

Defending Damages in Catastrophic Medical Injury Cases

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Defending Damages in Catastrophic Medical Injury Cases

I. What is a Catastrophic Medical Injury?

Some Examples of What Could Constitute a Catastrophic Injury (Not Exhaustive):

- A. Traumatic Brain Injury (TBI)
- B. Quadriplegia/Paraplegia
- C. Loss of a Limb
- D. Loss of Eyesight/Hearing
- E. Death
- F. Significant Surgeries
- G. Disfigurement
- H. "Perfect Storm of Injuries" or Conglomeration of Multiple Injuries
- I. Miscellaneous (RSD, Seizure Disorder, etc.)

II. Categories of Recoverable Damages

It is said that the purpose of an award of damages is to restore the aggrieved party to the position that he or she held prior to the injury. See, *McDougald v Garber*, 73 NY2d 246, 538 NYS2d 937, 536 NE2d 372 (1989). Under the law, this is accomplished by awarding a sum of money that compensates the party for the actual loss sustained as well as those items that will be sustained in the future. In cases where the alleged injury or injuries is "catastrophic" in nature, the main focus of the case will generally be what damages are recoverable. Aside from their general experience, there is no legal criterion to guide jurors in translating into money values such intangibles as pain, suffering.

Each category can be sectioned into awards for both past and future depending on the proof adduced at trial. Past damages are calculated from the date of the alleged

accident to the date of the jury's verdict. Future damages compensate for future loss. The cornerstone damages in any personal injury case naturally are past and future pain and suffering. Commonly, lost wages and medical expenses are also sought; however the evidence in a given case will dictate whether these categories are recoverable. Future damages can be significant when dealing with alleged catastrophic injuries. Key factors in determining future damages include:

- Age of the Plaintiff
- Life Expectancy
- Future Work Life
- Nature of Plaintiff's Employment (or Lack Thereof)
- Benefits - Union v. Non-Union
- Future Care Needed by Plaintiff (or Not)

Please keep in mind that under New York law, an award for damages is excessive or inadequate if it deviates materially from what would be reasonable compensation. See, CPLR §5501(c).

A. Pain and Suffering

The law is clear that an award for pain and suffering is a proper element in a plaintiff's recovery for personal physical injuries. Since damages for pain and suffering are not susceptible to proof by a specific dollar amount, the jury has wide discretion in rendering a particular amount; however, there must be evidence to justify the amount awarded. This discretion of the jury is always one of the most important points to understand in a case dealing with catastrophic injuries. It often may be the overriding factor on both sides of the lawsuit as to how the case should be resolved. As will be shown, the jury is given great latitude from the court in their instructions. The jury charge on past pain and suffering is: "If you decide that defendant is liable, plaintiff is entitled to recover a sum of money which will justly and fairly compensate (him, her) for any injury, disability and conscious pain and suffering to date caused by defendant. [If there is an issue relative to the level of plaintiff's awareness, the following should be charged.] Conscious pain and suffering means pain and suffering of which there was some level of awareness by plaintiff (decedent)." PJI 2:280

The term "pain and suffering" has been utilized to encompass all items of general, non-economic damages. *McDougald v. Garber*, 73 NY2d 246, 538 NYS2d 937, 536 NE2d 372 (1989); *Lamot v. Gondek*, 163 AD2d 678, 558 NYS2d 284 (3d Dept. 1990). For example, disfigurement is an aspect of pain and suffering and is not a separate element of damages. See also, *Bartoli v. Asto Const. Corp.*, 22 AD3d 437, 802 NYS2d 463 (2d Dept. 2005). No precise rule can be formulated to measure pain or to compensate for it in money damages. *Robison v. Lockridge*, 230 App Div 389, 244 NYS 663 (4th Dept. 1930); see *McDougald v. Garber*, 73 NY2d 246, 538 NYS2d 937, 536 NE2d 372 (1989). It is

improper for the trial judge to give the jury the court's evaluation of the maximum sum recoverable, *Lieberman v. Washington Square Hotel Corp.*, 40 AD2d 647, 336 NYS2d 518 (1st Dept. 1972); or to state to the jury that a given sum would not be too much or too little, *Wersebe v. Broadway & S.A.R. Co.*, 1 Misc 472, 21 NYS 637 (Super Ct 1893). An award for pain and suffering should include compensation to an injured person for both the physical and emotional consequences of the injury. It is improper to permit the jury to award damages for shock and fright as a category of damages separate from past pain and suffering, *Eaton v. Comprehensive Care America, Inc.*, 233 AD2d 875, 649 NYS2d 293 (4th Dept. 1996).

In determining the amount to be awarded the plaintiff for non-economic damages, the jury may properly consider the effect of the injuries on the plaintiff's capacity to lead a normal life. However, while the loss of the enjoyment of life may be considered in fixing the amount awarded to the plaintiff for pain and suffering, the loss of enjoyment of life does not, by itself, constitute a separate and distinct item of damages, *McDougald v. Garber*, supra; see *Kavanaugh v. Nussbaum*, 129 AD2d 559, 514 NYS2d 55 (2d Dept. 1987), aff'd as mod on other grounds, 71 NY2d 535, 528 NYS2d 8, 523 NE2d 284 (1988); *Golden v. Manhasset Condominium*, 2 AD3d 345, 770 NYS2d 55 (1st Dept. 2003); *Ledogar v. Giordano*, 122 AD2d 834, 505 NYS2d 899 (2d Dept. 1986) (treating loss of enjoyment of life as permissible component of pain and suffering award). In *Nussbaum v. Gibstein*, 73 NY2d 912, 539 NYS2d 289, 536 NE2d 618 (1989), decided simultaneously with *McDougald v. Garber*, supra, the court stated that "loss of enjoyment of life is not a separate element of damages deserving a distinct award but is, instead, only a factor to be considered by the jury in assessing damages for conscious pain and suffering." The following supplemental charge should be given, following the main charge on pain and suffering, in any action where plaintiff has presented evidence on the issue of loss of enjoyment of life as an element of pain and suffering: "In determining the amount, if any, to be awarded plaintiff for pain and suffering, you may take into consideration the effect that plaintiff's (decedent's) injuries have had on plaintiff's ability to enjoy life (have had on decedent's ability to enjoy life up to the time of death). Loss of enjoyment of life involves the loss of the ability to perform daily tasks, to participate in the activities which were a part of the person's life before the injury, and to experience the pleasures of life. However, a person suffers the loss of enjoyment of life only if the person is aware, at some level, of the loss that (he, she) has suffered." PJI 2:280.1. Similarly, "mental suffering" is not an item of damage distinct from "pain and suffering," *Lamot v. Gondek*, supra.

