

Medical Malpractice Lawsuit Saga in NY: After 13 Years, Doctors Lose Two Trials, Fail to Enforce a Favorable Settlement Agreement and Must Pay \$1,405,000

Posted on December 20, 2009 by [John Hochfelder](#)

It's not an uncommon situation in **the ever-uncertain world of jury deliberations** in personal injury and medical malpractice cases in New York and nationwide. After years of litigation, months of trial preparation and weeks of trial testimony, the jury is deliberating and each side again assesses its strengths and weaknesses. A settlement is finally discussed and appears to have been reached. The end? Usually, but not in one **medical malpractice case that started in 1996 with surgery in Brooklyn and ended this week with an amazing appellate court decision.**

On June 5, 1996, a 32 year old college math professor underwent a lengthy surgery to repair chronic instability in his left knee. Immediately following surgery, he felt severe pain in his right leg which was swollen and deformed. Turns out, he had deep venous thrombosis (DVT) in three veins in his right calf and was ultimately diagnosed with **tibial and peroneal nerve damage and RSD** resulting in permanent intense, burning pain in his right leg requiring lifelong narcotic pain medication.



The left leg (the one operated on) healed well; however, as to his right leg (the one not operated on and with respect to which he never before had any problems) Mahmoud Diarassouba sued his orthopedic surgeon and his two anesthesiologists claiming that their **failure to reposition his right leg during the lengthy surgery was a departure from good and accepted medical practice** that caused his right leg injuries.

These are the types of **support stirrups** used in knee surgeries:



Prof. Diarassouba won his case in 2003 when the jury found the doctors liable for **\$1,500,000** in pain and suffering damages (\$500,000 past – 7 years, \$1,000,000 future – 37 years). [Here is a copy of the verdict sheet with the jury's findings.](#)

The defendants appealed the verdict against them on several grounds but mainly because certain evidence was improperly heard by the jury and other evidence was improperly held from them. The appellate court agreed, issuing a [decision setting aside the verdict and directing a new trial.](#)

The **new trial was held in 2007**. When the jury was deliberating a verdict, the parties appeared to have reached a settlement. Plaintiff's attorney told the defendants' attorney that plaintiff would accept defendants' \$150,000 offer and plaintiff's attorney then told the court clerk who found and told the judge. At that time, though, the judge just received a note from the jury advising that they had reached a verdict!

Plaintiff's attorney asked the judge to memorialize the settlement by putting it on the record – i.e., by stating the details in open court, having them transcribed by the court reporter and having defense counsel and the plaintiff himself state that they are in accord with and agree to the terms. The judge refused and told the plaintiff's attorney that he would first bring in the jury and have its verdict read after which, the judge said, the parties would be free to do what they agreed to.

The jury was "out" - still in the jury room - when plaintiff's attorney advised the judge of a settlement:



The jury came in. The verdict was announced: the **doctors were again found liable** for pain and suffering damages, this time in the sum of **\$1,450,000** (\$800,000 past – 11 ½ years, \$650,000 future – 30 years).

This was a stunning development. Clearly, plaintiff had anticipated a defense verdict and had been eager to settle for a mere \$150,000. Just as clearly, the jury found the defendants at fault and they assessed damages at 10 times the purported settlement figure. So: **had the case already been settled for**

\$150,000 or would the \$1,450,000 verdict stand? Those were the questions in the [second appeal in this case, a decision on which was issued this week holding that there was no legally enforceable settlement and the verdict stands.](#)

At first glance, it looks like plaintiff was seeking to wiggle out of a binding agreement that he wished he hadn't made since the verdict was so much more favorable. On close examination, though, **the court's decision makes sense and is fair.** Before the verdict was announced, defense counsel had not acknowledged that a settlement had been reached. My reading is that the defendants were trying to have it both ways – hoping the verdict would exonerate them but if it didn't and the verdict was more than \$150,000 then defense counsel could claim (as he ultimately did) that a settlement had been reached for only \$150,000.

Settlements during trial are common but to make them binding in the absence of a signed written agreement the law ([CPLR 2104](#)) **requires the attorneys to place the settlement agreement on the record – typically meaning that they announce the details of the settlement in open court,** before the judge, with the court reporter transcribing the statements and the settling parties themselves stating that they understand the terms of the settlement and agree to them. **None of that was done in this case,** in part because the judge wanted the verdict announced first and in part because defense counsel did not state that he or his clients acknowledged and agreed to the \$150,000 proposal (that is, until after the verdict was read).

Inside Information:

- In the first trial, liability was apportioned 60% to the orthopedic surgeon and 20% each to the anesthesiologists but in the second trial the surgeon's share was 30% and the shares of the other two were 35% each.
- Before the second trial, the surgeon settled with the plaintiff for \$390,000.
- Since the surgeon was 30% at fault in the second trial, plaintiff's total verdict of \$1,450,000 was reduced by 30% as against the other two defendants and the plaintiff is entitled to only \$1,015,000 from them. Since plaintiff already has \$390,000 from the surgeon, his total recovery here is \$1,405,000.