

26 Misc.3d 1212(A), 906 N.Y.S.2d 779, 2009 WL 5457856 (N.Y.Ct.Cl.), 2009 N.Y. Slip Op. 52714(U)

(Table, Text in WESTLAW), Unreported Disposition

(Cite as: 26 Misc.3d 1212(A), 2009 WL 5457856 (N.Y.Ct.Cl.))

## H

NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

Court of Claims of New York.  
Hector Luis GONZALEZ, Claimant,  
v.  
STATE of New York, Defendant.  
**No. 107301.**

Nov. 23, 2009.

Neufeld, Scheck & Brustin, LLP, by [Nick Brustin](#), Esq., Emma Freudenberger, Esq., Glenn A. Garber, P.C., by [Glenn A. Garber](#), Esq., for Claimant's.

[Andrew M. Cuomo](#), Attorney General, by [Robert J. Schwerdt](#), AAG, for Defendant's.

[FAVIOLA A. SOTO](#), J.

\*1 By Decision filed January 22, 2009, this Court found in favor of claimant Hector Gonzalez on his claim for wrongful conviction and imprisonment pursuant to [Court of Claims Act § 8-b](#) (liability decision). The damages trial was held on June 22, 23, 24 and 25 and July 2, 2009. The Court received post-trial letter briefs and other submissions, the last submission being submitted on September 23, 2009.

As set forth more fully in the liability decision, Mr. Gonzalez was arrested on December 2, 1995. On October 21, 1996, at the age of nineteen, and while maintaining his innocence, he was convicted of murder. He was sentenced to fifteen years to life, and served a total of five and a half years in State maximum security prisons prior to the vacating of his conviction and his release from prison on April 24, 2002.

Mr. Gonzalez seeks damages for past and future

pain and suffering and past and future lost wages. He testified on his own behalf, presented six additional witnesses, including medical, economic and rehabilitation experts, and submitted numerous exhibits. The State did not call any witnesses or submit exhibits, and relied instead on cross-examination and its arguments. In determining the amount of damages to be awarded herein, the Court, to avoid double recovery, must also apportion and set-off the monies Mr. Gonzalez received in a settlement, made following the liability trial herein and jury selection therein, in a companion action in State Supreme Court against the City of New York (the City action). See [Carter v. State of New York](#), 139 Misc.2d 423, *affd* 154 A.D.2d 642. The claim for lost earnings was not part of that settlement. Based on the credible and persuasive testimony and evidence, the Court makes the following findings of fact and conclusions of law, and, while avoiding double recovery, determines the amount of damages, both pecuniary and non-pecuniary, that “will fairly and reasonably compensate” claimant for his unjust conviction and imprisonment. [Court of Claims Act § 8-b](#) (6); [Carter](#), 139 Misc.2d 423, *affd* 154 A.D.2d 642.

Hector Gonzalez, a shy and reserved young man, was born in Puerto Rico on January 11, 1977 and raised in Brooklyn, with his mother, sister and stepfather. He was very close to his family. In school, he experienced difficulties in reading comprehension, and these difficulties increased as he progressed. In 10th grade, he was taking 9th grade classes, and he dropped out as he was falling further and further behind. At the age of fifteen he met Mr. Antonio Morales, a community organizer and leader and an advocate for troubled youth. Mr. Gonzalez liked to work with his hands and was interested in carpentry, and, at Mr. Morales's recommendation, Mr. Gonzalez applied to Job Corps. He was accepted in the Job Corps' pre-apprenticeship program in Buffalo; the program was sponsored by the United Brotherhood of Carpenters and Joiners

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of America.

At the carpentry program, Mr. Gonzalez learned how to build walls, entrances and the form for the building foundation. He had a positive experience and received praise from his instructors. He also took pre-GED courses, but was unable to complete the pre-GED program.

\*2 He attended the carpentry program for approximately sixteen months and, on July 25, 1995, he received a pre-apprenticeship and training certificate. His goals were to become a journeyman carpenter after completion of a four year apprenticeship program and to build his own house. Upon completing his Job Corps' assignment, he returned to Brooklyn and was offered two apprenticeship positions for carpentry, one in South Carolina and the other in Pennsylvania. He declined these positions because he was hoping to obtain a position in the New York area, as he maintained his close relationship with his family and wished to remain in close physical proximity to them.