In a case with a deceased plaintiff, where the interval between the injury in question and death is relatively brief, the amount, if any, awarded for the decedent's conscious pain and suffering depends upon such factors as degree of consciousness, severity of pain, apprehension of impending death, and duration of suffering. *Jones v. Simeone*, 112 AD2d 772, 492 NYS2d 270 (4th Dept. 1985). The plaintiff has the initial burden of proving consciousness for at least some period of time following an accident to justify

an award of damages for pain and suffering. *Cummins v. Onondaga*, 84 NY2d 322, 618 NYS2d 615, 642 NE2d 1071 (1994); *Cleary v. LJR Associates*, 198 AD2d 394, 604 NYS2d 140 (2d Dept. 1993). The plaintiffs' burden can be satisfied by direct or circumstantial evidence. See, *Cushing v. Seemann*, 247 AD2d 891, 668 NYS2d 791 (4th Dept. 1998) (affirmation of pathologist who performed autopsy was sufficient to establish triable issue of fact with respect to whether decedent had conscious pain and suffering after his vehicle was struck by truck). Testimony given by the deceased infant's parents that, in the moments before he died, the baby was "changing colors," "trying to breathe," "his forehead was becoming swollen," "his eyes were different" and "he was full of blood" was legally sufficient to create a question for the jury. *Lopez v. Gomez*, 305 AD2d 292, 761 NYS2d 601 (1st Dept. 2003). In those circumstances, the requirement that there must have been some level of cognitive awareness did not preclude recovery for the pain and suffering experienced by the 15-day-old decedent, *Id.*

The jury charge on future pain and suffering is as follows: "With respect to any of the plaintiff's injuries or disabilities, the plaintiff is entitled to recover for future pain, suffering and disability and the loss of (his, her) ability to enjoy life. In this regard you should take into consideration the period of time that the injuries or disabilities are expected to continue. If you find that the injuries or disabilities are permanent, you should take into consideration the period of time that the plaintiff can be expected to live. In accordance with statistical life expectancy tables, AB has a life expectancy of [insert number] years. Such a table, however, provides nothing more than a statistical average. It neither guarantees that AB will live an additional [insert number] years or means that (he, she) will not live for a longer period. The life expectancy figure I have given you is not binding upon you, but may be considered by you together with your own experience and the evidence you have heard concerning the condition of AB's health, (his, her) habits, employment and activities in deciding what AB's present life expectancy is." *PJI* 2:281.

The court will generally use the life expectancy tables set forth in Appendix A to the New York Pattern Jury Instructions. Tables referring to differences based on race have been eliminated. Where the plaintiff dies before trial from causes unconnected with the accident, the damages are limited to those occurring before his or her death. Damages for future pain and suffering are available regardless of whether the plaintiff's injuries are permanent, and it is error to charge that such damages may be awarded only upon a finding of permanence. *Gallagher v. Samples*, 6 AD3d 659, 776 NYS2d 585 (2d Dept. 2004); *Rizzo v. DeSimone*, 6 AD3d 600, 775 NYS2d 531 (2d Dept. 2004). Where it was uncontroverted that the plaintiff was in pain at the time of trial and that the pain would continue, a jury verdict which failed to make any award for future pain and suffering was against the weight of the evidence, *Fenocchi v. Syracuse*, 216 AD2d 864, 629 NYS2d 580 (4th Dept. 1995). Although a plaintiff may lack normal health, it is still proper for the jury to consider mortality tables along with all of the other evidence in the case bearing on life expectancy. 29A *Am Jur 2d*, Evidence §1418. A verdict will not be

disturbed; however, where proof of plaintiff's physical condition supports the jury's finding that plaintiff's life expectancy is less than the statistical average. *O'Rourke v. Berner*, 249 AD2d 975, 672 NYS2d 216 (4th Dept. 1998). The jury may also conclude that the duration of a particular plaintiff's life will be longer than the tables indicate. See, *Sternfels v. Metropolitan St. Ry. Co.*, 73 App Div 494, 77 NYS 309 (1st Dept. 1902), *aff'd*, 174 NY 512, 66 NE 1117 (1903). Therefore, it is proper to charge the jury that the life expectancy table should be used merely as a guide. *Blyskal v. Kelleher*, 171 AD2d 718, 567 NYS2d 174 (2d Dept. 1991). If the jury finds that plaintiff's injury is permanent, the amount awarded as damages for future pain and suffering must be separately itemized on the verdict sheet and the number of years for which the award is made must be stated. See, CPLR §4111(d)(e)(f).

B. Lost Wages

Loss of earnings must be established with reasonable certainty focusing on the plaintiff's earning capacity before and after the accident, *Calo v. Perez*, 211 AD2d 607, 621 NYS2d 370 (2d Dept. 1995); *Clanton v. Agoglitta*, 206 AD2d 497, 615 NYS2d 68 (2d Dept. 1994); *Butts v. Braun*, 204 AD2d 1069, 612 NYS2d 520 (4th Dept. 1994); see *Shubbuck v. Conners*, 15 NY3d 871, 913 NYS2d 120, 939 NE2d 137 (2010); see also, *Whalen v. New York*, 270 AD2d 340, 704 NYS2d 305 (2d Dept. 2000) (the plaintiff met burden of proof with respect to lost earnings by submitting evidence that included documentation of wages received by union workers at plaintiff's pay scale and documentation of his employment during period immediately preceding accident). It is the plaintiff's burden to establish his or her own loss of "actual" past earnings, for example, by submitting tax returns and/or other relevant documentation. *Papa v. New York*, 194 AD2d 527, 598 NYS2d 558 (2d Dept. 1993). In calculating lost earnings, the jury may consider the value of fringe benefits, as well as increases in earnings resulting from promotions that plaintiff would logically have received. *Paz v. New York*, 185 AD2d 793, 586 NYS2d 970 (1st Dept. 1992); see *Reid v. Weir-Metro Ambulance Service, Inc.*, 191 AD2d 309, 595 NYS2d 40 (1st Dept. 1993). However, if fringe benefits are to be considered, there must be evidence as to the nature and value of such benefits. An award may include recovery for diminution of pension benefits if established with reasonable certainty based on plaintiff's earning ability both before and after the accident. *Lamot v. Gondek*, *supra*. In the case of a plaintiff who was self-employed, lost earnings means net profits. *Young v. Utica Mut. Ins. Co.*, 86 AD2d 764, 448 NYS2d 83 (4th Dept. 1982); see also, *Bielich v. Winters*, 95 AD2d 750, 464 NYS2d 189 (1st Dept. 1983).

