# UNWISE AND UNNECESSARY: STATUTORY CAPS ON NON-ECONOMIC DAMAGES IN MEDICAL MALPRACTICE CASES AND THE APPELLATE REVIEW ALTERNATIVE

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## I. INTRODUCTION

In June 1999, a New York jury awarded over $76 million dollars to Gaelle Prindilus, a woman who suffered brain damage when she was an infant because of the purported carelessness of the resident doctors who delivered her at Harlem Hospital.[1] Allegedly, the hospital staff failed to do a sonogram that would have revealed the umbilical cord tied around the plaintiff's neck.[2] Such headline-grabbing stories have motivated many in legal, medical, and political communities to demand tort reform.[3] Specifically, many desire a cap on the amount of non-economic damages a plaintiff can receive.[4] The concern of many commentators and advocacy groups is that large awards like these are having profoundly adverse effects on the medical community and healthcare in general.[5]

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[1] Jay Greene, *Delegates May Seek a Closer Watch on Residents' Hours*, AM. MED. NEWS, Dec. 6, 1999, at 11.

[2] *Id.*

[3] *See* Lewis L. Laska & Katherine Forrest, *Faulty Data and False Conclusions: The Myth of Skyrocketing Medical Malpractice Verdicts*, at 3 (2004), *available at* http://www.commonwealinstitute.org/reports/CI-MedMalpracticeReport-Oct20041.pdf.

[4] *See* Tanya Albert, *Liability Insurance Crisis: Bigger Awards Just One Factor*, AM. MED. NEWS, Apr. 15, 2002, at 2 (discussing the American Medical Association's support for laws that limit the amount of non-economic damages a plaintiff can recover); *see also* The White House: President George W. Bush, *Medical Liability*, http://www.whitehouse.gov/infocus/medicalliability (last visited Mar. 18, 2006) [hereinafter *Medical Liability*] (discussing President George W. Bush's medical liability reform plan, including the imposition of a $250,000 limit on non-economic damages).

[5] For a discussion of these adverse effects, see *infra* text accompanying notes 21–25; *Medical Liability*, *supra* note 4.

With stories of astronomical jury awards like the *Prindilus*[6] case, one can understand why many would argue for a reform measure such as a limit on damages for pain and suffering.[7] Reports of huge jury verdicts, however, tell the reader only half of the story. What happens after the verdict rarely gets discussed in any follow-up article and is often dwarfed by the more salacious headline and underlying story.[8] In the *Prindilus* case, for instance, the plaintiff received a $9 million settlement while an appeal of the case was pending;[9] this award was .118th of the size of that originally given by the jury. The power of the appellate courts to reduce damages awards[10] was likely a motivating factor for the plaintiff's attorney in settling the case.[11]

An appellate court's power to reduce awards does not have much significance if the power is not actually used on a regular basis. The Appellate Division, however, fulfills its statutory responsibility to reduce excessive damages awards in medical malpractice cases.[12] Accordingly, it is unnecessary for New York to adopt a statutory cap limiting non-economic damages.

A study of Appellate Division activity over a ten-year period demonstrates that the court is attentive to excessive damage awards and responds appropriately to them. Using cases decided between 1994 and 2003 as a representative sample, this study includes any medical malpractice case decided during the ten-year time frame if one of the issues discussed on appeal was whether excessive non-economic damages were awarded.[13]

Part II provides background information and reviews issues

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[6] Prindilus v. New York City Health & Hosps. Corp., 743 N.Y.S.2d 770 (App. Div. 2002).

[7] The term "pain and suffering" is used interchangeably with "non-economic" throughout this Article because pain and suffering typically makes up the core of non-economic damages in most cases. For further discussion, see *infra* text accompanying notes 14–15.

[8] *See* Laska & Forrest, *supra* note 3, at 4; *see also* Neil Vidmar et al., *Jury Awards for Medical Malpractice and Post-Verdict Adjustments of Those Awards*, 48 DEPAUL L. REV. 265, 299 (1998).

[9] Laska & Forrest, *supra* note 3, at 41; *Prindilus*, 743 N.Y.S.2d at 770.

[10] N.Y. C.P.L.R. 5501(c) (McKinney 1995).

[11] *See* Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 CORNELL L. REV. 589, 635 (1991).

[12] *See infra* Part III. While many tort reform advocates want damage caps for all tort cases, this Article and the Appellate Division study herein focus only on medical malpractice cases. Medical malpractice cases generally have higher awards compared to other tort cases and therefore are worthy of some independent analysis. For a discussion of the higher average and median size of medical malpractice awards as compared to other tort cases, see Vidmar et al., *supra* note 8, at 267–68; Tanya Albert, *Malpractice Awards Hit the Jury Jackpot*, AM. MED. NEWS, Feb. 3, 2003, at 13 (discussing how three medical malpractice cases were in the "Top 10 Highest Jury Award list for 2002").

[13] For a discussion of the time frame used, see *infra* note 34.

unique to non-economic damages and their purported relationship to the civil liability "crisis." Part III presents a study of Appellate Division activity and assesses the frequency with which the court has reduced non-economic damage awards on appeal. Part III also provides an analysis of several illustrative cases. Specifically, it looks at the three cases in the sample that had the largest damage awards in order to determine whether the appellate courts reduced the award. Additionally, Part III considers the three cases with the largest damages awards where the appellate courts declined to reduce the award. After comparing the process of appellate review to a statutory cap, Part IV argues that the former is the superior method for addressing the issue of excessive non-economic damage awards.

## II. BACKGROUND ON NON-ECONOMIC DAMAGES

Non-economic damages are damages that cannot be precisely measured in money.[14] Common examples of non-economic damages include awards for pain and suffering and loss of consortium.[15] The driving force behind capping such damages is the common criticism that they are arbitrary, unpredictable, and subjective.[16] As one legal commentator noted:

> Since there is no market for the sale and purchase of pain and suffering, no source other than the legal process exists for determining whether the awards made for pain and suffering are reasonable or unreasonable . . . . One of the most difficult aspects of evaluating the likely damage verdict in a medical malpractice case remains predicting what the court or jury is likely to award for pain and suffering.[17]

Such imprecision also allows juries to consider arguably improper characteristics, such as personal like or dislike for the plaintiff(s)

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[14] BLACK'S LAW DICTIONARY 418 (8th ed. 2004). The term "nonpecuniary" also means "non-economic."

[15] Loss of parental guidance and punitive damages would also fall under the category of non-economic damages. While there is conflicting authority on the subject, loss of services will be classified as a type of economic damage for the purposes of this article. *Compare* Dominguez v. Fixrammer Corp., 656 N.Y.S.2d 111, 114 (Sup. Ct. 1997) (classifying loss of services as a non-economic loss), *with* N.Y. EST. POWERS & TRUSTS LAW § 5-4.3, at 439, Margaret Valentine Turano, Practice Commentary (McKinney 1999) (describing loss of services as an economic loss under wrongful death causes of action in New York). Therefore, loss of services will not be factored into this Article's analysis.

[16] New Yorkers for Civil Justice Reform, *Why Tort Reform Matters*, http://www.nycjr.org/why-tort-reform-matters.cfm (last visited Mar. 18, 2006).

