner should have been set aside and a new trial ordered, pursuant to N.Y. C.P.L.R. 4404. York v St. Mary's R.C. Church at Manhasset, 22 A.D.3d 484, 802 N.Y.S.2d 183, 2005 N.Y. App. Div. LEXIS 10606 (N.Y. App. Div. 2d Dep't), app. dismissed, 6 N.Y.3d 751, 810 N.Y.S.2d 418, 843 N.E.2d 1158, 2005 N.Y. LEXIS 3442 (N.Y. 2005).

10. —Witness-related matters

Defendant's motion for mistrial should have been granted on ground that he was denied fair trial in personal injury case where (1) trial court improperly permitted plaintiff to comment on defendant's decision not to use surveillance films of plaintiff at trial, (2) court improperly precluded defendant from introducing medical testimony to explain non-appearance of witness, (3) plaintiff's counsel improperly commented on witness' failure to appear by suggesting that defendant was trying to cover up real facts of case, and (4) court improperly prevented defendant's vocational expert from testifying as to amount that plaintiff could be expected to earn from alternative employment. DiMichel v South Buffalo Ry. Co., 80 N.Y.2d 184, 590 N.Y.S.2d 1, 604 N.E.2d 63, 1992 N.Y. LEXIS 3426 (N.Y. 1992), cert. denied, 510 U.S. 816, 114 S. Ct. 68, 126 L. Ed. 2d 37, 1993 U.S. LEXIS 4989 (U.S. 1993).

Municipal appellants were deprived of fair trial in medical malpractice action against hospitals by spouse of woman who allegedly received inadequate treatment after stabbing, where court routinely interrupted counsel to question witnesses in manner that was at times facetious, at other times pedantic and often in detail concerning hospital standards of care and other witnesses' opinions, diagnostic techniques and ambulance response time. Lopez v Linden General Hospital, 89 A.D.2d 1010, 454 N.Y.S.2d 452, 1982 N.Y. App. Div. LEXIS 18265 (N.Y. App. Div. 2d Dep't 1982).

In malpractice action, physician was not deprived of fair trial by reason of court's participation in questioning of certain witnesses where such questioning was infrequent, of limited duration, and not done in such way as to suggest court's own views. Kavanaugh v Nussbaum, 129 A.D.2d 559, 514 N.Y.S.2d 55, 1987 N.Y. App. Div. LEXIS 45230 (N.Y. App. Div. 2d Dep't 1987), modified, 71 N.Y.2d 535, 528 N.Y.S.2d 8, 523 N.E.2d 284, 1988 N.Y. LEXIS 207 (N.Y. 1988).

Defendant was not entitled to new trial based on judge's conduct where (1) judge criticized defense counsel for interrupting beginning of its charge to jury, but criticism was warranted given that counsel's interjection at that point was improper and he had repeatedly failed to comply with court's instructions to provide timely written requests to charge, (2) judge made inappropriate comments in presence of jury to defense's expert witness, who was being difficult, and (3) judge gave curative instructions to jury specifically addressed to these problems. Thoda v Arcoleo, 179 A.D.2d 508, 579 N.Y.S.2d 30, 1992 N.Y. App. Div. LEXIS 474 (N.Y. App. Div. 1st Dep't 1992).

New trial was mandated by trial court's excessive, biased intervention into trial proceedings favoring plaintiff, in violation of due process, where court virtually shepherded plaintiff's counsel through proceedings by, among other things, assuming examination of witnesses and eliciting evidence critical to plaintiff's case, prompting plaintiff's counsel to make key objections, and making repeated disparaging comments to and about defense counsel in front of jury. Taromina v Presbyterian Hosp., 242 A.D.2d 505, 662 N.Y.S.2d 491, 1997 N.Y. App. Div. LEXIS 9141 (N.Y. App. Div. 1st Dep't 1997).

New trial of personal injury action was warranted where (1) defendant's examining physician was improperly allowed to testify that, based on his review of bone scan immediately before trial, plaintiff had not suffered fracture, (2) in compliance with CLS CPLR § 3101(d) and CLS Unif Tr Ct Rls § 202.17(h) (22 NYCRR § 202.17(h)), defendant had earlier served that physician's medical report, which stated that "[f]rom the records it is apparent that [plaintiff] had a fracture," (3) physician's contradictory testimony at trial surprised and prejudiced plaintiff, because existence of fracture had not previously been disputed, and (4) defendant did not show good cause for admission of contradictory testimony. Gregory v Mulligan, 266 A.D.2d 344, 698 N.Y.S.2d 309, 1999 N.Y. App. Div. LEXIS 11511 (N.Y. App. Div. 2d Dep't 1999).

Trial court properly denied a county's motions for judgment as a matter of law, N.Y. C.P.L.R. 4401, and to set aside a verdict, N.Y. C.P.L.R. 4404; in light of the evidence presented, the jury could have found in favor of the injured party, and the damages awarded did not deviate materially from reasonable compensation pursuant to N.Y. C.P.L.R. 5501(c). Patterson v Nassau Cmty. College, 308 A.D.2d 519, 764 N.Y.S.2d 841, 2003 N.Y. App. Div. LEXIS 9669 (N.Y. App. Div. 2d Dep't 2003).

11. Juror misconduct

In a medical malpractice action in which plaintiff sought to set aside a jury verdict of "no cause of action" on the grounds that one of the jury allegedly failed to disclose her prior treatment by one of defendant doctor's associates, the Appellate Division properly reinstated the jury's verdict which had been set aside, since it could not be said that the order reinstating the verdict was an abuse of discretion as a matter of law. Galus v Milner, 54 N.Y.2d 1019, 446 N.Y.S.2d 261, 430 N.E.2d 1314, 1981 N.Y. LEXIS 3192 (N.Y. 1981).

Although the oral communication from the juror to the trial judge and the communication between the juror and the clerk regarding the juror's wife's desire that the juror telephone her should have been conveyed to counsel, in light of the undisputed nature of the communications no prejudice resulted and there was no showing of "substantial risk of prejudice" necessary to

warrant the granting of a motion to set aside the verdict, and the hearing judge properly ruled that the thought processes of the jurors should not be invaded by questions concerning the possibility that their fellow juror's prospective inability to keep his appointment had operated as an "exterior influence" affecting their votes. Snediker v County of Orange, 58 N.Y.2d 647, 458 N.Y.S.2d 517, 444 N.E.2d 981, 1982 N.Y. LEXIS 3890 (N.Y. 1982).

On motion for post-trial relief, trial judge did not abuse his discretion in ignoring possible improprieties of jurors where no misconduct or probability of misconduct of jurors was shown. Cangilos v Schermerhorn, 41 A.D.2d 780, 341 N.Y.S.2d 36, 1973 N.Y. App. Div. LEXIS 4993 (N.Y. App. Div. 3d Dep't 1973).

New trial based on juror misconduct was not required where plaintiff's only basis for motion was affidavit of sole juror who had voted in favor of liability, which stated that, contrary to court's instructions, jury had discussed case throughout trial, and that at least one juror had prematurely opined that plaintiff was negligent; nothing indicated that juror who suggested plaintiff's negligence had preexisting bias or based opinion on anything but facts of case. Copeland v Amboy, 152 A.D.2d 911, 543 N.Y.S.2d 816, 1989 N.Y. App. Div. LEXIS 9746 (N.Y. App. Div. 4th Dep't 1989).

In medical malpractice action for wrongful death based on alleged failure to diagnose bacterial meningitis, court properly denied plaintiff's motion to set aside verdict on ground that one juror had researched meningitis and brought research materials into deliberations with her where (1) research material consisted of definition of meningitis taken from medical dictionary, (2) definition of meningitis was not material, (3) juror did not read definition through, or use it as basis for her deliberations, and (4) juror never circulated definition to other jurors. Desmond v Nassau Hosp., 157 A.D.2d 828, 550 N.Y.S.2d 730, 1990 N.Y. App. Div. LEXIS 1012 (N.Y. App. Div. 2d Dep't), app. denied, 75 N.Y.2d 711, 557 N.Y.S.2d 309, 556 N.E.2d 1116, 1990 N.Y. LEXIS 1047 (N.Y. 1990).

Defendants in motor vehicle accident case involving tractor trailer were not entitled to mistrial after court learned that trade publication dealing with motor carriers inadvertently had been left

in jury room by prior jury where court examined each juror separately with regard to offending publication, 2 jurors who had read portions of publication averred that they had not discussed it with any other jurors, and they were excused; third juror, who admitted seeing cover of publication but denied reading it or any portion thereof, did not require removal when he stated that his deliberations would not be affected by reason of his observations. Farrell v Stafford Mach. Corp., 205 A.D.2d 951, 613 N.Y.S.2d 766, 1994 N.Y. App. Div. LEXIS 6528 (N.Y. App. Div. 3d Dep't), app. dismissed in part, app. denied, 84 N.Y.2d 947, 621 N.Y.S.2d 512, 645 N.E.2d 1211, 1994 N.Y. LEXIS 4140 (N.Y. 1994).

In action against town, county and vehicle operator arising from motorcycle accident, plaintiff was not entitled to have verdict for defendants set aside merely because sole juror to vote against county on issue of proximate cause alleged juror misconduct in that one other juror had visited scene of accident. Careccia v Enstrom, 212 A.D.2d 658, 622 N.Y.S.2d 770, 1995 N.Y. App. Div. LEXIS 1722 (N.Y. App. Div. 1st Dep't 1995).

Trial court should have granted plaintiffs' motion to set aside jury verdict for defendant in medical malpractice action on ground that jury was improperly influenced by court attendant who, while taking lunch orders when jury was deadlocked, told them that they must continue deliberations until verdict was reached, although there was no evidence that attendant offered any opinion on merits of case; because jury was deadlocked before communication, there was reason to believe that different verdict or hung jury might have resulted if misconduct had not occurred. Burtch v Shah, 230 A.D.2d 223, 661 N.Y.S.2d 118, 1997 N.Y. App. Div. LEXIS 4731 (N.Y. App. Div. 4th Dep't 1997).

Original jury verdict in personal injury action could not be set aside and replaced by new verdict where (1) after jury was discharged, 3 jurors informed court reporter and then plaintiff's counsel that, instead of putting full amount of damages on verdict sheet as instructed, jury had calculated net amount due to plaintiff's injured son, taking into account percentage of liability that it had assigned to him, (2) all 6 jurors acknowledged mistake when polled by court, and (3) second verdict sheet completed by reassembled jury was identical to first except that each

amount awarded to son was 5 times greater than original amount. Despite jury's mistake in calculating amount due to plaintiff's injured son by taking into account percentage of liability that it had assigned to him, instead of putting full amount of damages on verdict sheet, verdict would not be set aside on ground of jury confusion where special verdict sheet and charge to jury, to which plaintiff registered no objection, were not so unclear as to warrant new trial. Alkinburgh v Glessing, 240 A.D.2d 904, 658 N.Y.S.2d 735, 1997 N.Y. App. Div. LEXIS 6681 (N.Y. App. Div. 3d Dep't 1997).

Prospective juror is duty bound not only to truthfully answer all questions posed during voir dire but also to volunteer information that he or she has reason to believe would render him unacceptable to litigants. In probate proceeding, Surrogate's Court properly denied motion to set aside jury verdict finding that decedent had testamentary capacity when will was executed where allegations of juror misconduct were based solely on hearsay, and juror injected only her personal experiences, rather than outside material, into deliberations. Surrogate's Court was not required to conduct hearing on issue of juror's misconduct where opponents of will failed to allege manner in which juror's conduct affected deliberations or otherwise prejudiced their cases. In re Estate of Buchanan, 245 A.D.2d 642, 665 N.Y.S.2d 980, 1997 N.Y. App. Div. LEXIS 12542 (N.Y. App. Div. 3d Dep't 1997), app. dismissed, 91 N.Y.2d 957, 671 N.Y.S.2d 717, 694 N.E.2d 886, 1998 N.Y. LEXIS 926 (N.Y. 1998).

Jury verdict finding that plaintiff did not sustain "serious injury" under CLS Ins § 5102(d) was not against weight of evidence, even though her treating physician testified that, based on plaintiff's subjective complaints, she had sustained cervical, shoulder, and chest wall strain and possible posttraumatic carpel tunnel syndrome, where he acknowledged that MRI revealed neither disc herniation nor nerve root compression and that he conducted no tests for carpel tunnel syndrome, (2) plaintiff's chiropractor testified that although tests showed no neurological or reflex abormalities, plaintiff nevertheless sustained permanent partial disability to her cervical and upper thoracic spine, (3) defendant's expert testified that X-rays and MRI were normal, that examination revealed no abnormalities, that any strain was not permanent, and that there was

no evidence of carpel tunnel syndrome, and (4) plaintiff returned to work 3 weeks after accident. Also, jury verdict finding that plaintiff did not sustain “serious injury” under CLS Ins § 5102(d) was not against weight of evidence, even though he testified that his lower lip was numb in area of injury, which made it difficult for him to eat certain foods, prevented him from smiling, and caused him to drool, where (1) his treating physician testified that wound had healed well, that there was no muscular damage to his lip, and that he was able to smile, (2) photograph of him smiling was admitted into evidence, (3) he demonstrated smile to jury, and (4) jury thus properly found that he did not sustain significant disfigurement or permanent consequential limitation of body organ or member. Moxley v Givens, 255 A.D.2d 632, 679 N.Y.S.2d 472, 1998 N.Y. App. Div. LEXIS 11672 (N.Y. App. Div. 3d Dep't 1998).

On motion to set aside verdict, there was no factual predicate for further inquiry or hearing as to whether dissenting juror had participated in deliberations relating to apportionment and damages where her responses on being polled had not been ambiguous; to require inquiry under such circumstances would mandate further proceedings whenever verdict is not unanimous. Panzarino v Jeffrey A. Weisberg, M.D., P.C., 257 A.D.2d 483, 684 N.Y.S.2d 208, 1999 N.Y. App. Div. LEXIS 426 (N.Y. App. Div. 1st Dep't), app. dismissed, 93 N.Y.2d 998, 695 N.Y.S.2d 743, 717 N.E.2d 1080, 1999 N.Y. LEXIS 1962 (N.Y. 1999).

It was error to grant plaintiffs’ motion to set aside jury verdict as to damages on ground of juror confusion, even though verdict sheet may have been somewhat confusing, where court’s instructions properly conveyed to jury, under PJI 2:36.1, that it was to determine total amount damages sustained by plaintiff, undiminished by any percentage of fault, and it appeared that jury properly followed those instructions. Mattei v Figueroa, 262 A.D.2d 459, 692 N.Y.S.2d 119, 1999 N.Y. App. Div. LEXIS 6648 (N.Y. App. Div. 2d Dep't 1999).

Court properly denied plaintiff’s motion to set aside verdict and for new trial on ground of juror confusion where, during deliberations, jurors asked for new verdict sheet, saying they had made error on original, and new sheet was provided without objection; no juror confusion was apparent from trial record despite fact that jurors later claimed to have been confused and trial

court then conducted unauthorized procedure in which it directed jurors to return one week later for questioning. Moisakis v Allied Bldg. Prods. Corp., 265 A.D.2d 457, 697 N.Y.S.2d 100, 1999 N.Y. App. Div. LEXIS 10591 (N.Y. App. Div. 2d Dep't 1999), app. denied, 95 N.Y.2d 752, 711 N.Y.S.2d 154, 733 N.E.2d 226, 2000 N.Y. LEXIS 1054 (N.Y. 2000).

In action alleging breach of plaintiff's distributorship agreements with defendant manufacturer of X-ray film products, court did not err in summarily denying plaintiff's post-trial motion for new trial based on claimed juror bias where plaintiff submitted single juror affidavit which, if credited, established only that jury foreperson had at some point during trial expressed interest in obtaining employment in medical X-ray field and stated that perhaps he should talk with defendant's trial representative about jobs, and that he spoke with defendant's representative after jury had been discharged and ultimately obtained employment in medical X-ray field. Capital Med. Sys. v Fuji Med. Sys. U.S.A., Inc., 270 A.D.2d 728, 705 N.Y.S.2d 122, 2000 N.Y. App. Div. LEXIS 3094 (N.Y. App. Div. 3d Dep't 2000).

In personal injury action, plaintiffs were not entitled to have verdict set aside on ground that jury was affected by outside influences where (1) plaintiffs presented affidavit of juror stating that jury had speculated that plaintiff would receive workers' compensation and Social Security disability benefits, thus causing jury to award lesser damages than it otherwise would have awarded, (2) juror also stated that another juror had expressed concern that her school taxes would be affected by verdict, and (3) absent exceptional circumstances, juror's affidavit could not be used to attack verdict. Lopez v Kenmore-Tonawanda Sch. Dist., 275 A.D.2d 894, 713 N.Y.S.2d 607, 2000 N.Y. App. Div. LEXIS 9791 (N.Y. App. Div. 4th Dep't 2000).

Polling of jury was not prematurely concluded, and there was no indication of such substantial confusion among jurors as would warrant new trial, where, when court asked "is this verdict in all respects your verdict?," each juror replied in affirmative. Lopez v Kenmore-Tonawanda Sch. Dist., 275 A.D.2d 894, 713 N.Y.S.2d 607, 2000 N.Y. App. Div. LEXIS 9791 (N.Y. App. Div. 4th Dep't 2000).

There was no merit in plaintiff's claim that jurors were subjected to improper outside influence when they were given cake and had photo taken of them during juror appreciation week where there was no evidence that allegedly improper outside influence had any impact on jury or prejudiced any party, and possibility of prejudice was based solely on speculation. Hersh v Przydatek, 286 A.D.2d 984, 730 N.Y.S.2d 916, 2001 N.Y. App. Div. LEXIS 8893 (N.Y. App. Div. 4th Dep't 2001).

In action by injured construction worker under CLS Labor § 240(1), worker was entitled to new trial on ground that jury verdict was tainted by improper outside influence where (1) jurors' post-trial affidavits revealed that one juror had recounted her own experience of having received lump-sum settlement in personal injury case and had assured remaining jurors that worker would receive entire verdict in lump sum that he could then invest, (2) jurors averred that they had intended to award worker $10,000,000, based on his "intense paid and suffering" and "total" and "permanent" disability, but thought that $4,200,000, if received in lump sum and invested, would generate $10,000,000, (3) jurors' belief was erroneous, (4) their consideration of entire subject violated court's explicit instructions, mandated by CLS CPLR § 4111(f), to award full amount of future damages without reduction to present value, and (5) thus, juror injected significant extra-record facts into deliberation process and became unsworn witness to nonrecord evidence. In order to prevail on claim that verdict was tainted by improper outside influence, it is not necessary to show to certainty that outside influence prejudiced complaining party; rather, facts in each case must be examined to determine nature of material placed before jury and likelihood of prejudice. Edbauer v Bd. of Educ., 286 A.D.2d 999, 731 N.Y.S.2d 309, 2001 N.Y. App. Div. LEXIS 9083 (N.Y. App. Div. 4th Dep't 2001).

Trial court's determination that jurors conducted an unauthorized experiment because they opened packaging that surrounded syringes that were given to them for the limited purpose of providing them with a warning label which a company placed on the packaging was based on speculation, and appellate court returned the case to the trial court for a hearing on that issue so it could determine if the trial court properly granted plaintiff's motion to set aside the jury's verdict

in favor of the company, and for a new trial. Yaccarino v Sherwood Med., 3 A.D.3d 562, 771 N.Y.S.2d 168, 2004 N.Y. App. Div. LEXIS 704 (N.Y. App. Div. 2d Dep't 2004).

While the jury went beyond the issues as instructed in the verdict form, and should not have apportioned liability between an injured person and his employer, or fixed an amount for damages, once the jury found that a code violation was not a proximate cause of the accident and that the corporation, the manufacturer of a crane, was not negligent, where the jury understood the fundamental question before it, its actions did not require a new trial, and the verdict should not have been disturbed; the trial court erred in granting a new trial pursuant to N.Y. C.P.L.R. 4404(a) on a city's liability under N.Y. Lab. Law § 241(6). Pavlou v City of New York, 21 A.D.3d 74, 797 N.Y.S.2d 478, 2005 N.Y. App. Div. LEXIS 7022 (N.Y. App. Div. 1st Dep't 2005), app. dismissed, 5 N.Y.3d 878, 808 N.Y.S.2d 138, 842 N.E.2d 24, 2005 N.Y. LEXIS 3323 (N.Y. 2005), aff'd, 8 N.Y.3d 961, 836 N.Y.S.2d 506, 868 N.E.2d 186, 2007 N.Y. LEXIS 942 (N.Y. 2007).

Denial of a motion to set aside a jury verdict in favor of the doctor on the issue of liability in a medical malpractice action was proper, as allegations of juror misconduct did not rise to the level of improper influence or prejudice the substantial rights of the deceased patient's daughter. Russo v Mignola, 142 A.D.3d 1064, 38 N.Y.S.3d 209, 2016 N.Y. App. Div. LEXIS 5964 (N.Y. App. Div. 2d Dep't 2016).

Where jury returned verdict in medical malpractice suit against defendant and defendant moved to set aside the verdict on the ground of jury misconduct in that an affidavit of a juror indicated that during the second day of deliberations one of the jurors brought in a medical dictionary, looked up several medical terms and explained their meaning, and further, that on the third day of deliberations another juror brought in some figures from the Department of Correction concerning the salary of employees and the jury used those figures when considering the amount to be awarded plaintiff, no substantial prejudice has been demonstrated. Tanner v Stim, 66 Misc. 2d 1030, 322 N.Y.S.2d 769, 1971 N.Y. Misc. LEXIS 1535 (N.Y. Sup. Ct. 1971).

Actions of juror, who speaks Spanish and is familiar with dialect spoken by plaintiff, in passing note to court to advise court that he felt that there was discrepancy in what plaintiff actually said and what was communicated by Spanish interpreter to jury did not prejudice jury panel so as to warrant mistrial since juror did not speak to any other jurors concerning matter and stated that he would be capable and willing to rely solely on interpreter's words rather than on his own knowledge of language but that he would bring any large discrepancies to attention of court. Santana v New York City Transit Authority, 132 Misc. 2d 777, 505 N.Y.S.2d 775, 1986 N.Y. Misc. LEXIS 2777 (N.Y. Sup. Ct. 1986).

In summary holdover proceeding in which sole issue before jury was whether respondent lived in rent-controlled apartment with her husband (who was tenant of record) prior to his death, court set aside verdict in favor of respondent and ordered new trial where (1) landlord showed by clear and convincing evidence that attorney sitting on jury had wrongly instructed other jurors that law required landlord to prove that respondent did not live in apartment prior to her husband's death, and (2) respondent failed to establish that this erroneous legal instruction did not affect jury's deliberations and verdict. Juror's reliance, during deliberations in summary eviction proceeding, on his background experience as attorney in offering his "interpretation" of legal principles did not alone amount to improper outside influence where his professional experience as attorney was matter that he naturally brought with him to deliberations, his reliance on knowledge derived from that experience was outside realm of impermissible influence, and to hold otherwise would frustrate policy goals underlying jury reform measures to facilitate selection of attorneys and other professionals to jury pools comprising "a fair cross-section of the community." Juror's statements during deliberations based on background knowledge or personal beliefs, unaccompanied by extra-record information directly related to litigation, provide no basis to impeach jury verdict. No prejudice resulted from juror's reliance, during deliberations in summary eviction proceeding, on his background experience as attorney in offering his "interpretation" of legal principles where there was no persuasive evidence that jurors failed to apply legal principles enunciated in court's instructions or that loosely described statements attributed to attorney juror played significant role in jury's decision-making process,

lone dissenting juror had no independent memory at posttrial hearing of content of attorney juror's deliberation statements, those statements merely caused jury to ask court to issue clarifying instruction on law, and court complied to apparent satisfaction of both parties. 23 Jones St. Assocs. v Beretta, 182 Misc. 2d 177, 699 N.Y.S.2d 250, 1999 N.Y. Misc. LEXIS 494 (N.Y. App. Term 1999).

Plaintiffs' motion under N.Y. C.P.L.R. 4404 to set aside a jury verdict for a city was granted because the jury foreman's reading during deliberations of the dictionary definition of "preponderance," with its various differences from the definition in the court's charge on the law, created a sufficient likelihood that plaintiffs were prejudiced, in that there was a sufficient likelihood that some jurors had not made up their minds on this issue and that the definition of "preponderance" contained in the dictionary affected their views on this critical question. Ryan v City of New York, 802 N.Y.S.2d 854, 9 Misc. 3d 664, 2005 N.Y. Misc. LEXIS 1784 (N.Y. Sup. Ct. 2005).

Issues of juror misconduct involving concerns over the race of jurors and plaintiffs' counsel, which concerns were revealed in postverdict juror affidavits and apparently confirmed information that the trial court obtained from private interviews with two jurors during the jury's deliberations, caused the appellate court to affirm the trial court's decision to grant a new trial. Furthermore, the juror misconduct issue was not waived during the trial as the parties and their attorneys were not aware during the deliberations of the jurors' concerns over race. Wing Shung Lam v Chung-Ko Cheng, 196 Misc. 2d 538, 762 N.Y.S.2d 759, 2003 N.Y. Misc. LEXIS 862 (N.Y. App. Term 2003), rev'd, 5 A.D.3d 290, 773 N.Y.S.2d 303, 2004 N.Y. App. Div. LEXIS 3466 (N.Y. App. Div. 1st Dep't 2004).

12. Newly discovered evidence

The exercise of the power of the court to accept newly discovered evidence is not governed by any well defined rules, but depends in a great degree upon the peculiar circumstances of each case, and upon whether substantial justice has been done. Altimari v Meisser, 23 A.D.2d 672,

257 N.Y.S.2d 254, 1965 N.Y. App. Div. LEXIS 4736 (N.Y. App. Div. 2d Dep't), app. dismissed, 15 N.Y.2d 964, 259 N.Y.S.2d 854, 207 N.E.2d 525, 1965 N.Y. LEXIS 1534 (N.Y. 1965).

Defendants' rule 5015 motion for a new trial on the ground of newly discovered evidence should have been granted, where the evidence submitted in support of the motion, which could not have been discovered in time to move for a new trial under rule 4404, went directly to the heart of the fact issues raised at the trial and, if credited, would probably have produced a different result. Cesla v Frydman, 47 A.D.2d 742, 364 N.Y.S.2d 547, 1975 N.Y. App. Div. LEXIS 9016 (N.Y. App. Div. 2d Dep't), app. dismissed, 36 N.Y.2d 648, 1975 N.Y. LEXIS 2641 (N.Y. 1975), app. dismissed, 36 N.Y.2d 982, 374 N.Y.S.2d 602, 337 N.E.2d 119, 1975 N.Y. LEXIS 2066 (N.Y. 1975).

Trial court erred when it accepted certain photographs from plaintiff's attorney, which had not been offered or received in evidence on the trial, and viewed such photographs before making its decision on motion to set aside verdict in automobile accident case. Beechey v De Sorbo, 53 A.D.2d 727, 383 N.Y.S.2d 925, 1976 N.Y. App. Div. LEXIS 13497 (N.Y. App. Div. 3d Dep't 1976).

New trial motion was properly denied in divorce proceedings since new evidence allegedly available could have been presented at trial. Baker v Baker, 59 A.D.2d 519, 397 N.Y.S.2d 11, 1977 N.Y. App. Div. LEXIS 13298 (N.Y. App. Div. 2d Dep't), app. denied, 43 N.Y.2d 642, 1977 N.Y. LEXIS 4924 (N.Y. 1977).

An order which denied plaintiffs' motion for a new trial was improper where newly discovered evidence submitted on plaintiffs' motion to vacate judgment in favor of defendants was sufficient to require vacatur of the judgment as against those defendants and a direction for a new trial. Oppenheim v Travelers Ins. Co., 90 A.D.2d 515, 454 N.Y.S.2d 1020, 1982 N.Y. App. Div. LEXIS 18558 (N.Y. App. Div. 2d Dep't 1982).

Plaintiff in medical malpractice action was not entitled to new trial based on newly discovered evidence, which allegedly would have demonstrated that doctor fraudulently tampered with

record of surgical procedure performed on plaintiff by replacing typewritten record with subsequently handwritten report, since plaintiff (1) failed to demonstrate that witnesses who possessed alleged evidence could not have been discovered with due diligence, (2) was unable to identify substance of information that witnesses would have provided, other than that report had been typewritten, and (3) was in possession of hospital records for at least 7 years prior to trial and thus had every opportunity, had she suspected any irregularity, to investigate recording practices of both doctor and hospital. Bertan v Richmond Memorial Hospital & Health Center, 131 A.D.2d 799, 517 N.Y.S.2d 165, 1987 N.Y. App. Div. LEXIS 48249 (N.Y. App. Div. 2d Dep't 1987).

Court erred in dismissing insurer’s affirmative defense of failure to cooperate in action for breach of insurance contract where fact issue existed as to whether insured substantially performed his obligations under cooperation clause. Ashline v Genesee Patrons Coop. Ins. Co., 224 A.D.2d 847, 638 N.Y.S.2d 217, 1996 N.Y. App. Div. LEXIS 1268 (N.Y. App. Div. 3d Dep't 1996).

Motion under CLS CPLR § 4404 to set aside jury verdict and for judgment as matter of law was properly denied where based on event that occurred prior to trial. Harrington v Halpert, 241 A.D.2d 540, 663 N.Y.S.2d 836, 1997 N.Y. App. Div. LEXIS 8131 (N.Y. App. Div. 2d Dep't 1997).

In custody action, court properly denied mother’s motion for new trial based on report of her psychologist, since (1) report was not “newly-discovered” within meaning of CLS CPLR § 5015(a)(2) where mother was aware of it before trial, (2) report would not have produced different result, as court found that mother was adequate parent, and (3) report did not address pivotal issue of which parent would foster healthier relationship between child and noncustodian. Falabella v Murray, 265 A.D.2d 450, 697 N.Y.S.2d 92, 1999 N.Y. App. Div. LEXIS 10419 (N.Y. App. Div. 2d Dep't 1999).

Trial court properly exercised its discretion pursuant to N.Y. C.P.L.R. 4404(b) in denying the owner’s motion to reopen the record in a condemnation proceeding or for a new trial; there was insufficient explanation for the failure to present at trial the testimony of a union official knowledgeable about a predecessor’s 1992 option and the 1998 purchase of the property.

Matter of John Jay Coll. of Criminal Justice of the City Univ. of N.Y., 74 A.D.3d 460, 905 N.Y.S.2d 18, 2010 N.Y. App. Div. LEXIS 4614 (N.Y. App. Div. 1st Dep't 2010), app. denied, 16 N.Y.3d 889, 924 N.Y.S.2d 318, 948 N.E.2d 925, 2011 N.Y. LEXIS 847 (N.Y. 2011), cert. denied, 566 U.S. 982, 132 S. Ct. 2102, 182 L. Ed. 2d 883, 2012 U.S. LEXIS 3323 (U.S. 2012).

After jury verdict awarding plaintiff damages for pain and suffering due to back injuries sustained in automobile accident, defendant was not entitled to new trial because of appearance after trial of bill of particulars in unrelated prior personal injury case in which plaintiff claimed back and neck injuries, since defendant failed to demonstrate that alleged new evidence could not have been discovered with due diligence prior to trial, how bill would have been used other than to impeach plaintiff, and that use of bill during trial would have resulted in different verdict. Lauria v New York City Dep't of Envtl. Protection, 152 Misc. 2d 543, 577 N.Y.S.2d 764, 1991 N.Y. Misc. LEXIS 673 (N.Y. Civ. Ct. 1991), aff'd, 156 Misc. 2d 31, 600 N.Y.S.2d 603, 1993 N.Y. Misc. LEXIS 253 (N.Y. App. Term 1993).

13. Timeliness of motion

Generally when post-trial motion is collateral, long-delayed, or merely reflects a “second thought”, a new trial is denied; but if there is clear evidence of a gross fraud practiced upon the court, a new trial is granted. McCarthy v Port of New York Authority, 21 A.D.2d 125, 248 N.Y.S.2d 713, 1964 N.Y. App. Div. LEXIS 3974 (N.Y. App. Div. 1st Dep't 1964).

The time limitation of CPLR 4405 precludes granting a motion by a party directed to CPLR 4404, subd b. Hill v State, 29 A.D.2d 824, 287 N.Y.S.2d 533, 1968 N.Y. App. Div. LEXIS 4593 (N.Y. App. Div. 3d Dep't 1968).

A motion to set aside a decision and to reopen a hearing to take further testimony was properly denied when not made within 15 days after the decision nor before the judge who presided at trial in the absence of an adequate reason advanced for an untimely application. Gross v State, 32 A.D.2d 598, 299 N.Y.S.2d 699, 1969 N.Y. App. Div. LEXIS 4094 (N.Y. App. Div. 3d Dep't 1969).

Motion for a new trial is directed to the components of the trial and, when such motion did not refer to the trial itself but rather to the absence of notice or a defect of parties and was not made within 15 days after the verdict and the record revealed no persuasive reason for the failure in making a timely motion, order granting a new trial was error. In re Estate of De Lano, 34 A.D.2d 1031, 311 N.Y.S.2d 134, 1970 N.Y. App. Div. LEXIS 4623 (N.Y. App. Div. 3d Dep't 1970), aff'd, 28 N.Y.2d 587, 319 N.Y.S.2d 844, 268 N.E.2d 642, 1971 N.Y. LEXIS 1557 (N.Y. 1971).

By not moving for mistrial until after jury returned its verdict in defendants' favor in medical malpractice action, plaintiff's counsel waived objections to defense counsel's alleged misconduct. Reilly v Wright, 55 A.D.2d 544, 390 N.Y.S.2d 1, 1976 N.Y. App. Div. LEXIS 15222 (N.Y. App. Div. 1st Dep't 1976).

Posttrial motion for judgment as matter of law was not untimely where no time limit on motion was set by court even when movant made such request, and no party suffered prejudice as result of delay in presenting written argument invited by court. Brown v Two Exchange Plaza Partners, 146 A.D.2d 129, 539 N.Y.S.2d 889, 1989 N.Y. App. Div. LEXIS 4384 (N.Y. App. Div. 1st Dep't 1989), app. dismissed, 74 N.Y.2d 793, 545 N.Y.S.2d 109, 543 N.E.2d 752, 1989 N.Y. LEXIS 4998 (N.Y. 1989), aff'd, 76 N.Y.2d 172, 556 N.Y.S.2d 991, 556 N.E.2d 430, 1990 N.Y. LEXIS 1358 (N.Y. 1990).

Court did not abuse its discretion in denying motion to set aside verdict as untimely, even though counsel served supporting affidavit and accompanying exhibits on day motion was due, since notice of motion was not served until 3 days later, and trial transcript, to which motion papers referred, was not provided until more than 2 weeks thereafter. Kobylarz v Nett, 192 A.D.2d 980, 596 N.Y.S.2d 905, 1993 N.Y. App. Div. LEXIS 4459 (N.Y. App. Div. 3d Dep't 1993).

Plaintiff failed to establish "good cause" for her late motion to set aside jury verdict based on substitution of counsel and lack of trial transcripts, where it was unclear whether delay in substituting counsel was caused by attorneys involved or by plaintiff's own inaction. Coutrier v Haraden Motorcar Corp., 237 A.D.2d 774, 655 N.Y.S.2d 660, 1997 N.Y. App. Div. LEXIS 2429 (N.Y. App. Div. 3d Dep't 1997).

In action against police department and others for false arrest and battery, plaintiff's motion under CLS CPLR § 4404(a) to set aside jury verdict for defendants on cause of action for battery was timely where plaintiff proved "good cause" for her 3-day delay in making motion. Johnson v Suffolk County Police Dep't, 245 A.D.2d 340, 665 N.Y.S.2d 440, 1997 N.Y. App. Div. LEXIS 12801 (N.Y. App. Div. 2d Dep't 1997).

Plaintiff's motion to set aside reinstated jury verdict was untimely where motion was made almost one year after verdict was rendered Gropper v St. Luke's Hosp. Ctr., 255 A.D.2d 123, 679 N.Y.S.2d 385, 1998 N.Y. App. Div. LEXIS 11632 (N.Y. App. Div. 1st Dep't 1998).

In action alleging breach of exclusive distributorship agreement and implied promise to pay commissions to plaintiff on defendant's direct sales to customers, posttrial motion for judgment and new trial was properly rejected as untimely where (1) plaintiff's assertion, that there was no evidence to support jury's finding that defendant did not breach implied contract which arose following expiration of distributorship agreement, was actually thinly veiled claim that verdict was inconsistent based on jury's finding that parties entered into implied contract and plaintiff substantially performed its obligations thereunder, and (2) plaintiff deprived court and jury of opportunity to take corrective action by failing to raise alleged inconsistencies before jury was discharged. Capital Med. Sys. v Fuji Med. Sys. U.S.A., Inc., 270 A.D.2d 728, 705 N.Y.S.2d 122, 2000 N.Y. App. Div. LEXIS 3094 (N.Y. App. Div. 3d Dep't 2000).

Buyer's untimely motion for post-trial judgment under N.Y. C.P.L.R. § 4404(b) was properly considered by the trial court because the buyer presented a compelling public policy interest when he pointed out to the court that the option to purchase that the seller and his successors sought to enforce affected public policy concerns because the provision was void ab initio. Barnes v Oceanus Nav. Corp., Ltd., 21 A.D.3d 975, 801 N.Y.S.2d 368, 2005 N.Y. App. Div. LEXIS 9183 (N.Y. App. Div. 2d Dep't 2005).

Plaintiffs' motion pursuant to N.Y. C.P.L.R. 4404 to set aside a jury verdict in favor of defendants, made on December 9, 2004, was within 30 days from November 10, 2004, and was timely. A postmark dated December 11, 2004, on the envelope in which the motion was

received did not establish that service was not completed on December 9, 2004. Kresch v Saul, 29 A.D.3d 863, 816 N.Y.S.2d 147, 2006 N.Y. App. Div. LEXIS 6830 (N.Y. App. Div. 2d Dep't 2006).

Because a wife's N.Y. C.P.L.R. 4404 motion to modify the divorce judgment was made after the expiration period agreed to by the parties, it was properly denied as untimely. Scartozzi v Scartozzi, 32 A.D.3d 1008, 822 N.Y.S.2d 89, 2006 N.Y. App. Div. LEXIS 11483 (N.Y. App. Div. 2d Dep't 2006), app. denied, 8 N.Y.3d 812, 836 N.Y.S.2d 552, 868 N.E.2d 235, 2007 N.Y. LEXIS 945 (N.Y. 2007).

Denial of an owner's motion to vacate an order dismissing a cross claim against a driver for indemnification in a personal injury case was error because, although the motion was initially filed without the required notice, an amended motion was submitted to supply the notice and all parties were timely noticed and not prejudiced, as the motion was fully briefed. Baron v Grant, 48 A.D.3d 608, 852 N.Y.S.2d 374, 2008 N.Y. App. Div. LEXIS 1562 (N.Y. App. Div. 2d Dep't), app. dismissed, 11 N.Y.3d 825, 868 N.Y.S.2d 593, 897 N.E.2d 1077, 2008 N.Y. LEXIS 3372 (N.Y. 2008).

The court in a non-jury trial has the power to set aside a decision on its own initiative under the provisions of subd (b) of this section, and this discretionary power is not controlled by the 15-day limitation set forth in CPLR § 4405, but there must be an overriding and persuasive reason before such power is exercised. Moore v State, 45 Misc. 2d 1060, 258 N.Y.S.2d 655, 1965 N.Y. Misc. LEXIS 2032 (N.Y. Ct. Cl. 1965).

A motion to dismiss a claim brought four months after the decision awarding damages in a condemnation action was not timely, since CPLR 4404 must be read in conjunction with CPLR 4405, and is binding upon the Court of Claims. Arlen of Nanuet, Inc. v State, 52 Misc. 2d 1009, 277 N.Y.S.2d 560, 1967 N.Y. Misc. LEXIS 1762 (N.Y. Ct. Cl. 1967).

Where, after case was submitted to jury in action by passenger/owner against other driver, Court of Appeals announced rule that negligence of driver was not imputable to

passenger/owner who was not personally negligent, plaintiff's motion to set aside verdict pursuant to CPLR 4404 as being contrary to law was granted, even though made after 15-day time limitation. Natiello v Carroll, 77 Misc. 2d 470, 353 N.Y.S.2d 909, 1974 N.Y. Misc. LEXIS 1171 (N.Y. Sup. Ct. 1974).

A motion to set aside a court decision pursuant to CPLR § 4404(b) would be timely under CPLR § 4405 where it was made within 15 days after the order was signed, although that was more than 15 days after a written decision was rendered. Hamel v Hamel, 117 Misc. 2d 118, 457 N.Y.S.2d 729, 1982 N.Y. Misc. LEXIS 4031 (N.Y. Fam. Ct. 1982).

Claimant in action for damages against state was not precluded from asserting motion to vacate, set aside, or amend decision for state on its counterclaim, although claimant's motion was not brought within 15-day period required by CLS CPLR § 4405, where motion was based on lack of jurisdiction and thus relief sought could be granted under CLS CPLR § 5015; moreover, 15-day limitation would not be applicable if court took initiative in making motion, and court would be inclined to take initiative if relief were not otherwise available in situation where claimant's rights had been adversely affected. Gildea v State, 133 Misc. 2d 269, 507 N.Y.S.2d 127, 1986 N.Y. Misc. LEXIS 2862 (N.Y. Ct. Cl. 1986).

After a judgment in favor of a tenant in the landlord's holdover summary proceeding was entered, based upon a finding that the landlord had waived the "no pet" rider by not bringing an action within three months of knowledge that the tenant had two cats, pursuant to New York City, N.Y., Admin. Code § 27-2009.1(b), the landlord's motion under N.Y. C.P.L.R. 2221(d) to "reargue" that was made seven months after the judgment was really one to set aside the verdict under N.Y. C.P.L.R. 4404(b); the motion should have been denied as untimely under N.Y. C.P.L.R. 4405, and the motion also lacked substantive merit where there was no basis offered to change the verdict. 184 W. 10th St. Corp. v Marvits, 852 N.Y.S.2d 557, 18 Misc. 3d 46, 238 N.Y.L.J. 103, 2007 N.Y. Misc. LEXIS 7672 (N.Y. App. Term 2007), aff'd, 59 A.D.3d 287, 874 N.Y.S.2d 403, 2009 N.Y. App. Div. LEXIS 1321 (N.Y. App. Div. 1st Dep't 2009).

14. Verdicts contrary to law, generally

Appellate division properly granted two employers' motions to set aside a jury verdict pursuant to N.Y. C.P.L.R. 4404 because the employers claimed that the employees were fired for illicit union activities, and the employees did not meet their burden under N.Y. Exec. Law § 296 that the employers' reasons for firing them were pretextual. Stephenson v Hotel Emples. & Rest. Emples. Union Local 100 of AFL-CIO, 6 N.Y.3d 265, 811 N.Y.S.2d 633, 844 N.E.2d 1155, 2006 N.Y. LEXIS 157 (N.Y. 2006).

In a strict products liability action brought by a restaurant employee to recover damages for burns sustained when the bottom fell out of a glass coffee pot she was carrying, the motions of the manufacturer, distributor, and seller of the pot to set aside the verdict in favor of the employee would be granted, and the complaint dismissed, where there had been no direct proof of any defect in the coffee pot, and where the employee had failed to satisfy her burden of eliminating improper cleaning as a possible cause of the defect. Shelden v Hample Equipment Co., 89 A.D.2d 766, 453 N.Y.S.2d 934, 1982 N.Y. App. Div. LEXIS 17883 (N.Y. App. Div. 3d Dep't 1982), aff'd, 59 N.Y.2d 618, 463 N.Y.S.2d 194, 449 N.E.2d 1272, 1983 N.Y. LEXIS 3030 (N.Y. 1983).

In personal injury action by passenger in southbound car which skidded into northbound lane and collided with defendant's car, which was in its proper lane, judgment in favor of defendant was properly granted at close of evidence since defendant was not required to anticipate that car going in opposite direction would cross over into her lane. Benedetto v New York, 166 A.D.2d 209, 564 N.Y.S.2d 95, 1990 N.Y. App. Div. LEXIS 11702 (N.Y. App. Div. 1st Dep't 1990).

In action for personal injuries, court properly set aside jury verdict and granted new trial where (1) during trial, court ruled that proposed defense exhibit, which consisted of employee disability benefits claim filed by plaintiff 2 years before accident for apparently similar injuries, was inadmissible as irrelevant, (2) exhibit was mistakenly sent into deliberations room, and (3) all members of jury indicated that they had considered document, despite instructions of judge.