The jury charge as to loss of earnings is as follows: "Plaintiff AB is entitled to be reimbursed for any earnings lost as a result of (his, her) injuries caused by Defendant CD's negligence from the time of the accident to today. Moreover, if you find that as a result of those injuries AB has suffered a reduction in (his, her) capacity to earn money in the future, then AB is also entitled to be reimbursed for loss of future earnings. Any award you make for earnings lost to date must not be the result of speculation; any

award must be calculated from the number of days that you find AB was disabled from working by the injuries and the amount that you find AB would have earned had (he, she) not been disabled. Any award you make for reduction of AB's earning capacity in the future should be determined on the basis of AB's earnings before the accident, the condition of AB's health, (his, her) prospects for advancement and the probabilities with respect to future earnings before the accident, the extent to which you find that those prospects or probabilities have been reduced by the injuries, the length of time that you find AB would reasonably be expected to work had (he, she) not been injured, the nature and hazards of AB's employment and any other circumstances which would have an effect on AB's earning capacity. AB is now [insert number] years of age and has a (life expectancy according to the mortality tables, work life expectancy according to the work life expectancy tables in evidence) of [insert number] more years. Such tables are, of course, nothing more than statistical averages. They neither assure that AB will have the span of (working) life I have given you nor assure that AB's span will not be greater. The figures I have given you are not binding upon you, but may be considered by you together with your own experience and the evidence you have heard in determining what AB's (life, work life) expectancy is. If you find that AB is entitled to an award for reduction in earning capacity in the future, you will fix the dollar amount of such reduction over the entire period that you find AB will suffer such reduction and include that amount in your verdict. In your verdict you will state separately the amount awarded for loss of earnings to date, if any, and, if you make an award for loss of future earnings, you will state in your verdict the amount awarded and the period of years over which such award is intended to provide compensation. Do not state an amount per year but only a total amount for the entire period." *PJI* 2:290.

The loss of future earnings is a proper measure of damages, even as to an infant plaintiff. *Kavanaugh v. Nussbaum*, 129 AD2d 559, 514 NYS2d 55 (2d Dept. 1987), *aff'd* as *mod* on other grounds, 71 NY2d 535, 528 NYS2d 8, 523 NE2d 284 (1988); *Sullivan v. Locastro*, 178 AD2d 523, 577 NYS2d 631 (2d Dept. 1991). However, an award for loss of future earnings may not be based upon speculation. *Davis v. New York*, 264 AD2d 379, 693 NYS2d 230 (2d Dept. 1999). The loss must be established with reasonable certainty. *Shubbuck v. Conners*, 15 NY3d 871, 913 NYS2d 120, 939 NE2d 137 (2010). While the value of future fringe benefits may be considered, *Reid v. Weir-Metro Ambulance Service, Inc.*, 191 AD2d 309, 595 NYS2d 40 (1st Dept. 1993), where plaintiff was not a union member, it was too speculative to permit consideration of hypothetical union benefits that plaintiff would have received had he joined. *Hackworth v. WDW Development, Inc.*, 224 AD2d 265, 637 NYS2d 720 (1st Dept. 1996). The mere fact that a plaintiff returns to work following an accident does not resolve the issue of lost wages. There may still be a diminution of earning claim. Where a plaintiff returns to work after the accident but in a different job, in order to recover for loss of future earnings, plaintiff must show that the earnings in the new employment will be less than the earnings in the former employment. *Johnson v. Danly Mach. Specialties, Inc.*, 183 AD2d 592, 584 NYS2d 26 (1st Dept. 1992).

Lastly, awards for lost earnings and loss of future earnings must be itemized in a special verdict, CPLR §4111. Evidence as to inflation is admissible on the issue of future economic losses, including loss of earnings, *Brown v. State*, 184 AD2d 126, 592 NYS2d 533 (4th Dept. 1992); *Andrialis by Andrialis v. Snyder*, 159 Misc2d 419, 603 NYS2d 670 (Sup 1993); *Gambardelli v. Allstate Overhead Garage Doors, Inc.*, 150 Misc2d 395, 576 NYS2d 770 (Sup 1991). It is improper for the jury to consider the effect of inflation on an award for future lost earnings in the absence of expert testimony. *Kelly v. State*, 259 AD2d 962, 687 NYS2d 843 (4th Dept. 1999).

C. Medical Expenses

In order to recover for future medical expenses, the plaintiff must show: 1) the reasonable value of each of the expected medical charges; 2) that the future services or supplies are reasonably certain to be necessary to treat the injury; and, 3) that the condition requiring the future medical care is causally connected to the injuries inflicted by the defendant. Such evidence generally must be introduced through expert testimony. In New York, a plaintiff who has been injured by another's negligence is entitled to a sum of money that will justly and fairly compensate him for all losses proximately caused by the wrongdoing, to restore him, to the extent possible, to the position he would have been in had the wrong not occurred. *NY PJI* 2:277. It is stated as a general rule in personal injury actions that a plaintiff may recover the necessary and reasonable expenses for medicine and medical attendance, hospital expenses, and care and nursing. And it is also said that, as a general rule, recovery may be had for those expenses which are reasonably certain to be necessarily incurred in the future.

The following is the jury charge related to future expenses: "If you decide for plaintiff AB on the question of liability, AB will be entitled to recover the amount of reasonable expenditures for medical (and dental) services and medicines, including physician's charges, nursing charges, hospital expenses, diagnostic expenses and X-ray charges. Thus, you will include in your verdict the amount that you find from the evidence to be the fair and reasonable amount of the medical (and dental) expenses necessarily incurred as a result of AB's injuries. If you find that AB will need medical, hospital or nursing expenses in the future, you will include in your verdict an amount for those anticipated medical, hospital and nursing expenses which are reasonably certain to be incurred in the future and that were necessitated by plaintiff's injuries. If you find that AB is entitled to an award for medical (and dental) expenses to be incurred in the future, you will fix the dollar amount of expenses over the entire period that you find AB will incur such expenses and include that amount in your verdict. In your verdict you will state separately the amount awarded for medical (and dental) expenses to date, if any, and, if you make an award for future medical (and dental expenses), you will state in your verdict the amount awarded and the period of years over which such award is intended to provide compensation. Do not state an amount per year but only a

total amount for the entire period.” *PJI* 2:285.