[17] FRANK M. MCCLELLAN, MEDICAL MALPRACTICE: LAWS, TACTICS, AND ETHICS 112 (1994).

and/or defendant(s).[18] Similarly, it allows juries to use such awards to improperly "punish" the defendant instead of trying to simply compensate the plaintiff.[19] The general public's dislike of managed care and the healthcare system might also have some influence on a jury's decision to award a large amount of damages.[20]

Excessive and unpredictable non-economic damages, it is argued, contribute to the overall civil liability "crisis" in New York and indeed, the entire nation.[21] This "crisis" in turn results in skyrocketing insurance premiums for doctors, which then increases the cost of practicing medicine.[22] Other alleged harmful effects are the potential for physicians retiring early or moving out of New York, leading to healthcare access problems for patients.[23] Furthermore, many argue that the alleged "crisis" leads to the practice of "defensive medicine" whereby doctors make decisions about patient care based on concerns over potential litigation rather than their best medical judgment.[24] Lastly, many believe that the current civil justice system creates a "culture of fear" for doctors, making them reluctant to report medical errors that are important for improving the quality of patient care because they are afraid that revealing such information will then be "used against them in a lawsuit."[25]

Not surprisingly then, healthcare providers in New York and throughout the country are some of the strongest advocates of a statutory cap on damages.[26] The Medical Society of New York, through its affiliation with the lobbying group New Yorkers for Civil

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[18] *Id*. at 103; *see also* Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation into "Punishment,"* 54 S.C. L. REV. 47, 59–60 (2002).

[19] Schwartz & Lorber, *supra* note 18, at 49.

[20] Albert, *supra* note 4, at 2.

[21] *See* Am. Med. Ass'n, *America's Medical Liability Crisis Backgrounder,* http://www.ama-assn.org/ama/pub/category/print/12392.html (last visited Oct. 16, 2005); The White House: President George W. Bush, *President Discusses Medical Liability Reform*, http://www.whitehouse.gov/news/releases/2005/01/print/20050105-4.html (last visited Mar. 18, 2006) [hereinafter *President Discusses Medical Liability Reform*].

[22] Amanda Craig, *A Physician's Perspective on the Medical Malpractice Crisis*, 13 ANNALS HEALTH L. 623, 624 (2004).

[23] *President Discusses Medical Liability Reform*, *supra* note 21; *see also* Craig, *supra* note 22, at 624.

[24] Craig, *supra* note 22, at 626–27. For example, "defensive medicine" occurs when physicians order "excessive procedures for fear of liability." *Id.* at 626.

[25] *Id.* at 627–28.

[26] *See* Am. Coll. of Surgeons Prof'l Ass'n, *Medical Liability Reform: The Answer to Soaring Insurance Premiums*, http://www.facs.org/acspa/soaringinsur.html (last visited Mar. 18, 2006) (charting different medical liability premiums per state with New York amongst the highest).

Justice Reform,[27] has advocated that New York should follow the trend of other states and adopt a $250,000 cap on non-economic damages.[28]

Caps on damages in medical malpractice cases also have support at the federal level, as evidenced by the policy agenda of the Bush Administration in its second term.[29] It is the states, however, that have the most direct effect on tort law.[30] While it is true that some tort reform proposals are rooted at the federal level, states have been responsible for most of the reform in this area over the past few decades.[31] Moreover, because this area of law has historically been in the states' domain, such federal proposals raise serious concerns over federalism.[32] Therefore, any meaningful discussion of and proposals for tort reform should be focused primarily at the state level.

The question remains whether New York should adopt a statutory cap on non-economic damages. The following sections explore the idea that the appellate courts might in fact already be acting as a surrogate for a statutory cap on excessive damages and that appellate review is preferable to any sort of legislatively imposed cap on non-economic damages.

## III. NEW YORK APPELLATE DIVISION FINDINGS

That the Appellate Division has the power to reduce excessive awards in malpractice cases[33] is irrelevant if it is not actually using that power. In other words, if the Appellate Division never, or very rarely, reduces an award in malpractice cases where an excessive

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[27] New Yorkers for Civil Justice Reform, *Who We Are*, http://www.nycjr.org/tort-reform.cfm?listalpha=m (last visited Mar. 18, 2006).

[28] New Yorkers for Civil Justice Reform, *supra* note 16 (move mouse over question mark next to "It encourages erratic and unfair awards"). This advocacy group supports a cap in all tort cases, including, as is relevant here, a cap for medical malpractice cases. *Id.* (follow "The Case for Medical Liability Reform" hyperlink).

[29] *Medical Liability*, *supra* note 4.

[30] *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (arguing that the federal government has no authority over state tort law).

[31] *See, e.g.*, MCCLELLAN, *supra* note 17, at 80–82 (giving an overview of the various kinds of tort reform legislation enacted by a number of states throughout the 1970s and 1980s).

[32] *See* Robert A. Levy, Op-Ed., *Constitutional Malpractice*, WASH. TIMES, Apr. 2, 2003, at A17 (arguing that federal proposals to cap medical malpractice awards and to limit attorney fees violate the principles of federalism and are thus unconstitutional); *see also* William A. Niskanen, *Do* Not *Federalize Tort Law: A Friendly Response to Senator Abraham*, 1 MICH. L. & POL'Y REV. 105, 106–07 (1996) (opining that the Commerce Clause does not give Congress constitutional authority to make tort law unless it is a barrier to interstate commerce).

[33] *See* N.Y. C.P.L.R. 5501(c) (McKinney 1995).

award was an issue on appeal, the argument that a statutory cap is unnecessary would be rather hollow. As the data will show, however, the Appellate Division in fact uses this power quite frequently.

### *A. Criterion for Eligibility and Exclusion in the Case Study*

Broadly stated, this case study includes any medical, dental, or podiatric malpractice case reviewed by the Appellate Division within a ten-year span, from 1994 to 2003, in which one of the issues decided on appeal was whether excessive non-economic damages were awarded.[34] Since medical, dental, and podiatric malpractice are commonly grouped together in New York statutes,[35] it is likely that any possible cap would include all three categories. Therefore, all three professions were deemed eligible for the case study. Furthermore, only cases discussing non-economic damages were included;[36] cases exclusively discussing issues of economic damages, such as loss of services, were excluded.

The Appellate Division derives the power to reduce awards it deems excessive from section 5501(c) of the New York Civil Practice Laws and Rules (CPLR).[37] CPLR 5501(c) allows the Appellate Division to order a new trial unless plaintiff agrees to reduce the award to whatever amount the court deems appropriate if the court finds that the award "deviates materially from what would be reasonable compensation."[38] This is the predominant method for courts to reduce a damages award, but it is not the exclusive method used in cases included in this study. In a handful of cases,

[34] Admittedly, the length of time and years chosen are somewhat arbitrary, but no variables make any other period any more representative than the one chosen. The only variable that could possibly make a difference is appellate cases decided before the 1986 amendment to the CPLR in which the standard for appellate courts reviewing the amount of damages awarded was changed from the "'shock[ing] the conscience' of the court" standard to the "deviates materially" standard. *See* N.Y. C.P.L.R. 5501, at 25, David Siegel, Practice Commentary.

[35] *See, e.g.*, N.Y. C.P.L.R. 214-a (McKinney 2003) (setting a statute of limitations for medical, dental, and podiatric malpractice cases); N.Y. C.P.L.R. 3012-a (McKinney 1991) (requiring that the plaintiff's attorney file a "certificate of merit" in any medical, dental, or podiatric malpractice action). The underlying reason that these three particular health care providers are grouped together appears to be their mutually successful lobbying efforts. *See* Betsy A. Rosen, *The 1985 Medical Malpractice Reform Act: The New York State Legislature Responds to the Medical Malpractice Crisis with a Prescription for Comprehensive Reform*, 52 BROOK. L. REV. 135, 143 n.42 (1986).

[36] As to what constitutes non-economic damages, see *supra* text accompanying notes 14–15.

[37] N.Y. C.P.L.R. 5501(c) (McKinney 1995).

[38] *Id.*

the appellate court completely eliminated a certain kind of damages for lack of evidentiary support or for erroneous application of legal standards.[39] If such damages were non-pecuniary in nature, the case was included in this study.

