

## TRIAL TRANSCRIPT OF DR. GEORGE VINCENT DIGIACINTO; 1990 Trial Trans. LEXIS 746

Supreme Court of New York, New York County

003466/1987

June 12, 1990

### **Reporter**

1990 Trial Trans. LEXIS 746 \*

DWIGHT CARSON, Plaintiff, -against- NEW YORK CITY HEALTH and HOSPITALS CORP., EARL JAMES, MAUREEN E. BOOKER and GEORGE DiGIACINTO, Defendants.

**Expert Name:** Dr. Vincent DiGiacinto, M.D.

### **Disclaimer**

---

Certain information may have been removed or redacted. LexisNexis, its subsidiaries, affiliates and related entities bear no responsibility whatsoever for such content or any removal or redaction thereof.

### **Counsel**

---

[\*1] WIESEN, GURFEIN & JENKINS, ESQS., Attorneys for Plaintiff, New York, New York, BY: MARK WIESEN, ESQ.

BOWER & GARDNER, ESQS., Attorneys for Defendant, New York, New York, BY: JAY RAPPAPORT, ESQ.

### **Judges**

---

Before HONORABLE IRA GAMMERMAN, Justice

### **Proceedings**

---

1 3946

[2](Whereupon the trial resumes after

[3]the recess.)

[4](Whereupon the jury enters the

[5]c courtroom.)

[6]THE COURT: We are going to interrupt

[7]the presentation of the plaintiff's case.

[8]It is almost finished. All [\*2] that is nec-

[9]essary to complete the plaintiff's

[10]presentation is the final reading of

[11]the portion of the deposition of Dr.

[12]Booker, a portion of which has already

[13]been read and certain bills for Mr.

[14]Carson.

[15]We have Dr. DiGiancinto with us

[16]so we will call him.

[17]DR. G E O R G E V I N C E N T

[18]D I G I A C I N T O , 330 West End

[19]Avenue, New York, New York 10023, called

[20]as a witness by and on behalf of the

[21]Defendants, having been first duly sworn, was

[22]examined and testified as follows:

[23]THE COURT: Go ahead.

[24]DIRECT EXAMINATION

[25]BY MR. RAPPAPORT.

[1]3947

[2]Q DR. DiGiancinto, before today did you

[3]ever receive any subpoena from Mr. Wiesen's office

[4]to appear in court?

[5]A Yes, I did.

[6]MR. WIESEN: Objection.

[7]THE COURT: Overruled.

[8]Q At any time after you received that

[9]subpoena did Mr Wiesen ever ask you to come to court

[10]to testify?

[11]A No.

[12]Q Now doctor let me ask you this. Are

[13]you a physician duly licensed to practice medicine

[14]in the State of New York?

[15]A Yes, I am.

[16]Q And I want to give the jury some idea

[17]of [\*3] your background up until 1984 so could you tell

[18]us initially sir where did you go to medical school?

[19]A Harvard Medical School.

[20]Q When did yo complete your medical school

[21]training at Harvard?

[22]A 1970.

[23]Q And after 1970 did you then continue

[24]or pursue your medical career training?

[25]A From 1970 to 1972 I was a general surgery

[1]3948

[2]intern and resident at the Roosevelt Hospital in New

[3]York City. From 1972 to 1974 I was a medical officer

[4]in the United States Navy. From 1974 to 1978 I was

[5]a resident in neurological surgery at the Neurological

[6]Institute at Columbia Presbyterian Medical. Center.

[7]In 1978 I went into the private practice of neurosurgery

[8]and also became a staff member at Harlem Hospital.

[9]Q And following your training in neurosurgery

[10]did you then take your neurosurgical boards?

[11]A Yes, I did.

[12]Q Did you pass those boards?

[13]a Yes, I did.

[14]Q When was that?

[15]A In 1981.

[16]IQ Could you tell us after 19 -- well as

[17]of today what are your hospital affiliations?

[18]A As of today my hospital affiliations

[19]include Harlem Hospital, [\*4] St. Luke's Roosevelt Hospital

[20]Center, Doctor's Hospital and I am instructor in

[21]Neurosurgery at Columbia Presbyterian Medical Center

[22]Q And at Roosevelt Hospital both today

[23]and back in 1984 did you also perform teaching as

[24]well as your private practice of medicine?

[25]A Yes.

[1]3949

[2]Q Who did you teach?

