ARE THE APPELLATE COURTS DEVIATING FROM THE "DEVIATES MATERIALLY" STANDARD OF REVIEW?

Richard J. Montes, Esq. & David A. Beatty, Esq.***

Efforts at tort reform have taken many forms over the years. One area that has received considerable attention is the size of pain and suffering awards. While some states have adopted caps on pain and suffering awards, New York has not enacted such laws.[1] Instead, in 1986 New York changed its standard of judicial review of jury awards.[2] It moved from a more liberal "shocks the conscience" standard to a more scrutinizing "deviates materially from reasonable compensation" standard.[3] The purpose of this change was to tighten the range of tolerable awards by requiring courts to compare the jury's awards with jury awards for similarly situated plaintiffs and defendants.[4]

This article reviews how the courts have been applying the "deviates materially" standard and whether their application of the standard has succeeded in tightening the range of tolerable awards. Part I of this article discusses the Legislature's adoption of the "deviates materially" standard.[5] Part II discusses some basic principles the courts have adopted with respect to how the standard should be applied.[6] Part III explores whether our appellate courts have been consistently adhering to those standards and fulfilling

*Richard J. Montes is a partner with Mauro Lilling Naparty, LLP, the largest law firm in New York that exclusively dedicates its practice to appeals and litigation strategy.
**David A. Beatty is an associate of Mauro Lilling Naparty, LLP.

[1] N.Y. C.P.L.R. 5501(c) (McKinney 2013); Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 429 (1996).

[2] Act of July 30, 1986, ch. 682, sec. 10, § 5501(c), 1986 N.Y. Laws 2839, 2846 (codified as amended at N.Y. C.P.L.R. 5501(c) (McKinney 2013)); Memorandum of Office of Court Administration, in support of L. 1986, ch. 682 (reprinted in 1986 N.Y. Sess. Laws 3392 (McKinney 1987)).

[3] Legis. Findings & Declaration, L. 1986, ch. 266, § 1, 1986 N.Y. Laws 2021, 2021; Executive Memoranda from Mario M. Cuomo, Governor of N.Y., on approving L. 1986, ch. 682 (July 30, 1986) (reprinted in 1986 N.Y. Sess. Laws 3182, 3184 (1987) (McKinney)).

[4] Cuomo, *supra* note 3, at 3184.

[5] *See* discussion *infra* Part I.

[6] *See* discussion *infra* Part II.

the purpose of the statute.[7] Part IV offers some reasons why the standard has not been applied consistently.[8] Finally, Part V proposes a method of applying the "deviates materially" standard so as to more closely fulfill the Legislature's intent.[9]

I. NEW YORK ADOPTS A "DEVIATES MATERIALLY" STANDARD OF APPELLATE REVIEW

Like many states today, prior to 1986 New York applied the "shocks the conscience" standard of review to damages awards.[10] Under that standard, a trial judge would initially determine whether an award "was so exorbitant that it 'shocked the conscience of the court.'"[11] Appellate courts would review that determination.[12] It was a strict standard that required the courts to give considerable deference to the jury.[13]

By the mid-1980s, however, as jury awards were spiraling to even greater heights, it became apparent that the "shocks the conscience" standard of review was not controlling excessively large jury verdicts in New York.[14] As one example, a publicized 1986 medical malpractice action tried in Bronx County resulted in a $65 million dollar jury award, including $58 million dollars for pain and suffering alone.[15] The First Department reviewed the case, but

---

[7] *See* discussion *infra* Part III.

[8] *See* discussion *infra* Part IV.

[9] *See* discussion *infra* Part V.

[10] Petosa v. City of New York, 63 A.D.2d 1016, 1016–17, 406 N.Y.S.2d 354, 355 (App. Div. 2d Dep't 1978) ("To warrant interference with a jury's assessment of damages, the excessiveness or inadequacy of the award must be such as to shock the conscience of the court."); Senko v. Fonda, 53 A.D.2d 638, 641–42, 384 N.Y.S.2d 849, 854 (App. Div. 2d Dep't 1976). *See also* Irene Deaville Sann, *Remittiturs (and Additurs) in the Federal Courts: An Evaluation with Suggested Alternatives*, 38 CASE W. RES. L. REV. 157, 186 n.113 (1987) (surveying federal application of the "shocks the conscience" standard across various circuit and district courts).

[11] Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 422 (1996).

[12] *Id.* at 422–23 (citing state and federal decisions indicating the use of abuse of discretion language for review of motions for additur or remittitur).

[13] *See* Consorti v. Armstrong World Indus., 72 F.3d 1003, 1013–14 (2d Cir. 1995), *vacated on other grounds sub nom.* Consorti v. Owens-Corning Fiberglas Corp., 518 U.S. 1031 (1996); Rice v. Ninacs, 34 A.D.2d 388, 390, 312 N.Y.S.2d 246, 249 (App. Div. 4th Dep't 1970) ("In view of the permanent injuries sustained by plaintiff, we cannot say that the verdict shocks our consciences. Moreover, it did not shock the conscience of the Trial Judge who denied defendant's motion for a new trial and refused to reduce the verdict. We see no fair basis for interfering with his discretion.").

[14] *See* Nicholas D. Kristof, *Insurance Woes Spur Many States to Amend Law on Liability Suits*, N.Y. TIMES, Mar. 31, 1986, at A1.

[15] Whitaker v. N.Y. Health & Hosps. Corp., 135 A.D.2d 1155, 1155, 521 N.Y.S.2d 964, 964 (App. Div. 1st Dep't 1987) (mem.); *see* Editorial, *The $65 Million Malpractice Question*, N.Y.

issued an affirmance with no opinion.[16] To better understand the size of that award today, when adjusted for inflation to 2013 dollars using the Consumer Price Index,[17] the award would be roughly equivalent today to an award of almost $130 million for pain and suffering alone.[18] Given spiraling awards and a mounting insurance crisis, New York's then-Governor Mario Cuomo created a special panel called the Jones Commission to review proposals for reform.[19]

The Jones Commission focused in particular "on pain and suffering awards as a driving force behind the 'cost surge' which threatened the ability to obtain insurance coverage and posed a threat to self-insured municipal corporations."[20] As found by the Commission:

> All of us are moved by the pain and anxiety that most people who suffer more than minor injuries go through. Our natural tendency is to want to help. Inasmuch as there is no objective way to value these harms, our inclination is to err on the high side. Over time, this tendency gathers its own momentum, a momentum which has no natural curbing force. Particularly in an era where the existence of insurance is commonly assumed, so that the defendant is not expected to bear most of the loss, the urge to provide the

---

TIMES, July 24, 1986, at A24.

[16] *Whitaker*, 135 A.D.2d at 1155, 521 N.Y.S.2d at 964.

[17] The Second Circuit has expressly relied on the Consumer Price Index when comparing an award being reviewed with older awards. *See* Falzon v. JPMorgan Chase & Co., 501 F. App'x 92, 94 & nn.1–2 (2d Cir. 2012). New York district courts have variously relied on other available Consumer Price Index tools. *See* Lewis v. City of New York, 689 F. Supp. 2d 417, 433 n.10 (E.D.N.Y. 2010) (citing a Consumer Price Index calculator available online); Brady v. Wal-Mart Stores, Inc., 455 F. Supp. 2d 157, 201 n.18 (E.D.N.Y. 2006), *aff'd*, 531 F.3d 127 (2d Cir. 2008) (referring to the Bureau of Labor's Consumer Price Index growth for all urban consumers when comparing old award). Judges are not uniformly in agreement, however, as one judge opined that the Consumer Price Index should not be used, claiming there is no "empirical evidence showing that jury awards move like consumer prices." Nisanov v. Black & Decker (U.S.) Inc., No. 05 Civ. 5911(BMC), 2009 WL 3347088, at *2 n.2 (E.D.N.Y. Apr. 10, 2009). Another counter-example involves a Second Circuit court ostensibly referencing devaluation of the dollar to conclude that dollars at the time of its decision in 2003 were less valuable than dollars from a decision in 1997. *See* DeSena v. Pavel, 289 F. App'x 426, 429 (2d Cir. 2008).

[18] *See* CoinNews Media Group, LLC, *US Inflation Calculator*, http://www.usinflationcalculator.com/ (last visited Jan. 14, 2013) [hereinafter *US Inflation Calculator*]. Dollar amounts in this article that were adjusted for comparison purposes relied on the latest available CPI-U data, which was for November 2013.

[19] GOVERNOR'S ADVISORY COMM'N ON LIAB. INS., INSURING OUR FUTURE 1 (N.Y. 1986).

[20] Donlon v. City of New York, 284 A.D.2d 13, 15, 727 N.Y.S.2d 94, 96 (App. Div. 1st Dep't 2001) (citing INSURING OUR FUTURE, *supra* note 19, at 137–52).

most assistance possible becomes nearly irresistible.[21]

While the Jones Commission proposed a cap on pain and suffering awards to address the lack of a "natural curbing force," the Legislature rejected that proposal.[22] Instead, the New York State Legislature enacted CPLR section 5501(c), which replaced the more elastic "shocks the conscience" standard for reviewing jury verdicts with the "deviates materially standard."[23] Section 5501(c) states:

> In reviewing a money judgment in an action in which an itemized verdict is required by rule forty-one hundred eleven of this chapter in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation.[24]

"As stated in Legislative Findings and Declarations accompanying New York's adoption of the 'deviates materially' formulation, the lawmakers found the 'shock the conscience' test an insufficient check on damage awards; the Legislature therefore installed a standard 'inviting more careful appellate scrutiny.'"[25] By ratcheting up the standard of review, the goal was to "influence[] outcomes by tightening the range of tolerable awards."[26] The goal also was to promote "greater fairness for similarly situated defendants throughout the State."[27] Thus, to determine whether an award "materially deviates from what [would be] reasonable compensation," New York courts must look to awards approved in similar cases.[28] Indeed, the necessity of comparing cases was recognized by the U.S. Supreme Court in *Gasperini v. Center for Humanities, Inc*.[29]

In *Gasperini*, the defendant moved for a new trial, arguing that

---

[21] INSURING OUR FUTURE, *supra* note 19, at 85.

[22] *Donlon*, 284 A.D.2d at 15, 727 N.Y.S.2d at 96.

[23] N.Y. C.P.L.R. 5501(c) (McKinney 2013). *See* Reed v. City of New York, 304 A.D.2d 1, 5, 757 N.Y.S.2d 244, 247 (App. Div. 1st Dep't 2003); *Donlon*, 284 A.D.2d at 14, 16, 727 N.Y.S.2d at 95, 96.

[24] C.P.L.R. 5501(c).

[25] Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 423 (1996) (quoting Act of July 8, 1986, ch. 266, § 1, 1986 N.Y. Laws 470 (McKinney)).

[26] *Reed*, 304 A.D.2d at 5, 757 N.Y.S.2d at 247 (quoting *Gasperini*, 518 U.S. at 424–25).

[27] *Id.* (quoting *Gasperini*, 518 U.S. at 424).

[28] *Gasperini*, 518 U.S. at 421, 425 (quoting Gasperini v. Ctr. For Humanities, Inc., 66 F.3d 427, 431 (2d Cir. 1995).

