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The Bar's Most Common Repeated Mistakes in Applying CPLR 5501(c)

Timothy Capowski, Jonathan Shaub and Jennifer Graw write: "The largest impediment to accurately valuing cases arises from the myth that the Appellate Division is endorsing larger and larger awards, thereby signaling an abandonment of anything but lip-service to CPLR 5501(c). There is no such trend."

By **Timothy R. Capowski, Jonathan P. Shaub and Jennifer Graw** | October 19, 2020

Tim Capowski, Jonathan Shaub, and Jennifer Graw

A burgeoning litigation backlog, exacerbated by COVID, requires the Bench and Bar to become more efficient in valuing personal injury actions, especially in the realm of non-pecuniary (pain and suffering) damages reviewed under CPLR 5501(c). The first step in this process involves eliminating a number of common misconceptions that have been repeated over and over in damages litigation for the past two decades. Through repetition, these errors have achieved a measure of traction they do not remotely deserve.

The largest impediment to accurately valuing cases arises from the myth that the Appellate Division is endorsing larger and larger awards, thereby signaling an abandonment of anything but lip-service to CPLR 5501(c). There is no such trend. And the absence of a trend is consistent with historically-low economic inflation since the turn of the century.

In reality, the adherents of this narrative fundamentally misconstrue CPLR 5501(c) jurisprudence by relying on outlier decisions, federal opinions, lower court decisions, and opinions that employ the wrong standard of review, all as camouflage for their wholesale embrace of litigation tactics designed to drive up compensatory awards and escape or undermine CPLR 5501(c).

At base, the Legislature specifically enacted CPLR 5501(c) as a tort reform measure to promote stability and fairness in the tort system, avoid sudden shocks, and prevent the upward spiral of verdicts. The very idea that the courts should endorse a rise in non-pecuniary awards, rather than strict adherence to the existing CPLR 5501(c) framework, in the face of the economic devastation wreaked by COVID-19 on New York's municipalities, businesses and citizens,[i] is abhorrent to common sense, rationality and fairness to all New Yorkers.

The So-Called Game-Changer Decisions Are Actually Outlier, Standalone Decisions, And Are Provably Not Relevant or Controlling Pain and Suffering Damages Precedent

Whether utilized in settlement negotiations or in an effort to justify an excessive verdict, plaintiffs are understandably keen to always depict the sustainable range as far higher and far more elastic than it actually is. Plaintiffs invariably justify their demands and patently improper verdicts through references to outlier decisions. Wrongful death claims perfectly encapsulate this trend.

Because of the huge outlier pain and suffering awards permitted in *In re 91st St. Crane Collapse Litig.*, 154 A.D.3d 139 (1st Dept. 2017), this decision is cited by plaintiffs in virtually every wrongful death case as indicative of either the First Department quadrupling the prior sustainable range for short duration pain and suffering awards in death cases, or of the First Department generally signaling that, going forward, it will disregard New York's tort reforms embodied in CPLR 5501(c). Both uses of this decision are sorely misplaced. [ii] [iii]

The *Crane Collapse* decision specifically and repeatedly describes itself—*not* as a harbinger of increased pain and suffering awards in death cases or even generally—but as a standalone outlier not guided by (or susceptible to) comparison, and which involves a significant punitive component. The First Department took great pains to explain this: "[T]here are also no cases that are similar in facts or present such a confluence of facts: catastrophic injuries leading to death, and egregious, wanton disregard for potential loss of life and property." **** "[W]e again acknowledge that the inconceivable pain and suffering endured by [plaintiff] warrants a variance from the cited awards."

In addition to self-describing its decision as one in "variance" from existing CPLR 5501(c) precedent, the First Department specifically included references to the defendant Lomma's *conduct* ("reprehensible," "egregious, wanton disregard for potential loss of life" spanning a lengthy time period) as a factor in its pain and suffering analysis. Since pain and suffering damages are designed for compensatory, not punitive purposes, this also renders the awards in *Crane Collapse* significantly distinguishable as anomalies or outliers.[iv]

The truth is, *Crane Collapse* and other $3 million and higher wrongful death decisions that stray from the traditional sustainable range,[v] are outliers that each included significant punitive and exacerbating factors.[vi] Like *Crane Collapse*, each involved a notorious, highly-publicized litigation involving significant overarching punitive considerations that generated a standalone pain and suffering award well out of line with the court's precedent, but which was tailored and limited to the special facts and circumstances of the case.

For example, in 2003, the First Department approved a $3 million award (that had been reduced by the trial court from $4.5 million) in what it termed an "unusual case" where a hostage used as a human shield was killed in a highly-publicized shootout between a bank robber and police that entailed troubling questions concerning the NYPD's training, tactics, and discipline. The First Department affirmed an award of $3 million for pain and suffering to the estate of the decedent whose leg was "split in half" with blood coming from her groin and chest, as she remained alive for an hour. *Lubecki v. City of New York*, 304 A.D.2d 224 (1st Dept. 2003).