[3]A Residents -- general surgery residents.

[4]Q Now, doctor, you --

[5]THE CXOURT: Roosevelt Hospital

[6]did not hve a neurological residency

[7]program is that right?

[8]THE WITNESS: No they still do

[9]not.

[10]THE COURT: Okay.

[11]Q Doctor were you the surgeon that performed

[12]surgery on Dwight Carson on July 13, 1984?

[13]A Yes, I was.

[14]Q Is there any question about that in your

[15]mind?

[16]A None whatsoever.

[17]Q Doctor in addition to the hopsital records

[18]are there records maintained at the hospital where

[19]they specifically state who was the surgeon and who

[20]was the assistant during any given procedure?

[21]A Yes.

[22]Q I sthat known as an operating room log?

[23]A Yes.

[24]THE COURT: It is in evidence.

[25]MR. RAPPAPORT: We only [\*5] put the

[1]3950

[2]myelogram log in.

[3]THE COURT: Oh. If you will offer

[4]it show it to mr. Wiesen. Is it a redacted

[5]copy?

[6]MR. RAPPAPORT: Yes I took out

[7]the names of the other patients.

[8]MR. WIESEN: NO objection.

[9]THE COURT: That will be Defendant's

[10]N as in Nancy. Pardon me it is not

[11]N, it is "O". That is right,

[12]it is O. You want me to give it to the

[13]witness?

[14]MR. RAPPAPORT: No, I can read

[15]it to the jury with your permission.

[16]THE COURT: All right it is in

[17]evidence

[18]Q Reading from Defendant's Exhibit O which

[19]is the operating room log it indicates from the patient'

[20]named Dwight Carson pre operative diagnosis surgical

[21]cord compression. Operative diagnosis same. Time:

[22]5:40 p.m. 8:35 p.m. Complications during operation

[23]none. Operation. Cervical laminectomy C2, 3, 4 5,

[24]6. Superior Dr. DiGisincinto. First assistant Dr. James."

[25]THE COURT: All right.

[1]3951

[2]Q Now doctor I want you to before -- strike

[3]that.

[4]Before you performed your surgery did

[5]you have an opportunity to review both the myelogram

[6]films and the CT scan films [\*6] that were done on July

[7]13, 1984?

[8]A Yes, I did.

[9]Q I want you to keep in your mind for the

[10]purpose of my next question as to what those films

[11]showed, all right?

[12]A Yes.

[13]Q I want you to assume for the moment that

[14]beginning in June of 1984 Mr. Carson first began to

[15]complain of neurological complaints referable to his

[16]upper extremities and pain in his lower back, that

[17]subsequent thereto progressed to weakness in his

[18]leg and subsequent thereto it progressed to where he

[19]had a buckling of his knee. I want you to assume

[20]further that Mr. Carson up until this point was healthy

[21]and that no trauma, no impact, no specific event that

[22]he can recall of any trauma had brought about these

[23]complaints. With that understanding doctor does the

[24]fact that these complaints first arose as a result

[25]of no trauma, nothing what you know what the CT scans

[1]3952

[2]say have any significance to us as a neurosurgeon.

[3]A Nothing that the CT scan showed a high

[4]degree of pressure against the spinal cord and with

[5]your assumption that a cough ---

[6]THE COURT: Didn't hear a cough.

[7] [\*7] Q You read the record before.

[8]THE COURT: Mr. Rappaport is hypothe-

[9]sizing.

[10]THE WITNESS: I am sorry.

[11]q The record does refer to the cough.

[12]So let's deal with the cough and so the record is

[13]clear we will not leave anything out.

[14]Now you can answer my question:

[15]A given a non traumatic event causing the

[16]on set of a neurological deficit and knowing that the

[17]space for the spinal cord was extremely narrow I wold

[18]say that that type of initiation indicated that it

[19]took very very little to start the spinal cord from

[20]showing symptoms. More clearly the patient evidenced

[21]weakness in his legs and it was brought about by essen-

[22]tially no trauma other than normal every day activity

[23]that would impress me knowing what I did about the

[24]myelogram and CT scan that he had a high degree of

[25]narrowing and a high degree of compression of the

[1]3953

[2]spinal cord. Does that answer your question?

[3]q Yes.

[4]THE COURT: All right that is

[5]the answer.

[6]Q Now we heard the term this patient was

[7]diagnosed as having what is. called cervical stenosis

[8]and also spondylosis if I am [\*8] pronouncing that correctly.

