

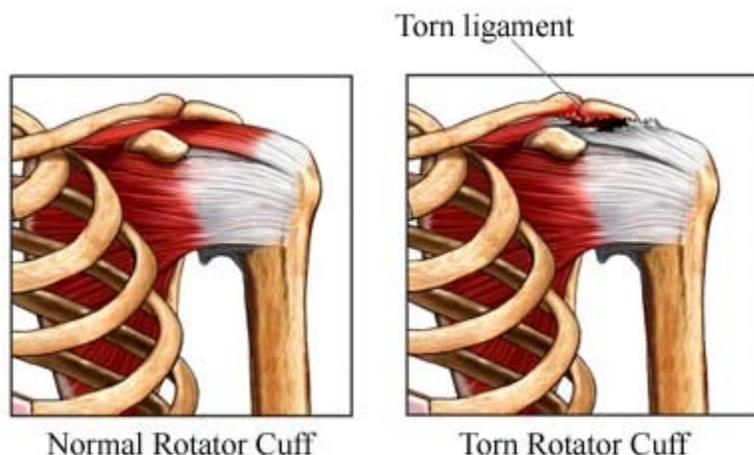
## Surprisingly Low Bronx County Jury Verdict in New York Shoulder Injury Case Modified Only Slightly by Appeals Court

Posted on May 24, 2009 by [John Hochfelder](#)

**Bronx and Kings Counties** are among the few venues that New York personal injury attorneys (those representing plaintiffs, that is) will tell you are favorable counties for much larger than average-sized pain and suffering verdicts. **Westchester, Rockland, Nassau and many upstate counties** are among the worst (i.e., the juries are stingy in their verdict amounts). These "rules of thumb" do not always hold true, of course. And not so at all in a recent car accident case.

In [Shifrel v. Singh](#), a 49 year old man was stopped in traffic on July 22, 2004 on the Cross Bronx Expressway when he was hit in the rear by defendant's car. He complained of left shoulder pain at the hospital that day, followed up with an orthopedic surgeon, had an MRI that showed a **torn rotator cuff** and eventually had surgery to repair the tear. Following seven weeks of physical therapy, Mr. Shifrel tried to resume his pre-accident way of life which had included sports such as softball and basketball and riding a motorcycle. He could not and his doctor testified that his restricted range of motion was permanent.

**Here's a comparison of normal and torn rotator cuffs:**



Although the defense had an opportunity to examine the plaintiff with its own doctor before trial, that doctor was not called to testify at the trial and the plaintiff was given a **missing witness charge**. That's where the judge tells the jury that, when a witness under the control of one of the parties is not called to testify when it's expected he would have been, the jury may draw negative inferences from that failure. In other words, the judge tells the jury that it will be permitted to conclude the defense was trying to hide testimony that may have been favorable to the other side. Here, the defense doctor probably would have agreed with the plaintiff's doctor's testimony.

Usually the missing witness charge when the witness is a defense doctor will be very damaging to the defense. It allows the jury to "buy" everything the plaintiff's doctor says as to causation,

permanence and severity and it suggests to the jury that the defense doctor would have said the same thing.

In this case, the missing witness charge meant nothing. It was no help to the plaintiff. **The jury returned a verdict of \$5,000 for all of plaintiff's pain and suffering!** And that sum was just for past pain and suffering (3 1/2 years). **The jury's verdict for future pain and suffering was - 0-.**

Naturally, the plaintiff appealed. **The appellate court held that indeed the past pain and suffering sum was too low - it found \$50,000 was a reasonable figure for past pain and suffering.** Less than what plaintiff's counsel urged but at least the appeals judges saw the impropriety of only \$5,000 for past pain and suffering.

**As to the jury's failure to award any amount at all for future pain and suffering, though, the appeals court affirmed the verdict. It found that plaintiff was not entitled to any award for future pain and suffering because of the "lack of permanency of plaintiff's injuries."**

The \$50,000 ultimate award in this case is way out of line with other rotator cuff tear injury cases in New York. For example, see our reports [here](#) and [here](#). As you can see, when surgery occurs after a rotator cuff injury, in relatively routine non-complicated cases (medically), the sustained verdicts in New York injury cases for middle-aged persons appear to fall in the \$150,000 to \$300,000 range.

#### **Inside Information:**

- as this was a car accident case, the nuances of Insurance Law Section 5102 applied (see [Eric Turkewitz's terrific expose of this statute](#)) and the jury found that plaintiff had met the statutory threshold because he suffered an injury of a non-permanent nature that prevented him from performing his usual and customary activities for at least 90 of the 180 days after the accident
- the appeals court concluded that the jury's finding that the so-called 90/180 standard had been met meant that the jury specifically concluded plaintiff's injuries were non-permanent
- even if the jury did make a finding of non-permanence (a) the plaintiff's doctor testified - unchallenged (remember the missing witness charge) - that plaintiff's injuries were indeed permanent and (b) non-permanence does not preclude any and all pain and suffering into the future; it would allow for an award of 10 years of pain, 20, one, whatever

#### **Really Inside Information:**

- the defense offered \$65,000 to settle just before trial (acceptable to plaintiff's counsel but rejected by the plaintiff himself)
- after the verdict, plaintiff's counsel would have settled for \$50,000 (not offered)