Likewise, in *Launders v. Steinberg*, 39 A.D.3d 57 (1st Dept. 2007), aff'd. *and modified on other grds*. 9 N.Y.3d 930 (2007), the First Department affirmed a $5 million pain and suffering award to the estate of a horrifically and chronically abused infant who underwent eight to ten hours of pain and suffering before succumbing to her injuries from the latest brutal beating from her drug-addled father. Because of the ghastly nature of the defendant's criminal conduct, the court justified its departure from precedent on the basis that the case was "without precedential analog" (id. at 59).

Despite the fact that *Lubecki, Launders*, and *Crane Collapse*, have each been routinely cited as CPLR 5501(c) precedent by plaintiffs since their issuance (in 2003, 2007 and 2017 respectively) in *every* subsequent New York wrongful death case, none have been cited in support of a single pain and suffering award by any New York appellate court, further confirming that each is a unique or outlier compensatory award with punitive underpinnings.[vii]

Actually, consistent with this analysis, *Lubecki* was cited by the Appellate Division a grand total of *once* to support a pain and suffering award: in *Crane Collapse*. And *Launders* has only been cited on the issue of damages for review of a punitive damages award, not a compensatory award. *See Guariglia v. Price Chopper Operating Co., Inc.*, 38 A.D.3d 1043, 1044 (3d Dept. 2007).

While more appropriately a subject worthy of its own future article, it should be noted that our research has not uncovered any appellate decisions where the courts have allowed a punitive element to influence the pain and suffering award outside of a context where the tortfeasor to be punished *was the only defendant to which the award applied*. It does not appear that the courts would allow a punitive-based compensatory award in a situation where it would be borne in part by passively-negligent co-tortfeasors, as this would be, quite obviously, unfair and inequitable.

However, by this same logic, the appellate courts should always seek to carefully caveat such awards[viii]—just as the First Department did in *Crane Collapse* and *Launders*—to prevent their subsequent misuse by the Bench and Bar as new record-setting compensatory precedent. Otherwise, such decisions—once accorded

status as general CPLR 5501(c) precedent—tend to punish all future defendants and New Yorkers, while contributing to the upward spiral of compensatory awards that CPLR 5501(c) was enacted to prevent. From a pragmatic standpoint, such caveats make the entire valuation process far more efficient for courts and litigant

Federal Court Decisions Applying CPLR 5501(c) Are Irrelevant to State Court Analysis

Another tactic favored by plaintiffs involves relying on federal court decisions as evidence that the sustainable range for claims has shifted upwards. Use of the U.S. Court of Appeals for the Second Circuit's unpublished decision in *Saladino v. Am. Airlines, Inc.,* 2013 U.S. App. LEXIS 5349 (2d Cir. 2013), is a paradigmatic example of this approach. Because it involves an unprecedented $15 million pain and suffering award approved on appeal by the Second Circuit, and is several million higher than the highest-ever sustained award for paralysis injuries in New York, plaintiffs in paralysis and other catastrophic injury cases frequently rely on *Saladino* to justify wholly unsupportable settlement demands and verdicts. The flaw in this approach is two-fold.

First, the caption of the *Saladino* decision specifically states that it is an unpublished decision and "Summary Order," hence it is specifically designated as *non-precedential*.[ix] In fact, the decision contains an unambiguous warning in its header to consult the very rule confirming this: "Notice: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS." It borders on frivolous for plaintiffs to continue relying on *Saladino* under these circumstances.

Second, the Seventh Amendment precludes federal appellate courts, unlike New York State appellate courts, from applying CPLR 5501(c)'s plenary standard of review. *See Gasperini v. Ctr. for Humanities,* 518 U.S. 415, 438 (1996). Instead, federal appellate courts, like the Second Circuit, are limited to reviewing the district court's application of CPLR 5501(c) for an abuse of discretion. *Id.* Plainly, New York State appellate courts should not (and do not) follow decisions that do not actually apply CPLR 5501(c) in the manner intended by the Legislature.

Unsurprisingly, in the seven years since its issuance, the unpublished *Saladino* opinion has never been cited by any New York State appellate court, and certainly not for CPLR 5501(c) review.

Lower Court Decisions and Jury Verdicts Are Irrelevant to the CPLR 5501(c) Analysis

Plaintiffs also frequently cite to trial court decisions and jury verdicts for pain and suffering in support of their argument that the sustainable ranges are drifting upwards. Three examples illustrate this phenomenon. All-too-often plaintiffs in catastrophic injury cases cite to *Tenuto v Lederle Labs.*, 27 Misc. 3d 506 (Sup.Ct., Richmond Co. 2010), *Savillo v. Greenpoint*, 2011 N.Y. Slip Op. 31950 (Sup.Ct., N.Y. Co. 2011), and *Flynn v. GMAC*, 179 Misc. 2d 555 (Sup.Ct., N.Y. Co. 1998). Each involve a runaway verdict approved by a trial court on post-trial motion.