[9]Could you in laymens terms could you

[10]describe to the members o the jury what all of that

[11]means and what was the condition that Mr. Carson had

[12]when he was finally diagnosed by the CT scan and the

[13]myelogram on July 13, 1984?

[14]A Both terms talk number one about the

[15]neck region, the cervical being the neck region. Cer-

[16]vical stenosis indicates that there is a narrowing

[17]of the space where the spinal cord normally runs.

[18]The degree of stenosis would define the degree of narrow-

[19]ing so there may be a severe narrowing which we

[20]will call a severe stenosis. Severe -- cervical spondy-

[21]losis is basically similar in that it talks about changes

[22]in the spinal cord which bring about narrowing of the

[23]spinal cord. These may be arthritic changes. These

[24]may be pre existing changes without any real pathology

[25]but both are meant to describe a space which is smaller

[1]3954

[2]than normal for the spinal cord to pass through.

[3]Q And what effect does spondylosis on an

[4]already cervical stenosis have upon a patient?

[5]A Spondylosis is a progressive process

[6]in that it implies **[\*9]** further changes in the spine which

[7]will increase the narrowing. If this is superimposed

[8]on a canal or added to a canal that is already very

[9]narrow it will imply that the narrowing is increasing.

[10]Q And could you tell us what effect if

[11]any does a narrow cervical canal and spondylosis

[12]have upon a spinal cord, good for the cord, bad for

[13]the cord and how does it affect the cord?

[14]A It is bad for the cord in that compression

[15]of the spinal cord can cause it to either gradually

[16]or very rapidly lose its function. Over time it can

[17]cause the cord to become atrophied or smaller than it

[18]should be because of loss of substance of the spinal

[19]cord.

[20]q When you say loss of substance and we

[21]according to the record am I correct the cord in this

[22]case is described as being atrophic?

[23]a The record does indicate that, yes.

[24]Q You say loss of substance what substances

[25]benig lost and how would that come about and is that

[1]3955

[2]an acute process, was that a long standing process

[3]be more specific.

[4]MR. WIESEN: Objection to the

[5]form.

[6]THE COURT: Well there are about

[7]three [\*10] questions.

[8]MR. RAPPAPORT: You are right.

[9]Let me see if I can break it down.

[10]Q When you say atrophic in regard to the

[11]cord, what is happening to the cord to re-- to create

[12]this condition?

[13]THE COURT: Why is it becoming

[14]atrophic that is the question.

[15]Q It sounds better.

[16]A The cord is becoming visibly smaller

[17]if you have a way of looking at the spinal cord its

[18]diameter would decrease it would get smaller. This

[19]is believed to be secondary to loss of one of two

[20]substances number one actual nerve fibers which can

[21]be actively progressively destroyed and number two

[22]the lining of the nerve fiber something called myelin

[23]sheath which acts as an insulator of nerve fibers and

[24]as an aid of conducting impulses along the nerve fibers.

[25]Some of the nerve fibers may be lost and some of the

[1]3956

[2]myelin sheaths may be lost either with the nerve fibers

[3]intact or not intact. This over a period of time and

[4]with the loss of probably thousands or more appropriately

[5]millions of cells would lead to a smaller spinal cord

[6]or an atrophic spinal cord.

[7]Q What is the mechanism [\*11] that is causing

[8]this atrophic spinal cord over time?

[9]THE COURT: Why are the cells

[10]being lost and the myelin being lost?

[11]A That is a little more difficult to answer.

[12]It may be because of the direct trauma to nerve cells

[13]is causing them to die and shrink away. It may be

[14]because direct trauma to the lining of the nerve cell

[15]or the myelin will cause that to gradually disappear.

[16]It may be that it is causing some sort of inadequacy

[17]of blood supply to the spinal cord leading to either

[18]of the two that I have just mentioned.

[19]Q Doctor assume for the moment in a case

[20]such as Mr. Carson, that no surgery would be performed

[21]to relieve this compression. In your opinion, sir,

[22]to a degree of medical certainty would Mr. Carson's

[23]condition over a period of time get worse?

[24]A Yes.

[25]Q Would you tell us why and how bad in

[1]3957

[2]your opinion would he eventually get?