Please note that in order for the plaintiff to recover future medical expenses, it is not necessary of the plaintiff to prove the injuries in question are permanent. Damages for future medical expenses are available regardless of whether the plaintiff's injuries are permanent, and it is error to charge the jury that such damages may be awarded only upon a finding of permanence. *Gallagher v. Samples*, 6 AD3d 659, 776 NYS2d 585 (2d Dept. 2004); see, *Rizzo v. DeSimone*, 6 AD3d 600, 775 NYS2d 531 (2d Dept. 2004).

As stated, under New York law, an award for damages is excessive or inadequate if it deviates materially from what would be reasonable compensation. *CPLR* 5501(c). To show that future medical expenses do not materially deviate from reasonable compensation, the plaintiff must prove his expenses with reasonable certainty. *Adebiyi v. Yankee Fiber Control, Inc.*, 705 F. Supp. 2d 287 (S.D. N.Y. 2010) (applying New York law). As with a pain and suffering award, reasonable certainty is required to support a claim for future medical expenses. See, *Askey v. Occidental Chem. Corp.*, 102 A.D. 2d 130, 137 (4th Dept. 1984). If a plaintiff is seeking future medical expenses as an element of consequential damages, he must establish with a degree of reasonable medical certainty through expert testimony that he will incur such expenses. See, *Ivory v. International Business Machines Corp.*, 116 A.D.3d 121, 983 N.Y.S.2d 110 (3d Dept. 2014).

How does a plaintiff meet the “reasonably certain” standard? Awards of damages for past and future medical expenses must be supported by competent evidence which establishes the need for, and the cost of, medical care. *Bock v. City of Mount Vernon*, 123 A.D.3d 644, 997 N.Y.S.2d 684 (2d Dept. 2014). An award for future medical expenses cannot be based upon mere speculation; the plaintiff must establish future medical expenses with reasonable certainty by offering competent proof of necessary, anticipated medical costs. *Haleemeh M.S. ex rel. Mohammad S.F. v. MRMS Realty Corp.*, 28 Misc. 3d 443, 904 N.Y.S.2d 862 (Sup. 2010). See, *Guallpa v. Key Fat Corp.*, 98 AD3d 650, 651, (2d Dept. 2012); *Janda v. Michael Rienzi Trust*, 78 AD3d 899, 901 (2d Dept. 2010).

Here are some examples of the failure by the plaintiff to prove the cost of the future treatment:

Jury's award of \$100,000 for future medical expenses would be set aside, in plumber's action against operator of chemical plant, seeking to recover damages for respiratory injuries he allegedly sustained as a result of a chemical spill that occurred while he was working at the plant, where there was no evidence regarding how much plumber's past medical testing and medications had already cost him or would cost in the future, and the stipulated past medical expenses award could not be projected forward to determine future costs. *Leto v. Amrex Chemical Co., Inc.*, 85 A.D.3d 1509, 926 N.Y.S.2d 697 (3d Dept. 2011).

Jury's award for future medical expenses in sum of \$500,000 was clearly speculative and not supported by the evidence in pedestrian's action to recover damages for injuries sustained when she was struck and run over by a bus, warranting reduction of the award to \$416,220, although pedestrian's expert testified that she would likely require further medication and treatment should she develop an arthritic condition in the future and for back problems, where the only evidence regarding future medical expenses related to the cost of prescription medication in the amount of \$6,937 per year. *Mohamed v. New York City Transit Authority*, 80 A.D.3d 677, 915 N.Y.S.2d 599 (2d Dept. 2011).

In action for injuries sustained by pedestrian hit by van, jury award for future medical expenses was properly stricken by trial court, where no questions were put to medical expert regarding cost or expense of any portion of future medical care and there was no other evidence on point; jury's award was based entirely on uninformed speculation. *Buggs v. Veterans Butter & Egg Co.*, 120 A.D.2d 361, 502 N.Y.S.2d 12 (1st Dept. 1986).

D. Loss of Services/Loss of Consortium

The jury charge with regard to a claim for loss of services by a spouse is as follows: If you find that the injured plaintiff's (husband, wife) is entitled to recover, you will award the (husband, wife) damages for the monetary value of lost services and society which you find plaintiff (husband, wife) sustained by the loss of (his, her) spouse's services and society. In deciding the amount of such damages, you may take into consideration the nature and extent of the (husband's, wife's) services and society before the injury, including (his, her) disposition, temperament, character and attainments; the interest (he, she) showed in (his, her) home; the social life of (his, her) family and in the comfort, happiness, education and general welfare of the members of the family; the services (he, she) rendered in superintending the household, training the children, assisting (his, her) spouse in the management of the business or affairs in which the spouse was engaged, if any; (his, her) acts of affection, love and sexual intercourse and the extent to which the injuries (he, she) sustained prevented (him, her) from performing such services and providing such society. You will award plaintiff (husband, wife) such an amount based upon the evidence and upon your own observation, experience and knowledge conscientiously applied to the facts and circumstances as in your judgment will compensate (him, her) for the monetary value of the lost services and society that you find (he, she) has sustained and is reasonably certain to sustain in the future by reason of (his, her) spouse's inability to perform such services and provide such society as a result of (his, her) injuries. Your award, if any, for loss of spousal services and society will be in separate amounts for past and future damages. In addition, you will state the number of years over which your award for future damages is meant to cover. *PJI* 2:315.

E. Loss of Parental Guidance

In a case of wrongful death, in addition to support and services, a child's compensable pecuniary injuries include the loss of nurture and guidance, including loss of parental moral and educational training, caused by the death of a parent, or grandparent, whether or not that person is a wage earner. Thus, children who lose parents may recover damages not only for the time of infancy, but also for those adult years when the parent would have been alive. Neither the age of the child nor the fact that the decedent's assistance was not financial bars recovery. In addition, adult grandchildren may present sufficient evidence of pecuniary injuries suffered by reason of their grandparent's wrongful death to support an award for damages for loss of services and guidance and support. The loss of parental care and guidance is considered a pecuniary loss to the extent that they have a pecuniary value and a salutary effect on the child. The best way to support a claim for loss of nurture, guidance and training is to provide evidence of the loving relationship between the parent and child, although loss of parental love and society is not recoverable.