Job Corps referred him to a work referral program in the Bronx in preparation for work placement. That program informed him that he had to be twenty-one years old before placement in a carpentry position in New York. In the interim, he obtained employment as a factory worker in a cosmetic factory for a brief period. On the day prior to his arrest for the murder, Mr. Gonzalez again met with Mr. Morales, and Mr. Morales scheduled a follow-up for the next day to explore his goal of becoming a carpenter. Mr. Morales testified that claimant was happy and excited about his Job Corps' experiences and accomplishments, and his future.

Then Mr. Gonzalez was arrested and charged with murder, remanded and held at Rikers Island (Rikers), convicted by a jury, sentenced, and imprisoned for five and a half years.

This Court finds, based on the record evidence before it and the credible and persuasive testimony, that but for his wrongful conviction, Mr. Gonzalez

would have become a union carpenter. While he had academic difficulties, he was motivated, had a realistic plan for the future, received training and succeeded in that training, and was on his way to accomplishing his goal, prior to his wrongful conviction and imprisonment.

At Rikers, Mr. Gonzalez, who had not previously been incarcerated, wanted to be placed with his co-defendants in C-95 so he falsely told the Department of Correctional Services (Corrections) that he was a drug user. He was eventually transferred to the North facility. During his stay there he was housed in open dormitories housing approximately fifty-sixty prisoners.

He spent most of his time in a cell, pacing back and forth, a habit he still maintains.

While in prison he joined the Almighty Latin King Nation (Latin Kings) for protection, as initially he was afraid of being attacked by other inmates. He remained a member for six to eight months until he found that he did not need the Latin Kings' protection, as he kept mostly to himself. As a member he engaged in illegal activities, such as sending messages and possessing contraband. He received a misbehavior ticket and spent ten months in the Special Housing Unit (SHU).

After his conviction, he was placed in Comstock Correctional Facility (Comstock), where he served approximately four and a half years. At Comstock, he was diagnosed with [Multiple Sclerosis](#), after experiencing symptoms for several months, including seizures, loss of balance, blurred vision, and tingling in his legs.

\*3 Prior to the diagnosis, he was told he might have HIV, was tested and found to be negative. He believed he was not getting prompt and adequate medical attention. He was treated and his symptoms subsided. He was placed in Coxsackie Correctional Facility (Coxsackie) for a few months. After Coxsackie, he was placed in the Eastern Correctional Facility before being released.

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While in prison he lacked privacy, witnessed violent altercations, was subject to strip searches and to humiliation and confinement.

He also spent a lot of time in the law library attempting to understand his conviction and to prove his innocence. While at Coxsackie, his appeals were denied and he eventually lost hope.

While in prison he received visits from his family and friends approximately every other week. He received a visit from his sister's friend, Yara, and they corresponded. They again met after he was released, and they established a relationship which they maintain to date.

Upon his release he moved back home with his family in the same Brooklyn area near Sunset Park, back to his old room. He stayed there for two years, working with his step-father in the scrap metal business, eventually becoming a driver. He missed several job opportunities as he was missing calls and appointments and because of his limited experience. To the extent defendant argues that his missing calls and appointments or not immediately resuming his carpenter training upon his release constituted a failure to mitigate his damages, it has failed to meet its burden of proof on this record.

After being released, Mr. Gonzalez felt he had been left back by society, as if he had fallen behind in the world. He kept and continues to keep to himself; he avoided and continues to avoid social interactions and activities; he suffered throughout the term of his wrongful imprisonment and continues to suffer from the effects; he lost his sense of hope, confidence, and trust, and he has not regained them.

He moved to Florida in June 2004, with Yara, his first serious girlfriend. They lived with her mother for about one year and then moved into their own residence. Although they experienced and continue to experience intimacy and certain relationship difficulties, they are committed to one another and otherwise maintain a good relationship.

The Court, having closely observed Mr. Gonzalez's demeanor and carefully weighed his testimony, finds him to be highly credible and his testimony persuasive. Moreover, this trier of fact observed that at times Mr. Gonzalez did not volunteer information regarding, and tried to avoid discussing, his painful experiences and his difficulties. Further, he understated and minimized those painful experiences and his difficulties. Although his conviction was vacated and he later was exonerated and found innocent by this Court, he still wears a badge of conviction.

