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## \$19 Million Award Sets Record

*State Failed to Properly Maintain Rural Road*

BY JOHN CAHER

ALBANY — In a soul-searching opinion, a Court of Claims judge has ordered New York to pay a record-setting sum in excess of \$19 million on behalf of a young woman whose catastrophic injuries resulted primarily from the State's negligent maintenance of an upstate rural highway.

Judge James P. King indicated in the 49-page opinion that he is acutely aware of the magnitude of the award, and the fact that no appellate division panel has ever sustained a personal injury judgment that high. And even at that, the judge noted that the award will at most cover only a relatively conservative treatment program, rather than the "Cadillac" regimen sought by claimant's counsel.

"This has not been a comfortable decision to make, nor a comfortable opinion to write, and it is impossible to be altogether comfortable with the end result," Judge King wrote in *Auer v. State*, Claim No. 86167. "At the same time that one recoils from having awarded 'the most' money, particularly when that money belongs to the public, there is simultaneously a genuine concern that, especially once litigation costs are paid, there may, in fact, not be enough money to see Melody safely through the next several decades."

The decision is on NYLJ.com and will be in the paper on Tuesday.



The claim arises in the case of Melody Dawn Auer, who was 18 years old in 1990 when the car in which she was a back seat passenger crashed into a tree on Route 32 in the Ulster County Town of Saugerties. Ms. Auer suffered a severe brain injury resulting in quadriplegia and also sustained many other fractures. She is almost completely physically incapacitated and is frequently in physical and mental anguish, aware of her predicament and projected to live in that condition for another 38 years.

More than two years ago, Judge King found the State 80 percent liable for failing to properly maintain the shoulder of the road, and the driver 20 percent liable, for neglecting to properly

respond when his vehicle veered off the roadway. His most recent opinion dealt only with damages, and included an exhaustive analysis of the claimant's life prospects prior to the accident, and various treatment protocols available to make her life tolerable in the future.

"Life is often unfair, and it has been grotesquely unfair to Melody Auer," the court said. "No amount of money can possibly compensate her for the losses she has suffered, nor can money make her future what it could have been. But monetary compensation is all that the law — and life — allow ..."

Damages to Miss Auer totaled \$18.9 million and included awards of \$14.8 million for future care, \$1.5 million for past pain and suffering and \$1.29 million for lost wages. Also, sums of \$100,000 and \$52,180 were awarded to her parents, Sarah E. Auer and Franklin H. Auer, respectively.

David B. Klingaman, chief clerk of the Court of Claims, said yesterday that the award in the Auer case exceeds by at least \$7 million the prior record for damages in that court.

Judge King ordered a hearing pursuant to CPLR Article 50-B to determine how the award to Ms. Auer will be structured, how it will be adjusted for present-day values and inflation, how attorney fees will be apportioned and similar issues. The final sum will almost certainly change and, in the meantime, the \$18.9 million judgment was ordered held in abeyance.

The judge expressed "absolutely no desire to make...headlines or...to provide an opportunity for the Third Department to determine whether the award presented here is excessive." However, the Third Department may well have that opportunity, as the State will consider an appeal after the 50-B hearing and after it has a better idea of the real dollars-and-cents cost to taxpayers, according to the Attorney General's office.

Assistant Attorneys General Belinda Wagner and Risa Vigucci defended the State in the damages portion of the case. The liability portion was tried by Providence Baker, who has since left the Attorney General's office.

The lawyer who tried the case for the

Auer family was Michael W. Kessler, a name partner in the Albany firm Rosenblum, Ronan, Kessler & Sarachan and a well-known personal injury litigator in the Capital Region. A native of Albany and graduate of American University and Albany Law School, the 51-year-old Mr. Kessler spent his early years in the profession litigating with a firm across the river in Troy and dividing his time equally between plaintiff and defense work.

