AHRMNY CLE Program
Trends in Medical Malpractice Litigation/References
June 6, 2025

References

Lessons Learned from The Trial of a Third-Party Action

CPLR Article 10- Parties Generally

Sec. 1007- When Allowed

Sec. 1008- Answer of Third-Party Defendant- all same defenses available except jurisdiction based on service of Complaint on Defendants

Sec. 1009- Claim by Plaintiff Against Third-Party Defendant- within 20 days after service of the Answer, Plaintiff may amend Complaint to add claims against Third-Party Defendant without leave of Court.

Sec. 1010- Dismissal or Separate Trial of Third-Party Complaint- Court may dismiss without prejudice, order a separate trial of the third-party claim or any issue. Court shall consider whether the controversy between the parties in the Third-Party action will unduly delay the determination of the main action or prejudice the substantial rights of any party.

Cases- most reported cases concerning Third-Party Actions concern general liability matters and focus on the Relation Back Doctrine which allow plaintiff to claim over/plead directly against Third-Party Defendants brought into the case by Third-Party Plaintiffs.

Bisono v. Mist Enterprises, 231 A.D.3d 134, 216 N.Y.S.3d 23 2024 Slip Op. 03873

Buran v. Coupal, 87 N.Y.2s 173, 638 N.Y.S.2d 405 (1995).

Fitzpatrick v. City of New York, 185 Misc.2d 79, 714 N.Y.S.2d 185, 2000 N.Y. Slip. Op. 20374

Successful Trial Strategies

New York Pattern Jury Instructions (Third Edition; 2024)

- 2:277. Damages—General
    - Only if you decide that the plaintiff is entitled to recovery will you consider the measure of damages.

- 2:277A. Damages—Comment by Counsel During Closing Remarks
    - In any action for personal injuries or wrongful death, the parties' attorneys may refer in their closing statements to "a specific dollar amount that the attorney believes to be appropriate compensation for any element of damage that is sought to be recovered in the action." See CPLR 4016(b).

- **2:151A(2). Malpractice—Medical, Dental and Podiatric Malpractice—Damages—Itemized Verdict**
    - Applicable in actions other than wrongful death actions commenced on or after July 26, 2003. See CPLR 4111(d).

- The court must take care to omit items which are duplicative or which are not supported by the evidence. Taylor v. Henderson, 175 AD2d 590, 573 NYS2d 793 (4th Dept. 1991).
- Possible items of damages:
  - From the time of occurrence up to the date of your verdict:
    - Medical, Dental, Podiatric expenses
    - Medical equipment
    - Custodial care
    - Rehabilitation services
    - Loss of Earnings
    - Impairment of earning ability
    - Pain and suffering
  - Future pain and suffering (and number of years)
  - Future economic damages (and number of years)
    - Medical, dental, podiatric expenses
    - Loss of earnings
    - Impairment of earning ability
    - Custodial care
    - Rehabilitation services

- 2:151B. Malpractice—Medical, Dental and Podiatric Malpractice—Income Taxation of Lost Earnings
  - The court is required to instruct the jury not to make any reductions on account of income tax and that the question of such reductions is a matter for the court to decide. See CPLR 4546(2).

- The pattern charge of 2:151B is to be used with the appropriate general instructions as to damages. See 2:277-2:325.

- 2:280. Damages—Personal Injury—Injury and Pain and Suffering
  - An award for pain and suffering should include compensation to an injured person for the physical and emotional consequences of the injury.
  - "Mental suffering" is not an item of damage distinct from "pain and suffering." Lamot v. Gondek, 163 AD2d 678, 558 NYS2d 284 (3d Dept. 1990).

- 2:280.1 [loss of enjoyment of life]
  - Loss of enjoyment of life, as well as other factors in determining the amount of damages for conscious pain and suffering, may be considered only if plaintiff has "some cognitive awareness" of the loss. McDougald, supra.

- 2:281. Damages—Personal Injury—Future—Permanence—Life Expectancy Tables
  - If the jury finds that plaintiff's injury is permanent, the amount awarded as damages for future pain and suffering must be separately itemized on the verdict sheet and the number of years for which the award is made must be stated. See CPLR 4111(d)(e)(f).