F. Other

An injured plaintiff's inability to perform household services is a quantitative economic loss separate and apart from pain and suffering. *Cramer v. Kuhns*, 213 AD2d 131, 630 NYS2d 128 (3d Dept. 1995); see, *Compani v. State*, 183 AD2d 966, 583 NYS2d 582 (3d Dept. 1992). Damages for loss of household services should be awarded only for those services which are reasonably certain to be incurred and necessitated by plaintiff's injuries. *Schultz v. Harrison Radiator Div. General Motors Corp.*, 90 NY2d 311, 660 NYS2d 685, 683 NE2d 307 (1997). In *Schultz*, the court held that since plaintiff did not incur any actual expenditures for household services between the accident and the date of verdict, having relied on the gratuitous assistance of relatives and friends, the jury improperly awarded plaintiff an award for household services for that period.

III. Pre-Suit Activity

- Could Be the Most Important Time for Investigation
- Creativity May be Rewarded
- Role of Defense Counsel
- Things to Contemplate:
 - Witness Statements (Co-Workers, Bystanders, Etc.)
 - Photos of Scene

- Preservation of Scene
 - Preservation of Apparatus, Tools, Materials, etc.
 - Accident Reports
 - Documents from Site of Accident (Logs, Reports, etc.)
 - Video Footage of Accident
 - Photographs of Accident
 - Video Footage of Scene
 - Documentation from the Employer
 - Results of OSHA Investigation
 - Results of Police/Fire Investigation
 - Contracts/Insurance Information/Tenders
- Often Concentrates on Liability (For Good Reason)
 - However Do Not Forget About Damages
 - Start to Get a Picture of the Plaintiff
 - Explore:
 - Background Checks
 - Prior Injuries/Prior Claims
 - Criminal Convictions
 - Work History

IV. Pleadings and Third-Party Actions

A. Responsive Pleading a/k/a “The Answer”

Proper Denials

Affirmative Defenses

Collateral Source Defense (Very Important)

Failure to Mitigate Damages

Cross-Claims Against Co-Defendants (See most common claims below)

B. Third-Party Actions

1. Most Common Third-Party Claims (and Cross-Claims)

Contribution
Contractual Indemnification
Common Law Indemnification
Breach of Contract for Failure to Procure Insurance

2. Action Against the Plaintiff's Employer

Section 11 of the Workers' Compensation Law provides that an employer's liability prescribed by the Workers' Compensation Law shall be exclusive and in place of any other liability whatsoever. See, *Stabile v. Viener*, 291 A.D.2d 395 (2nd Dept. 2002); *Soto v. Alert No. 1 Alarm Systems, Inc.*, 272 A.D.2d 466 (2nd Dept. 2000); *Goodarzi v. City of New York*, 217 A.D.2d 683 (2nd Dept. 1995). Therefore, any third-party action against the employer for common law contribution and/or common law indemnification would be barred. However, the section further provides that an employer may be liable in a third-party action for contribution or indemnification only where the third-party plaintiff proves through competent medical evidence that the employee sustained a grave injury, see, *Flores v. Lower East Side Service Center, Inc.*, 4 N.Y.3d 363 (2005); *Meis v. ELO Org.*, 97 N.Y.2d 714 (2002); see, also, *Spiegler v. Gerken Bldg. Corp.*, 35 A.D.3d 715, 715 (2nd Dept. 2006); *Angwin v. SRF Partnership, L.P.*, 285 A.D.2d 568 (2nd Dept. 2001), or that a written agreement provides for the right to contribution and indemnification.

a. Is there a contract with the employer?

Contractual Indemnification
Breach of Contract for Failure to Procure

b. If there is no contract with the employer?

If there is not a valid contract with the plaintiff's employer that contains an indemnification agreement, you must ascertain, has the plaintiff suffered a "Grave Injury" pursuant to *Workers Compensation Law §11*? If there is, then there still may be a viable claim for contribution and/or indemnification against the employer. The Workers' Compensation Law provides that an employer is not liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury." For purposes of this provision, a "grave injury" means only one or more of the following:

- Death
- Permanent and total loss of use or amputation of an arm, leg, hand, or foot
- Loss of multiple fingers
- Loss of multiple toes

- Paraplegia or quadriplegia
- Total and permanent blindness
- Total and permanent deafness
- Loss of nose
- Loss of ear
- Permanent and severe facial disfigurement
- Loss of an index finger
- An acquired injury to the brain caused by an external physical force resulting in permanent total disability.

The term “grave injury” as contained in Workers’ Compensation Law § 11 has been described as a statutorily-defined threshold for catastrophic injuries, and it includes only those injuries listed in the statute and determined to be permanent. Furthermore, the statutory list of grave injuries is intended to be exhaustive, not illustrative.” *Dunn v. Smithtown Bancorp*, 286 A.D.2d 701, 702 (2d Dept. 2001); *McCoy v. Queens Hydraulic Co., Inc.*, 286 A.D.2d 425 (2d Dept. 2001). Grave injuries are narrowly defined and include only those injuries which are listed in the statute. The list is intended to be exhaustive, not merely illustrative. *Rubeis v. Aqua Club Inc.*, 3 N.Y.3d 408, 788 N.Y.S.2d 292, 821 N.E.2d 530 (2004); *Dunn v. Smithtown Bancorp*, 286 A.D.2d 701, 730 N.Y.S.2d 150 (2d Dep’t 2001) and see, *Castro v. United Container Machinery Group, Inc.*, 96 N.Y.2d 398, 736 N.Y.S.2d 287, 761 N.E.2d 1014 (2001). One of the most contentious categories of grave injuries is an acquired injury to the brain caused by an external physical force resulting in permanent total disability. The test for whether a brain injury results in permanent total disability, and is therefore a grave injury for purposes of the statute, is whether the injury renders the worker no longer employable in any capacity regardless of whether the worker is able to perform day-to-day functions. *Galindo v. Dorchester Tower Condominium*, 56 A.D.3d 285, 868 N.Y.S.2d 11 (1st Dep’t 2008); *Rubeis v. Aqua Club Inc.*, 3 N.Y.3d 408, 788 N.Y.S.2d 292, 821 N.E.2d 530 (2004); *Schuler v. Kings Plaza Shopping Center and Marina, Inc.*, 294 A.D.2d 556, 743 N.Y.S.2d 141 (2d Dep’t 2002); *Way v. George Grantling Chemung Contracting Corp.*, 289 A.D.2d 790, 736 N.Y.S.2d 424 (3d Dep’t 2001). Daily headaches and frustrating loss of focus from which an employee testified he suffered did not satisfy the Workers’ Compensation Law’s acquired brain injury standard for “grave injury” as required to support claims against his employer for common-law indemnification and contribution. *Anton v. West Manor Const. Corp.*, 100 A.D.3d 523, 954 N.Y.S.2d 76 (1st Dep’t 2012). Expert neurologist’s testimony that worker’s brain injury rendered him permanently and totally disabled established that worker suffered “grave injury” during workplace accident within meaning of workers’ compensation statute permitting third-party actions against employer for contribution or indemnity. *Chelli v. Banle Associates, LLC*, 22 A.D.3d 781, 803 N.Y.S.2d 201 (2d Dep’t 2005). Some examples of such brain injuries that met the criteria of the statute are: An iron worker who sustained brain damage in a fall from a ladder was deemed to have suffered a grave injury, for purposes of the statute, where he experienced blindness in