Both Mr. Edmond A. Provder and Dr. Frank D. Tinari testified as experts on Mr. Gonzalez's pecuniary damages. Mr. Provder, a certified rehabilitation counselor, testified as a vocational expert. He has administered occupational assessment services and provided life care planning since 1981, and has served as a vocational expert. He is a Diplomate in the American Board of Vocational Experts, and, among other post-graduate education, has a Masters of Education in Rehabilitation Counseling, and earned sixty credits as a Rehabilitation Counseling Doctoral Candidate. The Court finds his testimony credible and persuasive.

\*4 Mr. Provder opined on the effects of Mr. Gonzalez's incarceration on his vocational capacity, employability and his earning capacity, basing his opinion on his review of records and his vocational diagnostic interviews and testing of Mr. Gonzalez on July 8, 2003 and February 16, 2008. The evaluation included a review of documents including the wage statements, several medical records, and the certificate from Job Corps, the interviews, an analysis of the work history, and the results of vocational testing, including one for academic achievement, which averaged an 8th grade academic level.

Mr. Provder opined as to the effect Mr. Gonzalez's wrongful conviction and imprisonment had on his earnings and his employment opportunities. Had Mr. Gonzalez not been incarcerated, he would have continued his training and become a union carpenter or worked as a construction carpenter or

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laborer; carpenters in New York earn on average \$53,590.00 annually, and construction laborers earn on average \$45,320.00 annually. He also opined that due to Mr. Gonzalez's incarceration, his employment opportunities are significantly limited and his prospect for employment is as an unskilled worker, with a salary range of \$25,670.00 to \$15,480.00, with an average annual earning of \$20,909.00.

Mr. Provder considered claimant's medical condition and determined that this factor was not significant, as claimant's condition had stabilized and he demonstrated the ability to work in a satisfactory manner in his post-conviction employment. The State did not present medical or other evidence to the contrary or rebut the showing of Mr. Gonzalez's ability to work. Mr. Provder noted that although Mr. Gonzalez took and passed GED classes throughout his incarceration, he did not take the GED exam. To the extent defendant argues that claimant failed to mitigate his damages by not further pursuing and obtaining a GED degree, the Court finds that it has failed to meet its burden on this defense.

Following claimant's relocation to Florida in 2004, he worked as a helper on a construction job. He was laid off. He then worked for approximately one year at a McDonald's restaurant as a maintenance and grill man. His hourly wage averaged \$7.35 an hour, having made initially \$6.25 an hour, then \$7.50 an hour, and then \$8.00 an hour. With respect to this period of employment, claimant called his employer, Mr. Juan Hernandez, who testified via video from Florida. Mr. Hernandez testified that at the job interview, Mr. Gonzalez addressed his wrongful conviction and imprisonment, was forthright about it and was worried that he would not get the job. Mr. Gonzalez was embarrassed at the interview and thereafter about his wrongful conviction and imprisonment. Mr. Hernandez, who has seventeen years' experience as a general manager, spoke highly of Mr. Gonzalez. He describes Mr. Gonzalez as a good employee who did a good job. Claimant,

who left to work in construction, gave him two weeks' notice and they parted on good terms.

\*5 Mr. Gonzalez then worked in construction as an Assistant Saw Man and Quality Control Inspector for over a year before he was laid off. He made \$9.25 an hour and frequently was offered overtime.

He obtained a job the next week as a Saw Man, working with wood and rebar. He made \$10.75 an hour. He worked there for approximately sixteen months before being laid off in October 2008, and has not worked since although he has been looking for employment. His W-2 for 2007 listed his annual income as \$22,635.00.

Mr. Provder opined that, as a result of Mr. Gonzalez's imprisonment, Mr. Gonzalez's employment opportunities are significantly limited, and his employability and earning capacity are diminished.

The Court finds that claimant has met his burden and established that his diminished future earnings capacity and his future inability to earn at his pre-conviction/incarceration earning capacity have been proximately caused by claimant's wrongful conviction and imprisonment. Frank D. Tinari, who holds a Ph.D. in economics, testified as an expert on Mr. Gonzalez's economic loss. He was a university professor and associate professor for thirty-one years; he has served as an officer, member or trustee of numerous boards and organizations, including serving as an immediate past president of the National Association of Forensic Economics and an editorial reviewer for a number of publications. He also has received numerous honors and awards and has spoken at numerous seminars, including those given at the NJ Institute for Continuing Legal Education.

Dr. Tinari took the raw data provided by Mr. Provder, averaged what Mr. Gonzalez would have earned but for the imprisonment, subtracted monies previously earned at or that would be earned at Mr. Gonzalez's reduced employability, and, through a series of calculations and appropriate adjustments,

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determined claimant's lost earnings, past and present. The Court found his testimony persuasive and credible and his approach based on sound economic principals. The Court, however, has adjusted and modified certain of the calculations for the reasons set forth below.

