

Traumatic Brain Injury Pain and Suffering Verdict of \$2,750,000 Affirmed on Appeal in New York Injury Case

Posted on June 9, 2009 by [John Hochfelder](#)

On November 12, 2002, Florencio Hernandez, a **63 year old retired maintenance man**, was walking home in New York City. He was in a crosswalk at Madison Avenue and 115th Street when, all of a sudden, a bus slammed into a taxi. After spinning around, the **taxi slammed into Mr. Hernandez, threw him into the air and when he landed he struck his head on the concrete street** rendering him unconscious and causing profuse bleeding from his head.



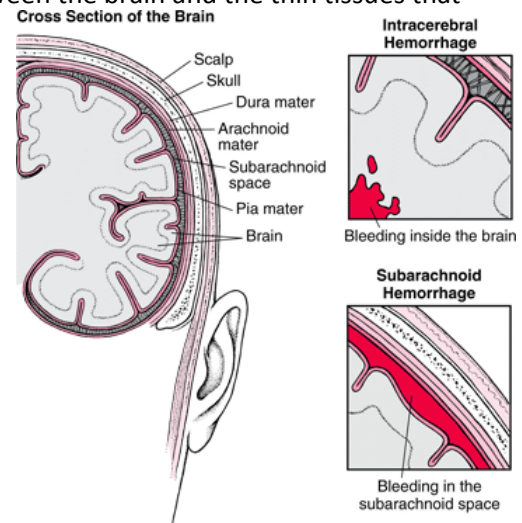
The bus driver insisted she was free of fault so the case headed to trial five years later and on April 19, 2007 a Manhattan jury found the bus driver 100% liable for the accident and the injuries to Mr. Hernandez. And the jury awarded Hernandez pain and suffering damages of **\$2,750,000** (\$1,000,000 past, \$1,750,000 future) for his **traumatic brain injuries ("TBI")**.

Last week, an appeals court upheld the jury's findings. [The decision in Hernandez v. Vavra is here.](#)

The defense argued that \$2,750,000 in pain and suffering damages for a retired man in his 60's (he was almost 70 by the time of trial) was excessive, especially in view of the facts that plaintiff had previously been disabled due to a heart condition and was already suffering from diabetes, hypertension, arteriosclerosis and had suffered two strokes before he was injured in the bus-taxi crash. And the defense argued that a cerebral infarct suffered a week after the crash could not have been caused by the accident. Finally, as so often happens in TBI cases, the defense contended that the plaintiff was fabricating his injuries.

The plaintiff and the appeals court judges disagreed and concluded that **the jury acted reasonably in awarding the \$2,750,000 based on the following injuries sustained in this accident:**

1. **subarachnoid hemorrhage** (bleeding in the area between the brain and the thin tissues that cover the brain)
2. **cerebral infarct** (a kind of stroke caused by a disturbance in the vessels supplying blood to the brain)
3. **memory loss**
4. **speech difficulties** including the inability to name objects known to him
5. **loss of sensation** over his entire face
6. **decreased hearing** in one ear
7. constant pressure on his brain causing **severe headaches** daily



According to plaintiff's doctors, his cognitive impairments were **permanent**, required lifelong medication and required that he be supervised by a home health attendant during his waking hours (i.e., 12 hours a day, 7 days a week) to avoid danger to himself and others if left alone.

In upholding the pain and suffering verdict, the appellate court relied on prior similar appeals court cases dealing with TBI, in particular:

- [Paek v. City of New York](#) - **\$4,300,000** pain and suffering verdict (\$1,300,000 past, \$3,000,000 future) for a 35 year old highly skilled, sought-after pattern maker for the premier fashion house of Calvin Klein. Ms. Paek had tripped and fallen over the remnant of a no-parking sign striking her head and sustaining a skull fracture and an epidural hematoma (a collection of blood below the skull but above the thick, leathery cover of the brain known as the dura). She required a craniotomy with evacuation of the hematoma and was left with **severe cognitive dysfunction, depression and disabling headaches**. The jury awarded Ms. Paek \$9,000,000 for her future pain and suffering; however the trial judge found that to be excessive and ordered a reduction to \$5,000,000 which the appeals court further reduced to \$3,000,000.
- [Roness v. Federal Express Corp.](#) - **\$1,000,000** past pain and suffering verdict (but nothing at all for the future) affirmed for a 43 year old psychologist who was struck by defendant's truck and knocked to the ground sustaining TBI manifested by a subarachnoid hemorrhage, a subdural hematoma (a collection of blood inside the skull but also inside the dura) and a diffuse axonal injury (the tearing of nerve tissue in the brain). Plaintiff's doctors testified that she suffered post-accident **brain deficits, including problems with short-term recall and executive function**. The defense argued that plaintiff's injury was insignificant and that she had recovered upon leaving the hospital two days after the accident. Prior to the accident, plaintiff had been admitted twice for alcohol rehabilitation and once to a psychiatric hospital for depression and thus the defense argued that if plaintiff had any future deficits they were attributable to her own pre-existing alcohol abuse and depression. The jury agreed and declined to award any future damages (and that finding was upheld on appeal).

Every year in the United States (according to the Centers for Disease Control) 1.4 million people sustain a TBI with 50,000 deaths, 235,000 hospital admissions and 1.1 million treated and released from a hospital emergency room. Nonetheless, TBI claims and lawsuits are

unique in that the injuries and consequential brain damage are often not readily apparent and can manifest weeks, months or even years later.

Insurance companies defending the parties who cause TBI accidents routinely resist payment of the TBI victim's harms and losses. They claim, usually in a battle of expert medical witnesses, that the injuries could not have been caused by the accident or that there are no obvious or objective signs of brain injuries. Finally, as an alternative, the defense will often assert that if there are indeed injuries then they were pre-existing.

The foregoing claims and defenses are just what the defendants tried to prove in the **Hernandez v. Vavra** and **Roness v. Federal Express Corp.** cases discussed above. In those cases, they were rejected by the juries and the appeals courts. In other cases, the defenses are accepted by the juries and upheld on appeal.

We have discussed TBI cases before, [here](#), and we will continue to report on TBI verdicts and appellate decisions as they are rendered. TBI cases are among the most fascinating and challenging cases that I handle in my trial practice and they are among the most difficult to evaluate for juries and judges. No doubt, we will be revisiting these issues and TBI cases in the near future.