- 2:284. Damages—Personal Injury—Emotional Distress and Physical Consequences Thereof
    - In order to recover damages for pure emotional distress, the emotional disturbance must be serious and verifiable, and plaintiffs must produce evidence which is sufficient to guarantee the genuineness of the claim. Bovsun v. Sanperi, 61 NY2d 219, 473 NYS2d 357 (1984); Ornstein v. New York City Health and Hospitals Corp., 10 NY3d 1, 852 NYS2d 1 (2008).

- 2:285. Damages—Personal Injury—Expenses Incurred
    - See CPLR 4111(d)
    - The jury should not be charged on future medical expenses unless there is evidence of the need for them and their reasonable cost. Beyer v. Murray, 33 AD2d 246, 306 NYS2d 619 (4th Dept. 1970).

- 2:290. Damages—Personal Injury—Loss of Earnings—In General
    - Loss of earnings must be established with reasonable certainty focusing on the plaintiff's earning capacity before and after the accident. Shubbuck v. Conners, 15 NY3d 871, 913 NYS2d 120 (2010).

- 2:278. Damages—Punitive
    - Punitive damages may be recovered in a medical malpractice action where defendant's conduct is so "intentional, malicious, outrageous, or otherwise aggravated beyond mere negligence" to warrant such an award. McDougald v. Garber, 73 NY2d 246, 538 NYS2d 937 (1989).

- 2:315 Damages – Derivative Action Re Spouse – Loss of Services
    - Nature and extent of the services and society before the injury, including disposition, temperament, character and attainments;
    - Services rendered in superintending the household, training the children
    - Punitive damages cannot be recovered by a spouse in a derivative action

- 2:317 Damages – Derivative Action Re Child – Loss of Services
    - Parent has a right to the services of a child
    - Pecuniary loss sustained by the loss of the child's services until the child becomes 18 years of age
    - Reasonable value of the child's services which the parent has been and will be deprived of as a result of the injuries sustained by the child

- **2:320. Damages—Actions for Wrongful Death and Conscious Pain and Suffering.**
    - Such damages include loss of support, voluntary assistance, and possible inheritance, as well as medical expenses incidental to death and funeral expenses. Gonzalez v. New York City Housing Authority, 77 NY2d 663, 569 NYS2d 915 (1991).
    - Pecuniary injuries do not include sorrow or mental anguish, loss of companionship of a deceased child, or loss of companionship of a deceased spouse.

- 2:320:1. [monetary loss]

- Generally, evidence of a decedent's gross income at the time of death is the standard by which to measure the value of income already lost and to measure the loss of future earnings. Rodriguez v. Triborough Bridge and Tunnel Authority, 276 AD2d 769, 716 NYS2d 24 (2d Dept. 2000).

- 2:320.2. [loss of services; loss of guidance]
  - If the decedent was a homemaker, recovery may include the monetary value of the services provided. De Long v. Erie, 60 NY2d 296, 469 NYS2d 611 (1983).
  - The standard by which to measure the value of past and future loss of household services is the cost of replacing the decedent's services. Klos v. New York City Transit Authority, 240 AD2d 635, 659 NYS2d 97 (2d Dept. 1997).
  - Pecuniary injuries do include loss of parental nurture and care and loss of physical, moral and intellectual training by a parent. Zygmunt v. Berkowitz, 301 AD2d 593, 754 NYS2d 313 (2d Dept. 2003).

- 2:320.3, 2:320.4, 2:320.5 [income tax considerations]

Post-Verdict

- A Nuclear Verdict

- Collateral Source Hearing pursuant to CPLR 4545
  - Any collateral source deduction required by this subdivision shall be made by the trial court after the rendering of the jury's verdict. The plaintiff may prove his or her losses and expenses at the trial irrespective of whether such sums will later have to be deducted from the plaintiff's recovery.

- Post-Trial Motions
  - 1) Immediate oral motion after decision

  - 2) Pursuant to CPLR 4404 (a)
    - The court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action or separable issue where the verdict is:
      - contrary to the weight of the evidence,
      - in the interest of justice, or
      - where the jury cannot agree after being kept together for as long as is deemed reasonable by the court.