Dr. Tinari, using Mr. Gonzalez's arrest date and incarceration, evaluated and calculated the economic loss suffered by Mr. Gonzalez as a result of his incarceration. He based his calculations on Mr. Gonzalez's background information, his salary history, his worklife and various other factors. It is not disputed that claimant was thirty-two years old at the time of the damages trial and there was no dispute as to his worklife expectancy. He determined the loss after making adjustments to pre-incarceration earnings, post-incarceration earnings and averaging the salary of a union carpenter and construction laborer as well as non-skilled jobs, and subtracting Mr. Gonzalez's actual or projected earnings. At the request of the Court and by submission received September 23rd, his calculation of lost earnings was adjusted to calculate future lost earnings as of the date of the damages and not the liability trial.

\*6 Dr. Tinari calculated the total lost earnings as \$1,855,689.00, representing \$384,037.00 for past net lost earnings and \$1,471,652.00 for future net lost earnings.

The Court makes the following three adjustments to Dr. Tinari's calculations of past lost earnings.

First, Dr. Tinari's calculations included lost earnings representing the year of imprisonment following Mr. Gonzalez's arrest until his conviction. Damages for the period of incarceration prior to conviction, however, are not recoverable in an unjust conviction claim. See *Fudger v. State of New York*, 131 A.D.2d 136, 140-141, *lv. denied*, 70 N.Y.2d 616. Accordingly, the Court subtracts \$30,000.00 from the calculation for past lost earnings.

Second, this Court finds that claimant did not estab-

lish to a reasonable certainty that Mr. Gonzalez would have worked as an apprentice in the approximate two year period between the date of his conviction and reaching the age of twenty-one, and, therefore, this calculation must be adjusted. The record evidence shows that Mr. Gonzalez did not secure work as an apprentice in New York City for the six month period after being released from Job Corps and was advised that he needed to be twenty-one to work in carpentry. As claimant provided insufficient or no proof as to what he alternatively would have earned as an unskilled worker for those two years, the Court subtracts from Dr. Tinari's calculations the entire amount of \$63,500.00.

Third, at the time of his arrest in 1995, claimant did not yet have the skills to work as a carpenter. Dr. Tinari's calculations, however, calculated the loss at a carpenter's higher earnings. The Court finds that Mr. Gonzalez would not have suffered lost earnings at the rate set by Dr. Tinari for approximately four years after he reached the age of twenty-one. Rather, the appropriate amount of lost earnings for those four years is at the rate of an apprentice or laborer. Accordingly, the amount of past lost earnings is further decreased by \$79,000.00.

The Court, after subtracting these three adjustments totaling \$172,500.00 from Dr. Tinari's lost past wages calculation of \$384,037.00, finds the amount of past lost earnings to be \$211,537.00.

Having made these adjustments, the Court finds that claimant met his burden and established his total pecuniary loss at \$1,683,189.00, representing \$ 211,537.00 for past lost earnings, and \$1,471,652.00 for future lost earnings. As noted, damages for past lost and future earning were excluded from the City action settlement.

Dr. Sanford L. Drob, a clinical and forensic psychologist, testified concerning the emotional and psychological injuries and distress Mr. Gonzalez suffered during his imprisonment following his wrongful conviction and those he suffered following his release which resulted from his wrongful

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conviction and incarceration. Dr. Drob is a Clinical Assistant Professor of Psychiatry at New York University Medical Center, where he has been affiliated for twenty-eight years. He has been in private practice in the areas of clinical and forensic psychology for twenty-two years, and has extensive experience in conducting neuro-psychological and psychological evaluations. Additionally, he served thirteen years as Director of Psychological Assessment at Bellevue Hospital, and nine years as a Staff and Senior Psychologist in Bellevue's Division of Forensic Psychiatry. He has published numerous manuscripts and has made many national presentations.

\*7 Dr. Drob has considerable experience evaluating inmates who were incarcerated on a long and short term basis. This experience includes evaluating former inmates who were wrongfully convicted. He interviewed, examined and extensively tested Mr. Gonzalez on July 1 and July 16, 2003, August 15, 2008 and July 19, 2009. The Court finds Dr. Drob's testimony persuasive and credible.

