

11 A.D.3d 201, 782 N.Y.S.2d 269, 2004 N.Y. Slip Op. 07090
(Cite as: 11 A.D.3d 201, 782 N.Y.S.2d 269)

FIND Request: 11 A.D.3d 201

Supreme Court, Appellate Division, First Department,
New York.

Terry LIPTON, et al., Plaintiffs-Respondents,
v.

NEW YORK CITY TRANSIT AUTHORITY, Defendant-Appellant.

Oct. 5, 2004.

Background: In negligence action, the Supreme Court, New York County, Robert D. Lippmann, J., awarded plaintiff damages. Defendant appealed.

Holdings: The Supreme Court, Appellate Division, held that:

- (1) audiotape, offered for impeachment, was properly received in evidence, and
(2) damage award was not excessive.

Affirmed.

West Headnotes

[1] Evidence 157 ↪ 380

157 Evidence

157X Documentary Evidence

157X(D) Production, Authentication, and Effect

157k369 Preliminary Evidence for Authentication

157k380 k. Photographs and Other Pictures; Sound Records and Pictures. Most Cited Cases

Witnesses 410 ↪ 391

410 Witnesses

410IV Credibility and Impeachment

410IV(D) Inconsistent Statements by Witness

410k390 Competency of Evidence of Inconsistent Statements in General

410k391 k. Oral Statements, and Examination of Impeaching Witnesses. Most Cited

Cases

Testimony of plaintiffs' investigator, who made audiotape and participated in conversation recorded on it, to effect that tape completely and accurately reproduced conversation and had not been altered, provided necessary foundation for admission of tape to impeach testimony of defense witness.

[2] Damages 115 ↪ 127.20

115 Damages

115VII Amount Awarded

115VII(B) Injuries to the Person

115k127.18 Arm, Hand, Wrist, and Shoulder Injuries

115k127.20 k. Loss of Function in General. Most Cited Cases

(Formerly 115k132(8))

Damages 115 ↪ 127.51

115 Damages

115VII Amount Awarded

115VII(B) Injuries to the Person

115k127.45 Loss of Earnings

115k127.51 k. Arm, Hand, Wrist, and Shoulder Injuries. Most Cited Cases

(Formerly 115k133)

Award to plaintiff of \$815,000 for pain and suffering and past lost earnings was not excessive for massive rotator cuff injury, which was particularly devastating, since plaintiff, a polio victim, had, prior to accident, relied upon his upper body to ambulate with crutches and was unable to do so effectively thereafter, and plaintiff's rehabilitation was long and painful and injury permanently and very significantly compromised his mobility and independence.

****270** Wallace D. Gossett, Brooklyn (Lawrence A. Silver of counsel), for appellant.

Alexander J. Wulwick, New York, for respondents.

BUCKLEY, P.J., MAZZARELLI, SAXE, ELLERIN,

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GONZALEZ, JJ.

*201 Judgment, Supreme Court, New York County (Robert D. Lippmann, J.), entered January 2, 2004, which, upon a jury verdict, inter alia, awarded plaintiff Terry Lipton damages in the total amount of \$845,264.91, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about October 9, 2003, which denied defendant's motion to set aside the verdict, unanimously dismissed, without costs, as subsumed in the appeal from the ensuing judgment.

[1] Contrary to defendant's argument, the audio-tape, offered by plaintiffs to impeach the testimony of a defense witness, was properly received in evidence. The testimony of plaintiffs' investigator, who made the tape and participated in the conversation recorded on it, to the effect that the tape completely and accurately reproduced the conversation and had not been altered, provided the necessary foundation for the admission of the tape (*see People v. Ely*, 68 N.Y.2d 520, 527, 510 N.Y.S.2d 532, 503 N.E.2d 88 [1986]), and the court properly found that the tape was sufficiently audible to *202 justify its admission (*see People v. Norwood*, 142 A.D.2d 885, 886, 531 N.Y.S.2d 385 [1988], *lv. denied* 72 N.Y.2d 960, 534 N.Y.S.2d 673, 531 N.E.2d 306 [1988]). Defense counsel's deplorable and disruptive behavior during the playing of the tape provided ample justification for his exclusion from the courtroom in order to enable the jury to hear the tape. We note such behavior on the part of trial counsel is wholly unacceptable.

[2] Although defendant maintains that the damages awarded plaintiff Dr. Terry Lipton for pain and suffering and past lost earnings, totaling \$815,000, were excessive, our review of the record discloses that the massive rotator cuff injury sustained by Dr. Lipton as a result of defendant's negligence was particularly devastating since Dr. Lipton, a polio victim, had, prior to the accident, relied upon his upper body to ambulate with crutches and was unable to do so effectively thereafter. The evidence showed that Dr. Lipton's rehabilitation from his rotator cuff injury was long and painful and that the injury has permanently and very significantly compromised his mobility and independence. Accordingly, we perceive no basis to conclude that the challenged awards deviate materially from what is reasonable compensation under the circumstances (*see CPLR 5501[c]*; *and see*

Bernstein v. Red Apple Supermarkets, 227 A.D.2d 264, 642 N.Y.S.2d 303 [1996], *lv. dismissed* 89 N.Y.2d 961, 655 N.Y.S.2d 881, 678 N.E.2d 493 [1997]; *Guillory v. Nautilus Real Estate*, 208 A.D.2d 336, 624 N.Y.S.2d 110 [1995], *appeal dismissed and lv. denied* 86 N.Y.2d 881, 635 N.Y.S.2d 943, 659 N.E.2d 766 [1995]).

We have reviewed defendant's remaining arguments and find them unavailing.

N.Y.A.D. 1 Dept., 2004.
Lipton v. New York City Transit Authority
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