[3]A In the chronic sense Mr. Carson was showing

[4]signs that his spinal cord was losing function. Because

[5]of the high degree of narrowing that we saw very well

[6]on the myelogram and CT scan it was clear that there

[7] **[\*12]** was at all times active compression or on going pressure

[8]on the spinal cord. This over time alone would cause

[9]progressively more damage to the spinal cord. Moreover,

[10]over a long period of time whether it is a month or

[11]two or six months or whatever there is an increase

[12]in that process we described as cervical spondylosis

[13]with the process that is adding to the narrowing so

[14]that the narrowing was already severe and we woul antici-

[15]pate that with a high degree of certainty that it would

[16]progressively increase. Was there a second part?

[17]THE COURT: You answered the question.

[18]A What would happen ultimately.

[19]THE COURT Well he would get worse.

[20]You said that. What would the eventual

[21]outcome be?

[22]a The eventual outcome would be loss of

[23]all function of the spinal cord and this would result

[24]in the patient's ability to move his extremities and

[25]ability to move his extremities and the ability to

[1]3958

[2]breathe without a respirator.

[3]Q Now you refer to the spondylosis. Is

[4]this part of the normal aging process that all of us

[5]go through as we get on in our years?

[6]a Yes, it **[\*13]** is.

[7]Q Is there any way that you doctors know

[8]about to stop this aging process?

[9]A No.

[10]q And -- I didn't hear you.

[11]MR. WIESEN: I said there is a

[12]fountain of youth.

[13]MR. RAPPAPORT: We have not discovered

[14]the fountain of youth yet.

[15]THE COURT: Go ahead.

[16]q Now doctor you mentioned loss of breathing.

[17]Could you explain to the jury what relation the cervical

[18]area has to breathing inlay terms? Why is breathing

[19]involved?

[20]a There are two mechanisms in -- which

[21]help control breathing. First of all all impulses

[22]come from the brain and the lower portion o the brain

[23]caled the brain stem pass through the region of the

[24]cervical cord that we are discussing and go beyond

[25]that. The two ways in which breathing is affected

[1]3959

[2]is by loss of the ability to expand and contract the

[3]chest itself. There are muscles between each rib called

[4]intracostal muscles and these are controlled by nerves

[5]coming off the spinal cord below the level of the

[6]cervical region or the region we are talking about.

[7]If the cervical spinal cord is damaged those muscles

[8]no longer [\*14] receive muscles from above and therefore

[9]the rib cage itself is no longer expand or contract.

[10]More critically ahd more directly in this case the

[11]diaphram which is the other large muscle and probably

[12]the major muscle to allow breathing comes off at about

[13]the C4 level or right in the middle of where the maximum

[14]compression on the spinal cord was. If the spinal

[15]cord stops working at this level a patient will entirely

[16]lose the ability to breathe on his own.

[17]Q Is it any big deal if a patient stops

[18]breathing?

[19]A Well he either dies or he has to be on

[20]a respirator for the rest of his life.

[21]q Doctor before today did you and I meet

[22]and discuss this case?

[23]a Yes.

[24]Did I also bring with me x-rays some

[25]of which you have seenbefore and some of which you

[1]3960

[2]had not seen before?

[3]ME. WIESEN: Objection, your Honor.

[4]THE COURT: Overruled.

[5]Q Is that correct?

[6]A Yes.

[7]MR. RAPPAPORT: Judge can I put

[8]the shadow box up with your permission?

[9]THE COURT: Sure. Did we ever

[10]find the x-rays?

[11]MR. RAPPAPORT: Yes.

[12]THE COURT: Where are [\*15] they?

[13]MR. RAPPAPORT: In the cabinet.

[14]That was the simple solution. I

[15](Whereupon the shadow box is

[16]placed before the witness.)

[17]MR. RAPPAPORT: I will identify

[18]it your Honor.

[19]THE COURT: All right.

[20]Q I will show you Defendant's exhibit B

[21]which is an x-ray which was taken on July 11, 1984.

[22]Okay?

[23]A All right.

[24]THE COURT: The plain x-ray.

[25]MR. RAPPAPORT: The plain lateral  
film of the cervical region.

[1]3961- 3985

[2]THE COURT: all right.

[3]

[4]

[5]

[6]

[7]

[8]

[9]

[10]

[11]

[12]

[13]

[14]

[15]

[16]

[17]

[18]

[19]

[20]

[21]

[22]

[23]

[24]

[25]

[1]3986

[2]THE COURT: The jury has seen this a

[3]number of times. Go ahead.