As expected, in almost all of the cases the defendant is the appellant. Cases where the plaintiff was the appellant were included only if they met one of the following criteria: (1) the defendant cross-appealed on the issue of excessive damages; or (2) the appellate court partially reinstated a jury award reduced by the trial court, finding that an award higher than the trial court's but still lower than the jury's was appropriate. Cases fitting the second criterion were included because their results imply appellate court findings of excessive jury awards despite disagreement among the appellate and trial court as to the degree of excessiveness.[40]

A possible criticism of including cases falling under the second criterion is that since *fully* reinstated jury awards were excluded from this study, inclusion of partially reinstated jury awards inflates the results favorable to the argument presented (since by implication such cases would be categorized as finding excessive damages). Fully reinstated jury award cases were excluded from this study, however, because such cases deal with an appealing plaintiff arguing that *inadequate* damages were given. Such cases bear no relevance to the underlying issue, unless the defendant cross-appeals arguing that the damages were excessive. Moreover, cases in which the plaintiff unsuccessfully appealed on the issue of inadequate damages were also excluded from the study. Furthermore, in partially reinstated jury award cases, had the defendant appealed based on a jury award *not* reduced by the trial judge, the appellate court very likely would have deemed the original jury award excessive.[41] Consequently, including such cases is appropriate.

Awards in which general verdicts were issued were also included in this case study. "General verdicts" are verdicts that "do not itemize the amount" of damage awards into categories such as pain

[39] *See, e.g.*, Charell v. Gonzalez, 673 N.Y.S.2d 685, 686–87 (App. Div. 1998) (vacating the $150,000 punitive damages award against defendant for lack of evidentiary support).

[40] *See, e.g.*, Cepeda v. New York City Health & Hosps. Corp., 756 N.Y.S.2d 189, 190 (App. Div. 2003) (holding that the trial court's reduction of a $12 million jury award to $175,000 for conscious pain and suffering was excessive and that a $750,000 award was more appropriate).

[41] For example, if, hypothetically, the trial court had not reduced the award in *Cepeda*, *id.*, and the defendant appealed the $12 million jury award as excessive, the appellate court would likely have agreed because in the actual holding of the case, the court finds $750,000 to be an appropriate award.

and suffering or loss of earnings and instead award one lump sum.[42] At first blush, it would appear appropriate not to include cases with such verdicts because it is unclear as to whether non-economic damages were awarded or not. However, general verdicts do in fact include non-economic damages,[43] and it is apparent in many of the cases included in the study that the non-economic portion of the general verdict damages was a factor for the court in deciding whether or not to reduce the award.[44] Therefore, it is proper to include such cases.

Lastly, cases in which damages were among the issues raised on appeal but were not decided in light of the appellate court's holding on other issues—most commonly being reversal of the judgment against the defendant—were excluded from this study.[45] Since the courts expressed no opinion on the damages issues, such cases would be impossible to categorize.

### *B. Categorization of Eligible Cases*

In its simplest terms, the eligible cases were categorized as either reducing the damages award or as expressly declining the invitation to reduce the damages award. Unfortunately, many cases do not present a simple answer to the question of whether the Appellate Division decided to reduce the award. As previously discussed, partially reinstated jury awards were also categorized as cases in which the Appellate Division reduced an excessive award.[46]

Another difficulty arises on account of the trial court's power of remittitur, whereby the trial court itself can order a new trial on damages unless the plaintiff agrees to reduce the jury award to whatever amount the judge thinks appropriate.[47] Thus, a common problem in categorizing these cases is how to treat a case in which the trial court reduced the jury award, and the Appellate Division merely affirmed the award as reduced by the trial court. For

[42] *See* David Baldus et al., *Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages*, 80 IOWA L. REV. 1109, 1173 (1995).

[43] *Id.* at 1173 n.158.

[44] *See, e.g.*, Osorio v. Brauner, 662 N.Y.S.2d 488, 489 (App. Div. 1997) (arguing that since plaintiff experiences muscle weakness and pain in certain instances due to his injury, the general verdict damages award was not excessive).

[45] *See, e.g.*, Bartha v. Lombardo & Assocs., P.C., 622 N.Y.S.2d 527, 528 (App. Div. 1995) (holding that since judgment against the defendant was reversed there was no need to address the issue of excessive damages).

[46] *See supra* text accompanying notes 40–41.

[47] BLACK'S LAW DICTIONARY 1321 (8th ed. 2004).

purposes of categorization, unless the Appellate Division lowered an award already reduced by the trial court, or it is unequivocally clear that the appellate court would have reduced the award if the trial court had not,[48] such cases will be treated as cases in which the appellate courts did *not* reduce an allegedly excessive award. The reason for this is to avoid confounding the analysis by including cases in which trial courts rather than appellate courts can be credited with reducing excessive awards.[49]

Another issue is the itemization of damages, which occurs when a court divides a non-economic damages award into, for example, loss of consortium, past pain and suffering, and future pain and suffering. As a result of this, a court may reduce a very specific kind of non-economic damages but will leave untouched other kinds of non-economic damages.[50] In these situations, the case is categorized as one in which the court reduced an excessive award because the *overall* amount of non-economic damages has been reduced.

### *C. Results of the Appellate Division Study*

Application of the eligibility and exclusion criteria yielded ninety-two Appellate Division cases presenting alleged excessive non-economic damage awards as an issue on appeal. Among these ninety-two cases, the appellate courts found excessive damage awards in 59.8% of the cases.[51] These findings show that, more often than not, an appealing defendant is successful in getting a damages award reduced. Moreover, the data shows that the appellate courts will quite often use their statutory authority to

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[48] *Compare* Woods v. City of New York, 707 N.Y.S.2d 628, 628–29 (App. Div. 2000) (holding that the $504,000 jury award was excessive and the trial court's reduction of the award to $300,000 was appropriate), *with* Harris v. New York City Health & Hosps. Corp., 707 N.Y.S.2d 213, 215 (App. Div. 2000) (holding that damages awarded for past pain and suffering as reduced by the trial court were not excessive).

[49] It could be argued that if the trial court had not reduced the jury award, the appellate court might have; such cases should therefore be treated as ones in which the appellate court reduced the award. Such a contention is purely speculative, however, unless the court uses language that clearly indicates it would have reduced the award. *See supra* text accompanying note 48. Therefore, treating such cases as favorable to my argument would be misleading.

[50] In fact, appellate courts are frequently silent as to other categories of damages. The effect of this is that the court is implicitly saying a particular award category is reasonable. *See, e.g.*, Holder v. Sheiman, 701 N.Y.S.2d 44, 44 (App. Div. 2000) (holding that the jury award of $500,000 for past pain and suffering was excessive but expressing no opinion as to the award for future pain and suffering).

[51] *See infra* Appendix (citing cases where Appellate Division found an excessive award).

reduce excessive damages. Therefore, the culpable defendant has an effective safeguard in cases in which he or she may be rightfully liable but has been unfairly "punished" with a damages award that would arguably give the prevailing plaintiff some degree of a windfall. The question must then be asked: Since the appellate courts are doing a sufficient job of cutting down on excessive damage awards, would any additional value be added if New York adopted a statutory cap on damages? After consideration of these empirical findings coupled with the policy analysis in Part IV, the answer is clearly no.

### *D. A Sampling of Appellate Division Cases*

While the appellate courts are in fact finding excessive non-economic damages quite frequently, a qualitative analysis of a sample of the cases is helpful in assessing the appellate courts' activity with respect to those awards tort reform advocates would likely label as the most egregious and excessive. One way to make such an assessment is to scrutinize some representative cases more closely. This section examines the three cases in the sample that had the largest damage awards to see whether the court reduced the award.

Additionally, this section will give closer scrutiny to a sample of the cases—the three cases with the largest damage awards where the court *declined* to reduce the award—to see if the court was justified in reaching that conclusion. Such scrutiny attempts to mitigate any residual criticism levied by supporters of statutory caps. In other words, cap supporters might argue that an Appellate Division reduction of damages 60% of the time is insufficient, and that no reduction occurred in a handful of situations in which the award was in the millions of dollars and should have been reduced.