Dr. Drob testified that, generally, released inmates suffer from feelings of isolation, personal estrangement and mistrust of others. On release, former inmates develop a phobic response to the environment. Depression and anxiety also are common reactions to incarceration, and incarceration can exacerbate a pre-existing condition. A loss of a sense of self and autonomy and a loss of sense of the ability to control one's environment also are common, as inmates adjust to the prison routine and a learned helplessness sets in. Additionally, their identification process is impaired because of a lack of positive and enhancing role models, and they experience developmental delays as their maturation process is thwarted.

He testified that the impact of incarceration is enhanced for those who are wrongfully convicted. These are individuals who believe themselves to be innocent and yet are convicted and incarcerated. A disconnect with reality results, along with a greater loss of sense of self.

Dr. Drob found that prior to incarceration, Mr. Gonzalez displayed some characteristics of an avoidant personality style, but prison reinforced and exacerbated this style. While he may have experienced some occasional feelings of mild anxiety and depression, these feelings intensified during incarceration.

Dr. Drob opines that during and because of Mr. Gonzalez's incarceration, he suffered from anxiety, experienced estrangement from his family, and experienced [clinical depression](#) as an adjustment disorder.

Mr. Gonzalez's psychological style is to retreat into a defensive posture. He employs the mechanisms of denial and avoidance to protect himself, and he tries to keep disturbing thoughts and feelings out of his conscious awareness. Mr. Gonzalez denies and underplays his distress. During his incarceration, this highly constricted mode of coping prevented Mr. Gonzalez from going into a deeper depression.

These coping mechanisms and psychological defenses were insufficient after Mr. Gonzalez's release. Mr. Gonzalez has decompensated considerably and he is experiencing more severe levels of depression. He feels stigmatized and marked as a person who spent many years in prison. He has an extremely low self-esteem, other serious deficits and a low motivational level. He is mistrustful of others.

Mr. Gonzalez feels people have moved on in their lives and that he was just passed by, and that people look at him as unworthy and unacceptable. In turn, he has become further withdrawn, isolated, inhibited and asocial. He experiences difficulties in forming and managing interpersonal relationships. Mr. Gonzalez worries, and, since being laid-off from his employment, paces back and forth all day in his home.

\*8 Dr. Drob testified that during the interviews and evaluations, Mr. Gonzalez's avoidant personality style and denial and other defense mechanisms

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were evident, and Mr. Gonzalez tried to present himself as doing better than he actually is and attempted to deflect and minimize his painful experiences. Dr. Drob found Mr. Gonzalez to be the opposite of a malingerer, as Mr. Gonzalez downplayed his symptoms.

Dr. Drob opines that while Mr. Gonzalez's long term prognosis would be enhanced with counseling and occupational rehabilitation, the prognosis is still guarded, based on Mr. Gonzalez's avoidant personality and his being timid, fearful and withdrawn, which traits were reinforced or caused by his incarceration. Mr. Gonzalez has not availed himself of Dr. Drob's recommended counseling, partially due to the added stigma which would attach. To the extent defendant argues that Mr. Gonzalez failed to mitigate his damages by not pursuing counseling, the Court finds that it has failed to sustain its burden of proof on this defense. Claimant has not requested damages for, or presented evidence establishing, an award for such medical treatment, and the Court makes no such award.

Further testing reveals that Mr. Gonzalez has limited psychological resources, has difficulty coping with stress and tends to cope by shutting his responses down, displaying a lack of initiative and becoming inactive. He has educational and learning deficits. Mr. Gonzalez continues to lack social skills, have deficits in his self esteem and exhibit dependence. He is subject to episodes of anxiety and depression. He has problems with reality testing and has distorted thinking. He believes that because of his wrongful incarceration experience, people immediately view and label him as a criminal and former inmate. Mr. Gonzalez never loses sight that he is marked as a convict and is fearful and preoccupied about the possibility of somehow getting into trouble and returning to jail. He represses his feelings and deals with problems in an escapist manner.

Mr. Gonzalez's wrongful imprisonment has affected every aspect of his life.

Dr. Drob additionally testified that Mr. Gonzalez's incarceration occurred during his formative years when he normally would have been expected to surmount certain social, sexual, and occupational tasks and hurdles. He opined that imprisonment during these critical developmental years resulted in a lack of proper preparation and inadequate facilitation for Mr. Gonzalez's life as an independent and mature adult. Mr. Gonzalez's incarceration arrested and negatively impacted on his maturation process, including his career building, and on his psychological and social development.