one eye, lost his sense of smell, and was no longer employable in any capacity, even though he remained capable of performing simple tasks, including carrying packages from the grocery store. *Rubeis v. Aqua Club Inc.*, 3 N.Y.3d 408, 788 N.Y.S.2d 292, 821 N.E.2d 530 (2004). Also, a worker suffered a "grave injury" where he had no orientation to place and time, was the subject of a court-ordered guardianship, required 24-hour-a-day supervision and the care of a nursing facility, and, due to his cognitive impairments, was not capable of giving any testimony whatsoever in his action to recover damages from building owners and a subcontractor. *Tzic v. Kasampas*, 93 A.D.3d 438, 940 N.Y.S.2d 218 (1st Dep't 2012).

Some situations in which employees have been deemed not to have suffered "grave injury" are: Loss of a thumb since it was not a "permanent and total loss of use" of a hand. *Meis v. ELO Organization, LLC.*, 97 N.Y.2d 714, 740 N.Y.S.2d 689, 767 N.E.2d 146 (2002). A partial loss of multiple fingers, since it was not a "loss of multiple fingers". *Blackburn v. Wysong and Miles Co.*, 11 A.D.3d 421, 783 N.Y.S.2d 609 (2d Dep't 2004); *Castro v. United Container Machinery Group, Inc.*, 96 N.Y.2d 398, 736 N.Y.S.2d 287, 761 N.E.2d 1014 (2001). A partial loss of an index finger. *Mentesana v. Bernard Janowitz Const. Corp.*, 36 A.D.3d 769, 828 N.Y.S.2d 522 (2d Dep't 2007). Facial injuries, consisting of multiple scars on his forehead and right upper eyelid. *Fleming v. Graham*, 10 N.Y.3d 296, 857 N.Y.S.2d 8, 886 N.E.2d 769 (2008). Loss of part of an ear. *Hansen v. 510 Manhattan Affordable Housing, LP*, 2 A.D.3d 274, 770 N.Y.S.2d 21 (1st Dep't 2003). Temporary paralysis from a head trauma and spinal cord injury sustained in a workplace accident, sensation was restored to his limbs within an hour after the accident, and experienced only mild numbness in his lower extremities after six hours, plus the plaintiff could walk and drive at the time of the present action. *Bradt v. Lustig*, 280 A.D.2d 739, 721 N.Y.S.2d 114 (3d Dep't 2001). Whether a worker has sustained a grave injury within the meaning of the statute is ordinarily a question of fact which should not be resolved on a motion for summary judgment. *Cogan v. Madeira Associates*, 1 A.D.3d 1066, 766 N.Y.S.2d 475 (4th Dep't 2003); *Balaskonis v. HRH Const. Corp.*, 1 A.D.3d 120, 767 N.Y.S.2d 9 (1st Dep't 2003).

V. Discovery

A. Demand for a Bill of Particulars

B. Initial Combined Discovery Demands

- All of the usual demands plus authorizations for the following:
 - Employment Records incl. W2s (as far back as possible, but most courts will limit)

- IRS/Tax Returns (Form 4056 – also courts may limit depending on jurisdiction)
- Union Records
 - Member Work History
 - Rate Sheets (Wage and Benefits)
 - Pension Credit Summary Sheet
 - Member Contributions Printout
 - Pension Fund Summary Plan Description
 - Annuity Fund Summary Plan Description
 - Welfare Fund Summary Plan Description
 - Collective Bargaining Agreement
- Social Security Disability
- No-Fault
- Private Disability Insurance
- Workers' Compensation
- Unemployment (Dept. of Labor)

C. Video Surveillance

- Dependent upon facts of case, injury alleged, etc.
- May not be prudent
- If done, generally needs to be exchanged with plaintiff prior to deposition of plaintiff

D. Deposition of the Plaintiff

- Goal is to obtain as much information as possible
- Natural curiosity is important
- Topics should always include:

- Pain and Suffering (pain levels, pain frequency, treatment, effect on life, etc.)
- Lost Wages
- Medical Expenses
- Loss of Services/Loss of Consortium
- Loss of Parental Guidance
- Collateral Sources

VI. Experts

A. What Experts Will You See From Plaintiff

1. Treating Physician
2. Examining Physician
3. Surgeon
4. Pain Management Physician
5. Economist
What can the economist testify to?
6. Life Care Planner
What does the Life Care Planner testify about?
7. Vocational Rehabilitation Expert
8. Social Worker

B. Defense Experts

1. IME Physicians
Which disciplines should be used?
Specialists within same discipline
2. Radiologist
3. Vocational Rehabilitation Expert

4. Life Care Planner
5. Economist
6. Others

C. Defense Expert Considerations

- To Examine or Not to Examine a Plaintiff
- To Call or Not to Call an Expert
- Which Experts Must be Called at the Time of Trial
 - Missing Witness Charge

When a party fails to call a witness, there may be a ramification, in the form of the missing witness charge. With respect to a defendant, the failure to call an examining physician or an expert who performed an examination such as a vocational rehabilitation expert may result in the charge being given to the jury. The charge (PJI 1:75) states as follows:

A party is not required to call any particular person as a witness. However, the failure to call a certain person as a witness may be the basis for an inference against the party not calling the witness. For example, in this case the (plaintiff, defendant) did not call AB [*identify witness, e.g. treating physician, examining physician*] to testify on the question of [*identify issue, e.g., permanent extent of injury, causation*]. (The plaintiff, defendant) (has offered the following explanation for not calling AB [*summarize explanation*], as a witness or has offered no explanation for not calling AB). [*If explanation is offered*] If you find that this explanation is reasonable, then you should not consider the failure to call AB in evaluating the evidence. If, however, you find (the explanation is not a reasonable one, no explanation has been offered) you may, although you are not required to, conclude that the testimony of AB would not support (the plaintiff's, defendant's) position on the question of [*identify issue*] [*add if opposing party has offered evidence on the issue*]: and would not contradict the evidence offered by (the plaintiff, defendant) on this question and you may, although you are not required to, draw the strongest inference against the (the plaintiff, defendant) on that question, that opposing evidence permits.