[4]MR. RAPPAPORT: That's why I'm going

[5]to go quickly, because we have been through

[6]this.

[7]Q Doctor, in your opinion, to a degree of

[8]medical certainty, does that film show some narrowing of

[9]the cervical area?

[10]A Yes, it does.

[11]MR. WIESEN: Which one is this?

[12]THE COURT: The flat x-ray, plane

[13]x-ray of the cervical spine, taken on the

[14]11th, on the day of admission.

[15]MR. WIESEN: Thank you.

[16]Q And, [\*16] Doctor, is that narrowness something

[17]that. can be measured by you neurosurgeons or

[18]radiologists?

[19]A It can to a degree be measured. It's very

[20]difficult to get a very precise measurement on a plane

[21]cervical spine film.

[22]THE COURT: I take it this is a

[23]narrowing that a competent radiologist

[24]should recognize on this x-ray?

[25]THE WITNESS: Yes.

[1]3987

[2]Q And you in fact did measure that stenosis

[3]with me in your office, is that right?

[4]A Yes.

[5]Q Can you tell the members of the jury, what

[6]was the number, at least so far as the measurement that

[7]you got at that time?

[8]A My recollection is that we measured it to be

[9]somewhere between 12 and 14 millimeters, the variation

[10]being that it is difficult to know precisely where the

[11]front part of the canal or tube begins and where the

[12]back part of the canal begins.

[13]It was somewhere on that order of magnitude,

[14]12 to 14 millimeters.

[15]Q Doctor, let's take the narrowest; let's take

[16]12. And the question I want to ask you, is it fact that

[17]a person has on a lateral film such as this cervical

[18]stenosis which measures [\*17]

[19]lowest, is that a contraindication to performing a

[20]myelogram?

[21]MR. WIESEN: Objection to the leading.

[22]THE COURT: Sustained.

[23]Q In light of that film, Doctor, was it a

[24]departure from good and accepted medical practice to

[25]have a myelogram performed?

[1]3988

[2]A No, it was not.

[3]Q Well, Doctor, during the myelogram--assuming

[4]for the moment that a lumbar myelogram was done--excuse

[5]me--a cervical myelogram, via a lumbar approach. Are

[6]you familiar with that?

[7]A Yes.

[8]Q And in order to do that procedure, must

[9]there be something done with the patient's neck during

[10]the procedure?

[11]A Yes.

[12]Q Could you tell us what's done with the

[13]patient's neck?

[14]A The patient's neck is mildly extended

[15]during--

[16]THE COURT: I missed the word.

[17]Mildly?

[18]THE WITNESS: Mildly extended during

[19]the performance of a cervical myelogram.

[20]Q Why is that?

[21]A In performing the myelogram, one of your

[22]goals is to pool or have the dye, the term we use,

[23]because the substance shows up on x-ray, it's not truly

[24]dye--but an **[\*18]** attempt to pool the dye in the region of the

[25]cervical spinal column.

[1]3989

[2]To do that and to prevent it from running

[3]directly past this area into the region of the brain,

[4]the patient's neck is extended.

[5]Q Now, Doctor, knowing what you know about

[6]this film, and knowing what you know and you just told

[7]the jury has to be done during a myelogram, was it, in

[8]your opinion, a departure from good and accepted

[9]practice to do a myelogram, a cervical myelogram, via

[10]the lumbar approach, on Mr. Carson?

[11]A No, I do not feel that it was.

[12]Q Now, doctor, does a myelogram, as far as you

[13]know, with some extension, carry some risk to a patient?

[14]MR. WIESEN: Objection, your Honor.

[15]THE COURT: Sustained.

[16]Q Does a myelogram--

[17]THE COURT: What risks, if any, are

[18]involved in the performance of a myelogram?

[19]MR. RAPPAPORT: Okay.

[20]THE COURT: Forget about cervical

[21]stenosis for the moment. Just generally

[22]speaking.

[23]THE WITNESS: The risks of a myelogram

[24]include those related to the fact that I

[25]have to perform a spinal tap. It requires

[1]3990

[2]that [\*19] the so-called subarachnoid spade, or

[3]the space where spinal fluid runs, be

[4]entered. The risks there are that you may

[5]develop headache secondary to that, you

[6]could theoretically develop infection

[7]secondary to a spinal tap.