[29] *Id.* at 425.

the jury award of $450,000 was excessive.[30] The district court denied the motion without comment, but on appeal, the Second Circuit Court of Appeals reviewed the award in light of New York's "deviates materially" standard.[31] After review, the Second Circuit ordered a remittitur, vacating the jury verdict and granting a new trial unless the plaintiff agreed to a reduced sum of $100,000.[32] The plaintiff contended that federal appellate review under CPLR section 5501(c) violated the Seventh Amendment's Re-examination Clause.[33] The Supreme Court held that the "deviates materially" standard did not violate the Seventh Amendment and that federal appellate courts could review a trial judge's determination on a motion to set aside a jury verdict as excessive.[34] In doing so, the Court reviewed the purpose of CPLR section 5501(c) and its intended application.[35] The Supreme Court specifically addressed the importance of comparing other cases when determining whether an award deviates materially.[36] It further recognized that the maximum allowed is set by case law, and whether that limit is exceeded is not a question of fact where reasonable men may differ, but a question of law.[37]

In 1988, the New York Legislature also amended CPLR 5522 to add subsection (b).[38] The amendment requires the appellate division, when it alters a jury's verdict under section 5501(c), to recite its reasons for that alteration, including the factors it considered when determining the excessiveness or inadequacy of an award.[39] This provision has been explicitly acknowledged as

---

[30] *Id.* at 420.

[31] *Id.* at 420–21.

[32] *Id.* at 421.

[33] *Id.* at 426. The Seventh Amendment's Re-examination Clause insulates a civil jury's determination of questions of fact from a court's review. *See* Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 447–48 (1830). It is concerned with protecting the jury from a court's review other than "according to the rules of the common law." U.S. CONST. amend. VII.; *see Parsons*, 28 U.S. (3 Pet.) at 447.

[34] *Gasperini*, 518 U.S. at 436.

[35] *Id.*

[36] *Id.* at 425, 429, 431 (stating that courts look to awards in similar cases and quoting an amicus brief that states maximum recoverable amount is set by case law).

[37] *Id.* at 429, 431, 435.

[38] Subsection (b) provides:

> In an appeal from a money judgment in an action . . . in which it is contended that the award is excessive or inadequate, the appellate division shall set forth in its decision the reasons therefor, including the factors it considered in complying with subdivision (c) of section fifty-five hundred one of this chapter.

N.Y. C.P.L.R. 5522(b) (McKinney 2013).

[39] *Id.*; Donlon v. City of New York, 284 A.D.2d 13, 14, 727 N.Y.S.2d 94, 95 (App. Div. 1st

creating an affirmative obligation on an appellate court to "identify the reasons for [its] decision."[40] As will be shown below, however, in practice the Appellate Division often does not meet this statutory obligation.[41]

II. BASIC PRINCIPLES USED TO APPLY THE "DEVIATES MATERIALLY" STANDARD OF REVIEW

Since the enactment of CPLR section 5501(c), there are certain basic principles regarding the application of the "deviates materially" standard that appear to have been well accepted.

A. Courts Must Compare Cases

One of the principles previously mentioned is the necessity of comparing cases. Thus, for more than two decades, appellate review under section 5501(c) "has been performed by analogizing an appealed case with relevant precedent and 'tightening the range' to accomplish the purposes of the 1986 reform."[42] Importantly, comparing "appealed verdicts using CPLR 5501(c) is not optional but a legislative mandate."[43] In determining whether an award of damages "deviates materially from what would be reasonable compensation," a court is obliged to look to awards approved in cases involving similar injuries.[44] This standard governs trial judges as well.[45] As the Second Department has stated:

Dep't 2001); *see* McKay v. Ciani, 288 A.D.2d 587, 590, 732 N.Y.S.2d 447, 451 (App. Div. 3d Dep't 2001).

[40] *Donlon*, 284 A.D.2d at 147, 27 N.Y.S.2d at 95. *See McKay*, 288 A.D.2d at 590, 732 N.Y.S.2d at 451; Johnston v. Joyce, 192 A.D.2d 1124, 1125, 596 N.Y.S.2d 625, 626 (App. Div. 4th Dep't 1993); Murphy v. A. Louis Shure, P.C., 156 A.D.2d 85, 88, 553 N.Y.S.2d 170, 172 (App. Div. 1st Dep't 1990).

[41] *See, e.g.*, Deandino v. New York City Transit Auth., 105 A.D.3d 801, 802–03, 963 N.Y.S.2d 288, 290 (App. Div. 2d Dep't 2013) (increasing past pain and suffering, but failing to mention injury or factors considered); Caliendo v. Ellington, 104 A.D.3d 635, 637, 960 N.Y.S.2d 471, 474 (App. Div. 2d Dep't 2013) (same); Walsh v. Brown, 72 A.D.3d 806, 808, 898 N.Y.S.2d 250, 252 (App. Div. 2d Dep't 2010) (same).

[42] *Donlon*, 284 A.D.2d at 16, 727 N.Y.S.2d at 97.

[43] *Id.*

[44] *See id.* at 14, 727 N.Y.S.2d at 95, 99; Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 425 (1996).

[45] *Gasperini*, 518 U.S. at 425; Consorti v. Armstrong World Indus., 72 F.3d 1003, 1013–14 (2d Cir. 1995), *vacated on other grounds sub nom.* Consorti v. Owens-Corning Fiberglas Corp., 518 U.S. 1031 (1996). *See, e.g.*, Osiecki v. Olympic Reg'l Dev. Auth., 256 A.D.2d 998, 1000, 682 N.Y.S.2d 312, 314 (App. Div. 3d Dep't 1998) (agreeing with trial court that award should be reduced); Shurgan v. Tedesco, 179 A.D.2d 805, 806, 578 N.Y.S.2d 658, 659 (App. Div. 2d Dep't 1992) (approving trial court's modification of award because it deviated materially from

> 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.[46]

A comparison with cases involving similar injuries or worse injuries is particularly crucial with respect to awards for pain and suffering.[47] "Because personal injury awards, especially those for pain and suffering, are not subject to precise quantification . . . [courts] look to comparable cases to determine at what point an award 'deviates materially' from what is considered reasonable compensation."[48] To determine whether cases are comparable, courts will look at certain factors, including the nature and type of injury, severity of subjective pain, permanency of the injury, age of the plaintiff, prior health status, need for future surgery, ability to return to work, and impact on daily living.[49] Of course, courts cannot expect or require a perfect factual identity.[50] Courts, however, can fulfill their statutory obligation by determining what awards have been approved on appellate review in analogous cases and whether the award falls within those boundaries.[51]

B. Setting the Boundaries of Reasonable Compensation

The range of acceptable awards is set by appellate precedent.[52] In that regard, conditional increases and reductions (additurs and

what would be reasonable compensation).

[46] Senko v. Fonda, 53 A.D.2d 638, 639, 384 N.Y.S.2d 849, 851–52 (App. Div. 2d Dep't 1976) (quoting Fried v. New York, New Haven & Hartford R.R. Co., 183 A.D. 115, 125, 170 N.Y.S. 697, 704 (App. Div. 2d Dep't 1918), *aff'd*, 230 N.Y. 619, 130 N.E. 917 (1921)).

[47] *See* Kahl v. MHZ Operating Corp., 270 A.D.2d 623, 624–25, 703 N.Y.S.2d 842, 844 (App. Div. 3d Dep't 2000).

[48] *Id.* at 624, 703 N.Y.S.2d 842, 844 (alteration in original) (quoting Karney v. Arnot-Ogden Mem'l Hosp., 251 A.D.2d 780, 782, 674 N.Y.S.2d 449, 452 (App. Div. 3d Dep't 1998)).

[49] *See* Skelly-Hand v. Lizardi, 111 A.D.3d 1187, 975 N.Y.S.2d 514, 517–18 (App. Div. 3d Dep't 2013) (comparing the severity of injuries in different cases); Ciuffo v. Mowery Constr., Inc., 107 A.D.3d 1195, 1197, 967 N.Y.S.2d 223, 225 (App. Div. 3d Dep't 2013); *see also* Donlon v. City of New York, 284 A.D.2d 13, 19, 727 N.Y.S.2d 94, 99 (App. Div. 1st Dep't 2001); Stedman v. Buillon, 234 A.D.2d 876, 877, 651 N.Y.S.2d 685, 686 (App. Div. 3d Dep't 1996); Johnston v. Joyce, 192 A.D.2d 1124, 1125, 596 N.Y.S.2d 625, 626 (App. Div. 4th Dep't 1993).

[50] *See Donlon*, 284 A.D.2d at 16, 727 N.Y.S.2d at 97.

[51] *Id.* at 18, 727 N.Y.S.2d at 98.

[52] *See* Paek v. City of New York, 28 A.D.3d 207, 209, 812 N.Y.S.2d 83, 85 (App. Div. 1st Dep't 2006).

remittiturs) establish the outer boundaries of what awards have been deemed to be fair and reasonable for a type of injury.[53] Where a court determines that an award is excessive, the court must reduce the award "only to the [maximum] amount that the jury could properly have awarded."[54] In other words, a reduction reflects the maximum amount sustainable for that particular type of plaintiff and injury.

Conversely, when a court determines that an award is inadequate, a court should increase the award to the minimum amount that could be considered fair and reasonable for a particular plaintiff and injury.[55] Affirmances simply recognize that an award falls within the range of awards that are fair and reasonable.[56] They do not, however, necessarily mean that a larger verdict would have been unreasonable or that a lower verdict would have been unreasonable.[57]

For example, the highest sustained award for reflex sympathetic dystrophy (RSD) in the First Department is $1.5 million in *Jeffries v. 3520 Broadway Management Company*.[58] The highest sustained award for the same injury in the Second Department is also $1.5 million in *Nassour v. City of New York*.[59] *Nassour*, however, represents a reduction, whereas *Jeffries* represents an affirmance.[60] Thus, *Nassour* could represent a ceiling for RSD cases in the Second

---

[53] *See* Charles D. Cole, Jr., *Charging the Jury on Damages in Personal-Injury Cases: How New York Can Benefit from the English Practice*, 31 SYRACUSE J. INT'L L. & COM. 1, 6–7 (2004).

[54] Rangolan v. Cnty. of Nassau, 370 F.3d 239, 244 (2d Cir. 2004) (quoting 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2815, at 167–68 (2d ed. 1995)); *see also Johnston*, 192 A.D.2d at 1125, 596 N.Y.S.2d at 626; Medina v. Chile Commc'ns, Inc., 15 Misc. 3d 525, 531, 832 N.Y.S.2d 750, 756 (Sup. Ct. Bronx County 2006).

[55] *See* Camacho v. Rochester City Sch. Dist., 20 A.D.3d 916, 916, 798 N.Y.S.2d 288, 290 (App. Div. 4th Dep't 2005); *Medina*, 15 Misc. 3d at 535, 832 N.Y.S.2d at 758–59.

[56] *See Rangolan*, 370 F.3d at 244; s*ee also* Apuzzo v. Ferguson, 20 A.D.3d 647, 649, 798 N.Y.S.2d 537, 539 (App. Div. 3d Dep't 2005) (affirming pain and suffering award while explicitly acknowledging that the verdict "was in the upper range for" the injury but was not beyond a reasonable range); *Medina*, 15 Misc. 3d at 534, 832 N.Y.S.2d at 758 ("[A] simple affirmance . . . does not address adequacy, because in those instances, the determination is whether the verdict is minimally adequate, within the lower limit of the range of awards justified by the evidence.").

[57] *See Rangolan*, 370 F.3d at 246.

[58] Jeffries v. 3520 Broadway Mgmt. Co., 36 A.D.3d 421, 421, 827 N.Y.S.2d 136, 136 (App. Div. 1st Dep't 2007).

[59] Nassour v. City of New York, 35 A.D.3d 556, 557, 828 N.Y.S.2d 110, 111 (App. Div. 2d Dep't 2006).