Razza v Sanchez-Roda, 173 A.D.2d 594, 570 N.Y.S.2d 272, 1991 N.Y. App. Div. LEXIS 7649 (N.Y. App. Div. 2d Dep't 1991).

Fraud action by cooperative housing corporation against sponsor was properly dismissed as matter of law where cooperative was seeking to vindicate its shareholders for information withheld or misrepresented by sponsor, which is exactly what Martin Act commits exclusively to Attorney General. Whitehall Tenants Corp. v Estate of Olnick, 213 A.D.2d 200, 623 N.Y.S.2d 585, 1995 N.Y. App. Div. LEXIS 2611 (N.Y. App. Div. 1st Dep't), app. denied, 86 N.Y.2d 704, 631 N.Y.S.2d 608, 655 N.E.2d 705, 1995 N.Y. LEXIS 2688 (N.Y. 1995).

Court erred in denying defendant’s motion for new trial where verdict sheet demonstrated substantial confusion by jury in reaching its verdict. Kim v Cippola, 231 A.D.2d 886, 647 N.Y.S.2d 596, 1996 N.Y. App. Div. LEXIS 14304 (N.Y. App. Div. 4th Dep't 1996).

Court properly set aside jury verdict finding defendants 50 percent at fault where their vehicle was struck by vehicle proceeding in opposite direction which crossed over double yellow line into their lane of travel, presenting emergency situation. Cortes by Gutierrez v Edoo, 249 A.D.2d 501, 671 N.Y.S.2d 360, 1998 N.Y. App. Div. LEXIS 4621 (N.Y. App. Div. 2d Dep't 1998).

Court erred in denying defendant’s motion to set aside verdict on issue of liability in action for negligent design and manufacture of bus ducts, which conduct building’s electricity, where plaintiff’s alleged losses of only economic nature resulting from explosion in ducts; fact that 2 injured workers may have had strict products liability or negligence claims did not inure to plaintiffs’ benefit by creating tort cause of action on their behalf as well, where losses they claimed were purely economic in nature—those stemming from damage to and replacement of ducts and consequential losses thereto. 7 World Trade Co. v Westinghouse Elec. Corp., 256 A.D.2d 263, 682 N.Y.S.2d 385, 1998 N.Y. App. Div. LEXIS 13940 (N.Y. App. Div. 1st Dep't 1998).

In action by plaintiff that had sublicensing agreement to produce and sell apparel bearing defendants’ logos, alleging that defendants’ breach of confidentiality clause contained in

settlement agreement which terminated licensing agreement caused plaintiff's largest customer to cancel its contract with plaintiff, jury verdict in plaintiff's favor was properly set aside as "legally unsupportable" since it would be inappropriate to hold defendants liable for truthfully responding to direct questions by plaintiff's customer concerning status of parties' business arrangements, and defendants' confirmation of plaintiff's right to fill existing orders fell within exception to confidentiality clause. Shalor Designs, Inc. v NBA Props., 264 A.D.2d 686, 696 N.Y.S.2d 32, 1999 N.Y. App. Div. LEXIS 9507 (N.Y. App. Div. 1st Dep't), superseded, Shalor Designs, Inc. v NBA Props., Inc., 699 N.Y.S.2d 278, 1999 N.Y. App. Div. LEXIS 9751 (N.Y. App. Div. 1st Dep't 1999).

Court should have granted defendants' motion for judgment notwithstanding verdict in action for breach of implied warranty of merchantability since action was not brought until at least 12 years after action accrued. Vanata v Delta Int'l Mach. Corp., 269 A.D.2d 175, 702 N.Y.S.2d 293, 2000 N.Y. App. Div. LEXIS 1153 (N.Y. App. Div. 1st Dep't 2000).

In action to reform fire insurance policy to add plaintiff trustees as owners and loss payees, defendant insurer's post-trial motion to set aside judgment in plaintiffs' favor was properly denied, although trial judge had erroneously applied "preponderance of evidence" standard rather than "clear and convincing" standard, because plaintiffs met their burden of proof under correct standard based on uncontradicted evidence that they contacted insurer at least 4 times before fires to inform it that insured premises had been conveyed to trust of which they were trustees, and to request that trust be added to policy as insured, to which insurer had agreed. Koskey v Pacific Indem. Co., 270 A.D.2d 461, 704 N.Y.S.2d 656, 2000 N.Y. App. Div. LEXIS 3179 (N.Y. App. Div. 2d Dep't 2000).

Verdict which awarded no damages for future pain and suffering was contrary to weight of evidence where plaintiff presented medical proof that his injury (fractures of tibia and fibula) resulted in permanent partial disability that would continue to cause him pain and significant loss of range of motion in his ankle. Simmons v Dendis Constr., Inc., 270 A.D.2d 919, 705 N.Y.S.2d 779, 2000 N.Y. App. Div. LEXIS 3590 (N.Y. App. Div. 4th Dep't 2000).

Company was entitled pursuant to N.Y. C.P.L.R. 4404 to set aside the verdict against it and for judgment as a matter of law in a cab driver's personal injury action, as there was no evidence that the company's rules concerning the taxi distribution system at an airport were promulgated for the safety of cab drivers using the central taxi hold area at an airport, let alone intended to protect them from the kind of unforeseeable hazards resulting from a motor vehicle going out of control. Jean v City of New York, 40 A.D.3d 926, 836 N.Y.S.2d 666, 2007 N.Y. App. Div. LEXIS 6382 (N.Y. App. Div. 2d Dep't 2007), app. denied, 10 N.Y.3d 702, 853 N.Y.S.2d 543, 883 N.E.2d 370, 2008 N.Y. LEXIS 199 (N.Y. 2008).

Because the evidence established that a worker was mixing concrete on a basement floor without any enclosure or local exhaust ventilation system, the trial court properly granted the worker's N.Y. C.P.L.R. 4404(a) motion to set aside the jury verdict on the issue of whether the company violated N.Y. Lab. Law § 241(6) by failing to comply with N.Y. Comp. Codes R. & Regs. tit. 12, § 12-2.7. Husak v 45th Ave. Hous. Co., 52 A.D.3d 782, 862 N.Y.S.2d 63, 2008 N.Y. App. Div. LEXIS 5766 (N.Y. App. Div. 2d Dep't 2008).

Verdict on the issue of damages was contrary to the weight of the evidence; since the amount of lost profits associated with certain contracted sales was certain, plaintiff was entitled to an award of $ 16,000 for the loss of these 16 containers of stallion semen, but regarding the remaining 194 containers that were destroyed, for which no contracts to purchase had been executed, the proper measure of market value was the price at which they could be replaced with a product of similar quality, and a new trial on this issue was ordered. Reed v Cornell Univ., 138 A.D.3d 816, 30 N.Y.S.3d 163, 2016 N.Y. App. Div. LEXIS 2676 (N.Y. App. Div. 2d Dep't 2016).

Trial court erred in denying a motion filed by a driver injured in an automobile accident and his wife (jointly, the injured driver) to set aside so much of a jury verdict and for a new trial on the issue of damages for past pain and suffering and past loss of earnings because the jury awards deviated materially from what would be reasonable compensation where the injured driver's injuries required surgery and the insertion of hardware, his economist testified that the injured driver's loss of earnings during the approximately two years since the accident totaled $298,280,

and that testimony was not refuted by the other driver. Gorman v Mathew, 151 A.D.3d 816, 58 N.Y.S.3d 87, 2017 N.Y. App. Div. LEXIS 4739 (N.Y. App. Div. 2d Dep't 2017).

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Judgment upon a jury verdict in favor of defendant hospital on the issue of liability and dismissing plaintiff’s medical malpractice complaint was upheld because the jury verdict finding no continuous course of treatment and that defendant did not depart from good and accepted medical practice in its treatment of the decedent during his final hospitalization was not contrary to the weight of the evidence and a psychiatrist may not be held liable for a mere error in professional judgment. Hervey v Northern Westchester Hosp., 2025 N.Y. App. Div. LEXIS 3267 (N.Y. App. Div. 2d Dep't 2025).

A quotient verdict, one based upon the average judgment of all the jurors, is illegal only where it affirmatively appears that there was an agreement in advance to abide by quotient of the averages. Honigsberg v New York City Transit Authority, 43 Misc. 2d 1, 249 N.Y.S.2d 296, 1964 N.Y. Misc. LEXIS 1817 (N.Y. Civ. Ct. 1964).

Defendant real estate broker’s motion to dismiss an action, brought against it by prospective purchasers of real estate for recovery of their earnest money deposit, as being contrary to law and to set aside the verdict of the jury, was sustained where there was no evidence to show that the broker had pledged its individual responsibility for return of the deposit or obligated itself in any way to return the deposit in the event the sales contract was not consummated.

Scaramuzzino v Larkin, 54 Misc. 2d 839, 283 N.Y.S.2d 375, 1967 N.Y. Misc. LEXIS 1212 (N.Y. City Ct. 1967).

In a no-fault personal injury action in which the trial court submitted the threshold question of whether plaintiff had sustained a “serious injury” within the meaning of Ins Law § 671(4) to the jury, plaintiff would be permitted to question the propriety of such charge in a post-trial motion pursuant to CPLR § 4404 despite the fact that plaintiff failed to object to the charge, since the trial court had the power to review its own charge, even if not objected to, and to order a new trial in the event an error in the charge was determined to be fundamental to the outcome of the case. Hutchinson v Petropoulos, 119 Misc. 2d 1024, 465 N.Y.S.2d 110, 1983 N.Y. Misc. LEXIS 3639 (N.Y. Civ. Ct. 1983).

In malpractice action against practitioner of “nonconventional” medicine who treated plaintiff for uterine cancer by prescribing special diet, court would not vacate jury’s finding that plaintiff “impliedly” assumed risk of injury to herself by agreeing to undergo treatment by defendant notwithstanding jury’s specific finding that defendant did not give appropriate information regarding risks of his procedure and available alternatives, as plaintiff was well-educated person who did significant amount of investigation regarding defendant’s treatment and thus she independently obtained sufficient information of risks of harm. Charell v Gonzalez, 173 Misc. 2d 227, 660 N.Y.S.2d 665, 1997 N.Y. Misc. LEXIS 265 (N.Y. Sup. Ct. 1997), modified, aff'd in part, vacated in part, 251 A.D.2d 72, 673 N.Y.S.2d 685, 1998 N.Y. App. Div. LEXIS 6503 (N.Y. App. Div. 1st Dep't 1998).

Failure of a contractor to plead and establish itself as a corporation with regard to his breach of contract and quantum meruit suit against a homeowner did not provide a ground for the homeowner to have the unanimous verdict in favor of the contractor for unpaid services vacated or to obtain a new trial. However, because the contractor was unlicensed, as required by New York City, N.Y., Admin. Code §§ 20-386(2) and 20-385, he was precluded from recovering the unpaid balance of the services rendered, even on a quantum meruit basis, thus, the verdict was

set aside and the complaint was dismissed. Nemard Constr. Corp. v Deafeamkpor, 863 N.Y.S.2d 546, 21 Misc. 3d 320, 2008 N.Y. Misc. LEXIS 5000 (N.Y. Sup. Ct. 2008).

Plaintiff claimed that a city employee negligently allowed her to use a street transverse without warning her of a pothole in the road ahead, which she hit with her bicycle, sustaining injuries. As the employee was acting in a discretionary capacity at the time plaintiff sought permission to cross, the city was immune from suit and its motion to set aside the verdict in plaintiff's favor was granted. Wittorf v City of New York, 928 N.Y.S.2d 842, 33 Misc. 3d 368, 2011 N.Y. Misc. LEXIS 4047 (N.Y. Sup. Ct. 2011), aff'd, 104 A.D.3d 584, 961 N.Y.S.2d 432, 2013 N.Y. App. Div. LEXIS 1954 (N.Y. App. Div. 1st Dep't 2013).

Because the record was devoid of any evidence that the owner of a building had notice of a leak in a bathroom that allegedly caused an employee to slip and fall, the trial court erred in denying the owner's N.Y. C.P.L.R. § 4404(a) motion to set aside a verdict apportioning liability between it and the employer as a matter of law. Gomez v 192 E. 151st St. Assocs., L.P., 26 A.D.3d 276, 810 N.Y.S.2d 51, 2006 N.Y. App. Div. LEXIS 2191 (N.Y. App. Div. 1st Dep't 2006).

Trial court's denial of the coexecutors' motion to set aside the jury verdict and for a new trial was error because the jury's finding that the buyer did not obtain the property by fraud or undue influence was against the weight of the evidence as it was completely at odds with any fair interpretation of the evidence; the evidence established that the decedent was mentally impaired at the time of the transfer, that the decedent was represented by an attorney that she had never met who was referred by the buyer, and that the buyer exerted undue influence over the decedent. Sepulveda v Aviles, 308 A.D.2d 1, 762 N.Y.S.2d 358, 2003 N.Y. App. Div. LEXIS 7225 (N.Y. App. Div. 1st Dep't 2003).

As plaintiffs' expert's opinion, that defendant police officer should have asked another defendant whether she knew how to drive before ordering her to move a parked car, was overwhelmingly contradicted by evidence adduced by the city and officer and by the training materials relied upon by plaintiffs' expert himself, and there was no other evidence establishing negligence on the part of the city and officer, their motion pursuant to N.Y. C.P.L.R. 4404 to set aside the

verdict in favor of a pedestrian injured by the other defendant should have been granted. Persaud v City of New York, 307 A.D.2d 346, 762 N.Y.S.2d 641, 2003 N.Y. App. Div. LEXIS 8358 (N.Y. App. Div. 2d Dep't), app. denied, 1 N.Y.3d 502, 775 N.Y.S.2d 240, 807 N.E.2d 290, 2003 N.Y. LEXIS 3996 (N.Y. 2003), app. denied, 1 N.Y.3d 502, 775 N.Y.S.2d 240, 807 N.E.2d 290, 2003 N.Y. LEXIS 4003 (N.Y. 2003).

Trial court erred in denying defendants' motion to set aside a verdict pursuant to N.Y. C.P.L.R. 4404 in favor of former employees in an age discrimination action; defendants had a nondiscriminatory reason for the firings, based on reports of criminal activity by the employees. Stephenson v Hotel Emples. & Rest. Emples. Union Local 100 of the AFL-CIO, 14 A.D.3d 325, 787 N.Y.S.2d 289, 2005 N.Y. App. Div. LEXIS 33 (N.Y. App. Div. 1st Dep't 2005), aff'd, 6 N.Y.3d 265, 811 N.Y.S.2d 633, 844 N.E.2d 1155, 2006 N.Y. LEXIS 157 (N.Y. 2006).

Injuries sustained by the injured party as a result of contact with a load of timber being hoisted by a barge-mounted crane fell under N.Y. Lab. Law § 241(6), as the appellate court declined to hold that the safety provisions of N.Y. Comp. Codes R. & Regs. tit. 12, pt. 23-8 applied exclusively to land-based mobile cranes; thus, the trial court properly denied the contractor's motion under N.Y. C.P.L.R. 4404 to set aside a jury verdict in favor of the injured party on the issue of liability. Mulhern v Manhasset Bay Yacht Club, 22 A.D.3d 470, 803 N.Y.S.2d 90, 2005 N.Y. App. Div. LEXIS 10573 (N.Y. App. Div. 2d Dep't 2005).

Trial court erred in denying a motion by a city and others for judgment as a matter of law pursuant to N.Y. C.P.L.R. 4404(a) in a personal injury action, arising from a minor's fall off of a playground ladder which was wet, as the parents did not show that the city was negligent for not having slip-resistant rungs based on old guidelines, as they did not establish negligence, they had been superseded by new requirements, and the new requirements of the guidelines and the contract specifications had been met. Carrasquillo v City of New York, 78 A.D.3d 635, 910 N.Y.S.2d 526, 2010 N.Y. App. Div. LEXIS 7954 (N.Y. App. Div. 2d Dep't 2010).

Because there was no rational basis upon which the jury could have determined that the property was occupied by only one dwelling, the school district's motion for a directed verdict

had to be granted since the homes did not fall within the statute. Because the property intersected by the boundary line was owned in common and was separate and distinct from the dwelling units, it was not encumbered by any dwellings and, even if it had been, it was encumbered not by one unit, but by 28. Palm v Tuckahoe Union Free Sch. Dist., 993 N.Y.S.2d 452, 46 Misc. 3d 358, 2014 N.Y. Misc. LEXIS 3467 (N.Y. Sup. Ct. 2014), aff'd, 141 A.D.3d 635, 36 N.Y.S.3d 178, 2016 N.Y. App. Div. LEXIS 5413 (N.Y. App. Div. 2d Dep't 2016).

No valid line of reasoning supported a jury’s conclusion that a faculty student association was negligent in the supervision or retention of a basketball coach where the uncontested evidence was that the association had no duty to investigate the coach and had no responsibility for overseeing the basketball team or canceling its season. Thomas v County of Westchester, 69 Misc. 3d 386, 129 N.Y.S.3d 685, 2020 N.Y. Misc. LEXIS 3875 (N.Y. Sup. Ct. 2020), aff'd, app. dismissed, 222 A.D.3d 799, 202 N.Y.S.3d 385, 2023 N.Y. App. Div. LEXIS 6430 (N.Y. App. Div. 2d Dep't 2023).

Although the jury’s finding that the county was negligent was supported by the evidence where it knew or should have known of the coach’s propensity to forge transcripts based upon an investigation of an email, no valid line of reasoning supported the conclusion that defendants’ negligence was a substantial factor in causing a former student to lose a scholarship to another school as he had not met the scholarship’s eligibility requirement of earning an associate’s degree and was not on track to meet the requirement before the investigation. Thomas v County of Westchester, 69 Misc. 3d 386, 129 N.Y.S.3d 685, 2020 N.Y. Misc. LEXIS 3875 (N.Y. Sup. Ct. 2020), aff'd, app. dismissed, 222 A.D.3d 799, 202 N.Y.S.3d 385, 2023 N.Y. App. Div. LEXIS 6430 (N.Y. App. Div. 2d Dep't 2023).

14.5. —Apportionment of fault

Trial court erred in denying an employer's motion to set aside the jury verdict on the issue of apportionment of fault because the jury's apportionment of fault--60% to an employer, 30% to the injured employee, and 10% to a vehicle owner and driver--was not supported by a fair

interpretation of the evidence where the employee was struck as he attempted to close the trailer ramp to a truck owned by the employer that was parked in a lane of traffic, the employee parked the truck and set up the warning devices pursuant to the employer's instructions and its custom and practice, and the driver was temporarily blinded by the bright sun. Loja v Lavelle, 132 A.D.3d 637, 17 N.Y.S.3d 483, 2015 N.Y. App. Div. LEXIS 7191 (N.Y. App. Div. 2d Dep't 2015).

Trial court properly found a city 65% at fault in the happening of a pedestrian's trip and fall accident and denied its motion to set aside the jury verdict against it and for judgment as a matter of law because, while the city did not owe a direct duty of care to the pedestrian under Administrative Code of the City of NY § 7-210, it owed an independent, special duty to the adjacent property owners where the city department of transportation issued a notice of violation to the owners regarding a sidewalk defect and no one from the city contacted the owners to facilitate the inspection and permit for the sidewalk repair for over 10 months even though the testified that he made repeated telephone calls seeking to schedule the inspection. Stanciu v Bilello, 138 A.D.3d 824, 29 N.Y.S.3d 482, 2016 N.Y. App. Div. LEXIS 2685 (N.Y. App. Div. 2d Dep't 2016).

15. —Causation at issue

Lower appellate court properly affirmed the denial of the city’s motion to set aside the verdict because the city was not entitled to qualified immunity wherein a child was struck and injured on a city street for which it had received notice of speeding because the acts or omissions claimed to have caused the injury were within the field of roadway design and safety, thus, the city was acting in a proprietary capacity. Turturro v City of New York, 28 N.Y.3d 469, 68 N.E.3d 693, 45 N.Y.S.3d 874, 2016 N.Y. LEXIS 3895 (N.Y. 2016).

In a medical malpractice action in which plaintiff alleged that the failure of the defendant doctor to perform a pelvic examination and make a proper diagnosis of her condition caused her to have to undergo a hysterectomy two years later, the doctor was properly granted judgment as a

matter of law pursuant to CPLR § 4404(a), where there was no causal connection between the alleged negligence and plaintiff's injury in that the alleged negligence did not cause the plaintiff's endometriosis, which necessitated the hysterectomy, or delay its discovery. Gayle v Neyman, 91 A.D.2d 75, 457 N.Y.S.2d 499, 1983 N.Y. App. Div. LEXIS 16098 (N.Y. App. Div. 1st Dep't 1983).

New trial was required in action for injuries allegedly suffered in elevator accident where trial court submitted 2 questions to jury, one asking whether elevator company was negligent, and other asking whether such negligence was cause of "accident," but facts left little doubt as to cause of accident and operative question was whether accident was cause of plaintiff's injury; at new trial, correct interrogatory should be posed to jury. Bustamante v Westinghouse Elevator Co., 195 A.D.2d 318, 600 N.Y.S.2d 35, 1993 N.Y. App. Div. LEXIS 7130 (N.Y. App. Div. 1st Dep't 1993).

Court should have granted plaintiff's motion for new trial based on jury confusion where, in response to specific questions on verdict sheet, jury found that defendant's negligence was not proximate cause of accident, yet in answer to second question, jury determined that defendant's percentage of fault was 10 percent. Trotter v Johnson, 210 A.D.2d 946, 621 N.Y.S.2d 761, 1994 N.Y. App. Div. LEXIS 13418 (N.Y. App. Div. 4th Dep't 1994).

In action where uncontroverted trial evidence established that plaintiff was injured when ladder on which he was standing suddenly collapsed, and jury found that defendant violated CLS Labor § 240 by failing to furnish scaffolding or ladder which would provide proper protection, court should have granted plaintiff's motion for judgment as matter of law; once jury found that § 240 was violated, there was no evidence on which it could conclude that violation was not proximate cause of plaintiff's injuries. Chaitovitz v Lewis, 222 A.D.2d 392, 634 N.Y.S.2d 727, 1995 N.Y. App. Div. LEXIS 12616 (N.Y. App. Div. 2d Dep't 1995).

Defendant, which designed plaintiff's van, should have been granted judgment as matter of law under CLS CPLR § 4404 where sole proximate causes of plaintiff's injuries were codefendant's decedent's impaired condition and careless driving combined with plaintiff's own negligence in standing in traveling lane in dark; van's alleged inadequate rear lighting, in that its rear lights

were blocked when rear doors were fully open, was not, as matter of law, proximate cause of accident in which decedent's southbound vehicle struck plaintiff while he was in roadway unloading newspapers from rear of his van, which was facing south while double parked in northbound lane. Goodman v GMC, 235 A.D.2d 456, 652 N.Y.S.2d 626, 1997 N.Y. App. Div. LEXIS 393 (N.Y. App. Div. 2d Dep't), app. denied, 89 N.Y.2d 816, 659 N.Y.S.2d 856, 681 N.E.2d 1303, 1997 N.Y. LEXIS 1278 (N.Y. 1997).

Court erred in granting plaintiff's motion to set aside verdict finding that defendant's actions were not proximate cause of plaintiff's injury where plaintiff's father, who was operating backhoe leased from defendant at time of accident, offered one account of how accident occurred at trial, but, according to testimony offered by defendant's principal, he described accident in contradictory fashion immediately after it occurred, and court itself recognized that jury could rationally and fairly have declined to credit material portions of plaintiff's case, including testimony of his expert. Pedone v B & B Equip. Co., 239 A.D.2d 397, 662 N.Y.S.2d 766, 1997 N.Y. App. Div. LEXIS 5111 (N.Y. App. Div. 2d Dep't 1997).

Court properly denied plaintiff's motion to set aside verdict in favor of defendant store owner since jury reasonably could have found that while defendant was negligent in allowing french fries to remain on its floor, plaintiff's fall was not caused by french fries. Miglino v Supermarkets Gen. Corp., 243 A.D.2d 451, 662 N.Y.S.2d 818, 1997 N.Y. App. Div. LEXIS 9357 (N.Y. App. Div. 2d Dep't 1997).

Plaintiff's motion to set aside verdict was properly denied where (1) conflict in expert opinion as to whether plaintiff's disc herniation resulted from trauma of accident or was degenerative condition was for jury to resolve, and (2) verdict was not defective on ground that defendants advanced several theories on issue of proximate cause, some of which were not supported by evidence, because defendants did not have burden of proof on that issue, they advanced no affirmative defenses, and their "theories" did no more than challenge credibility of plaintiff's case. Richardson v John Danna & Sons, 245 A.D.2d 20, 664 N.Y.S.2d 780, 1997 N.Y. App. Div.

LEXIS 12522 (N.Y. App. Div. 1st Dep't 1997), app. denied, 92 N.Y.2d 803, 677 N.Y.S.2d 73, 699 N.E.2d 433, 1998 N.Y. LEXIS 1724 (N.Y. 1998).

In action by plaintiff who fell from ladder that had no protective rubber skids and slipped to side, jury which found that defendants violated CLS Labor § 240 improperly went on to conclude that defendant's violation of § 240 was not proximate cause of accident, and thus trial court should have granted plaintiff's motion to set aside verdict, and for judgment in his favor as matter of law. Dedes v Cambria, 258 A.D.2d 495, 684 N.Y.S.2d 622, 1999 N.Y. App. Div. LEXIS 1034 (N.Y. App. Div. 2d Dep't), app. dismissed, 93 N.Y.2d 919, 691 N.Y.S.2d 383, 713 N.E.2d 418, 1999 N.Y. LEXIS 852 (N.Y. 1999).

Personal injury plaintiff was entitled to new trial, rather than dismissal of complaint, where jury, which had previously expressed difficulty in comprehending concept of proximate cause, found that plaintiff's negligence was proximate cause of traffic accident, that plaintiff was 90 percent at fault for happening of accident, that defendant was 10 percent at fault for happening of accident, but that defendant's negligence was not proximate cause of accident. Clarke v Order of the Sisters of St. Dominic, 273 A.D.2d 431, 710 N.Y.S.2d 108, 2000 N.Y. App. Div. LEXIS 7372 (N.Y. App. Div. 2d Dep't 2000).

Because a stairway spill was virtually contemporaneous with a delivery man's fall and because the delivery man did not prove that a delicatessen's employee or agent negligently caused the delivery man's injuries, the trial court correctly granted the delicatessen's N.Y. C.P.L.R. § 4404(a) motion to set aside the verdict and for judgment as a matter of law. Ramos v Castega-20 Vesey St., LLC, 25 A.D.3d 773, 808 N.Y.S.2d 424, 2006 N.Y. App. Div. LEXIS 943 (N.Y. App. Div. 2d Dep't 2006).

Trial court erred in denying an employer's motion for judgment notwithstanding the verdict after a jury found the employer liable to a property owner in a common law indemnification action; there was absolutely no evidence that any negligence on the part of the employer contributed to the injuries one of its worker's suffered while working on the owner's property. Consolidated

Edison Co. of N.Y., Inc. v Vilsmeier Auction Co., Inc., 21 A.D.3d 726, 800 N.Y.S.2d 690, 2005 N.Y. App. Div. LEXIS 8865 (N.Y. App. Div. 1st Dep't 2005).

All a patient had to prove in his malpractice case against a hospital was that the hospital's delay in treating him was a cause of a diminution of a substantial chance of avoiding the devastating result that the injured patient suffered; this, the patient accomplished, and therefore, the trial court erred in finding that the patient failed to establish proximate cause and in setting aside the verdict in favor of the patient. Fellin v Sahgal, 35 A.D.3d 800, 826 N.Y.S.2d 731, 2006 N.Y. App. Div. LEXIS 15878 (N.Y. App. Div. 2d Dep't 2006).

Jury could not have found an ambulette service's negligence in transporting a patient was not a substantial factor in causing an accident on any fair interpretation of the evidence, in a case where a single attendant, employed by the service, attempted to take the patient and her wheelchair down a flight of steps, and the patient was thrown from the chair. Accordingly, the trial court providently exercised its discretion in setting aside the jury verdict and granting a new trial (N.Y. C.P.L.R. 4404(a)). Begum v New York City Health & Hosps. Corp., 41 A.D.3d 400, 836 N.Y.S.2d 710, 2007 N.Y. App. Div. LEXIS 6954 (N.Y. App. Div. 2d Dep't 2007).

Trial court erred in denying the transit authorities' motion to set aside an amended judgment—apportioning 65% liability to them and awarding damages the co-administratrices—and for judgment as a matter of law dismissing the complaint because, even assuming that the authorities' employees were negligent in failing to remove the decedent from a subway train before it was taken into a relay tunnel, that negligence merely furnished the condition or occasion for the occurrence of the decedent's fall from the train, rather than being one of its proximate causes, where the circumstances that led the decedent to be in the area between the two northernmost subway cars, and the cause of the fall itself, remained unknown and, therefore, speculative. Williams v New York City Tr. Auth., 175 A.D.3d 581, 107 N.Y.S.3d 366, 2019 N.Y. App. Div. LEXIS 6178 (N.Y. App. Div. 2d Dep't 2019), app. denied, 35 N.Y.3d 909, 149 N.E.3d 74, 125 N.Y.S.3d 380, 2020 N.Y. LEXIS 1370 (N.Y. 2020).

There was a rational process by which the jury could have found that a hospital departed from accepted standards of medical practice by failing to obtain an appropriate patient history for the plaintiff, that a physician departed from accepted standards of medical practice by failing to diagnose and treat the plaintiff's transient ischemic attack, and that these departures proximately caused the plaintiff's injuries. Chicoine v Mendola, 233 A.D.3d 841, 224 N.Y.S.3d 458, 2024 N.Y. App. Div. LEXIS 6720 (N.Y. App. Div. 2d Dep't 2024).

Nursing and rehabilitation center's motion to set aside the jury verdict and for judgment as a matter of law was properly denied as there was a valid line of reasoning by which the jury could have concluded that the center had departed from accepted standards of medical practice by failing to place a bed alarm in the injured party's bed, that it was a proximate cause of the party's injuries and was supported by the evidence, and the verdict was not contrary to the weight of the evidence. Nugent v Highland Rehab. & Nursing Ctr., 2025 N.Y. App. Div. LEXIS 4171 (N.Y. App. Div. 2d Dep't 2025).

Plaintiff, which obtained liability insurance for its business through defendant insurance broker at excessive cost and with unwanted exclusion, allegedly due to defendant's fraudulent misrepresentations and negligence, was entitled to directed verdict against defendant on liability issue in action seeking indemnification for cost to settle action by insurer against plaintiff for nonpayment of premiums since defendant's negligence in understating plaintiff's payroll to insurer was proximate cause of plaintiff's injury; jury verdict that defendant was negligent in having bound plaintiff to insurance obtained, but that defendant's negligence was not proximate cause of plaintiff's injury, was defective since, if defendant had negligently bound plaintiff to insurance in question, that negligence without doubt was proximate cause of injury (obligation to pay insurer). Trans World Maintenance Services, Inc. v Accident Prevention Brokerage Corp., 148 Misc. 2d 518, 560 N.Y.S.2d 914, 1989 N.Y. Misc. LEXIS 889 (N.Y. Sup. Ct. 1989), aff'd, 169 A.D.2d 519, 564 N.Y.S.2d 375, 1991 N.Y. App. Div. LEXIS 384 (N.Y. App. Div. 1st Dep't 1991).

Trial court erred by denying the victim's N.Y. C.P.L.R. 4404 motion to set aside the verdict because the driver's violations of N.Y. Veh. & Traf. Law §§ 1142(a) and 1172(a), by proceeding

into the westbound lane of traffic without yielding the right-of-way to the victim, constituted negligence as a matter of law and could not be disregarded by the jury. Moussouros v Liter, 22 A.D.3d 469, 802 N.Y.S.2d 460, 2005 N.Y. App. Div. LEXIS 10574 (N.Y. App. Div. 2d Dep't 2005).

Where a construction company that was handling an employer's expansion project of its leased office space was not in control of, nor did it supervise, an employee as he removed and dismantled metal shelves from a wall that was to be demolished, an action against it pursuant to N.Y. Lab. Law § 241(6), arising from an injury suffered by the employee when he fell during that task, should have resulted in the granting of the company's motion to set aside the verdict and for judgment as a matter of law dismissing the complaint, pursuant to N.Y. C.P.L.R. 4404(a); similarly, the third-party complaint against the employer should also have been dismissed. Pino v Robert Martin Co., 22 A.D.3d 549, 802 N.Y.S.2d 501, 2005 N.Y. App. Div. LEXIS 10825 (N.Y. App. Div. 2d Dep't 2005).

16. —Inconsistencies

In construction contract dispute, new trial would be required where trial court was asked by party to resubmit jury's inconsistent answers to interrogatories, court failed either to resubmit or to order new trial, and court instead attempted to "adjust the outcome of the litigation" itself by allowing jury's inconsistent arithmetical verdicts to be entered as judgments; when trial court has been asked to resubmit inconsistent answers of jury, trial court only has power to ask jury to further consider its answers and verdict, or to order new trial. Mars Associates, Inc. v New York City Educational Constr. Fund, 126 A.D.2d 178, 513 N.Y.S.2d 125, 1987 N.Y. App. Div. LEXIS 41142 (N.Y. App. Div. 1st Dep't), app. dismissed, 70 N.Y.2d 747, 519 N.Y.S.2d 1033, 514 N.E.2d 391, 1987 N.Y. LEXIS 18620 (N.Y. 1987).

Defendants in personal injury action were entitled to new trial on damages unless plaintiffs agreed to reduction of award by amount granted for mental suffering since verdict separately granted sum for pain and suffering, and mental suffering could not be separated from pain and

suffering. Lamot v Gondek, 163 A.D.2d 678, 558 N.Y.S.2d 284, 1990 N.Y. App. Div. LEXIS 8146 (N.Y. App. Div. 3d Dep't 1990).

In action by landowners for property damage arising out of excavation work on adjoining lot, wherein jurors' answers to interrogatories determined that defendant general contractor (who failed to file for necessary permits, excavated illegally and made no effort to support plaintiffs' structure until after it had already collapsed) was liable for punitive but not compensatory damages, new trial was required where, in face of such inconsistent findings, court failed to take available options under CLS CPLR § 4111(c)—either to direct jurors to reconsider answers and verdict or to order new trial. Sobie v Katz Constr. Corp., 189 A.D.2d 49, 595 N.Y.S.2d 750, 1993 N.Y. App. Div. LEXIS 2693 (N.Y. App. Div. 1st Dep't 1993).

Court should have granted plaintiff's motion for new trial based on jury confusion where, in response to specific questions on verdict sheet, jury found that defendant's negligence was not proximate cause of accident, yet in answer to second question, jury determined that defendant's percentage of fault was 10 percent. Trotter v Johnson, 210 A.D.2d 946, 621 N.Y.S.2d 761, 1994 N.Y. App. Div. LEXIS 13418 (N.Y. App. Div. 4th Dep't 1994).

In action arising from sale of goods, jury's finding that buyer failed to establish either fraud or breach of warranty could not be rationally reconciled with its failure to find for seller on its counterclaim for balance due for printing press; thus, court should have granted seller's motion to set aside verdict and to order new trial. Cayuga Press v Lithografiks, Inc., 211 A.D.2d 908, 621 N.Y.S.2d 187, 1995 N.Y. App. Div. LEXIS 54 (N.Y. App. Div. 3d Dep't 1995).

In negligence action, where jury found defendant not liable with respect to each of 3 incidents but nevertheless awarded damages due to "misdirection" on verdict sheet, and court accepted jury's verdict of no negligence, vacating damage award, court should not have thereafter granted plaintiff's motion to set aside verdict under CLS CPLR § 4404(a) or CLS CPLR § 4111(c) on ground that jury's decision of no negligence, followed by decision to award future damages, was internally inconsistent when reviewed in context of court's charge that no damages can be awarded if no negligence is found; fixing by jury of amount for plaintiff's future

damages is not, in itself, inconsistent with determination of no liability and should not be taken as allocation of responsibility to defendant. Peters v Port Auth. Trans-Hudson Corp., 234 A.D.2d 205, 651 N.Y.S.2d 500, 1996 N.Y. App. Div. LEXIS 12834 (N.Y. App. Div. 1st Dep't 1996), app. denied, 90 N.Y.2d 802, 660 N.Y.S.2d 712, 683 N.E.2d 335, 1997 N.Y. LEXIS 1627 (N.Y. 1997).

In negligence action arising from motor vehicle collision in which both decedent and his wife were injured, decedent's estate was entitled to damages for decedent's loss of consortium, and to vacatur of that part of jury's verdict that inconsistently found that decedent suffered loss of consortium but failed to award any damages for that loss, where, after accident, decedent assumed for first time all duties of running household. Harris v Moyer, 255 A.D.2d 890, 680 N.Y.S.2d 351, 1998 N.Y. App. Div. LEXIS 12078 (N.Y. App. Div. 4th Dep't 1998).

In action to recover for injuries sustained by plaintiff either during or after hernia surgery, jury rendered inconsistent verdict by finding that neither attending surgeon nor resident anesthesiologist had been negligent, but that hospital (which plaintiff alleged was vicariously liable for negligence of its employees) had been negligent and its negligence was proximate cause of plaintiff's injuries; trial court properly set aside jury's verdict plaintiff and ordered new trial as against all defendants. Edin v Halff, 261 A.D.2d 569, 690 N.Y.S.2d 705, 1999 N.Y. App. Div. LEXIS 5745 (N.Y. App. Div. 2d Dep't 1999).

Court properly set aside jury verdict in defendants' favor in view of court's finding that jury had been "thoroughly confused by the multiplicity of parties and the conflicting burdens of proof associated with a vicarious strict liability statute, Labor Law § 240, and a common-law codification of negligence, Labor Law § 200," and court's determination was supported by jury note that indicated jury found no liability as to primary defendant, whose sole liability was vicarious, but believed that one or more of third-party defendants was liable. Dinino v D.A.T. Constr. Corp., 267 A.D.2d 148, 700 N.Y.S.2d 24, 1999 N.Y. App. Div. LEXIS 13212 (N.Y. App. Div. 1st Dep't 1999).

Personal injury plaintiff was entitled to new trial, rather than dismissal of complaint, where jury, which had previously expressed difficulty in comprehending concept of proximate cause, found

that plaintiff's negligence was proximate cause of traffic accident, that plaintiff was 90 percent at fault for happening of accident, that defendant was 10 percent at fault for happening of accident, but that defendant's negligence was not proximate cause of accident. Clarke v Order of the Sisters of St. Dominic, 273 A.D.2d 431, 710 N.Y.S.2d 108, 2000 N.Y. App. Div. LEXIS 7372 (N.Y. App. Div. 2d Dep't 2000).

Trial court erred in denying an injured party's motion pursuant to N.Y. C.P.L.R. 4404(a) to set aside a jury verdict in favor of a city in a personal injury action; the jury's finding that city was negligent in failing to repair a hole in pavement, but that the negligence was not a proximate cause of the injuries, was irreconcilably inconsistent. Alexander v City of New York, 21 A.D.3d 389, 800 N.Y.S.2d 436, 2005 N.Y. App. Div. LEXIS 8391 (N.Y. App. Div. 2d Dep't 2005).

In a personal injury action, trial court improperly granted that branch of defendants' N.Y. C.P.L.R. 4404(a) motion to set aside a jury verdict as inconsistent; defendants' post-trial argument that the jury verdict was internally inconsistent was known to defendants before the jury was discharged and yet they chose not to object to the verdict at that time. Furthermore, the verdict was not against the weight of the evidence. Gilbert v Kingsbrook Jewish Ctr., 37 A.D.3d 531, 829 N.Y.S.2d 686, 2007 N.Y. App. Div. LEXIS 1745 (N.Y. App. Div. 2d Dep't 2007).

Order granting homeowners' motion to set aside a jury verdict in a premises liability action as inconsistent was improper because, by failing to raise their objection until long after the time for any possible cure had passed, the homeowners were deemed to have waived the objection. Moreover, the verdict was not against weight of the evidence. Gunther v Muschio, 40 A.D.3d 1030, 837 N.Y.S.2d 283, 2007 N.Y. App. Div. LEXIS 6624 (N.Y. App. Div. 2d Dep't 2007).

Jury verdict should have been set aside under N.Y. C.P.L.R. § 4404(a) in personal injury action as it was inconsistent in finding that defendant driver was negligent in violating N.Y. Veh. & Traf. Law §§ 1129, 1180 by striking plaintiff driver's vehicle in the rear but was not the substantially contributing factor in causing the accident; the verdict was also ambiguous as it did not address the issue of whether defendant driver's negligence proximately caused plaintiff driver's injuries.

Rodriguez v Budget Rent-A-Car Sys., Inc., 44 A.D.3d 216, 841 N.Y.S.2d 486, 2007 N.Y. App. Div. LEXIS 9303 (N.Y. App. Div. 1st Dep't 2007).

Jury verdict on medical malpractice claim against an employer was set aside as inconsistent under N.Y. C.P.L.R. § 4404(a) because defendant physician assistant was found not to have departed from accepted medical practice in his treatment of the decedent. Marus v Village Med., 51 A.D.3d 879, 858 N.Y.S.2d 735, 2008 N.Y. App. Div. LEXIS 4386 (N.Y. App. Div. 2d Dep't 2008), amended, 59 A.D.3d 1144, 2009 N.Y. App. Div. LEXIS 1305 (N.Y. App. Div. 2d Dep't 2009).

Jury’s verdict found that, although a school district was negligent, its negligence was not a substantial factor in causing a child’s playground accident. As the testimony allowed the jury to conclude that, although the district was negligent in having only two playground aides, the accident happened so quickly that greater supervision would not have prevented it, its verdict finding negligence but not liability was not inconsistent. Mata v Huntington Union Free School Dist., 57 A.D.3d 738, 871 N.Y.S.2d 194, 2008 N.Y. App. Div. LEXIS 9644 (N.Y. App. Div. 2d Dep't 2008), app. denied, 12 N.Y.3d 712, 882 N.Y.S.2d 682, 910 N.E.2d 430, 2009 N.Y. LEXIS 1821 (N.Y. 2009).

Trial court properly granted a convenience store's motion to set aside a jury verdict in favor of an injured customer and for a new trial because, while a rational jury could conclude that the store was negligent and that its negligence was a substantial factor in causing the customer's accident, the court properly determined that the jury was confused about the meaning of the court's charge regarding proximate cause inasmuch as the liability verdict was internally inconsistent by attributing 15% of the fault for the accident to the customer, despite having found that her negligence was not a substantial factor in causing her injuries. Magee v Cumberland Farms, Inc., 145 A.D.3d 769, 43 N.Y.S.3d 125, 2016 N.Y. App. Div. LEXIS 8220 (N.Y. App. Div. 2d Dep't 2016).

Trial court erred in granting a defendant's motion to set aside the jury verdict and to direct that judgment be entered in his favor because, while the court properly rejected the jury's first verdict

as inconsistent, the court should have granted the defendant's motion for a new trial instead of attempting to “reinstate” the jury's verdict where, unknown to the court, a court officer had pointed to portions of the verdict sheet that he believed were in error and handed it back to the jury, which action, when combined with the court's instructions, resulted in an unreliable verdict. Kitenberg v Gulmatico, 143 A.D.3d 947, 40 N.Y.S.3d 459, 2016 N.Y. App. Div. LEXIS 6889 (N.Y. App. Div. 2d Dep't 2016).

In personal injury action arising from collapse of ceiling in building owned by defendant partnerships, there was no inconsistency between jury’s finding that individual partners were not grossly negligent and its finding of gross negligence of part of owner-partnerships, and thus defendants’ motion to set aside verdict in favor of plaintiffs was denied. Bank of New York v Ansonia Assocs., 172 Misc. 2d 70, 656 N.Y.S.2d 813, 1997 N.Y. Misc. LEXIS 118 (N.Y. Sup. Ct. 1997).

Court would set aside, as inconsistent, personal injury verdict for defendant where jury answered “yes” to interrogatory “was the defendant negligent?” on evidence that plaintiff fell from ladder when it was struck by wheelbarrow being used by defendant’s employee, and answered “no” to interrogatory “was the negligence of the defendant a substantial factor in causing the accident?” but only negligence at issue was wheelbarrow striking ladder, and there was no dispute that such event precipitated plaintiff’s fall. DiMaggio v M. O'Connor Contr. Co., 175 Misc. 2d 253, 668 N.Y.S.2d 449, 1998 N.Y. Misc. LEXIS 5 (N.Y. Sup. Ct. 1998).