The fallacy in this approach lies in the assumption that jury verdicts, or verdicts approved at the trial court level, constitute meaningful precedent for CPLR 5501(c) analysis. Simply stated, they do not. As the Appellate Division has emphasized, "analysis of *appealed* verdicts using CPLR 5501(c) is not optional but a legislative mandate." *Donlon v. City of New York*, 284 A.D.2d 13, 16 (1st Dept. 2001) (emphasis added). The rationale of deference to jury verdicts cannot trump the courts' CPLR 5501(c)-mandated review, as "[n]o jury can determine the issue of material deviation and we cannot, consistent with CPLR 5501(c), attempt to use the rationale of

deference to a jury verdict in resolving that issue when we are supposed to compare analogous verdicts." *Id.; see also Morsette v. "The Final Call,"* 309 A.D.2d 249, 256 (1st Dept. 2003) ("In order for us to determine whether the award in this matter 'deviates materially from what would be reasonable compensation,' we are required to review awards approved in similar cases.")

This point was underscored in *Paek v. City of New York*, 28 A.D.3d 207 (1st Dept. 2006), in which the plaintiff sought to justify a grossly excessive verdict by citing to an equally excessive verdict approved in a lower court decision, while emphasizing the sanctity of a jury verdict. The Appellate Division's rejection of plaintiff's argument is unequivocal (*id.* at 209): "Of course, that is not the standard of appellate review. An award is excessive if it deviates materially from what would be reasonable compensation (*see* CPLR 5501[c]). The standard for that determination is set by judicial precedent, not juries."

Indeed, the Appellate Division explicitly rejected the dissent's reliance on *Flynn, supra*, to support a grossly excessive pain and suffering award: "The jury award [in *Flynn]* is hardly an exemplar for us on appellate review." *Paek*, 28 A.D.3d at 209. Of course, as the court implicitly recognized*, Flynn*, just like *Tenuto* and *Savillo*, settled prior to appellate review for a significantly lower amount in recognition that the jury's award would not remotely withstand appellate review under CPLR 5501(c).

Decisions Reviewed Under Shocks the Conscience Standards Are Irrelevant and Inapplicable

Finally, plaintiffs often ground their unreasonable settlement demands and verdicts in damages awards reviewed under inapplicable standards. This includes New York state court cases brought under federal statutes (e.g., Federal Employers Liability Act ["FELA"]), and out-of-state decisions, both of which employ a "shocks the judicial conscience" standard for the review of damages awards. In other words, they are reviewed under the standard that the New York State Legislature rejected and abandoned as too deferential in enacting CPLR 5501(c).

Along these lines, we have repeatedly encountered plaintiffs who cite to *Cruz v. LIRR*, 22 A.D.3d 451 (2d Dept. 2005), a FELA case, because it involves a significantly larger award than permissible under existing CPLR 5501(c) precedent. Despite that we have repeatedly explained the inapplicability of this altogether different review standard, plaintiffs persist in citing this decision and ignoring the distinction in cases controlled by CPLR 5501(c). Unsurprisingly, *Cruz* has not been cited or discussed in a single CPLR 5501(c) decision since it was handed down in 2005, notwithstanding the fact that plaintiffs repeatedly cite to it in catastrophic injury cases.

The same applies for reliance on out-of-state decisions involving excessive awards for pain and suffering. As the eminent Justice Ruth Bader Ginsburg observed, "[W]hen New York substantive law governs a claim for relief, New York law and decisions guide the allowable damages." *Gasperini*, 518 U.S. at 437. Unsurprisingly, our research unearthed zero New York State appellate court decisions contradicting Justice Ginsburg and instead relying on out-of-state damages awards for CPLR 5501(c) review.

Conclusion

Frankly, all that a plaintiff establishes by persistent mistaken reliance on the above cases and concepts is that they are fully aware that their position on damages is unsupported by existing, applicable damages precedent. It is our hope that the elimination of these misconceptions from parties' arguments and submissions will

assist the Bench and Bar toward greater consistency and efficiency in valuing personal injury actions in the realm of non-pecuniary damages reviewed under CPLR 5501(c). This, in turn, will lead to greater fairness, more and quicker settlements, less recourse to overburdened courts, and less litigation backlog and delays.