VII. Resolution Prior to Trial

- Voluntary Non-Binding Mediation
- Pre-Trial/Settlement Conference
- Mandatory or Court Mediation
- Lien Considerations
- Issues Surrounding Multiple Defendants

Whenever your client is one of multiple defendants in a catastrophic injury case, having full and complete knowledge of your co-defendants' primary policy limits and available excess coverage is of the utmost importance. In addition, an analysis of the priority of coverage (horizontal v. vertical exhaustion) between the defendants' policies, especially in those cases dealing with indemnification, is critical when dealing with catastrophic injuries.

In any multiple defendant case, any issue of one defendant settling directly with the plaintiff invariably arises. There are certain considerations that must be made when one defendant is "settling out" with the plaintiff. Under *General Obligations Law* § 15-108, a release or a covenant not to sue made by one tortfeasor does not discharge any other tortfeasors from liability. However, it does reduce the claim against the other tortfeasors by the amount in the settling party's stipulation, or the amount of the tortfeasor's equitable share, whichever is greater, see *Williams by Williams v. Niske by Niske*, 81 NY2d 437, 599 NYS2d 519, 615 NE2d 1003 (1993). *GOL* §15-108 only applies where parties are liable in tort for the same injury, *Ackerman v. Price Waterhouse*, 252 AD2d 179, 683 NYS2d 179 (1st Dept. 1998). Obviously, in order to determine a tortfeasor's equitable share, a determination of apportionment of the defendants must be made by a jury (or judge) following a trial. When dealing with a case involving a catastrophic injury, the amount of the set-off could be significant.

General Obligations Law §15-108 provides the following: (a) Effect of release of or covenant not to sue tortfeasors. When a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for the same injury, or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms expressly so provide, but it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equitable share of the damages under article fourteen of the civil practice law and rules, whichever is the greatest. (b) Release of tortfeasor. A release given in good faith by the

injured person to one tortfeasor as provided in subdivision (a) relieves him from liability to any other person for contribution as provided in article fourteen of the civil practice law and rules. (c) Waiver of contribution. A tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person. (d) Releases and covenants within the scope of this section. A release or a covenant not to sue between a plaintiff or claimant and a person who is liable or claimed to be liable in tort shall be deemed a release or covenant for the purposes of this section only if: (1) the plaintiff or claimant receives, as part of the agreement, monetary consideration greater than one dollar; (2) the release or covenant completely or substantially terminates the dispute between the plaintiff or claimant and the person who was claimed to be liable; and (3) such release or covenant is provided prior to entry of judgment.

VIII. Trial

Trial Considerations

- **Sustainability** - Pain and Suffering awards by the jury are often much higher than what is sustained by the Appellate Courts and awards for economic damages often go undisturbed.
- **Appellate Review** - Often trying the case for the Appellate Division when dealing with catastrophic injuries.
- **Do not be “penny wise and pound foolish” in preparation**
- **Factors to think about:**
 - Trial judge
 - Format (Bifurcated or Unified)
 - Venue
 - Bench or jury
 - Jury make-up (socio-economic factors, education, etc.)
 - Plaintiff’s counsel
- **Recommend an award during summation or not?**

CPLR §4016(b) expressly permits counsel for both plaintiff and defendant to make reference in their closing statements to “a specific dollar amount that the attorney believes to be appropriate compensation for any element of damage that is sought to be recovered in the action.” The statute further provides that if an attorney exercises the

right to refer to a specific dollar amount of damages, the court must, upon request of any party, include in its closing charge instructions that the attorney's remarks are permitted as argument, that the attorney's references to specific dollar amounts are not evidence and should not be considered as evidence and, finally, that the determination of damages is solely for the jury. *PJI* 2:277A. It is often a point of strategy as to whether or not counsel for either party should recommend an amount for any of the categories of damages sought. For the plaintiff there is a risk at offending the jury. For the defendant there is a risk of setting a "floor" and/or losing credibility with the jury.

Other notes on trial practice: Any allusion by plaintiff's attorney to the defendant's ability to pay damages is improper and if made is grounds for mistrial. *Adams v. Acker*, 57 AD2d 741, 394 NYS2d 8 (1st Dept. 1977); *Nicholas v. Island Industrial Park of Patchogue, Inc.*, 46 AD2d 804, 361 NYS2d 39 (2d Dept. 1974); *Laughing v. Utica Steam Engine and Boiler Works*, 16 AD2d 294, 228 NYS2d 44 (4th Dept. 1962). Likewise, defense counsel may not suggest that defendant lacks the funds to respond to a large judgment and may not make allusions to plaintiff's financial status. *Vassura v. Taylor*, 117 AD2d 798, 499 NYS2d 120 (2d Dept. 1986). Moreover, it is improper for counsel in summation or the court in its charge to relate the amount to be fixed to what the jurors would like to receive as compensation if they were in plaintiff's place. *Liosi v. Vaccaro*, 35 AD2d 790, 315 NYS2d 225 (1st Dept. 1970); *Weintraub v. Zabolinsky*, 19 AD2d 906, 244 NYS2d 905 (2d Dept. 1963).

➤ **The Verdict Sheet**

The jury must itemize each element of damages into past and future. For future damages it must also determine the period of years, and award the full amount without reduction to present value. CPLR 4111(e).

IX. Post Trial

Post Trial Considerations

➤ **Collateral Source Hearing - To Determine Setoffs**

Needs to be plead as an Affirmative Defense (CPLR §4545).

The court may reduce the amount of the plaintiff's award if it finds that any element of the economic loss encompassed in the award was or will be replaced, in whole or in part, from a collateral source.

The reduction is authorized only when the collateral source payment represents reimbursement for a particular category of loss for which damages were awarded.

It applies to economic losses only, such as out of pocket damages for medical care, custodial care or rehabilitation services, loss of earnings claims and other economic losses.

The offset is not applied to awards for pain and suffering.

Insurance payments, social security disability, worker's compensation, and employee benefit programs may qualify.

Payments received from Medicare and/or life insurance does not diminish an economic award.

Any collateral source payments received by a plaintiff from an entity that is entitled by law to a lien against a recovery are not considered for purposes of an offset.