[60] *Jeffries*, 36 A.D.3d at 421–22, 827 N.Y.S.2d at 137; *Nassour*, 35 A.D.3d at 557, 828 N.Y.S.2d at 111.

Department, but the same cannot be definitively said for *Jeffries*. An argument can be made, however, that because they were decided around the same time and had similar awards, $1.5 million should reflect a ceiling.

The accuracy of comparisons between future and past cases, therefore, turns on an awareness of the proper context of the range of awards that has been permitted and whether a jury's award falls within that range. In that regard, increases and reductions establish the ceiling and floor, respectively, of what awards have been deemed to be fair and reasonable for a type of injury. Affirmances represent reasonable amounts within that range.

C. Not All Injuries Are Created Equal

Injuries and pain and suffering are perhaps not quantifiable on their own, but by comparison, certain things can be agreed upon. It is uncontroversial to say a person suffering a laceration will almost assuredly have less pain and suffering than a person fracturing multiple bones. It should also be uncontroversial to say that even within the same type of injury, distinctions can be made. Two people suffering a stroke or a heart attack can end up with very different residual injuries. Objectively, a person who suffers a stroke, but later recovers and can return to work, has less pain and suffering than a person who suffers a stroke resulting in cognitive impairment and paralysis. Thus, the fact that two plaintiffs suffered the same injury should not, without more specific facts, indicate whether a particular award is or is not excessive. Injuries are often compared by severity.[61] In such cases, the courts should recognize that similar injuries should be treated similarly (known as "horizontal equity"), but that injuries of different severity should be treated differently (known as "vertical equity").[62]

---

[61] Skelly-Hand v. Lizardi, 111 A.D.3d 1187, 975 N.Y.S.2d 514, 517–18 (App. Div. 3d Dep't 2013) (comparing pain and suffering by the severity of the injuries); *see* Ronen Avraham, *Putting a Price on Pain-and-Suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for Change*, 100 NW. U. L. REV. 87, 93–94 (2006); Joseph Sanders, *Why Do Proposals Designed to Control Variability in General Damages (Generally) Fall on Deaf Ears? (And Why This Is Too Bad)*, 55 DEPAUL L. REV. 489, 493–94 (2006).

[62] Randall R. Bovbjerg, *Beyond Tort Reform: Fixing Real Problems*, 3 IND. HEALTH L. REV. 3, 21 n.85 (2006) [hereinafter *Beyond Tort Reform*] (referring to vertical equity as proportionality in awards and horizontal equity as consistency in awards); Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. REV. 163, 176 (2004) (describing significant variation for seemingly similar injuries as "horizontal *in*equity" (emphasis added)).

Scholars studying pain and suffering awards have attempted to categorize injuries based on severity level to help with comparing and understanding differences in awards.[63] These categories have been designed to provide meaningful distinctions that explain some of the differences in the size of awards.[64] One such system was developed and published years ago by the National Association of Insurance Commissioners.[65] That system used a nine-point scale to characterize injuries based on whether they were temporary or permanent, and by varying degrees.[66] So, for example, a laceration would be at one level, while a bone fracture would be in a higher severity level, and permanent and severe brain damage would be at the highest severity level.[67] One study, later referred to as the seminal work on pricing pain and suffering awards,[68] took these categories and calculated their relationship to jury awards from Kansas City and Florida.[69] The authors found that they could initially explain some variation in awards by looking to the severity of the injury overall, such that a person suffering quadriplegia,[70] for example, would generally be awarded more than a person suffering paraplegia.[71] Even more could be explained by looking to additional demographic information, such as the plaintiff's age or the amount of medical care received, among other factors.[72]

---

[63] *See* Avraham, *supra* note 61, at 94; Sanders, *supra* note 61, at 493, 494 & n.28 (noting studies of damage awards and attempts to explain variability among awards).

[64] *See* Avraham, *supra* note 61, at 94–95; Sanders, *supra* note 61, at 493, 494 & n.28.

[65] NAT'L ASS'N OF INS. COMM'RS, 2 MALPRACTICE CLAIMS: FINAL COMPILATION 304 (M. Patricia Sowka ed., 1980).

[66] *Id.* Purely emotional injuries render one point on the scale. "Temporary insignificant" injuries, such as lacerations and contusions requiring virtually no recovery, are given two points on the scale. "Temporary minor" injuries, such as infections and fractures, are given three points. "Temporary major" injuries—burns and brain damage, for example—render four points. "Permanent minor" injuries, including non-disabling injuries, are given five points on the scale. "Permanent significant" injuries, such as deafness or loss of limb, render six points. "Permanent major" injuries—paraplegia, blindness, and the like—are given seven points. "Permanent grave" injuries—quadriplegia, severe brain damage, or an injury that requires lifelong care or a fatal prognosis—is assigned eight points. Finally, death is assigned nine points on the scale. *Id.*

[67] *See id.*

[68] Avraham, *supra* note 61, at 87.

[69] Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 NW. U. L. REV. 908, 919–24 (1989).

[70] Quadriplegia is defined as "paralysis of all four limbs." STEDMAN'S MEDICAL DICTIONARY 1182 (William H. L. Dornette ed., 5th Unabr. Lawyers' ed. 1982).

[71] Bovbjerg et al., *supra* note 69, at 922–24 & 922 tbl.2. Paraplegia is defined as "[p]aralysis of both lower extremities and, generally, the lower trunk." STEDMAN'S MEDICAL DICTIONARY, *supra* note 70, at 1029.

[72] Bovbjerg et al., *supra* note 69, at 922–24.

Consistent with scholars, New York courts also implicitly recognize these distinctions within categories of injuries. For example, the highest appellate-reviewed award for a person with a severe form of Erb's palsy[73] or with additional injuries might be $3,150,000,[74] but in *Abdelkader v. Shahine*,[75] the Second Department reduced an award to $550,000 for a plaintiff with a mild to moderate form of Erb's palsy with slight range of motion restrictions and sloping and winging of the scapula.[76] Furthermore, in *Miller v. Weisel*,[77] the same court ordered a reduction to $700,000 for a slightly more severe Erb's palsy case where use of the arm was more limited.[78] Like with Erb's palsy, cases involving loss of guidance and services also show a wide spectrum with numerous reductions within that spectrum.[79]

Cases involving strokes or stroke-like injuries provide yet another example. Appellate courts have reviewed pain and suffering in stroke cases and approved awards between $300,000 and $9.6 million.[80] Within that range, however, there have been three cases involving reductions applied to amounts below $9.6 million.[81] These

[73] "[P]aralysis of the muscles of the upper arm (deltoid, biceps, anterior brachial, and long supinator muscles) due to a lesion of the brachial plexus or of the roots of the fifth and sixth cervical nerves." STEDMAN'S MEDICAL DICTIONARY, *supra* note 70, at 1018.

[74] Skelly-Hand v. Lizardi, 111 A.D.3d 1187, 975 N.Y.S.2d 514, 517–18 (App. Div. 3d Dep't 2013).

[75] Abdelkader v. Shahine, 66 A.D.3d 615, 889 N.Y.S.2d 594 (App. Div. 2d Dep't 2009).

[76] *Id.* at 616, 889 N.Y.S.2d at 595–96; Abdelkader v. Shahine, No. 44493/03, 2006 WL 3371862 (N.Y. Sup. Ct. Kings County Oct. 18, 2006).

[77] Miller v. Weisel, 15 A.D.3d 458, 790 N.Y.S.2d 189 (App. Div. 2d Dep't 2005).

[78] *Id.* at 458, 459, 790 N.Y.S.2d at 189, 190.

[79] *See, e.g.*, Sanchez v. City of New York, 97 A.D.3d 501, 501, 949 N.Y.S.2d 368, 370 (App. Div. 1st Dep't 2012) (affirming a $325,000 award for such loss); Adderley v. City of New York, 304 A.D.2d 485, 485–86, 757 N.Y.S.2d 735, 735 (App. Div. 1st Dep't 2003) (affirming trial court reduction of award to $1 million for loss of parental guidance); Cavlin v. N.Y. Med. Grp., P.C., 286 A.D.2d 469, 469, 730 N.Y.S.2d 337, 338 (App. Div. 2d Dep't 2001) (reducing the jury award for future loss of services to $450,000); Paccione v. Greenberg, 256 A.D.2d 559, 560, 561, 682 N.Y.S.2d 442, 444 (App. Div. 2d Dep't 1998) (reducing the judgment amount to $1.5 million per child); Bryant v. N.Y.C. Health & Hosps. Corp., 250 A.D.2d 797, 797–98, 673 N.Y.S.2d 471, 473 (App. Div. 2d Dep't 1998), *aff'd as modified*, 93 N.Y.2d 592, 716 N.E.2d 1084, 695 N.Y.S.2d 39 (1999) (reducing a $1.1 million award for loss of guidance after an initial reduction by the trial court).

[80] *See* Oakes v. Patel, 87 A.D.3d 816, 817–18, 928 N.Y.S.2d 795, 797–98 (App. Div. 4th Dep't 2011) (affirming an award of $9.6 million for pain and suffering), *aff'd as modified*, 20 N.Y.3d 633, 649–50, 988 N.E.2d 488, 496–97, 965 N.Y.S.2d 752, 761 (2013) (reversing the pain and suffering portion of the award based upon the trial court's erroneous decision to hold certain testimony inadmissible); Lang v. Newman, 54 A.D.3d 483, 485, 488, 862 N.Y.S.2d 859, 861, 863 (App. Div. 3d Dep't 2008) (affirming award of $300,000 in pain and suffering), *aff'd*, 12 N.Y.3d 868, 870, 910 N.E.2d 982, 983, 883 N.Y.S.2d 153, 154 (2009).

[81] *See* Jiang v. Dollar Rent a Car, Inc., 91 A.D.3d 603, 603–04, 938 N.Y.S.2d 90, 91 (App. Div. 2d Dep't 2012) (reducing past and future pain and suffering from $6 million to $5 million,

appear to be explainable in part by fairly well-defined characteristics, an indisputably poor recovery with significant residual limitations versus a near-complete recovery, or by looking at differences in age.[82] In practice, many attorneys fail to make these distinctions, but as shown above, the courts have, generally speaking, been responsive to these factors.[83]

III. ARE THE COURTS FULFILLING THEIR LEGISLATIVE MANDATE?

While these principles have often been repeated, in practice they have not been consistently applied. This is due in part to the failure to comply with CPLR section 5522(b)[84] and the persistence of certain myths and misunderstandings raised by the bench and the bar.

A. Failure to Consistently Adhere to Accepted Rules of Review

The deviates materially standard was supposed to enhance predictability and tighten the range of awards.[85] At times, though, the awards sustained by the various departments of the appellate

making plaintiff's original awards of $3 million and $3 million, respectively, $2.5 million and $2.5 million); Sawtelle v. Southside Hosp., 305 A.D.2d 659, 659–60, 760 N.Y.S.2d 206, 207 (App. Div. 2d Dep't 2003) (reducing past and future pain and suffering from $8 million to $3.25 million, making plaintiff's original awards of $5 million and $3 million, respectively, $2 million and $1.25 million); Palmieri v. Long Island Jewish Med. Ctr., 221 A.D.2d 511, 511, 635 N.Y.S.2d 483, 484 (App. Div. 2d Dep't 1995) (reducing past and future pain and suffering from $1.5 million to $750,000, making plaintiff's original awards of $500,000 and $1 million, respectively, $250,000 and $500,000).