Selection of the six cases above was based on the damages award at issue on appeal. This means that a trial court's reduction of damages was taken as the award, as opposed to the jury's award. It would be wholly speculative in some cases to guess what the appellate court would have held in the absence of trial court remittitur. Use of the actual award before the court on appeal is therefore the appropriate method.

#### 1. The Largest Damage Awards: *Sawtelle*, *Weinstein*, and *Sugrim*

The three cases in which the largest amounts of non-economic

damages were awarded are *Sawtelle v. Southside Hospital* ($8 million),[52] *Weinstein v. New York Hospital* ($10 million),[53] and *Sugrim v. City of New York* ($6.75 million).[54] In *Sawtelle*, the plaintiff was awarded $8 million for pain and suffering after the defendant failed to properly examine and diagnose the plaintiff's condition, causing the plaintiff to have a stroke after surgery for his cerebral aneurysm.[55] The $8 million award was deemed excessive and accordingly was reduced to $3.25 million,[56] a 41% reduction.

In *Weinstein*, the court gave the plaintiff a $10 million award when defendants were negligent in not giving the plaintiff further arterial blood gas studies and not arranging for an intubation, causing injury to the plaintiff.[57] The appellate court reduced the $8 million future pain and suffering award by 56% to $4.5 million, giving the plaintiff $6.5 million in total pain and suffering damages, 65% the size of the original award.[58]

In *Sugrim*, the infant plaintiff was awarded $6.75 million in pain and suffering for injuries caused by the negligence of defendants.[59] The Second Department deemed the award excessive and reduced the award to $3.5 million,[60] a 52% reduction in the plaintiff's recovery.

These results suggest that the Appellate Division is indeed inclined to reduce the awards in cases that tort reform advocates would label the most egregious and out-of-control.[61] Nevertheless, in other cases with large damage awards, the Appellate Division declined to make any reduction. Additional analysis of some of those cases is helpful in shedding more light on Appellate Division patterns.

### 2. The Largest Damage Awards Not Reduced on Appeal: *Malki*,

[52] 760 N.Y.S.2d 206, 207 (App. Div. 2003).

[53] 720 N.Y.S.2d 475, 475 (App. Div. 2001).

[54] 697 N.Y.S.2d 314, 315 (App. Div. 1999).

[55] 760 N.Y.S.2d at 207–08.

[56] *Id.* at 207.

[57] 720 N.Y.S.2d at 475–76.

[58] *Id.* It should be noted that the trial court reduced the total pain and suffering award to $10 million from $31 million originally awarded by the jury. *Id.* at 475.

[59] 697 N.Y.S.2d at 315.

[60] *Id.*

[61] A case that technically fell out of the sample because the award pending appeal was only $175,000 but worth mention is *Cepeda v. New York City Health & Hosps. Corp.*, 756 N.Y.S.2d 189, 190 (App. Div. 2003). In this case the appellate court found the trial court's reduction of the jury award of $12 million to be excessive but nonetheless awarded the plaintiff only $750,000, *id.*, an award 6.25% the size of that given by the jury.

*Contorino*, and *John*

The three cases with the largest awards of non-pecuniary damages awarded in which the Appellate Division declined to make a reduction were *Malki v. Krieger*,[62] *Contorino v. Florida Ob/Gyn Association*,[63] and *John v. City of New York*.[64] In *John*, the appellate court held that the $6.5 million award for past and future pain and suffering was not excessive.[65] The court noted that the plaintiff-patient endured six surgeries with the eventual amputation of both legs, would continue to suffer constant pain throughout his body, and would be unable to resume working or enjoying recreational activities.[66] It is difficult to quantify what such loss is worth in dollar amounts,[67] but the plaintiff having lost the ability to walk, and essentially being in some degree of pain for the rest of his life, makes it difficult to criticize the court for declining to reduce the award.

Similarly, in *Malki v. Krieger*, the court refused to further reduce the $4 million pain and suffering award to the plaintiff which had already been reduced from $12 million by the trial court.[68] In *Malki*, before undergoing reconstructive surgery, the plaintiff was without an esophagus for six months.[69] Even after receiving a reconstructed esophagus, the plaintiff continued to experience great difficultly eating and was forced to spend the remainder of his life in an upright position because he lacked an esophageal sphincter to keep stomach acid down.[70] As in *John*, the plaintiff in *Malki* had his lifestyle fundamentally altered and would continue to suffer significant pain and suffering for the rest of his life. Given such circumstances, a multi-million dollar award does not seem excessive.[71]

Finally, in *Contorino*, the Second Department held that the $5.55 million award to an infant plaintiff did not deviate materially from what would be reasonable compensation.[72] Here, the plaintiff was

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[62] 624 N.Y.S.2d 167, 169 (App. Div. 1995).
[63] 686 N.Y.S.2d 88, 89 (App. Div. 1999).
[64] 652 N.Y.S.2d 15, 16 (App. Div. 1997).
[65] *Id.*
[66] *Id.*
[67] This is the fundamental problem in the whole debate on this issue.
[68] 624 N.Y.S.2d 167, 169 (App. Div. 1995).
[69] *Id.* at 168.
[70] *Id.* at 168–69.
[71] No purely scientific reasoning for such a conclusion exists; instead it is more of an appeal to one's sense of fairness and humanity.
[72] 686 N.Y.S.2d 88, 89 (App. Div. 1999).

born oxygen-deprived because of a failure by the nursing staff to appropriately monitor the labor and a delay in obtaining an operating room to perform a Cesarean section.[73] As a result, the plaintiff "suffers from cerebral palsy, and is cortically blind, hearing impaired, and incontinent, among other permanent and irreversible conditions."[74] With such debilitating conditions lasting the rest of the plaintiff's life, an award in the millions of dollars does not seem egregious.[75]

The preceding three cases demonstrate that the courts' selectivity in reducing damage awards is justified. The awards given seem to be based on legitimate pain and suffering proven by sufficient evidence and not purely the result of jury (or judicial) sympathies toward the plaintiff. Deprivation of the ability to live a "normal" life—present in all three cases—is also a compelling justification for the amount of awards given. At most, the awards may be debatable. And, if reasonable people can disagree as to the amount of the award, perhaps this alone is enough to leave it untouched by appellate review.[76]

Tort reform advocates would likely argue that the appellate courts might be cutting the awards, even the largest ones, but that they are not cutting the *amounts* of the awards enough. If one accepts the assumption that $250,000 is the maximum amount of non-economic damages that a plaintiff should be awarded, there is some validity to this argument. The data shows that only ten of the fifty-five malpractice cases, or 18%, were cases in which the appellate courts reduced a non-economic damages award that was over $250,000 to a number equal to or less than this number.[77] As

[73] Contorino v. Fla. Ob/Gyn Ass'n, 726 N.Y.S.2d 121, 122 (App. Div. 2001). This case was another appeal of the same case in which the plaintiff's attorneys were seeking an increase in their contingency fee. *Id.* at 122–23. This case lays out the facts of the *Contorino* case in far greater detail than the earlier appeal cited in *supra* note 63.

[74] *Id.* at 122.

[75] *See, e.g.*, *Malki*, 626 N.Y.S.2d at 169.

[76] To analogize, the law is clear that a trial court should not substitute its judgment for that of the jury with respect to the verdict in a case if a rational jury could reach such a verdict. *See, e.g.*, Calafiore v. Kiley, 756 N.Y.S.2d 348, 351 (App. Div. 2003); Coaxum v. City of New York, 562 N.Y.S.2d 644, 645 (App. Div. 1990).