In a personal injury action, a bicyclist was entitled to set aside a jury verdict under N.Y. C.P.L.R. § 4404(a) as inconsistent because a finding that an automobile driver was negligent but not the proximate cause of the accident was against the weight of the evidence as although the bicyclist failed to signal in violation of N.Y. Veh. & Traf. Law §§ 1163, 1164, the driver saw the bicyclist change lanes to avoid an obstruction and it was foreseeable that she would move back; the driver should have sounded his horn as required by N.Y. Veh. & Traf. Law § 1146. Doubrovinskaya v Dembitzer, 858 N.Y.S.2d 874, 20 Misc. 3d 440, 239 N.Y.L.J. 113, 2008 N.Y.

Misc. LEXIS 3074 (N.Y. Sup. Ct. 2008), app. dismissed, 77 A.D.3d 608, 908 N.Y.S.2d 590, 2010 N.Y. App. Div. LEXIS 7231 (N.Y. App. Div. 2d Dep't 2010).

Where a jury found a doctor negligent, but then found that the negligence was not a substantial factor in the patient's injury, the jury's verdict was not inconsistent because the issues of negligence and causation were not inextricably interwove; thus, the trial court properly denied the patient's motion to set aside the jury verdict as inconsistent. Waild v Boulos, 2 A.D.3d 1284, 770 N.Y.S.2d 253, 2003 N.Y. App. Div. LEXIS 14267 (N.Y. App. Div. 4th Dep't 2003), app. denied, 2 N.Y.3d 703, 778 N.Y.S.2d 462, 810 N.E.2d 915, 2004 N.Y. LEXIS 573 (N.Y. 2004).

In a personal injury case, the trial court erred in not granting the passenger's N.Y. C.P.L.R. 4404(a) motion to set aside the jury verdict on the issue of liability as against the weight of the evidence because the trial court's instruction to the jury that a finding of negligent conduct with respect to each driver could be based, inter alia, on the failure to keep a proper lookout or to maintain a safe distance between the vehicles created the circumstance that the issues of negligence and proximate cause were so inextricably interwoven that it was logically impossible for the jury to find that both drivers were negligent without also finding that the negligence of at least one of them was a proximate cause of the accident. Misa v Filancia, 2 A.D.3d 810, 769 N.Y.S.2d 404, 2003 N.Y. App. Div. LEXIS 14203 (N.Y. App. Div. 2d Dep't 2003).

In a personal injury action arising from an automobile collision with a driver, because the internal inconsistency in the verdict demonstrated substantial juror confusion, the branch of plaintiff's motion which was to set aside the verdict as inconsistent pursuant to N.Y. C.P.L.R. 4404(a) should have been granted; the trial court granted plaintiff judgment as a matter of law on the issue of defendants' liability, and the jury was so instructed, but the jury returned a verdict apportioning 0 percent of the fault to the driver. Batal v Assoc. Univs., Inc., 18 A.D.3d 484, 795 N.Y.S.2d 268, 2005 N.Y. App. Div. LEXIS 5067 (N.Y. App. Div. 2d Dep't 2005).

Police officer's N.Y. C.P.L.R. 4404(a) motion to set aside the jury's defense verdict in the police officer's N.Y. Gen. Mun. Law § 205-e suit against a city was proper because the trial court correctly instructed the jury on causation; moreover, the record failed to establish the existence

of substantial juror confusion, occasioned by the instructions, that warranted a new trial. Although the jury found that the city was negligent, but that its negligence was not a proximate cause of the accident, the issues of negligence and causation were not inextricably interwoven. Casella v City of New York, 69 A.D.3d 549, 893 N.Y.S.2d 556, 2010 N.Y. App. Div. LEXIS 89 (N.Y. App. Div. 2d Dep't 2010).

17. —Vicarious liability

In personal injury action by passenger on all-terrain vehicle (ATV) which collided with tree while friend of owner's son was driving, defendant owner was not entitled to order setting aside jury verdict as to liability on ground that he could not be held liable on negligent entrustment theory because driver of ATV was unrelated to him, where evidence was legally sufficient for jury to find that he created unreasonable risk of harm to injured passenger by negligently entrusting ATV to his minor son, whose use involved lending it to another minor. Rios v Smith, 95 N.Y.2d 647, 722 N.Y.S.2d 220, 744 N.E.2d 1156, 2001 N.Y. LEXIS 167 (N.Y. 2001).

Verdict for plaintiff in personal injury case, which found that defendant employee was not driving employer's vehicle at time accident occurred, was erroneously permitted to stand where there was no evidence showing that a stranger was driving said vehicle at time of fatal wreck, which jury determined was caused by said vehicle while being operated with employer's consent. Gasser v Olin's Car Rental, Inc., 41 A.D.2d 922, 343 N.Y.S.2d 722, 1973 N.Y. App. Div. LEXIS 4449 (N.Y. App. Div. 1st Dep't 1973).

Court erred in refusing to reduce verdict against vendor by percentage of decedent's liability and instead entering judgment against vendor for 100 percent of verdict where jury found patron 40 percent liable and both vendor and decedent each 30 percent liable; while vendor in Dram Shop Act action is barred by public policy from seeking contribution from estate of vendee when it is vendee's dependents who are seeking recovery, issue here was whether recovery by third person, not spouse or dependent of intoxicated person, should be diminished by third person's liability. In action under Dram Shop Act (CLS Gen Oblig § 11-101) and for wrongful death based

on police officer's death, court properly refused to reduce verdict by 3 collateral sources under CLS CPLR § 4545(c) where death benefits paid under 42 USCS § 3796 and death benefits paid under collective bargaining agreement were in nature of life insurance, and third benefit paid under CLS Retire & S S 361 and 361-a was explicitly excluded as collateral source by statute; moreover, defendant failed to match collateral sources to items of loss in verdict. Adamy v Ziriakus, 231 A.D.2d 80, 659 N.Y.S.2d 623, 1997 N.Y. App. Div. LEXIS 6271 (N.Y. App. Div. 4th Dep't 1997).

In action under CLS Labor § 240(1), court's finding, necessary to its grant of defendant's motion for directed verdict on its claim for common-law indemnification, that defendant was no more than vicariously responsible for plaintiff's harm, was not consistent with its denial of defendant's motion to extent that that motion sought to have jury's apportionment of liability against it set aside; thus, matter would be remanded for new trial for purpose of reapportioning liability as between other defendants. Salamone v Wincaf Props., 249 A.D.2d 169, 671 N.Y.S.2d 737, 1998 N.Y. App. Div. LEXIS 4408 (N.Y. App. Div. 1st Dep't 1998).

Court properly set aside jury verdict in defendants' favor in view of court's finding that jury had been "thoroughly confused by the multiplicity of parties and the conflicting burdens of proof associated with a vicarious strict liability statute, Labor Law § 240, and a common-law codification of negligence, Labor Law § 200," and court's determination was supported by jury note that indicated jury found no liability as to primary defendant, whose sole liability was vicarious, but believed that one or more of third-party defendants was liable. Dinino v D.A.T. Constr. Corp., 267 A.D.2d 148, 700 N.Y.S.2d 24, 1999 N.Y. App. Div. LEXIS 13212 (N.Y. App. Div. 1st Dep't 1999).

Where, after case was submitted to jury in action by passenger/owner against other driver, Court of Appeals announced rule that negligence of driver was not imputable to passenger/owner who was not personally negligent, plaintiff's motion to set aside verdict pursuant to CPLR 4404 as being contrary to law was granted, even though made after 15-day

time limitation. Natiello v Carroll, 77 Misc. 2d 470, 353 N.Y.S.2d 909, 1974 N.Y. Misc. LEXIS 1171 (N.Y. Sup. Ct. 1974).

18. — —Municipal vicarious liability

In a damages action arising from a break in a water main lying beneath a city street against the city and Con Edison, the jury verdict which adjudged only the city liable would be modified to the extent of vacating the decretal provisions imposing liability against the city where, even though the theory of negligence was directed against both defendants on the basis of their failure to discover improper installation of Con Edison’s work, upon inspection, if any, the jury returned a verdict in favor of the plaintiffs only against the city. Gillette Shoe Co. v New York, 86 A.D.2d 522, 445 N.Y.S.2d 750, 1982 N.Y. App. Div. LEXIS 15039 (N.Y. App. Div. 1st Dep't 1982), aff'd, 58 N.Y.2d 853, 460 N.Y.S.2d 490, 447 N.E.2d 38, 1983 N.Y. LEXIS 2846 (N.Y. 1983).

In an action to recover damages for personal injuries in which plaintiff received a jury verdict in her favor against defendant county and police department, the trial court improperly set aside the jury verdict and dismissed the complaint against said defendants as a matter of law on the ground that plaintiff failed to demonstrate that the defendant municipality owed her a “special duty”, where the gravamen of plaintiff’s action was that the police department had actual knowledge that a horse was loose on a public street and it failed to take reasonable safety measures with regard thereto, including the closing of an appropriate section of the street, thereby causing the accident, the proof adduced by plaintiff with respect to this allegation raised a question of fact for the jury’s resolution, and its verdict was amply supported by the record. Napolitano v County of Suffolk, 92 A.D.2d 931, 460 N.Y.S.2d 353, 1983 N.Y. App. Div. LEXIS 17340 (N.Y. App. Div. 2d Dep't 1983), rev'd, 61 N.Y.2d 863, 474 N.Y.S.2d 461, 462 N.E.2d 1179, 1984 N.Y. LEXIS 4124 (N.Y. 1984).

In action seeking punitive damages against city and certain individual police officers for battery, court properly set aside verdict for plaintiff on its own initiative where charge and verdict sheet failed to separate claims for punitive damages on each cause of action and for each defendant,

since immunity of municipality from punitive damages does not extend to individual police officers. Staudacher v Buffalo, 155 A.D.2d 956, 547 N.Y.S.2d 770, 1989 N.Y. App. Div. LEXIS 14826 (N.Y. App. Div. 4th Dep't 1989).

City was entitled to order setting aside verdict against it in action to recover for injuries sustained by parade spectators when overhead sidewalk bridge collapsed on them due to weight of people who had climbed onto it to watch parade since there was no “special relationship” between injured spectators and city, notwithstanding that city had security plan in effect for parade and that certain spectators had been directed by police officers to stand under bridge. Maslowski v H.J. Kalikow & Co., 168 A.D.2d 265, 562 N.Y.S.2d 125, 1990 N.Y. App. Div. LEXIS 14797 (N.Y. App. Div. 1st Dep't 1990).

Court properly granted defendants’ motion to set aside jury verdict in favor of plaintiffs on cause of action for false arrest, since officer had probable cause for arrest where (1) plaintiffs testified that they agreed to give complainant ride home from discotheque but that, after she became unruly, they pulled over to side of road and told her leave, which she did under her own volition, and (2) officer testified that he saw complainant fall to sidewalk as if she had been thrown from vehicle, that she yelled to him to stop plaintiffs’ car because they had stolen her purse, that he pulled plaintiffs over, and that he found complainant’s purse in front seat, although plaintiffs claimed that they did not know that purse was there. Kramer v New York, 173 A.D.2d 155, 569 N.Y.S.2d 67, 1991 N.Y. App. Div. LEXIS 5330 (N.Y. App. Div. 1st Dep't), app. denied, 78 N.Y.2d 857, 574 N.Y.S.2d 938, 580 N.E.2d 410, 1991 N.Y. LEXIS 3998 (N.Y. 1991).

In action against school for sexual assault of 5-year-old kindergarten student, who was sent to bathroom alone and unsupervised where he was assaulted by older student, court properly denied motions to dismiss complaint made by school at close of evidence and following jury’s verdict in favor of plaintiffs; jury could reasonably conclude that danger of assault was foreseeable and preventable, although school had no actual or constructive notice of similar incidents or prior dangerous conduct by alleged assailant, given school’s written security guidelines concerning young children, coupled with principal’s testimony, indicating awareness

of risks to unescorted students in corridors and bathrooms. Garcia v City of New York, 222 A.D.2d 192, 646 N.Y.S.2d 508, 1996 N.Y. App. Div. LEXIS 8412 (N.Y. App. Div. 1st Dep't 1996), app. denied, 89 N.Y.2d 808, 655 N.Y.S.2d 888, 678 N.E.2d 501, 1997 N.Y. LEXIS 175 (N.Y. 1997).

Court properly granted city's post-trial motion to dismiss complaint where city had undertaken study of intersection in question but had not completed study at time of accident, and city was not negligent in failing to install multi-way stop signs as interim safety measure given expert witness' unequivocal testimony that he considered such signs as interim measure but decided against such installation because he believed that they would cause increase in number of accidents. O'Brien v City of New York, 231 A.D.2d 698, 647 N.Y.S.2d 561, 1996 N.Y. App. Div. LEXIS 9660 (N.Y. App. Div. 2d Dep't 1996), app. dismissed, 89 N.Y.2d 1026, 658 N.Y.S.2d 241, 680 N.E.2d 614, 1997 N.Y. LEXIS 501 (N.Y. 1997).

Court properly granted defendant board of education's motion to set aside verdict in favor of plaintiffs and for judgment as matter of law dismissing complaint where plaintiff, experienced softball player, assumed risk of injury which she sustained on voluntarily participating in interscholastic softball game. Bartucelli by Bartucelli v New York City Bd. of Educ., 233 A.D.2d 352, 650 N.Y.S.2d 588, 1996 N.Y. App. Div. LEXIS 11721 (N.Y. App. Div. 2d Dep't 1996).

Court should have granted city's motion to set aside jury's liability verdict where plaintiff, experienced equestrian, while riding rented horse on park bridle path, lost control of horse and was thrown, fracturing her leg, when horse slipped; despite plaintiff's contention that city's liability arose from its failure to construct fencing segregating bridle path from roadway in vicinity of park exit, she assumed risks associated with reasonably foreseeable consequences of potentially dangerous recreational event. Freskos v City of New York, 243 A.D.2d 364, 663 N.Y.S.2d 174, 1997 N.Y. App. Div. LEXIS 10318 (N.Y. App. Div. 1st Dep't 1997).

Jury verdict holding New York City Housing Authority liable for not terminating employee after learning of his undisclosed convictions was properly set aside since 3 nonviolent convictions that employee did not disclose in his employment application, in conjunction with robbery

conviction that he did disclose, did not, as matter of law, give Authority reason to know that employee had propensity for violence, or was otherwise unsuited for employment as caretaker. Givens v New York City Hous. Auth., 249 A.D.2d 133, 671 N.Y.S.2d 479, 1998 N.Y. App. Div. LEXIS 4342 (N.Y. App. Div. 1st Dep't 1998).

Injury occurred while plaintiff, police officer, was performing act taken in furtherance of specific police function which exposed her to risk of sustaining particular injury, and thus court properly granted defendant city's motion to set aside jury verdict against it where plaintiff was issuing parking citation to illegally-park car when she fell because of defect in sidewalk. Carter v City of New York, 272 A.D.2d 498, 708 N.Y.S.2d 426, 2000 N.Y. App. Div. LEXIS 5807 (N.Y. App. Div. 2d Dep't 2000).

In action brought against New York City Transit Authority by infant plaintiff injured when his mother committed suicide by throwing herself, with plaintiff in her arms, under wheels of moving subway train, court would vacate verdict finding negligence on part of Authority police officer, who noticed mother on roadbed near tracks, asked her if she was all right and wanted to go home, to which she responded yes, and then observed her appear to leave, since officer did not, under circumstances, assume affirmative duty to act on plaintiff's behalf or have knowledge that inaction could lead to harm. Figueroa v New York City Transit Authority, 152 Misc. 2d 948, 579 N.Y.S.2d 831, 1991 N.Y. Misc. LEXIS 755 (N.Y. Sup. Ct. 1991), aff'd, Figueroa v New York City Transit Auth., 213 A.D.2d 586, 624 N.Y.S.2d 260, 1995 N.Y. App. Div. LEXIS 3228 (N.Y. App. Div. 2d Dep't 1995).

Trial court properly granted an injured party's motion pursuant to N.Y. C.P.L.R. 4404(a) to set aside a verdict for defendants, the driver and owner of an automobile, in a personal injury action; the jury's finding that the driver was negligent but that her negligence did not cause the accident was against the weight of the evidence and unsupported by sufficient evidence. Polidoro v D'Angelo, 2 A.D.3d 428, 767 N.Y.S.2d 844, 2003 N.Y. App. Div. LEXIS 12860 (N.Y. App. Div. 2d Dep't 2003).

19. Weight of evidence generally

New trial would be granted unless plaintiffs stipulated to reduce the verdict where amount of verdict indicated jury's determination against the weight of the evidence that plaintiff wife's condition was entirely attributable to accident and not to pre-existing conditions, and where plaintiffs' counsel argued for so-called "unit-of-time" basis for appraising damages for pain and suffering. Jacobs v Peress, 24 A.D.2d 746, 263 N.Y.S.2d 675, 1965 N.Y. App. Div. LEXIS 3287 (N.Y. App. Div. 1st Dep't 1965).

If the court determines that the verdict is contrary to the weight of the evidence, the proper disposition is to set aside the verdict and order a new trial. Ryder v Cue Car Rental, Inc., 32 A.D.2d 143, 302 N.Y.S.2d 17, 1969 N.Y. App. Div. LEXIS 3978 (N.Y. App. Div. 4th Dep't 1969).

Although paucity of evidence warranted setting aside of verdict, it was error also to dismiss complaints where evidence was not so meager as to be nonexistent. Oleksik v Jones, 41 A.D.2d 692, 342 N.Y.S.2d 504, 1973 N.Y. App. Div. LEXIS 5060 (N.Y. App. Div. 4th Dep't 1973).

A jury verdict in favor of defendant may not be set aside unless it plainly appears that evidence so predominates in favor of plaintiff that a verdict could not have been reached on any fair interpretation of the evidence. Roberts v Ausable Chasm Co., 47 A.D.2d 979, 367 N.Y.S.2d 120, 1975 N.Y. App. Div. LEXIS 9463 (N.Y. App. Div. 3d Dep't 1975).

Where trial court's determination, on new trial motion, that a jury verdict is contrary to the weight of the evidence is not unreasonable, the Supreme Court, Appellate Division, will not intervene to reverse that finding. Motion for new trial on ground that verdict was against the weight of the evidence should not be granted unless preponderance in favor of the movant was so great that the finding in favor of the opponent could not have been reached on any fair interpretation of the evidence. McDowell v Di Pronio, 52 A.D.2d 749, 382 N.Y.S.2d 201, 1976 N.Y. App. Div. LEXIS 12452 (N.Y. App. Div. 4th Dep't 1976).

Where verdict for plaintiff was contrary to weight of evidence but was not incredible as matter of law, new trial was preferable to entry of judgment in favor of defendant. Shane v St. Paul's

United Methodist Church, 56 A.D.2d 597, 391 N.Y.S.2d 465, 1977 N.Y. App. Div. LEXIS 10667 (N.Y. App. Div. 2d Dep't 1977).

Motion to set aside verdict for defendant should not be granted unless preponderance of evidence in plaintiff’s favor is so great that verdict could not have been reached upon any fair interpretation of evidence. Boyle v Gretch, 57 A.D.2d 1047, 395 N.Y.S.2d 797, 1977 N.Y. App. Div. LEXIS 12350 (N.Y. App. Div. 4th Dep't 1977).

Where a valid question of fact is presented, and it would not be utterly irrational for a jury to reach its result, a court may not conclude that the verdict is as a matter of law not supported by the evidence. Hoffman v Board of Education, 64 A.D.2d 369, 410 N.Y.S.2d 99, 1978 N.Y. App. Div. LEXIS 12756 (N.Y. App. Div. 2d Dep't 1978), rev'd, 49 N.Y.2d 121, 424 N.Y.S.2d 376, 400 N.E.2d 317, 1979 N.Y. LEXIS 2489 (N.Y. 1979).

A motion under CPLR 4404 (a) should not be granted unless the verdict is palpably wrong and there is no basis upon which the jury could reach it upon any fair interpretation of the evidence. Tripoli v Tripoli, 83 A.D.2d 764, 443 N.Y.S.2d 488, 1981 N.Y. App. Div. LEXIS 15086 (N.Y. App. Div. 4th Dep't 1981), aff'd, 56 N.Y.2d 684, 451 N.Y.S.2d 717, 436 N.E.2d 1319, 1982 N.Y. LEXIS 3350 (N.Y. 1982).

In considering motion for judgment notwithstanding verdict, test is not whether jury erred in weighing evidence presented but whether any viable evidence exists to support verdict. Kozlowski v Amsterdam, 111 A.D.2d 476, 488 N.Y.S.2d 862, 1985 N.Y. App. Div. LEXIS 51557 (N.Y. App. Div. 3d Dep't 1985).

Whether jury verdict is against weight of evidence is essentially discretionary and factual determination which is to be distinguished from question of whether jury verdict, as matter of law, is supported by sufficient evidence, and jury verdict should not be set aside unless jury could not have reached verdict on any fair interpretation of evidence. Nicastro v Park, 113 A.D.2d 129, 495 N.Y.S.2d 184, 1985 N.Y. App. Div. LEXIS 52340 (N.Y. App. Div. 2d Dep't 1985).

Verdict in favor of defendant should not be set aside as against weight of credible evidence unless preponderance in favor of plaintiff was so great that finding in favor of defendant could not have been reached on any fair interpretation of evidence. Ciotti v New York Hosp., 221 A.D.2d 581, 634 N.Y.S.2d 204, 1995 N.Y. App. Div. LEXIS 12474 (N.Y. App. Div. 2d Dep't 1995).

Trial court erred in denying an injured party's motion pursuant to N.Y. C.P.L.R. 4404 to set aside a verdict in favor of defendants in a personal injury action; the verdict was against the weight of the evidence, which indicated that the injured party did not tamper with a load bar which fell on the injured party's hand. Weon Tak Hong v Roadway Express Co., 21 A.D.3d 483, 799 N.Y.S.2d 818, 2005 N.Y. App. Div. LEXIS 8488 (N.Y. App. Div. 2d Dep't 2005).

Trial court erred in granting a patient's motion to set aside a jury verdict and for a new trial pursuant to N.Y. C.P.L.R. 4404(a) after the jury returned a verdict in favor of a doctor in the patient's medical malpractice action, as the verdict on the informed consent claim was not against the manifest weight of the evidence to such an extent that a new trial was mandated; further, the failure to submit proposed interrogatories to the jury was not reversible error. Murray v Maniatis, 21 A.D.3d 1012, 801 N.Y.S.2d 348, 2005 N.Y. App. Div. LEXIS 9233 (N.Y. App. Div. 2d Dep't 2005).

Verdict entered against a mother in her personal injury action seeking damages resulting from her son's injuries sustained when he was struck by a police car driven by defendant officer, was not against the weight of the evidence presented, as: (1) the trial court properly responded to the jury's inquiry stating a need for a definition of "reckless disregard;" and (2) given the fact that the police department's policy outlining its procedures used in responding to emergency situations was in evidence, and the policy was set forth in terms easily understood by the typical juror, expert testimony as to evidence regarding those procedures was unnecessary. Kettles v City of Rochester, 21 A.D.3d 1424, 802 N.Y.S.2d 572, 2005 N.Y. App. Div. LEXIS 10416 (N.Y. App. Div. 4th Dep't 2005).

In a driver’s negligence action against a town, a trial court properly denied the town’s motion under N.Y. C.P.L.R. 4404 to set a verdict as to its liability aside; the verdict was not against the weight of the evidence, and the town’s negligence was a proximate cause of the driver’s automobile accident, which occurred in an intersection. The town had a duty to maintain its roads in a reasonably safe condition, including a duty to trim the growth of foliage on the road’s right-of-way to ensure the visibility of the stop signs, and the jury could have fairly interpreted the evidence, which included the driver’s testimony, the testimony of an accident reconstruction expert, and the photographs taken 10 days after the accident, that the town had not properly trimmed the stop sign at the intersection in question in a way that would have allowed the driver to see the sign. D'Onofrio-Ruden v Town of Hempstead, 29 A.D.3d 512, 815 N.Y.S.2d 141, 2006 N.Y. App. Div. LEXIS 5946 (N.Y. App. Div. 2d Dep't 2006).

In a driver’s negligence action against a town, a trial court erroneously denied the town’s motion under N.Y. C.P.L.R. 4404 to set aside a verdict because the verdict was against the weight of the evidence, even though the town’s negligence was a proximate cause of the driver’s automobile accident in an intersection; the town was not solely liable for the accident, and the fault and damages should have been apportioned. While the town had a duty to maintain its roads in a reasonably safe condition, including a duty to trim foliage on a road’s right-of-way to ensure the visibility of stop signs, a driver who entered an intersection, against the stop sign that was hidden by foliage, and turned right, should have seen the second car; the second car was 75 percent of the way through the intersection, and any driver was negligent when an accident happened after he or she failed to see that which, through the proper use of his or her senses, should have been seen. D'Onofrio-Ruden v Town of Hempstead, 29 A.D.3d 512, 815 N.Y.S.2d 141, 2006 N.Y. App. Div. LEXIS 5946 (N.Y. App. Div. 2d Dep't 2006).

Trial court erred in granting a transit authorities motion pursuant to N.Y. C.P.L.R. 4404 to set aside a jury verdict in favor of plaintiff in a personal injury action, as the jury’s finding that only the authority’s negligence was the proximate cause of the underlying accident was supported by

the evidence. Won Sok Kim v New York City Tr. Auth., 29 A.D.3d 984, 817 N.Y.S.2d 306, 2006 N.Y. App. Div. LEXIS 7095 (N.Y. App. Div. 2d Dep't 2006).

Jury verdict on the issue of liability was set aside under N.Y. C.P.L.R. 4404(a) as being against the manifest weight of the evidence in a student's personal injury action against a school district, arising from her fall off playground equipment during recess, as she had alleged that the district was liable under a theory of negligent supervision and the jury found that the district was negligent but that such negligence was not the proximate cause of the injuries; based on the theory presented to the jury, it could not logically have found as it did, such that the jury verdict was properly deemed against the manifest weight of the evidence. Rodriguez v Elmont School Dist., 37 A.D.3d 448, 829 N.Y.S.2d 221, 2007 N.Y. App. Div. LEXIS 1514 (N.Y. App. Div. 2d Dep't 2007).

Plaintiffs' were not entitled, pursuant to N.Y. C.P.L.R. 4404(a), to set aside a jury verdict in favor of a construction company as to damages in plaintiffs' personal injury action, as the jury's resolution of the credibility issues in favor of the construction company was supported by a fair interpretation of the evidence. Wilson v Hallen Constr. Corp., 40 A.D.3d 986, 837 N.Y.S.2d 202, 2007 N.Y. App. Div. LEXIS 6459 (N.Y. App. Div. 2d Dep't 2007).

In a personal injury action, because the verdict was supported by legally sufficient evidence, although against the weight of the evidence, an individual's N.Y. C.P.L.R. § 4404 motion for judgment as a matter of law was improperly granted; instead, the individual should have been granted a new trial on the issues of liability and damages. Scavuzzo v City of New York, 47 A.D.3d 793, 850 N.Y.S.2d 526, 2008 N.Y. App. Div. LEXIS 454 (N.Y. App. Div. 2d Dep't 2008).

Because neither of the doctors failed to perform complete colonoscopies to the cecum, the jury verdict finding that they failed to do so could not have been reached upon any fair interpretation of the evidence; therefore, the trial court properly found, pursuant to N.Y. C.P.L.R. 4404(a), that the verdict was against the weight of the evidence. Cardenales v Queens-Long Is. Med. Group, P.C., 49 A.D.3d 585, 854 N.Y.S.2d 440, 2008 N.Y. App. Div. LEXIS 2103 (N.Y. App. Div. 2d Dep't 2008).

In an action alleging a deprivation of rights pursuant to N.Y. Pub. Health Law § 2801-d by a residential care facility, a personal representative of a deceased resident was not entitled under N.Y. C.P.L.R. § 4404(a) to set aside the jury verdict as to the fourth through seventh interrogatories as contrary to the weight of the evidence because the jury's determinations that the facility did not violate certain federal and state regulations and, thus, did not cause the decedent to suffer any injuries by violating a particular regulation were based upon a fair interpretation of the evidence. Sullivan v Our Lady of Consolation Geriatric Care Ctr., 60 A.D.3d 663, 875 N.Y.S.2d 116, 2009 N.Y. App. Div. LEXIS 1597 (N.Y. App. Div. 2d Dep't 2009).

Denial of motion to set aside a verdict for a seller in an agency's claim for a real estate commission was proper because the jury could have found that the parties merely reached "agreement to agree" and did not enter into an express contract for brokerage services; efforts made by the agency were made in furtherance of a proposed sale of the property to a prospective buyer, but that transaction did not occur. The agency produced no written documentation supporting a claim that its principal owner had informed the seller about a lawyer who acquired an interest in the buyer, and the written proposals and draft contracts did not indicate the specific identity of the purchasers, or that the lawyer was involved as a purchaser in addition to his role as an attorney. Zere Real Estate Servs., Inc. v Adamag Realty Corp., 60 A.D.3d 758, 875 N.Y.S.2d 162, 2009 N.Y. App. Div. LEXIS 1830 (N.Y. App. Div. 2d Dep't 2009).

Jury verdict in favor of an accusee in his defamation action against corporate individuals, based on their report to police that the accusee had stolen store property, was not against the weight of the evidence for purposes of a motion to set aside the verdict, as the jury acted within its discretion in finding the acusee's claims more credible than those of the individuals as to the presence of the property in a hut on the acusee's property. Strader v Ashley, 61 A.D.3d 1244, 877 N.Y.S.2d 747, 2009 N.Y. App. Div. LEXIS 2988 (N.Y. App. Div. 3d Dep't 2009).

Jury verdict in favor of an accusee in his action that alleged malicious prosecution was supported by the evidence, as the accusee had informed the corporate individuals who reported that he had stolen property to the police that the person who accused the the accusee was not

trustworthy; the jury was entitled to infer malice based upon a finding that the individuals lacked probable cause to initiate the criminal proceeding, such that there was no basis to set aside the verdict. Strader v Ashley, 61 A.D.3d 1244, 877 N.Y.S.2d 747, 2009 N.Y. App. Div. LEXIS 2988 (N.Y. App. Div. 3d Dep't 2009).

Verdict finding that a driver was not negligent in striking a decedent was not against the weight of the evidence because the evidence established that the driver did not see the decedent when the driver began to turn at the intersection because the decedent was not in the unmarked crosswalk and that he did not see her thereafter because he was suddenly and unexpectedly blinded by sun glare; there was a fair interpretation of the evidence supporting a finding that the decedent was outside of the unmarked crosswalk, requiring her to yield the right-of-way in accordance with N.Y. Veh. & Traf. Law § 1152(a). The trial court's instruction defining the location of the unmarked crosswalk was not erroneous because it was properly based on the definition of an unmarked crosswalk set forth in N.Y. Veh. & Traf. Law § 110(a) and the definition of a sidewalk set forth in N.Y. Veh. & Traf. Law § 144, as well as the application of § 110 to a "T" intersection. Lifson v City of Syracuse, 72 A.D.3d 1523, 900 N.Y.S.2d 568, 2010 N.Y. App. Div. LEXIS 3478 (N.Y. App. Div. 4th Dep't 2010), rev'd in part, 17 N.Y.3d 492, 934 N.Y.S.2d 38, 958 N.E.2d 72, 2011 N.Y. LEXIS 3023 (N.Y. 2011).

There was no fair interpretation of the evidence by which the jury could have found both that the rezoning effectuated a regulatory taking of Liberty Plaza and that the property owner's damages as to that property were only $360,000; thus, the court should have granted that branch of the town's' motion pursuant to CPLR 4404(a) which was to set aside the verdict with respect to Liberty Plaza as contrary to the weight of the evidence and for a new trial with respect to that property. Therefore, the claims that alleged a partial regulatory taking of the property known as Liberty Plaza without just compensation pursuant to 42 U.S.C.S. § 1983 were severed, and the matter was remitted for a new trial. Noghrey v Town of Brookhaven, 92 A.D.3d 851, 938 N.Y.S.2d 613, 2012 N.Y. App. Div. LEXIS 1395 (N.Y. App. Div. 2d Dep't), app. dismissed, 19 N.Y.3d 1023, 951 N.Y.S.2d 718, 976 N.E.2d 247, 2012 N.Y. LEXIS 2183 (N.Y. 2012).

Trial court properly denied a daughter's N.Y. C.P.L.R. 4404(a) motion to set aside a jury verdict that awarded zero damages for the her mother's conscious pain and suffering because that portion of the verdict was based on a fair interpretation of the evidence. Curry v Hudson Val. Hosp. Ctr., 104 A.D.3d 898, 961 N.Y.S.2d 563, 2013 N.Y. App. Div. LEXIS 1984 (N.Y. App. Div. 2d Dep't 2013).

Trial court should have granted the defendants' N.Y. C.P.L.R. 4404 motion to set aside a jury verdict on the issue of damages and for judgment as a matter of law on the issue of serious injury because, given that the evidence of an accident victim's previous injuries and degenerative condition at the time of an automobile accident, the victim's expert opinion that her injuries were causally related to the subject accident was speculative. McDonald v Kohanfars, 106 A.D.3d 1058, 966 N.Y.S.2d 179, 2013 N.Y. App. Div. LEXIS 3744 (N.Y. App. Div. 2d Dep't 2013), app. denied, 22 N.Y.3d 860, 981 N.Y.S.2d 371, 4 N.E.3d 383, 2014 N.Y. LEXIS 93 (N.Y. 2014).

Judgment setting aside the verdict in plaintiff's favor on his malicious prosecution claim was reversed and the verdict reinstated because it could not be said that there was no valid line of reasoning supporting the verdict reached by the jury on the basis of the evidence and the trial court impermissibly usurped the jury's role and made factual determinations. Cardoza v City of New York, 139 A.D.3d 151, 29 N.Y.S.3d 330, 2016 N.Y. App. Div. LEXIS 2643 (N.Y. App. Div. 1st Dep't 2016).

In a personal injury suit where the plaintiff alleged that the vehicle he was operating was standing still in stop-and-go traffic when it was struck in the rear by a vehicle operated by the defendant, and where the defendant testified that the plaintiff had come to an abrupt stop, which resulted in his inability to avoid hitting the plaintiff's vehicle, the verdict for the defendant was not contrary to the weight of the evidence because the evidence presented at trial provided a rational basis upon which the jury could have found that the defendant was not negligent in the operation of his vehicle. Khaydarov v AK1 Group, Inc., 173 A.D.3d 721, 103 N.Y.S.3d 104, 2019 N.Y. App. Div. LEXIS 4375 (N.Y. App. Div. 2d Dep't 2019).

Court could review an unpreserved weight of the evidence contention because the Court of Appeals had long recognized that the Appellate Division had the authority to review a verdict based upon the weight of the evidence, without any requirement that the issue be preserved. CPLR 5501 and this statute were also sources of the court's authority to review the weight of the evidence absent a motion to set aside the verdict. Evans v New York City Tr. Auth., 179 A.D.3d 105, 113 N.Y.S.3d 127, 2019 N.Y. App. Div. LEXIS 7944 (N.Y. App. Div. 2d Dep't 2019).

Trial court properly granted a motion filed by a deceased patient's wife to set aside a jury verdict in favor of a physician in the wife's medical malpractice action because by her own testimony, and that of the defendants' expert witness, the physician's treatment of the decedent departed from good and accepted medical practice in the diagnosis and treatment of back pain, in that the physician failed to ascertain relevant information as to the history and nature of the decedent's pain and failed to consider differential diagnoses apart from a musculoskeletal injury. Yac v County of Suffolk, 205 A.D.3d 764, 169 N.Y.S.3d 86, 2022 N.Y. App. Div. LEXIS 2943 (N.Y. App. Div. 2d Dep't 2022).

Supreme court did not err in denying a homeowner's motion to set aside the verdict on the ground that it was against the weight of the evidence where the jury was presented with a classic battle of the experts as to what caused the homeowner's basement to flood, and deferring to the jury's determination to credit the neighbor's expert over the homeowner's expert was appropriate. Endemann v Dubois, 207 A.D.3d 1009, 172 N.Y.S.3d 522, 2022 N.Y. App. Div. LEXIS 4643 (N.Y. App. Div. 3d Dep't 2022), app. denied, 39 N.Y.3d 909, 206 N.E.3d 1258, 186 N.Y.S.3d 114, 2023 N.Y. LEXIS 357 (N.Y. 2023).

Supreme court properly denied the branch of defendant's motion to set aside the jury verdict on the issue of liability as contrary to the weight of the evidence and for a new trial because the evidence preponderated so heavily in defendant's favor and against plaintiff's testimony that he had a solid green light that the jury could not have reached its liability verdict in favor of the plaintiff under any fair interpretation of the evidence. Blair v Coleman, 211 A.D.3d 671, 180 N.Y.S.3d 233, 2022 N.Y. App. Div. LEXIS 6823 (N.Y. App. Div. 2d Dep't 2022).

Heath care provider’s motion to set aside the jury verdict under N.Y. C.P.L.R. 4404(a) as to liability in a medical malpractice proceeding was denied because sufficient evidence was presented at trial, despite conflicting expert testimony, to support the liability verdict. Harding v Onibokun, 828 N.Y.S.2d 780, 14 Misc. 3d 790, 2006 N.Y. Misc. LEXIS 4104 (N.Y. Sup. Ct. 2006).

Jury verdict will not be set aside as against the weight of the evidence unless the jury could not have reached the verdict upon any fair interpretation of the evidence. Harris v City of New York, 2 A.D.3d 782, 770 N.Y.S.2d 380, 2003 N.Y. App. Div. LEXIS 14166 (N.Y. App. Div. 2d Dep't 2003), app. dismissed, 2 N.Y.3d 758, 778 N.Y.S.2d 773, 811 N.E.2d 35, 2004 N.Y. LEXIS 654 (N.Y. 2004).

Trial court erred in granting an injured party’s motion pursuant to N.Y. C.P.L.R. 4404(a) to set aside a jury verdict in favor of defendants in a personal injury action; the jury reasonably could have concluded from the evidence that a fracture was not a result of the auto accident in question. Torres v Esaian, 5 A.D.3d 670, 773 N.Y.S.2d 453, 2004 N.Y. App. Div. LEXIS 3274 (N.Y. App. Div. 2d Dep't 2004).

On the issue of the trial court’s not giving jury instructions, (1) the patient failed to meet her initial burden of establishing past lost wages with reasonable certainty, and (2) for future medical expenses, although the patient’s physician testified that the patient would require asthma medication for the rest of her life, the patient failed to present any evidence with respect to the cost of that medication, so a new trial was properly denied that was based on those arguments. Swedowski v Ethicon, Inc., 6 A.D.3d 1198, 775 N.Y.S.2d 718, 2004 N.Y. App. Div. LEXIS 6192 (N.Y. App. Div. 4th Dep't 2004).

Trial court’s order setting aside a verdict, as against the weight of the evidence, and for a new trial was unwarranted as it could not be said that the findings of the jury could not have been reached on any fair interpretation of the evidence at trial. McDermott v Coffee Beanery, Ltd., 9 A.D.3d 195, 777 N.Y.S.2d 103, 2004 N.Y. App. Div. LEXIS 7102 (N.Y. App. Div. 1st Dep't 2004), app. denied, 2004 N.Y. App. Div. LEXIS 11716 (N.Y. App. Div. 1st Dep't Oct. 7, 2004).

Trial court erred in denying the injured parties' N.Y. C.P.L.R. 4404 motion where the only evidence as to the cause of an oil tank's rupture was testimony by the injured parties' expert that the use of the one-and-one quarter inch vent piping rather than two-inch vent piping caused pressure to build up in the tank and that this was the sole proximate cause of the accident; an installer testified that he did not know why the oil tanks ruptured and the installers offered no evidence as to why the tank ruptured. Murphy v Malouf, 22 A.D.3d 539, 801 N.Y.S.2d 764, 2005 N.Y. App. Div. LEXIS 10870 (N.Y. App. Div. 2d Dep't 2005).

Denial of a city's N.Y. C.P.L.R. 4404(a) motion to set aside a verdict on the issue of liability on plaintiff's battery claim was error because the verdict was contrary to the weight of the evidence; the evidence so preponderated in the city's favor that the verdict in favor of plaintiff could not have been reached based on any fair interpretation of the credible evidence. Acosta v City of New York, 84 A.D.3d 706, 921 N.Y.S.2d 644, 2011 N.Y. App. Div. LEXIS 3771 (N.Y. App. Div. 2d Dep't 2011).

20. Witnesses generally

Where after defendant conceded liability, plaintiff's case was a studied attempt to create an atmosphere of sympathy, and although plaintiff had been examined by two doctors from an impartial medical panel, the jury was not advised of the status or relationship of the doctors to the case, but considered them merely hired experts, the verdict could not stand. Peppe v New York, 23 A.D.2d 828, 259 N.Y.S.2d 185, 1965 N.Y. App. Div. LEXIS 4223 (N.Y. App. Div. 1st Dep't 1965).

Where, in action by pedestrian to recover from taxi company and trucking company for injuries resulting from collision, eyewitness to accident, who was called by trucking company, gave testimony which indicated negligence on part of taxi and absolved trucking company of liability, and counsel for trucking company on direct examination of such witness introduced evidence of prior inconsistent statement and elicited testimony from witness that he had been paid $200 from taxi company for making prior statement, admission of such collateral evidence on direct

examination was improper and clearly prejudiced taxi company, and thus trial court was justified in setting aside verdict, which found taxi company solely liable, and ordering new trial. Szabo v Super Operating Corp., 51 A.D.2d 466, 382 N.Y.S.2d 63, 1976 N.Y. App. Div. LEXIS 11105 (N.Y. App. Div. 1st Dep't 1976).

In an action for personal injuries in which plaintiffs relied primarily on the testimony of the infant plaintiff and his sisters, who were sympathetic to plaintiffs' position, the trial court erred in setting aside the jury verdict in favor of defendant as against the weight of the evidence, since it was within the province of the jury to determine the credibility of the witnesses. De Leon v New York City Transit Authority, 85 A.D.2d 593, 444 N.Y.S.2d 711, 1981 N.Y. App. Div. LEXIS 16395 (N.Y. App. Div. 2d Dep't 1981).

In a personal injury action brought against the operator of a pony ride concession and the city in which the ride was located, a new trial would be required based on prejudicial testimony offered by the concession owner's expert witness since the expert's testimony assumed facts unsupported by the record and he invaded the province of the jury, and since, although the evidence was not offered by plaintiff and the concession owner was absolved from guilt by the jury, the co-defendant city would still be entitled to a new trial in that the evidence may have improperly swayed the jury in reaching its verdict. Corelli v New York, 88 A.D.2d 810, 450 N.Y.S.2d 823, 1982 N.Y. App. Div. LEXIS 17113 (N.Y. App. Div. 1st Dep't 1982).

In a personal injury action based upon an automobile accident during which plaintiff had been riding as a passenger in defendant's car, the trial court erred in denying plaintiff's motion to set aside the jury's verdict in favor of defendant as being against the weight of the evidence where defendant's testimony at trial, rather than exculpating him, raised an inference that he had been negligent in the operation and control of his vehicle at the time of the accident in that he had been driving at 30 to 35 miles per hour on a road that was under construction and that was "pretty bumpy," and where defendant's questions to plaintiff on cross examination, as to whether she had gone to the beach with defendant on prior occasions and whether she had told her husband of such trips, were irrelevant to any issue in the case, were clearly intended to raise an

inference that plaintiff had been involved in an immoral extramarital relationship with defendant, and served only to unfairly influence the jury's verdict. Guzzardi v Grotas, 98 A.D.2d 761, 469 N.Y.S.2d 475, 1983 N.Y. App. Div. LEXIS 21087 (N.Y. App. Div. 2d Dep't 1983).

In a personal injury action in which defendant had filed a third-party complaint against a state employee on which the jury had rendered a verdict of no cause of action, the trial court erred in ordering a new trial for its refusal to allow defendant to impeach third-party defendant's expert witnesses, who were also state employees, by establishing that the state was obligated to indemnify third-party defendant for any liability for his negligence pursuant to Pub O Law § 17, where the jury knew of the coemployee relationship between third-party defendant and his experts and that the Attorney-General represented the third-party defendant, defendant's counsel had emphasized the relationship in summation, and one of the experts had testified he was not familiar with § 17. Levo v Greenwald, 107 A.D.2d 991, 484 N.Y.S.2d 712, 1985 N.Y. App. Div. LEXIS 49861 (N.Y. App. Div. 3d Dep't), aff'd, app. dismissed, 66 N.Y.2d 962, 498 N.Y.S.2d 784, 489 N.E.2d 753, 1985 N.Y. LEXIS 18254 (N.Y. 1985).