[82] *Compare* Brief for Defendant-Appellant at 6, 29, *Oakes*, 87 A.D.3d 816, 928 N.Y.S.2d 795 (CA 10-00367) (describing the thirty-eight-year-old plaintiff's cognitive defects, incontinence, paralysis, and need for twenty-four hour care), *with* Brief for Defendant-Appellant-Cross-Respondent at 3, 23, *Lang*, 54 A.D.3d 483, 862 N.Y.S.2d 859 (No. 2009-0103) (asserting that the evidence establishes that the twenty-six-year-old plaintiff "made a great recovery from the stroke"), Brief for Defendant-Appellant at 6, 7, *Jiang*, 91 A.D.3d 603, 938 N.Y.S.2d 90 (No. 2010-09483) (asserting that post-injury tests did not indicate brain injury and noting plaintiff's return to part-time work six months after the accident), Brief for Defendants-Appellants-Respondents at 5, 64, *Sawtelle*, 305 A.D.2d 659, 760 N.Y.S.2d 206 (No. 2001-08511) (maintaining that the twenty-nine-year-old plaintiff's injuries, though grave, did not include loss of speech, incontinence, confinement to a wheelchair, or twenty-four hour care), *and* Brief for Defendants-Appellants at 2, 39, 40, 48, 49, *Palmieri*, 221 A.D.2d 511, 635 N.Y.S.2d 483 (No. 94-11463) (recounting medical testimony from two doctors who had explained that the thirty-seven-year-old plaintiff had experienced a mild stroke from which he had substantially recovered, and that while his cognitive abilities were low, they were still within a normal range).

[83] *See* cases cited *supra* notes 80–81.

[84] *See supra* note 38.

[85] *See* Donlon v. City of New York, 284 A.D.2d 13, 14-15, 18, 727 N.Y.S.2d 94, 96, 98 (App. Div. 1st Dep't 2001).

division are seemingly impossible to explain. Wrongful death claims offer one example of the inconsistent application of the deviates materially standard. To illustrate, in *Olsen v. Burns*,[86] the Second Department *reduced* a $1,146,000 award to $700,000 for a decedent who suffered eleven months of pain and suffering before death.[87] Twelve years later, in *Capwell v. Muslim*,[88] the same court *affirmed* a $3 million award for a decedent who suffered a similar period of pain and suffering before death.[89]

To roughly compare *Olsen* with *Capwell* using 2011 dollars (the year *Capwell* was decided), the *Olsen* award would have been approximately $950,000 in 2011 dollars, or approximately $2 million less than the amount affirmed in *Capwell*.[90] In each case, however, pain and suffering was determined over a period of about one year.[91] With very similar time periods and inflation accounted for, the 300% increase from the ceiling in *Olsen* to a non-ceiling in *Capwell* must then have to be attributable to other factors. Perhaps it was the type and severity of the pain and suffering experienced. A comparison of the injury, however, also fails to give any meaningful guidance.

In *Olsen*, the plaintiff's decedent, Dorothy Gibbs, died at age fifty-six after her physician failed to diagnose lung cancer.[92] When diagnosed, the cancer was characterized as stage four, and the plaintiff had shown that the cancer should have been diagnosed seventeen-months earlier, when the plaintiff would have had an excellent opportunity for survival.[93] By the time the cancer was diagnosed, it had spread to the bone marrow, and it had caused the destruction of three ribs, multiple vertebrae, and part of her

[86] Olsen v. Burns, 267 A.D.2d 366, 699 N.Y.S.2d 731 (App. Div. 2d Dep't 1999).

[87] *Id.* at 367, 699 N.Y.S.2d at 732. *See also* Brief for Plaintiff-Respondent at 22, *Olsen*, 267 A.D.2d 366, 699 N.Y.S.2d 731 (No. 98-04745) (indicating that the decedent suffered from September until August).

[88] Capwell v. Muslim, 80 A.D.3d 722, 915 N.Y.S.2d 617 (App. Div. 2d Dep't 2011).

[89] *Id.* at 722, 723, 915 N.Y.S.2d at 617, 618; Brief for Defendant-Appellant at 1, *Capwell*, 80 A.D.3d 722, 915 N.Y.S.2d 617 (No. 2009-06793).

[90] Adjusting the 1999 award in *Olsen* to 2011 dollars using the Consumer Price Index Inflation Calculator results in a 2011 award of $945,121. *See US Inflation Calculator*, *supra* note 18.

[91] Plaintiff's Verified Bill of Particulars at 3, 6, *Capwell*, 80 A.D.3d 722, 915 N.Y.S.2d 617 (No. 2009-06793) (indicating that the plaintiff suffered from August to September); Plaintiff's Verified Bill of Particulars at 12, *Olsen*, 267 A.D.2d 366, 699 N.Y.S.2d 731 (No. 98-04745) (indicating that the plaintiff suffered from September to August).

[92] *See* Transcript of Record at 818, 1064–65, *Olsen*, 267 A.D.2d 366, 699 N.Y.S.2d 731 (No. 98-04745).

[93] *See id.* at 1062, 1064–65.

clavicle.[94] Even before the diagnosis, Mrs. Gibbs consumed a bottle of acetaminophen daily to assist with the pain.[95] She lost substantial weight, developed clubbed fingers, and complained of severe shoulder pain.[96] Still before the diagnosis, the plaintiff lost her strength and energy, losing the ability to climb her stairs or leave her house, and she eventually became bedridden.[97] Then the cancer was diagnosed and she was treated with radiation and chemotherapy.[98] In the last few months before she passed away, Mrs. Gibbs's condition deteriorated, with her all the while knowing she was terminally ill.[99] Eventually, she became unable to tend to her own bodily functions,[100] developed sores over her body and sores in and around her mouth,[101] and even before she was diagnosed she had been reduced to eating rice pudding.[102] Also, she was treated with such doses of morphine that she hallucinated,[103] but she was still cognizant to the point where she could participate in a last rites mass before she passed away.[104]

The *Capwell* case, by contrast, involved a decedent who was reduced to a semi-comatose or near-vegetative state[105] for an eleven-month period.[106] This raises the question of how—objectively—could the *Capwell* injury be considered three times as severe as in *Olsen*?

What is more, a decision rendered merely four months before *Capwell* makes plausible rationales infinitely harder to justify. Before *Capwell*, the same appellate court decided another wrongful

---

[94] *See id.* at 928, 1181.

[95] *Id.* at 80.

[96] *Id.* at 69, 75, 585–86.

[97] *Id.* at 76, 80–81.

[98] *Id.* at 93.

[99] *See id.* at 108–10.

[100] *Id.* at 106–07.

[101] *Id.* at 93–94.

[102] *Id.* at 80.

[103] *Id.* at 635.

[104] *Id.* at 823.

[105] *See* Record on Appeal at 1813–16, Capwell v. Muslim, 80 A.D.3d 722, 915 N.Y.S.2d 617 (App. Div. 2d Dep't 2011) (No. 2009-06793) (describing the brain damage and limited responsiveness of the decedent); *see also id.* at 1229–30 (demonstrating that even the limited responsiveness shown would be inconsistent with someone in a deep coma).

[106] While there are some inconsistencies in the record, the decedent appears to have suffered from October to September. *See id.* at 759 (indicating that the permanent brain damage likely began in October and continued until death, but misstating the decedent's month of death); Plaintiff's Verified Bill of Particulars at 142a, *Capwell*, 80 A.D.3d 722, 915 N.Y.S.2d 617 (stating that the decedent actually died in September).

death case, *Schaffer v. Batheja*.[107] In *Schaffer*, the Second Department evaluated the reasonableness of an award for a decedent's approximately *four years* of pain and suffering before death.[108] There, the Second Department reduced a pain and suffering award to $2.5 million, or a ceiling $500,000 lower than what the court sustained just four months later in *Capwell*.[109]

Complicating matters further is that the ascertainable facts from *Capwell* and *Schaffer* are remarkably similar despite the different awards and procedural postures. Like Ms. Capwell, the decedent in *Schaffer* was in a semi-comatose state and occasionally aware of her condition.[110] Ms. Schaffer was "respon[sive] to tactical stimuli,"[111] often "tear[ed] up" when her family came to visit,[112] sometimes could "move her hand on command,"[113] could open her eyes to auditory stimuli,[114] and at times could move her eyes in the direction of stimuli.[115] Although Ms. Schaffer's condition was quite similar to Ms. Capwell's, the Second Department reduced the award in *Schaffer*, for more than four years of pain and suffering, to $2.5 million—less than the amount sustained in *Capwell* for eleven months of pain and suffering.[116]

How is it that $2.5 million represented the highest award compensable for pain and suffering over *four years*, and yet months later a $3 million award did not deviate materially from reasonable compensation for a period one-quarter the length of time?[117] There is no dispute that pain and suffering cannot simply be calculated or translated into dollars. But, comparisons between and among cases should "furnish to the judicial mind some indication of the

---

[107] Schaffer v. Batheja, 76 A.D.3d 970, 908 N.Y.S.2d 82 (App. Div. 2d Dep't 2010).

[108] *Id.* at 972, 908 N.Y.S.2d at 84.

[109] *Id. See Capwell*, 80 A.D.3d at 723, 915 N.Y.S.2d at 618 (awarding $3 million for pain and suffering).

[110] *See Schaffer*, 76 A.D.3d at 972, 908 N.Y.S.2d at 84 ("[The decedent] lapsed into a coma . . . [and] was only sporadically aware of her condition.").

[111] Joint Record on Appeal at 543, *Schaffer*, 76 A.D.3d 970, 908 N.Y.S.2d 82 (No. 2009-5600).

[112] *Id.* at 306.

[113] *Id.* at 297.

[114] *See id.* at 569.

[115] *Id.* at 114, 295.

[116] *Schaffer*, 76 A.D.3d at 972–73, 908 N.Y.S.2d at 84–85. *See* Capwell v. Muslim, 80 A.D.3d 722, 915 N.Y.S.2d 617, 618 (App. Div. 2d Dep't 2011).

[117] This is not to suggest there is a rigid ratio of awards to duration. *See* Consorti v. Armstrong World Indus., 72 F.3d 1003, 1013–14 (2d Cir. 1995), *vacated on other grounds sub nom.* Consorti v. Owens-Corning Fiberglas Corp., 518 U.S. 1031 (1996).

consensus of opinion of jurors and courts."[118] Judging the propriety of an award is not supposed to be done ad hoc, but rather should involve "[m]ore rigorous comparative evaluations" than were performed under the shocks the conscience standard.[119]

Furthermore, what stymies attorneys' attempts to predict future awards is not simply the existence of these three seemingly conflicting precedential awards. *Capwell* and *Olsen* also failed to reference any factors relied upon in making the decisions and they failed to cite any authorities upon which the court relied.[120] Neither decision described the plaintiff's injuries, the wrongful conduct, or anything that could be identified as the relevant facts on which the court decided the deviates materially issue.[121] Indeed, only *Schaffer* attempted to describe the decedent's physical condition and some facts upon which the court relied.[122]

This lack of description may frustrate some attorneys, but it also hurts future court panels in trying to find or apply relevant precedent. In *Skelly-Hand v. Lizardi*,[123] the Third Department explicitly complained about lack of detail, noting "[m]any of the decisions . . . upon which defendant relies . . . are unhelpful as they fail to indicate the severity of the underlying injury" but other decisions "describe[d] the injury as mild."[124] Finding that the injuries in the present case had a "severe impact" on the plaintiff, the court concluded that the jury award was justified.[125] This decision did not indicate whether the court reviewed details underlying the "unhelpful" decisions to see whether they involved similar impacts on the lives of prior plaintiffs.[126] Instead, the decision shows that the absence of details in decisions resulted in a

[118] Senko v. Fonda, 53 A.D.2d 638, 639, 384 N.Y.S.2d 849, 851–52 (App. Div. 2d Dep't 1976) (quoting Fried v. New York, New Haven & Hartford R.R. Co., 183 A.D. 115, 125, 170 N.Y.S. 697, 704 (App. Div. 2d Dep't 1918)).