[77] DeVivo v. Birnbaum, 754 N.Y.S.2d 60, 61 (App. Div. 2003); Neils v. Putnam Hosp. Ctr., 715 N.Y.S.2d 67, 68 (App. Div. 2000); Damen v. N. Shore Univ. Hosp., 710 N.Y.S.2d 621, 622 (App. Div. 2000); Bethell v. Stephens, 701 N.Y.S.2d 443, 444 (App. Div. 2000); Elkins v. Ferencz, 677 N.Y.S.2d 342, 343 (App. Div. 1998); Julien v. Physician's Hosp., 647 N.Y.S.2d 831, 832 (App. Div. 1996); Reape v. City of New York, 645 N.Y.S.2d 499, 501 (App. Div. 1996); Harnett v. Long Island Jewish-Hillside Med. Ctr., 627 N.Y.S.2d 83, 84 (App. Div. 1995); Barcliff v. Brooklyn Hosp., 622 N.Y.S.2d 746, 746 (App. Div. 1995); Velez v. Empire Med. Group, 608 N.Y.S.2d 246, 247 (App. Div. 1994).

Part IV will show, however, such an argument is unsound because the initial assumption—that $250,000 is the maximum amount of non-economic damages that should be recoverable—is fundamentally flawed.

## IV. FAIR AND FLEXIBLE APPELLATE REVIEW VS. A RIGID STATUTORY CAP

Advocates of statutory caps on non-economic damages argue that such caps will alleviate the problem of unpredictable, subjective, and arbitrary awards given by juries.[78] A cap may solve the problem of unpredictability but will do nothing to solve the problems of arbitrariness and subjectivity. All of these problems, however, are alleviated to some degree by Appellate Division review. This process is also the fairest way for all parties concerned to deal with the underlying problem of how to determine what is an appropriate monetary award for non-pecuniary damage—something that by definition is difficult to quantify in terms of dollars.

### *A. The Problem of Arbitrariness Under a Statutory Cap*

As previously mentioned, $250,000 is the figure the supporters of caps typically advocate.[79] But where does this $250,000 figure come from? Why not $1 million or $100,000? What makes the $250,000 figure superior to any other dollar amount? At the end of the day, the $250,000 figure, or any amount chosen for that matter, is essentially arbitrary.

To elaborate, in 1975, California instituted a $250,000 limit on non-economic damages for medical malpractice cases.[80] Other states have used the same figure, at least at some point, for their caps on non-economic damages. For instance, Colorado (enacted 1995),[81] Ohio (enacted 2002),[82] Texas (enacted 2003),[83] and Utah (enacted 2001)[84] all have established $250,000 as a base figure for their damage caps. This raises the suspicion that many states are simply

[78] New Yorkers for Civil Justice Reform, *supra* note 16.
[79] *Id.*
[80] CAL. CIV. CODE § 3333.2(b) (West 1997).
[81] COLO. REV. STAT. § 13-64-302 (2004); 1995 Colo. Legis. Serv. 95-165 (West).
[82] OHIO REV. CODE ANN. § 2323.43(A)(2) (LexisNexis 2005); 2002 Ohio Legis. Serv. Ann. 250 (West).
[83] TEX. CIV. PRAC. & REM. CODE ANN. § 74.301(a) (Vernon 2005); 2003 Tex. Sess. Law Serv. ch. 204 (West).
[84] UTAH CODE ANN. § 78-14-7.1(1) (2002); 2001 Utah Laws 246.

copying the figure used by states that have already implemented caps.[85]

Furthermore, one must question why inflation was apparently not considered in the states' determinations of an appropriate number to use. In other words, how can a number used by California in 1975 be the appropriate figure for states to use in the 1990s and 2000s? While it is true that many state statutes have inflation adjustment mechanisms incorporated into their statutes,[86] that does not explain why the base number used is $250,000. These findings reinforce the notion that the $250,000 figure is picked out of thin air or, perhaps more accurately, is simply copied from other states.

Another problem is that these caps are applied across-the-board to all cases without regard to their unique facts and circumstances. Theoretically, this means that a plaintiff similarly situated to the plaintiff in *John* gets the same pain and suffering award as the plaintiff in *Stevens v. Bronx Cross County Medical Group*, who had a bad hip but could at least walk, because both received awards over $250,000.[87] The effect of such a cap is to make an illogical and unsupportable assignment of a single dollar amount to all situations above the threshold, even though the degree of pain and suffering may be significantly different. As one commentator points out, "[i]ronically, assigning rigid caps [to the process of determining pain and suffering awards] . . . makes the numbers chosen for these caps even more arbitrary than the numbers that jurors assign to an injured patient's pain and suffering."[88] "Solving" the problem of an arbitrary process with a solution that is equally, if not more, arbitrary is not a satisfactory approach.

A final dilemma is that a statutory cap does not address the underlying problem: the inherent difficulty of assigning a dollar value to pain and suffering. As articulated by NYU School of Law Professor Mark Geistfeld:

> Capping damages is problematic because it fails to address the fundamental problems created by the current system for

[85] *See, e.g.*, S.B. 80, 125th Gen. Assem., Reg. Sess. (Ohio 2003) (stating that the amount for the damages cap was based on testimony given to the Ohio General Assembly stating that the proposed cap amount was similar to caps on awards adopted by other states).

[86] *See, e.g.*, UTAH CODE ANN. § 78-14-7.1(2)(a) (2002).

[87] Stevens v. Bronx Cross County Med. Group, P.C., 681 N.Y.S.2d 531, 532 (App. Div. 1998). I in no way mean to trivialize the pain and suffering of the plaintiff in *Stevens*; but as a matter of comparison, arguably the plaintiff in *John* did and will have more pain and suffering than the plaintiff in *Stevens*.

[88] Elizabeth Stewart Poisson, Comment, *Addressing the Impropriety of Statutory Caps on Pain and Suffering Awards in the Medical Liability System*, 82 N.C. L. REV. 759, 779 (2004).

> awarding pain-and-suffering damages. This reform does not help juries or courts determine the appropriate award in the first instance, and thus any awards below the cap are subject to the same claims of arbitrariness and unfairness that plague the current system.[89]

There are certainly cases in which juries give awards under $250,000 that are arguably unfair and arbitrary.[90] Assuming no remittitur or appellate review, such cases would slip under the statutory cap radar. A statutory cap is thus only a temporary and unsatisfactory fix to a more complex problem.

### *B. The Problem of Subjectivity Under a Statutory Cap*

Similarly, a statutory cap does nothing to address the problem of subjectivity. It is the inherent difficulty in assigning a dollar amount to non-economic loss that makes the awards given so subjective, not some fundamental problem with the civil justice system or juries. Any figure assigned by the legislature is equally subjective. The reality is that whatever number is agreed upon will be the result of political compromise and not some objective analysis of what might be an appropriate limit on such awards.[91]

Furthermore, a statutory cap in fact amplifies the subjectivity problem. As previously mentioned in the discussion of arbitrariness, plaintiffs with substantially different circumstances could wind up with the same award for non-economic damages.[92] Related to this is the possibility that plaintiffs with a considerable difference in age will receive the same award for non-pecuniary damages. In other words, if two plaintiffs will have pain and suffering for the rest of their lives, a teenager should presumably receive more than a senior citizen because the teenager will live longer (presuming that their pain and suffering is similar in terms of degree). A cap would, however, eliminate this seemingly logical delineation in situations where the award was over the threshold figure and give the same award to both plaintiffs.[93] Thus, some objective criterion—namely, assessing the life expectancy of a

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[89] Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 773, 790 (1995).

[90] *See, e.g.*, Panzarino v. Carella, 669 N.Y.S.2d 301, 302 (App. Div. 1998) (reducing plaintiff's award for past pain and suffering from $200,000 to $100,000).

[91] Poisson, *supra* note 88, at 780.

[92] *See supra* text accompanying note 87.