Prior to discussing the testimony of the next witness, the determination of the appropriate set-off and the awarding of damages, the Court turns now to the history of the City action and the settlement, and this Court's obligation to set-off the settlement monies and avoid double recovery in this award.

\*9 The City action was commenced in July 2003 in Supreme Court of the State of New York for Kings County, Index No. 26771/03, and settled on October 6, 2008. Settlement followed the liability trial herein and jury selection in the City action. The action named as defendants the City of New York (City) and several City police officers who were sued in their individual and official capacities, and asserted federal and State causes of action under [42 USC § 1983](#) for malicious prosecution, violations of his Fourteenth Amendment due process rights and his rights to a fair trial and, under State law, malicious prosecution, negligence, and negligent and reckless infliction of emotional distress.

On the record and prior to the parties setting forth the settlement terms, Justice Wayne Saitta heard and granted Mr. Gonzalez's application that his claim for lost wages in the City action be voluntarily dismissed. The City action then was settled for the overall sum of \$3,400,000.00, and the settlement was so-ordered. Apparently addressed in the settlement were claimant's non-pecuniary damages including compensation for the eleven and one-half months' imprisonment following his arrest and prior to his conviction, the approximate five and one-half

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years' imprisonment following his conviction until his release, attorneys' fees, costs and disbursements. Certain of these damages are not recoverable in this claim (for example, pre-conviction imprisonment and attorneys' fees), and certain damages are recoverable. Lost wages were carved-out, and were not part of the settlement.

The Court notes that there is no apportionment of the settlement monies between the different items of damages. The settlement in the City action was reached by the parties and there is no indication that the Court was involved in the settlement or that there was a judicial determination of allocation for the award or that the settlement was inadequate, fair and reasonable, generous or excessive. Nor is there record evidence as to the role played by and weight given to various factors, such as the likelihood of success, the merits of each cause of action, the allocation of monies to the different categories of damages, etc.

In this claim, to set-off the settlement recovery and to determine the appropriate damages to be awarded herein, this Court must first determine and apportion the reasonable value of claimant's claim in the City action, including attorneys' fees and disbursements, pre-conviction incarceration, and non-pecuniary damages during and post-imprisonment.

Claimant has the burden of showing that he was not fully compensated by the settlement in the City action ( *Carter v. State of New York*, 139 Misc.2d 423, *affd* 154 A.D.2d 642), as that settlement includes damages "of the type and for the period covered by the (Court of Claims) Act." *Id.* at 432.

To meet his burden, claimant additionally presented testimony and arguments regarding attorneys' fees and disbursements and apportionment and the appropriate set-off for the settlement monies. While there is no reward for attorneys' fees and disbursements in a wrongful conviction and imprisonment claim, they may be recoverable in a civil rights action such as the City action. Claimant seeks to have attorneys' fees and disbursements related to his City

action serve as a set-off against the settlement of that action. Claimant additionally seeks, as an additional set-off, to allot a substantial portion of the remaining settlement monies to the pre-conviction period of imprisonment. Additionally, claimant argues that the settlement monies did not fully represent claimant's non-pecuniary damages. As the settlement carved-out pecuniary loss, claimant argues that he is entitled to full recovery of those damages.

**\*10** The State argues that claimant has failed to meet this burden, and argues that claimant has not demonstrated that he is entitled to additional compensation.

In this trial, Andrew G. Celli, Esq., testified as an expert on: the reasonable hourly rate for a civil rights attorney in a complex case such as *Gonzalez v. City of New York*; the reasonable amount of time for attorneys to spend on the case, and the experience and qualifications of the attorneys. He also testified as to the range of damage awards and settlements on false arrest and malicious prosecution claims and those involving pretrial detention of one year or less.

Mr. Celli is a co-founder and partner of a law firm and for the past eighteen years has been representing institutions and individuals in commercial, civil rights and civil liberties matters. From 1999 to 2003, he served as Chief of the Civil Rights Bureau in the New York State Attorney General's Office; the bureau included affirmative police misconduct litigation. His present hourly rate is \$525.00. The Court finds his testimony credible and persuasive.

Mr. Celli reviewed the pleadings and documents in the City action, including the complaint, the summary judgment motion, the disclosure forms and various reports. He also reviewed this Court's liability decision and the affidavits and attachments in evidence in this damages trial from the three principal attorneys, to wit, Nick Brustin, Esq., Glenn A. Garber, Esq., and Jennifer E. Laurin, Esq.