[119] Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 429 (1996).

[120] *See Capwell*, 80 A.D.3d at 722–24, 915 N.Y.S.2d at 617–18 (App. Div. 2d Dep't 2011); Olsen v. Burns, 267 A.D.2d 366, 367, 699 N.Y.S.2d 731, 732–33 (App. Div. 2d Dep't 1999).

[121] *See Capwell*, 80 A.D.3d at 722–24, 915 N.Y.S.2d at 617–18; *Olsen*, 267 A.D.2d at 367, 699 N.Y.S.2d at 732–33.

[122] *See* Schaffer v. Batheja, 76 A.D.3d 970, 972, 908 N.Y.S.2d 82, 84 (App. Div. 2d Dep't 2010) (describing the decedent's mental condition and awareness over the four year period but not going into any further detail on the decedent's physicial condition during that time).

[123] Skelly-Hand v. Lizardi, 111 A.D.3d 1187, 975 N.Y.S.2d 514, 517 (App. Div. 3d Dep't 2013).

[124] *Id.* at 517.

[125] *Id.* at 517–18.

[126] *See* discussion *supra* Part II.B (referencing details underlying some of the decisions that the *Skelly-Hand* court described as "unhelpful").

future court giving significant weight to the choice of a single adjective such as mild, moderate, or severe. This is an exemplar for how failing to detail injuries and conditions can affect future appellate review.

Cases involving pain and suffering awards for strokes also highlight the inconsistent exercise of the court's power to review damages awards. Moreover, each of the three cases below fails to provide any explanation for the decision made. First, in *Belt v. Girgis*,[127] the eighteen-year-old decedent[128] was a pedestrian struck by a car.[129] The accident left the decedent in a coma for three weeks.[130] The evidence showed that,

> [The decedent] sustained, among other injuries, a left femoral fracture, a right clavicular fracture, laceration of the right anterior tibial area, a fracture of the right medial malleolus, a fracture of the pubic rami, and a severe head injury, including an intracranial hemorrhage on the left parietal hemisphere and a left frontal lobe intra-axial hematoma with right temporal bone fracture.[131]

After a bench trial, the court awarded $5 million for past pain and suffering and $10 million for future pain and suffering.[132] The Second Department *reduced* those awards to $2 million for past pain and suffering and $3 million for future pain and suffering, for a total pain and suffering award of $5 million.[133]

Second, in *Nunez v. City of New York*,[134] the forty-nine-year-old plaintiff was working for the New York City Transit Authority when a walkway suddenly collapsed and he fell thirty feet.[135] The plaintiff sustained wrist, pelvic, and facial fractures.[136] He also sustained a traumatic brain injury following a hemorrhage to his frontal lobe, hygromas, and temporal bone fracture.[137] As a result, he has problems with attention, processing speed, executive

---

[127] Belt v. Girgis, 82 A.D.3d 1028, 920 N.Y.S.2d 151 (App. Div. 2d Dep't 2011).

[128] Transcript of Proceedings at 86, *Belt*, 82 A.D.3d 1028, 920 N.Y.S.2d 151 (No. 2009-10800).

[129] *Belt*, 82 A.D.3d at 1029, 920 N.Y.S.2d at 153.

[130] *Id.*

[131] *Id.*

[132] *Id.* at 1028, 920 N.Y.S.2d at 152.

[133] *Id.* at 1029, 920 N.Y.S.2d at 153.

[134] Nunez v. City of New York, 85 A.D.3d 885, 926 N.Y.S.2d 113 (App. Div. 2d Dep't 2011).

[135] Transcript of Proceedings at 9–10, *Nunez*, 85 A.D.3d 885, 926 N.Y.S.2d 113 (No. 2010-01739).

[136] *See id.* at 10, 11.

[137] *See id.* at 10, 12.

function, and higher thinking.[138] In addition, he has residual post concussion disorder, causing problems with sleep, headaches, anxiety, and depression.[139] The jury awarded $9.2 million for total pain and suffering, which the trial judge reduced to $5.5 million.[140] On appeal the Second Department affirmed the reduced award.[141]

Third, in *Jiang v. Dollar Rent a Car, Inc.*,[142] the twenty-six-year-old plaintiff was struck by a vehicle while riding his bicycle.[143] He sustained fractures to multiple vertebrae, transverse processes, ribs, the left fibula and tibia, and the right forearm.[144] The accident also caused a concussion and subarachnoid hemorrhage resulting in impaired cognition (including impairments to memory, executive function, mood, and thought processes).[145] The jury awarded $3 million for past pain and suffering and $3 million for future pain and suffering over forty-four years.[146] The Second Department *reduced* these awards to $2.5 million each, for a total pain and suffering award of $5 million.[147]

Of these three cases, not one provided any explanation for the decision.[148] Thus, it is unclear why the Second Department affirmed a total pain and suffering award in *Nunez* of $500,000 more than in *Belt*, despite the older age of the plaintiff in *Nunez*. While one could speculate that the Court decided in *Nunez* that the extra $500,000 did not "deviate materially" from the $5 million reduced award in *Belt*, courts have in the past reduced awards by lesser amounts.[149] Further complicating this trilogy of cases, the

[138] *Id.* at 12.

[139] *Id.* at 13.

[140] *Nunez*, 85 A.D.3d at 885–86, 926 N.Y.S.2d at 114.

[141] *Id.* at 886, 926 N.Y.S.2d at 115.

[142] Jiang v. Dollar Rent a Car, Inc., 91 A.D.3d 603, 938 N.Y.S.2d 90 (App. Div. 2d Dep't 2012).

[143] John Hochfelder, *Court Orders Substantial Reduction in Pain and Suffering Damages in Severe Orthopedic and Brain Injury Trauma Case*, NEW YORK INJURY CASES BLOG (April 27, 2012), http://www.newyorkinjurycasesblog.com/2012/04/articles/back-injuries/court-orders-substantial-reduction-in-pain-and-suffering-damages-in-severe-orthopedic-and-brain-injury-trauma-case/.

[144] *Id.*

[145] *Id.*

[146] *Jiang*, 91 A.D.3d at 603, 938 N.Y.S.2d at 91.

[147] *Id.* at 603–04, 938 N.Y.S.2d at 91.

[148] *See id.* (vacating the judgment unless the plaintiff stipulated to a reduced award, but providing no reason for the reduced amount); Nunez v. City of New York, 85 A.D.3d 885, 886–87, 926 N.Y.S.2d 113, 115 (App. Div. 2d Dep't 2011) (affirming a reduced pain and suffering award with no discussion); Belt v. Girgis, 82 A.D.3d 1028, 1029, 920 N.Y.S.2d 151, 152–53 (App. Div. 2d Dep't 2011) (vacating the judgment unless the plaintiff stipulated to a reduced award, but providing no reason for the reduced amount).

[149] *See, e.g.*, Hood v. Avis Rent A Car Sys., Inc., 69 A.D.3d 797, 798, 893 N.Y.S.2d 239, 240–

same court that affirmed in *Nunez* then ordered the later reduction in *Jiang*. These cases, therefore, further underscore that the appellate process of reviewing damages at times is not as clear or predictable as it could be.

B. The Failure to Comply with CPLR Section 5522(b)

Determining whether the courts are properly performing their role under the deviates materially standard is often difficult in practice because frequently the important details for "rigorous comparative evaluations"[150] are omitted by the appellate court decisions. For example, in *Walsh v. Brown*,[151] the Second Department considered and reduced an award for past pain and suffering from $750,000 to $200,000.[152] The court did so without explanation.[153] Indeed, the decision does not mention what injuries the plaintiff suffered, what factors were considered in reducing the damages, or even what authorities were relied upon to arrive at the reduced sum. Instead, the court cited CPLR section 5501(c), which merely sets forth its authority to review the damages award.[154]

Similarly, in *Young v. City of New York*,[155] the First Department reviewed damages and concluded that the jury award deviated materially from what would be reasonable compensation.[156] In its decision, the court held that the pain and suffering awards were excessive and conditionally reduced the past award from $600,000 to $300,000 and the future award from $500,000 to $150,000.[157] The *Young* court described the basic facts underlying the claim for

41 (App. Div. 2d Dep't 2010) (reducing past pain and suffering from $1 million to $600,000 as well as reducing the award for future pain and suffering from $1.5 million to $800,000); Kithcart v. Mason, 51 A.D.3d 1162, 1165, 857 N.Y.S.2d 794, 797 (App. Div. 3d Dep't 2008) (reducing $400,000 award for future pain and suffering to $300,000); Sanabia v. 718 W. 178th St., LLC, 49 A.D.3d 426, 426, 854 N.Y.S.2d 375, 375 (App. Div. 1st Dep't 2008) (reducing $400,000 future pain and suffering award to $300,000); Harris v. City of New York Health & Hosps. Corp., 49 A.D.3d 321, 321, 856 N.Y.S.2d 11, 11 (App. Div. 1st Dep't 2008) (reducing past pain and suffering award from $500,000 to $400,000); Manuka v. Crenshaw, 43 A.D.3d 886, 886–87, 841 N.Y.S.2d 782, 782–83 (App. Div. 2d Dep't 2007) (upholding a reduction of a past pain and suffering award from $1.5 million to $1.3 million).

[150] *See* Gasperini v. Ctr. For Humanities, Inc., 518 U.S. 415, 429 (1996).

[151] Walsh v. Brown, 72 A.D.3d 806, 898 N.Y.S.2d 250 (App. Div. 2d Dep't 2010).

[152] *Id.* at 807, 898 N.Y.S.2d at 251.

[153] *Id.* at 807–09, 898 N.Y.S.2d at 251–52.

[154] *Id.* at 808, 898 N.Y.S.2d at 252 (citing N.Y. C.P.L.R. 5501(c) (McKinney 2013)).

[155] Young v. City of New York, 72 A.D.3d 415, 898 N.Y.S.2d 33 (App. Div. 1st Dep't 2010).

[156] *Id.* at 418, 898 N.Y.S.2d at 35.

[157] *Id.* at 416, 418 898 N.Y.S.2d at 33, 35.

excessive force and negligence during an arrest.[158] The plaintiff had been pushed down stairs, banged into a door, lifted by handcuffs, and then complained of pain in her wrist.[159] Nowhere, however, was the plaintiff's medical injury discussed. Instead, the only citation to support the conclusion that the damages award was excessive was to the statutory authority under CPLR section 5501(c) to review the damages award.[160]

These are just two examples. A review, though, from July 2011 to July 2013 gives a two-year window with approximately sixty appellate division decisions evaluating pain and suffering awards to determine whether they deviate materially from what would be reasonable compensation.[161] Of that number, twenty are appellate modifications that do not explain the basis for the reduction.[162] Further, some of the cases: (1) do not describe the illness or injury at all,[163] (2) mention only the principal injury in a vacuum (for example, a plaintiff subject to negligence in a bunionectomy by "sustain[ing] an injury to her left shoulder"),[164] (3) call an injury traumatic or extensive without more description,[165] or (4) state that the court considered the circumstances or the nature and extent of the injury but do not elaborate.[166] Thus, decisions failing to comply with CPLR section 5522(b) make up approximately one-third of all appellate division decisions reviewing pain and suffering awards.

