

## **Jury Awards \$7,000,000 in Cervical Fusion Case - Judge Denies Defendants' Post-Trial Motion to Set Aside \$5,000,000 Portion of the Verdict for Pain and Suffering**

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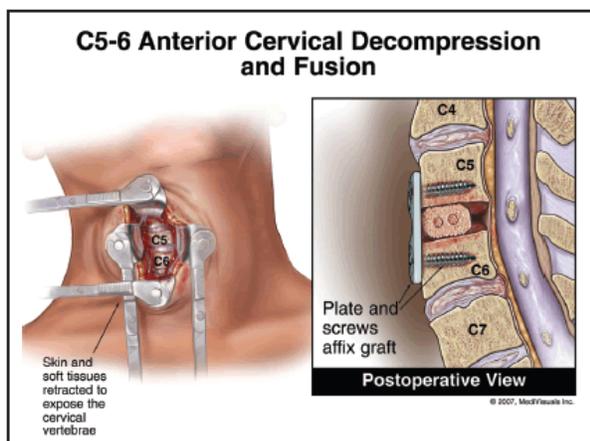
On December 26, 2003, a 37 year old nurse was involved in a car accident at an intersection in the Bronx when a Salvation Army van slammed into her car causing a **herniated disc in her neck and nerve damage to her right arm.**

It wasn't this van but probably one similar:



The van driver, Anita Peterson, claimed she had a green light and that the accident was caused by the other driver, Tara Kelly; however, on August 1, 2008, in **Kelly v. Peterson** (Supreme Court, Bronx County; Index #18607/04), a jury found that the accident was caused wholly by Ms. Peterson. A few months after that finding, on November 12, 2008 a new jury was empaneled to determine the amount of damages to which Ms. Kelly was entitled.

At that point, it was clear to all that Ms. Kelly would be awarded a large sum for her pain and suffering. As a result of the crash, she had undergone surgery – an **anterior discectomy at C5-6 and a fusion of the two vertebrae** at that level. The fusion involved the placement of a bone graft in the spine where the disc had been and the fixing of a plate with screws into the bone to prevent the bone graft from moving out of place.



Additionally, objective medical tests showed that plaintiff had suffered **denervation in her dominant right arm leaving her with a permanent 30% loss of use.**

Courtroom observers say that this case could have been settled for about \$750,000 before the verdict in the damages trial but that the defense hadn't offered more than \$500,000 to settle. So, the damages trial went forward and in the end the **jury awarded \$7,000,000: \$5,000,000 for pain and suffering (\$2,000,000 past – 5 years, \$3,000,000 future – 48 years) plus \$2,000,000 for future medical expenses.**

The defendants then asked the trial judge to set the entire verdict aside as excessive and order a new trial on damages. In her [post-trial decision](#) dated October 5, 2009, the [Hon. Sallie Manzanet-Daniels](#) (now an appellate court judge) **declined to disturb the jury's pain and suffering awards**; the only modification she made was a reduction of the future medical expense recovery from \$2,000,000 to \$285,000 which was the amount plaintiff's counsel had proven and asked for in his summation.

It's fair to say that the Salvation Army had the bell rung against it when the jury returned its verdict.



**Court records now indicate that this case has just settled but the amount is confidential.** Facing a verdict in excess of \$5,000,000, with interest mounting at the rate of 9% per year since the date of the liability trial verdict (as provided for in [New York's CPLR 5002](#)), the defendants were no doubt finally anxious to settle and they probably paid less than the verdict amount but far more than the amount for which this case could have been settled before trial.

In my opinion, **the \$5,000,000 pain and suffering verdict in this case would have been reduced by the appellate court based on its review and analysis of prior cases.** Here are some of the prior appellate court decisions dealing with fusion surgery pain and suffering, any one of which might have been relied upon or cited as support for a finding that the \$5,000,000 award to Ms. Kelly was excessive.

[Sanango v. 200 East 16th Street Housing Corp.](#) (2004)- **\$2,452,000** pain and suffering verdict (\$1,000,000 past – 6 years, \$1,452,000 future – 29 years) for a construction worker who fell 15 feet from a ladder and sustained multiple fractures of his cervical and thoracic spine, a concussion, a torn rotator cuff in his shoulder and nerve damage to his eyes. He underwent spinal fusion surgery and at trial his neck was still in a brace and he was still suffering from significant limitations of mobility and continued pain. His poor prognosis was further complicated by the separation of a pedicle screw that presented the risk of further surgery due to migration of the fragment. Finally, because of the fragment's location, surgery to repair the torn rotator cuff was contraindicated.

[Diaz v. West 197th Street Realty Corp.](#) (2002) - **\$1,350,000** pain and suffering award for a 29 year old mail carrier in a slip and fall accident who sustained a fractured transverse process at L-3 and a herniated disc at L5-S1 requiring posterior spinal fusion with iliac bone graft. She claimed she was totally disabled, could not walk without limping and required chronic pain management. The jury's verdict for pain and suffering was \$8,250,000 (\$5,500,000 past – 3 ½ years, \$2,750,000 future); however, on appeal those figures were found to be grossly disproportionate to awards in factually analogous cases.

[Lewis v. Port Authority of New York and New Jersey](#) (2004) - **\$1,500,000** pain and suffering award (\$500,000 past – 6 ½ years, \$1,000,000 future – 42 years) for a 31 year old plaintiff in a motor vehicle accident who sustained injuries to her back, hip and legs requiring fusion surgery to repair her sacroiliac joint. She also suffered from post-traumatic stress syndrome and depression (confirmed by the defense neuropsychiatrist). The jury had awarded \$4,500,000 for pain and suffering but the appellate judges ruled that to be disproportionate (citing the [Diaz](#) case).

#### **Inside Information:**

- Ms. Kelly appears to be what I like to call a trooper – she returned to work as an intensive care unit nurse as soon as she could both after the accident and after her surgery three years later and she didn't miss much time from her job. Juries tend to love that type of can-do attitude and, conversely, hate those they conclude are malingerers.
- The defense claimed that plaintiff's injuries were not severe and in closing arguments to the jury suggested that \$150,000 would be a fair pain and suffering award (plaintiff's attorney asked for \$5,000,000). Shortly after the jury began deliberating, the judge received a note asking whether there was a maximum they could award. Half an hour later, they returned their \$7,000,000 verdict (\$5,000,000 for pain and suffering plus \$2,000,000 for future medical expenses).
- The jurors were treated to a blistering cross-examination of defense neurologist Ramon Valderrama, M.D. who had examined Ms. Kelly for five minutes two and a half years before trial. He testified that plaintiff's neck range of motion was entirely normal, even though he had not conducted any such tests and admitted on cross-examination that he saw Ms. Kelly only four months after her fusion surgery and that normal range of motion simply does not return so early.
- Perhaps the most stunning moment in the trial occurred when one of New York's top trial attorneys, [Michael Jaffe](#) of Pazer, Epstein & Jaffe, P.C. (plaintiff was also represented by the preeminent [Jeffrey S. Stillman](#) of Stillman & Stillman, P.C.), confronted the defense doctor with a report he wrote in an unrelated case, involving different injuries, in which his findings in 12 paragraphs of the report were identical, word for word, to the report he prepared for Ms. Kelly in this case. It was clear to even the casual courtroom observer that Dr. Valderrama was decimated by Mr. Jaffe, this was a turning point in the trial and that defense counsel was overmatched by plaintiff's attorneys.