In action for assault and battery, trial court did not abuse its discretion in denying plaintiff's motion to set aside verdict on ground that defendants had offered perjured testimony where only evidence in support of motion were plaintiff's and defendants' conflicting versions of facts; plaintiff's claim that defendants' testimony was incredible was merely attempt to reargue issues of credibility which were properly resolved by jury. Pastore v Boone, 127 A.D.2d 872, 511 N.Y.S.2d 694, 1987 N.Y. App. Div. LEXIS 43381 (N.Y. App. Div. 3d Dep't 1987).

In personal injury action arising from traffic accident, new trial was required by cumulative effect of 3 errors in admitting testimony (1) of police officer that he made notation on police accident report that "causing [sic] factor for the accident" was plaintiff's "inattention," (2) of police officer that defendant driver was not issued traffic citation in connection with accident, and (3) of defendants' expert witness that defendant driver did not violate any statute or regulation in backing up tractor-trailer. LaPenta v Loca-Bik Ltee Transp., 238 A.D.2d 913, 661 N.Y.S.2d 132, 1997 N.Y. App. Div. LEXIS 4714 (N.Y. App. Div. 4th Dep't 1997).

Plaintiff's motion to set aside verdict was properly denied where court properly denied missing witness charge regarding defendant driver; because verdict with respect to negligence had been directed, driver could not have had anything material to say. Richardson v John Danna & Sons, 245 A.D.2d 20, 664 N.Y.S.2d 780, 1997 N.Y. App. Div. LEXIS 12522 (N.Y. App. Div. 1st Dep't 1997), app. denied, 92 N.Y.2d 803, 677 N.Y.S.2d 73, 699 N.E.2d 433, 1998 N.Y. LEXIS 1724 (N.Y. 1998).

After jury rendered verdict for defendant finding that plaintiff did not sustain "serious injury" under CLS Ins § 5102(d), plaintiff was not entitled to new trial on ground that defendant's attorney improperly questioned witnesses on prejudicial matters where (1) as to questions asked of plaintiff on cross-examination, witness may be impeached by questioning concerning any prior immoral, vicious, or criminal acts that may show him to be unworthy of belief, and (2) defendant's attorney properly inquired as to whether another witness was aware of plaintiff's prior bad acts in effort to impeach that witness's testimony, elicited over defendant's objection, concerning plaintiff's good character and reputation for truth and veracity. Wolff v Mahrer, 273 A.D.2d 812, 709 N.Y.S.2d 310, 2000 N.Y. App. Div. LEXIS 6812 (N.Y. App. Div. 4th Dep't 2000).

Although court erred in precluding personal injury plaintiff's treating psychiatrist from testifying on issue of plaintiff's inability to work in future, error was harmless where that psychiatrist otherwise testified that plaintiff was chronically disabled, would remain totally disabled, and was incapable of functioning in job. Court properly gave missing witness charge regarding one of personal injury plaintiff's doctors where plaintiff failed to show that doctor was neither available to testify nor under his control. Dudek v Call, 275 A.D.2d 992, 714 N.Y.S.2d 251, 2000 N.Y. App. Div. LEXIS 9529 (N.Y. App. Div. 4th Dep't 2000).

In action against city for trip and fall in crosswalk, allegedly caused be depression remaining after negligent repair of pothole, plaintiff was deprived of critical evidence and entitled to new trial where (1) trial court had refused to allow plaintiff to present expert testimony of city's in-house highway repairer, who had been involved in repairing pothole in question, (2) that expert's pretrial examination provided city with type of pretrial disclosure that CLS CPLR § 3101(d)(1)(i)

was intended to afford as to other party's expert, and (3) scope of disclosure for employees of party, whether noticed or not, is defined by CLS CPLR § 3101(a) rather than CLS CPLR § 3101(d). Lippel v City of New York, 281 A.D.2d 327, 722 N.Y.S.2d 511, 2001 N.Y. App. Div. LEXIS 3135 (N.Y. App. Div. 1st Dep't 2001).

New trial would be granted to medical malpractice plaintiffs where they were prejudiced by preclusion of testimony of their expert witness and curtailment of their examination of defendant doctor. Vega v LaPalorcia, 281 A.D.2d 623, 722 N.Y.S.2d 563, 2001 N.Y. App. Div. LEXIS 3091 (N.Y. App. Div. 2d Dep't 2001).

In veterinary malpractice action for overanesthetizing and improperly monitoring race horse during arthroscopic surgery for removal of bone chip from fetlock, with result that horse died of cardiac and respiratory arrest in recovery stall, plaintiff horse owner's expert was qualified to give opinion on standard of care applicable to veterinarians administering anesthesia during surgery, even though he practiced in university rather than clinical setting, where he had impressive credentials in specific area of veterinary anesthesiology and was familiar with applicable standard of care. Kenny v Lesser, 281 A.D.2d 853, 722 N.Y.S.2d 302, 2001 N.Y. App. Div. LEXIS 3003 (N.Y. App. Div. 3d Dep't 2001).

In medical malpractice action based on claim that plaintiff suffered substantial reduction of vision as result of negligent placement of his head during back surgery, plaintiff was not entitled to have set aside jury verdict for defendant physicians, even though ophthalmologist was allowed to testify for plaintiff on issue of causation despite noncompliance with notice requirements of CLS CPLR § 3101(d), where (1) jury found physicians not negligent and did not reach issue of causation, and thus any error in admitting expert's testimony was harmless, and (2) noncompliance with § 3101(d) did not require preclusion of expert's testimony, because noncompliance was neither willful nor prejudicial. Gilbert v Luvin, 286 A.D.2d 600, 730 N.Y.S.2d 85, 2001 N.Y. App. Div. LEXIS 8389 (N.Y. App. Div. 1st Dep't 2001).

In a personal injury action brought by a wife and her injured husband, because the trial court's evidentiary rulings erroneously precluded the husband's treating physician from testifying

concerning the permanency of the husband’s injuries and allowed a defense expert to testify regarding matters that were beyond scope of his medical report and were inconsistent with the report, substantial justice required the appellate court to order new trial pursuant to N.Y. C.P.L.R. 4404(a) because the trial court’s improper evidentiary rulings most likely tainted the jury’s verdict. Langhorne v County of Nassau, 40 A.D.3d 1045, 839 N.Y.S.2d 94, 2007 N.Y. App. Div. LEXIS 6662 (N.Y. App. Div. 2d Dep't 2007).

Even if a $10,000 payment to a doctor as a fact witness was unreasonable, the exclusion of the testimony was not required, and denial of the pedestrian’s motion to set aside was proper, because the trial court properly allowed the pedestrian’s counsel to cross-examine the doctor without limitation regarding the payment; the appropriate remedy in a case where one might reasonably infer that a fact witness had been paid a fee for testifying was to permit opposing counsel to fully explore the matter of compensation on cross-examination and summation, and to leave it for a properly instructed jury to consider whether the payment made to the witness was, in fact, disproportionate to the reasonable value of the witness’s lost time and, if so, what effect, if any, that payment had on the witness’s credibility. Although the jury instruction relating to bias or prejudice was insufficient, because the pedestrian did not challenge the believability of the doctor’s testimony, and the payment of fees to a fact witness went merely to the credibility of the witness, the charge error was not so prejudicial as to warrant reversal. Caldwell v Cablevision Sys. Corp., 86 A.D.3d 46, 925 N.Y.S.2d 103, 2011 N.Y. App. Div. LEXIS 4584 (N.Y. App. Div. 2d Dep't 2011), aff'd, 20 N.Y.3d 365, 960 N.Y.S.2d 711, 984 N.E.2d 909, 2013 N.Y. LEXIS 115 (N.Y. 2013).

Supreme court improvidently exercised its discretion in denying plaintiffs' motion to set aside the verdict rendered in favor of the doctor defendants on the issue of liability; the expert witness disclosure filed by one of the doctors failed to inform plaintiffs that the expert would testify that the decedent's stroke was caused by calcification, which prejudiced plaintiffs' ability to prepare for the trial. Rocco v Ahmed, 146 A.D.3d 836, 45 N.Y.S.3d 161, 2017 N.Y. App. Div. LEXIS 206 (N.Y. App. Div. 2d Dep't 2017).

B. Damages

i. In General

21. Generally

Fact that liability question did not appear to present any difficulty for the jury as the proof unfolded during trial and that jury appeared to be acting adversely to proof on damages was properly taken into account by trial judge in ruling on motion for new trial limited to issue of damages alone. Figliomeni v Board of Education, 38 N.Y.2d 178, 379 N.Y.S.2d 45, 341 N.E.2d 557, 1975 N.Y. LEXIS 2304 (N.Y. 1975), reh'g denied, 39 N.Y.2d 743, 1976 N.Y. LEXIS 3487 (N.Y. 1976).

Where award of damages in non-jury case is not supported by the evidence, the appellate court can direct a new trial as to damages only. Deutsch v National Properties, Inc., 19 A.D.2d 823, 243 N.Y.S.2d 658, 1963 N.Y. App. Div. LEXIS 3060 (N.Y. App. Div. 1st Dep't 1963).

The trial justice can properly set aside a verdict as inadequate and order a new trial solely on the issue of damages. Pfeiffer v Empire Merchandising Co., 33 A.D.2d 565, 305 N.Y.S.2d 245, 1969 N.Y. App. Div. LEXIS 3153 (N.Y. App. Div. 2d Dep't 1969).

In a negligence action to recover damages for personal injuries, the trial court acted properly within its discretion in setting aside the verdict on the issue of damages as contrary to the weight of the evidence. In addition, plaintiffs were entitled to a new trial on the issue of damages where the trial court had refused to permit them to voir dire the jury on the question of damages prior to the phase of the trial on the issue of damages. Pavis v Scott, 82 A.D.2d 800, 439 N.Y.S.2d 215, 1981 N.Y. App. Div. LEXIS 14455 (N.Y. App. Div. 2d Dep't 1981).

Motions for judgment as matter of law and for judgment notwithstanding verdict, based on plaintiff’s failure to prove damages with exactitude in breach of contract action, were properly denied where it was apparent that jury applied experience and common sense to facts proved

and awarded damages reasonably calculated to be result of breach. Jetson Air Center, Inc. v Green Drake Leasing Co., 128 A.D.2d 677, 513 N.Y.S.2d 176, 1987 N.Y. App. Div. LEXIS 44368 (N.Y. App. Div. 2d Dep't 1987).

Court erred in unconditionally reducing verdict from $40,000 to $15,000; court may set aside verdict and order new trial, or may direct new trial as to damages if plaintiff does not agree to entry of judgment in specific amount, but it has no authority to reduce verdict directly. Feathers v Walter S. Kozdranski, Inc., 129 A.D.2d 975, 514 N.Y.S.2d 838, 1987 N.Y. App. Div. LEXIS 45632 (N.Y. App. Div. 4th Dep't 1987).

Court erred in setting aside jury verdict for damages in action to recover for additional work performed beyond contract between parties where evidence of damages consisted of testimony by vice president of plaintiff construction company who testified that his computations were based on actual expenses records kept in his office. Reed Paving, Inc. v Glen Ave. Builders, Inc., 148 A.D.2d 934, 539 N.Y.S.2d 173, 1989 N.Y. App. Div. LEXIS 2509 (N.Y. App. Div. 4th Dep't 1989).

Affidavits of jurors may not be considered in cases where there is jury confusion regarding apportionment of damages and party moves for “correction” of verdict under CLS CPLR § 4404. Scaduto v Suarez, 150 A.D.2d 545, 541 N.Y.S.2d 826, 1989 N.Y. App. Div. LEXIS 7053 (N.Y. App. Div. 2d Dep't 1989).

In action by homeowners to recover under fire insurance policy, court did not err in denying insurance company’s post-trial motion to dismiss on ground that homeowners’ fraud was demonstrated by substantial difference between damages sought ($116,000) and damages awarded ($58,600) where liability portion was hotly contested with homeowners presenting witnesses who identified lost items as being in house before fire, and insurance company presenting testimony of investigators to show that no remains of items were identified. Lilledahl v Insurance Co. of North America, 163 A.D.2d 696, 558 N.Y.S.2d 709, 1990 N.Y. App. Div. LEXIS 8398 (N.Y. App. Div. 3d Dep't 1990).

Defendants were improperly granted new trial on issue of damages in slander case since there was evidentiary support for jury verdict of $550,000 for past compensatory damages and $175,000 for future compensatory damages where (1) plaintiff was discharged as counsel for lucrative investment project as direct result of defendants' defamatory statements, (2) attorney who was hired to replace plaintiff provided about 1,800 hours of legal services to project over 4 ½ -year period, (3) there was testimony that it would take 8 to 10 years more to finish project, at annual cost of $150,000 to $200,000 for legal fees, and (4) local law firm had stopped referring cases to plaintiff, and several clients left him, as result of defamatory statements. Calhoun v Cooper, 206 A.D.2d 497, 614 N.Y.S.2d 762, 1994 N.Y. App. Div. LEXIS 7654 (N.Y. App. Div. 2d Dep't 1994).

Jury's finding that plaintiff did not sustain damages as result of accident was against weight of evidence, and thus court should have set finding aside and granted him new trial on issue of damages, even though there was conflicting evidence whether certain injuries were preexisting, where it was uncontroverted that plaintiff sustained fractured sternum as result of accident, he spent approximately 5 hours in hospital emergency room, he underwent numerous tests while there, and he was then treated by his personal physician. Bortel v Burke, 207 A.D.2d 981, 617 N.Y.S.2d 609, 1994 N.Y. App. Div. LEXIS 10178 (N.Y. App. Div. 4th Dep't), app. dismissed, 207 A.D.2d 982, 617 N.Y.S.2d 667, 1994 N.Y. App. Div. LEXIS 10179 (N.Y. App. Div. 4th Dep't 1994).

In action arising from low-speed collision between pickup truck driven by plaintiff and defendant's van, court did not err in denying plaintiffs' motion to set aside jury verdict which found both parties negligent, but failed to award damages to plaintiffs on ground that defendant's negligence did not proximately cause their injuries, in view of minor nature of accident, absence of proof of causal relationship between accident and plaintiff's injury, and plaintiff's responses on job application indicating that he was free of injury 3 months after accident. White v Hoyt, 223 A.D.2d 853, 636 N.Y.S.2d 863, 1996 N.Y. App. Div. LEXIS 100 (N.Y. App. Div. 3d Dep't 1996).

Award of $120,000 as damages for hypertrophic scarring as result of tattoo removal operation did not deviate materially from reasonable compensation for 4-inch raised scar on plaintiff's forearm, where scar changed color and became painful when exposed to sunlight and caused muscle weakness. Osorio v Brauner, 242 A.D.2d 511, 662 N.Y.S.2d 488, 1997 N.Y. App. Div. LEXIS 9129 (N.Y. App. Div. 1st Dep't 1997), app. denied, 91 N.Y.2d 813, 674 N.Y.S.2d 278, 697 N.E.2d 179, 1998 N.Y. LEXIS 1275 (N.Y. 1998).

In action for wrongful death of motorcyclist who collided with truck operated by defendant, court properly refused to set aside portion of verdict awarding damages for motorcylist's pre-impact terror where it was reasonably inferable, from motorcylist's application of brakes 5 seconds before impact and his inability to control motorcycle as it went down on its side and slid into truck, that he was aware of likelihood and then certainty of serious collision. Lang v Bouju, 245 A.D.2d 1000, 667 N.Y.S.2d 440, 1997 N.Y. App. Div. LEXIS 13578 (N.Y. App. Div. 3d Dep't 1997).

New trial on damages was required by substantial prejudice to defendant resulting from admission of report by doctor who examined plaintiff for his insurer but never testified where report covered crucial issues of severity of plaintiff's injuries and whether alleged herniated lumbar discs were caused by accident, each party presented one witness on causation issue, entire report was read to jury, and plaintiff used report in his summation. Schwartz v Gerson, 246 A.D.2d 589, 668 N.Y.S.2d 223, 1998 N.Y. App. Div. LEXIS 387 (N.Y. App. Div. 2d Dep't 1998).

In action against insurance broker (defendant) for breach of contract to procure enforceable insurance on plaintiff's behalf, court improperly denied defendant's motion under CLS CPLR § 4404 to vacate damage award where insurance adjuster's testimony, at best, showed only amount which, according to adjuster, insurer would have paid for defendant's misrepresentation—which was inappropriate measure of damages, and plaintiff's proof on that subject was predicated on opinions of 2 experts, salvor, who had reported to adjuster but did not testify, and accountant's testimony which, to extent is calculations relied on inventory, which was

not in evidence, constituted inadmissible hearsay as to plaintiff's actual damages; thus, new trial would be ordered on issue of damages. Soho Generation of New York, Inc. v Tri-City Ins. Brokers, 256 A.D.2d 229, 683 N.Y.S.2d 31, 1998 N.Y. App. Div. LEXIS 13951 (N.Y. App. Div. 1st Dep't 1998).

In attorney's action for breach of employment contract against law firm that formerly employer her and her father, firm was not entitled to post-trial reduction of jury's verdict regarding damages for cost of secretarial services, and jury's verdict would be reinstated, where contract was ambiguous as to whether firm was required to provide attorney with secretarial services only until her father's death or until 2 years after his death. Hoffman v Schwartz, 273 A.D.2d 148, 710 N.Y.S.2d 330, 2000 N.Y. App. Div. LEXIS 7180 (N.Y. App. Div. 1st Dep't 2000).

Motion to set aside verdict on issue of damages in slip and fall case was properly denied, since plaintiffs' medical expert was properly permitted to testify to plaintiff's injuries on basis of his examination of plaintiff as well as his examination of certified hospital records, second physician's medical records, MRI report and X-rays. Ferrantello v St. Charles Hosp. & Rehabilitation Ctr., 275 A.D.2d 387, 712 N.Y.S.2d 615, 2000 N.Y. App. Div. LEXIS 8853 (N.Y. App. Div. 2d Dep't 2000).

In veterinary malpractice action for over-anesthetizing and improperly monitoring race horse during arthroscopic surgery for removal of bone chip from fetlock, with result that horse died of cardiac and respiratory arrest in recovery stall, evidence supported jury's finding that horse's fair market value was $100,000, despite opinion of defendants' expert that value was $20,000, where (1) plaintiff owner testified that horse showed tremendous amount of talent, had "fantastic" disposition with ability to learn quickly, and had made significant racing accomplishments in relatively short period with minimal training, (2) licensed horse trainer familiar with horse was ready and willing to buy him for $75,000 in 1993, which offer remained viable even after trainer learned about bone chip, and (3) licensed thoroughbred trainer and horse breeder, who was very familiar with horse and experienced in buying, selling, and evaluating horses, described horse as "very nice," "very well balanced," "very fast and sound,"

and healthy, and opined that horse was worth $125,000 in 1993. Kenny v Lesser, 281 A.D.2d 853, 722 N.Y.S.2d 302, 2001 N.Y. App. Div. LEXIS 3003 (N.Y. App. Div. 3d Dep't 2001).

Jury's damage award was not based on speculative evidence where (1) pediatrician testified that lead poisoning caused infant plaintiff to suffer attention deficit hyperactivity disorder, oppositional defiant disorder, reading disorder and other permanent cognitive disorders, (2) neuropsychologist further testified that such disorders were associated with greatly increased rates of social problems, substance abuse, marital and occupational failures, depression, anxiety and lower quality of life, and (3) school psychologist testified that infant plaintiff's specific memory deficiency and significant short-term memory weakness profoundly affected her reading ability. La Fountaine v Franzese, 282 A.D.2d 935, 724 N.Y.S.2d 514, 2001 N.Y. App. Div. LEXIS 4177 (N.Y. App. Div. 3d Dep't 2001).

New trial would be granted on issue of damages for future medical expenses only, and remaining awards of damages would be reinstated, where sole challenge was to award for future medical expenses, and that issue was not so intertwined with other segments of verdict that new trial was required on all damages. Hunter v E. Rochester Union Free Sch. Dist., 286 A.D.2d 982, 730 N.Y.S.2d 764, 2001 N.Y. App. Div. LEXIS 8901 (N.Y. App. Div. 4th Dep't 2001).

Trial court properly denied a driver's motion to set aside an awards of damages for past and future loss of household services because, in the absence of any evidence establishing what services the decedent actually performed, those awards were speculative and were not warranted by the facts. Finney v Morton, 170 A.D.3d 811, 95 N.Y.S.3d 566, 2019 N.Y. App. Div. LEXIS 1776 (N.Y. App. Div. 2d Dep't 2019).

Trial court erred in denying a plaintiff's posttrial motion with respect to damages for future pain and suffering and future economic loss because the jury's failure to award damages was contrary to a fair interpretation of the evidence and deviated materially from what would be reasonable compensation, and, while the plaintiff returned to work with no restrictions, the evidence established that her severely affected her ability to perform the same sorts of tasks that she had performed with ease prior to the accident, and the uncontroverted expert testimony

at trial established that the plaintiff would suffer a reduction in work-life expectancy following the accident, which would eventually cause her to suffer economic loss. Mast v DeSimone, 177 A.D.3d 1348, 113 N.Y.S.3d 435, 2019 N.Y. App. Div. LEXIS 8348 (N.Y. App. Div. 4th Dep't 2019), reh'g denied, 179 A.D.3d 1558, 114 N.Y.S.3d 897, 2020 N.Y. App. Div. LEXIS 802 (N.Y. App. Div. 4th Dep't 2020).

In rear end collision case, verdict apportioning liability 65 percent to lead driver and 35 percent to following driver was against weight of evidence where following driver testified that she was traveling 20 miles per hour and that she saw stopped car in front of her 10 seconds before she applied brakes, thus indicating that she traveled 290 feet before braking; new trial would be ordered unless parties stipulated to apportion liability $^{1}/_{3}$ to lead driver and ? to following driver. Brown v Maleh, 171 Misc. 2d 730, 656 N.Y.S.2d 133, 1997 N.Y. Misc. LEXIS 64 (N.Y. Sup. Ct. 1997).

In action wherein jury found that defendant took jewelry and watches from plaintiff’s apartment on mutual understanding that he would appraise them and purchase or return them, but then refused to redeliver them when plaintiff decided not to sell, new trial was not required as to compensatory damages even though plaintiff had offered no expert testimony on total value of items converted and admitted her own ignorance of value, as competent testimony of total value came in form of plaintiff’s statement that defendant offered to purchase entire list of items for $10,000, which was admissible as substantive evidence against defendant, being inconsistent with position taken by him at trial. Muhlfield v Bak, 174 Misc. 2d 396, 664 N.Y.S.2d 427, 1997 N.Y. Misc. LEXIS 490 (N.Y. Sup. Ct. 1997).

Trial court could order a new trial limited to the damages only under N.Y. C.P.L.R. 4404(a) if an award deviated materially from what would have been reasonable compensation under N.Y. C.P.L.R. 5501(c). The trial court also used the same material deviation rule as an appellate court in reviewing damage verdicts under N.Y. C.P.L.R. 5501(c). Harding v Onibokun, 828 N.Y.S.2d 780, 14 Misc. 3d 790, 2006 N.Y. Misc. LEXIS 4104 (N.Y. Sup. Ct. 2006).

Trial court properly granted a motion by the owners of a building pursuant to N.Y. C.P.L.R. 4404(a) to set aside the verdict in a personal injury action as against the weight of the evidence as to future loss of earnings and future medical costs, and to reduce the verdict as to damages awarded for past pain and suffering and future pain and suffering as excessive to the extent of directing a new trial on these issues unless plaintiffs stipulated to reduce the verdict; the jury awards for past and future pain and suffering deviated materially from what would have been reasonable compensation pursuant to N.Y. C.P.L.R. 5501(c), as no evidence was offered as to the actual cost of any such future medical expenditures, and the calculation by plaintiffs' expert concerning future loss of earnings was based on the speculative premise that the child would only obtain a ninth-grade education. Jackson v Chetram, 300 A.D.2d 446, 751 N.Y.S.2d 551, 2002 N.Y. App. Div. LEXIS 12286 (N.Y. App. Div. 2d Dep't 2002).

Trial court set aside a jury award of punitive damages, and ordered a remittitur of an enormous compensatory damages award for pain and suffering and emotional distress, in a case that arose out of a defamation and invasion of privacy action by an HIV-positive model whose picture was used in a booklet containing prewritten, purported patient biographies, circulated by a drug company to publicize its AIDS cocktail medications. Doe v Merck & Co., 781 N.Y.S.2d 623, 1 Misc. 3d 911(A), 2002 N.Y. Misc. LEXIS 1987 (N.Y. Sup. Ct. 2002).

Because the plaintiff presented evidence of the cost of future doctors' office visits and the cost of medications, the trial court erred, inter alia in granting the food market's N.Y. C.P.L.R. 4404(a) motion to set aside the award for future medical expenses. Staats v Wegmans Food Mkts., Inc., 35 A.D.3d 1150, 826 N.Y.S.2d 870, 2006 N.Y. App. Div. LEXIS 15621 (N.Y. App. Div. 4th Dep't 2006).

In a fitness club's suit against a software developer, the developer's motion to set aside the jury verdict, that it breached the contract was properly denied as it was not utterly irrational or against the weight of the evidence for the jury to conclude that the developer breached the contract by making false statements in progress reports, but the award of damages to the fitness club was set aside because the alleged damages were speculative and not supported by the

evidence. Town Sports Intl., LLC v Ajilon Solutions, 112 A.D.3d 409, 976 N.Y.S.2d 53, 2013 N.Y. App. Div. LEXIS 7940 (N.Y. App. Div. 1st Dep't 2013).

22. Consortium; spousal support

In personal injury action, defendants were entitled to new trial on issue of damages where trial court admitted evidence on plaintiff's disc injuries, and on loss of sexual relations with respect to his wife's loss of consortium claim, since neither item was specified in plaintiff's bill of particulars and there was no indication that defendants should have known of such injuries. Porter v Shapiro, 124 A.D.2d 794, 508 N.Y.S.2d 516, 1986 N.Y. App. Div. LEXIS 62114 (N.Y. App. Div. 2d Dep't 1986).

In a personal injury action brought by a wife and her injured husband, because the wife provided unrefuted evidence regarding the toll that her husband's injury had taken on her, the jury's determination denying her damages on her derivative cause of action for loss of past and future services was against the weight of the evidence; thus, the trial court correctly ordered a new trial on those categories of damages pursuant to N.Y. C.P.L.R. 4404(a). Langhorne v County of Nassau, 40 A.D.3d 1045, 839 N.Y.S.2d 94, 2007 N.Y. App. Div. LEXIS 6662 (N.Y. App. Div. 2d Dep't 2007).

In an action to recover damages based on allegations of sexual abuse and harassment, in which the jury awarded compensatory damages but failed to award punitive damages for the conduct committed by defendant in causing his acting students to engage in sexual acts, the trial court, in the exercise of discretion granted to it pursuant to CPLR § 4404, would order a new trial solely on the issue of punitive damages unless defendant stipulated to an award of $5000 punitive damages for each movant. Micari v Mann, 126 Misc. 2d 422, 481 N.Y.S.2d 967, 1984 N.Y. Misc. LEXIS 3636 (N.Y. Sup. Ct. 1984).

23. Discounting damages to present worth

In action by injured construction worker under CLS Labor § 240(1), court erred in allowing jury to consider worker's claim of future loss of household services, which were too speculative to support award of damages; however, worker might be able to prove that element of damages on retrial. Edbauer v Bd. of Educ., 286 A.D.2d 999, 731 N.Y.S.2d 309, 2001 N.Y. App. Div. LEXIS 9083 (N.Y. App. Div. 4th Dep't 2001).

24. Infant's damages

In a negligence action to recover damages for personal injuries, a new trial would be granted as to damages only, since the trial court improperly had refused to permit the infant plaintiff's expert to testify as to the permanency of the infant's psychological injuries. Gurecki v Gurecki, 92 A.D.2d 606, 459 N.Y.S.2d 1017, 1983 N.Y. App. Div. LEXIS 16865 (N.Y. App. Div. 2d Dep't 1983).

In medical malpractice action, defendants were entitled to set aside of jury's award of $600,000 to infant plaintiff for future institutional custodial care on ground that award was based on "uninformed speculation," despite testimony regarding cost of such care, where plaintiffs' medical expert testified that, although institutional facilities were available, infant's disability (retardation and epilepsy) was much less severe than that of average person in those facilities, and he could continue to live under supervision of parent or relative so long as such person was available to care for him. Kavanaugh v Nussbaum, 129 A.D.2d 559, 514 N.Y.S.2d 55, 1987 N.Y. App. Div. LEXIS 45230 (N.Y. App. Div. 2d Dep't 1987), modified, 71 N.Y.2d 535, 528 N.Y.S.2d 8, 523 N.E.2d 284, 1988 N.Y. LEXIS 207 (N.Y. 1988).

When an infant sued a thruway authority for personal injuries arising from an automobile accident, after suing various private parties in a related action, the infant was not collaterally estopped from litigating the issue of damages because, in the related action, while a jury returned a damages verdict for the infant, that verdict was never reflected in a judgment, and, after the party found liable for damages moved, under N.Y. C.P.L.R. 4404(a), to set aside the verdict, but before that motion was decided, an appellate court decided this party's appeal of the

trial court’s denial of its earlier summary judgment motion, and dismissed the complaint, so it could not be said that the infant had a full and fair opportunity to litigate the damages issue nor was that issue finally decided, and the issues which were decided in that action did not depend on the damages question. Church v N.Y. State Thruway Auth., 16 A.D.3d 808, 791 N.Y.S.2d 676, 2005 N.Y. App. Div. LEXIS 2414 (N.Y. App. Div. 3d Dep't 2005).

Owners’ CPLR 4404(a) motion to set a jury verdict in a lead-exposure case was properly denied because the award to the younger sister of $420,000 for future pain and suffering, the award to the older sister of $380,000 for future pain and suffering, and the award of punitive damages of $260,000 were not unreasonable and the award of damages for future pain and suffering without damages for past pain and suffering was not inconsistent; medical experts testified that the infant plaintiffs suffered brain damage as a result of their exposure to lead dust, were only beginning to exhibit the sequella of lead poisoning, and that their conditions would worsen over time. Further, there was evidence demonstrating, among other things, that the owners was aware of the dangers of lead paint, and an inspection by the department of health revealed that the apartment at issue had not been adequately cleaned of lead dust. Solis-Vicuna v Notias, 71 A.D.3d 868, 898 N.Y.S.2d 45, 2010 N.Y. App. Div. LEXIS 2057 (N.Y. App. Div. 2d Dep't 2010).

Because the children’s pain and suffering caused by lead poisoning would manifest in the future, and because the owners were put on notice of the dangerous lead conditions in the children’s apartment on at least two occasions and yet failed to take action to abate the condition, the awards for future pain and suffering and punitive damages were justified; accordingly, there was no basis under N.Y. C.P.L.R. 4404 to set aside the jury verdict or to reduce the amount of damages. Solis-Vicuna v Notias, 862 N.Y.S.2d 883, 20 Misc. 3d 723, 240 N.Y.L.J. 3, 2008 N.Y. Misc. LEXIS 3619 (N.Y. Sup. Ct. 2008), aff'd, 71 A.D.3d 868, 898 N.Y.S.2d 45, 2010 N.Y. App. Div. LEXIS 2057 (N.Y. App. Div. 2d Dep't 2010).

25. Jury instructions

In ejectment action the right to recover damages for withholding constitutes a separate and distinct cause of action, and either the trial court or an appellate court is warranted in exercising its discretionary right to direct a partial retrial of the separate issue of damages, where the jury's error on this issue arose only because plaintiff's proof and the trial court's instructions supplied the jury with an erroneous measure of damages. Crawford v Hamburg, 19 A.D.2d 100, 241 N.Y.S.2d 357, 1963 N.Y. App. Div. LEXIS 3439 (N.Y. App. Div. 4th Dep't 1963).

Plaintiff who was injured in slip and fall accident was entitled to new trial on damages where court denied her request to charge jury on future pain and suffering despite evidence that second operation was needed to remove medical hardware from injured ankle, which would obviously produce some pain and suffering, and that she would probably suffer some future discomfort unrelated to second operation. Caro v Skyline Terrace Cooperative, Inc., 132 A.D.2d 512, 517 N.Y.S.2d 531, 1987 N.Y. App. Div. LEXIS 49044 (N.Y. App. Div. 2d Dep't 1987).

Hospital in medical malpractice action was entitled to new trial on issue of damages due to confusion of jury in reaching verdict where, even after repeated questioning of jurors by court, it was unclear whether they intended to award certain sum as amount that hospital should pay plaintiff, or as plaintiff's total damages; confusion resulted from parties' failure to request, and court's consequent failure to give, instruction to effect that, after apportioning fault, jurors were to disregard such apportionment in fixing damages, thereby leaving it to court to determine hospital's share of damages. Scaduto v Suarez, 150 A.D.2d 545, 541 N.Y.S.2d 826, 1989 N.Y. App. Div. LEXIS 7053 (N.Y. App. Div. 2d Dep't 1989).

Plaintiff's motion to set aside damages portion of verdict, on ground that jury did not intend verdict that it rendered, was properly denied, even though motion was supported by affidavit of one of 2 allegedly confused jurors, since (1) juror's affidavit could not be considered inasmuch as alleged error was not ministerial one in reporting verdict, (2) court's main and supplemental charges clearly and properly instructed jury on damages award, and (3) after submission of verdict, jurors were polled and confirmed verdict. Labov v New York, 154 A.D.2d 348, 545 N.Y.S.2d 826, 1989 N.Y. App. Div. LEXIS 12258 (N.Y. App. Div. 2d Dep't 1989).

New trial was not required in automobile collision case by jury's allegedly inconsistent reduction of award for past pain and suffering on basis of plaintiff's failure to wear seat belt, but without similar reduction of award for future pain and suffering, where charge to jury correctly provided for single monetary reduction and made no mention of any apportionment of that value between past and future damages, and jury showed no confusion in following that direction by setting forth amount of its unallocated reduction at first available opportunity. Carson v De Lorenzo, 238 A.D.2d 790, 657 N.Y.S.2d 469, 1997 N.Y. App. Div. LEXIS 3944 (N.Y. App. Div. 3d Dep't), app. denied, 90 N.Y.2d 810, 666 N.Y.S.2d 99, 688 N.E.2d 1381, 1997 N.Y. LEXIS 3628 (N.Y. 1997).

Jury's award of damages for breach of contract would not be disturbed where defendants presented no evidence to dispute plaintiffs' expert or documentary evidence as to amounts sought and no evidence as to ways in which plaintiffs could have mitigated their damages, and defendants did not object to court's charge on issue of damages. Cheng Sing Liang v Chwen Jen Huang, 255 A.D.2d 671, 679 N.Y.S.2d 210, 1998 N.Y. App. Div. LEXIS 11683 (N.Y. App. Div. 3d Dep't 1998).

Personal injury defendants were entitled to new trial on issue of future damages for plaintiff, who was infected with Human Immune Deficiency Virus (HIV), where court improvidently precluded testimony of defendants' infectious disease expert as to plaintiff's life expectancy, defendants did not intentionally or willfully fail to disclose identity of witness, they disclosed his name and expected testimony before opening statements of liability phase of trial, jury was charged that future damages were to be based on plaintiff's life expectancy, and thus jury should have had benefit of expert's testimony on effect of plaintiff's HIV on his life expectancy. Davis v City of New York, 273 A.D.2d 342, 709 N.Y.S.2d 587, 2000 N.Y. App. Div. LEXIS 7056 (N.Y. App. Div. 2d Dep't 2000).

In a personal injury claim, the award of damages to the injured person for future pain and suffering in the principal sum of $550,000 deviated materially from what would have been reasonable compensation, as did the award of damages to the injured person's husband for future loss of services, and the award of damages to the injured person for future medical

expenses was unsupported by the record; a new trial was granted as to these damages issues unless the injured person agreed to reduce the damages for future pain and suffering to $300,000, and for future medical expenses to $10,100, and the husband agreed to reduce the future loss of services damages to $10,000. Diaz v Parsons Props., 309 A.D.2d 892, 766 N.Y.S.2d 102, 2003 N.Y. App. Div. LEXIS 11087 (N.Y. App. Div. 2d Dep't 2003).

In a pedestrian’s personal injury claim, it was error for the trial court to charge, over an objection, that the jury could award damages for increased susceptibility to injury based on an alleged preexisting condition because the pedestrian failed to allege, either in his complaint or in six bills of particulars, that he sustained an aggravation of any preexisting degenerative disc condition; a new trial was warranted on the issues of which of the injuries, if any, were proximately caused by the accident, and whether any injuries proximately caused by the accident constituted a “serious injury” under N.Y. Ins. Law § 5102(d). Rodgers v New York City Tr. Auth., 70 A.D.3d 917, 896 N.Y.S.2d 112, 2010 N.Y. App. Div. LEXIS 1481 (N.Y. App. Div. 2d Dep't 2010).

26. Loss of future earnings

A new trial would be required solely on the issue of damages for a cause of action based on malicious prosecution where the plaintiff’s proof of damages was improperly restricted in that he should have been afforded the opportunity to establish that he lost specific prospective employment opportunities as a consequence of the malicious prosecution; furthermore, plaintiff must establish that his damages resulted from malicious prosecution and not from false imprisonment. Miller v New York, 90 A.D.2d 483, 454 N.Y.S.2d 551, 1982 N.Y. App. Div. LEXIS 18492 (N.Y. App. Div. 2d Dep't 1982).

In action by injured worker against ship owner based on negligence, court should have denied defense motion to set aside jury award for future lost earnings where evidence demonstrated that (1) severity of injury prevented worker from returning to work in his occupation of unlashing cargo, (2) worker had worked 3,000 straight-time hours in 52-week period preceding injury, (3) worker was man of ambition, energy, and diligence, and (4) it was not likely that his future

income from another occupation would exceed that of his potential income as lasher. Vargas v American Export Lines, Inc., 160 A.D.2d 223, 553 N.Y.S.2d 673, 1990 N.Y. App. Div. LEXIS 3819 (N.Y. App. Div. 1st Dep't 1990).

Plaintiff was not entitled to order setting aside jury verdict rejecting his claim for lost earnings due to injury to his foot, despite his claim that he was likely to become police officer given fact that he had passed initial police department written exam and character investigation, where there was no testimony that he would have become police officer but for injury. Moreno v Franchise Realty Interstate Corp., 232 A.D.2d 298, 648 N.Y.S.2d 568, 1996 N.Y. App. Div. LEXIS 10534 (N.Y. App. Div. 1st Dep't 1996).

Plaintiff's past and future lost earnings were not proved with reasonable certainty where plaintiff's testimony of prior part-time employment, and new employment acquired on day of accident, was vague and unsubstantiated by any tax returns or W-2 forms, and there was complete absence of medical testimony connecting plaintiff's injuries to his claimed inability to work in future. Razzaque v Krakow Taxi, 238 A.D.2d 161, 656 N.Y.S.2d 208, 1997 N.Y. App. Div. LEXIS 3192 (N.Y. App. Div. 1st Dep't 1997).

Award, as reduced by the trial court upon an N.Y. C.P.L.R. 4404 motion, of $5,419,085 for future lost earnings in a medical malpractice case was vacated unless the patient, an infant, agreed to a further reduction to $1,404,072 because the award deviated from was reasonable compensation under the circumstances, and was excessive pursuant to N.Y. C.P.L.R. 5501(c). Lovett v Interfaith Med. Ctr., 52 A.D.3d 578, 860 N.Y.S.2d 172, 2008 N.Y. App. Div. LEXIS 5401 (N.Y. App. Div. 2d Dep't 2008).

Order setting aside a jury award to a policeman for future loss of earnings in a slip and fall accident was error because collateral estoppel did not apply; it was not established that in an earlier administrative proceeding the policeman had a full and fair opportunity to litigate the extent to which his injuries were caused by a prior traffic accident. Lauro v City of New York, 67 A.D.3d 744, 889 N.Y.S.2d 215, 2009 N.Y. App. Div. LEXIS 8036 (N.Y. App. Div. 2d Dep't 2009).

In a hostile-work-environment action based on a co-worker's actions, the jury properly assessed future damages against the employer emotional injury and lost income. However, the award of future loss of earnings had to be reduced based on the employee's last salary, where there was no evidence to support an upward adjustment. Boodram v Brooklyn Developmental Ctr., 773 N.Y.S.2d 817, 2 Misc. 3d 574, 2003 N.Y. Misc. LEXIS 1582 (N.Y. Civ. Ct. 2003).

Trial court erred in denying a tortfeasor's motion under N.Y. C.P.L.R. 4404(a) as to a jury verdict for an injured party as the injured party's expert based his testimony on the injured party's future lost earnings on the incorrect assumption that the injured party could not engage in any wage-earning activity, and was of no probative value; although it was undisputed that the injured party was unable to continue working as a police officer, he held other employment before becoming a police officer, was a college graduate, and had taken additional college courses following his disability retirement. Harris v City of New York, 2 A.D.3d 782, 770 N.Y.S.2d 380, 2003 N.Y. App. Div. LEXIS 14166 (N.Y. App. Div. 2d Dep't 2003), app. dismissed, 2 N.Y.3d 758, 778 N.Y.S.2d 773, 811 N.E.2d 35, 2004 N.Y. LEXIS 654 (N.Y. 2004).

27. Mitigation of damages

Trial court improperly shifted the burden of proof with regard to the question of mitigation of damages from the employer to employee; hospital should have carried the burden of establishing the amount that the employee actually did earn or reasonably could have earned during the remaining term of the breached contract. Bornstein v Neuman, 92 A.D.2d 578, 459 N.Y.S.2d 462, 1983 N.Y. App. Div. LEXIS 16826 (N.Y. App. Div. 2d Dep't 1983).

Appeals court found that the jury's verdict as to damages (related to past and future pain and suffering) was supported by valid lines of reasoning and permissible inferences from the evidence at trial and not against the weight of the evidence, N.Y. C.P.L.R. 4404(a), and did not deviate materially from reasonable compensation under the circumstances, N.Y. C.P.L.R. 5501(c), in a person's slip and fall case against a corporation; the person's pain from the fall had subsided and the person's pain from degenerative arthritis that long predated the accident

continued. Mejia v JMM Audubon, Inc., 1 A.D.3d 261, 767 N.Y.S.2d 427, 2003 N.Y. App. Div. LEXIS 12177 (N.Y. App. Div. 1st Dep't 2003).

28. Pain and suffering, generally

Erroneous submission of a cause of action for conscious pain and suffering in a suit brought by automobile passengers to recover for injuries and death as result of a collision warranted retrial on issue of damages. Malanify v Pauls Trucking Co., 27 A.D.2d 622, 275 N.Y.S.2d 948, 1966 N.Y. App. Div. LEXIS 2724 (N.Y. App. Div. 3d Dep't 1966), app. dismissed, 19 N.Y.2d 804, 279 N.Y.S.2d 962, 226 N.E.2d 697, 1967 N.Y. LEXIS 1606 (N.Y. 1967).

Court erred in setting aside jury verdict awarding damages for conscious pain and suffering where uncontroverted testimony of plaintiff's expert established that decedent did not instantly die as result of injuries she sustained in crash of car in which she was riding as passenger, that decedent would have been conscious and alert for minimum of 20 minutes after impact, and that decedent sustained injuries which were extremely painful. Jamaica v Narvaez, 198 A.D.2d 476, 604 N.Y.S.2d 209, 1993 N.Y. App. Div. LEXIS 11115 (N.Y. App. Div. 2d Dep't 1993).

In personal injury action, court erred in granting plaintiff's motion to set aside damages verdict on ground of inadequacy, in view of conflicting evidence as to etiology of plaintiff's injury, necessity for future surgery and anticipated impact on plaintiff's future quality of life, and fact that damages awarded for past and future pain and suffering did not deviate from what would be reasonable compensation. Burgos v Lovell Realty, 229 A.D.2d 558, 645 N.Y.S.2d 871, 1996 N.Y. App. Div. LEXIS 8257 (N.Y. App. Div. 2d Dep't 1996).

Award of $110,000 for past and future pain and suffering did not deviate materially from what was reasonable compensation where plaintiff suffered "significant" facial disfigurement, including line-shaped scar under his right eye that was "deeply discolored," and $^1/_3$-inch scar on his nose that was somewhat "thickened," which had assumed their "permanent or definitive configuration" for which "no treatment...could accomplish any significant improvement in the appearance of

these two lesions." Abdulai v Roy, 232 A.D.2d 229, 647 N.Y.S.2d 778, 1996 N.Y. App. Div. LEXIS 10025 (N.Y. App. Div. 1st Dep't 1996).