A post-trial hearing with the court must be held and is only addressed when a plaintiff has been awarded economic damages.

The defendant has the burden to prove "with reasonable certainty" that costs or expenses have been or will be reimbursed.

➤ **Interest (Post Trial and Pre-Judgment)**

In NY interest runs at 9% per annum

➤ **Structured Judgments**

Article 50 B of the CPLR (§5041, et seq) provides that certain future damages are to be paid in periodic installments funded by an annuity contract purchased by the defendant.

For example, in NY after applying setoffs, credits, comparative negligence, etc., past damages and the first \$250,000 of future damages are paid in a lump sum. Remaining future damages are reduced to present value and added to the lump sum damages for the total present value of the verdict. Litigation expenses and the attorney fee are used to reduce each element of damages on a pro rata basis. Defendant pays lump sums in cash and purchases an annuity(ies) to fund the remaining future damages over the prescribed period of years.

CPLR §5041(entitled Basis for determining judgment to be entered provides): "In order to determine what judgment is to be entered on a verdict in an action to recover damages for personal injury, injury to property or wrongful death under this article,

and not subject to article fifty-A of this chapter, the court shall proceed as follows: (a) The court shall apply to the findings of past and future damages any applicable rules of law, including set-offs, credits, comparative negligence pursuant to section fourteen hundred eleven of this chapter, additurs, and remittiturs, in calculating the respective amounts of past and future damages claimants are entitled to recover and defendants are obligated to pay. (b) The court shall enter judgment in lump sum for past damages, for future damages not in excess of two hundred fifty thousand dollars, and for any damages, fees or costs payable in lump sum or otherwise under subdivisions (c) and (d) of this section. For the purposes of this section, any lump sum payment of a portion of future damages shall be deemed to include the elements of future damages in the same proportion as such elements comprise of the total award for future damages as determined by the trier of fact. (c) Payment of litigation expenses and that portion of the attorney's fees related to past damages shall be payable in a lump sum. Payment of that portion of the attorney's fees related to future damages for which, pursuant to this article, the claimant is entitled to a lump sum payment shall also be payable in a lump sum. Payment of that portion of the attorney's fees related to the future periodically paid damages shall also be payable in a lump sum, based on the present value of the annuity contract purchased to provide payment of such future periodically paid damages pursuant to subdivision (e) of this section. (d) Upon election of a subrogee or a lien holder, including an employer or insurer who provides workers' compensation, filed within the time permitted by rule of court, any part of future damages allocable to reimbursement of payments previously made by the subrogee or the lien holder shall be paid in lump sum to the subrogee or the lien holder in such amount as is calculable and determinable under the law in effect at the time of such payment. (e) With respect to awards of future damages in excess of two hundred fifty thousand dollars in an action to recover damages for personal injury, injury to property or wrongful death, the court shall enter judgment as follows: After making any adjustment prescribed by subdivisions (b), (c) and (d) of this section, the court shall enter a judgment for the amount of the present value of an annuity contract that will provide for the payment of the remaining amounts of future damages in periodic installments. The present value of such contract shall be determined in accordance with generally accepted actuarial practices by applying the discount rate in effect at the time of the award to the full amount of the remaining future damages, as calculated pursuant to this subdivision. The period of time over which such periodic payments shall be made and the period of time used to calculate the present value of the annuity contract shall be the period of years determined by the trier of fact in arriving at the itemized verdict; provided, however, that the period of time over which such periodic payments shall be made and the period of time used to calculate the present value for damages attributable to pain and suffering shall be ten years or the period of time determined by the trier of fact, whichever is less. The court, as part of its judgment, shall direct that the defendants and their insurance carriers shall be required to offer and to guarantee the purchase and payment of such an annuity contract. Such annuity contract shall provide for the payment of the annual payments of such remaining future damages over the period of

time determined pursuant to this subdivision. The annual payment for the first year shall be calculated by dividing the remaining amount of future damages by the number of years over which such payments shall be made and the payment due in each succeeding year shall be computed by adding four percent to the previous year's payment. Where payment of a portion of the future damages terminates in accordance with the provisions of this article, the four percent added payment shall be based only upon that portion of the damages that remains subject to continued payment. Unless otherwise agreed, the annual sum so arrived at shall be paid in equal monthly installments and in advance. (f) With the consent of the claimant and any party liable, in whole or in part, for the judgment, the court shall enter judgment for the amount found for future damages attributable to said party as such are determinable without regard to the provisions of this article."

➤ **Post-Trial Motion and Appeal**

The court retains supervisory power to be exercised where the damages are excessive or inadequate. *CPLR §4404; Figliomeni v. Board of Ed. of City School Dist. of Syracuse*, 38 NY2d 178, 379 NYS2d 45, 341 NE2d 557 (1975). The court may also affirm on damages and remand for a new trial on liability where appropriate, *Trimarco v. Klein*, 56 NY2d 98, 451 NYS2d 52, 436 NE2d 502 (1982), and vice versa. However, in order to protect the right to a jury trial, a court that finds a verdict to be inadequate or excessive may not enter judgment for an increased or decreased amount. Proper procedure is for the court to grant a new trial on the issue of damages unless, in the case of an inadequate verdict, defendant stipulates to an increased amount or, in the case of an excessive verdict, plaintiff stipulates to a reduced amount. *Ashton v. Bobruitsky*, 214 AD2d 630, 625 NYS2d 585 (2d Dept. 1995); *Anderson v. Stephen M. Donis, D.P.M., P.C.*, 150 AD2d 414, 541 NYS2d 25 (2d Dept. 1989); see *Kane v. Linsky*, 156 AD2d 333, 548 NYS2d 286 (2d Dept. 1989); see also *Walker v. New York City Transit Authority*, 130 AD2d 442, 515 NYS2d 777 (1st Dept. 1987) (excessiveness of monetary award not a basis for granting a new trial on issue of liability). The courts generally have been reluctant to interfere with the verdict unless it is not within reasonable bounds.

A motion may be made to the trial court to set aside the verdict and/or reduce the verdict amount as being against the weight of the evidence. If unsuccessful, an appeal from the verdict may be taken upon entering of a judgment. In reviewing a claim of excessiveness or inadequacy of the monetary award of a judgment in an action in which an itemized verdict as to damages is required by *CPLR §4111*. *CPLR §5501(c)* provides that "the Appellate Division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation". *Christopher v. Great Atlantic & Pacific Tea Co., Inc.*, 76 NY2d 1003, 564 NYS2d 715, 565 NE2d 1266 (1990).