He opined as to the reasonableness of the attorneys'

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fees and disbursements that were incurred and as to attorneys' fees that would have been incurred had the City action proceeded to trial. For calculating the attorneys' fees, he multiplied the number of hours times the hourly billing rate. He opined that the total would have amounted to \$1,046,926.04. This figure includes \$83,361.04 in expenses, \$787,165.00 in actual attorney time incurred and \$176,400.00 in projected time for the preparation and trial time in that action. The reasonable rates of the principal counsel are, for Mr. Brustin and Mr. Garber, \$450.00 an hour, and, for Ms. Laurin, \$350.00 an hour. For the projected time, he calculated thirteen trial days at eight hours a day with a daily four hour preparation time and ten additional hours over the weekend, totaling one hundred and ninety-six additional hours each for Mr. Brustin and for Mr. Garber. The hourly rate for the paralegals and law students who also worked on the case was set at \$125.00, and the hourly rate for Brandon Garrett, Esq., an associate attorney, was set at \$375.00 an hour. Mr. Gonzalez's attorneys have not sought compensation for the work performed by Barry Scheck, Esq., a named partner, or for work performed periodically by others.

Claimant additionally asserts that all the work performed in the liability trial in this § 8-b action is attributable as well to trial preparation for the City action, as the work is also applicable and relevant.

\*11 The State asserts that claimant is not entitled to a set-off for attorneys' fees and disbursements, and that, if the Court determines a set-off is appropriate, the amount must be reduced. The State points to the differences between the City action and this § 8-b claim, and suggests that this claim was incidental and ancillary to the City action. The State additionally argues that claimant's counsel spent many hours in the preparation and trial of the liability phase of this claim, and that such preparation did not enhance the City action. Also, the State argues that there was over-lawyering in this claim, as typified by claimant having three attorneys represent him during the trial and by the two motions made

by claimant. Moreover, the State argues that a set-off for attorneys' fees would violate [Court of Claims Act § 27](#), which states “nor shall counsel or attorney's fees be allowed by the court to any party.” The State suggests that if attorneys' fees are awarded as a set-off, that the amount requested should be cut in half.

The Court makes the following determinations, having fully considered the issues and the record and in the exercise of its discretion. The Court finds that the experience and skill of each of claimant's attorneys warrant the hourly rate suggested. The Court has enjoyed its time with counsel and finds them extremely knowledgeable of the law and facts, and courteous and professional in their presentations and arguments. The Court further finds that the amount of hours actually spent and the disbursements incurred in the Civil action are reasonable in light of the complexity of that case. Although this Court did not have an opportunity to examine the entire Supreme Court file, it is fair to say that the City action involved numerous causes of action, multiple defendants, extensive discovery and complex factual and legal issues. The Court overall accepts Mr. Celli's opinion as to time and disbursements actually incurred, with the following adjustments.

The Court adjusts the hours to exclude the time spent on the liability trial in this claim. The Court also excludes the time spent on the § 8-b motion for partial summary judgment. While claimant was successful and the motion was brought in good-faith, it appears to the Court that the issues resolved thereby would have been more efficiently addressed in summary fashion at trial. After deducting from their hours based on work done not attributed to the City action, which the Court finds to be 10% of the actual time spent, the Court finds that the reasonable value of the attorneys' fees for the actual time spent attributed to the City action is \$708,448.50. The Court also finds reasonable the disbursements, which were not reimbursed, in the amount of \$83,361.04. The Court finds that these amounts

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serve as a set-off.

As to the projected hours, however, the Court does not find, under these circumstances, that these serve as a set-off. This work was not performed and there is no indication that future attorneys' fees formed a part of the settlement equation.

**\*12** Accordingly, the Court finds that the total set-off for reasonable attorneys' fees and disbursements is \$791,809.54.

In support of claimant's assertions that his non-pecuniary damages were not fully recovered in the City action settlement and how the monies recovered should be allocated, Mr. Celli further testified as to the range of recoverable damages in a civil rights action for claimant's eleven and a half months in pre-conviction detention. Based on his review of awards in New York State and nationally, he testified that, as the adjustment to prison life is most difficult during the first year and as this was claimant's first inmate experience, this period would be compensated at a higher amount, to wit, \$2,000,000. These damages include compensation for the deprivation of liberty, lack of privacy, humiliation and degradation, and the anguish and the psychological impact for someone with a prosecution for murder looming above them.