---

[158] *Id.* at 416, 417, 898 N.Y.S.2d at 33, 34.

[159] *Id.*

[160] *Id.* at 418, 898 N.Y.S.2d at 35 (citing N.Y. C.P.L.R. 5501(c) (McKinney 2013)).

[161] This review was accomplished by a search of appellate division decisions between 7/10/2011 and 7/10/2013 referencing the deviates materially standard, CPLR section 5501(c), and pain and suffering. Excluded from the review are those cases reversing for a new trial or where the court mentions these as an argument but does not decide the issue.

[162] *See, e.g.*, Algerio v. Caribbean A.C., 98 A.D.3d 465, 466, 949 N.Y.S.2d 449, 451 (App. Div. 2d Dep't 2012); Arroyo v. Fox, 92 A.D.3d 705, 705, 938 N.Y.S.2d 455, 455 (App. Div. 2d Dep't 2012); Perone v. City of New York, 86 A.D.3d 600, 600–01, 927 N.Y.S.2d 379, 380–81 (App. Div. 2d Dep't 2011).

[163] *See, e.g.*, Shipley v. City of New York, 105 A.D.3d 936, 936, 963 N.Y.S.2d 692, 692–93 (App. Div. 2d Dep't 2013); Deandino v. N.Y.C. Transit Auth., 105 A.D.3d 801, 801–02, 963 N.Y.S.2d 288, 289 (App. Div. 2d Dep't 2013); *Arroyo*, 92 A.D.3d at 705, 938 N.Y.S.2d at 455; Jean-Louis v. City of New York, 86 A.D.3d 628, 628, 928 N.Y.S.2d 310, 311 (App. Div. 2d Dep't 2011).

[164] Hernandez v. Metro. Transit Auth., 101 A.D.3d 1083, 1084, 956 N.Y.S.2d 547, 548 (App. Div. 2d Dep't 2012); *see, e.g.*, Sokol v. Lazar, 106 A.D.3d 512, 512–13, 964 N.Y.S.2d 532, 533 (App. Div. 1st Dep't 2013); Rubio v. N.Y.C. Transit Auth., 99 A.D.3d 532, 534, 952 N.Y.S.2d 512, 514 (App. Div. 1st Dep't 2012).

[165] *See, e.g.*, Bergamo v. Verizon N.Y., Inc., 95 A.D.3d 916, 917, 944 N.Y.S.2d 211, 213 (App. Div. 2d Dep't 2012).

[166] *See, e.g.*, Caliendo v. Ellington, 104 A.D.3d 635, 637, 960 N.Y.S.2d 471, 473–74 (App. Div. 2d Dep't 2013); *Algerio*, 98 A.D.3d at 466, 949 N.Y.S.2d at 451.

Of the remaining forty or so decisions, many are affirmances which also do not provide a statement of the injury. As a result, the bar and lower courts are afforded little insight into the court's decision-making process and how the decision can be applied in future cases.

In addition to failing to cite to any authorities in some of their decisions, at other times the cases the appellate divisions cite provide little insight into their rationale or provide minimal guidance for future cases. Further still, some cases cite to decisions where a court reduced or increased an award, but did so for dissimilar injuries.[167] At other times, the cases cited involve noticeably different awards than the amount the court set for the remittitur.

C. Increasing Awards to the Highest Amount Sustainable Rather Than Lowest

Although courts are supposed to increase inadequate awards to the lowest amount that would constitute reasonable compensation for an injury, the courts have not always followed that rule. For example, in *Grinberg v. C & L Contracting Corporation*,[168] the First Department concluded that the pain and suffering awards were inadequate and increased the past award from $75,000 to $500,000 and the future award from $35,000 to $450,000.[169] The *Grinberg* court cited two cases in support, with the signal "*see e.g.*"[170] A review of the injuries in those cases, however, shows that they involved reductions and arguably dissimilar injuries.[171]

In *Grinberg*, the plaintiff suffered a pilon fracture.[172] The court

---

[167] See Inya v. IDE Hyundai, Inc., 209 A.D.2d 1015, 1015, 619 N.Y.S.2d 440, 440 (App. Div. 4th Dep't 1994) which cited Shurgan v. Tedesco, 179 A.D.2d 805, 806, 578 N.Y.S.2d 658, 659 (App. Div. 2d Dep't 1992) in increasing an award, despite the fact that *Shurgan* involved a dog attack resulting in facial scarring and the injury in *Inya* involved fractures of the tibia, radius, and femur, as well as expected degeneration of the knee.

[168] Grinberg v. C & L Contracting Corp., 107 A.D.3d 491, 967 N.Y.S.2d 58 (App. Div. 1st Dep't 2013).

[169] *Id.* at 491, 967 N.Y.S.2d at 58 (increasing awards based upon extensive injuries to the lower leg resulting from a fall).

[170] *Id.* at 492, 967 N.Y.S.2d at 59 (citing Rivera v. N.Y.C. Transit Auth., 92 A.D.3d 516, 516–17, 938 N.Y.S.2d 535, 535-36 (App. Div. 1st Dep't 2012); Orellano v. 29 E. 37th St. Realty Corp., 4 A.D.3d 247, 247–48, 772 N.Y.S.2d 659, 660 (App. Div. 1st Dep't 2004)).

[171] *See Rivera*, 92 A.D.3d at 516–17, 938 N.Y.S.2d at 535–36 (reducing an award for pain and suffering based upon an ankle injury); *Orellano*, 4 A.D.3d at 247–48, 772 N.Y.S.2d at 660 (affirming, after modifying to a slightly higher amount, a reduction to a pain and suffering award based upon fractures to the tibia and fibula).

[172] *Grinberg*, 107 A.D.3d at 491, 967 N.Y.S.2d at 58.

wrote that the injury was "limb threatening" and that the plaintiff also suffered damage to the surrounding tissues, as well as a spiral fracture of the fibula near the knee.[173] The plaintiff underwent a surgical procedure, an "open reduction and internal fixation, and a second surgery to remove the hardware."[174] The plaintiff was also treated with rehabilitation, and in the future will suffer from arthritis, tendonitis, and possibly future surgeries.[175] At trial, the plaintiff reported "pain when walking on uneven surfaces, where his ankle twists, and when he walks or stands for more than fifteen or twenty minutes."[176] However, the court admitted that the plaintiff experienced a "good recovery."[177] The plaintiff stopped seeing his orthopedist about eight to ten months prior to trial and did not suffer disabling pain.[178] For this, the *Grinberg* court concluded that $950,000 was the minimum award supportable by the evidence and therefore issued an additur.[179]

In modifying the award, however, the First Department relied on *Orellano v. 29 East 37th Street Realty Corp.*, a decision involving a reduction and questionable relevance in terms of the amount of damages awarded.[180] While both cases involved injuries to similar parts of the body, the similarities end there. In *Orellano*, the plaintiff suffered from a comminuted tibia and fibula fracture that required several surgeries, a two-month hospital stay, extensive physical therapy, and the plaintiff was characterized as having a partial permanent disability.[181] In *Orellano*, the First Department *reduced* the past and future pain and suffering awards to $375,000 each, for a total award of $750,000.[182] Adjusting for inflation to compare the awards, the 2004 *Orellano* award is approximately $925,000 in 2013 dollars.[183] The reduction in *Orellano* indicates, however, that it was the highest award that could have been sustained by a jury.

---

[173] *Id.*

[174] *Id.*

[175] *Id.* at 491, 967 N.Y.S.2d at 59.

[176] *Id.* at 492, 967 N.Y.S.2d at 59.

[177] *Id.* at 491, 967 N.Y.S.2d at 59.

[178] *Id.* at 491–92, 967 N.Y.S.2d at 59.

[179] *Id.* at 491, 967 N.Y.S.2d at 58.

[180] *See id.* at 492, 967 N.Y.S.2d at 59 (citing Orellano v. 29 E. 37th St. Realty Corp., 4 A.D.3d 247, 772 N.Y.S.2d 659 (App. Div. 1st Dep't 2004)).

[181] *Orellano*, 4 A.D.3d at 247–48, 772 N.Y.S.2d at 660.

[182] *Id.* (citing Brownell v. City of New York, 277 A.D.2d 31, 31–32, 715 N.Y.S.2d 405, 405–06 (App. Div. 1st Dep't 2000)).

[183] *See US Inflation Calculator*, *supra* note 18.

Taken together, what do the *Grinberg* and *Orellano* decisions say about tibia and fibula fractures? Well, *Orellano* indicates that approximately $925,000 in 2013 dollars is the highest award a jury could give for a tibia and fibula fracture with several surgeries, a lengthy hospital stay, rehabilitation, and residual disabilities. But *Grinberg* says that $950,000 in 2013 dollars is the lowest award for a tibia and fibula fracture when the plaintiff has a good recovery. This of course raises the question, how can the highest award permissible be less than the lowest award permissible?

The *Grinberg* court also cited to *Rivera v. N.Y.C. Transit Authority*, a case involving a tri-malleolar ankle fracture, with dislocation.[184] The plaintiff in *Rivera* also suffered tendon and cartilage damage and underwent three surgeries.[185] Her residual condition included complaints of pain and limitations, with an increased risk for arthritis.[186] For these conditions, the First Department reduced the past pain and suffering award of $710,000 to $600,000 and a future award of $1 million to $600,000, which indicated that the highest permissible award was $1.22 million in 2013 dollars.[187] The case provides no explanation, however, for the nearly $300,000 disparity between *Rivera* and *Orellano*, even though both cases involved reductions. It is thus unclear how either case is a valid indicator that $950,000 should be the floor for an award in *Grinberg*.

Thus, when comparing *Grinberg* with the authorities on which the court relied, practitioners are left with a number of conceivable interpretations—the following are just a few: first, that the injuries and plaintiffs are not as similar as the court suggests; second, that the later additur failed to increase the award to the lowest amount permissible; third, that the court was indicating something about whether the cited reductions were appropriate; fourth, that the range of awards for lower leg and ankle fractures should be actually quite narrow, between about $900,000 and $1.2 million for similarly situated plaintiffs. The true rationale, however, is unknown because while the court wrote about how a "good recovery" does not preclude future pain and suffering damages, the cited authorities

[184] Rivera v. N.Y.C. Transit Auth., 92 A.D.3d 516, 517, 938 N.Y.S.2d 535, 536 (App. Div. 1st Dep't 2012).

[185] *Id.*

[186] *Id.*

[187] *Id.* at 516–17, 938 N.Y.S.2d at 535–36.

for the additur raise more questions than they answer.[188]

IV. EXPLAINING THE DEVIATIONS

While, in large measure, the failure to adhere to the above-mentioned principles has resulted in the sometimes inconsistent application of the standard, there are additional factors to consider. These factors may include changes in the composition of the courts and the failure of counsel to provide the court with all relevant precedent, to name a few. Furthermore, there are additional myths and misunderstandings professed by the bench and the bar that contribute to the inconsistency.

A. Myth 1: Cases That Do Not Describe the Injury Are Irrelevant

In addition to failing to give an explanation for their decision to reduce or increase an award, often the appellate courts will provide little to no facts about the injury in their decision. This has led to one of the biggest myths that if a case orders a reduction, but does not describe the injury, it is irrelevant. The facts of any reported decision, however, can be found by reviewing the briefs and record on appeal for that case or in the jury verdict reports.[189] Because briefs and records are publically available, the courts will take judicial notice of the facts contained in the briefs and records.[190]

---

[188] Grinberg v. C & L Contracting Corp., 107 A.D.3d 491, 491, 967 N.Y.S.2d 58, 59 (App. Div. 1st Dep't 2013).