[93] Poisson, *supra* note 88, at 782–83.

plaintiff—is lost in the process, a counterproductive result to the very goals sought to be achieved by statutory cap supporters. Aside from subjectivity, this is also markedly unfair to the younger plaintiff.

### *C. Arbitrariness and Subjectivity under Appellate Review*

Appellate Division review, by contrast, is the fairest and most effective mechanism for resolving the problem of excessive non-economic damage awards. It is less arbitrary, subjective, and unfair than a statutory cap and at the same time diminishes the problem of unpredictability. First, an appellate court inherently looks at the facts and circumstances of each case in its assessment of whether to lower the damages award, giving each case individualized treatment. This process is thus inherently less arbitrary than assigning a maximum dollar limit across-the-board for all cases. Furthermore, the appellate courts will frequently cite to other cases for purposes of guidance and comparison.[94] This "comparative approach" can be useful in alleviating the problems related to non-economic damages. As one New York intermediate appellate court aptly put it in *Senko v. Fonda*:

> [P]rior verdicts may guide and enlighten the court and in a sense, may constrain it . . . . "A long course of practice, numerous verdicts rendered year after year, orders made by trial justices approving or disapproving them, decisions on the subject by appellate courts, furnish to the judicial mind some indication of the consensus of opinion of jurors and courts as to the proper relation between the character of the injury and the amount of compensation awarded."[95]

Moreover, CPLR 5522(b) requires appellate courts to state the reasons and factors it considered in changing a jury award.[96] This prevents the appellate court from arbitrarily lowering a damages award without justification.

As noted in then Governor Mario Cuomo's Approval Memorandum of the law that amended Appellate Division review of monetary awards, such review "will assure greater scrutiny of the

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[94] *See, e.g.*, Karney v. Arnot-Ogden Mem'l Hosp., 674 N.Y.S.2d 449, 452 (App. Div. 1998) (comparing the case at bar to similar cases in determining that the award for pain and suffering was excessive); *see also* Baldus et al., *supra* note 42, at 1134.

[95] 384 N.Y.S.2d 849, 851–52 (App. Div. 1976) (citations omitted), *reprinted in* Baldus et al., *supra* note 42, at 1135.

[96] N.Y. C.P.L.R. 5522(b) (McKinney 1995).

amount of verdicts and promote greater stability in the tort system and greater fairness for similarly situated defendants throughout the State."[97] Thus, the appellate process makes reductions of awards less arbitrary and subjective, while furthering the goals of predictability, fairness, and uniformity.

## V. CONCLUSION

The data compiled in this case study supports a finding that appellate courts will routinely reduce a non-economic damages award in medical malpractice cases. This study also revealed that in the cases with the three highest non-economic damage awards reviewed on appeal, the Appellate Division reduced the amount of damages awarded in all of them. Moreover, there is also the mechanism of trial court remittitur and the probative value the possibility of appellate review damage reduction may have on encouraging plaintiffs to settle for lower awards post-trial. Such findings cast serious doubt on the necessity of statutory caps.

Furthermore, what might arguably be appropriate in one state may not be necessary in another state. For instance, in California, there is some empirical evidence that trial court remittitur was used infrequently.[98] Therefore, perhaps a statutory cap is acceptable for California but not necessarily for New York.

Assuming there is a problem with out-of-control jury awards resulting in broader repercussions, a statutory cap is not the answer. Such a cap is even more arbitrary than the current jury assessment method to the extent that it is across-the-board and thus does not look at the facts and circumstances of each case. Moreover, the Appellate Division was arguably justified in refusing to reduce the damage awards in the second set of cases analyzed above.[99] If a cap had been in place in those cases, it would undoubtedly raise fairness and equity concerns. In light of these problems, New York should reject a statutory cap as a wholly unsuitable reform measure.

[97] Governor's Approval Memorandum, *Toxic Torts/Discovery Statute of Limitations*, *reprinted in* 1986 NEW YORK STATE LEGISLATIVE ANNUAL 288, 289.

[98] Baldus et al., *supra* note 42, at 1120 n.21.

[99] *See supra* Part III.D.2.

# APPENDIX

| Case Name | Reduction? | Amount on Appeal[100] | Amount After Reduction |
|---|---|---|---|
| Knight v. Loubeau, 765 N.Y.S.2d 366 (App. Div. 2003) | YES | $1,000,000 | $500,000 |
| Sawtelle v. Southside Hosp., 760 N.Y.S.2d 206 (App. Div. 2003) | YES | $3,000,000<br>$5,000,000 | $1,250,000<br>$2,000,000 |
| Davanzo v. Fisher, 758 N.Y.S.2d 49 (App. Div. 2003) | NO | $271,600 | N/A |
| Chisolm v. N.Y Hosp., 757 N.Y.S.2d 34 (App. Div. 2003) | NO | $500,000<br>$100,000 (spousal derivative cause of action) | N/A |
| Cepeda v. New York City Health & Hosps. Corp., 756 N.Y.S.2d 189 (App. Div. 2003) | YES | $175,000<br>($12,000,000)[101] | $750,000 |

[100] Unless otherwise noted, the dollar number used is post-trial court remittitur. The figures in this column and the "Amount After Reduction" reflect only the specific damage figures and not the total award unless a general verdict was issued. Multiple dollar numbers indicate that multiple sources of non-economic damages were reduced.

[101] The jury's award of $12,000,000 was subsequently reduced by the trial court to $175,000. 756 N.Y.S.2d at 190.

| Case Name | Reduction? | Amount on Appeal[102] | Amount After Reduction |
|---|---|---|---|
| DeVivo v. Birnbaum, 754 N.Y.S.2d 60 (App. Div. 2003) | YES | $300,000<br>$300,000 | $150,000<br>$100,000 |
| Cramer v. Benedictine Hosp., 754 N.Y.S.2d 414 (App. Div. 2003) | YES | $1,000,000 | $350,000 |
| Dombrowski v. Moore, 752 N.Y.S.2d 183 (App. Div. 2002) | YES | $500,000<br>$600,000 | $200,000<br>$400,000 |
| Rivers v. St Mary's Hosp. of Brooklyn, 745 N.Y.S.2d 562 (App. Div. 2002) | YES | $1,700,000 | $750,000 |
| Ramos v. Shah, 740 N.Y.S.2d 376 (App. Div. 2002) | YES | $900,000 | $450,000 |
| Jump v. Facelle, 739 N.Y.S.2d 730 (App. Div. 2002) | NO | $1,300,000 | N/A |

[102] *See supra* note 100.

| **Case Name** | **Reduction?** | **Amount on Appeal**[103] | **Amount After Reduction** |
|---|---|---|---|
| Sutch v. Yarinsky, 739 N.Y.S.2d 214 (App. Div. 2002) | NO | $300,000<br>$500,000 | N/A |
| Blanar v. Dickinson, 745 N.Y.S.2d 65 (App. Div. 2002)[104] | NO | $975,490.40<br>$117,878.96 | N/A |
| Charles v. Day, 733 N.Y.S.2d 690 (App. Div. 2001) | YES | $100,000<br>$500,000 | $50,000<br>$250,000 |
| Valentine v. Lopez, 725 N.Y.S.2d 714 (App. Div. 2001) | NO | $750,000<br>$250,000 (spousal derivative cause of action) | N/A |
| Wisholek v. Douglas, 722 N.Y.S.2d 316 (App. Div. 2001), *rev'd on other grounds*, 769 N.E.2d 808 (N.Y. 2002) | YES | $3,000,000<br>$25,000 (spousal derivative cause of action) | $1,500,000<br>$25,000 |
| Weinstein v. New York Hosp., 720 N.Y.S.2d 475 (App. Div. 2001) | YES | $2,000,000<br>$8,000,000 | $2,000,000<br>$4,500,000 |

[103] *See supra* note 100.
[104] There was a general verdict issued in this case.

