Ninety Days of Back Pain Results in $50,000 Verdict for Pain and Suffering in New York Car Accident Case Upheld on Appeal

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New York has a very restrictive law when it comes to winning pain and suffering damages in car accident lawsuits. Our so-called **No Fault Law** was first enacted in 1973 and was designed to weed out frivolous claims and limit recovery to significant injuries. In return, car accident victims received some guaranteed medical and lost wage benefits, regardless of who was at fault.

Now, **many whiplash cases are being dismissed before or at trial** because judges and juries conclude that plaintiffs' injuries do not meet the minimum test of seriousness required under the statute.

Whiplash is a non-medical term used to describe back and neck pain following soft tissue and intervertebral disc injuries in the spine caused by abnormal motion or force that makes the spine whip back and forth.

Under the law, one may be awarded pain and suffering damages only if the one has sustained a "**serious injury,**" defined under **Insurance Law Section 5102 (d)** as one of the following:
1. A personal injury that results in death;
2. Dismemberment;
3. A significant disfigurement;
4. A fracture;
5. The loss of a fetus;
6. Permanent loss of use of a body organ, member, function or system;
7. Permanent consequential limitation of use of a body organ or member;
8. Significant limitation of use of a body function or system; or
9. A medically determined injury or impairment of a non-permanent nature which prevents the

injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than **ninety days** during the one hundred eighty days immediately following the occurrence of the injury or impairment.

The **main battlegrounds in the courts have been the categories that deal with permanent loss, permanent limitation and significant limitation (six, seven and eight)**. Judges have been requiring more and more objective proof of injuries (such as range of motion testing) that plaintiffs and their health care providers have been unable to provide. Cases are being dismissed routinely. Attorneys representing plaintiffs have been frustrated by this trend and some say it's time for the law to be changed (see, **New York's No-Fault Problem With Serious Injuries**).

The **ninth category** – what the lawyers call **the 90/180 test** - was first thought to be an easy test to meet. Just show that the plaintiff was out of work for three months or more (or otherwise laid up for 90 out of the 180 days after the accident) and then pain and suffering damages may be recovered. It's never been that easy (nor was it intended to be) and now **it's difficult to win damages under this category as well.**

Judges are routinely applying ever more rigorous standards to dismiss cases of those trying to prove they meet the 90/180 test. In each of the following recent cases it was held that plaintiff failed to meet the requirements under the 90/180 test (in large part because of the lack of objective testing showing significant deficits):

- **Toure v. Avis Rent A Car Systems** (Court of Appeals 2002)
- **Taylor v. American Radio Dispatcher, Inc.** (1st Dept. 2009)
- **Dembele v. Cambisaca** (1st Dept. 2009)
- **Dieujuste v. Kiss Management Corp**. (1st Dept. 2009)

The most recent appellate court case dealing with the 90/180 test is **this month's Chery v. Souffrant** (2nd Dept. 2010). Reading that decision, however, gives one little insight as to what the issues or injuries were. We've uncovered the details.

On July 24, 2006 Marie Chery was driving home in Spring Valley, New York where she was a factory worker. She was **stopped when her car was struck in the rear** by a car operated by Lavaud Souffrant traveling at about 25 miles per hour.

Ms. Chery's head struck the headrest of her car seat, she passed out briefly and then she was taken by ambulance to the hospital. Complaining of back and neck pain, Marie was examined, x-rayed, cleared and released to home. She followed up with a doctor within a few days, was diagnosed with a **herniated disc at L4-5** and advised to rest and stay out of work. Her injuries were itemized in her **Bill of Particulars**.

After a course of treatment including physical therapy, chiropractic treatment and massage therapy and after testing including nerve conduction studies and an MRI, **Ms. Chery's physician cleared her to return to work on October 23, 2006**. And that's what she did (although she refrained from some of the more rigorous work she normally did as a furniture sander) and she also basically stopped her medical treatment for the injuries in her accident.

In her ensuing lawsuit, defendant conceded fault for the accident and therefore the trial was only to determine damages; however, the defense successfully moved to have dismissed any claim that categories six, seven and eight were met. The trial **judge issued an order allowing only the 90/180 claim to proceed to trial.**

So, on January 6, 2009 the case was tried in Rockland County and **the only issue for the jury was whether the 55 year old plaintiff had satisfied the 90/180 test and if so the amount of her pain and suffering damages for the 90 days**.

The jury found that the 90 days (exactly) that Ms. Chery was unable to work (or sing in her church choir, cook or attend to most of her chores at home) satisfied the 90/180 test and she should receive **$50,000 for her past pain and suffering**.

On appeal, the **defense claimed that the $50,000 verdict was unreasonably excessive**. In summation, defense counsel had stated that damages should be no more than $15,000. Plaintiff's counsel did not suggest a specific sum stating that he was leaving it up to the jury to determine the amount. The **appellate court sustained the $50,000 award** finding that it is not deviate from what would be reasonable compensation.

The court in Chery v. Souffrant cited no cases in support of its affirmance of the $50,000 damages award. **Here are the 90/180 damages cases the judges could have mentioned (and probably relied upon):**

- **Baez v. Goldman** (App. Term 1st Dept. 1999) - $75,000 affirmed where plaintiff returned to work in 76 days but on restricted duty
- **Vasquez v. Weiss** (3rd Dept. 1996) - $50,000 affirmed where plaintiff returned to work in one month due to economic necessity

Inside Information:

- Plaintiff, a Haitian immigrant, spoke no English so an interpreter had to be utilized in court. That often makes it very difficult for a jury to follow testimony and become endeared to a non-English speaking party.
- The defense doctors who examined the plaintiff did so well after the 180 day period and they were not called to testify (and had the defense sought to bring them in their testimony would have been excluded as irrelevant).