[189] Some briefs and records are now available through electronic databases, but other sources are often overlooked. Court law libraries and law school libraries often carry microfiche copies of records and briefs. The microfiche is processed and then sent out to the various depositories around the state, and, in our experience, it has taken about nine months from the date of oral argument for the microfiche to be made available. Another valuable and overlooked source of information comes from blogs of New York attorneys who provide valuable resources and insight not available elsewhere. *See, e.g.*, John Hochfelder, *Appellate Court Reduces Foot Injury Pain and Suffering Award*, NEW YORK INJURY CASES BLOG, http://www.newyorkinjurycasesblog.com/2013/08/articles/foot-injuries/appellate-court-reduces-foot-injury-pain-and-suffering-award/ (discussing recent pain and suffering verdicts and settlements). There are also companies that publish facts about damages awards in electronic or physical form. *See, e.g.*, ALM Media Properties, LLC, VERDICTSEARCH, http://verdictsearch.com/ (last visited Jan 3, 2014) (offering a comprehensive database in this area).

[190] *See, e.g.*, Yuppie Puppy Pet Prods., Inc. v. Street Smart Realty, LLC, 77 A.D.3d 197, 202, 906 N.Y.S.2d 231, 236 (App. Div. 1st Dep't 2010) (citing RGH Liquidating Trust v. Deloitte & Touche LLP, 71 A.D.3d 198, 207, 891 N.Y.S.2d 324, 331 (App. Div. 1st Dep't 2009)) (permitting judicial notice by appellate court of recently filed brief opposing summary judgment in a separate, pending foreclosure proceeding); Lane v. Lane, 68 A.D.3d 995, 997, 892 N.Y.S.2d 130, 132–33 (App. Div. 2d Dep't 2009) (quoting Allen v. Strough, 301 A.D.2d 11,

Researching the facts in the briefs and records is critical in making the important distinctions necessary for a case. For example, in a wrongful death case our office handled, the court had to review the excessiveness of a jury's award for pain and suffering of a brief duration right before death. During oral argument the court questioned whether the amount awarded might be justified because the plaintiff had to be restrained as he writhed in pain. The court questioned whether any of the other prior reviewed cases involved a person similarly restrained. Because we had reviewed the briefs and records in the cases we cited, we were able to point the court to a prior case where the plaintiff had been similarly restrained. The court ultimately reduced the jury's award. Thus, all prior decisions, whether the injury is discussed or not, are relevant in determining whether an award deviates materially. Neither the bar nor the bench should dismiss a prior decision simply because the factual recitation is absent or scant.

B. Myth 2: "Older" Cases Are Irrelevant

Another myth is that "older" cases are irrelevant or less persuasive. Some will argue that because a case was decided in 1999, it should be disregarded because the value of money in 1999 is different today. No one doubts that the time value of money matters, but prior cases are still binding and have precedential effect that is not diluted by the passing of time. Precedent should be treated as precedent. Indeed, if the whole purpose of enacting CPLR section 5501(c) was to "tighten[] the range of tolerable awards,"[191] it would defeat the purpose of the statute to disregard prior cases or consider them of lesser value because they are old. No one doubts *Marbury v. Madison*[192] is just as authoritative today as it was when it was decided in 1803.[193] In the context of reviewing whether damages are excessive, some courts address the

18, 752 N.Y.S.2d 339, 345 (App. Div. 2d Dep't 2002)) (concluding that the court may take judicial notice of a record in the same court of the pending matter or some other action).

[191] Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 425 (1996) (citing Consorti v. Armstrong World Indus., Inc., 72 F.3d 1003, 1013 & n.10, 1014–15 & n.14 (2d Cir. 1995), *vacated on other grounds sub nom*, Consorti v. Owens-Corning Fiberglass Corp., 518 U.S. 1031 (1996)).

[192] Marbury v. Madison, 5 U.S. 137 (1803).

[193] *See, e.g.*, Zivotofsky v. Clinton, 132 S. Ct. 1421, 1427–28 (2012) ("At least since *Marbury v. Madison*, we have recognized that when an Act of Congress is alleged to conflict with the Constitution, '[i]t is emphatically the province and duty of the judicial department to say what the law is.'") (alteration in original) (citations omitted).

issue of older cases head-on. For example, in *DiSorbo v. Hoy*,[194] the Second Circuit Court of Appeals expressly addressed older cases, noting that "[e]ven taking into account that [a damages case] was decided approximately fifteen years ago, the disparity between the two compensatory damages awards is considerable."[195] Older cases, therefore, should not be ignored. How to account for that age, however, is a different question entirely.

One potential way to account for the fact that a case is older is to consider inflation.[196] In doing so, however, you will find most adversaries and the courts will unscientifically arrive at a number saying it accounts for inflation. For example, in *Harding v. Onibokun*,[197] the court stated that a $700,000 award in 1993[198] was "likely" worth $1.15 million in 2006.[199] Using the Consumer Price Index Inflation Calculator on the Bureau of Labor and Statistics website,[200] however, reveals that a $700,000 award in 1993 is approximately a $976,000 award in 2006.[201] Thus, the court's estimation was off by roughly $276,000, a difference of more than 25%. While that number may not seem grossly off the mark, if the award was of a completely different magnitude—say a $7 million award in 1993 to 2006—the court's estimate would mean a nearly $2 million difference in principal,[202] to say nothing of how the error would be enlarged by the additional statutory 9% simple interest.[203]

---

[194] DiSorbo v. Hoy, 343 F.3d 172 (2d Cir. 2003).

[195] *Id*. at 185.

[196] *See* Falzon v. JPMorgan Chase & Co., 501 F. App'x 92, 94 (2d Cir. 2012) (citing *DiSorbo*, 343 F.3d at 185) ("When adjusted for inflation, [the *DiSorbo*] award would be nearly identical to [the plaintiff's] award for past pain and suffering.") (citations omitted); DeSena v. Pavel, 289 F. App'x 426, 429 (2d Cir. 2008) (relying on devaluation of the dollar currency to conclude that a $25,000 award in 2003 dollars was less valuable than a numerically equal 1997 damage award); *DiSorbo*, 343 F.3d at 185 ("[The court] must take into account inflation, as the reasonable range for [the plaintiff's] injuries today is higher than what it would have been ten years ago."). But see Nisanov v. Black & Decker (U.S.) Inc., No. 05 Civ. 5911 (BMC), 2009 U.S. Dist. LEXIS 101774, at *5 n.2 (E.D.N.Y. Apr. 9, 2009), where the court rejected the Consumer Price Index and reasoned that there is no "empirical evidence showing that jury awards move like consumer prices."

[197] Harding v. Onibokun, 14 Misc. 3d 790, 828 N.Y.S.2d 780 (Sup. Ct. Jefferson County 2006).

[198] This was the amount awarded for an Erb's palsy injury in a case upheld by the Second Department in 1993. Sutherland v. Cnty. of Nassau, 190 A.D.2d 664, 664–65, 593 N.Y.S.2d 287, 288 (App. Div. 2d Dep't 1993).

[199] *Harding*, 14 Misc. 3d at 797, 828 N.Y.S.2d at 786–87 (using the upheld *Sutherland* award as representative of the "lowest range" of an award for the type of injury involved).

[200] *US Inflation Calculator*, *supra* note 18.

[201] *Id.*

[202] *Id.*

[203] The statutory interest rate as codified by N.Y. C.P.L.R. 5004 (McKinney 2013).

It is also significant because, as previously stated, often an adversary or court will just guess at a number. Thus, while referring to the inflation calculator may still not be the most mathematically precise way of accounting for inflation, it can be a useful tool in demonstrating how "older" numbers, even when accounting for inflation, are still higher than the award in the case being reviewed.

A related myth is that where there is a disparity between older appellate cases and recent jury verdicts, recent jury verdicts should trump. The First Department implicitly rejected that view in *Paek v. City of New York*.[204] In *Paek*, the court held:

> The dissent justifies its reliance on *Flynn* on the ground that 'the voice of the jury is the voice of the community, and it should not be so cavalierly ignored.' Of course, that is not the standard of appellate review. An award is excessive if it deviates materially from what would be reasonable compensation. The standard for that determination is set by judicial precedent, not juries.[205]

Thus, when reviewing awards, appellate decisions should always trump unreviewed jury verdicts.

C. Myth 3: All Injuries to a Particular Body Part Should Be Treated the Same

When conducting a damages analysis, some will look at the range of awards for a particular type of injury and argue that as long as the jury's award falls within the range, it is acceptable. Such an approach, however, falsely treats all injuries of a certain type as equal. For example, a leg amputation for a twenty-eight-year-old professional soccer player is worse than a leg amputation for a fifty-year-old inactive individual with multiple preexisting injuries and limitations. The courts have acknowledged these differences and have reduced awards accordingly.[206]

Thus, a chart simply setting out the range of accepted awards is not enough. More details must be marshaled before analysis of the

---

[204] Paek v. City of New York, 28 A.D.3d 207, 812 N.Y.S.2d 83 (App. Div. 1st Dep't 2006).

[205] *Id*. at 209, 812 N.Y.S.2d at 85 (citations omitted).

[206] *See* Riselle L. Wissler et al., *Decisionmaking About General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 MICH. L. REV. 751, 791 (1999) (citing studies where horizontal inequity has failed to account for "legally relevant differences" between victims who suffer injuries that render jury verdicts).

proper sustainable value of a pain and suffering award. Every analysis must take into account the unique factors of the case and ascertain whether a similar constellation of factors was present in other cases reviewed by the courts.[207] Numerous factors can be used to draw similarities and distinctions between cases.[208] Such factors include surgeries, the length of hospitalization, the nature and severity of pain, complications, work status, age of the plaintiff, success of treatment, and pre- and post-injury lifestyle.[209] The previously discussed nine-point scale developed by the National Association of Insurance Commissioners could be one useful way to categorize injuries along the spectrum of severity.[210] Often the best approach is to find a case for a particular type of plaintiff that is objectively worse than the case being reviewed. Then it can be demonstrated that since the injuries involved in the case being reviewed are not as severe as in the prior case, the award should be less than or equal to the prior award.

Furthermore, when making case comparisons, attorneys are not limited to cases with the same exact injury. You can look to other cases that have a different unifying factor. For example, in *Kahl v. MHZ Operating Corp.*,[211] the plaintiff fractured his right hip and was hospitalized for twelve days, then went to rehabilitation for seven days and made a good recovery.[212] The appellate division affirmed the trial court's reduction of the awards based on comparisons to a case involving a fractured elbow where the plaintiff regained most of his range of motion, a case involving a fractured ankle and a good recovery, and a case involving a fractured tibia and fibula where there was a more extensive injury.[213] Case comparisons, therefore, do not need to be limited to the type of injury alone. Other factors should be considered. In that way, you will very rarely have a case that is so unique it cannot be compared to a previously reviewed case.[214]

---

[207] *See* Edwards v. Stamford Healthcare Soc'y Inc., 267 A.D.2d 825, 827, 699 N.Y.S.2d 835, 836 (App. Div. 3d Dep't 1999) ("Review of the adequacy of a damage award entails its comparison to awards in similar cases.").

