Another $1,000,000 Elbow Fracture Verdict Sustained on Appeal in New York

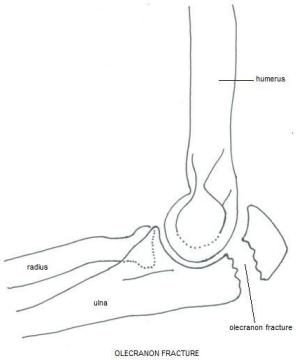
Posted on February 7, 2010 by John Hochfelder

Kerwin Park was a 36 year old **day laborer doing construction work** on a residential building in Manhattan on September 7, 2000 when a wooden plank he'd been standing on collapsed and **sent him tumbling 20 feet to the unfinished basement below**.

Here's what it looked like before Mr. Park fell:

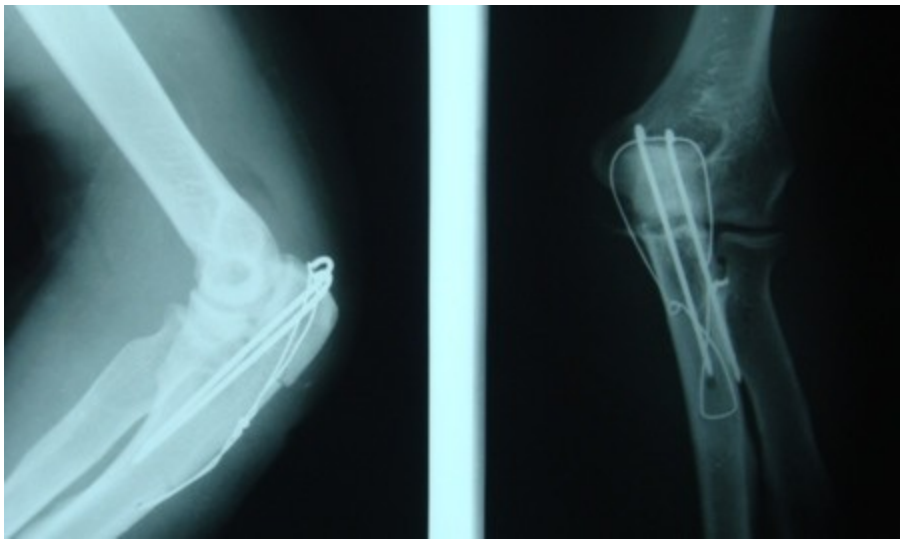
Park was rushed to the hospital where he was diagnosed with a displaced, comminuted, intra-articular **fracture of his right elbow's olecranon** (as well as a non-displaced fracture of his left wrist).

Here's what an olecranon fracture looks like:



OLECRANON FRACTURE

He required open reduction internal fixation (ORIF) surgery in which the elbow fracture fragments were pushed into place and then **tension band wiring and pins** were used to create compression at the elbow fracture site, **like this**:



Park underwent a **second surgery to remove the hardware** within a year after his accident. Then, he underwent 10 months of physical therapy. In the interim, he undertook nursing courses and he then pursued a new career as a certified nursing attendant taking care of elderly patients.

In the ensuing lawsuit against the premises owner, a contractor and others, Park claimed he wasn't provided a safe place to work or proper equipment. After extensive pre-trial procedures and motions, Park was finally granted summary judgment on liability and a Manhattan **jury returned a pain and suffering damages verdict in his favor in the sum of $2,300,000 ($1,500,000 past – 7 ½ years, $800,000 future – 33 years).**

On the defendant's **post-trial** motion, the trial judge **reduced the verdict to $1,400,000 ($600,000 past, $800,000 future)** and plaintiff then appealed.

Park argued on appeal that the original jury verdict of $2,300,000 should be reinstated in full while the defense argued that the trial judge's reduction to $1,400,000 was not enough and the verdict should be reduced even further.

