

## Trial Judge Upholds \$1,030,000 Pain and Suffering Verdict in New York Injury Case for 11 Year Old Boy's Ankle Fracture

Posted on July 7, 2009 by [John Hochfelder](#)

In a case we discussed [here](#), a Kings County trial judge (Hon. James G. Starkey) has now issued a written decision upholding a jury's verdict awarding **\$1,030,000** for an 11 year old boy's pain and suffering (\$190,000 past, \$840,000 future) due to an ankle fracture.

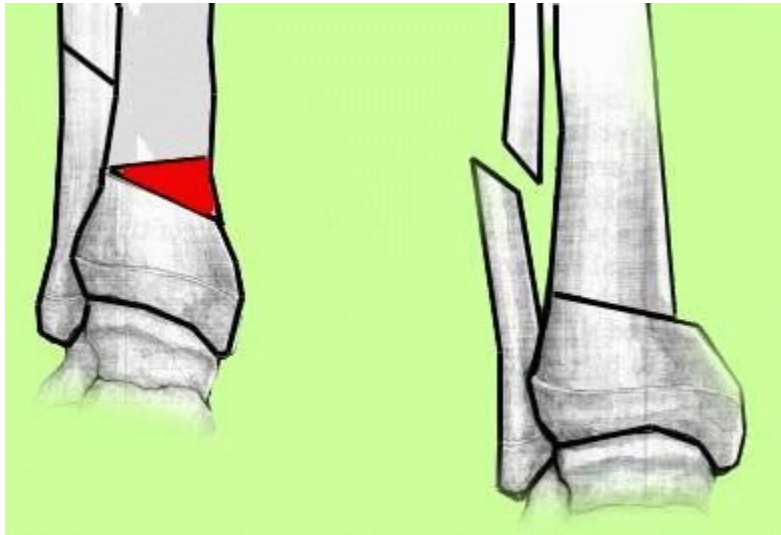
Jonathan Bermudez sustained a severe bimalleolar ankle fracture during his sixth grade gym class back in November 2001 when he was trying to kick a soccer ball during an unsupervised game of line soccer. The case, **Bermudez v. New York City Board of Education**, went to trial seven years later and after the verdict was rendered, the defendant (the New York City Board of Education) made a motion to set it aside, both as to liability and as to the amount of damages. As to liability, the judge stated in his opinion, [here](#), that there was enough evidence to allow the jury to make a finding that the defendant was negligent in failing to supervise the soccer game. It's likely that an appeals court will have the final word on this issue.

Assuming the appeals court allows the liability verdict to stand, it will also be presented with the damages issue: is \$1,030,000 excessive under the circumstances of this case? Judge Starkey said the award was not excessive and that the award should not be set aside.

Here are the factors the judge relied upon:

- plaintiff's proof included detailed testimony from his treating orthopedic surgeon supported by particularized medical records
- the defendant did not call an expert of its own
- plaintiff's life expectancy is 56 years and he may require surgical fusion of his ankle due to arthritis
- plaintiff's had four separate surgical procedures before trial (including an **osteotomy**)

Here is what an **osteotomy** looks like:



As this case makes its way up to the appellate court (the Appellate Division, 2nd Department), the parties need to be mindful of the recent decision by that court in [Smith v. Bywise Holding LLC](#) in which a 44 year old man fell and sustained a fracture of the distal region of his tibia (which forms the upper portion of his ankle). Robert Smith underwent open reduction internal fixation surgery and his pain and suffering Kings County jury verdict of \$775,000 (\$175,000 past, \$600,000 future - 25 years) was reduced by the trial judge and ultimately set by the appeals court at **\$500,000** (\$175,000 past, \$325,000 future).

The ankle injuries, treatment and prognoses in [Smith](#) and [Bermudez](#), are quite similar so there is a **good chance that the appeals court would affirm the damages verdicts in Bermudez**. While we note that Jonathan Bermudez was awarded much more than Smith for future damages (\$840,000 compared to \$325,000), Jonathan's life expectancy (and therefore the amount of time he is expected to suffer from his injuries) is a little more than twice that of Mr. Smith's so the future damages award to Jonathan appears to be in a permissible range.

We will follow this case and report back as it makes its way through the appeals process.