

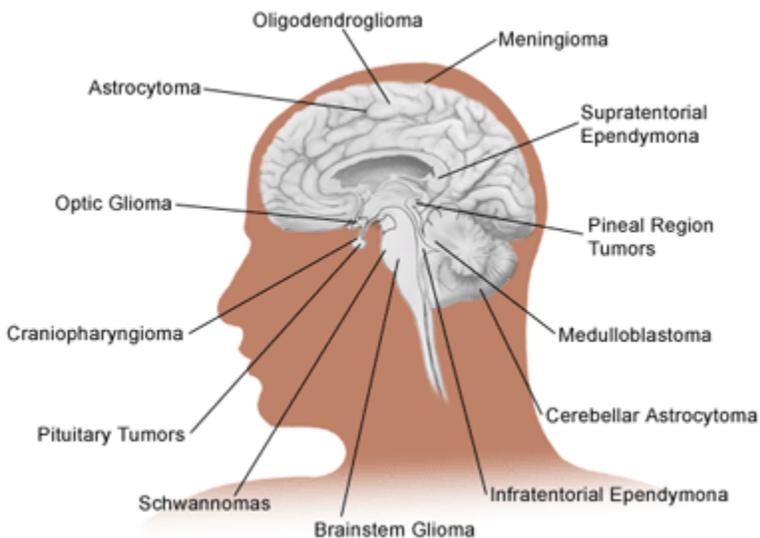
Appeal of Verdict in excess of \$105,000,000 for Brain Damages from Medical Malpractice Results in Recovery of Only \$5,357,000

Posted on March 8, 2010 by [John Hochfelder](#)

On March 12, 2002, Thomas Dockery, a 34 year old cable splicer for Verizon, suffered a **grand mal seizure** in his sleep of unknown origin. He'd never before had a seizure so he was rushed by ambulance to Peninsula Hospital in Far Rockaway, New York.

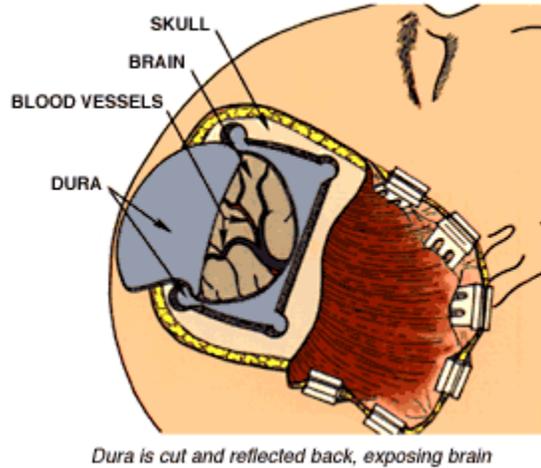
At the hospital, a CT scan was interpreted as normal. An MRI two days later, though, was interpreted as showing a lesion that seemed to be a **glioma** (a central nervous system tumor) and Dockery was immediately referred to M. Chris Overby, M.D., a neurosurgeon, who concurred. A second opinion from Philip Gutin, M.D. of Memorial Sloan Kettering Cancer Center in Manhattan corroborated Dr. Overby's diagnosis and surgery was set for March 25th.

At first, doctors thought Dockery had a brain tumor and here are several types:



A pre-surgical MRI on March 24th, though, indicated an inconsistent **massive edema of the brain** and Dockery underwent a **craniotomy** the next day during which pus in the lesion area was removed and found to be a non-tumorous abscess that had grown rapidly during the prior several days and caused an edema that produced **herniation of the brain**.

In a craniotomy, surgeons cut into the skull to access the brain, like this:



After several more brain surgeries, five weeks in the hospital and three and a half years of extensive rehabilitation, Mr. Dockery was left with **severe aphasia** – a loss of the ability to produce and/or comprehend language and a **severe loss of memory**.