Last week, in **Park v. City of New York**, the judges of the Appellate Division, First Department agreed with the defendants and the judges reduced the future damages verdict another $400,000 so that the **final pain and suffering verdict now stands at $1,000,000 ($600,000 past, $400,000 future).**

The trial testimony by plaintiff and his doctors was at odds with that offered by the doctor who examined the plaintiff on behalf of the defendants. While there was no dispute as to the initial seriousness of plaintiff's elbow fracture and the need for the significant surgery he underwent, the parties vigorously disputed the seriousness of plaintiff's condition at trial and his prognosis:

- **Pain**: plaintiff testified he has pain every day and cannot ride a bike, play basketball or lift heavy objects; defendants pointed out, though, that plaintiff missed no time from work, showers, feed and helps his patients walk (in his new job as a nursing attendant) and that he has pain only in certain positions

- **Future Surgery**: plaintiff's orthopedist claimed he'd need future elbow surgery due to post-traumatic arthritis but the defense doctor disagreed testifying that there was no evidence of arthritis and no need for more surgery
- **Wrist Injury**: plaintiff claimed residual pain in his left (non-dominant) wrist but the defense argued that the wrist injury was insignificant as it was treated only with a bandage, didn't require any surgery and plaintiff testified before trial that he had good range of motion and no pain in his wrist

In reducing the plaintiff's verdict $400,000 more than the trial judge had already reduced it – leaving plaintiff with $1,300,000 less than the jury had awarded him – **the appellate judges stated that they based their decision on four prior cases involving "a comminuted fracture to the elbow/arm, multiple surgeries, potential additional surgery and permanent pain and limitation of motion."** Only one of those cases, though, **Roshwalb v. Regency Maritime Corp.** (1st Dept. 1992), involved an elbow fracture (**$750,000** sustained for 63 year old woman).

The other three cases cited in Park v. City of New York all involved fractures to different parts of the arm:

- **Baez v. New York City Transit Authority** (1st Dept. 2005) - $980,000 for 56 year old woman with comminuted, midshaft humeral fracture [we previously discussed this case in our article on humerus fracture cases, here]
- **Martinez v. Gouverneur Gardens Housing Corp.** (1st Dept. 1992) - $800,000 for 3 ½ year old boy with comminuted fracture of his arm, shortening and atrophy
- **Fudali v. New York City Transit Authority** (Supreme Court, New York County, 2005) - $1,200,000 for 59 year old woman with humeral neck and head fracture)

While there aren't any cases that the judges failed to mention in Park v. City of New York that would likely have led them to a different conclusion, there were **several prior cases that involved elbow fractures only that were much more relevant and instructive**. Here they are (some of which we discussed in **our prior article on elbow fracture cases**):

- **Flores v. Parkchester Preservation Co.** (1st Dept. 2007) - **$350,000** for 24 year old woman with an intra-articular elbow fracture
- **Vertsberger v. City of New York** (2nd Dept. 2006) - **$1,400,000** for 51 year old man with comminuted intertrochanteric elbow fracture
- **Chisolm v. Madison Square Garden Center, Inc.** (1st Dept. 2001) - **$400,000** for 15 year old boy comminuted elbow fracture
- **Boinoff v. Riverbay Corp**. (1st Dept. 1997) - **$100,000** for 58 year old woman with badly fractured elbow
- **Carrasquillo v. City of New York** (Supreme Court, Kings County 2009) - **$1,200,000** for six year old with supracondylar fracture of her elbow [link is to the October 5, 2009 trial judge decision rendered after our earlier article discussing the $3,200,000 jury verdict]

The point in referring to the more relevant elbow fracture cases is not that the court in Park v. City of New York erroneously evaluated pain and suffering damages; rather, it's to highlight the fact that **elbow fractures are usually more significantly limiting and painful than mid-shaft humerus fractures**.

The elbow involves a complex joint with three moving parts (the radius, ulna and humerus) and after elbow surgery it's typical that there will be some significant permanent loss of range of motion. **The judges could and should have cited the more relevant elbow fracture cases, discussed them and enlightened all of us as to why it was proper to reduce Mr. Park's verdict by $400,000 (after the trial judge had already reduced it by $900,000**).

Inside Information:

Before trial, plaintiff had demanded $750,000 to settle against which defendants had offered $350,000.