Lumbar Fusion Damages: Jury Awards 32 Year Old Woman Only $75,000; Appeals Court Still Too Low At $225,000

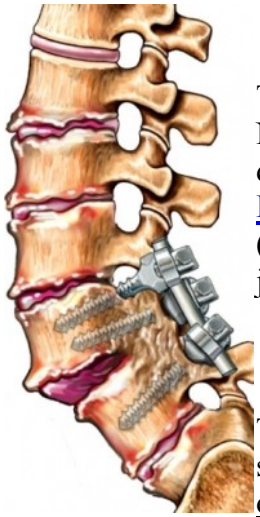
Posted on April 12, 2009 by John Hochfelder

Deanna Kmiotek was 32 years old on July 8, 2004, sitting in her car at a red light in hometown Amherst, New York when out of nowhere the **town's dump truck carrying an 18 ton load smashed into the rear of her car.** She was seriously injured and sued the town for her damages.

A judge ruled well before trial that the facts and fault were plain and that the issue of fault need not be addressed at trail; the only issue at trial would be the amount of damages.

Deanna sustained **herniations in her back requiring surgery to fuse lumbar discs at L4-5 and L5-S1 with a bone graft from her pelvis and the insertion of two metal titanium rods and six screws.** As a result, she could no longer work either at home or as a commercial cleaner and she could no longer pick up her children or give then baths.

Here's what a spine looks like after lumbar fusion surgery:



The town offered $250,000 to settle before trial but the offer was rejected. In November 2007, an Erie County jury awarded plaintiff pain and suffering damages in the sum of $75,000 ($35,000 past, $40,000 future). On appeal in **Kmiotek v. Chaba**, $75,000 was held to be unreasonably low and **$225,000** ($75,000 past, $150,000 future) was found to be the minimum amount the jury could have awarded as a matter of law based on the evidence at trial.

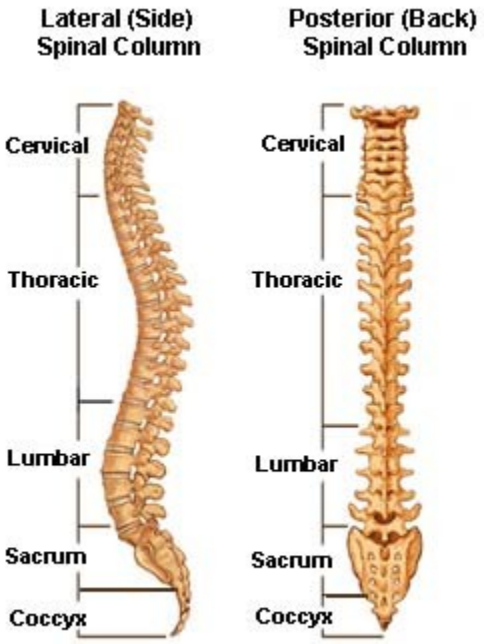
The amount determined by the appellate court as reasonable in this case is strikingly lower than awards in similar cases and the court should have ordered an increase to at least $500,000.

It cannot be repeated enough that each case, each person, each injury and each recovery is unique so there's no one guideline or set of numbers to look to when ruling on appropriate pain and suffering damage figures. That said, the appellate courts in New York routinely rule in these cases by looking to prior cases for guidance.

Had a thorough review of precedent been undertaken and relied upon, it's clear to me that Ms. Kmiotek would have had her paltry $75,000 jury verdict increased to more than $225,000 - say, $500,000 or more. Here are cases that the appeals court did not mention in its decision:

- **Baird v. V.I.P. Management Co., Inc.** - **$700,000** ($400,000 past, $300,000 future) for a Westchester County woman who fell and underwent three surgeries with bone grafts to fuse and repair two cervical discs. Plaintiff in that case testified she was in constant pain and could not work; although she admitted on cross-examination that she had told her doctors before trial that she was improving and in less pain.
- **Kihl v. Pfeffer** - **$1,845,000** ($625,000 past, $1,200,000 future) for a 38 year old passenger in a car accident who sustained a neck injury that required spinal fusion surgery involving the removal of her disc at C2-3 and its replacement with bone from her hip. Unfortunately, surgery made her worse and her doctors had to implant a permanent morphine pump to alleviate her pain.
- **Barrowman v. Niagara Mohawk Power Corp**. - **$3,000,000** for a worker who fell off a scaffold 12 feet down to a concrete floor. He sustained herniated discs in his neck and back requiring spinal fusions with bone grafts. There was evidence that his neck and back injuries would worsen and more surgery would be needed.

Here are side and back views of the whole spine:



Inside Information:

- Defense counsel argued in summation that plaintiff sought a big damage award so that the Town of Amherst could buy her a new building. Counsel was playing to the well known reluctance of jurors to render big damage awards against their own municipalities.
- Defense counsel also suggested repeatedly in closing that a 10 year old car accident plaintiff had been involved in somehow caused the injuries plaintiff was suing for in the 2004 accident lawsuit - this despite the fact that the defense offered no proof at all as to any lingering injuries.

- Juries and courts are often affected by and reduce pain and suffering verdicts because of any bits of information as to any prior injuries or accidents. A good example of this is found in Sanz v. MTA-Long Island Bus where an appellate court reduced a jury's award from $750,000 to **$400,000** in a cervical fusion case apparently influenced by facts related to an accident eight years earlier.
- Plaintiff's counsel objected to what he called improper, unethical closing argument statements made by defense counsel, such as above, that were intended to influence the jury and the appellate court agreed that the statements were improper. But not so improper that plaintiff should be afforded a new trial on damages.

The appeals court in the Kmiotek case missed the ball on two counts:

1. Its increase of the paltry $75,000 verdict to $225,000 was much too low in view of plaintiff's debilitating injuries and similar prior sustained verdicts.
2. Second, defense counsel's statements to the jury in closing were outrageous, and should have resulted in a new trial so that a new jury could rule on damages without being affected by improper arguments that clearly influenced them to render such a meager award.