Dockery (and his wife) sued claiming malpractice in the doctors' failure to have properly and timely diagnosed his condition and removed the abscess by March 18th when his injuries could have been avoided.

During the trial, the judge dismissed claims against Peninsula Hospital and the doctors there but, in July 2007, after six weeks of testimony, a Queens County **jury returned a verdict finding that there was malpractice by Dr. Overby (45%) and Dr. Gutin and his hospital (55%)** and they awarded non-economic damages in the sum of \$104,450,000.

Here's how the \$104,450,000 non-economic damages verdict broke down:

- Pain and suffering - \$37,750,000 (\$10,000,000 past – 5 years; \$27,750,000 future – 36 years)
- Loss of consortium (wife's claim) - \$66,700,000 (\$18,000,000 past; \$48,700,000 future).

Just before trial, Dr. Gutin and Memorial Sloan Kettering had settled for \$4,400,000.

And just after the verdict, the trial judge dismissed the claims against Dr. Overby finding that the verdict against him was against the weight of the credible evidence (because he saw Dockery only once before Dr. Gutin took over and made a new diagnosis that was relied upon by Dockery and proved to be negligent).

The Dockerys thus gained no new money as a result of the trial because Dr. Gutin and Memorial Sloan Kettering had already settled and Dr. Overby's post-trial motion to dismiss the claims against him, notwithstanding the verdict, was granted.

In the ensuing appeal, plaintiffs claimed that the judge should not have dismissed the claims against Peninsula Hospital and its doctors, nor the claims against Dr. Overby. Conversely, the defendants argued that the dismissals were properly granted and, alternatively, that the damages verdict was grossly excessive.

On December 22, 2009, in [Dockery v. Sprecher](#) (2nd Dept., 2009), the appellate court upheld the dismissal as to Peninsula Hospital and its doctors, reinstated some liability against Dr. Overby (10%), found that Dr. Gutin and Memorial Sloan Kettering were 90% at fault and **ruled that the non-economic damages should be reduced to \$9,100,000.**

Here are the non-economic damages reductions:

- past pain and suffering – from \$10,000,000 to **\$1,000,000**
- future pain and suffering – from \$27,750,000 to **\$6,750,000**
- loss of consortium – from \$48,700,000 to **\$1,350,000**

The jury had awarded **\$470,000 in economic damages** (mostly for lost earnings) which the appellate court did not disturb so the resulting **new total damages award is \$9,570,000.**

The net result is that **plaintiffs' total recovery is now \$5,357,000, as follows:**

- **\$4,400,000** (the pre-trial settlement with Dr. Gutin and his hospital) plus
- **\$957,000** (Dr. Overby's 10% share of the new \$9,570,000 verdict)

Inside Information:

- The appellate court decision was difficult to unravel as to what really happened and its practical effects. My colleague, [Eric Turkewitz over at New York Personal Injury Law Blog has taken the court to task for its “tortured language” and the “open questions” its decision left for readers.](#)
- If there were a retrial in this case, the looks on the faces of plaintiffs’ counsel and the trial judge (**Hon. Duane A. Hart**) when in court together again would be something to behold. Counsel claimed that the judge handled the lawyers and witnesses rather roughly and therefore made the unusual request that any retrial be held before a different judge. The appeals judges ignored that request (and the fact that [this judge has been censured twice by the Commission on Judicial Conduct for his actions towards lawyers during trials](#)).
- Counsel for Dr. Overby has indicated that he will make a **motion to reargue this decision and/or for leave to appeal to the Court of Appeals** based upon well settled

law that provides one is not liable when one's negligence, if any, is superseded by an intervening act that caused the injuries complained of. Dr. Overby has long maintained that whatever he did or didn't do regarding Mr. Dockery could not as a matter of law result in a finding of liability against him because it was Dr. Gutin who took over treatment after only one day and Dr. Gutin's actions or inactions were the key to any malpractice. We will follow this case and report on any significant new developments.