Based on his review of cases involving post-conviction imprisonment, Mr. Celli also testified as to the nature and range of damages in traditional tort cases and in unjust conviction claims. Claimant argues that in an unjust conviction case, claimant suffers additional loss of trust in and of authority and the world around him. Moreover, claimant here bore a particularly heavy burden as, during his formative years, he was wrongfully convicted of murder with a sentence of fifteen years to life. Claimant suggests that a floor of one million dollars for each year of post-conviction imprisonment is appropriate, and refers to various cases in his post-trial submission which so provide.

As noted, the State argues that claimant has been

fully compensated in the City action settlement, has not met his burden to demonstrate to the contrary, and is not entitled herein to any additional recovery for non-pecuniary loss. The State additionally argues that claimant has failed to prove his pecuniary damages to the requisite level of proof.

As stated in the report of the Law Revision Commission in recommending the enactment of § 8-b, imprisonment resulting from the unjust conviction of an innocent individual is "the most serious deprivation of individual liberty that a society may impose". Report of the New York Law Revision Commission to the Governor on Redress for Innocent Persons Unjustly Convicted and Subsequently Imprisoned, McKinney's 1984 Session Laws of New York, 2899 at 2903. Guiding this Court in its determination of the elements of and amount for non-pecuniary damages is the body of case law that eloquently addresses the grievous suffering, mental anguish, loss of liberty, degradation, loss of reputation, humiliation and other injuries of those unjustly convicted and imprisonment. *See, for example, Harris v. State of New York*, 38 AD3d 144; *Carter*, 139 Misc.2d 423, *affd* 154 A.D.2d 642; *Baba-Ali v. State of New York*, 24 Misc.3d 576; *Johnson v. State of New York*, 155 Misc.2d 537; *Campbell v. State of New York*, 186 Misc. 586; *Reed v. State of New York*, NYLJ, Nov. 7, 1988, at 24.

**\*13** In the record before this Court, the Court additionally has the credible and persuasive testimony of claimant and Dr. Drob as to claimant's emotional and psychological pain and suffering, past and future. Claimant was imprisoned for approximately five and a half years in maximum security for a murder he did not commit. He still bears and suffers from the scars of that imprisonment and the badge of conviction.

The Court finds that Mr. Gonzalez has met his burden and established his past and future non-pecuniary losses with reasonable certainty which the State has failed to rebut. The Court's findings as to the operative established facts have been previously set forth and will not be repeated herein, ex-

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cept as to the following summation. For the time claimant spent in prison, the loss of liberty and privacy, his emotional distress and anguish, separation from his family, the arrest of his development and the psychological and emotional pain, the Court awards \$1.5 million for past pain and suffering. As to future damages, claimant was thirty-two years old at the time of the damages trial and has a life expectancy of 75.6 years or 43.6 additional years. For Mr. Gonzalez's future non-pecuniary damages, the Court awards \$400,000.00.

The Court determines that the set-off for claimant's non-pecuniary losses for the approximate one year of pre-conviction imprisonment to be \$350,000.00.

As previously noted, the Court finds that the reasonable value of the attorneys' fees and disbursements which will serve as a set-off from the City action settlement is \$791,809.54.

To determine the proper set-off and avoid double recovery for non-pecuniary loss, the Court subtracts its determination of the apportionment of the settlement monies and non-pecuniary damages as follows:

Amount of Settlement Monies in the City action:\$3,400,000.00

City action Reasonable Attorneys' Fees and Disbursements:(\$ 791,809.54)

City action Pre-Conviction Imprisonment, Pain and Suffering:(\$ 350,000.00)

Post-Conviction Imprisonment, Pain and Suffering:(\$1,500,000.00)

Future Pain and Suffering:(\$ 400,000.00)

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\$ 358,190.46

The Court finds, accordingly, that Mr. Gonzalez has been fully compensated for his non-pecuniary loss and therefore makes no award herein for past

and future non-pecuniary loss.

As to past and future pecuniary loss, the Court finds that claimant has proved his claim by reasonable certainty, and defendant has failed to rebut, and the Court awards damages in the amount of \$211,537.00 for past lost earnings and \$1,471,652.00 for future lost earnings, for a total award of \$1,683,189.00, with interest from December 23, 2008, the date of the liability decision. To the extent claimant paid a filing fee, it may be recovered, and any motions not decided herein are denied.

Let Judgment be entered accordingly.

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