Latest New York Appeals Court to Evaluate Ankle Fracture Pain and Suffering Case: $550,000; Most Range Between $300,000 and $600,000

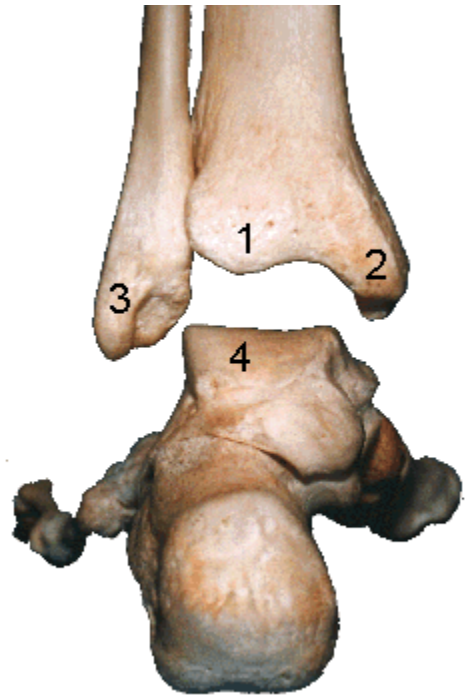
Posted on September 21, 2009 by John Hochfelder

Another **significant ankle fracture pain and suffering verdict** has been reviewed by a New York appeals court and in its decision this week a Kings County verdict for **$800,000 was deemed unreasonable and reduced to $550,000.**

Myron Fishbane, a 69 year old semi-retired accountant, slipped and fell down stairs in 2004, broke his ankle and sued the owner for negligence in that the stairs were slippery, without an adequate handrail and with treads that were too large. The defendants denied their negligence but in the course of the lawsuit they failed to provide information after the judge ordered them to do so and therefore their defense was stricken and the case proceeded to an evaluation of damages only.

Fishbane's ankle was fractured in three places (a **trimalleolar fracture**) and he required open reduction internal fixation surgery whereby a metal rod and 11 screws were placed to hold the bones in place.

Here is an illustration showing how the tibia (1 and 2), the fibula (3) and the foot (4) meet to form the ankle joint.



In a trimalleolar fracture, both the **medial and lateral malleoli** (1 and 2 in the illustration above) are fractured (constituting a bimalleolar fracture) as well as the posterior malleolus of the tibia (also called the **tibial plafond**). The real significance of this third fracture (the tibial plafond) is that it occurs when ligaments in that area tear so violently that they actually cause a break-away or fracture of the bone below the ligament. Both injuries usually require surgery to insert a plate and screws to stabilize the bones but recovery from a trimalleolar fracture is usually (not always) more difficult than from a bimalleolar fracture.

Here is an x-ray showing the tibial plafond (the end or lip of the tibia, between the malleoli):

Mr. Fishbane claimed at trial that he had difficulties bending or moving his foot and the defense expert agreed that scar tissue from the surgery made it impossible to bend or move the foot properly. Furthermore, Fishbane said he still has trouble walking and using stairs.

The jury awarded Mr. Fishbane $800,000 for his pain and suffering ($500,000 past - 3 years, $300,000 future - 11 years). On appeal, though, in **Fishbane v. Chelsea Hall, LLC**, the Appellate Division, 2nd Department, this week, without explanation, found that $800,000 was unreasonably excessive and held that the reduced sum of **$550,000** ($350,000 past, $200,000 future) was appropriate.

We have railed against the appellate courts before, **here, here** and **here,** for their refusal to provide adequate explanations of their reduction (or increase) of jury awards in bodily injury cases. At most, the courts generally will cite prior rulings that attorneys and the public assume are relevant factually and provide reasoning for the jury award modifications. Sometimes they

do, often they don't. In **Fishbane**, reference was made to to only two cases, **Lowenstein v. Normandy Group, LLC** and **Clark v. N-H Farms, Inc.**

The **Clark** case does have some relevance in that there the same appeals court ruled in 2005 that a pain and suffering verdict for a 43 year old woman who sustained a **trimalleolar fracture** should be reduced from $1,200,000 ($500,00 past - 2 1/2 years, $700,000 future - 34 years) to **$425,000** ($200,000 past, $225,000 future).

The **Lowenstein** case, though, involved both a trimalleolar **ankle fracture and a three part comminuted shoulder fracture**. Although the shoulder did not require surgery, the 51 year old plaintiff was left with permanent loss of range of motion both in her shoulder and in her arm and hand. In reducing the jury's pain and suffering award from $1,800,000 ($300,000 past - 2 years, $1,500,000 future - 28 years) to **$1,150,000** ($300,000 past, $850,000 future) one has no indication of how the judges valued each injury. So why cite that case as illustrative in reducing Mr. Fishbane's verdict since his case involved only an ankle fracture?

Here are the other most significant ankle fracture cases from the New York appellate courts over the past few years that are meaningful for pain and suffering analyses and comparisons:

- **Downes v. Mount Vernon** (2009) (previously discussed **here**) - **$288,000** for a 66 year old woman with a trimalleolar fracture that resulted in post-traumatic arthritis within three years.
- **Bermudez v. New York City Board of Education** (2009) (previously discussed **here**) - **$1,030,000** ($190,000 past, $840,000 future - 56 years). This is a trial court decision for an 11 year old boy with a severe bimalleolar fracture already requiring four surgeries including an osteotomy.
- **Ruiz v. New York City Transit Authority** (2007) - **$300,000** ($100,000 past - 4 1/2 years, $200,000 future - 34 years) for a 46 year old woman with a displaced malleolus fracture and ruptured ligaments but an uncomplicated recovery. The jury had awarded $1,2000,000.
- **Ruiz v. Hart Elm Corp.** (2007) - **$900,000** ($400,000 past - 5 years, $500,000 future - 35 years) for a 22 year old woman with a bimalleolar fracture that her doctor testified was more serious and destabilizing than a trimalleolar fracture because plaintiff's ankle ligaments were permanently destroyed. The jury's verdict was not modified on appeal.
- **Uriondo v. Timberland Camplands, Inc.** (2005) - **$315,000** ($25,000 past, $290,000 future - 28 years) for a man in his 40's with a trimalleolar fracture with resultant arthritis and the need for additional surgery. The jury's verdict was not modified on appeal.

Each case and each plaintiff and each injury is unique; however, the appellate courts are required to look to prior verdicts and decisions when reviewing a jury's pain and suffering verdict. As you can see, not all decisions fit into a neat pattern. There are always cases about which we wonder why the court let stand such a high or low verdict. And, too, we wonder sometimes why a court modified up or down certain verdicts. The best guide we can offer is that **in each case one should consider the following items:**

- the plaintiff's age
- whether the medical experts agreed on the prognosis and/or the presence of post-traumatic arthritis
- the credibility of the parties involved: plaintiff and defendant, the lawyers and the doctors

- how long plaintiff could not work or was disabled
- the objective testing evidence as to range of motion
- whether plaintiff requires narcotic pain medication
- how many surgeries up to the time of trial
- the degree of permanence and whether plaintiff will have a permanent limp

Finally, remember that the appellate courts are not charged with fixing or setting a specific verdict amount that they deem the right one. They are merely charged with determining whether the verdict amount deviated from what was reasonable compensation and in so doing the judges will knock down or up an award into the **range** they find is reasonable. So, in modifying upward the courts will determine what figure is the lowest amount that would be qualify as reasonable and in modifying downward they will determine the figure that is at the highest end of what's reasonable.

As significant ankle fracture cases are decided in the future, we will continue to analyze them and report about them.