Plaintiff was not entitled to order setting aside jury award of $30,000 for past and future pain and suffering for foot injury, even though he described injury as "severe ankle fracture" and complained of severe pain and decreased movement, where his own treating physician characterized it as only "small chip fracture of lateral malleolus," defendant's expert testified that there was no avulsion fracture, only sprain, and plaintiff failed to complete prescribed course of physical therapy. Moreno v Franchise Realty Interstate Corp., 232 A.D.2d 298, 648 N.Y.S.2d 568, 1996 N.Y. App. Div. LEXIS 10534 (N.Y. App. Div. 1st Dep't 1996).

In personal injury action, it was error for trial court to grant plaintiff's motion for new trial unless defendants stipulated to increase $3,000 award for pain and suffering to $10,000, as jury could have decided that plaintiff's complaints were overstated and that she refused to follow prescribed course of treatment that would have alleviated her pain, where did not take anti-inflammatory medication prescribed by specialist, she wore cervical collar for only 2 weeks, she attended only 2 or 3 physical therapy sessions, and she did not return to specialist for nearly 8 months although she claimed to continue suffering from back and neck pain. Steiner v Enright, 237 A.D.2d 899, 654 N.Y.S.2d 515, 1997 N.Y. App. Div. LEXIS 3490 (N.Y. App. Div. 4th Dep't 1997).

Judgment on jury's award of $200,000 for future pain and suffering would be reversed, and new trial would be ordered on issue of damages, where award was irreconcilable with jury's failure to award any damages for past pain and suffering, and jury's substantial confusion was evident because jury could not reasonably have concluded that plaintiff's injuries were worsening over time. Cadet v City of New York, 238 A.D.2d 368, 656 N.Y.S.2d 331, 1997 N.Y. App. Div. LEXIS 3883 (N.Y. App. Div. 2d Dep't 1997).

New trial was not required in automobile collision case by jury's allegedly inconsistent reduction of award for past pain and suffering on basis of plaintiff's failure to wear seat belt, but without similar reduction of award for future pain and suffering, where charge to jury correctly provided

for single monetary reduction and made no mention of any apportionment of that value between past and future damages, and jury showed no confusion in following that direction by setting forth amount of its unallocated reduction at first available opportunity. Carson v De Lorenzo, 238 A.D.2d 790, 657 N.Y.S.2d 469, 1997 N.Y. App. Div. LEXIS 3944 (N.Y. App. Div. 3d Dep't), app. denied, 90 N.Y.2d 810, 666 N.Y.S.2d 99, 688 N.E.2d 1381, 1997 N.Y. LEXIS 3628 (N.Y. 1997).

Jury verdict was properly set aside, new trial was properly ordered on issue of damages for past pain and suffering, and award of $100,000 on retrial for past pain and suffering was reasonable where plaintiff had suffered serious and constant pain in his neck and back for 4 years preceding original verdict, jury found that he would suffer same or similar pain for one year after verdict and that his injuries were severe enough to justify $50,000 damage award for that year, and it was inconsistent to simultaneously find that his damages for past pain and suffering were only $20,000 for 4 years ($5,000 per year). DePasquale v Klenetsky, 255 A.D.2d 546, 680 N.Y.S.2d 666, 1998 N.Y. App. Div. LEXIS 12878 (N.Y. App. Div. 2d Dep't), app. dismissed, 255 A.D.2d 545, 682 N.Y.S.2d 600, 1998 N.Y. App. Div. LEXIS 12941 (N.Y. App. Div. 2d Dep't 1998).

In action for injuries sustained by 67-year old plaintiff when elevator in which he was riding fell 3 floors to ground level, trial court erred in reducing jury’s award for past pain, suffering and disability from $215,000 to $150,000, where plaintiff was previously in good health, he sustained fracture of his spine which caused him great deal of pain which intensified after accident, and his debilitation was so great that he required help in bathing, attending to his hygienic needs, and simply moving about. In action by 24-year-old plaintiff who suffered multiple fractures of her ankle and torn ligament when elevator in which she was riding fell 3 floors to ground level, trial court erred in reducing jury’s award for past pain, suffering and disability from $400,000 to $250,000 where plaintiff was hospitalized for 10 days, she underwent open reduction surgery on her ankle and surrounding area which necessitated insertion of metal plate, she had to be cared for by her family for 10 months and remained on crutches for 2 years, she remained in great pain after 3 years of rigorous physical therapy, she developed “permanent” traumatic arthritis,

and she was unable to bear more than moderate weights, which restricted her ability to be complete parent for her child. Trial court's 40 percent reduction of jury's award for past pain, suffering and disability of 39-year-old plaintiff who sustained sprained ankle in accident, from $75,000 to $45,000, was appropriate where plaintiff was released from hospital few hours after accident with his ankle wrapped in Ace bandage, and he was able to return to work (albeit not in his accustomed role as truck driver and deliveryman). Po Yee So v Wing Tat Realty, Inc., 259 A.D.2d 373, 687 N.Y.S.2d 99, 1999 N.Y. App. Div. LEXIS 2838 (N.Y. App. Div. 1st Dep't 1999).

Considering 9-year period between injury and jury's verdict, trial court erred in reducing award of $375,000 for past pain and suffering, and its reduction of award for future pain and suffering from $1,875,999 to $400,000 was inordinately large, where plaintiff was 30 years old at time of injury, underwent 3 arthroscopic surgical procedures to his knee, continued to suffer significant deterioration of knee cartilage and pain, walked with limp, and might require future knee replacement surgery. Cruz v Manhattan & Bronx Surface Transit Operating Auth., 259 A.D.2d 432, 687 N.Y.S.2d 350, 1999 N.Y. App. Div. LEXIS 3220 (N.Y. App. Div. 1st Dep't 1999).

Award of $1,550,000 was reasonable for injured worker's lifetime pain and suffering stemming from twice operated on fractured left heel and ruptured disc where worker stipulated to that sum, as reduction from $1,750,000 awarded by jury, in lieu of new trial on issue of damages. Vasquez v Chase Manhattan Bank, N.A., 266 A.D.2d 3, 697 N.Y.S.2d 611, 1999 N.Y. App. Div. LEXIS 11176 (N.Y. App. Div. 1st Dep't 1999).

Judgment awarding pre-structured damages of $1.5 million for past pain and suffering and $1 million for future pain and suffering, upon plaintiff's stipulation, in lieu of new trial on damages, to reduce jury awards for past and future pain and suffering from $4 million and $3 million, respectively, was modified on facts to partially reinstate jury's verdict to extent of $2.3 million and $2.5 million for past and future pain and suffering, respectively, where 12-year-old plaintiff sustained severe comminuted fracture of mid-shaft of her left femur, requiring 2 surgeries within week of accident and third surgery to remove rod from her leg one ½ -years later, involving ongoing pain, substantial limitations in range of motion, and likelihood of future surgery and

chronic pain. Carl v Daniels, 268 A.D.2d 395, 702 N.Y.S.2d 279, 2000 N.Y. App. Div. LEXIS 775 (N.Y. App. Div. 1st Dep't 2000), app. dismissed, 95 N.Y.2d 790, 711 N.Y.S.2d 157, 733 N.E.2d 229, 2000 N.Y. LEXIS 954 (N.Y. 2000), app. denied, 96 N.Y.2d 704, 723 N.Y.S.2d 130, 746 N.E.2d 185, 2001 N.Y. LEXIS 178 (N.Y. 2001).

In action by plaintiff who sustained back injuries as result of collision with defendant's boat, court did not err in, sua sponte, vacating jury's award of $20,000 for past pain and suffering covering 4-year period and $240,000 for future pain and suffering covering 15-year period, as 2 components of award were inconsistent and there was no rational basis in record for jury's finding, implicit in its verdict, that plaintiff's pain and suffering would be worse after trial than it was between date of accident and trial. Brown v Cerrone, 283 A.D.2d 934, 723 N.Y.S.2d 915, 2001 N.Y. App. Div. LEXIS 4527 (N.Y. App. Div. 4th Dep't 2001).

In action by injured construction worker under CLS Labor § 240(1), court properly discounted worker's future damages to present value. Obligation of worker's employer to pay future damages, if any, for worker's loss of household services would not cease on worker's death. Edbauer v Bd. of Educ., 286 A.D.2d 999, 731 N.Y.S.2d 309, 2001 N.Y. App. Div. LEXIS 9083 (N.Y. App. Div. 4th Dep't 2001).

In personal injury action, court correctly denied plaintiff's motion to set aside jury verdict awarding him only $115,000 for past pain and suffering where evidence established that plaintiff returned to work 2 months after incident, that he resumed most of his daily activities, and that he consistently failed to attend scheduled physical therapy sessions recommended by his physicians. Rivera v 21st Century Restaurant, 199 A.D.2d 14, 604 N.Y.S.2d 106, 1993 N.Y. App. Div. LEXIS 11175 (N.Y. App. Div. 1st Dep't 1993).

Trial court properly granted a city's motion to set aside as to damages a jury verdict that awarded an injured party whose burns required minimal hospitalization and standard care, with no skin grafts, surgery, or visible scars, $650,000 for past pain and suffering and $100,000 for future pain and suffering because the jury deviated from what would have been reasonable compensation under N.Y. C.P.L.R. 5501(c); the trial court appropriately granted a new trial as to

damages unless the injured party accepted an award of $50,000 for future pain and suffering, but the award for past pain and suffering should have been reduced to $250,000 instead of $150,000 because of the significant pain the injured party suffered for a short time. Stefanescu v City of New York, 31 A.D.3d 428, 819 N.Y.S.2d 49, 2006 N.Y. App. Div. LEXIS 8681 (N.Y. App. Div. 2d Dep't 2006).

Lower court erred in granting the N.Y. C.P.L.R. 4404(a) motion filed by defendants, a van driver and her passenger, and reducing a $1,000,000 jury award for the conscious pain and suffering of plaintiffs' decedent because under the circumstances of the accident in which the decedent was struck by the driver's van, the severity of her injuries, and the decedent's two-and-one-half-hour period of consciousness thereafter, the jury award did not deviate materially from what would be reasonable compensation under N.Y. C.P.L.R 5501(c), and further, the $460,000 jury award for pecuniary loss also did not deviate materially from what would be reasonable compensation under N.Y. C.P.L.R. 5501(c). Twersky v Busche, 37 A.D.3d 704, 830 N.Y.S.2d 725, 2007 N.Y. App. Div. LEXIS 2133 (N.Y. App. Div. 2d Dep't 2007).

Jury awarded plaintiff $500,000 for a decedent's pain and suffering pain, While the jury was entitled to consider the decedent's pain, terror, and suffering during and after the incident, an award of $350,000 for her pain and suffering was the maximum the jury could have awarded as a matter of law; therefore, the trial court erred by not granting defendant's N.Y. C.P.L.R. 4404(a) motion to set aside the award. Estate of Angelica Pesante v Mundell, 37 A.D.3d 1173, 829 N.Y.S.2d 390, 2007 N.Y. App. Div. LEXIS 1175 (N.Y. App. Div. 4th Dep't 2007).

In a medical malpractice action, a jury verdict was set aside pursuant to N.Y. C.P.L.R. § 4404 because the jury had no basis to reach its determination not to award damages for the decedent's conscious pain and suffering as the expert testimony from both parties indicated that an aortic dissection, from which the decedent died, caused extreme pain, even if only for a relatively brief period of time. Carter v New York City Health & Hosps. Corp., 47 A.D.3d 661, 851 N.Y.S.2d 588, 2008 N.Y. App. Div. LEXIS 214 (N.Y. App. Div. 2d Dep't 2008).

Considering the medical facts and the 6 ½ -year period of time between the accident and the second trial on the issue of damages, and comparable precedent, the award of $576,867 for past pain and suffering and the award of $2,219,229 for a period of 28.2 years for future pain and suffering deviated materially from what was reasonable compensation where the injured person fractured her coccyx, herniated her discs and suffered depression. Unless the injured person agreed to lesser damages, a new trial as to the issue of damages would be necessary. Turuseta v Wyassup-Laurel Glen Corp., 91 A.D.3d 632, 937 N.Y.S.2d 240, 2012 N.Y. App. Div. LEXIS 209 (N.Y. App. Div. 2d Dep't 2012).

Trial court erred in granting a county's motion to set aside a jury verdict as excessive because the jury's award for future pain and suffering and economic damages did not deviate materially from what would be reasonable compensation and the jury could reasonably have concluded, based on the expert testimony presented at trial, that an economist's projections of the plaintiff's earnings were properly based on an assumption that he was totally disabled. Kowalsky v County of Suffolk, 139 A.D.3d 906, 33 N.Y.S.3d 85, 2016 N.Y. App. Div. LEXIS 3708 (N.Y. App. Div. 2d Dep't 2016).

Trial court erred in denying the injured plaintiffs’ motion to set aside, as inadequate, so much of the verdict as awarded them damages for past pain and suffering because the awards deviated materially from what would be reasonable compensation; however, since the jury found that one of the plaintiffs sustained a serious injury under only the 90/180-day category of § 5102(d), the jury’s award of zero damages for future pain and suffering did not deviate materially from what would be reasonable compensation. Coleman v Karimov, 173 A.D.3d 669, 103 N.Y.S.3d 146, 2019 N.Y. App. Div. LEXIS 4368 (N.Y. App. Div. 2d Dep't 2019).

Trial court properly denied an insurer’s motion to set aside a jury verdict in favor of a child—who was struck by a hit-and-run vehicle—and his mother as to damages for past pain and suffering and for judgment as a matter of law in its favor because the jury was not instructed that testimony as to the mode of measurement of range of motion was necessary, and it could not be said that there was no rational process by which the jury could find that the child sustained a

serious injury under the significant limitation of use category of the Insurance Law. Bell v Motor Veh. Acc. Indem. Corp., 175 A.D.3d 1475, 109 N.Y.S.3d 396, 2019 N.Y. App. Div. LEXIS 6787 (N.Y. App. Div. 2d Dep't 2019).

Trial court erred in denying an insurer's motion as to damages for future pain and suffering because a mother did not establish that her child, who was struck by a hit-and-run vehicle, sustained a serious injury to the cervical region of his spine under the permanent consequential limitation of use category of the Insurance Law. Bell v Motor Veh. Acc. Indem. Corp., 175 A.D.3d 1475, 109 N.Y.S.3d 396, 2019 N.Y. App. Div. LEXIS 6787 (N.Y. App. Div. 2d Dep't 2019).

Trial court erred in denying an injured motorist's motion to set aside, as inadequate, a jury verdict awarding him damages for past and future pain and suffering and for a new trial on the issue of those damages because the jury's award for past pain and suffering was inadequate where the motorist was required to undergo an anterior cervical discectomy and fusion surgery as a result of the accident, the cervical fusion, inter alia, permanently reduced the motorist's cervical range of motion, the jury's failure to award any damages for future pain and suffering was not based upon a fair interpretation of the evidence and was inadequate. Chung v Shaw, 175 A.D.3d 1237, 108 N.Y.S.3d 47, 2019 N.Y. App. Div. LEXIS 6537 (N.Y. App. Div. 2d Dep't 2019).

Trial court properly granted the defendants' motion to set aside a jury verdict in favor of the plaintiff on the issue of damages for past and future pain and suffering as excessive—to the extent of directing a new trial on the issue of damages for past and future pain and suffering unless the plaintiff stipulated to reduce the damages—because, considering the nature and the extent of the injuries sustained by the plaintiff, the awards, as reduced by the trial court, did not deviate materially from what would be reasonable compensation. Pimenta v 1504 CIA, 197 A.D.3d 670, 153 N.Y.S.3d 129, 2021 N.Y. App. Div. LEXIS 4810 (N.Y. App. Div. 2d Dep't 2021).

In plaintiff's action seeking damages for injuries that she sustained at a construction site, the trial court did not err in denying defendant's posttrial motions to set aside the jury award because the jury's award for future pain and suffering did not deviate materially from reasonable

compensation given that plaintiff established that her injuries caused persistent pain in her neck, shoulder, and arm, and she would need continued medical care in the future, and with respect to future lost earnings and benefits, the jury's award of $356,150 over five years did not deviate materially from reasonable compensation. 2024 N.Y. App. Div. LEXIS 523.

In plaintiff's action to recover damages for personal injuries sustained when his vehicle was involved in a collision, the appellate court held that the jury award of damages in the sums of $24,167 for past pain and suffering and $32,000 for future pain and suffering over 40 years were inadequate; therefore, he was entitled to a new trial. Plaintiff presented evidence that he sustained fractures to his right hand, he underwent surgery, he experienced continued pain and limitations after a period of 10 years and more than 200 sessions of rehabilitative therapy; two medical experts acknowledged the potential for plaintiff to develop post-traumatic arthritis. Murray v Cnty. of Suffolk, 236 A.D.3d 665, 230 N.Y.S.3d 264, 2025 N.Y. App. Div. LEXIS 1198 (N.Y. App. Div. 2d Dep't 2025).

Jury awards for past pain and suffering, future pain and suffering, and future medical expenses did not deviate materially from what would be reasonable compensation, and should not have been set aside as excessive. Aguilar v Graham Terrace, LLC, 237 A.D.3d 1149, 233 N.Y.S.3d 634, 2025 N.Y. App. Div. LEXIS 2625 (N.Y. App. Div. 2d Dep't 2025).

In negligence action based on death of plaintiff's children when hit by tractor-trailer while crossing intersection with her, wherein plaintiff suffered "zone of danger" emotional distress injuries from witnessing accident, award to plaintiff's husband for loss of consortium would be sustained to extent it did not exceed $200,000 since there was no valid reason to require that plaintiff have suffered physical harm or that her mental harm have resulted from intentional act. In action based on death of plaintiff's children when hit by tractor -trailer while crossing intersection with her, any pain and suffering experienced by children in flash between contact and loss of consciousness was speculative, and jury verdict awarding damages therefor would be vacated. Delosovic v New York, 143 Misc. 2d 801, 541 N.Y.S.2d 685, 1989 N.Y. Misc. LEXIS

277 (N.Y. Sup. Ct. 1989), aff'd, 174 A.D.2d 407, 572 N.Y.S.2d 857, 1991 N.Y. App. Div. LEXIS 8708 (N.Y. App. Div. 1st Dep't 1991).

Heath care provider's motion to set aside the jury verdict under N.Y. C.P.L.R. 4404(a) in a medical malpractice action as to the award for past pain and suffering was denied because the amount found by the jury for the child's past pain and suffering did not materially deviate from what a reasoned finding would have been for the pain endured in the first three years of the child's life. The child was a three-year-old female who (1) suffered an Erb's palsy injury; (2) underwent physical therapy, occupational therapy, and two major surgical procedures; (3) was scarred in the area of the shoulder injury and on her leg; (4) wore a splint; and (5) underwent electrical stimulation at night. Harding v Onibokun, 828 N.Y.S.2d 780, 14 Misc. 3d 790, 2006 N.Y. Misc. LEXIS 4104 (N.Y. Sup. Ct. 2006).

Although a jury found that a passenger who suffered a closed head injury, fractured vertebrae, fractured ribs, and a collapsed lung in a one-car accident was 60 percent liable for the accident, it was a material deviation from reasonable compensation for the trial court to approve the jury's award of no damages for past pain and suffering, and the appellate court reversed the trial court's judgment denying the passenger's motion pursuant to N.Y. C.P.L.R. 4404 and entering judgment confirming the jury's award, and remitted the case for a new trial on the issue of damages for past pain and suffering. Gillespie v Girard, 301 A.D.2d 1018, 754 N.Y.S.2d 461, 2003 N.Y. App. Div. LEXIS 671 (N.Y. App. Div. 3d Dep't 2003).

Trial court properly denied plaintiffs' motion pursuant to N.Y. C.P.L.R. 4404 to set aside the verdict entered in favor of plaintiffs as against the weight of the evidence with respect to the jury's failure to award damages for the injured party's past and future lost wages in view of the evidence that the lost wages were the result of factors unrelated to the accident; however, the trial court erred in denying the motion to set aside the verdict as against the weight of the evidence with respect to the award of damages for the injured party's past pain and suffering, future pain and suffering, future medical expenses, and a derivative cause of action, as those awards were inadequate and could not have been reached upon any fair interpretation of the

evidence. Inzinna v Brinker Rest. Corp., 302 A.D.2d 967, 754 N.Y.S.2d 495, 2003 N.Y. App. Div. LEXIS 919 (N.Y. App. Div. 4th Dep't 2003).

In a case in which plaintiff worker was granted summary judgment on the issue of defendant city's liability pursuant to N.Y. Lab. Law § 240 in relation to injuries which the worker suffered when a wall of an excavation ditch collapsed on the worker, the trial court properly denied the city's motion to set aside as excessive the verdict regarding past pain and suffering and properly granted the worker's motion to set aside as inadequate the jury's verdict on damages to the extent of granting a new trial on the issue of damages for past and future pain and suffering unless the city stipulated to an increased award for past pain and suffering from $500,000 to $1,500,000, and an increase for future pain and suffering from $350,000 to $500,000, as the jury's award deviated materially from what was reasonable compensation within the meaning of N.Y. C.P.L.R. 5501(c) given that (1) the worker sustained a severe spinal fracture, and the worker's left knee mechanism was completely destroyed, requiring six surgeries; (2) the worker underwent several years of intensive physical therapy; (3) the worker endured numerous complications and repercussions, including painful intestinal complications, significant weight loss, and an inability to engage in sexual activity, socialize, or work in a non-sedentary job; and (4) the worker had permanent disabilities and an increased risk of experiencing accelerated degenerative changes to the worker's spine and knee. Machado v City of New York, 304 A.D.2d 626, 758 N.Y.S.2d 165, 2003 N.Y. App. Div. LEXIS 3968 (N.Y. App. Div. 2d Dep't 2003).

It was error for the district court to conditionally reduce the jury's award for future pain and suffering from $825,000 to $100,000, and the court found that a reduction to $500,000 was proper, and to conditionally reduce the award for past pain and suffering at all because there was evidence to support the jury's finding of a serious bodily injury as required by N.Y. Ins. Law 5102(d) and the award for past pain and suffering did not materially deviate from what would be considered reasonable compensation. Lifshits v Variety Poly Bags, 5 A.D.3d 566, 773 N.Y.S.2d 304, 2004 N.Y. App. Div. LEXIS 2731 (N.Y. App. Div. 2d Dep't 2004).

Award of damages for past and future pain and suffering did not deviate materially from what would be reasonable compensation, N.Y. C.P.L.R. § 5501(c), so denial of new damage trial under N.Y. C.P.L.R. § 4404 on that basis was not an abuse of discretion. Swedowski v Ethicon, Inc., 6 A.D.3d 1198, 775 N.Y.S.2d 718, 2004 N.Y. App. Div. LEXIS 6192 (N.Y. App. Div. 4th Dep't 2004).

Damages award against city that deviated materially from reasonable compensation was remanded, under N.Y. C.P.L.R. § 5501(c) in the exercise of appellate discretion, and after the trial court had denied the city's motions under N.Y. C.P.L.R. § 4401 judgment as a matter of law, and under N.Y. C.P.L.R. § 4404 for new trial, on that issue only, unless city and couple agreed, within 30 days, to specified lower amount for past and future pain and suffering. Seifert v City of New York, 7 A.D.3d 779, 776 N.Y.S.2d 872, 2004 N.Y. App. Div. LEXIS 7303 (N.Y. App. Div. 2d Dep't 2004).

Jury's verdict findings (1) that the city was 30 percent at fault was sustained, but (2) that the woman sustained damages in the sum of $10,000 for past pain and suffering deviated materially from what would be reasonable compensation. Under the circumstances of the case, including the fact that the woman underwent multiple surgical procedures after her fall on a city sidewalk defect, $100,000 represented reasonable compensation for her past pain and suffering, so the appeals court modified the net award to the woman (1) for the pain and suffering to be 30 percent of the $100,000 rather than 30 percent of the $10,000, plus (2) 30 percent of the total of the remainder of the jury's award: $10,000 for future pain and suffering, $10,000 for past medical expenses, and $10,000 for future medical expenses. Hospodar-Anikin v City of New York, 12 A.D.3d 405, 786 N.Y.S.2d 530, 2004 N.Y. App. Div. LEXIS 13350 (N.Y. App. Div. 2d Dep't 2004).

A new trial on the issue of damages was warranted because, since a disfigurement, such as the scar suffered by the tenant, was not a separate element of damages deserving a distinct award but was, instead, only a factor to be considered by the jury in assessing damages for conscious pain and suffering, the trial court erred in instructing the jury to make a separate determination

with respect to that issue. Bartoli v Asto Constr. Corp., 22 A.D.3d 437, 802 N.Y.S.2d 463, 2005 N.Y. App. Div. LEXIS 10601 (N.Y. App. Div. 2d Dep't 2005).

School district's motion under N.Y. C.P.L.R. 4404(a) to set aside jury verdict, which granted past and future pain and suffering damages to a mother on her claims of inadequate supervision and instruction of her minor son's use of a joint planer machine that cut off part of the student's finger. was properly denied as the mother's engineer expert sufficiently established prima facie negligence by demonstrating expertise on standard of care to supervise and instruct on how to safely handle the machine. The jury's decision to award past and future pain and suffering was a factual determination within its province and the amount was justified upon consideration of other similar case, the medical evidence, and the student's testimony on how the injury affected his life. Hudson v Lansingburgh Cent. Sch. Dist., 27 A.D.3d 1027, 812 N.Y.S.2d 678, 2006 N.Y. App. Div. LEXIS 3731 (N.Y. App. Div. 3d Dep't 2006).

Jury's verdict deviated materially from reasonable compensation because the jury made no award for pain and suffering after finding that the husband sustained a serious injury; moreover, it could not have been discerned from the record which injuries the jury found were related to the accident or which one (or more) they found to be a serious injury. Under such circumstances, and in light of both an error in voir dire and the likelihood that the verdict resulted from an impermissible compromise, the trial court's denial of the N.Y. C.P.L.R. 4404 motion for a new trial filed by the husband and the wife was error. Zgrodek v McInerney, 61 A.D.3d 1106, 876 N.Y.S.2d 227, 2009 N.Y. App. Div. LEXIS 2477 (N.Y. App. Div. 3d Dep't 2009).

Award of $1.2 million to a firefighter for past pain and suffering in a case under N.Y. Gen. Mun. Law § 205-a based on injuries to, inter alia, his left wrist, left shoulder, and right knee due to a fall down a stairwell deviated materially from what would be reasonable compensation under N.Y. C.P.L.R. § 5501(c); the court suggested a reduction to $755,000, or a new trial would be awarded to the city under N.Y. C.P.L.R. § 4404(a). Cusumano v City of New York, 63 A.D.3d 5, 877 N.Y.S.2d 153, 2009 N.Y. App. Div. LEXIS 2644 (N.Y. App. Div. 2d Dep't 2009), rev'd, 15 N.Y.3d 319, 910 N.Y.S.2d 410, 937 N.E.2d 74, 2010 N.Y. LEXIS 2899 (N.Y. 2010).

Lessors' motion to set aside a personal injury verdict was granted on appeal, and a new trial was ordered unless the passenger consented to reduce the verdict as to damages for past pain and suffering from $1,000,000 to $600,000, and for future pain and suffering from $1,500,000 to $800,000. Hood v Avis Rent A Car Sys., Inc., 69 A.D.3d 797, 893 N.Y.S.2d 239, 2010 N.Y. App. Div. LEXIS 462 (N.Y. App. Div. 2d Dep't 2010).

City's motion to set aside a jury verdict pursuant to N.Y. C.P.L.R. 4404(a), 5501(c), was without merit because, inter alia, the mother's testimony that an officer advised her not to leave her apartment, and that police would arrest her ex-boyfriend, who later shot the mother in front of the children, created a special relationship and established the city's duty to act non-negligently to protect mother and children; since the mother's testimony disclosed that the children were near her when they saw the ex-boyfriend shoot her three times, they were in the zone of danger. Although the jury's award for future medical expenses was improper, the awards to the mother of $3,000,000 for past pain and suffering and $5,000,000 for future pain and suffering, and the award to the children of $750,000 each for past pain and suffering were proper. Valdez v City of New York, 873 N.Y.S.2d 238, 21 Misc. 3d 1107(A), 239 N.Y.L.J. 71, 2008 N.Y. Misc. LEXIS 5816 (N.Y. Sup. Ct. 2008), app. dismissed, 74 A.D.3d 76, 901 N.Y.S.2d 166, 2010 N.Y. App. Div. LEXIS 3408 (N.Y. App. Div. 1st Dep't 2010).

29. —Future pain and suffering

In action to recover damages sustained when 13-year-old plaintiff suffered loss of his left eye when he was shot with BB gun, verdict in amount of $500,000 for future pain and suffering was not excessive since (1) loss of sight made it difficult to drive or engage in sports, (2) plaintiff had continued headaches, (3) plaintiff suffered pain, discomfort and humiliation of disfigurement, as well as that occasioned by having to remove and clean prothesis—which could not be properly fitted and gave him "pop-eyed" look—at least 2 or 3 times per day, (4) pellet which caused loss of eye was still lodged against optical nerve, and (5) plaintiff would likely require further operations and refittings for replacement protheses over course of his entire lifetime. Davis v

Board of Educ., 168 A.D.2d 261, 562 N.Y.S.2d 496, 1990 N.Y. App. Div. LEXIS 14809 (N.Y. App. Div. 1st Dep't 1990), app. denied, 78 N.Y.2d 862, 576 N.Y.S.2d 220, 582 N.E.2d 603, 1991 N.Y. LEXIS 4765 (N.Y. 1991).

Court should not have set aside portion of verdict which failed to award damages for future pain and suffering to plaintiff, who suffered 3 fractures in left leg as result of accident, where (1) plaintiff's sole complaint on visit to orthopedist 3 years after accident was that his leg ached in cold, damp weather, which was common experience when bone has been broken, (2) although plaintiff had arthroscopic procedure on left knee 2 months later, such procedure was similar to one performed 3 years prior to accident, and (3) plaintiff's orthopedist testified that fractures were fully and well healed without complications at time of examinations one year and 3 years after accident, and that aggravation of knee injury could have been caused by plaintiff's job as roofer. Esner v Janisziewski, 180 A.D.2d 991, 580 N.Y.S.2d 551, 1992 N.Y. App. Div. LEXIS 2922 (N.Y. App. Div. 3d Dep't 1992).

Award of $110,000 for past and future pain and suffering did not deviate materially from what was reasonable compensation where plaintiff suffered "significant" facial disfigurement, including line-shaped scar under his right eye that was "deeply discolored," and $^{1}/_{3}$-inch scar on his nose that was somewhat "thickened," which had assumed their "permanent or definitive configuration" for which "no treatment...could accomplish any significant improvement in the appearance of these two lesions." Abdulai v Roy, 232 A.D.2d 229, 647 N.Y.S.2d 778, 1996 N.Y. App. Div. LEXIS 10025 (N.Y. App. Div. 1st Dep't 1996).

Plaintiff was not entitled to order setting aside jury award of $30,000 for past and future pain and suffering for foot injury, even though he described injury as "severe ankle fracture" and complained of severe pain and decreased movement, where his own treating physician characterized it as only "small chip fracture of lateral malleolus," defendant's expert testified that there was no avulsion fracture, only sprain, and plaintiff failed to complete prescribed course of physical therapy. Moreno v Franchise Realty Interstate Corp., 232 A.D.2d 298, 648 N.Y.S.2d 568, 1996 N.Y. App. Div. LEXIS 10534 (N.Y. App. Div. 1st Dep't 1996).

Judgment on jury's award of $200,000 for future pain and suffering would be reversed, and new trial would be ordered on issue of damages, where award was irreconcilable with jury's failure to award any damages for past pain and suffering, and jury's substantial confusion was evident because jury could not reasonably have concluded that plaintiff's injuries were worsening over time. Cadet v City of New York, 238 A.D.2d 368, 656 N.Y.S.2d 331, 1997 N.Y. App. Div. LEXIS 3883 (N.Y. App. Div. 2d Dep't 1997).

New trial was not required in automobile collision case by jury's allegedly inconsistent reduction of award for past pain and suffering on basis of plaintiff's failure to wear seat belt, but without similar reduction of award for future pain and suffering, where charge to jury correctly provided for single monetary reduction and made no mention of any apportionment of that value between past and future damages, and jury showed no confusion in following that direction by setting forth amount of its unallocated reduction at first available opportunity. Carson v De Lorenzo, 238 A.D.2d 790, 657 N.Y.S.2d 469, 1997 N.Y. App. Div. LEXIS 3944 (N.Y. App. Div. 3d Dep't), app. denied, 90 N.Y.2d 810, 666 N.Y.S.2d 99, 688 N.E.2d 1381, 1997 N.Y. LEXIS 3628 (N.Y. 1997).

Court erred in setting aside verdict insofar as jury failed to award any damages for future pain and suffering where testimony supported determination that any possible future knee surgery that injured plaintiff might require was not causally connected to accident but, rather, was due to normal degenerative conditions in his knee, and his knee had essentially returned to its pre-accident condition, any restrictions previously imposed on him due to his knee were lifted, he had no gait deviations, and he did not limp. Mattei v Figueroa, 262 A.D.2d 459, 692 N.Y.S.2d 119, 1999 N.Y. App. Div. LEXIS 6648 (N.Y. App. Div. 2d Dep't 1999).

Award of $1,550,000 was reasonable for injured worker's lifetime pain and suffering stemming from twice operated on fractured left heel and ruptured disc where worker stipulated to that sum, as reduction from $1,750,000 awarded by jury, in lieu of new trial on issue of damages. Vasquez v Chase Manhattan Bank, N.A., 266 A.D.2d 3, 697 N.Y.S.2d 611, 1999 N.Y. App. Div. LEXIS 11176 (N.Y. App. Div. 1st Dep't 1999).

Judgment awarding pre-structured damages of $1.5 million for past pain and suffering and $1 million for future pain and suffering, upon plaintiff's stipulation, in lieu of new trial on damages, to reduce jury awards for past and future pain and suffering from $4 million and $3 million, respectively, was modified on facts to partially reinstate jury's verdict to extent of $2.3 million and $2.5 million for past and future pain and suffering, respectively, where 12-year-old plaintiff sustained severe comminuted fracture of mid-shaft of her left femur, requiring 2 surgeries within week of accident and third surgery to remove rod from her leg one ½ -years later, involving ongoing pain, substantial limitations in range of motion, and likelihood of future surgery and chronic pain. Carl v Daniels, 268 A.D.2d 395, 702 N.Y.S.2d 279, 2000 N.Y. App. Div. LEXIS 775 (N.Y. App. Div. 1st Dep't 2000), app. dismissed, 95 N.Y.2d 790, 711 N.Y.S.2d 157, 733 N.E.2d 229, 2000 N.Y. LEXIS 954 (N.Y. 2000), app. denied, 96 N.Y.2d 704, 723 N.Y.S.2d 130, 746 N.E.2d 185, 2001 N.Y. LEXIS 178 (N.Y. 2001).

Trial court erred in setting aside jury verdict on ground that it made no award for future pain and suffering where (1) following initial operation to repair torn rotator cuff tendons, plaintiff underwent second surgery for removal of bone spurs unrelated to accident, during which surgeon determined that rotator cuff had been fully repaired, (2) defendants' expert testified that plaintiff's unrelieved shoulder pain following initial surgery was result of bone spurs, not torn rotator cuff, and (3) plaintiff testified that he regained full strength to his shoulder and he made no claim of continuing pain at trial. Butcher v Rotterdam Square Mall, 268 A.D.2d 941, 702 N.Y.S.2d 681, 2000 N.Y. App. Div. LEXIS 824 (N.Y. App. Div. 3d Dep't 2000).

Personal injury plaintiff was not entitled to recover lost earnings where sole evidence on that issue was her testimony that she was working full-time making "$6.00 and something" per hour, and no payroll records, W-2 statements, income tax returns, or testimony from her employer was introduced. Plaintiff who suffered bimalleolar fracture dislocation of ankle requiring 2 surgical procedures within 17 months was not entitled to have set aside jury's award of no damages for future pain and suffering where (1) she last saw her attending physician 10 months before trial for follow-up visit one week after second surgery, which resulted in removal of

hardware from ankle, (2) at that appointment, she informed physician that she was feeling much better, (3) physician discharged her from further medical care and told her to return only if further treatment were needed, and (4) physician testified that “I was thinking I was going to see her again but it didn’t seem to be that I had to. So I have to only presume that she’s—that she was doing well.” Ordway v Columbia County Agric. Soc'y, 273 A.D.2d 635, 709 N.Y.S.2d 691, 2000 N.Y. App. Div. LEXIS 7201 (N.Y. App. Div. 3d Dep't 2000).

Court properly set aside jury verdict awarding no damages for future pain and suffering, where testimony of plaintiff’s orthopedic surgeon was only expert medical evidence presented at trial, his opinion that plaintiff sustained impingement syndrome and permanent deformity which prevented her from fully extending her arm was unchallenged by cross-examination or other testimony, plaintiff’s deformity was readily observable, and medical proof of permanent nature of her injury and continuing pain was uncontroverted. Baker v Shepard, 276 A.D.2d 873, 715 N.Y.S.2d 83, 2000 N.Y. App. Div. LEXIS 10475 (N.Y. App. Div. 3d Dep't 2000).

Court should have granted defendant’s motion to set aside jury award for past and future lost wages where it was based only on plaintiff’s testimony regarding his prior employment, unsubstantiated by any tax returns or W-2 forms, and his current employment of less than 2 weeks. DelValle v White Castle Sys., 277 A.D.2d 13, 715 N.Y.S.2d 57, 2000 N.Y. App. Div. LEXIS 11058 (N.Y. App. Div. 1st Dep't 2000).

Jury’s finding that plaintiff sustained injury resulting in permanent loss of use of body organ, member, function or system under CLS Ins § 5102(d) could not be reconciled with its failure to award damages for future pain and suffering, and thus new trial on issue of damages was warranted. Shaw v Jacobs, 279 A.D.2d 624, 719 N.Y.S.2d 709, 2001 N.Y. App. Div. LEXIS 826 (N.Y. App. Div. 2d Dep't 2001).

In personal injury action, defendants did not meet their burden, under CLS CPLR § 4545(c), of proving injured plaintiff’s continued eligibility for Social Security and disability benefits, and thus defendants were not entitled to offset those benefits against jury’s award for future lost earnings, where injured plaintiff, although still partially disabled, had shown some improvement and was

capable of performing limited sedentary work. And, defendants were not entitled to offset, against jury's award for past lost earnings, amount of Social Security benefits paid to injured plaintiff's minor children where entitlement to such payments belonged to children, not to plaintiff. Young v Knickerbocker Arena, 281 A.D.2d 761, 722 N.Y.S.2d 596, 2001 N.Y. App. Div. LEXIS 2510 (N.Y. App. Div. 3d Dep't 2001).

In action by infant plaintiff whose head became trapped between change machine and amusement ride at defendant's amusement kiosk, court properly declined to set aside jury's award of $100,000 for future pain and suffering over 12-year period, where plaintiffs introduced evidence from more than one source that infant plaintiff suffered posttraumatic stress disorder, had memory and reading problems, and would probably suffer from fearfulness and anxiety for remainder of her life. Mahoney v Nanco Cybertainment Inc., 282 A.D.2d 949, 724 N.Y.S.2d 93, 2001 N.Y. App. Div. LEXIS 4167 (N.Y. App. Div. 3d Dep't 2001).

In action by plaintiff who sustained back injuries as result of collision with defendant's boat, court did not err in, sua sponte, vacating jury's award of $20,000 for past pain and suffering covering 4-year period and $240,000 for future pain and suffering covering 15-year period, as 2 components of award were inconsistent and there was no rational basis in record for jury's finding, implicit in its verdict, that plaintiff's pain and suffering would be worse after trial than it was between date of accident and trial. Brown v Cerrone, 283 A.D.2d 934, 723 N.Y.S.2d 915, 2001 N.Y. App. Div. LEXIS 4527 (N.Y. App. Div. 4th Dep't 2001).

Judgment, which included awards for future pain and suffering, future lost earnings, and future medical expenses, as reduced by the trial court pursuant to defendants' motion to set aside the verdict under N.Y. C.P.L.R. § 4404(a), did not deviate from the realm of reasonable compensation. Lorenzo v Mass, Inc., 31 A.D.3d 616, 819 N.Y.S.2d 300, 2006 N.Y. App. Div. LEXIS 9411 (N.Y. App. Div. 2d Dep't 2006).

Because the physicians deviated from accepted practice in assessing, treating, and caring for a patient's acute perforated diverticulum, and because the future pain and suffering award did not deviate materially from what would be considered reasonable compensation under N.Y.

C.P.L.R. 5501(c), the trial court properly denied the physicians' N.Y. C.P.L.R. 4401, 4404 motions. Salmeri v Beth Isr. Med. Center-Kings Highway Div., 39 A.D.3d 841, 834 N.Y.S.2d 314, 2007 N.Y. App. Div. LEXIS 5175 (N.Y. App. Div. 2d Dep't 2007).

Plaintiff, a mother individually and on behalf of her minor child, were entitled to a new trial on damages under N.Y. C.P.L.R. 4404 because the trial court erred in failing to instruct the jury to consider the minor's future pain and suffering following an ankle fracture in determining the damage award as the evidence, which included a hospital record, an operative report, and testimony from the minor and the minor's treating physician, was legally sufficient to support such a damage award. Hughes v Webb, 40 A.D.3d 1035, 837 N.Y.S.2d 698, 2007 N.Y. App. Div. LEXIS 6675 (N.Y. App. Div. 2d Dep't 2007).

Trial court's denial of defendants' N.Y. C.P.L.R. 4404(a) motion to set aside a jury verdict relating to plaintiff's future pain and suffering award was error because the $1,000,000 award for future pain and suffering was excessive; the award for future pain and suffering was vacated unless plaintiff consented to a reduction to $675,000. Avitabile v Joseph J. Caspi, Inc., 50 A.D.3d 833, 855 N.Y.S.2d 654, 2008 N.Y. App. Div. LEXIS 3355 (N.Y. App. Div. 2d Dep't 2008).

Heath care provider's motion to set aside the jury verdict under N.Y. C.P.L.R. 4404(a) in a medical malpractice action as to the award for future pain and suffering was granted because the future pain and suffering award materially deviated from what was reasonable in the case. Accordingly, a new trial was directed on those damages only unless the mother executed and filed a written stipulation decreasing the verdict for future pain and suffering to the amount that the trial court found to be reasonable. Harding v Onibokun, 828 N.Y.S.2d 780, 14 Misc. 3d 790, 2006 N.Y. Misc. LEXIS 4104 (N.Y. Sup. Ct. 2006).

Pursuant to N.Y. C.P.L.R. art. 4404(a), it is procedurally improper for a trial court to enter a judgment reducing the award of damages for future pain and suffering without granting a new trial on that issue unless the plaintiff stipulates to reduce the verdict; trial court erred in reducing the amount of damages down to zero without setting a new trial in an action where the jury awarded a pedestrian $40,000 for future pain and suffering after a truck ran over his feet. McNeil

v MCST Preferred Transp. Co., 301 A.D.2d 579, 753 N.Y.S.2d 866, 2003 N.Y. App. Div. LEXIS 442 (N.Y. App. Div. 2d Dep't 2003).

Plaintiff's motion under N.Y. C.P.L.R. 4404 for a new trial on the issue of damages for future pain and suffering should have been granted where the supreme court erred in charging the jury that it had to find that the plaintiff sustained a permanent consequential limitation of the use of a body organ or member under N.Y. Ins. Law § 5102(d) to consider the issue of damages for future pain and suffering; the jury should have been instructed to consider the issue of future damages after it determined that plaintiff had sustained a significant limitation of use of a body function or system. Rizzo v DeSimone, 6 A.D.3d 600, 775 N.Y.S.2d 531, 2004 N.Y. App. Div. LEXIS 4685 (N.Y. App. Div. 2d Dep't 2004).

Where an award for future pain and suffering in favor of an injured pedestrian deviated materially from what would be reasonable compensation to the extent indicated, under N.Y. C.P.L.R. 5501(c), the trial court erred in denying a city's motion to set that part of the verdict aside, and a new trial on damages was awarded on appeal, unless the pedestrian agreed to a $200,000 reduction of said damages. Granovskaya v City of New York, 13 A.D.3d 412, 787 N.Y.S.2d 62, 2004 N.Y. App. Div. LEXIS 15257 (N.Y. App. Div. 2d Dep't 2004).