In 1991, Mr. Kessler was approached by Sanford Rosenblum, a highly regarded local attorney who had referred some cases to him in the past. Mr. Rosenblum made Mr. Kessler an offer he could not refuse, the chance to concentrate on a select handful of catastrophic personal injury cases, and he jumped at the opportunity. Over the last several years, Mr. Kessler has handled several regional headline-grabbers, but none of them nearly as big as the Auer case, and few as professionally taxing and emotionally draining.

Mr. Kessler was referred the Auer case nearly five years ago by another Albany attorney, Elliot J. Wachs of Ackerman, Wachs and Finton PC, who assisted at trial. For years, they worked the case, enlisting various engineers as experts in the liability portion of the trial. After liability was determined and settlement negotiations proved fruitless, an assortment of doctors and economists were readied for the damages phase.

The damages portion of the proceeding spanned nearly three weeks and involved such issues as the parents' derivative claim, Melody Auer's life expectancy, the earning potential of a girl who had dropped out of high school and had only recently begun working an entry-level job, past and future pain and suffering, past and future medical care and — of crucial importance — how best to accommodate the claimant's considerable needs.

"It is an unenviable task: 'penny-pinching' with the very items and services that will make Melody's life bearable because of the perceived need to preserve, as much as possible, the public funds from which this award must be paid," Judge King wrote.



Judge James P. King

Mr. Kessler's witnesses had advocated placing Miss Auer at the Datahr Rehabilitation Institute in Westchester County while the State's experts recommended a plan that would allow the claimant to live in her own home with round-the-clock attendants. Judge King said the award does not include enough money to cover a lifetime of care at Datahr, but will hopefully provide enough for Miss Auer to maximize her comfort and potential.

For Mr. Kessler, the distinction of winning the largest award in the history of the Court of Claims evokes mixed emotions, as do many of his cases.

"These are devastating injuries and it has a profound effect on us as lawyers," Mr. Kessler said. "We can get them resources that can improve their quality of life, but they still have to live with the condition. I feel bad that I can't make them better. All I can do is try to improve their quality of life, as terrible as it is."

Judge King, who retired just after filing the decision last week, bemoaned that there is not a "better way to resolve problems of this nature" and noted that the resolution here was possible only because of the seemingly bottomless pockets of the State.

"If Melody had been injured just as tragically by someone with a minimal auto insurance policy and no other assets, there would in all probability have been no trial and no extensive investigation into the treatments and placements available to best care for her needs and bring forth her potential," the judge. "Because the defendant is the State of New York and one cannot see the limit of its resources, although surely such a limit exists, this decision and opinion is possible."

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Today's  
Classified  
Section  
Begins on  
Page 8

## Malpractice Award

**ALBANY** — Court of Claims Judge Condon A. Lyons awarded a **\$5.35 million** judgement to a 21-year-old Albany woman who lapsed into a permanent coma when physicians at the state-owned Capital District Psychiatric Center failed to monitor her diabetes. It was the largest medical malpractice judgment ever awarded against the state in the Court of Claims, state officials said.

In the malpractice case—*Matter of Cole v. New York*, Claim No. 76385—Judge Lyons found the state negligent in failing to adequately monitor the metabolic condition of 21-year-old Tara Cole who was admitted to the state psychiatric facility in Albany for treatment of emotional disorders in September, 1986. Ten weeks later she suffered a diabetic seizure and

fell into a permanent coma.

The \$5.35 million judgment he awarded Ms. Cole was solely for the cost of past and future medical care. Judge Lyons made no award for lost earnings and no award for pain and suffering, finding that Ms. Cole does not meet “the minimal standard for cognitive awareness set by the Court of Appeals” for non-pecuniary damages.

The Cole family was represented by Troy attorney **Michael W. Kessler of Wager, Taylor, Howd, Brearton & Kessler**, and by Albany attorney Sanford Rosenblum of Rosenblum, Sarachan & Ronan. The state was defended by Assistant Attorney General James P. King.

No lawsuit was filed against the physicians involved.