

## **Pedestrian Hit by New York City Bus Wins \$1,400,000 Pain and Suffering Jury Verdict for Back Injuries; Appeals Court Orders New Trial Because Plaintiff Failed to Allege Preexisting Condition**

Posted on March 2, 2010 by [John Hochfelder](#)

**Defendants routinely and successfully argue in back and neck injury cases that plaintiff's injuries pre-existed an accident and no pain and suffering damages should be awarded** (even if defendant is found to have caused the new accident). There's merit to the argument but it's not as simple as I've implied.

Under New York law, a plaintiff who's been injured before is still entitled to recover pain and suffering damages resulting from a new injury to the same body part; however, **a plaintiff is only entitled to damages to the extent to which he's been further disabled or injured as a result of the new accident.**

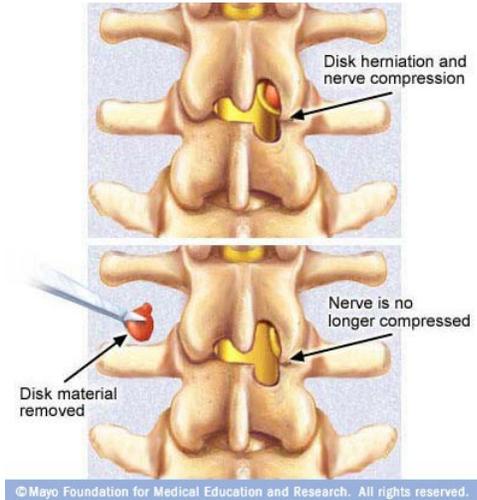
And, **a plaintiff must make the aggravation or exacerbation of injury claim in his lawsuit pleadings before a trial judge will tell the jury that they may make an award for the increased pain and suffering.** Otherwise, a plaintiff has to prove that all of his injuries were caused in the new accident and the defendant will win by convincing the jury that plaintiff's injuries predated the current accident.

Plaintiffs usually claim that their preexisting neck and back injuries were resolved and that for years they had returned to prior levels of activity and were pain free. Now, they say, new trauma has caused new injuries, especially herniated discs, and they are in great pain and disabled as a result. The problem is, though, that **magnetic resonance imaging (MRI) which illustrates the herniated discs very often is interpreted to show degenerative disc disease.** When that happens, defense doctors will testify that the degeneration means plaintiff has preexisting disc disease and that it's unclear what, if any, new spinal injuries were caused by the recent trauma.

With this background, we now turn to the case of Leslie Rodgers, a 40 year old man who was struck by a city bus at about 8 a.m. on September 23, 2003 while in the crosswalk on Gates Avenue at its intersection with Franklin Avenue in Brooklyn, New York. He was taken by ambulance to a local hospital where he was treated for minor back and other injuries and released. A month later, an MRI showed a **herniated disc at L5-S1 with impingement on the S1 nerve root.** Rodgers began a long course of conservative treatment including physical therapy, chiropractic treatment and two epidural steroid injections.

Finally, after three years, Rodgers underwent back surgery: a **laminotomy and discectomy** at L5-S1. During the surgery, the doctor plucked out a disc fragment that had been impinging upon a nerve.

**Here is what the discectomy procedure looks like:**



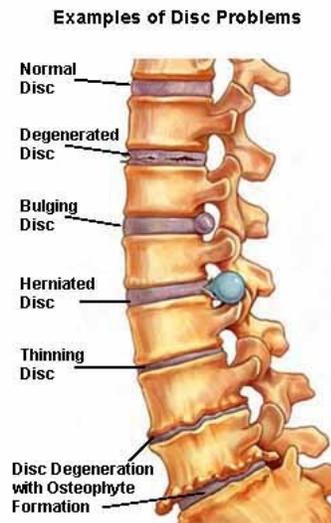
**Post-operatively, Mr. Rodgers was much improved but his pain soon returned** and at trial he testified that he was in great pain and disabled. He complained of intermittent numbness and pain up and down one leg with low back pain lasting all day and night. His surgeon opined that these conditions would be permanent. That meant Rodgers could no longer return to his job (at Fortune Society assisting HIV positive ex-convicts find housing); nor would he ever again enjoy basketball, handball or running.

The jury assessed pain and suffering at **\$1,400,000 (\$200,000 past - 4 1/2 years; \$1,200,000 future – 25 years)**.

**The city appealed asserting:**

1. that there was evidence that Rodgers had degenerative disc disease before the accident (the MRI a month after the accident revealed an osteophyte growth at the site of plaintiff's L5-S1 herniation as well as desiccation and degeneration of the disc),
2. that he failed to make a claim in the lawsuit that the bus accident injuries may have been due, at least in part, to his preexisting condition and
3. that the trial judge should not have instructed the jury that they could award damages for plaintiff's increased susceptibility to injury

Here is a comparison of normal, healthy discs with degenerated discs with osteophytes:



Last week, in [Rodgers v. New York City Transit Authority](#) (2nd Dept. 2010), the **appellate judges agreed with the city and ordered a new trial, thus vacating the entire jury verdict** (Rodgers was also awarded \$1,000,000 for past and future lost earnings).

The trial judge had told the jury they could award pain and suffering damages for all of the injuries suffered by Rodgers if they found that his prior physical condition left him more susceptible to greater injuries than a healthy person (i.e., one without preexisting degenerative disc disease). The **defense claimed it was prejudiced** by this charge ([Pattern Jury Instruction 2:283](#)) in that plaintiff had proceeded in the lawsuit for years on the sole theory that all of his injuries were caused by the bus accident and he had never once put the defense on notice that some injuries may have been exacerbated or due to his prior condition that had left him with an increased susceptibility or the possibility of asymptomatic conditions becoming symptomatic. **The appellate court agreed and ruled that the jury's verdict was improper because it may have included damages for injuries that Mr. Rodgers sustained before the bus accident.**

**In the new trial, the jury will consider only those injuries actually caused by the bus accident** and they may award pain and suffering damages only for those new injuries. That's a huge win for the defense in that it will be very hard for Rodgers to convince the jury that he sustained any new injuries at all in view of his preexisting condition.

#### Inside Information:

- Before the accident, plaintiff had been a drug addict and served 12 years in prison for participating in a kidnapping (by the time of trial he had become a productive member of society, working and enrolled in a Ph.D. program at Hunter College).

- Plaintiff claimed unfair surprise too – only three days before jury selection the defense notified plaintiff's counsel that a defense radiologist would testify that plaintiff's injuries were preexisting.
- The jury apportioned liability 80% on the city and 20% on the plaintiff and in the new trial that apportionment will stand with the new jury considering only the issues of which injuries (and the amount of damages), if any, were caused by the bus accident.