Trial court erred in denying the injured party's motion to set aside the verdict to the extent that the jury did not award anything to the injured party for future pain and suffering, as the refusal to award anything for that aspect of damages was not a fair interpretation of the evidence. Evers v Carroll, 17 A.D.3d 629, 794 N.Y.S.2d 398, 2005 N.Y. App. Div. LEXIS 4411 (N.Y. App. Div. 2d Dep't 2005).

Because a jury award for future pain and suffering deviated materially from what would be reasonable, and because part of the future medical expenses award constituted a basic economic loss that was not recoverable under N.Y. Ins. Law §§ 5102(a)(1)(2), 5104, the trial court erred in denying the defendants' N.Y. C.P.L.R. 4404 motions to set aside the award. Sanchez v Kronengold, 33 A.D.3d 607, 822 N.Y.S.2d 294, 2006 N.Y. App. Div. LEXIS 11990 (N.Y. App. Div. 2d Dep't 2006).

That plaintiff died the day after the trial court awarded her lump sum damages for future pain and suffering did not require the trial court to vacate that award, because under the plain language of N.Y. C.P.L.R. 5045(a), damages awarded in a lump sum for future pain and suffering were not contingent on plaintiff's actual longevity. Stinton v Robin's Wood, Inc., 45 A.D.3d 203, 842 N.Y.S.2d 477, 2007 N.Y. App. Div. LEXIS 9795 (N.Y. App. Div. 2d Dep't 2007), app. denied, 10 N.Y.3d 708, 859 N.Y.S.2d 393, 889 N.E.2d 80, 2008 N.Y. LEXIS 1091 (N.Y. 2008).

30. Post-verdict jury matters; polling, verdict sheets and the like

Appellate Division would order that new trial be limited to issue of total damages where confusing and ambiguous wording of special verdict sheet confirmed trial court's conclusion that jurors experienced substantial confusion in reaching their verdict as to precise amount they intended to award plaintiff, but neither party placed in issue jurors' apportionment of fault. Moore v John Bohlsen Associates, Inc., 141 A.D.2d 468, 530 N.Y.S.2d 6, 1988 N.Y. App. Div. LEXIS 7234 (N.Y. App. Div. 1st Dep't 1988).

In action against contractor that performed work on plaintiffs' home without obtaining requisite home improvement license, court properly reduced plaintiffs' refund by amount defendant contractor paid to its subcontractors, where trial minutes and verdict sheet clearly showed that jury improperly failed to distinguish between value of work performed by defendant and that performed by its subcontractors. Hunt v Contracting & Kitchen Centre, 227 A.D.2d 120, 641 N.Y.S.2d 668, 1996 N.Y. App. Div. LEXIS 4768 (N.Y. App. Div. 1st Dep't 1996).

New trial on issue of damages in medical malpractice action would be ordered where verdict sheet submitted to jury was unclear and confusing, jury was not instructed to disregard apportionment of liability and determine full amount of damages, and trial court's questioning of jurors revealed that they misunderstood court's instructions and verdict sheet. Flanagan v Southside Hosp., 251 A.D.2d 447, 674 N.Y.S.2d 723, 1998 N.Y. App. Div. LEXIS 6928 (N.Y. App. Div. 2d Dep't 1998).

In negligence action to recover for pain and suffering and wrongful death, where jury returned verdict in plaintiff's favor on issue of liability only and reported an inability to agree on damages and issues of damages and liability were not interwoven, new trial was warranted only on unresolved issue of damages. Garcia v Herald Tribune Fresh Air Fund, Inc., 80 Misc. 2d 970, 365 N.Y.S.2d 134, 1975 N.Y. Misc. LEXIS 2297 (N.Y. Sup. Ct. 1975), aff'd, 51 A.D.2d 897, 380 N.Y.S.2d 676, 1976 N.Y. App. Div. LEXIS 11550 (N.Y. App. Div. 1st Dep't 1976).

31. Punitive damages

Award of punitive damages for fraud and conversion was warranted where defendants' conduct was egregious, malicious, and intentional. H.B. Int'l Ltd. v Kahan Jewelry Corp., 266 A.D.2d 77, 700 N.Y.S.2d 671, 1999 N.Y. App. Div. LEXIS 11621 (N.Y. App. Div. 1st Dep't 1999).

On a motion pursuant to CPLR § 4404 to set aside a verdict in a sexual abuse and harassment case, the trial court could properly consider the contents of a note handed up by the jury with its verdict, explaining its decision to award "minimal damages," even though no explanation was sought of the jury. Micari v Mann, 126 Misc. 2d 422, 481 N.Y.S.2d 967, 1984 N.Y. Misc. LEXIS 3636 (N.Y. Sup. Ct. 1984).

Defendant corporation was not entitled to order setting aside entire punitive damage award on grounds that defendant's shareholders had entirely changed, and that those new individuals should not be liable for punitive damages due to prior shareholders' misconduct, where (1) it was not new shareholders, or even former shareholders, who had been held liable, (2) corporation was owner of subject premises throughout entire period, (3) new group of shareholders chose to acquire corporation by purchase of its shares and "gladly" acquired certain tax and other business benefits by so doing, and (4) new shareholders had been in control for past 7 or 8 years during which they had done nothing to comply with outstanding administrative order. Yokley v Henry-Clark Assocs., 164 Misc. 2d 177, 624 N.Y.S.2d 341, 1995 N.Y. Misc. LEXIS 78 (N.Y. Civ. Ct. 1995), app. dismissed, rev'd, 170 Misc. 2d 779, 655 N.Y.S.2d 714, 1996 N.Y. Misc. LEXIS 563 (N.Y. App. Term 1996).

In medical malpractice action, court declined to set aside punitive damages award, even though jury found that plaintiff had knowledge of risks involved and thus impliedly assumed risk of injury, as jury was entitled to find that defendant's intent in dealing with plaintiff was motivated by greed and that he was reckless in his care of her based on evidence that his practice of prescribing nutrition as cure was designed to enable companies in which he had financial interests to sell products. Charell v Gonzalez, 173 Misc. 2d 227, 660 N.Y.S.2d 665, 1997 N.Y. Misc. LEXIS 265 (N.Y. Sup. Ct. 1997), modified, aff'd in part, vacated in part, 251 A.D.2d 72, 673 N.Y.S.2d 685, 1998 N.Y. App. Div. LEXIS 6503 (N.Y. App. Div. 1st Dep't 1998).

Because a surgical center had, among other failings, no written plan to implement a patient's right to have privacy in treatment and confidentiality in the treatment of personal and medical records, and a nurse called a 20-year-old patient's home and provided her mother with sufficient information for the mother to determine her daughter had an abortion, punitive damages were appropriate; thus, the surgical center's motion to set aside the verdict based on punitive damages not being available was properly denied. Randi A. J. v Long Is. Surgi-Center, 46 A.D.3d 74, 842 N.Y.S.2d 558, 2007 N.Y. App. Div. LEXIS 9965 (N.Y. App. Div. 2d Dep't 2007).

32. Settlement, effect of

In action for injuries sustained by infant plaintiff while in care of defendant hospital, court did not err in setting aside jury's verdict as excessive to extent of ordering new trial on damages unless plaintiffs consented to accept reduced award, but improperly characterized its order as settlement and held that reduced award did not have to be structured, where plaintiff did not consent to reduction of verdict and both parties conceded that no settlement occurred; case originally sounded in medical malpractice as well as negligence, but verdict was returned on non-medical malpractice injuries, requiring application of CLS CPLR Art 50-B. Bermeo by Bermeo v Atakent, 241 A.D.2d 235, 671 N.Y.S.2d 727, 1998 N.Y. App. Div. LEXIS 4431 (N.Y. App. Div. 1st Dep't 1998).

ii. Excessive Damages

33. Generally

Although the trial court properly set aside a verdict as being excessive, where the questions of negligence and freedom from contributory negligence were fully and fairly tried, an order for a new trial would be modified to the extent of ordering a new trial solely on the issue of damages. Kane v Bateman, 28 A.D.2d 814, 281 N.Y.S.2d 647, 1967 N.Y. App. Div. LEXIS 3684 (N.Y. App. Div. 4th Dep't 1967).

A trial judge’s order setting aside a verdict on the grounds of excessiveness or inadequacy should be reversed only when it is not reasonably grounded. Hussey v Oneida Motor Freight Inc., 30 A.D.2d 741, 291 N.Y.S.2d 393, 1968 N.Y. App. Div. LEXIS 3593 (N.Y. App. Div. 3d Dep't 1968).

The action of the trial court in absolutely and unconditionally reducing verdicts rendered by the jury was error and constituted a usurpation by the court of the function of the jury to assess damages where, as in a negligence case, they are not liquidated. The proper procedure would have been to direct a new trial on the issue of damages alone unless the respective plaintiffs stipulated to remit the amounts the trial court found to be excessive. Ferro v Maline, 31 A.D.2d 779, 296 N.Y.S.2d 967, 1969 N.Y. App. Div. LEXIS 4833 (N.Y. App. Div. 4th Dep't 1969).

Although an award of $50,000 damages for conscious pain and suffering was excessive, it was error for trial court to usurp jury’s function by unconditionally substituting $10,000 award for the actual verdict, the proper proceeding being to direct a new trial on the issue of damages only unless plaintiff would agree to remit to court the amount found excessive. Kupitz v Elliott, 42 A.D.2d 898, 347 N.Y.S.2d 705, 1973 N.Y. App. Div. LEXIS 3527 (N.Y. App. Div. 1st Dep't 1973).

In malpractice action against family counselor who, inter alia, involved himself in sexual relationship with plaintiff’s wife, it was not error to set aside verdict in favor of plaintiff unless he stipulated to reduction of award from $150,000 to $80,000, even though plaintiff’s expert testified

that plaintiff suffered emotional damage which affected his ability to maintain intimate relationships, that damage was permanent to some extent, and that future therapy would cost $6,000 per year for 2 to 4 years and $2,000 per year thereafter, since record established that therapy had cost plaintiff only $700 to date of trial and that he was gainfully employed, was attending school, and had entered into intimate relationship with another woman. Hedgepeth v Merz, 131 A.D.2d 955, 516 N.Y.S.2d 539, 1987 N.Y. App. Div. LEXIS 48367 (N.Y. App. Div. 3d Dep't 1987), app. dismissed, 70 N.Y.2d 836, 523 N.Y.S.2d 491, 518 N.E.2d 3, 1987 N.Y. LEXIS 19056 (N.Y. 1987), app. dismissed, 73 N.Y.2d 784, 536 N.Y.S.2d 741, 533 N.E.2d 671, 1988 N.Y. LEXIS 3422 (N.Y. 1988).

It was error for court to reduce jury award for future medical expenses on basis of insufficiency of evidence; proper remedy was to order new trial on issue of damages. Kosinski v Consolidated Rail Corp., 195 A.D.2d 964, 601 N.Y.S.2d 754, 1993 N.Y. App. Div. LEXIS 7740 (N.Y. App. Div. 4th Dep't 1993).

Court erred in setting aside, in toto, punitive damage award as matter of law in action against parlor for unauthorized autopsy performed on plaintiff’s father contrary to decedent’s religious beliefs in violation of CLS Pub Health § 4210-c, where evidence showed that funeral parlor instigated call for reevaluation of “no-case” decision of medical examiner and also “rushed” body to office of chief medical examiner to have autopsy performed immediately for its own scheduling convenience, without notifying family members, in disregard not only of Jewish religious law but of provisions of CLS Pub Health § 4210-c; such evidence furnished valid line of reasoning to reach permissible inference that funeral parlor had acted consciously and deliberately in complete disregard of both civil and religious law. Liberman v Riverside Mem. Chapel, 225 A.D.2d 283, 650 N.Y.S.2d 194, 1996 N.Y. App. Div. LEXIS 12299 (N.Y. App. Div. 1st Dep't 1996).

Award of $1.4 million for decedent’s conscious pain and suffering was excessive, and would be reduced to $500,000, even though she suffered massive injuries in traffic accident, where she

was only minimally conscious before she died. Glassman v City of New York, 225 A.D.2d 658, 640 N.Y.S.2d 139, 1996 N.Y. App. Div. LEXIS 2599 (N.Y. App. Div. 2d Dep't 1996).

In action by passenger in minibus that collided with overpass, award of $750,000 for past and future pain and suffering deviated materially from what would be reasonable compensation, and should be reduced to principal amount of $450,000, where plaintiff sustained 2 herniated discs and developed hypertrophic posterior spurs, causing pain and permanent disability in that he could not freely move his neck from side to side. Adams v Romero, 227 A.D.2d 292, 642 N.Y.S.2d 673, 1996 N.Y. App. Div. LEXIS 5768 (N.Y. App. Div. 1st Dep't 1996).

It was appropriate to award plaintiff $250,000 for past pain and suffering and $425,000 for future pain and suffering where she sustained closed-head injury, broken nose, cervical sprain, and post-concussive syndrome. Also, plaintiff was properly awarded $150,000 for past and future pain and suffering where his knee injury involved torn cartilage, it prevented him from working for some 18 months and ultimately resulted in permanent 15 percent loss of use of his knee and foot, he would likely require additional arthroscopic surgery and could need knee replacement, and he could no longer due certain kinds of work without assistance. Duff v Mariani, 248 A.D.2d 905, 670 N.Y.S.2d 615, 1998 N.Y. App. Div. LEXIS 2834 (N.Y. App. Div. 3d Dep't 1998).

Obstetrical malpractice verdict of $2.6 million for past and future pain and suffering of premature child whose cerebral palsy and spastic diplegia left him unable to walk and almost totally dependent on others for his personal needs nevertheless would be reduced to $2 million where verdicts in recent comparable cases did not exceed $2 million for those items. Karney by Karney v Arnot-Ogden Mem'l Hosp., 251 A.D.2d 780, 674 N.Y.S.2d 449, 1998 N.Y. App. Div. LEXIS 6740 (N.Y. App. Div. 3d Dep't), amended, 688 N.Y.S.2d 923, 1998 N.Y. App. Div. LEXIS 9351 (N.Y. App. Div. 3d Dep't 1998), app. dismissed, 92 N.Y.2d 942, 681 N.Y.S.2d 470, 704 N.E.2d 223, 1998 N.Y. LEXIS 3719 (N.Y. 1998).

In action for obstetrical malpractice on behalf of premature child whose cerebral palsy and spastic diplegia left him unable to walk and almost totally dependent on others for his personal needs, verdict awarding $1.5 million for home equipment adaptations and transportation and $2

million for therapies was duplicative, and were properly reduced to $300,000 and $200,000, where those items were intended to provide compensation for 60.6 years, plaintiff would be living in group home after his 21st birthday, group home would provide those items, and reductions comported with opinion of economist as to cost of providing those services to plaintiff to age 21. Verdict of $4 million for cost of lifetime group home was not excessive where there was evidence that such cost would be $3,784,928 without inflation and $8,435,450 with 2.6 percent inflation rate. Karney by Karney v Arnot-Ogden Mem'l Hosp., 251 A.D.2d 780, 674 N.Y.S.2d 449, 1998 N.Y. App. Div. LEXIS 6740 (N.Y. App. Div. 3d Dep't), amended, 688 N.Y.S.2d 923, 1998 N.Y. App. Div. LEXIS 9351 (N.Y. App. Div. 3d Dep't 1998), app. dismissed, 92 N.Y.2d 942, 681 N.Y.S.2d 470, 704 N.E.2d 223, 1998 N.Y. LEXIS 3719 (N.Y. 1998).

Award of damages in medical malpractice action would be reduced by amount paid to plaintiffs by settling joint tortfeasors. Baumgarten v Slavin, 255 A.D.2d 538, 680 N.Y.S.2d 658, 1998 N.Y. App. Div. LEXIS 12942 (N.Y. App. Div. 2d Dep't 1998).

New trial would be granted on issues of past and future medical expenses unless personal injury plaintiff stipulated to reduced award of nothing for past medical expenses and $25,500 for future medical expenses where first $50,000 of basic economic loss is not recoverable under CLS Ins § 5104(a), amount of past medical expenses incurred did not exceed that $50,000 offset, remaining $42,000 of offset had to be applied to award of future medical expenses, that award of $200,000 was excessive, and any award above $67,500 for future medical expenses was speculative. Lloyd v Russo, 273 A.D.2d 359, 709 N.Y.S.2d 589, 2000 N.Y. App. Div. LEXIS 7068 (N.Y. App. Div. 2d Dep't 2000).

It was error for trial court to enter judgment reducing verdict for punitive damages without ordering new trial on issue unless plaintiffs stipulated to reduce verdict. K. Capolino Constr. Corp. v White Plains Hous. Auth., 275 A.D.2d 347, 712 N.Y.S.2d 158, 2000 N.Y. App. Div. LEXIS 8694 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 769, 722 N.Y.S.2d 472, 745 N.E.2d 392, 2000 N.Y. LEXIS 3838 (N.Y. 2000).

In action by worker who sustained spinal injuries in fall from 40-foot scaffold, evidence did not support award of $100,000 over 32 years for future medical expenses where costs of worker's required surgery, hospital stay, follow-up medical appointments, and MRIs every other year would amount to $53,400, and testimony that worker would require medication and either physical therapy or chiropractic services for rest of his life was not supported by evidence of costs; thus, new trial on damages for future medical expenses would be granted unless parties stipulated to reduction to $53,400. Strangio v New York Power Auth., 275 A.D.2d 945, 713 N.Y.S.2d 613, 2000 N.Y. App. Div. LEXIS 9506 (N.Y. App. Div. 4th Dep't 2000).

In action against employer for exposure of employees to dangerous substances, new trial would be granted to employer on issue of damages where jury awarded 3 plaintiffs damages of $359,888, $242,211, and $103,819, respectively, and jury's award for future pain and suffering deviated materially from reasonable compensation for their injuries. Aguirre v Long Island R.R. Co., 286 A.D.2d 658, 730 N.Y.S.2d 122, 2001 N.Y. App. Div. LEXIS 8549 (N.Y. App. Div. 2d Dep't 2001).

Judgment for plaintiff would be modified by vacating award of damages for future medical expenses, and new trial on sole issue of such damages would be granted unless plaintiff stipulated to reduce verdict for future medical expenses to $1,733,439, where expert economist testified that cost of plaintiff's future medical care was $1,733,439, and record did not support award of any greater amount. Hersh v Przydatek, 286 A.D.2d 984, 730 N.Y.S.2d 916, 2001 N.Y. App. Div. LEXIS 8893 (N.Y. App. Div. 4th Dep't 2001).

In a personal injury action where a motorcyclist suffered an amputated leg, a driver and a vehicle were entitled to set aside the jury verdict under N.Y. C.P.L.R. § 4404 because the award of future medical expenses required a reduction beyond that ordered by the trial court as, inter alia, a future above-the-knee amputation would likely not occur and a below-the-knee prosthesis would probably not be used on a daily basis; the award was reduced from $2,872,400 to $1.5 million. Firmes v Chase Manhattan Automotive Fin. Corp., 50 A.D.3d 18, 852 N.Y.S.2d 148,

2008 N.Y. App. Div. LEXIS 450 (N.Y. App. Div. 2d Dep't), app. denied, 11 N.Y.3d 705, 866 N.Y.S.2d 608, 896 N.E.2d 94, 2008 N.Y. LEXIS 2613 (N.Y. 2008).

Awards of compensatory and punitive damages by a jury verdict in favor of an accusee in his action that alleged malicious prosecution and defamation was supported by the evidence, as the accusee incurred legal fees in defending himself against criminal charges, he suffered medical and psychological problems from the surrounding effects of the criminal charges on his personal and professional life, and the ratio of punitive damages to compensatory damages was acceptable and did not indicate that the punitive damages were exorbitant. Strader v Ashley, 61 A.D.3d 1244, 877 N.Y.S.2d 747, 2009 N.Y. App. Div. LEXIS 2988 (N.Y. App. Div. 3d Dep't 2009).

Decedent’s past pain and suffering award in a trip and fall case was reduced from $1,500,000 to $400,000. Gonzalez v New York City Tr. Auth., 87 A.D.3d 675, 929 N.Y.S.2d 159, 2011 N.Y. App. Div. LEXIS 6227 (N.Y. App. Div. 2d Dep't 2011).

Award of damages in a traffic accident deviated materially from reasonable compensation and the case was remitted for a new trial on damages, unless the motorist consented to reduce the damages for past pain and suffering from $100,000 to $40,000, and to reduce the damages for future pain and suffering from $100,000 to $75,000, and to the entry of an appropriate amended judgment. Caliendo v Ellington, 104 A.D.3d 635, 960 N.Y.S.2d 471, 2013 N.Y. App. Div. LEXIS 1318 (N.Y. App. Div. 2d Dep't 2013).

While the award of damages for an injured pedestrian’s future medical expenses was reduced to the amount that was submitted by the pedestrian at trial, the trial court properly denied the building owner’s cross-motion to set aside a jury verdict that awarded damages for the pedestrian’s past and future medical expenses. Pilgrim v Wilson Flat, Inc., 110 A.D.3d 973, 973 N.Y.S.2d 738, 2013 N.Y. App. Div. LEXIS 6783 (N.Y. App. Div. 2d Dep't 2013).

Trial court erred in reducing a patient's damages for future medical care, equipment, medications, therapy, medical supplies, loss of earning capacity, and past and future pain and

suffering in the patient's medical malpractice action because it was procedurally improper for the court to reduce the awards without granting a new trial on those issues unless the patient stipulated to reduce the verdict, the court improperly averaged the annual costs, rather than relying on the inflation-adjusted figures submitted into evidence by the parties, and the jury's award for future loss of earning capacity was not speculative and did not deviate materially from what would be reasonable compensation. Reilly v St. Charles Hosp. & Rehabilitation Ctr., 143 A.D.3d 692, 40 N.Y.S.3d 118, 2016 N.Y. App. Div. LEXIS 6380 (N.Y. App. Div. 2d Dep't 2016).

Trial court erred in denying a motion filed by a city and its department of transportation to set aside a jury verdict because the award of damages for a pedestrian's future medical expenses was excessive where there was evidence that the costs were attributable to unrelated medical conditions suffered by the pedestrian, and the nursing home costs were duplicative of other items. Guss v City of New York, 147 A.D.3d 731, 46 N.Y.S.3d 652, 2017 N.Y. App. Div. LEXIS 635 (N.Y. App. Div. 2d Dep't 2017).

Standard of review for lower courts in deciding whether to reduce jury award as excessive on CLS CPLR § 4404 post-trial motion is more demanding “shocks the conscience” standard; less demanding standard of CLS CPLR § 5501(c)—i.e., whether award “deviates materially from what would be reasonable compensation”—applies only to review of award by Appellate Division. Lauria v New York City Dep't of Envtl. Protection, 152 Misc. 2d 543, 577 N.Y.S.2d 764, 1991 N.Y. Misc. LEXIS 673 (N.Y. Civ. Ct. 1991), aff'd, 156 Misc. 2d 31, 600 N.Y.S.2d 603, 1993 N.Y. Misc. LEXIS 253 (N.Y. App. Term 1993).

Court would grant landlords’ motion to set aside jury award of $3,750,000 in punitive damages for wrongful eviction and intentional infliction of emotional distress where assessed value of entire apartment complex was approximately $3 million, and award vastly exceeded any benefit landlords could have derived from their wrongful conduct; however, punitive damage award of $1 million could be justified given that (1) landlords did not direct their misconduct exclusively to plaintiff and his apartment, but their focus was rather to empty 2 buildings consisting of approximately 300 rental units of tenants, (2) plaintiff’s building had remained vacant and

uninhabitable for 12 years despite outstanding repair order, and (3) vacant buildings were worth substantially more than those burdened by rent-controlled and rent-stabilized tenants. Yokley v Henry-Clark Assocs., 164 Misc. 2d 177, 624 N.Y.S.2d 341, 1995 N.Y. Misc. LEXIS 78 (N.Y. Civ. Ct. 1995), app. dismissed, rev'd, 170 Misc. 2d 779, 655 N.Y.S.2d 714, 1996 N.Y. Misc. LEXIS 563 (N.Y. App. Term 1996).

Damage award in action for false arrest would not be reduced where jury determined that police did not have reasonable cause to believe that plaintiff had committed either obstructing government administration or disorderly conduct, and plaintiff had refused to identify himself to police, who had sought to issue him desk appearance ticket and eventually arrested him when he refused to identify himself; even if police had sufficient cause to question plaintiff under common-law right of inquiry, plaintiff had no obligation to respond, and his failure to do so could not be considered culpable conduct. Scott v City of New York, 182 Misc. 2d 654, 699 N.Y.S.2d 642, 1999 N.Y. Misc. LEXIS 510 (N.Y. Civ. Ct. 1999).

Where a pedestrian sued a city after the pedestrian suffered a dislocated shoulder from a fall on a sidewalk, and the evidence indicated that the pedestrian experienced pain and loss of movement in the shoulder and difficulty in performing activities at home and in performing hobbies, the trial court should have granted, in part, the city’s N.Y. C.P.L.R. 4404(a) motion to set aside the award of damages because, for purposes of N.Y. C.P.L.R. 5501(c), the award of $300,000 for future pain and suffering deviated materially from what was reasonable compensation; unless the pedestrian stipulated to an award of only $150,000 for future pain and suffering, a new trial only on the issue of damages for future pain and suffering was required. Conte v City of New York, 300 A.D.2d 430, 751 N.Y.S.2d 575, 2002 N.Y. App. Div. LEXIS 12297 (N.Y. App. Div. 2d Dep't 2002).

In a personal injury case brought by a firefighter, it was error for the trial court to request, prior to the jury’s deliberations, a moment of silence in light of the four-month anniversary of the September 11 attack, but the trial court did not err in denying the defending parties’ mistrial motion, as there was no evidence that substantial justice was not done, so defendants’ new trial

motion, as to this ground, was correctly denied, under N.Y. C.P.L.R. § 4404(a). McNamara v Hittner, 2 A.D.3d 417, 767 N.Y.S.2d 800, 2003 N.Y. App. Div. LEXIS 12855 (N.Y. App. Div. 2d Dep't 2003).

In the medical malpractice action where the trial court granted the doctor's motion pursuant to N.Y. C.P.L.R. 4404 to set aside a jury verdict and to dismiss the complaint only to the extent of granting a new trial on the issue of damages unless the patient stipulated to a reduced verdict from $950,000 to $700,000, the appellate reduced the stipulated damages award even further to $500,000 after finding that $700,000 was excessive pursuant to N.Y. C.P.L.R. 5501(c). King v McMillan, 8 A.D.3d 447, 778 N.Y.S.2d 290, 2004 N.Y. App. Div. LEXIS 8432 (N.Y. App. Div. 2d Dep't 2004).

34. Back

Order granting defendant's motion to set aside verdict in plaintiff's favor in negligence action to recover for back injuries would be affirmed, unless plaintiff agreed to reduction in amount of award, where, although undisputed medical evidence revealed that plaintiff suffered back injuries causing permanent disability, jury verdict did not sufficiently take into account plaintiff's misrepresentations as to severity of injuries as shown by testimony of private investigator who observed plaintiff engaging in activities that plaintiff claimed to be unable to perform. Dittrich v New York, 144 A.D.2d 335, 533 N.Y.S.2d 929, 1988 N.Y. App. Div. LEXIS 11163 (N.Y. App. Div. 2d Dep't 1988).

In action to recover for injuries sustained in automobile accident, court properly refused to set aside award of $184,900 as excessive where (1) plaintiff was nurse who was unable to return to work for 3 months after accident and then ceased working 2 months later due to pain, (2) chiropractor diagnosed plaintiff as having lumbosacral-lumbar strain and cervical strain with nerve root irritation in left cervical region, and (3) neurosurgeon testified that plaintiff had herniated discs in neck and lower back, some of which would cause permanent pain and some of which might be correctable by surgery, even though defendant's expert testified that he found

no objective basis for plaintiff's complaints, that it was unlikely that disc rupture or herniation of disc would occur in automobile accident and that most disc ruptures go away without treatment. Gayton v Palmateer, 163 A.D.2d 780, 558 N.Y.S.2d 744, 1990 N.Y. App. Div. LEXIS 8606 (N.Y. App. Div. 3d Dep't 1990).

In products liability action by 230-pound typist against manufacturer of office chair which collapsed underneath her due to weld defect, causing recurrence of herniated disc, jury's award of $175,000 to plaintiff for medical expenses did not deviate from what would be reasonable compensation (CLS CPLR § 5501), and thus defendant's motion to set aside verdict was properly denied, where plaintiff's treating physician testified that her injuries would be permanent, requiring continued medical care on monthly or bimonthly basis, physical therapy, diagnostic testing, and medications, and plaintiff's expert testified that estimated cost of these future medical necessities projected over plaintiff's remaining life would be $710,855. Reed v Harter Chair Corp., 185 A.D.2d 547, 586 N.Y.S.2d 401, 1992 N.Y. App. Div. LEXIS 9084 (N.Y. App. Div. 3d Dep't 1992).

Award of $175,000 for future pain and suffering was reasonable where 31-year-old plaintiff would suffer substantial pain from her back injuries, which included one herniated and 4 bulging discs. Jordan v Donat, 255 A.D.2d 242, 680 N.Y.S.2d 501, 1998 N.Y. App. Div. LEXIS 12717 (N.Y. App. Div. 1st Dep't 1998).

New trial of personal injury action would be ordered unless plaintiff stipulated in writing to decrease in award of damages for pain and suffering from $426,000 to $175,000, representing $100,000 for past and $75,000 for future pain and suffering, where plaintiff suffered from 4 bulging discs in lumbosacral spine, and those bulges impinged on his thecal sac. Maisonaves v Friedman, 255 A.D.2d 494, 680 N.Y.S.2d 619, 1998 N.Y. App. Div. LEXIS 12654 (N.Y. App. Div. 2d Dep't 1998).

Court properly granted defendant's motion to set aside verdict awarding plaintiff $495,000 for future pain and suffering as result of back injury, but it was improper to order new trial unless plaintiff agreed to reduce award to $75,000; appropriate award under circumstances would be in

amount of $243,000. Court also properly granted defendant's motion to set aside verdict awarding plaintiff $306,000 for future pain and suffering as result of cervical and lumbar muscle strain with radiculopathy and peripheral compression neuropathy, resulting in post-traumatic myofacial pain syndrome, but it was improper to order new trial unless plaintiff agreed to reduce award to $40,000; appropriate award under circumstances would be in amount of $145,000. Osiecki v Olympic Reg'l Dev. Auth., 256 A.D.2d 998, 682 N.Y.S.2d 312, 1998 N.Y. App. Div. LEXIS 13892 (N.Y. App. Div. 3d Dep't 1998).

Award of $2 million, as reduced by trial court from jury's award of $4 million, was not excessive compensation for plaintiff's past and future pain and suffering where plaintiff sustained serious injuries to his hip, back, and spine in construction-site accident, and he faced lifetime of constant pain and severe physical limitations only partially relievable by future medical procedures, such as spinal fusion surgery and hip replacement; thus, court properly ordered new trial unless plaintiff stipulated to reduction to $2 million. Kirby v Turner Constr. Co., 286 A.D.2d 618, 730 N.Y.S.2d 314, 2001 N.Y. App. Div. LEXIS 8571 (N.Y. App. Div. 1st Dep't 2001).

35. Chest

Damage award of $1,000,000 for decedent's conscious pain and suffering was excessive where he sustained wound to his chest when oxygen tank he was refilling exploded, his level of consciousness was listed as "unresponsive" on his admission to hospital no more than 30 minutes after injury, and according to hospital records he remained unresponsive until he expired about 4 hours after accident; thus, new trial would be ordered unless plaintiff stipulated to reduce award to $300,000. Rodd v Luxfer USA Ltd., 272 A.D.2d 535, 709 N.Y.S.2d 93, 2000 N.Y. App. Div. LEXIS 5788 (N.Y. App. Div. 2d Dep't 2000).

Where an individual sued the New York City Transit Authority (New York) after being injured in a head-on collision with a van belonging to the Transit Authority, the jury's verdict was too high and the trial court properly granted a motion to set aside the verdict under N.Y. C.P.L.R. 4404(a) as being excessive, but the trial court's suggested stipulations of a reduced verdict for damages

also deviated materially from what was reasonable compensation; considering the individual's multiple rib fractures, five-day hospitalization during which the individual suffered severe chest pain, and the crepitation in the individual's left knee, $100,000 for past pain and suffering and $75,000 for future pain and suffering was reasonable compensation; also, considering the individual's 10-day hospitalization involving multiple procedures, severe chest pains resulting from a cardiac contusion, and a hand deformity, $125,000 for past pain and suffering and $50,000 for past and future pain and suffering was reasonable compensation. Sandy v N.Y. City Transit Auth., 297 A.D.2d 667, 747 N.Y.S.2d 110, 2002 N.Y. App. Div. LEXIS 8426 (N.Y. App. Div. 2d Dep't 2002).

36. —Matectomy

Physician's motion to set aside malpractice verdict was properly granted to extent of directing new trial on damages unless plaintiff stipulated to reducing pain and suffering award from $2,250,000 to $850,000; larger amount deviated from reasonable compensation for patient who had undergone radical mastectomy on physician's misadvice when less invasive alternate treatment would have been appropriate. Motichka v Cody, 279 A.D.2d 310, 720 N.Y.S.2d 9, 2001 N.Y. App. Div. LEXIS 241 (N.Y. App. Div. 1st Dep't 2001), app. denied, 97 N.Y.2d 609, 739 N.Y.S.2d 98, 765 N.E.2d 301, 2002 N.Y. LEXIS 89 (N.Y. 2002).

37. Consortium; spousal services

In a personal injury action arising out of an accident between an automobile and a New York City Sanitation Department truck, the judgment in favor of plaintiffs would be reversed and a new trial ordered on the issue of damages, unless plaintiffs consented to reduce the verdict in favor of the injured husband from $700,000 to $450,000 and the verdict in favor of his wife from $300,000 to $50,000, since the damages awarded were excessive to the extent indicated. Durso v New York, 96 A.D.2d 458, 464 N.Y.S.2d 769, 1983 N.Y. App. Div. LEXIS 18966 (N.Y. App. Div. 1st Dep't 1983).

In action under CLS Labor §§ 240(1) and 241(6) by boiler repair worker who fell into 3-foot deep pit of scalding water, jury's award to worker's wife of $300,000 for past loss of services and $200,000 for future loss of services was excessive, and new trial on those issues would be ordered unless plaintiffs stipulated to decrease to $200,000 and $100,000 for wife's past and future loss of services, where worker, who was 59 years old at time of fall, sustained second and third degree burns to his legs and feet, was hospitalized for 28 days, and underwent excruciatingly painful debridement and skin grafting procedures resulting in permanent scarring to his legs and feet. Parris v Shared Equities Co., 281 A.D.2d 174, 721 N.Y.S.2d 634, 2001 N.Y. App. Div. LEXIS 2205 (N.Y. App. Div. 1st Dep't 2001).

Trial court properly exercised its discretion in reducing a jury's awards to the wife of an injured worker for the loss of her husband's services on the ground that the awards deviated materially from what would be reasonable compensation. Armellino v Fowler Equip. Corp., 297 A.D.2d 767, 747 N.Y.S.2d 799, 2002 N.Y. App. Div. LEXIS 8882 (N.Y. App. Div. 2d Dep't 2002).

38. Economic loss

In a lessee's action against its lessor for wrongful eviction, the trial court erred in denying the lessor's motion to set aside, pursuant to CPLR § 4404(a), so much of the jury verdict as awarded the tenant damages for loss of inventory where the evidence showed that the merchandise removed by the lessee from the demised premises after the eviction had been relocated to the lessee's other stores and to a storage locker without any recording of the serial number of each item of inventory, and had been commingled with identical merchandise such that there was no way to identify which unit came from the store from which the lessee had been evicted, that the problem had been compounded by use of a similar procedure when two other stores operated by the lessee had closed, and that, when merchandise was later discovered to be missing, missing items that had the same model numbers as items previously stored in the store from which the less had been evicted were attributed to such store by the lessee, even though the other locations had stored units with the same model number. Orangeburg

Associates, Ltd. v Sound & Screen Ventures, Ltd., 104 A.D.2d 641, 480 N.Y.S.2d 113, 1984 N.Y. App. Div. LEXIS 20063 (N.Y. App. Div. 2d Dep't 1984).

Although parties' agreement allowed defendant to terminate contract prior to its completion with damages limited to work performed, including reasonable profit for such work, and even though defendant properly terminated contract before work was completed, jury properly awarded plaintiff $136,824, representing amount that plaintiff would have profited had contract been completed, since court charged (at defendant's request) that jury could disregard measure of damages set forth in contract if unreasonable; accordingly, court erred in setting aside jury's verdict where evidence established that plaintiff had suffered loss of profit in sum of $136,824. Lanes Floor Coverings, Inc. v IBM Corp., 131 A.D.2d 729, 516 N.Y.S.2d 956, 1987 N.Y. App. Div. LEXIS 48186 (N.Y. App. Div. 2d Dep't 1987).

Trial Court properly set aside verdict awarding plaintiff $138,000, and entered judgment awarding plaintiff nominal damages of $1, in action for breach of contract by which plaintiff had been promised lease of space in commercial building, since agreement provided that rent would be charged at "going rate," proof was inadequate to establish that plaintiff had suffered loss of bargain damages, and plaintiff incurred no expenses in preparing to occupy premises. Ravell Productions, Inc. v Serota, 181 A.D.2d 723, 581 N.Y.S.2d 79, 1992 N.Y. App. Div. LEXIS 3267 (N.Y. App. Div. 2d Dep't 1992).

In lessee's action against landlord for breach of covenant of quiet enjoyment, wrongful eviction, and loss of business with respect to demised property on which lessee operated public sports and amusement center, punitive damages were properly awarded to lessee where landlord intentionally prevented ingress and egress to sports center by blocking both entrances in effort to intimidate lessee and terminate parties' valid lease; however, jury's verdict would be set aside unless parties stipulated to decrease punitive damages from $300,000 to $60,000. Suffolk Sports Ctr. v Belli Constr. Corp., 212 A.D.2d 241, 628 N.Y.S.2d 952, 1995 N.Y. App. Div. LEXIS 7097 (N.Y. App. Div. 2d Dep't 1995).

Defendant's claim that jury's award for past medical expenses incurred by plaintiff's wife was duplicative of its award for plaintiff's past loss of earnings was not preserved for appellate review where defendant did not object to charge on lost wages or to verdict sheet that listed as separate damage items plaintiff's lost wages and his wife's medical expenses; in any event, record did not support defendant's claim that plaintiff's economist included value of health insurance in calculation of lost fringe benefits. Myers v S. Schaffer Grocery Corp., 281 A.D.2d 156, 721 N.Y.S.2d 347, 2001 N.Y. App. Div. LEXIS 1908 (N.Y. App. Div. 1st Dep't 2001).

In action for enforcement of lien-discharge bond and for bad faith refusal to make payment on instrument, court improperly denied defendant's motion to set aside verdict awarding plaintiff $750,000 for lost profits where such award was purely speculative in view of uncontroverted testimony given by defendant's forensic accountant. Caribbean Constr. Servs. & Assocs. v Zurich Ins. Co., 286 A.D.2d 218, 729 N.Y.S.2d 27, 2001 N.Y. App. Div. LEXIS 7737 (N.Y. App. Div. 1st Dep't 2001).

In plaintiff's personal injury action, the portion of the jury's verdict which awarded past loss of overtime wages was improperly set aside under N.Y. C.P.L.R. 4404(a) as those damages were not speculative; the evidence presented, including W-2 forms, pay stubs, and testimony of an economist, established the loss with reasonable certainty. Marzano v YSF Realty Corp., 820 N.Y.S.2d 677, 12 Misc. 3d 116, 2006 N.Y. Misc. LEXIS 1778 (N.Y. App. Term 2006).

39. —Future earnings

Claim of lost working hours based on a 10 to 12 hour day, 7-day week, 52-week year is incredible, and new trial is ordered where in disregard of his own opening statement, plaintiff failed to call an accountant to substantiate his lost earnings, and where the court erroneously denied defendant's request for plaintiff to produce his contracts that were contemporaneous with his convalescence and failed to charge that lost earning damages must be established with reasonable certainty. Bielich v Winters, 95 A.D.2d 750, 464 N.Y.S.2d 189, 1983 N.Y. App. Div. LEXIS 18649 (N.Y. App. Div. 1st Dep't 1983).

In products liability action by 230-pound senior typist against manufacturer of office chair which collapsed underneath her due to weld defect, causing recurrence of herniated disc, jury's award of $100,000 to plaintiff for lost earnings did not deviate from what would be reasonable compensation (CLS CPLR § 5501), and thus defendant's motion to set aside verdict was properly denied, where plaintiff's expert testified that her expected earnings for 14.7 years would have been $593,350 but that due to disability resulting from injury her potential earnings were $204,105, for net lost earnings of $389,245. Reed v Harter Chair Corp., 185 A.D.2d 547, 586 N.Y.S.2d 401, 1992 N.Y. App. Div. LEXIS 9084 (N.Y. App. Div. 3d Dep't 1992).

Award of $340,000 for past lost earnings was excessive where uncontested evidence revealed that plaintiff was out of work for 3 ½ years and that he earned approximately $50,000 per year, and award of $255,00 for future lost earnings was not supported by evidence, and thus verdict should be set aside unless plaintiff stipulated to reduce award for past lost earnings to $175,000, and to accept no award for future lost earnings. Place v Federal Pac. Elec. Co., 241 A.D.2d 317, 659 N.Y.S.2d 29, 1997 N.Y. App. Div. LEXIS 7031 (N.Y. App. Div. 1st Dep't), app. denied, 90 N.Y.2d 812, 666 N.Y.S.2d 101, 688 N.E.2d 1383, 1997 N.Y. LEXIS 3654 (N.Y. 1997).

In action for obstetrical malpractice on behalf of premature child whose cerebral palsy and spastic diplegia left him unable to walk and almost totally dependent on others for his personal needs, jury's award of $2 million for impairment of earning capacity was properly set aside where plaintiff's response to defendants' demand for expert witness information was inadequate in that it failed to set forth in reasonable detail facts and opinions on which economist was expected to testify. Karney by Karney v Arnot-Ogden Mem'l Hosp., 251 A.D.2d 780, 674 N.Y.S.2d 449, 1998 N.Y. App. Div. LEXIS 6740 (N.Y. App. Div. 3d Dep't), amended, 688 N.Y.S.2d 923, 1998 N.Y. App. Div. LEXIS 9351 (N.Y. App. Div. 3d Dep't 1998), app. dismissed, 92 N.Y.2d 942, 681 N.Y.S.2d 470, 704 N.E.2d 223, 1998 N.Y. LEXIS 3719 (N.Y. 1998).

In action by worker who sustained spinal injuries in fall from 40-foot scaffold, evidence supported award of $1,500,000 over 18 years for future lost earnings where worker's witnesses testified that he was permanently and totally disabled from construction work and testified to

maximum earnings from work that he could perform, even though defendant's witnesses disagreed. Strangio v New York Power Auth., 275 A.D.2d 945, 713 N.Y.S.2d 613, 2000 N.Y. App. Div. LEXIS 9506 (N.Y. App. Div. 4th Dep't 2000).

Jury award of $1,200,000 for future loss of earnings in a slip and fall accident did not deviate materially from reasonable compensation. Lauro v City of New York, 67 A.D.3d 744, 889 N.Y.S.2d 215, 2009 N.Y. App. Div. LEXIS 8036 (N.Y. App. Div. 2d Dep't 2009).

40. Elbow

Court properly set aside jury verdict and awarded new trial on issue of damages unless plaintiff stipulated to reduction of award from $500,000 to $75,000 where he suffered fractured elbow in fall, but could nevertheless extend his arm to 95 percent full extension; further, his claim did not include damages for lost wages or medical expenses, and there was only minimal evidence that his injury was permanent. Rivera v New York, 170 A.D.2d 591, 566 N.Y.S.2d 367, 1991 N.Y. App. Div. LEXIS 2261 (N.Y. App. Div. 2d Dep't 1991).

41. Foot

Trial court erred when it reduced verdict in podiatric malpractice case on issue of damages and had sum so fixed stand as jury's verdict; proper procedure required that trial court direct new trial on issue of damages unless plaintiffs stipulated to reduce verdict by amount which court found to be excessive. Anderson v Stephen M. Donis, D.P.M., P.C., 150 A.D.2d 414, 541 N.Y.S.2d 25, 1989 N.Y. App. Div. LEXIS 6397 (N.Y. App. Div. 2d Dep't 1989).

