

No Pain and Suffering Damages in Wrongful Death Case Despite Appellate Court Ruling that Defendants Liable for Medical Malpractice

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Dolores Johnson was 70 years old when she suffered a stroke and had to undergo surgery for a clot on a pre-existing mitral valve. There was a danger that the clot would break off and block a blood vessel. After the surgery, Ms. Johnson never woke up and five days later she died. Cause of death: severe anoxic injury to her brain,

In her husband's ensuing medical malpractice lawsuit, the jury found that the cardiothoracic surgeon deviated from accepted medical practice in performing the surgery and in utilizing a relatively new technology called "heartport" (sometimes used as an alternative for the traditional aortic clamp).

Here is the traditional aortic clamp:



So, defendant's malpractice was established in **Johnson v. Jacobowitz** and plaintiff won the case but then came the **issue of damages**. To recover pain and suffering damages in a wrongful death case, as we've noted before, [here](#) and [here](#), plaintiff must show that the decedent experienced conscious pain and suffering before her death. That's where the case fell apart for Johnson.

This week, the appeals court in [Johnson v. Jacobowitz](#) upheld the trial judge's finding that there was insufficient evidence of awareness on the part of Ms. Johnson to make out a case with respect to conscious pain and suffering. Therefore, the the trial judge was correct in refusing to allow the jury even to consider the pain and suffering issue.

Proving conscious pain and suffering is difficult in cases involving comas or so-called vegetative states. It can be done, though, through medical testimony such as a neurologist testifying about the testing he did and the observations he made. Family members and nurses can show that the decedent cried out in pain, winced and so forth.

[Walsh v. Staten Island Obstetrics & Gynecology Associates, P.C.](#) is an oft-cited case in this area. There, an appeals court upheld a verdict of **\$650,000** in the case of an infant in a vegetative state for his entire eight year life. The court found that his level of awareness was established by

testimony that he cried when he received painful stimuli and smiled and laughed at pleasurable stimuli.

Colombini v. Westchester County Health Care Corp. is a tragic case involving the death of a six year old boy. Michael Colombini was at the hospital undergoing magnetic resonance imaging when he was struck by an oxygen tank as he lay inside the MRI machine. He died from his injuries 53 hours later.

This is an MRI machine similar to the one in the Colombini case:



A medical malpractice case was brought by Michael's parents against the hospital and several others including the machine manufacturer, nurses, technicians and doctors. Damages were sought for Michael's pain and suffering. Additionally, plaintiffs claimed punitive damages (recoverable when a defendant engages in willful or wanton conduct evidencing an utter indifference for the safety of others). Much of the **still pending litigation from this 2001 accident** relates to the punitive damages claim (trial judge's July 2009 decision [here](#)) and the claims against defendants other than the hospital (which acknowledged its responsibility early on and offered \$1,000,000 to settle).

The issue of pain and suffering in the **Colombini** case made its way to the **appellate court**. Both sides submitted medial affidavits.

- Defendants' neurologist claimed that because Michael had been sedated before the MRI procedure, he was already unconscious at impact and that after impact the brain damage from the impact made him unable to feel pain.
- Plaintiffs, however, submitted an affidavit from an anesthesiologist who stated that the sedatives merely put Michael into a tranquil state and that he was awake and experienced significant pain and suffering.

The appellate court in the Colombini case found that the competing medical affidavits resulted in issues of fact to be determined by a jury as to whether Michael did indeed experience conscious pain and suffering.

Whether plaintiffs prevail in the **Colombini** case as to pain and suffering or not, they will still face the fact that it was only two days after the accident that death occurred. Courts have necessarily addressed the issue of the amount of time a decedent suffered before death and have adjusted pain and suffering awards accordingly, as we discussed [here](#).