[208] *See id.*

[209] *See* Donlon v. City of New York, 284 A.D.2d 13, 17-20, 727 N.Y.S.2d 94, 97-101 (App. Div. 1st Dep't 2001); *Edwards*, 267 A.D.2d at 827, 699 N.Y.S.2d at 836.

[210] *See supra* notes 66–67 and accompanying text.

[211] Kahl v. MHZ Operating Corp., 270 A.D.2d 623, 703 N.Y.S.2d 842 (App. Div. 3d Dep't 2000).

[212] *Id.* at 623, 703 N.Y.S.2d at 843.

[213] *Id.* at 624–25, 703 N.Y.S.2d at 844.

[214] In *Launders v. Steinberg*, the dissent noted that the cases cited by both the plaintiff and

D. Myth 4: Prior Cases Do Not Bind the Courts

Similarly to Myth 2, various cases have held that prior decisions are not binding on the courts.[215] This concept, however, is derived from the Second Department's holding in *Senko v. Fonda*,[216] which was decided in 1976, before the enactment of CPLR section 5501(c).[217] In *Senko*, the Court stated that its decision should not be interpreted as holding "that the amount of damages awarded or sustained in cases involving similar injuries are in any way binding upon the courts in the exercise of their discretion."[218] The court stated that "prior verdicts may guide and enlighten the court and, in a sense, may constrain it."[219] That was under the shocks the conscience standard. CPLR section 5501(c), however, was enacted to tighten the range of tolerable awards and give more predictability.[220] To take the position that prior decisions do not bind the court, therefore, is contrary to the Legislature's intent in changing appellate review of such awards.[221] The only way to provide for that greater predictability and to ensure that awards do not constantly escalate is to treat prior decisions as binding.[222]

---

the majority contained virtually no injuries like the one at hand. Launders v. Steinberg, 39 A.D.3d 57, 72, 828 N.Y.S.2d 36, 47 (App. Div. 1st Dep't 2007), *aff'd as modified*, 9 N.Y.3d 930, 876 N.E.2d 901, 845 N.Y.S.2d 215 (2007) (Andrias, J., dissenting). The defendant had been convicted of manslaughter for killing his six-year-old daughter by a blow to the head. *Id.* at 59, 828 N.Y.S.2d at 38 (majority opinion). He struck his daughter around 6 p.m. one night, then went out to dinner, returned hours later, took cocaine, and at 4 a.m. the next morning put his daughter in bed, calling the paramedics shortly thereafter. *Id.* at 60, 828 N.Y.S.2d at 39. In describing why this case was unique, Justice Catterson wrote that he found no obligation to review awards that had been previously approved because it was a "case of an abusive father killing his child . . . and then leaving her without medical attention while he enjoyed dinner and freebased cocaine [and thus was] without precedential analog." *Id.* at 59, 828 N.Y.S.2d at 38. In dissent, Justice McGuire argued that the majority erred in describing the injury as without analog because the outrageousness of the conduct is not a relevant factor in determining compensatory damages. *See id.* at 75, 828 N.Y.S.2d at 49 (McGuire, J., dissenting). Justice McGuire looked to the pain and suffering experienced by the decedent, which would have included vomiting, discomfort from the vomiting, a feeling of being unable to catch her breath, and a severe headache with pain of increasing severity, and that these symptoms would have occurred over an approximate eight to ten-hour period. *Id.* at 76, 828 N.Y.S.2d at 50. Justice McGuire concluded that the plaintiff had not cited any awards sustaining a $5 million award for analogous injuries. *Id.*

[215] *See* discussion *supra* Part IV.B.

[216] Senko v. Fonda, 53 A.D.2d 638, 384 N.Y.S.2d 849 (App. Div. 2d Dep't 1976).

[217] N.Y. C.P.L.R. 5501(c) (McKinney 2013).

[218] *Senko*, 53 A.D.2d at 639, 384 N.Y.S.2d at 851.

[219] *Id.*

[220] *See supra* notes 23–28 and accompanying text.

[221] *See supra* notes 25–29 and accompanying text.

[222] *See* Donlon v. City of New York, 284 A.D.2d 13, 16, 727 N.Y.S.2d 94, 97 (App. Div. 1st

Thus, courts are bound by their prior decisions and must determine whether the jury's award deviates materially from the range they have established by their prior decisions.[223]

V. PROMOTING GREATER CONSISTENCY

In enacting CPLR 5501, New York State passed legislation that increased judicial scrutiny of money damages awards from a lax "shocks the conscience" standard to a more exacting "deviates materially" standard to provide greater consistency in the damages awarded. The courts, however, have been inconsistent, or at least seemingly inconsistent, in applying this standard to the review of damages. That inconsistency undermines the very purpose of the statute.

Fortunately, the tools to correct inconsistencies are readily available. The courts can give greater guidance to the bar, lower courts, and even future appellate panels by providing the details of the injury in their decisions. They can also comply with CPLR section 5522(b) by giving an explanation meaningful to future appellate courts for their decisions to reduce or increase an award. Furthermore, while CPLR section 5522(b) may not apply to affirmances,[224] the courts could give greater guidance by also explaining their decisions to affirm awards. Where, however, facts or explanations are lacking, the case should not be disregarded. Briefs and records on appeal can often fill in the gaps in sparse decisions and can provide a basis for meaningful comparisons.

In analyzing damages, courts should also follow a hierarchy of persuasiveness in determining the range of reasonable awards. When reviewing whether an award is excessive, a court should first rely on appellate reductions because they indicate the upper boundaries of the potential award.[225] Lower courts should consider

Dep't 2001) (indicating that while monetary awards increase and gather momentum over time, since the CPLR section 5501(c) measures were adopted appellate review has began to analogize appealed cases using "relevant precedent" and courts have "tighten[ed] the range'" to embody the statute's reform).

[223] *See* Paek v. City of New York, 28 A.D.3d 207, 209, 812 N.Y.S.2d 83, 85 (App. Div. 1st Dep't 2006) (rejecting dissent's reliance on jury verdict for a value set by judicial precedent).

[224] *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 423–24 & n. 5 (1996) (indicating that the appellate division must set forth its reasons for modifying an award, but not expressly discussing what is required if the original award is simply affirmed).

[225] As the imprimatur that a reduced award represents the highest sustainable award, the appellate reduction suggests no award on retrial with the same evidence could permissibly end with a higher award. *See* Rangolan v. Cnty. of Nassau, 370 F.3d 239, 244 (2d Cir. 2004);

themselves bound by these prior reductions and must reduce to that number if the award deviates materially. As the United States Supreme Court recognized, such review is a matter of law, not a question of fact.[226] If no decisions with reductions are available, then the court can look to affirmances. Where several affirmances converge around the same number, then a strong argument can be made that an award outside of that range is excessive. Where there is no appellate authority, trial court reductions or additurs should then be considered. If none of those are available, the courts next can look to jury verdicts to see if they fall within a well-defined range. Lastly, if there is no other analogous authority, settlements can provide some guidance as to the potential value of a case. In the end, experience shows that it is very rare that there is no "comparable" case. Thus, rarely will there be a lack of sufficient guidance and the courts should look to prior available cases to determine the appropriate range of tolerable awards.

Furthermore, a damages analysis requires more than just looking at the highest and lowest numbers that the courts have put on cases. It requires learning the spectrum of cases and where a case falls on that spectrum. Courts, therefore, should continue to recognize that there is a spectrum of injuries, from the worst-of-the-worst to the optimal recovery. Within that spectrum, reductions should be made where the case is objectively less severe—e.g., a temporary minor injury is less severe than a permanent significant injury.[227] Those intermediate reductions then can create different ranges from which other plaintiff's injuries can be assessed. Drawing these key distinctions will foster horizontal and vertical equity.[228]

Importantly, within a range of awards, determining whether something "deviates materially" does not depend on a particular percentage of deviation, but on whether it is material in relation to the relative size of the award. To illustrate, a $500 reduction is meaningful when an award is $1,000, but it is not when an award is $10 million. In contrast, a 10% reduction is meaningful when an award is $10 million, but may not be when the award is $1,000.

Johnston v. Joyce, 192 A.D.2d 1124, 1125, 596 N.Y.S.2d 625, 626 (App. Div. 4th Dep't 1993).

[226] *See Gasperini*, 518 U.S. at 435.

[227] *See* Bovbjerg et al., *supra* note 69, at 922–23.

[228] *See Beyond Tort Reform*, *supra* note 62, at 20 n.85 (explaining that horizontal equity means consistency among jury awards for similarly injured parties, and that vertical equity means proportionality between less and more severely injured parties).

Courts should, therefore, make these assessments based on the size of the jury award and the amount of the potential reduction. In addition, when pain and suffering awards approach the multi-million dollar range, the courts should proceed even more cautiously to avoid the further escalation of jury awards. When dealing with those larger awards, reductions of even a low percentage can be significant. For example, when awards grow from $10 million in 2010 to $12 million in 2012, it will then inevitably be argued in 2014 that $15 million is reasonable. While these awards are approximately 20% different at each interval, in the span of four years, what constitutes judicially sanctioned reasonable compensation would jump $5 million. Further compounding this problem is that statutory 9% interest on these awards can be significant.[229] Moreover, when does the escalation end? If $15 million is approved next year, what will the awards be in 2020? Surely, there must come a point where a pain and suffering award stops serving a compensatory function and becomes punitive. To avoid this, the courts should strive to bend the growth curve down, especially for the larger awards. If not, then inevitably calls for caps on damages or other reforms will follow.

Another way to promote greater consistency and predictability is during summations. It has been held that where counsel chooses to suggest a dollar amount during summation, that amount must be reflective of reasonable compensation.[230] Thus, when counsel suggests an amount during summation that is drastically higher than reported awards for such an injury, that suggestion risks anchoring the jurors' expectations of a fair award at a place set by counsel, rather than by precedent.[231] Indeed, "[a] jury is likely to infer that counsel's choice of a particular number is backed by some authority or legal precedent."[232] Thus, some of the excessive awards made by juries can be avoided or curbed by giving greater scrutiny to summations and requiring that any numbers suggested be supported by proper appellate precedent.

In the end, the overriding goal of a damages analysis is to create

---

[229] N.Y. C.P.L.R. 5004 (McKinney 2013) ("Interest shall be at the rate of nine per centum per annum, except where otherwise provided by statute.").

[230] *See* Braun v. Ahmed, 127 A.D.2d 418, 426, 515 N.Y.S.2d 473, 478 (App. Div. 2d Dep't 1987).

[231] Consorti v. Armstrong World Indus., 72 F.3d 1003, 1016 (2d Cir. 1995), *vacated on other grounds sub nom*, Consorti v. Owens-Corning Fiberglass Corp., 518 U.S. 1031 (1996).

[232] *Id.*

greater uniformity and more predictability. That goal is accomplished by tightening the range of awards, not by expanding or inconsistently adjusting it. While understandably the notion of trying to characterize plaintiffs along a spectrum may seem counter to notions of individual justice and fairness, the goal of the Legislature is clear and controlling. Further, the courts have upheld the constitutionality of CPLR section 5501(c) and reject the notion that it impermissibly infringes on the right to trial by jury.[233] What is more, studies have shown that jury awards already reflect a variation among awards depending on severity and other key factors.[234] Thus, categorizing cases along a spectrum is natural, possible, and necessary when working to fulfill the Legislature's intent. When courts more consistently apply precedent, it will result in greater certainty for the parties and greater fairness for similarly situated plaintiffs and defendants.

[233] *See supra* text accompanying notes 33–37.
[234] *See supra* Part II.C.