42. —Ankle

Award of $30,000 for future medical expense was based on "uninformed speculation," and would be reduced to $18,000, where sole evidence was testimony that plaintiff would eventually have to undergo either "fusion" or "joint replacement" surgery on his ankle at estimated cost of

$10,000 to $12,000. Sanvenero v Cleary, 225 A.D.2d 755, 640 N.Y.S.2d 174, 1996 N.Y. App. Div. LEXIS 3243 (N.Y. App. Div. 2d Dep't 1996).

43. Hand

Where an individual sued the New York City Transit Authority (New York) after being injured in a head-on collision with a van belonging to the Transit Authority, the jury's verdict was too high and the trial court properly granted a motion to set aside the verdict under N.Y. C.P.L.R. 4404(a) as being excessive, but the trial court's suggested stipulations of a reduced verdict for damages also deviated materially from what was reasonable compensation; considering the individual's multiple rib fractures, five-day hospitalization during which the individual suffered severe chest pain, and the crepitation in the individual's left knee, $100,000 for past pain and suffering and $75,000 for future pain and suffering was reasonable compensation; also, considering the individual's 10-day hospitalization involving multiple procedures, severe chest pains resulting from a cardiac contusion, and a hand deformity, $125,000 for past pain and suffering and $50,000 for past and future pain and suffering was reasonable compensation. Sandy v N.Y. City Transit Auth., 297 A.D.2d 667, 747 N.Y.S.2d 110, 2002 N.Y. App. Div. LEXIS 8426 (N.Y. App. Div. 2d Dep't 2002).

Trial court erred in denying a tortfeasor's motion under N.Y. C.P.L.R. 4404(a) as to a jury verdict for an injured party for past and future pain and suffering as the damages awarded were excessive; the injured party's surgery to reconstruct and stabilize the tendon was successful, although he continued to experience pain, weakness, numbness, and loss of motion in his wrist. Harris v City of New York, 2 A.D.3d 782, 770 N.Y.S.2d 380, 2003 N.Y. App. Div. LEXIS 14166 (N.Y. App. Div. 2d Dep't 2003), app. dismissed, 2 N.Y.3d 758, 778 N.Y.S.2d 773, 811 N.E.2d 35, 2004 N.Y. LEXIS 654 (N.Y. 2004).

44. Hip

In action by 73-year-old plaintiff who fell and fractured his hip, jury's verdict was properly set aside as excessive unless parties stipulated to reduction of award from $250,000 to $125,000 for past pain and suffering and from $125,000 to $100,000 for future pain and suffering (based on 9 year life expectancy). Kahl v MHZ Operating Corp., 270 A.D.2d 623, 703 N.Y.S.2d 842, 2000 N.Y. App. Div. LEXIS 2637 (N.Y. App. Div. 3d Dep't 2000).

Award of $2 million, as reduced by trial court from jury's award of $4 million, was not excessive compensation for plaintiff's past and future pain and suffering where plaintiff sustained serious injuries to his hip, back, and spine in construction-site accident, and he faced lifetime of constant pain and severe physical limitations only partially relievable by future medical procedures, such as spinal fusion surgery and hip replacement; thus, court properly ordered new trial unless plaintiff stipulated to reduction to $2 million. Kirby v Turner Constr. Co., 286 A.D.2d 618, 730 N.Y.S.2d 314, 2001 N.Y. App. Div. LEXIS 8571 (N.Y. App. Div. 1st Dep't 2001).

45. Infant's damages

Where $300,000 damage award to infant was grossly excessive but liability was conceded, interest of justice would be best served by giving infant's guardian option of accepting reduced verdict rather than putting all parties through another trial; were it not for fact that liability was clear and conceded and only issue one of damages, new trial on all issues would be ordered. Roman v Bronx-Lebanon Hosp. Ctr., 51 A.D.2d 529, 379 N.Y.S.2d 81, 1976 N.Y. App. Div. LEXIS 10750 (N.Y. App. Div. 1st Dep't), app. denied, 39 N.Y.2d 709, 386 N.Y.S.2d 1027, 1976 N.Y. LEXIS 3411 (N.Y. 1976).

In an action against a hospital to recover damages for surgery performed on an infant without informed consent, the trial court's order setting aside the verdict unless the plaintiff stipulated to a reduction of the $50,000 verdict on the mother's claim for loss of the infant's services to $10,000 would be affirmed where the evidence did not justify an award of $50,000, and where it could not be said that the diminution in the ability of a child to render services at home would not

be equal to $10,000. Zimmerman v New York City Health & Hospitals Corp., 91 A.D.2d 290, 458 N.Y.S.2d 552, 1983 N.Y. App. Div. LEXIS 16129 (N.Y. App. Div. 1st Dep't 1983).

In medical malpractice action, jury's award of $500,000 to infant plaintiff's mother on her derivative claim for loss of services was excessive; however, trial court erred in setting aside award in its entirety, and award of $35,000 would be justified given infant's retardation, attendant behavioral problems, and inability to work in other than structured vocational setting. Trial court properly reduced jury's $2,500,000 award to infant plaintiff for pain and suffering to $1,500,000, despite evidence that infant had to breathe through tracheotomy tube for first 3 years of his life, required constant monitoring during period, and suffered from repeated bouts of respiratory illness, where he would not require surgery or constant medical care in future, and his continued susceptibility to grand mal seizures could be controlled with medication. Defendants were not entitled to set aside of jury's finding that infant plaintiff's future earning capacity was impaired to extent of $740,000, despite "necessarily speculative" computation of damages, where plaintiff's economist testified that plaintiff would have earned total of $741,970 as high school graduate over course of normal work-life expectancy, and defendants adduced no evidence as to what he might have earned over course of his lifetime in vocational setting. Kavanaugh v Nussbaum, 129 A.D.2d 559, 514 N.Y.S.2d 55, 1987 N.Y. App. Div. LEXIS 45230 (N.Y. App. Div. 2d Dep't 1987), modified, 71 N.Y.2d 535, 528 N.Y.S.2d 8, 523 N.E.2d 284, 1988 N.Y. LEXIS 207 (N.Y. 1988).

In action to recover for second degree burn sustained by infant in hospital 11 days after premature birth, court properly denied defense motion to set aside compensatory award of $650,000, including pain and suffering, since award was not so shockingly excessive as to warrant vacatur, where infant's toes on her left foot were permanently mispositioned and without ability to grow toenails, sensitive areas would cause her to experience great pain and redness when wearing shoes, her left leg was smaller than her right, her ability to walk was impeded, and at least one future operation would be required. Rivera v New York, 160 A.D.2d 985, 554 N.Y.S.2d 706, 1990 N.Y. App. Div. LEXIS 5033 (N.Y. App. Div. 2d Dep't 1990).

In action on behalf of 16-year-old plaintiff who had suffered injuries resulting in cerebral palsy and consequential physical and mental handicaps while in care of prenatal intensive care unit of defendant hospital, value put on projected cost of future care by jury was so excessive that reduction from $31 million to $3.15 million was required, utilizing projected cost of $50,000 annually for residential care (inclusive of equipment and medical costs) for remaining 63 years of life projected by actuarial tables. Bermeo by Bermeo v Atakent, 241 A.D.2d 235, 671 N.Y.S.2d 727, 1998 N.Y. App. Div. LEXIS 4431 (N.Y. App. Div. 1st Dep't 1998).

Obstetrical malpractice verdict of $13,629,000 for premature child whose cerebral palsy and spastic diplegia left him unable to walk and almost totally dependent on others for his personal needs was nevertheless excessive where verdicts in recent comparable cases ranged from $6 to $9 million. Karney by Karney v Arnot-Ogden Mem'l Hosp., 251 A.D.2d 780, 674 N.Y.S.2d 449, 1998 N.Y. App. Div. LEXIS 6740 (N.Y. App. Div. 3d Dep't), amended, 688 N.Y.S.2d 923, 1998 N.Y. App. Div. LEXIS 9351 (N.Y. App. Div. 3d Dep't 1998), app. dismissed, 92 N.Y.2d 942, 681 N.Y.S.2d 470, 704 N.E.2d 223, 1998 N.Y. LEXIS 3719 (N.Y. 1998).

Although there was legally sufficient evidence to find that a physician deviated from accepted medical practice during an infant’s birth, the jury verdict on the issues of future pain and suffering, future nursing, therapy, and personal care, and future loss of earnings deviated materially from what would be reasonable compensation; therefore, the trial court erred in denying the physician’s N.Y. C.P.L.R. 4404 motion to set aside the verdict. Flaherty v Fromberg, 46 A.D.3d 743, 849 N.Y.S.2d 278, 2007 N.Y. App. Div. LEXIS 12847 (N.Y. App. Div. 2d Dep't 2007).

There was no competent evidence that the infant would have required a heart transplant, and a jury’s award for future medical expenses based on a heart transplant was improper; putting aside the cost of a heart transplant the court found that the evidence supported an award for future medical costs of $655,100. Haleemeh M. S. v MRMS Realty Corp., 904 N.Y.S.2d 862, 28 Misc. 3d 443, 243 N.Y.L.J. 105, 2010 N.Y. Misc. LEXIS 1051 (N.Y. Sup. Ct. 2010).

Trial court erred in granting plaintiffs' applications pursuant to CPLR 4404 to set aside a jury verdict in favor of the defendants in a personal injury action as against the weight of the evidence, and pursuant to CPLR 4401 for judgment as a matter of law on the issue of liability; although an infant plaintiff was injured due to an alleged defect within an escalator, based on the evidence adduced at trial, the jury rationally found that defendants were not negligent in their maintenance and operation of the escalator, and there was also no proof of any actual or constructive notice regarding the allegedly unsafe condition. Georgas v Mays Dep't Stores, Inc., 299 A.D.2d 314, 749 N.Y.S.2d 151, 2002 N.Y. App. Div. LEXIS 10482 (N.Y. App. Div. 2d Dep't 2002).

46. Knee

In action for injuries sustained in automobile accident, trial judge improvidently exercised his discretion in setting aside jury verdict of $25,500 and ordering new trial on damages since, although proof showed that plaintiff was able to maintain most of her daily activity, it also showed that her injury was permanent and that use of her knee was limited. Akin v Estate of Patti, 149 A.D.2d 964, 540 N.Y.S.2d 397, 1989 N.Y. App. Div. LEXIS 5996 (N.Y. App. Div. 4th Dep't 1989).

Court improperly granted defendants' motion for new trial unless plaintiff stipulated to reduce awards for past and future pain and suffering from [1]50,000 and $450,000 to $75,000 and $150,000, respectively, where plaintiff, who had been very active and athletic 28-year old at time of accident, suffered torn medial meniscus, which was removed in first surgery, following which degenerative arthritis developed in inner part of knee and under surface of patella, she underwent second surgery 3 years later, she continued to experience pain, swelling, and buckling of knee, she was no longer able to participate in athletic activities, and she could expect ongoing development of arthritic changes and chondromalacia. Garcia v Queens Surface Corp., 271 A.D.2d 277, 707 N.Y.S.2d 53, 2000 N.Y. App. Div. LEXIS 4109 (N.Y. App. Div. 1st Dep't 2000).

Jury's award of $1,000,000 for future pain and suffering was unreasonable, and new trial on that issue would be ordered unless plaintiff stipulated to reduction to $500,000, where (1) 19-year-old plaintiff stepped into manhole, tearing posterior cruciate ligament in his knee and requiring surgery, (2) hardware inserted in knee in 1990 was removed in 1991, and (3) he continued to experience swelling and pain in knee and to walk with limp. Mujica v State Univ. Constr. Fund, 275 A.D.2d 976, 713 N.Y.S.2d 710, 2000 N.Y. App. Div. LEXIS 9776 (N.Y. App. Div. 4th Dep't 2000).

Where an individual sued the New York City Transit Authority (New York) after being injured in a head-on collision with a van belonging to the Transit Authority, the jury's verdict was too high and the trial court properly granted a motion to set aside the verdict under N.Y. C.P.L.R. 4404(a) as being excessive, but the trial court's suggested stipulations of a reduced verdict for damages also deviated materially from what was reasonable compensation; considering the individual's multiple rib fractures, five-day hospitalization during which the individual suffered severe chest pain, and the crepitation in the individual's left knee, $100,000 for past pain and suffering and $75,000 for future pain and suffering was reasonable compensation; also, considering the individual's 10-day hospitalization involving multiple procedures, severe chest pains resulting from a cardiac contusion, and a hand deformity, $125,000 for past pain and suffering and $50,000 for past and future pain and suffering was reasonable compensation. Sandy v N.Y. City Transit Auth., 297 A.D.2d 667, 747 N.Y.S.2d 110, 2002 N.Y. App. Div. LEXIS 8426 (N.Y. App. Div. 2d Dep't 2002).

47. Spine, including disks

In action by worker who sustained spinal injuries in fall from 40-foot scaffold, award of $550,000 for pain and suffering was reasonable where worker suffered daily pain from bulging, possibly herniated, discs, and his pain would worsen over time and continue to restrict his enjoyment of life. Strangio v New York Power Auth., 275 A.D.2d 945, 713 N.Y.S.2d 613, 2000 N.Y. App. Div. LEXIS 9506 (N.Y. App. Div. 4th Dep't 2000).

Award of $2 million, as reduced by trial court from jury's award of $4 million, was not excessive compensation for plaintiff's past and future pain and suffering where plaintiff sustained serious injuries to his hip, back, and spine in construction-site accident, and he faced lifetime of constant pain and severe physical limitations only partially relievable by future medical procedures, such as spinal fusion surgery and hip replacement; thus, court properly ordered new trial unless plaintiff stipulated to reduction to $2 million. Kirby v Turner Constr. Co., 286 A.D.2d 618, 730 N.Y.S.2d 314, 2001 N.Y. App. Div. LEXIS 8571 (N.Y. App. Div. 1st Dep't 2001).

48. Wrongful death

Mere fact that jury's verdict in wrongful death action was excessive on issue of damages could not be interpreted to mean that jury was biased and did not reasonably assess evidence before it with respect to liability, requiring vacatur of judgment, since there was evidence sufficient to support finding that motorman negligently failed to stop train in time to avoid hitting decedent, and damage award was subsequently substantially reduced by trial court. Walker v New York City Transit Authority, 130 A.D.2d 442, 515 N.Y.S.2d 777, 1987 N.Y. App. Div. LEXIS 46418 (N.Y. App. Div. 1st Dep't), app. dismissed, 70 N.Y.2d 797, 522 N.Y.S.2d 113, 516 N.E.2d 1227, 1987 N.Y. LEXIS 19377 (N.Y. 1987).

In action for wrongful death of motorcyclist who collided with truck operated by defendant, jury's award of $239,125 for motorcyclist's conscious pain and suffering was excessive, and new trial would be ordered unless plaintiff administrator should stipulate to reduced recovery of $100,000, where there was no proof that motorcylist sustained any bodily injury or significant physical pain before his death from broken neck on impact, and his emotional pain and suffering lasted only about 5 seconds between his application of brakes and impact. Jury's award of $250,000 to parents of 22-year-old decedent for their loss of his services was not excessive where he lived at parents' home, worked full time as carpenter, directly contributed $50 per week to them, shared out-of-pocket expenses of their modest farming activities, assisted with farm chores, maintained all vehicles and farm machinery, regularly helped with landscaping and snow

removal, made several construction and renovation improvements on property, and planned to stay there and go into farming business with his father. Lang v Bouju, 245 A.D.2d 1000, 667 N.Y.S.2d 440, 1997 N.Y. App. Div. LEXIS 13578 (N.Y. App. Div. 3d Dep't 1997).

Court properly set aside verdict to extent of directing new trial unless plaintiff stipulated to reduction of damages from $504,000 to $300,000 where decedent died as result of failure of emergency medical service personnel to suction endotracheal tube placed in decedent's airway during asthma attack, together with delay in contacting medical control for direction and in transporting decedent to hospital. Woods v City of New York, 272 A.D.2d 215, 707 N.Y.S.2d 628, 2000 N.Y. App. Div. LEXIS 5867 (N.Y. App. Div. 1st Dep't 2000).

Denial of two gastroenterologists' motion pursuant to N.Y. C.P.L.R. 4404(a) was improper as Conscious pain and suffering and medical expenses awards were not reasonable compensation and were excessive under N.Y. C.P.L.R. 5501(c), but the awards for pecuniary loss were not against the weight of the evidence, nor were they unreasonable, as: (1) two gastroenterologists were prejudiced by plaintiff's failure to notify them in the bills of particulars or prior to trial of platintiff's intent to recover the amount charged on the decedent's hospital bill as medical expenses, and (2) it was prejudicial to the gastroenterologists to admit the entire hospital bill as the gastroenterologists were not consulted until five days after the decedent was admitted to the hospital for a medical problem unrelated to the decedent's cause of death. Hoehmann v Siebkin, 38 A.D.3d 839, 832 N.Y.S.2d 643, 2007 N.Y. App. Div. LEXIS 4007 (N.Y. App. Div. 2d Dep't 2007).

Jury's verdict awarding $6 million to the estate of a boy who drowned while on a school trip, and $4 million to the boy's mother on her claim that her son's teachers failed to provide her with timely notification that her son was missing, was excessive, and the trial court granted a board of education's motion to set aside the jury's verdict and for a new trial, but only to the extent of ordering a new trial on the issue of damages if the son's estate refused to accept a reduced award of $2 million and the mother refused to accept a reduced award of $750,000. Maracallo v

Bd. of Educ., 769 N.Y.S.2d 717, 2 Misc. 3d 703, 2003 N.Y. Misc. LEXIS 1621 (N.Y. Sup. Ct. 2003).

iii. Inadequate Damages

49. Generally

Where liability was clear but evidence on damages, including causal connection between the trauma to the plaintiff and certain resulting injuries, was not clear, trial court did not abuse its discretion in determining that inadequate verdict was not the result of a trade-off of finding of liability for reduced award of damages and in limiting new trial to issue of damages alone. Figliomeni v Board of Education, 38 N.Y.2d 178, 379 N.Y.S.2d 45, 341 N.E.2d 557, 1975 N.Y. LEXIS 2304 (N.Y. 1975), reh'g denied, 39 N.Y.2d 743, 1976 N.Y. LEXIS 3487 (N.Y. 1976).

A trial judge’s order setting aside a verdict on the grounds of excessiveness or inadequacy should be reversed only when it is not reasonably grounded. Hussey v Oneida Motor Freight Inc., 30 A.D.2d 741, 291 N.Y.S.2d 393, 1968 N.Y. App. Div. LEXIS 3593 (N.Y. App. Div. 3d Dep't 1968).

New trial would be ordered where amount of verdict in personal injury case, approximately equaling special damages, was patently inadequate. Zlatchin v Wischhusen, 41 A.D.2d 731, 341 N.Y.S.2d 651, 1973 N.Y. App. Div. LEXIS 4871 (N.Y. App. Div. 1st Dep't 1973).

In a personal injury action in which the jury found one defendant to be solely at fault and made a monetary award to the plaintiff, a new trial was warranted where inexplicably the jury made no award for loss of future earnings, and where exoneration of a second defendant appeared to be against the weight of the evidence. Fardys v Urbinati, 78 A.D.2d 835, 433 N.Y.S.2d 150, 1980 N.Y. App. Div. LEXIS 13514 (N.Y. App. Div. 1st Dep't 1980).

In a personal injury action, seeking to recover for alleged injuries that were sustained by plaintiff as the result of an accident on the defendant corporation’s property, plaintiff’s motion to set

aside the jury's verdict that awarded only his hospital costs after finding another corporate defendant guilty of negligence, was properly denied where the jury could have concluded that he sustained no injury, and that the hospital costs were a diagnostic expense, in view of the conflicting medical testimony on his degenerative disc disease, and in view of his false responses to medical tests. Laino v Jamesway Corp., 92 A.D.2d 652, 460 N.Y.S.2d 175, 1983 N.Y. App. Div. LEXIS 16920 (N.Y. App. Div. 3d Dep't 1983).

A new trial would be ordered to determine both liability and damages as to all parties, in an action arising out of a vehicle accident between an automobile whose driver was alleged to have been intoxicated and a bus whose driver was alleged to have been speeding, where the jury's shockingly low award of damages, in view of the sharply and substantially contested issues of liability, and in view of a stipulation between the parties as to plaintiff's special damages, suggested a substantial likelihood that the jury's verdict resulted from a trade off on a finding of liability, in return for a compromise on damages. Farmer v A & T Bus Co., 96 A.D.2d 783, 466 N.Y.S.2d 8, 1983 N.Y. App. Div. LEXIS 19376 (N.Y. App. Div. 1st Dep't), app. dismissed, 61 N.Y.2d 670, 1983 N.Y. LEXIS 6839 (N.Y. 1983).

Damage award of $1,000 was inadequate in medical malpractice case in which jury found physician liable for failure to obtain patient's informed consent prior to performing myelogram, but not liable for any malpractice in performing myelogram, and trial court properly granted plaintiff's motion for new trial on damages unless defendant stipulated for increase to $23,000. Medvejer v Katz, 131 A.D.2d 736, 516 N.Y.S.2d 911, 1987 N.Y. App. Div. LEXIS 48190 (N.Y. App. Div. 2d Dep't 1987), modified, 138 A.D.2d 361, 525 N.Y.S.2d 585, 1988 N.Y. App. Div. LEXIS 2111 (N.Y. App. Div. 2d Dep't 1988).

Buyer of restaurant was entitled to new trial on all issues in his action for rescission of purchase contract based on fraud where evidence was undisputed that buyer had made payments totaling $42,352 toward purchase price, and jury's verdict and answer to special interrogatory were in favor of buyer, but jury awarded buyer only $2,500 after asking court if it could award any amount of monetary damage; verdict reflected improper compromise by jury on issues of liability

and award. Rainbow Food Corp. v Tasty Donut, Inc., 180 A.D.2d 721, 579 N.Y.S.2d 749, 1992 N.Y. App. Div. LEXIS 2584 (N.Y. App. Div. 2d Dep't 1992).

In action to recover for slip-and-fall injuries which were aggravated by subsequent car accident, court did not improvidently exercise its discretion in setting aside jury verdict awarding plaintiff nothing for future damages, although she was awarded $10,000 for pain and suffering, $10,000 for medical expenses, and $16,000 for lost earnings, all from date of fall to date of verdict; in view of testimony from plaintiff and her doctor that her injuries were permanent and were due 50 percent to fall, jury's refusal to award future damages was inconsistent with its finding of past damages, and suggested that verdict was compromise, reflecting confusion as to what injuries were caused by fall as opposed to later car accident. Cochetti v Gralow, 192 A.D.2d 974, 597 N.Y.S.2d 234, 1993 N.Y. App. Div. LEXIS 4407 (N.Y. App. Div. 3d Dep't 1993).

It was error to grant plaintiffs' motion to set aside damage portion of verdict and direct new trial thereon where each of plaintiffs' contentions as to damages, including permanency of injuries and degree of alleged disability, was challenged at trial by defendants' medical experts. Wiseberg v Douglas Elliman-Gibbons & Ives, 224 A.D.2d 361, 638 N.Y.S.2d 82, 1996 N.Y. App. Div. LEXIS 1491 (N.Y. App. Div. 1st Dep't 1996).

Court properly set aside that portion of verdict as made no award for plaintiff's past pain and suffering where he testified at length as to pain he experienced in months following shooting and detailed his increasing need for pain medication, and his treating physician also testified as to plaintiff's persistent complaints of pain following accident. Court also properly set aside that portion of verdict as made no award for plaintiff's future pain and suffering, even though physician called by defendant testified that plaintiff should not be experiencing severe pain from pellet wounds, where both plaintiff's treating physician and second physician specializing in general surgery testified that plaintiff suffered from chronic pain syndrome from gunshot wounds and that such pain would be permanent in nature. But, court did not err in failing to set aside that portion of verdict on defendant's counterclaim as made no award for future pain and suffering, even though physician testified on his behalf that pellet wounds could be possible source of pain

or infection in future, and defendant testified that he continued to experience “small amount” of intermittent pain and soreness, since such testimony did not so preponderate in defendant’s favor that verdict could not have been reached on any fair interpretation of evidence. Failla v Amodeo, 225 A.D.2d 965, 639 N.Y.S.2d 586, 1996 N.Y. App. Div. LEXIS 2809 (N.Y. App. Div. 3d Dep't 1996).

Court properly set aside verdict as to no award for future losses, including medical care, pain and suffering, and lost earnings, where substantial damages were awarded to plaintiff up to date of verdict; as such, it was reasonable for court to find that opinion of defendant’s medical expert, finding that plaintiff sustained minor injury which had long ago resolved itself, was in fact rejected. Burns v Gooshaw, 225 A.D.2d 980, 639 N.Y.S.2d 528, 1996 N.Y. App. Div. LEXIS 2778 (N.Y. App. Div. 3d Dep't 1996).

Court properly denied plaintiff’s motion to set aside jury’s verdict of no recovery for future pain and suffering where accident involved slight impact, plaintiff sustained only soft tissue injuries, manifesting few, if any, objective signs or symptoms, and plaintiff had discontinued physical therapy and resumed full-time employment by time of trial. Kelley v Balasco, 226 A.D.2d 880, 640 N.Y.S.2d 652, 1996 N.Y. App. Div. LEXIS 3731 (N.Y. App. Div. 3d Dep't 1996).

Court erred in denying plaintiffs’ motion to set aside jury verdict as to award for past medical expenses where they produced uncontradicted evidence that such expenses totaled $28,908, and jury only awarded $15,000, which was amount of 1 of 2 bills admitted into evidence without objection; thus, new trial would be granted as to damages for past medical expenses unless defendants stipulated to increase of that award. Small v Yonkers Contr., 256 A.D.2d 326, 681 N.Y.S.2d 344, 1998 N.Y. App. Div. LEXIS 13176 (N.Y. App. Div. 2d Dep't 1998).

Trial court’s decision to set aside verdict and order new trial was proper and indeed prudent exercise of discretion in light of clear inadequacy of $9,000 verdict where jury found 35-year permanent disability. Pinkus v Esch, 257 A.D.2d 366, 682 N.Y.S.2d 576, 1999 N.Y. App. Div. LEXIS 52 (N.Y. App. Div. 1st Dep't 1999).

Jury properly awarded plaintiff $750 for past pain and suffering where his injuries from dog bite required only few stitches and resulted in no complications, he was at first unaware that he had been bitten, and he admitted that he never required any pain medication. Jury properly awarded plaintiff no damages for future pain and suffering as result of dog bite where there was no medical testimony to support any claim of lasting physical impairment or psychological trauma, and scar was in location that was not readily visible. Hornicek v Yonchik, 284 A.D.2d 895, 726 N.Y.S.2d 790, 2001 N.Y. App. Div. LEXIS 6868 (N.Y. App. Div. 3d Dep't 2001).

Trial court properly granted plaintiffs' motion pursuant to N.Y. C.P.L.R. 4404 to set aside the jury's award for future pain and suffering in a medical malpractice action, as the award of no damages for future pain and suffering was contrary to a fair interpretation of the evidence. Fryer v Maimonides Med. Ctr., 31 A.D.3d 604, 818 N.Y.S.2d 607, 2006 N.Y. App. Div. LEXIS 9401 (N.Y. App. Div. 2d Dep't 2006).

Although the trial court properly denied a plaintiff's N.Y. C.P.L.R. 4404(a) motion to set aside the jury verdicts and for a new trial as untimely, the damages awarded for past and future pain and suffering awarded to the plaintiff by a jury were inadequate and had to be increased. Brzozowy v ELRAC, Inc., 39 A.D.3d 451, 833 N.Y.S.2d 590, 2007 N.Y. App. Div. LEXIS 4242 (N.Y. App. Div. 2d Dep't 2007).

Trial court erred in denying plaintiff's motion pursuant to N.Y. C.P.L.R. 4404(a) to set aside the portion of a verdict in a personal injury action concerning past and future pain and suffering, because the amount of those awards deviated materially from the amount of reasonable compensation and was not based upon any fair interpretation of the evidence pursuant to N.Y. C.P.L.R. 5501(c). McAdams v Esposito, 35 A.D.3d 552, 825 N.Y.S.2d 753, 2006 N.Y. App. Div. LEXIS 14914 (N.Y. App. Div. 2d Dep't 2006).

Unpublished decision: In a personal injury action, a motion by a worker pursuant to N.Y. C.P.L.R. 4404 to set aside the jury's verdict against the manufacturer of a lift as to past and future pain and suffering was granted, because the award deviated materially from reasonable compensation in light of the serious and permanent nature of the injuries suffered by the worker,

which caused the worker severe pain and loss of use of his hand, and rendered him unable to work at his occupation. Adams v Genie Indus., Inc., 237 N.Y.L.J. 26, 2007 N.Y. Misc. LEXIS 323 (N.Y. Sup. Ct. Jan. 8, 2007), aff'd, 53 A.D.3d 415, 861 N.Y.S.2d 42, 2008 N.Y. App. Div. LEXIS 6469 (N.Y. App. Div. 1st Dep't 2008).

50. Arm

Court properly denied plaintiff's motion to set aside damage award as inadequate where he had speedy and successful recovery from surgery to reattach his ruptured biceps tendon, he reported no significant residual pain, he had full range of motion with no limitations in stretching or reaching, and he continued weight training 3 days per week and performed cardiovascular training 4 or 5 days per week; thus, award of $3,250 for past pain and suffering and $3,142 for future pain and suffering was appropriate. People ex rel. Hall v Bennett, 267 A.D.2d 644, 700 N.Y.S.2d 406, 1999 N.Y. App. Div. LEXIS 12757 (N.Y. App. Div. 3d Dep't 1999), app. denied, 94 N.Y.2d 762, 707 N.Y.S.2d 622, 729 N.E.2d 341, 2000 N.Y. LEXIS 851 (N.Y. 2000).

51. —Elbow

Jury's award of $11,534.76 for past pain and suffering would be vacated, and new trial on that issue would be granted unless parties stipulated to increase to $35,000, where 76-year-old plaintiff's fractured elbow required surgery and 6 pins to hold it together, pins were later removed because they were causing pain, plaintiff remained in hospital for 6 days after surgery, and she needed assistance from her family for 6 weeks while her arm was in cast. Evidence supported jury's failure to award any damages for future pain and suffering of 76-year-old plaintiff whose elbow was fractured where, at time of trial, plaintiff was not seeking medical treatment for elbow or taking any pain medication, she had only slight limitation of use of elbow, and she was able to cook her own meals, go shopping, and drive her car. Feneck v First Union Real Estate Equity & Mortg. Invs., 266 A.D.2d 916, 698 N.Y.S.2d 206, 1999 N.Y. App. Div. LEXIS 11913 (N.Y. App. Div. 4th Dep't 1999).

Personal injury plaintiff was not entitled to have set aside jury verdict for defendant on issue of damages, even though defendant did not strictly comply with CLS CPLR § 3101(d)(1)(i), where (1) defendant's examining physician was properly allowed to testify that injuries to plaintiff's shoulder and elbow, and resulting surgeries, were not proximately caused by subject accident, and (2) plaintiff could not claim surprise or prejudice as result of that testimony, because issue of causation was implicit in question of damages. Fishkin v Massre, 286 A.D.2d 749, 730 N.Y.S.2d 724, 2001 N.Y. App. Div. LEXIS 8652 (N.Y. App. Div. 2d Dep't 2001), app. denied, 97 N.Y.2d 700, 739 N.Y.S.2d 99, 765 N.E.2d 302, 2002 N.Y. LEXIS 38 (N.Y. 2002).

52. Back

Trial court improperly exercised its discretion in setting aside, as inadequate, $65,000 verdict for 68-year old woman injured when defendant's truck struck wood plank, causing plank to strike her, where (1) plaintiff was hospitalized for 12 days for fractured wrist, fractured foot, and "multiple injuries," (2) evidence was adduced from which jury could reasonably conclude that plaintiff's back condition was preexisting, or was natural consequence of aging process, and (3) "carpal tunnel syndrome" sustained by plaintiff was correctable by surgery which she had declined. Schare v Welsbach Electric Corp., 138 A.D.2d 477, 526 N.Y.S.2d 25, 1988 N.Y. App. Div. LEXIS 2903 (N.Y. App. Div. 2d Dep't 1988).

In action for injuries sustained in slip and fall in supermarket, court properly set aside jury award $15,000 for future pain and suffering, and properly ordered new trial unless defendant agreed to award of $100,000, where (1) plaintiff had been in constant pain since accident, was required to resort to pain relievers, was required to perform isometric exercises daily at 2 hour intervals, and wore cervical collar, (2) plaintiff was prevented from doing most activities she used to enjoy, and limitations affected plaintiff emotionally, (3) plaintiff's husband testified that she was frequently irritable and tired and that their sex life had suffered, and (4) plaintiff's expert testified that plaintiff had considerable lack of motion in her back and radiating pain associated with neck motion, and that symptoms would persist even if she had surgery. Wendell v Supermarkets

Gen. Corp., 189 A.D.2d 1063, 592 N.Y.S.2d 895, 1993 N.Y. App. Div. LEXIS 781 (N.Y. App. Div. 3d Dep't 1993).

Jury verdict in negligence action was against weight of evidence insofar as it awarded plaintiff no damages for future pain and suffering where he continued to suffer back pain and spasms and intermittent leg numbness, his injuries resulted in permanent partial disability that would continue to cause pain, he regularly took medication for chronic back pain, he had limited ability to bend and lift objects, his condition made it uncomfortable for him to sit or stand for any length of time, and, since accident, he was unable to engage in his former sporting activities. Diglio v Gray Dorchester Assocs., 255 A.D.2d 911, 680 N.Y.S.2d 786, 1998 N.Y. App. Div. LEXIS 12115 (N.Y. App. Div. 4th Dep't 1998).

Jury's award of $5,000 for past pain and suffering was inadequate, and new trial would be ordered on issue of damages, where (1) finding that plaintiff sustained "serious injury" in accident showed that jury must have rejected defendants' proof that plaintiff suffered only minor soft-tissue injury, (2) after accident, plaintiff had difficulty completing household chores, exercising, sitting for long periods, and lifting heavy objects, and (3) in order to relieve her severe back pain, she had to use narcotic medication, back brace, and TENS unit. Pares v La Prade, 266 A.D.2d 852, 697 N.Y.S.2d 413, 1999 N.Y. App. Div. LEXIS 11704 (N.Y. App. Div. 4th Dep't 1999).

Court properly granted plaintiffs' motion to set aside jury's aggregate award of damages of $95,000 and granted new trial on damages only where, inter alia, plaintiff sustained broken back, requiring spinal fusion and insertion of bone graft and stainless steel rods and hooks, she also sustained closed head injury with loss of consciousness, 3-centimeter facial laceration to bone, and partially collapsed lung. Kreutter v Goldthorpe, 269 A.D.2d 870, 703 N.Y.S.2d 774, 2000 N.Y. App. Div. LEXIS 1843 (N.Y. App. Div. 4th Dep't 2000).

In a personal injury action, there was evidence at trial that plaintiff suffered from a pre-existing condition with regard to plaintiff's lower back and that surgery had been recommended; therefore, it could not be said that a jury award of $30,300 deviated materially from what would

be reasonable compensation. Denial of plaintiff's N.Y. C.P.L.R. 4404 motion was affirmed. Vaval v NYRAC, Inc., 31 A.D.3d 438, 818 N.Y.S.2d 237, 2006 N.Y. App. Div. LEXIS 8712 (N.Y. App. Div. 2d Dep't 2006), app. dismissed, 8 N.Y.3d 1020, 839 N.Y.S.2d 452, 870 N.E.2d 692, 2007 N.Y. LEXIS 1593 (N.Y. 2007).

Appellate court granted defendant's request for a new trial on damages because the trial judge engaged in unwarranted cross-examination of defendant's expert witness and refused to give a missing witness charge with respect to a doctor who did not testify. O'Brien v Barretta, 1 A.D.3d 330, 766 N.Y.S.2d 871, 2003 N.Y. App. Div. LEXIS 11549 (N.Y. App. Div. 2d Dep't 2003).

53. Collarbone

In action for fractured clavicle sustained by plaintiff in fall, court properly granted plaintiff's motion to set aside, as inadequate, jury verdict awarding her nothing for future damages since evidence was overwhelming that plaintiff's collarbone was permanently disfigured, including photographs depicting bony prominence on clavicle, and plaintiff's medical expert testified that there was "deformity" which was permanent. Nautel v Crates, 173 A.D.2d 936, 569 N.Y.S.2d 800, 1991 N.Y. App. Div. LEXIS 5306 (N.Y. App. Div. 3d Dep't 1991).

Award of $25,000 for past pain and suffering was inadequate where 8-year-old plaintiff suffered fractured clavicle and fractured skull which required life-saving emergency exploratory brain surgery to remove blood clot, he was in coma for several days, and was hospitalized for 8 days, his parents noticed emotional changes in him, and his experts performed neurological and neuropsychological examinations on him and found that he suffered from neurological dysfunction including motor control problems, language difficulties, and visual memory impairment; appropriate award under circumstances would be $125,000. No award for future pain and suffering was inadequate where 8-year-old plaintiff suffered fractured clavicle and fractured skull, and he was suffering and would continue to suffer from neurological and neuropsychological dysfunction and impairment in future; appropriate award would be $150,000.

Dulmer v Lange, 272 A.D.2d 507, 708 N.Y.S.2d 449, 2000 N.Y. App. Div. LEXIS 5815 (N.Y. App. Div. 2d Dep't 2000).

54. Consortium; spousal services

Court in personal injury action should have set aside jury verdict awarding no damages on loss of consortium claim by plaintiff's wife, although parties concededly carried on long-distance marriage and were together for only 2 or 3 months per year, since uncontradicted evidence established existence of valid and continuing marriage and presence of elements of affection, companionship, society, and solace. Rakich v Lawes, 186 A.D.2d 932, 589 N.Y.S.2d 617, 1992 N.Y. App. Div. LEXIS 12390 (N.Y. App. Div. 3d Dep't 1992).

Court properly set aside verdict as to no award of damages for derivative claim of plaintiff's husband where defendants produced no evidence to controvert loss of services claim by him, and jury found plaintiff's testimony believable on question of her injuries. Burns v Gooshaw, 225 A.D.2d 980, 639 N.Y.S.2d 528, 1996 N.Y. App. Div. LEXIS 2778 (N.Y. App. Div. 3d Dep't 1996).

There was no reason to disturb jury's decision not to award damages on wife's derivative claim arising from her husband's injuries in motorcycle accident, even though husband sustained broken thumb and nose, lacerated lip, and 2 damaged teeth, where jury reasonably could have inferred that wife was not significantly deprived of husband's support, companionship, and services or required to provide extensive assistance for long period. Teller v Anzano, 263 A.D.2d 647, 694 N.Y.S.2d 780, 1999 N.Y. App. Div. LEXIS 7833 (N.Y. App. Div. 3d Dep't 1999).

Jury's award of no damages for future pain and suffering or for loss of plaintiff's services to her husband was contrary to weight of evidence, and new trial would be ordered on issue of damages, where (1) after accident, plaintiff had difficulty completing household chores, exercising, sitting for long periods, and lifting heavy objects, and (2) there was evidence that her severe back pain and limitations on her activities would continue and that she might ultimately require surgery. Pares v La Prade, 266 A.D.2d 852, 697 N.Y.S.2d 413, 1999 N.Y. App. Div. LEXIS 11704 (N.Y. App. Div. 4th Dep't 1999).

Trial court properly granted plaintiffs' motion to set aside verdict insofar as it awarded only $6,000 for past pain and suffering and no damages on derivative cause of action, or for future pain and suffering, where plaintiff presented medical and non-medical proof that as result of his injury (fractures of tibia and fibula) he was in severe pain and confined to bed for 4 weeks and disabled from working for over 6 months, his wife provided full-time care while he was confined and performed all household tasks and child care while he was disabled and slept apart from him to avoid causing him more pain, and his injury resulted in permanent partial disability that would continue to cause him pain and significant loss of range of motion in his ankle. Simmons v Dendis Constr., Inc., 270 A.D.2d 919, 705 N.Y.S.2d 779, 2000 N.Y. App. Div. LEXIS 3590 (N.Y. App. Div. 4th Dep't 2000).

55. Foot

Trial court improperly exercised its discretion in setting aside, as inadequate, $65,000 verdict for 68-year old woman injured when defendant's truck struck wood plank, causing plank to strike her, where (1) plaintiff was hospitalized for 12 days for fractured wrist, fractured foot, and "multiple injuries," (2) evidence was adduced from which jury could reasonably conclude that plaintiff's back condition was preexisting, or was natural consequence of aging process, and (3) "carpal tunnel syndrome" sustained by plaintiff was correctable by surgery which she had declined. Schare v Welsbach Electric Corp., 138 A.D.2d 477, 526 N.Y.S.2d 25, 1988 N.Y. App. Div. LEXIS 2903 (N.Y. App. Div. 2d Dep't 1988).

Jury's award for past and future pain and suffering was inadequate ($38,000 and $150,000, respectively) where, on first being admitted to hospital, plaintiff was at risk of bleeding to death and was placed on respirator to enable him to breathe, external fixator was utilized to stabilize his pelvic injuries, he was hospitalized for month, undergoing 2 surgeries, he required assistance of nurse and home health aide on discharge from hospital, he needed physical therapy to become able to walk unassisted, nerve damage to his foot resulted in permanent foot drop and clawing of toes, he could not sit, stand, or walk for extended periods without pain or

need to stretch, he could not perform his usual household chores or engage in many of his pre-accident activities, and prognosis for his injuries was poor, with possibility of future surgery; thus, new trial would be ordered to determine such damages. Jury's award of $25,000 for past lost earnings and $75,000 for projected future lost earnings was inadequate where plaintiff's expert opined that plaintiff sustained loss of past wages and benefits totaling $106,000 and projected future losses of $583,000, and defendants' economist did not testify; thus, new trial would be ordered as to such damages. Edwards v Stamford Healthcare Soc'y Inc., 267 A.D.2d 825, 699 N.Y.S.2d 835, 1999 N.Y. App. Div. LEXIS 13576 (N.Y. App. Div. 3d Dep't 1999).

56. —Ankle

Damages of $7,500 were not so inadequate as to shock conscience of court, and order granting new trial unless parties stipulated to increase verdict to $35,000 would be reversed, where plaintiff suffered simple fractured ankle and lacerations of chin and right elbow, there were no unusual medical complications during convalescence, allegations of permanent injury were limited to subjective contentions of periodic pain, and opinion of medical expert (who never examined plaintiff) that arthritis might develop in ankle joint could have been regarded by jury as speculative. Bauer v Kornhaber, 123 A.D.2d 416, 506 N.Y.S.2d 719, 1986 N.Y. App. Div. LEXIS 60176 (N.Y. App. Div. 2d Dep't 1986).

Jury reached its verdict on fair interpretation of evidence, finding building owner not negligent in maintenance of stairwell, and thus trial court usurped jury's function when it set aside its verdict unless owner stipulated to judgment in specified amount, where (1) plaintiff presented evidence of piece of metal on top stair which caused her to fall, poor lighting in stairwell, serious ankle injury requiring surgery which decreased her mobility, and lack of employment, and (2) defendant presented independent engineer's report showing no bumps and adequate lighting, admission by plaintiff that she was employed, videotape of plaintiff walking 5 blocks and up several flights of stairs to her job, and medical examination which revealed less extensive

injuries not requiring surgery. Martin v McLaughlin, 162 A.D.2d 181, 557 N.Y.S.2d 1, 1990 N.Y. App. Div. LEXIS 7077 (N.Y. App. Div. 1st Dep't 1990).

In personal injury action arising out of automobile-pedestrian collision, court did not err in setting aside, as inadequate, damage award to pedestrian of only $30,000 for past pain, suffering and disability, and no future damages, where evidence showed that he sustained serious injuries in accident, including shoulder dislocation, multiple fractures of leg, ankle and ribs, torn ligament in knee and punctured lung, which necessitated one-month hospitalization and home convalescence for 2 years and left him with permanent deformity in leg, 50 percent loss of motion in ankle, flexion contracture of knee, and post-injury arthritic conditions. Rakich v Lawes, 186 A.D.2d 932, 589 N.Y.S.2d 617, 1992 N.Y. App. Div. LEXIS 12390 (N.Y. App. Div. 3d Dep't 1992).

Plaintiff, 14-year-old found 60 percent liable for accident, was properly awarded $15,000 for past pain and suffering and no damages for future pain and suffering where she sustained fractured left clavicle, “Salter I” fracture of her right ankle, 2 fractures to her jaw, which required her mouth to be wired shut for 6 weeks, and concussion, no surgical intervention was required, and medical experts agreed that no permanent functional effects resulted from those injuries, and disagreed only as to whether bony protrusion over top of plaintiff’s shoulder caused by fracture would remain as permanent cosmetic deformity. Duncan by Guidry v Hillebrandt, 239 A.D.2d 811, 657 N.Y.S.2d 538, 1997 N.Y. App. Div. LEXIS 5560 (N.Y. App. Div. 3d Dep't 1997).