| **Case Name** | **Reduction?** | **Amount on Appeal**[105] | **Amount After Reduction** |
|---|---|---|---|
| Lopez v. New York City Health & Hosps. Corp., 718 N.Y.S.2d 303 (App. Div. 2000) | YES | $5,000,000 | $3,100,000 |
| Neils v. Putnam Hosp. Ctr., 715 N.Y.S.2d 67 (App. Div. 2000) | YES | $25,000<br>$315,000 | $25,000<br>$200,000 |
| Genco v. Millard Fillmore Suburban Hosp., 714 N.Y.S.2d 173 (App. Div. 2000) | NO | $225,000 | N/A |
| Damen v. N. Shore Univ. Hosp., 710 N.Y.S.2d 621 (App. Div. 2000) | YES | $650,000<br>$50,000 (spousal derivative cause of action) | $225,000<br>$20,000 |
| Woods v. City of New York, 707 N.Y.S.2d 628 (App. Div. 2000)[106] | YES | $504,000 | $300,000 |
| Johnson v. Queens-Long Island Med. Group, 708 N.Y.S.2d 134 (App. Div. 2000) | YES | $4,000,000 | $1,200,000 |

[105] *See supra* note 100.
[106] *See supra* note 104.

| **Case Name** | **Reduction?** | **Amount on Appeal**[107] | **Amount After Reduction** |
|---|---|---|---|
| Harris v. New York City Health & Hosps. Corp., 707 N.Y.S.2d 213 (App. Div. 2000) | NO | $750,000 | N/A |
| Royal v. Booth Mem'l Med. Ctr., 704 N.Y.S.2d 109 (App. Div. 2000) | YES | $2,000,000<br>$3,000,000 | $750,000<br>$1,500,000 |
| Rodriguez v. Long Island Coll. Hosp., 702 N.Y.S.2d 363 (App. Div. 2000) | YES | $500,000<br>$1,000,000 | $250,000<br>$400,000 |
| Bethell v. Stephens, 701 N.Y.S.2d 443 (App. Div. 2000)[108] | YES | $950,000 | $125,000 |
| Holder v. Sheiman, 701 N.Y.S.2d 44 (App. Div. 2000) | YES | $500,000<br>$100,000 | $325,000<br>$100,000 |
| Martelly v. New York City Health & Hosps. Corp., 714 N.Y.S.2d 64 (App. Div. 2000) | YES | Unknown | $4,000,000 |

[107] *See supra* note 100.
[108] *See supra* note 104.

| **Case Name** | **Reduction?** | **Amount on Appeal**[109] | **Amount After Reduction** |
|---|---|---|---|
| Lieberman v. Maimonides Med. Ctr.., 717 N.Y.S.2d 254 (App. Div. 2000) | NO | $1,000,000<br>$2,000,000 | N/A |
| Siegel v. Wank, 703 N.Y.S.2d 835 (App. Div. 2000) | NO | $475,000 | N/A |
| Salter v. Deaconess Family Med. Ctr., 701 N.Y.S.2d 586 (App. Div. 1999) | NO | $125,000 | N/A |
| Olsen v. Burns, 699 N.Y.S.2d 731 (App. Div. 1999) | YES | $1,146,000 | $700,000 |
| Parson v. Interfaith Med. Ctr., 700 N.Y.S.2d 224 (App. Div. 1999) | YES | $1,000,000 | $400,000 |
| English v. Fischman, 697 N.Y.S.2d 613 (App. Div. 1999) | YES | Unknown | Unknown |
| Sugrim v. City of New York, 697 N.Y.S.2d 314 (App. Div. 1999) | YES | $2,750,000<br>$4,000,000 | $1,500,000<br>$2,000,000 |

[109] *See supra* note 100.

| **Case Name** | **Reduction?** | **Amount on Appeal**[110] | **Amount After Reduction** |
|---|---|---|---|
| King v. Jordan, 696 N.Y.S.2d 280 (App. Div. 1999) | NO | $500,000<br>#300,000 | N/A |
| Walker v. Zdanowitz, 696 N.Y.S.2d 509 (App. Div. 1999) | YES | $3,500,000<br>$1,500,000 | $2,500,000<br>$1,500,000 |
| L.S. v. Harouche, 690 N.Y.S.2d 1 (App. Div. 1999) | NO | Unknown | N/A |
| Simmons v. E. Nassau Med. Group, 688 N.Y.S.2d 209 (App. Div. 1999) | YES | $800,000 | $450,000 |
| Contorino v. Florida Ob/Gyn Ass'n, P.C., 686 N.Y.S.2d 88 (App. Div. 1999)[111] | NO | $5,550,000 | N/A |
| Cooper v. Bronx Cross County Med. Group, 687 N.Y.S.2d 156 (App. Div. 1999) | NO | $500,000<br>$1,250,000 | N/A |
| Classen v. Ashkinazy, 686 N.Y.S.2d 164 (App. Div. 1999) | NO | $40,000 | N/A |

[110] *See supra* note 100.
[111] *See supra* note 104.

| Case Name | Reduction? | Amount on Appeal[112] | Amount After Reduction |
|---|---|---|---|
| Paccione v. Greenberg, 682 N.Y.S.2d 442 (App. Div. 1998) | YES | $5,000,000 (loss of parental guidance) | $3,000,000 |
| Colclough v. Interfaith Med. Ctr., 682 N.Y.S.2d 408 (App. Div. 1998)[113] | YES | $400,000 | $275,000 |
| Elkins v. Ferencz, 677 N.Y.S.2d 342 (App. Div. 1998), *rev'd on other grounds*, 715 N.E.2d 504 (N.Y. 1999) | YES | $300,000<br>$100,000 | $100,000<br>$50,000 |
| Stevens v. Bronx Cross County Med. Group, P.C., 681 N.Y.S.2d 531 (App. Div. 1998) | NO | $3,000,000 | N/A |
| Luneburg v. Wenig, 681 N.Y.S.2d 597 (App. Div. 1998) | YES | $900,000<br>$1,100,000 | $500,000<br>$900,000 |
| Baumgarten v. Slavin, 680 N.Y.S.2d 658 (App. Div. 1999) | YES | $2,000,000<br>$3,000,000 | $700,000<br>$1,300,000 |

[112] *See supra* note 100.
[113] *See supra* note 104.

| Case Name | Reduction? | Amount on Appeal[114] | Amount After Reduction |
|---|---|---|---|
| Karney v. Arnot-Ogden Mem'l Hosp., 674 N.Y.S.2d 449 (App. Div. 1998) | YES | $2,600,000 | $2,000,000 |
| Charell v. Gonzalez, 673 N.Y.S.2d 685 (App. Div. 1998) | YES | $2,500,000<br>$2,000,000<br>$150,000 (punitive damages) | $2,500,000<br>$2,000,000<br>$0 |
| Bryant v. New York City Health & Hosps. Corp., 673 N.Y.S.2d 471 (App. Div. 1998) | YES | $1,000,000<br>$360,000 (past parental guidance)<br>$1,800,000 (future parental guidance) | $1,000,000<br>$250,000<br>$850,000 |
| Forslund v. Nunez, 673 N.Y.S.2d 164 (App. Div. 1998) | YES | $750,000<br>$250,000 | $300,000<br>$150,000 |
| Bermeo v. Atakent, 671 N.Y.S.2d 727 (App. Div. 1998) | YES | $1,600,000[115]<br>$7,875,000 | $1,600,000<br>$3,150,000 |
| Garcia v. Seigel, 670 N.Y.S.2d 517 (App. Div. 1998) | YES | $200,000<br>$200,000<br>$50,000 (spousal derivative cause of action) | $200,000<br>$100,000<br>$50,000 |

[114] *See supra* note 100.

