

CAPITAL REGION



ALBANY, NEW YORK

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Court orders state to pay injured woman \$19M

Albany *Judgment in lawsuit over 1990 car crash is the largest ever to be issued against New York*

By **MELISSA GRACE**
Staff writer

A 27-year-old woman left quadriplegic after a 1990 crash in Saugerties has been awarded \$19 million in her lawsuit against the state — the largest personal injury judgment ever issued against New York.

Melody Dawn Auer, who was 18 at the time of the crash, sued in 1992 claiming the state failed to properly maintain the shoulder of

Route 32 in the town of Saugerties.

The 1989 Ford Festiva that Auer was riding in on Oct. 21, 1990 was forced off the road by a passing car, and, because the pavement on the shoulder of the roadway was "crumbling," the Ford's driver lost control. The car spun around, slammed into a tree and catastrophically injured Auer, said Michael W. Kessler, her attorney.

Massive brain trauma put Auer

in the hospital for 344 days and left her unable to care for herself. She still requires surgery and will most likely need 24-hour care for the rest of her life, Kessler said.

After an April 1998 trial, Court of Claims Judge James P. King found that the state was negligent in its maintenance of the roadway and that it was liable.

In a 49-page decision handed down Tuesday, King labeled the results of the accident "heart-breaking." Auer was awarded \$18,952,486 — largely to cover medical expenses over a life expectancy of 38 more years.

The judge awarded \$1.5 million of the total for past pain and suffering and \$750,000 for future pain and suffering. He gave her \$15.4 million for past and future medical care, and the rest in lost wages and employment benefits.

Auer's parents, Sarah and Franklin Auer of Saugerties, were awarded \$152,180 for medical services they have provided.

The award is the highest ever entered by the state Court of Claims, which hears only cases against the state, said Elliot Wachs, a second Albany attorney who represented Auer.

Previously, the highest judgment against the state was \$12 million, awarded in a medical malpractice case in which a 40-year-old woman was left quadriplegic by "grossly inadequate" care provided by the staff at a state hospital, said Russell F. Moran, editor of *The New York Jury Verdict Reporter*, a Long Island-based journal.

A spokesman for Attorney General Eliot Spitzer said no decision had been made as to whether the judgment would be appealed.

Region

Judge awards accident victim \$18.9 million

■ Melody Dawn Auer of Saugerties was paralyzed in 1990 when the car in which she was riding crashed into a tree on state Route 32.

By CYNTHIA WERTHAMER
Freeman staff

A STATE Court of Claims judge has decided that a 27-year-old Saugerties woman who was paralyzed in an auto accident in 1990 should receive nearly \$19 million in damages — the largest award ever issued against New York state.

But Judge James P. King wrote he was not "comfortable" in ruling that Melody Dawn Auer, who was left quadriplegic and brain damaged, should receive \$18.9 million to cover the costs of around-the-clock care, medication and rehabilitation. Her parents, who have cared for her since the accident, will receive \$152,180, the judge decided.

Calling the circumstances of the case "heartbreaking," the judge said the size of the award would nonetheless be insufficient to maintain Auer for the rest of her life.

Auer was 18 at the time of the October 1990 accident on state Route 32 in Saugerties. She was a passenger in the back seat of a 1989 Ford Fiesta when the car went off the road and crashed into a tree.

King ruled in November 1998 that the state was 80 percent liable for the accident because it failed to maintain

the shoulder of the road and that the driver of the car was 20 percent liable. The new ruling, handed down on Dec. 29, dealt strictly with damages owed to Auer.

King wrote he did not issue the damages to "make ... headlines" but to give Auer the best life possible.

"The court is aware, uncomfortably aware, that this award is one of the largest personal-injury awards that has ever been issued in a judicial decision," he wrote. "While no amount of money can hope to 'make her whole,' her life will surely be more or less bearable and productive depending on the level of financial resources that are available to her.

"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."

The damages included awards of \$14.8 million for future care, \$1.5 million for pain and suffering and \$1.29 million for lost wages. The judge wrote that although the victim is almost totally physically incapacitated and in great pain, she is in reasonably good health, is aware of her condition and is "able to interact and achieve within society."

Auer's attorney, Michael W. Kessler of Albany, said Friday that the award, despite its size, doesn't break new moral or legal ground. "The overwhelm-

ing amount ... is reflective of the very large cost of taking care of someone with Melody's type of problems appropriately," he said. "The only thing worse than the experiences she's had is having them and not having access to appropriate care. Not that the care she's getting is inappropriate, but there are other things available that might improve her quality of life."

Kessler said Auer's family is "pleased with the result."

The money is to be paid in a series of installments over Auer's life expectancy, which the court set at 65 years. A hearing will be held in the next few months to determine the structure of payment, which must be adjusted for inflation throughout Auer's lifetime, Kessler said.

A spokesman for the state Attorney General's Office, which represented the state in the Auer case, said Friday a decision on whether to appeal has not been made.

"We are reviewing it and assessing our options," Marc Violette said. He added that although the state did not appeal after King made his liability ruling in the case, "we have not forfeited our option to do so."

The Court of Claims, which deals only with cases against the state, heard arguments in the Auer matter in April 1998.

\$19 Million Award Sets Record

State Failed to Properly Maintain Rural Road

BY JOHN GAHER

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 www.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 \$14.8 million and included awards of \$18.9 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 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 Datsch 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 Datsch, 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 evoked 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 be 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."