Court properly set aside jury’s award of no damages for past pain and suffering, and court properly ordered additur of $48,500, where plaintiff suffered bimalleolar fracture dislocation of ankle requiring 2 surgical procedures within 17 months and hospitalizations attendant to both surgeries, medical testimony as to seriousness of injury was uncontroverted, and plaintiff’s other witnesses testified to pain that she experienced after her fall and before her second surgery. Ordway v Columbia County Agric. Soc'y, 273 A.D.2d 635, 709 N.Y.S.2d 691, 2000 N.Y. App. Div. LEXIS 7201 (N.Y. App. Div. 3d Dep't 2000).

57. Head, generally

Court properly denied plaintiff's motion to set aside jury verdict awarding $25,000 for past pain and suffering, including loss of enjoyment of life, and nothing for future pain and suffering or economic loss, for injuries sustained while participating in school's football training camp when coach struck him on head 13 or more times with foam rubber tackling dummy as he was performing agility drill, allegedly causing devastating permanent neurological injuries, since there was evidence that preexisting condition could account for many symptoms complained of, that plaintiff sustained injuries and was rendered unconscious in 2 other incidents, that his school work and social life had not been materially or adversely affected, that he had been less than truthful with some of his doctors and psychologists, and that he had perhaps exaggerated effect of injuries. Raucci v City Sch. Dist., 203 A.D.2d 714, 610 N.Y.S.2d 653, 1994 N.Y. App. Div. LEXIS 4145 (N.Y. App. Div. 3d Dep't 1994).

Court properly granted plaintiffs' motion to set aside jury's aggregate award of damages of $95,000 and granted new trial on damages only where, inter alia, plaintiff sustained broken back, requiring spinal fusion and insertion of bone graft and stainless steel rods and hooks, she also sustained closed head injury with loss of consciousness, 3-centimeter facial laceration to bone, and partially collapsed lung. Kreutter v Goldthorpe, 269 A.D.2d 870, 703 N.Y.S.2d 774, 2000 N.Y. App. Div. LEXIS 1843 (N.Y. App. Div. 4th Dep't 2000).

58. —Brain

Court properly granted plaintiff's motion to set aside jury's award of damages to extent of vacating its awards for past and future pain and suffering unless parties stipulated to increase those awards respectively from $150,000 to $500,000 and from $920,000 to $1,800,000 where plaintiff sustained serious brain injuries, which caused permanent emotional, visual, cognitive, and motor dysfunction, and 2 fractured vertebrae. Salamone v Wincaf Props., 249 A.D.2d 169, 671 N.Y.S.2d 737, 1998 N.Y. App. Div. LEXIS 4408 (N.Y. App. Div. 1st Dep't 1998).

Award of $25,000 for past pain and suffering was inadequate where 8-year-old plaintiff suffered fractured clavicle and fractured skull which required life-saving emergency exploratory brain surgery to remove blood clot, he was in coma for several days, and was hospitalized for 8 days, his parents noticed emotional changes in him, and his experts performed neurological and neuropsychological examinations on him and found that he suffered from neurological dysfunction including motor control problems, language difficulties, and visual memory impairment; appropriate award under circumstances would be $125,000. No award for future pain and suffering was inadequate where 8-year-old plaintiff suffered fractured clavicle and fractured skull, and he was suffering and would continue to suffer from neurological and neuropsychological dysfunction and impairment in future; appropriate award would be $150,000. Dulmer v Lange, 272 A.D.2d 507, 708 N.Y.S.2d 449, 2000 N.Y. App. Div. LEXIS 5815 (N.Y. App. Div. 2d Dep't 2000).

59. —Ear

Preverdict award of $2,000 for pain and suffering and $23,000 for future pain and suffering was appropriate compensation for plaintiff’s ear injury, which resulted in tinnitus and hearing loss for high pitches, correctable with use of hearing aid. Preston v Young, 239 A.D.2d 729, 657 N.Y.S.2d 499, 1997 N.Y. App. Div. LEXIS 5221 (N.Y. App. Div. 3d Dep't 1997).

60. —Face

In action on behalf of infant who suffered permanent facial scarring following attack by defendants’ vicious dog, requiring 4 surgeries, court properly set aside as inadequate jury verdict of $65,000, since award materially deviated from what would be reasonable compensation. Shurgan v Tedesco, 179 A.D.2d 805, 578 N.Y.S.2d 658, 1992 N.Y. App. Div. LEXIS 842 (N.Y. App. Div. 2d Dep't 1992).

Plaintiff, 14-year-old found 60 percent liable for accident, was properly awarded $15,000 for past pain and suffering and no damages for future pain and suffering where she sustained fractured

left clavicle, “Salter I” fracture of her right ankle, 2 fractures to her jaw, which required her mouth to be wired shut for 6 weeks, and concussion, no surgical intervention was required, and medical experts agreed that no permanent functional effects resulted from those injuries, and disagreed only as to whether bony protrusion over top of plaintiff’s shoulder caused by fracture would remain as permanent cosmetic deformity. Duncan by Guidry v Hillebrandt, 239 A.D.2d 811, 657 N.Y.S.2d 538, 1997 N.Y. App. Div. LEXIS 5560 (N.Y. App. Div. 3d Dep't 1997).

Verdict awarding no damages for future pain and suffering was properly set aside in civil assault action involving severe facial injuries where plaintiff testified that she continued to suffer from untreatable facial pain and numbness, increased cold sensitivity, and pain while bending over and performing daily activities, and presented uncontradicted medical testimony confirming that her complaints had objective medical basis and that her injuries were permanently disabling. Lagueux v Hayes, 241 A.D.2d 813, 661 N.Y.S.2d 86, 1997 N.Y. App. Div. LEXIS 8082 (N.Y. App. Div. 3d Dep't 1997).

Court properly ordered new trial after setting aside jury verdict, which found that plaintiff’s 3-year-old son did not sustain significant disfiguring scar, since y-shaped scar on child’s forehead was more than 3 ½ inches long and was result of laceration that required 40 to 50 stitches, and while scar might be realigned by surgery when child was teenager, it could not be eliminated and would be noticeable for rest of child’s life. Pickman v Musclow, 249 A.D.2d 958, 672 N.Y.S.2d 567, 1998 N.Y. App. Div. LEXIS 5078 (N.Y. App. Div. 4th Dep't 1998).

Court improperly denied plaintiff’s motion to set aside jury verdict finding that plaintiff was not entitled to damages for past or future pain and suffering where uncontroverted medical proof showed that despite 2 prior surgeries on plaintiff’s jaw as result of accident, he heard constant noise in his jaw and experienced daily pain, which conditions treating specialist in oral and maxillofacial surgery believed were permanent, and defendant’s examining dental surgeon concurred with specialist’s opinions as to causation and permanency. Bailey v Wood, 256 A.D.2d 846, 681 N.Y.S.2d 658, 1998 N.Y. App. Div. LEXIS 13586 (N.Y. App. Div. 3d Dep't 1998).

Jury's award of $8,000 for future pain and suffering of motorcylist whose thumb was injured in collision with car was reasonable, and his additur motion was properly denied, where he had sustained prior hand injury in serious chain-saw accident, defendant's expert opined that motorcylist's limitations in flexibility of his thumb emanated from prior injury and that there was no permanent disability resulting solely from motorcycle accident, and motorcyclist's physician acknowledged that prior accident nearly necessitated amputation of his arm and required several surgeries, including tendon transfer to allow greater use of thumb, and that motorcyclist developed "ulnar claw deformity" and had difficulty with normal functioning of his hand. Also, jury's award of $5,000 for past pain and suffering of motorcylist injured in collision with car was inadequate, and would be increased to $35,000 as alternative to new trial, even though he had serious preexisting injury to his arm, hand, and thumb, where (1) collision caused fracture of same thumb, requiring open reduction and internal fixation surgery and then wearing of cast for about one month, (2) collision also damaged 2 front teeth that previously had been capped, thus requiring extraction of roots and placement of first temporary bridges and later permanent dental bridges, (3) he also sustained lacerated lip and nasal fracture, and (4) he testified that his injuries caused him substantial pain and discomfort after accident. Teller v Anzano, 263 A.D.2d 647, 694 N.Y.S.2d 780, 1999 N.Y. App. Div. LEXIS 7833 (N.Y. App. Div. 3d Dep't 1999).

Court properly granted plaintiffs' motion to set aside jury's aggregate award of damages of $95,000 and granted new trial on damages only where, inter alia, plaintiff sustained broken back, requiring spinal fusion and insertion of bone graft and stainless steel rods and hooks, she also sustained closed head injury with loss of consciousness, 3-centimeter facial laceration to bone, and partially collapsed lung. Kreutter v Goldthorpe, 269 A.D.2d 870, 703 N.Y.S.2d 774, 2000 N.Y. App. Div. LEXIS 1843 (N.Y. App. Div. 4th Dep't 2000).

61. —Skull, including concussion

Plaintiff, 14-year-old found 60 percent liable for accident, was properly awarded $15,000 for past pain and suffering and no damages for future pain and suffering where she sustained fractured

left clavicle, “Salter I” fracture of her right ankle, 2 fractures to her jaw, which required her mouth to be wired shut for 6 weeks, and concussion, no surgical intervention was required, and medical experts agreed that no permanent functional effects resulted from those injuries, and disagreed only as to whether bony protrusion over top of plaintiff’s shoulder caused by fracture would remain as permanent cosmetic deformity. Duncan by Guidry v Hillebrandt, 239 A.D.2d 811, 657 N.Y.S.2d 538, 1997 N.Y. App. Div. LEXIS 5560 (N.Y. App. Div. 3d Dep't 1997).

62. —Infant’s damages

In an action against a hospital to recover damages for surgery performed on an infant without informed consent, the trial court’s order setting aside a $250,000 verdict unless the defendant stipulated to increase the verdict to $400,000 was improper where there was no dispute that the operation was necessary and that it was skillfully performed, the experts agreed that without the surgery the infant faced a grave risk of becoming a paraplegic, and although the infant suffered from permanent bladder incontinence after the operation, that could have occurred even if the operation was performed perfectly. Zimmerman v New York City Health & Hospitals Corp., 91 A.D.2d 290, 458 N.Y.S.2d 552, 1983 N.Y. App. Div. LEXIS 16129 (N.Y. App. Div. 1st Dep't 1983).

Court properly ordered new trial after setting aside jury verdict, which found that plaintiff’s 3-year-old son did not sustain significant disfiguring scar, since y-shaped scar on child’s forehead was more than 3 ½ inches long and was result of laceration that required 40 to 50 stitches, and while scar might be realigned by surgery when child was teenager, it could not be eliminated and would be noticeable for rest of child’s life. Pickman v Musclow, 249 A.D.2d 958, 672 N.Y.S.2d 567, 1998 N.Y. App. Div. LEXIS 5078 (N.Y. App. Div. 4th Dep't 1998).

Award of $25,000 for past pain and suffering was inadequate where 8-year-old plaintiff suffered fractured clavicle and fractured skull which required life-saving emergency exploratory brain surgery to remove blood clot, he was in coma for several days, and was hospitalized for 8 days, his parents noticed emotional changes in him, and his experts performed neurological and

neuropsychological examinations on him and found that he suffered from neurological dysfunction including motor control problems, language difficulties, and visual memory impairment; appropriate award under circumstances would be $125,000. No award for future pain and suffering was inadequate where 8-year-old plaintiff suffered fractured clavicle and fractured skull, and he was suffering and would continue to suffer from neurological and neuropsychological dysfunction and impairment in future; appropriate award would be $150,000. Dulmer v Lange, 272 A.D.2d 507, 708 N.Y.S.2d 449, 2000 N.Y. App. Div. LEXIS 5815 (N.Y. App. Div. 2d Dep't 2000).

63. — —Lead poisoning

Court properly granted plaintiffs' motion for new trial as to award for future pain and suffering where infant had to have suffered some injury as consequence of lead poisoning, or else jury would have found for defendants entirely, there was only insubstantial evidence to contradict plaintiffs' evidence that, if infant had brain damage, it was permanent, and there was no evidence that infant was exposed to any possible source of lead other than paint debris in defendants' apartment. Court also properly granted plaintiffs' motion for new trial as to finding that there was no loss of services where their expert's testimony as to difficulties infant would have doing such chores as going to store, and later getting entry-level job, went unchallenged except for necessarily rejected defense evidence that infant suffered no "substantial" organic damage at all from lead poisoning. Valdez v Sherman Estates, 224 A.D.2d 240, 638 N.Y.S.2d 10, 1996 N.Y. App. Div. LEXIS 1023 (N.Y. App. Div. 1st Dep't 1996).

64. —Leg, including pelvis

A plaintiff's motion to set aside a jury award in his favor of $100,000 as inadequate was improperly granted where the record disclosed a rational basis for the jury's verdict of $67,000 for the plaintiff's loss of earnings due to a leg injury, which was the only injury he was found to have sustained, and where the award of $33,000 for pain and suffering was solely and properly

within the province of the jury to make and should not be disturbed. Colao v Brightwater Towers, Inc., 88 A.D.2d 580, 449 N.Y.S.2d 801, 1982 N.Y. App. Div. LEXIS 16743 (N.Y. App. Div. 2d Dep't 1982).

Motorcyclist injured in automobile collision was entitled to new trial on issue of damages, unless defendants stipulated to increase verdict to $100,000, where automobile driver was found 86 percent at fault and jury awarded only $52,000 to motorcyclist for comminuted fracture of right thumb, with resulting loss of grip strength and possibility of degenerative arthritis, and fracture of tibia of left leg, with resulting distortion and shortening of leg and inability to run without limp. Anders v Segall, 124 A.D.2d 1029, 508 N.Y.S.2d 765, 1986 N.Y. App. Div. LEXIS 62376 (N.Y. App. Div. 4th Dep't 1986).

In personal injury action by 72-year-old plaintiff who suffered electrocution and numerous severe injuries, including broken neck and pelvis, jury verdict of $175,000 for past pain and suffering and $100,000 for future pain and suffering was inadequate, and new trial would be ordered unless parties stipulated to increase past pain and suffering award to $1 million and future pain and suffering award to $350,000. Stedman v Bouillon, 234 A.D.2d 876, 651 N.Y.S.2d 685, 1996 N.Y. App. Div. LEXIS 12865 (N.Y. App. Div. 3d Dep't 1996).

Jury verdict in negligence action was against weight of evidence insofar as it awarded plaintiff no damages for future pain and suffering where he continued to suffer back pain and spasms and intermittent leg numbness, his injuries resulted in permanent partial disability that would continue to cause pain, he regularly took medication for chronic back pain, he had limited ability to bend and lift objects, his condition made it uncomfortable for him to sit or stand for any length of time, and, since accident, he was unable to engage in his former sporting activities. Diglio v Gray Dorchester Assocs., 255 A.D.2d 911, 680 N.Y.S.2d 786, 1998 N.Y. App. Div. LEXIS 12115 (N.Y. App. Div. 4th Dep't 1998).

Jury’s award for past and future pain and suffering was inadequate ($38,000 and $150,000, respectively) where, on first being admitted to hospital, plaintiff was at risk of bleeding to death and was placed on respirator to enable him to breathe, external fixator was utilized to stabilize

his pelvic injuries, he was hospitalized for month, undergoing 2 surgeries, he required assistance of nurse and home health aide on discharge from hospital, he needed physical therapy to become able to walk unassisted, nerve damage to his foot resulted in permanent foot drop and clawing of toes, he could not sit, stand, or walk for extended periods without pain or need to stretch, he could not perform his usual household chores or engage in many of his pre-accident activities, and prognosis for his injuries was poor, with possibility of future surgery; thus, new trial would be ordered to determine such damages. Jury's award of $25,000 for past lost earnings and $75,000 for projected future lost earnings was inadequate where plaintiff's expert opined that plaintiff sustained loss of past wages and benefits totaling $106,000 and projected future losses of $583,000, and defendants' economist did not testify; thus, new trial would be ordered as to such damages. Edwards v Stamford Healthcare Soc'y Inc., 267 A.D.2d 825, 699 N.Y.S.2d 835, 1999 N.Y. App. Div. LEXIS 13576 (N.Y. App. Div. 3d Dep't 1999).

Trial court properly granted plaintiffs' motion to set aside verdict insofar as it awarded only $6,000 for past pain and suffering and no damages on derivative cause of action, or for future pain and suffering, where plaintiff presented medical and non-medical proof that as result of his injury (fractures of tibia and fibula) he was in severe pain and confined to bed for 4 weeks and disabled from working for over 6 months, his wife provided full-time care while he was confined and performed all household tasks and child care while he was disabled and slept apart from him to avoid causing him more pain, and his injury resulted in permanent partial disability that would continue to cause him pain and significant loss of range of motion in his ankle. Simmons v Dendis Constr., Inc., 270 A.D.2d 919, 705 N.Y.S.2d 779, 2000 N.Y. App. Div. LEXIS 3590 (N.Y. App. Div. 4th Dep't 2000).

65. — —Knee

In personal injury action arising out of automobile-pedestrian collision, court did not err in setting aside, as inadequate, damage award to pedestrian of only $30,000 for past pain, suffering and disability, and no future damages, where evidence showed that he sustained serious injuries in

accident, including shoulder dislocation, multiple fractures of leg, ankle and ribs, torn ligament in knee and punctured lung, which necessitated one-month hospitalization and home convalescence for 2 years and left him with permanent deformity in leg, 50 percent loss of motion in ankle, flexion contracture of knee, and post-injury arthritic conditions. Rakich v Lawes, 186 A.D.2d 932, 589 N.Y.S.2d 617, 1992 N.Y. App. Div. LEXIS 12390 (N.Y. App. Div. 3d Dep't 1992).

Jury verdict awarding damages for lost wages but not pain and suffering should have been set aside under CLS CPLR § 4404, where plaintiff sustained knee injury that he described as painful, requiring medical treatment, including pain medication and surgery, and partially disabling him from working. Kennett v Piotrowski, 234 A.D.2d 983, 651 N.Y.S.2d 820, 1996 N.Y. App. Div. LEXIS 13748 (N.Y. App. Div. 4th Dep't 1996).

Evidence did not support reduction of jury’s awards for past and future pain and suffering from $500,000 and $840,000 to $100,000 and $150,000, and new trial would be ordered unless plaintiff stipulated to awards of $500,000 and $350,000, where plaintiff was 58-year-old man who sustained 2 torn menisci that required arthroscopic surgery to both knees, surgical replacement of one knee with likelihood of further surgery, 15 percent limitation of range of motion in replaced knee, and herniated disk, he continued to use crutches for his pain, he was unable to return to his job as security guard, and many of his former activities became limited. Moorer v City of New York, 251 A.D.2d 119, 674 N.Y.S.2d 323, 1998 N.Y. App. Div. LEXIS 6949 (N.Y. App. Div. 1st Dep't 1998).

Court properly set aside jury verdict awarding $50,000 for past pain and suffering, and properly ordered new trial as to damages unless parties stipulated to $317,500 for past pain and suffering, where 61-year-old plaintiff sustained comminuted fracture of his right knee from fall, was in cylinder cast from ankle to groin for 1 ½ months and on crutches for 6 months, sustained atrophy of thigh, calf, and bone resulting from disuse, underwent arthroscopic surgery after 30 sessions of physical therapy did not relieve pain, and, at time of trial over one year after fall, was experiencing increased pain, which his doctor was recommending be immediately addressed

with second arthroscopy. Court also properly set aside jury verdict awarding nothing for future pain and suffering, and properly ordered new trial as to damages unless parties stipulated to $500,000 for future damages, where 61-year-old plaintiff, who sustained comminuted fracture of his right knee in fall, continued to suffer pain that eventually would have to be addressed with total knee replacement. Osoria v Marlo Equities, Inc., 255 A.D.2d 132, 679 N.Y.S.2d 612, 1998 N.Y. App. Div. LEXIS 11718 (N.Y. App. Div. 1st Dep't 1998).

Jury's award of $10,000 for future pain and suffering was adequate for 74-year-old woman with 5-year life expectancy whose accident caused her existing asymptomatic arthritic condition in her knees to become symptomatic and degenerative. Evidence supported jury's finding that 74-year-old plaintiff had only 5-year life expectancy, even though jury did not follow life expectancy table, where such tables are mere guidelines that are not binding on juries, and plaintiff had degenerative arthritic condition in her knees. Lolik v Big V Supermarkets Inc., 266 A.D.2d 759, 698 N.Y.S.2d 762, 1999 N.Y. App. Div. LEXIS 12128 (N.Y. App. Div. 3d Dep't 1999).

Court properly set aside jury's findings that plaintiff did not suffer any pain and suffering as result of accident, and court properly granted new trial unless defendant stipulated to $300,000 for past, and $120,000 for future, pain and suffering, where (1) jury, by awarding past and future medical expenses and earnings, necessarily rejected view of defendant's expert that plaintiff's knee injury was preexisting, (2) plaintiff suffered tear in posterior cruciate ligament and underwent arthroscopic surgery and several months of physical therapy, (3) his knee progressively worsened and was subject to further buckling, (4) he was 33 years old at time of accident, and (5) he was no longer able to participate in strenuous sports without pain. Myers v S. Schaffer Grocery Corp., 281 A.D.2d 156, 721 N.Y.S.2d 347, 2001 N.Y. App. Div. LEXIS 1908 (N.Y. App. Div. 1st Dep't 2001).

66. —Lung

In personal injury action arising out of automobile-pedestrian collision, court did not err in setting aside, as inadequate, damage award to pedestrian of only $30,000 for past pain, suffering and

disability, and no future damages, where evidence showed that he sustained serious injuries in accident, including shoulder dislocation, multiple fractures of leg, ankle and ribs, torn ligament in knee and punctured lung, which necessitated one-month hospitalization and home convalescence for 2 years and left him with permanent deformity in leg, 50 percent loss of motion in ankle, flexion contracture of knee, and post-injury arthritic conditions. Rakich v Lawes, 186 A.D.2d 932, 589 N.Y.S.2d 617, 1992 N.Y. App. Div. LEXIS 12390 (N.Y. App. Div. 3d Dep't 1992).

Court properly granted plaintiffs' motion to set aside jury's aggregate award of damages of $95,000 and granted new trial on damages only where, inter alia, plaintiff sustained broken back, requiring spinal fusion and insertion of bone graft and stainless steel rods and hooks, she also sustained closed head injury with loss of consciousness, 3-centimeter facial laceration to bone, and partially collapsed lung. Kreutter v Goldthorpe, 269 A.D.2d 870, 703 N.Y.S.2d 774, 2000 N.Y. App. Div. LEXIS 1843 (N.Y. App. Div. 4th Dep't 2000).

Tortfeasor's motions for judgment as a matter of law and to set aside the jury verdict on a cause of action to recover damages for fraud were properly denied as a rational basis existed for the jury's finding that the tortfeasor committed fraud. Maisano v Beckoff, 2 A.D.3d 412, 767 N.Y.S.2d 790, 2003 N.Y. App. Div. LEXIS 12943 (N.Y. App. Div. 2d Dep't 2003).

67. —Neck

In action for injuries sustained in slip and fall in supermarket, court properly set aside jury award $15,000 for future pain and suffering, and properly ordered new trial unless defendant agreed to award of $100,000, where (1) plaintiff had been in constant pain since accident, was required to resort to pain relievers, was required to perform isometric exercises daily at 2 hour intervals, and wore cervical collar, (2) plaintiff was prevented from doing most activities she used to enjoy, and limitations affected plaintiff emotionally, (3) plaintiff's husband testified that she was frequently irritable and tired and that their sex life had suffered, and (4) plaintiff's expert testified that plaintiff had considerable lack of motion in her back and radiating pain associated with neck

motion, and that symptoms would persist even if she had surgery. Wendell v Supermarkets Gen. Corp., 189 A.D.2d 1063, 592 N.Y.S.2d 895, 1993 N.Y. App. Div. LEXIS 781 (N.Y. App. Div. 3d Dep't 1993).

In personal injury action by 72-year-old plaintiff who suffered electrocution and numerous severe injuries, including broken neck and pelvis, jury verdict of $175,000 for past pain and suffering and $100,000 for future pain and suffering was inadequate, and new trial would be ordered unless parties stipulated to increase past pain and suffering award to $1 million and future pain and suffering award to $350,000. Stedman v Bouillon, 234 A.D.2d 876, 651 N.Y.S.2d 685, 1996 N.Y. App. Div. LEXIS 12865 (N.Y. App. Div. 3d Dep't 1996).

Award of $1,000 for past medical expenses and $15,000 for past pain and suffering, with no award for future medical expenses or future pain and suffering, was not inadequate where there was conflicting medical testimony as to cause of hyperextension injury to plaintiff’s neck, which resulted in spinal fusion surgery. Mannello v Town of Ulster, 272 A.D.2d 804, 707 N.Y.S.2d 725, 2000 N.Y. App. Div. LEXIS 5930 (N.Y. App. Div. 3d Dep't 2000).

68. —Ostomy

Court in chiropractic malpractice action correctly ordered new trial on issue of damages where jury awarded plaintiff only $19,000 for past medical expenses and $6,000 for past pain and suffering, and nothing for lost wages, future medical expenses and future pain and suffering, although her evidence showed that she was hospitalized for 40 days, culminating in total protocolectomy with permanent ileostomy, that she had undisputed medical expenses of $26,767.14 to date of verdict, that future expenses for appliances and medical supplies would be $43,920, that she required permanent medical care for life expectancy of 36.6 years, and that she suffered 22 weeks of lost wages due to disability. Storer v Roselle, 185 A.D.2d 625, 587 N.Y.S.2d 53, 1992 N.Y. App. Div. LEXIS 9147 (N.Y. App. Div. 4th Dep't 1992).

69. —Paralysis, including quadraplegia

Award of $50,000 for decedent’s pain and suffering following automobile accident was inadequate as matter of law where medical proof clearly established that she endured inordinate pain and depression associated with quadriplegic, bedridden state until her death 1,154 days after accident; new trial on damages would be required unless parties stipulated to increased award of $150,000. Walsh v Morris, 126 A.D.2d 911, 511 N.Y.S.2d 428, 1987 N.Y. App. Div. LEXIS 42018 (N.Y. App. Div. 3d Dep't), app. dismissed, 70 N.Y.2d 693, 518 N.Y.S.2d 1029, 512 N.E.2d 555, 1987 N.Y. LEXIS 17963 (N.Y. 1987).

70. — —Epilepsy

If injuries, including depressed fracture of frontal bone, infection requiring removal of infected bone, and epileptic seizures, were causally connected to defendant’s negligence, it was within the discretion of the trial court to set aside verdict of $18,000 for inadequacy and to determine that retrial should be on damages issue alone. Figliomeni v Board of Education, 38 N.Y.2d 178, 379 N.Y.S.2d 45, 341 N.E.2d 557, 1975 N.Y. LEXIS 2304 (N.Y. 1975), reh'g denied, 39 N.Y.2d 743, 1976 N.Y. LEXIS 3487 (N.Y. 1976).

71. —Psychological damages, including depression

Award of $50,000 for decedent’s pain and suffering following automobile accident was inadequate as matter of law where medical proof clearly established that she endured inordinate pain and depression associated with quadriplegic, bedridden state until her death 1,154 days after accident; new trial on damages would be required unless parties stipulated to increased award of $150,000. Walsh v Morris, 126 A.D.2d 911, 511 N.Y.S.2d 428, 1987 N.Y. App. Div. LEXIS 42018 (N.Y. App. Div. 3d Dep't), app. dismissed, 70 N.Y.2d 693, 518 N.Y.S.2d 1029, 512 N.E.2d 555, 1987 N.Y. LEXIS 17963 (N.Y. 1987).

Award of $50,000 for past pain and suffering was inadequate, and new trial on that issue would be ordered unless parties stipulated to increase to $400,000, where plaintiff, who was hit by lowered garage door, suffered herniated disc that caused pain and loss of mobility and required

surgery, physical therapy, and use of pain medication, muscle relaxants, neck brace, walker, and cane, and plaintiff was disabled from his employment as correction officer and suffered from depression and posttraumatic stress disorder. Smith v Monro Muffler Brake, Inc., 275 A.D.2d 1028, 713 N.Y.S.2d 581, 2000 N.Y. App. Div. LEXIS 9630 (N.Y. App. Div. 4th Dep't 2000), app. denied, 96 N.Y.2d 710, 726 N.Y.S.2d 373, 750 N.E.2d 75, 2001 N.Y. LEXIS 949 (N.Y. 2001).

72. —Ribs

In personal injury action arising out of automobile-pedestrian collision, court did not err in setting aside, as inadequate, damage award to pedestrian of only $30,000 for past pain, suffering and disability, and no future damages, where evidence showed that he sustained serious injuries in accident, including shoulder dislocation, multiple fractures of leg, ankle and ribs, torn ligament in knee and punctured lung, which necessitated one-month hospitalization and home convalescence for 2 years and left him with permanent deformity in leg, 50 percent loss of motion in ankle, flexion contracture of knee, and post-injury arthritic conditions. Rakich v Lawes, 186 A.D.2d 932, 589 N.Y.S.2d 617, 1992 N.Y. App. Div. LEXIS 12390 (N.Y. App. Div. 3d Dep't 1992).

Trial court properly granted an injured party’s motion to set aside the verdict and grant a new trial pursuant to N.Y. C.P.L.R. 4404 in a personal injury action unless a store agreed to increase in the verdict; the jury’s apportionment of fault and failure to award damages for future pain and suffering were against the weight of the evidence. Bun Sin Lee v Pathmark Stores, Inc., 1 A.D.3d 219, 767 N.Y.S.2d 94, 2003 N.Y. App. Div. LEXIS 11911 (N.Y. App. Div. 1st Dep't 2003).

Where superintendent and janitorial services did not have a comprehensive agreement with a building owner that displaced the building owner’s responsibility to maintain a safe premises, the contract did not give rise to tort liability in favor of a third party tenant of the building; the trial court’s denial of motions to set aside the jury verdict and to dismiss the complaint was reversed. Perkins v Cosmopolitan Care Corp., 308 A.D.2d 437, 764 N.Y.S.2d 276, 2003 N.Y. App. Div.

LEXIS 9278 (N.Y. App. Div. 2d Dep't 2003), app. denied, 2 N.Y.3d 704, 778 N.Y.S.2d 774, 811 N.E.2d 36, 2004 N.Y. LEXIS 664 (N.Y. 2004).

Trial court properly denied plaintiffs' motion for judgment notwithstanding the verdict pursuant to N.Y. C.P.L.R. 4404 and entered judgment for a contractor in a negligence action; the jury properly disregarded an expert's opinion concerning bridgework over a trench in a road, as a city ordinance did not required bridgework over trenches to be steel plate. Fazzone v Gourlay, 1 A.D.3d 678, 766 N.Y.S.2d 621, 2003 N.Y. App. Div. LEXIS 11597 (N.Y. App. Div. 3d Dep't 2003).

In a personal injury claim brought by an injured person who tripped and fell when her foot caught in a crate placed in an ice cream shop's doorway by employees of the shop owners, the jury's verdict of no proximate cause should have been set aside; the only evidence of causation was provided by the injured person, that she fell while exiting the store when her foot caught on the milk crate, and the verdict was inconsistent and unsupported by fair interpretation of evidence where the jury also found that ice cream shop owners were negligent in placing the crate in the doorway. Dellamonica v Carvel Corp., 1 A.D.3d 311, 766 N.Y.S.2d 854, 2003 N.Y. App. Div. LEXIS 11535 (N.Y. App. Div. 2d Dep't 2003).

Trial court erred in denying a limousine company's motion pursuant to N.Y. C.P.L.R. 4404(a) to set aside a verdict in favor of a driver and for judgment in its favor; the driver failed to show that the limousine company owed him a duty to maintain the seat of a limousine in an ergonomically-fit condition. Daubert v Flyte Time Regency Limousine, 1 A.D.3d 395, 769 N.Y.S.2d 39, 2003 N.Y. App. Div. LEXIS 11758 (N.Y. App. Div. 2d Dep't 2003).

73. —Shoulder

In personal injury action arising out of automobile-pedestrian collision, court did not err in setting aside, as inadequate, damage award to pedestrian of only $30,000 for past pain, suffering and disability, and no future damages, where evidence showed that he sustained serious injuries in accident, including shoulder dislocation, multiple fractures of leg, ankle and ribs, torn ligament in

knee and punctured lung, which necessitated one-month hospitalization and home convalescence for 2 years and left him with permanent deformity in leg, 50 percent loss of motion in ankle, flexion contracture of knee, and post-injury arthritic conditions. Rakich v Lawes, 186 A.D.2d 932, 589 N.Y.S.2d 617, 1992 N.Y. App. Div. LEXIS 12390 (N.Y. App. Div. 3d Dep't 1992).

Jury's refusal to award any damages for future pain and suffering was contrary to weight of credible evidence, and thus court properly granted plaintiff's motion for new trial on that issue where uncontroverted medical proof established that plaintiff suffered torn rotator cuff of his shoulder that was competent producing cause of continued pain and suffering. Beckwith v Rute, 235 A.D.2d 892, 653 N.Y.S.2d 172, 1997 N.Y. App. Div. LEXIS 572 (N.Y. App. Div. 3d Dep't 1997).

Plaintiff, 14-year-old found 60 percent liable for accident, was properly awarded $15,000 for past pain and suffering and no damages for future pain and suffering where she sustained fractured left clavicle, "Salter I" fracture of her right ankle, 2 fractures to her jaw, which required her mouth to be wired shut for 6 weeks, and concussion, no surgical intervention was required, and medical experts agreed that no permanent functional effects resulted from those injuries, and disagreed only as to whether bony protrusion over top of plaintiff's shoulder caused by fracture would remain as permanent cosmetic deformity. Duncan by Guidry v Hillebrandt, 239 A.D.2d 811, 657 N.Y.S.2d 538, 1997 N.Y. App. Div. LEXIS 5560 (N.Y. App. Div. 3d Dep't 1997).

In view of uncontroverted evidence that plaintiff had to undergo surgery to repair tears in his rotator cuff tendons, jury verdict which made no monetary award for past pain and suffering could not have been reached on any fair interpretation of evidence and was properly set aside. Butcher v Rotterdam Square Mall, 268 A.D.2d 941, 702 N.Y.S.2d 681, 2000 N.Y. App. Div. LEXIS 824 (N.Y. App. Div. 3d Dep't 2000).

Jury's failure to award plaintiff any damages for future pain and suffering was against weight of evidence where expert testimony, that plaintiff sustained permanent shoulder injury which caused pain and restricted range of motion of her right arm, was uncontroverted by defendant.

Sperduti v Mezger, 283 A.D.2d 1018, 724 N.Y.S.2d 250, 2001 N.Y. App. Div. LEXIS 4519 (N.Y. App. Div. 4th Dep't 2001).

Personal injury plaintiff was not entitled to have set aside jury verdict for defendant on issue of damages, even though defendant did not strictly comply with CLS CPLR § 3101(d)(1)(i), where (1) defendant's examining physician was properly allowed to testify that injuries to plaintiff's shoulder and elbow, and resulting surgeries, were not proximately caused by subject accident, and (2) plaintiff could not claim surprise or prejudice as result of that testimony, because issue of causation was implicit in question of damages. Fishkin v Massre, 286 A.D.2d 749, 730 N.Y.S.2d 724, 2001 N.Y. App. Div. LEXIS 8652 (N.Y. App. Div. 2d Dep't 2001), app. denied, 97 N.Y.2d 700, 739 N.Y.S.2d 99, 765 N.E.2d 302, 2002 N.Y. LEXIS 38 (N.Y. 2002).

74. —Spine, including disks

In products liability action by 230-pound typist against manufacturer of office chair which collapsed underneath her due to weld defect, causing recurrence of herniated disc, jury's awards of $30,000 for past pain and suffering and $100,000 for future pain and suffering were not inadequate. Reed v Harter Chair Corp., 185 A.D.2d 547, 586 N.Y.S.2d 401, 1992 N.Y. App. Div. LEXIS 9084 (N.Y. App. Div. 3d Dep't 1992).

Court erred in denying plaintiff's motion to set aside jury verdict which awarded $10,000 for past pain and suffering and no damages for future pain and suffering where, inter alia, it was undisputed that she sustained compression fracture of thorocal lumbar junction at T-12 with 70 percent loss of vertebral height and that her condition was permanent. Wroblewski v National Fuel Gas Distrib. Corp., 247 A.D.2d 917, 668 N.Y.S.2d 423, 1998 N.Y. App. Div. LEXIS 1264 (N.Y. App. Div. 4th Dep't 1998).

Court properly granted plaintiff's motion to set aside jury's award of damages to extent of vacating its awards for past and future pain and suffering unless parties stipulated to increase those awards respectively from $150,000 to $500,000 and from $920,000 to $1,800,000 where plaintiff sustained serious brain injuries, which caused permanent emotional, visual, cognitive,

and motor dysfunction, and 2 fractured vertebrae. Salamone v Wincaf Props., 249 A.D.2d 169, 671 N.Y.S.2d 737, 1998 N.Y. App. Div. LEXIS 4408 (N.Y. App. Div. 1st Dep't 1998).

Evidence did not support reduction of jury's awards for past and future pain and suffering from $500,000 and $840,000 to $100,000 and $150,000, and new trial would be ordered unless plaintiff stipulated to awards of $500,000 and $350,000, where plaintiff was 58-year-old man who sustained 2 torn menisci that required arthroscopic surgery to both knees, surgical replacement of one knee with likelihood of further surgery, 15 percent limitation of range of motion in replaced knee, and herniated disk, he continued to use crutches for his pain, he was unable to return to his job as security guard, and many of his former activities became limited. Moorer v City of New York, 251 A.D.2d 119, 674 N.Y.S.2d 323, 1998 N.Y. App. Div. LEXIS 6949 (N.Y. App. Div. 1st Dep't 1998).

Award of $50,000 for past pain and suffering was inadequate, and new trial on that issue would be ordered unless parties stipulated to increase to $400,000, where plaintiff, who was hit by lowered garage door, suffered herniated disc that caused pain and loss of mobility and required surgery, physical therapy, and use of pain medication, muscle relaxants, neck brace, walker, and cane, and plaintiff was disabled from his employment as correction officer and suffered from depression and posttraumatic stress disorder. Smith v Monro Muffler Brake, Inc., 275 A.D.2d 1028, 713 N.Y.S.2d 581, 2000 N.Y. App. Div. LEXIS 9630 (N.Y. App. Div. 4th Dep't 2000), app. denied, 96 N.Y.2d 710, 726 N.Y.S.2d 373, 750 N.E.2d 75, 2001 N.Y. LEXIS 949 (N.Y. 2001).

Court erred in denying plaintiff's motion to set aside verdict awarding her only $4,500 for past pain and suffering and nothing for future pain and suffering, and matter was remanded for new trial on issue of damages, where evidence, although conflicting, showed that plaintiff underwent surgery for cervical disc injury caused by accident, and that she continued to suffer pain and discomfort. Siragusa v City of New York, 283 A.D.2d 294, 727 N.Y.S.2d 389, 2001 N.Y. App. Div. LEXIS 5391 (N.Y. App. Div. 1st Dep't 2001).

Jury's award of damages for future pain and suffering for 18 months could not be reconciled with plaintiff's life expectancy of 40.5 years and jury's finding that she sustained permanent injury,

and thus that portion of jury's verdict was properly set aside. Trial court properly granted plaintiff's motion to set aside award of $15,000 for her future medical expenses where only evidence before jury with respect to future medical expenses was that she would likely undergo second spinal fusion surgery, costing approximately $26,000. Murry v Witherel, 287 A.D.2d 926, 731 N.Y.S.2d 571, 2001 N.Y. App. Div. LEXIS 9960 (N.Y. App. Div. 3d Dep't 2001).

75. —Thumb

Motorcyclist injured in automobile collision was entitled to new trial on issue of damages, unless defendants stipulated to increase verdict to $100,000, where automobile driver was found 86 percent at fault and jury awarded only $52,000 to motorcyclist for comminuted fracture of right thumb, with resulting loss of grip strength and possibility of degenerative arthritis, and fracture of tibia of left leg, with resulting distortion and shortening of leg and inability to run without limp. Anders v Segall, 124 A.D.2d 1029, 508 N.Y.S.2d 765, 1986 N.Y. App. Div. LEXIS 62376 (N.Y. App. Div. 4th Dep't 1986).

Jury's award of $8,000 for future pain and suffering of motorcylist whose thumb was injured in collision with car was reasonable, and his additur motion was properly denied, where he had sustained prior hand injury in serious chain-saw accident, defendant's expert opined that motorcylist's limitations in flexibility of his thumb emanated from prior injury and that there was no permanent disability resulting solely from motorcycle accident, and motorcyclist's physician acknowledged that prior accident nearly necessitated amputation of his arm and required several surgeries, including tendon transfer to allow greater use of thumb, and that motorcyclist developed "ulnar claw deformity" and had difficulty with normal functioning of his hand. Also, jury's award of $5,000 for past pain and suffering of motorcylist injured in collision with car was inadequate, and would be increased to $35,000 as alternative to new trial, even though he had serious preexisting injury to his arm, hand, and thumb, where (1) collision caused fracture of same thumb, requiring open reduction and internal fixation surgery and then wearing of cast for about one month, (2) collision also damaged 2 front teeth that previously had been capped, thus

requiring extraction of roots and placement of first temporary bridges and later permanent dental bridges, (3) he also sustained lacerated lip and nasal fracture, and (4) he testified that his injuries caused him substantial pain and discomfort after accident. Teller v Anzano, 263 A.D.2d 647, 694 N.Y.S.2d 780, 1999 N.Y. App. Div. LEXIS 7833 (N.Y. App. Div. 3d Dep't 1999).

76. —Wrist

Trial court improperly exercised its discretion in setting aside, as inadequate, $65,000 verdict for 68-year old woman injured when defendant's truck struck wood plank, causing plank to strike her, where (1) plaintiff was hospitalized for 12 days for fractured wrist, fractured foot, and "multiple injuries," (2) evidence was adduced from which jury could reasonably conclude that plaintiff's back condition was preexisting, or was natural consequence of aging process, and (3) "carpal tunnel syndrome" sustained by plaintiff was correctable by surgery which she had declined. Schare v Welsbach Electric Corp., 138 A.D.2d 477, 526 N.Y.S.2d 25, 1988 N.Y. App. Div. LEXIS 2903 (N.Y. App. Div. 2d Dep't 1988).

Court properly set aside verdict awarding no damages for pain and suffering where plaintiff fractured 2 bones in her right wrist, requiring cast for 5 weeks, and resulting in swelling, pain, and weakness in her hand for 2 years after accident and permanent restriction of wrist motion and weakness of grip; unapportioned award of $120,000 was reasonable compensation. Kotopoulos v Nathan Hale Gardens, 235 A.D.2d 276, 652 N.Y.S.2d 283, 1997 N.Y. App. Div. LEXIS 294 (N.Y. App. Div. 1st Dep't 1997).

77. —Wrongful death

Court properly set aside jury's determination that plaintiff suffered no pecuniary loss by death of her 14-year-old daughter, who had completed 8th grade with 85 average, had I.Q. of 125, was good student who aspired to professional career, played cello and guitar, was involved in Girl Scouts and other activities, was in good health with normal life expectancy, held part-time jobs, helped her parents with work-related tasks, and enjoyed loving relationship with her parents;

new trial on damages for pecuniary loss would be ordered unless defendants stipulated to award of $100,000, which would amount to net award of $35,000 after apportionment for comparative fault. Krueger v Wilde, 204 A.D.2d 988, 614 N.Y.S.2d 88, 1994 N.Y. App. Div. LEXIS 6797 (N.Y. App. Div. 4th Dep't 1994).

In action for wrongful death of 23-year-old son, award of $5,200 each to father and mother for past damages was properly measured by son’s contribution of $100 per week to household where he had minimal earnings during 3 years before his death. Also, jury’s denial of future pecuniary damages was supported by fair interpretation of evidence where there was conflicting testimony regarding pecuniary value of son to his parents. Driscoll v Akron Fire Co., 251 A.D.2d 1042, 675 N.Y.S.2d 264, 1998 N.Y. App. Div. LEXIS 7115 (N.Y. App. Div. 4th Dep't 1998), app. denied, 92 N.Y.2d 819, 685 N.Y.S.2d 421, 708 N.E.2d 178, 1999 N.Y. LEXIS 2046 (N.Y. 1999).

Research References & Practice Aids

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