[115] Appellate Court rejected the trial court's unitemized reduction of the jury award ($45+ million to 4.5 million) but nevertheless found the jury's award for pain and suffering to be excessive. 671 N.Y.S.2d at 730–31.

| **Case Name** | **Reduction?** | **Amount on Appeal**[116] | **Amount After Reduction** |
|---|---|---|---|
| DiMarco v. New York City Health & Hosps. Corp., 669 N.Y.S.2d 51 (App. Div. 1998) | YES | $2,000,000<br>$2,500,000 | $1,300,000<br>$1,500,000 |
| Panzarino v. Carella, 669 N.Y.S.2d 301 (App. Div. 1998) | YES | $200,000 | $100,000 |
| Douglass v. St. Joseph's Hosp., 667 N.Y.S.2d 477 (App. Div. 1998) | NO | $100,000<br>$25,000 | N/A |
| Bert v. Meyer, 663 N.Y.S.2d 99 (App. Div. 1997)[117] | NO | $2,010,000 | N/A |
| Osorio v. Brauner, 662 N.Y.S.2d 488 (App. Div. 1997)[118] | NO | $120,000 | N/A |
| Taylor-Gove v. St. Joseph's Hosp. Health Ctr., 662 N.Y.S.2d 675 (App. Div. 1997)[119] | NO | $2,050,000 | N/A |

[116] *See supra* note 100.
[117] *See supra* note 104.
[118] *See supra* note 104.
[119] *See supra* note 104.

| Case Name | Reduction? | Amount on Appeal[120] | Amount After Reduction |
|---|---|---|---|
| Free v. Nassau Queens Med. Group, P.C., 662 N.Y.S.2d 577 (App. Div. 1997) | YES | $500,000<br>$200,000 | $300,000<br>$200,000 |
| DeRosa v. Kaali, 659 N.Y.S.2d 60 (App. Div. 1997) | YES | $300,000<br>$680,000 | $300,000<br>$150,000 |
| Luecke v. Bitterman, 658 N.Y.S.2d 34 (App. Div. 1997) | NO | $500,000<br>$220,000 | N/A |
| Hawkins v. Brooklyn-Caledonian Hosp., 658 N.Y.S.2d 375 (App. Div. 1997) | NO | $150,000<br>$175,000 | N/A |
| Nelson v. New York City Health & Hosps. Corp., 654 N.Y.S.2d 378 (App. Div. 1997)[121] | NO | $1,400,000 | N/A |
| John v. City of New York, 652 N.Y.S.2d 15 (App. Div. 1997) | NO | $2,500,000<br>$4,000,000 | N/A |

[120] *See supra* note 100.
[121] *See supra* note 104.

| **Case Name** | **Reduction?** | **Amount on Appeal**[122] | **Amount After Reduction** |
|---|---|---|---|
| Mullen v. Eswar, 650 N.Y.S.2d 741 (App. Div. 1996) | YES | $700,000<br>$300,000 | $350,000<br>$250,000 |
| Eaton v. Comprehensive Care America, Inc., 649 N.Y.S.2d 293 (App. Div. 1996) | YES | $250,000 (shock and fright damages)<br>$500,000<br>$500,000 | $0<br>$500,000<br>$500,000 |
| Davis v. Nassau Ophthalmic Servs., P.C., 648 N.Y.S.2d 454 (App. Div. 1996)[123] | YES | $800,000 | $400,000 |
| Julien v. Physician's Hosp., 647 N.Y.S.2d 831 (App. Div. 1996) | YES | $300,000<br>$100,000 | $150,000<br>$75,000 |
| Bacigalupo v. Healthshield, Inc., 647 N.Y.S.2d 32 (App. Div. 1996) | YES | $1,500,000 | $300,000 |
| Reape v. City of New York, 645 N.Y.S.2d 499 (App. Div. 1996)[124] | YES | $1,000,000 | $60,000 |

[122] *See supra* note 100.
[123] *See supra* note 104.
[124] *See supra* note 104.

| **Case Name** | **Reduction?** | **Amount on Appeal**[125] | **Amount After Reduction** |
|---|---|---|---|
| Timal v. Kiamzon, 644 N.Y.S.2d 543 (App. Div. 1996) | YES | $700,000 | $500,000 |
| Allende v. New York City Health & Hosps. Corp., 644 N.Y.S.2d 18 (App. Div. 1996), *rev'd on other grounds*, 683 N.E.2d 317 (N.Y. 1997) | NO | $250,000<br>$500,000 | N/A |
| Silvestri v. Smallberg, 637 N.Y.S.2d 115 (App. Div. 1996) | NO | $1,250,00 | N/A |
| Kahl v. Loffredo, 633 N.Y.S.2d 612 (App. Div. 1995) | NO | $375,000<br>$375,000<br>$25,000 (spousal derivative cause of action) | N/A |
| Krueger v. Frisenda, 630 N.Y.S.2d 376 (App. Div. 1995)[126] | NO | $1,750,000 | N/A |
| Ryan v. New York City Health & Hosps. Corp., 633 N.Y.S.2d 500 (App. Div. 1995) | YES | $3,000,000 | $2,500,000 |

[125] *See supra* note 100.
[126] *See supra* note 104.

| **Case Name** | **Reduction?** | **Amount on Appeal**[127] | **Amount After Reduction** |
|---|---|---|---|
| Nuzzo v. Feinman, 631 N.Y.S.2d 399 (App. Div. 1995)[128] | NO | $750,000 | N/A |
| Flowers v. Southhampton Hosp., 627 N.Y.S.2d 81 (N.Y. App. Div.App. Div. 1995)[129] | NO | $210,000 | N/A |
| Harnett v. Long Island Jewish-Hillside Med. Ctr., 627 N.Y.S.2d 83 (App. Div. 1995) | YES | $635,000 | $150,000 |
| Malki v. Krieger, 624 N.Y.S.2d 167 (App. Div. 1995) | NO | $4,000,000 | N/A |
| Barcliff v. Brooklyn Hosp., 622 N.Y.S.2d 746 (App. Div. 1995) | YES | $54,000<br>$250,000 | $54,000<br>$54,000 |
| Marr v. Forrest, 617 N.Y.S.2d 881 (App. Div. 1994) | NO | $110,000<br>$150,000 | N/A |

[127] *See supra* note 100.
[128] *See supra* note 104.
[129] *See supra* note 104.

| Case Name | Reduction? | Amount on Appeal[130] | Amount After Reduction |
|---|---|---|---|
| Stewart v. New York City Health & Hosps. Corp., 616 N.Y.S.2d 499 (App. Div. 1994) | YES | $100,000 ($500,000)[131] | $300,000 |
| Connolly v. Pastore, 610 N.Y.S.2d 560 (App. Div. 1994) | YES | $500,000 | $300,000 |
| De Las Nueces v. Long Island Coll. Hosp., 609 N.Y.S.2d 592 (App. Div. 1994) | NO | $440,000 | N/A |
| Velez v. Empire Med. Group, 608 N.Y.S.2d 246 (App. Div. 1994) | YES | $1,150,000 | $250,000 |
| Coluzzi v. Korn, 624 N.Y.S.2d 688 (App. Div. 1994)[132] | NO | Unknown | N/A |
| Slaybough v. Nathan Littauer Hosp., 608 N.Y.S.2d 745 (App. Div. 1994) | NO | $90,000 $160,000 | N/A |

[130] *See supra* note 100.
[131] Jury's award of $500,000 was subsequently reduced by the trial court to $100,000.
[132] *See supra* note 104.

| **Case Name** | **Reduction?** | **Amount on Appeal**[133] | **Amount After Reduction** |
|---|---|---|---|
| Albury v. Bronx Cross-County Med. Group Clinton Ctr., 618 N.Y.S.2d 723 (App. Div. 1994)[134] | NO | $411,150 | N/A |

[133] *See supra* note 100.
[134] *See supra* note 104.