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ENDNOTES:

[i] See *"'We're at War': New York City Faces a Financial Abyss*" (NYT Sept. 28, 2020).

https://www.nytimes.com/2020/09/28/nyregion/nyc-budget-coronavirus.html?smid=fb-nytimes&smtyp=cur&fbclid=IwAR2vk8BBJz03x1JtjRvZdK6_pTQIuDij9f7-M0VXd6pC5bBMdsai39TLeWI&fbclid=IwAR3dxREVGbHXgmwmVtIXPE8q9lKZI45GB3qdUUUk74viRw4oe1589Cpj (https://www.nytimes.com/2020/09/28/nyregion/nyc-budget-coronavirus.html?smid=fb-nytimes&smtyp=cur&fbclid=IwAR2vk8BBJz03x1JtjRvZdK6_pTQIuDij9f7-M0VXd6pC5bBMdsai39TLeWI&fbclid=IwAR3dxREVGbHXgmwmVtIXPE8q9lKZI45GB3qdUUUk74viRw4oe1589Cpj

[ii] The huge awards for pain and suffering are also a product of the erroneous doubling of line item recovery for pain and suffering by separating out pre-impact terror—a component of pain and suffering—as an independent category of recovery. The First Department approved, after *remittiturs*, awards of $8 million and $9.5 million for pain and suffering respectively to the two decedents ($2.5 million for pre-impact terror and $5.5 million for pain and suffering, and $2 million for pre-impact terror and $7.5 million for pain and suffering). We addressed this facet of Crane Collapse in our research article published in the NYLJ on Sept. 21, 2020.

See https://www.law.com/newyorklawjournal/2020/09/28/when-a-pattern-jury-instruction-contrary-to-new-york-law-arrogates-the-law/ (https://www.law.com/newyorklawjournal/2020/09/28/when-a-pattern-jury-instruction-contrary-to-new-york-law-arrogates-the-law/)

[iii] Additional examples of such outliers include Stewart v. New York City Transit Auth., 82 A.D.3d 438, 440-41 (1st Dept. 2011) and Kromah v. 2265 Davidson Realty LLC, 169 A.D.3d 539 (1st Dept. 2019). Each was portrayed as indicative of a seismic shift in sustainable award jurisprudence when, in reality, the underlying briefs and records confirm that they were not indicative of anything other than an outlier award approved to a plaintiff with a longstanding, permanent, debilitating and uncontested chronic excruciating pain condition barely managed with high-dose narcotics.

[iv] The case was an outlier in virtually every conceivable respect as the trial in Crane Collapse was the longest in New York County history and spanned between 11-12 months. It included weeks of testimony directed at the multiple acts of egregious and outrageous behavior of the defendant crane owner over an extended period that unnecessarily endangered, not only the project's construction workers, but the general public as well. See Crane Collapse, supra at 144-148.

[v] See, e.g., Oates v. NYCTA, 138 A.D.3d 470 (1st Dept. 2016) ($300,000); Santana v. De Jesus, 110 A.D.3d 561 (1st Dept. 2013) (*remittitur* to $375,000**);** Sanchez v. City of New York, 97 A.D.3d 501 (1st Dept. 2012) (*additur* to $400,000); Filipinas v. Action Auto Leasing, 48 A.D.3d 333 (1st Dept. 2008) (sustaining *remittitur* to $350,000); Simon v. Granite Bldg. 2, LLC, 170 A.D.3d 1228 (2d Dept. 2019) (affirming $500,000); Vatalaro v. County of Suffolk, 163 A.D.3d 891 (2d Dept. 2018) ($1.25 million); Espinal v. Vargas, 101 A.D.3d 1072 (2d Dept. 2012) ($250,000); Dowd v. New York Tr. Auth., 78 A.D.3d 884 (2d Dept. 2010) (*remittitur* to $1.2 million).

[vi] This logic applies equally to awards involving asbestos and similar exposure injuries that carry an inherent punitive component, and will be the subject of a future article. Suffice it to say, exposure cases are inapplicable to the greater CPLR 5501(c) canon due to the specific nature and cause of such injuries.

[vii] Because it was decided in 2003, Lubecki is usually cited more recently in combination with the usual vague "inflationary" argument that, as pointed out, flies in the face of the historically low rate of economic inflation since the turn of the century.

[viii] As we will discuss in detail in a subsequent article, one way to accomplish this would be to emulate the federal court tactic of issuing non-precedential "Summary Orders" (see endnote ix). This would allow the Appellate Division flexibility in addressing particularly egregious fact patterns without creating unnecessary confusion or upward spiral in CPLR 5501(c) valuation for future litigants and courts. See also CPLR 5522(b).

[ix] The Second Circuit has "specifically cautioned against the reliance on non-precedential summary orders in 'clearly established analyses.'" Matusick v. Erie County Water Auth., 757 F.3d 31, 61 (2d Cir. 2014) (internal citation omitted). It further held that "[n]on-precedential decisions, by their very definition, do not make law." Id. See also 2d Cir. Local R. 32.1.1(a).

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