[8]The third possibility in introducing

[9]any substance into the region of the central

[10]nervous system is that it could

[11]theoretically cause some damage to the

[12]nervous system itself, all of which are

[13]extremely low in probability.

[14]Q Now, Doctor, adding on the fact that someone

[15]has a cervical stenosis, does that add on any additional

[16]risks to a patient?

[17]A I think that in a situation in which there

[18]is a compromise of the spinal cord, anything, breathing,

[19]coughing, turning the head, extending the neck, can

[20]cause problems. It is necessary in performing the

[21]myelogram, but I think--in answer to your question--I

[22]think I've answered the question.

[23]THE COURT: Yes.

[24]Q And will you tell us, Doctor, if those risks

[25]exist, if the patient can get worse, why do you

[1]3991

[2]physicians go ahead and do the procedure?

[3]MR. WIESEN: Object to the form, your

[4] **[\*20]** Honor.

[5]THE COURT: Sustained as to form.

[6]Q Why is the procedure done?

[7]A The procedure is performed to define the

[8]pathology which the patient has. It is necessary to

[9]balance the risks of any procedure against the potential

[10]benefits.

[11]In this case the benefits were learning

[12]exactly why he was developing a picture which indicated

[13]trouble with his spinal cord.

[14]Q Does the myelogram have any significance to

[15]you as a neurosurgeon planning a neurosurgical procedure

[16]on the patient?

[17]A In the context of this case, it was

[18]significant in that it very well defined the pathology

[19]which we had to treat. It told us what was wrong and

[20]told us what wasn't wrong.

[21]Q Well, insofar as what was wrong, what did it

[22]tell you?

[23]A It showed us that over the segments of the

[24]spinal canal that we define as C3, C4 and C5 and to a

[25]degree C6, there was a significant degree of narrowing

[1]3992

[2]of the spinal canal, implying very directly that there

[3]was a significant degree of compression of the spinal

[4]cord.

[5]Q And do the findings on a myelogram affect

[6]your technique **[\*21]** or approach or the way you do the surgery

[7]in any fashion?

[8]A Yes, they do.

[9]Q Could you explain that to the jury so they

[10]understand what the relationship is between the

[11]myelogram and your technique and approach in doing the

[12]surgery?

[13]A It affects the technique in two ways. I'll

[14]continue on with the area of compression. It really

[15]defines for us over which segments, or which portion of

[16]the spinal canal, there is compression of the spinal

[17]cord. In this case it was C3, C4 and C5.

[18]It also, importantly, tells us what's not

[19]there. Specifically, the spinal cord effectively ruled

[20]out the possibility of the patient having a tumor--I'm

[21]sorry--the myelogram and CAT scan ruled out the

[22]possibility of the patient having a tumor within the

[23]spinal cord, and it also ruled out the possibility of

[24]the patient having acutely developed a cervical disk,

[25]which would push from the opposite direction.

[1]3993

[2]Now, the question that I was asked was, how

[3]did the myelogram and CT scan affect the surgery.

[4]Q May I just stop you for a moment? We

[5]haven't heard anything about a disk before. **[\*22]** We have a

[6]model here. Would you explain to us what you are

[7]talking about, using the model, if it helps you to

[8]explain it to the jury, if that's possible.

[9]A It's almost easier if I point to the x-ray.

[10]Q Okay.

[11]A And then we'll look at the model.

[12]These are the vertebral bodies, or the major

[13]bone that supports the neck. Between each of these

[14]rectangles lies a cervical disk. Now, it's important to

[15]recognize that the spinal cord lies behind these

[16]vertebral bodies and the lamina, the part of the bone

[17]that actually forms the tunnel for the spinal canal,

[18]lies behind that.

[19]A cervical disk, which can cause pressure on

[20]the spinal cord, would push back--from in front to back.

[21]It would be in front of the spinal cord. The pen now is

[22]the spinal cord: it would be in front of the spinal cord

[23]and push back. That would be very different than

[24]pressure being caused by the lamina or the bone.

[25]On the model, and I don't really think you

[1]3994

[2]can see it that much better, the model is held in about

[3]the same position as the x-ray. These bones up front

[4]are the vertebral bodies, **[\*23]** the plastic-looking wafers are

[5]the disks, and the bone behind are the cervical laminae,

[6]with the yellow in between being the spinal cord.

[7]So that pressure from the lamina comes from

[8]behind forward, pressure from the cervical disk would

[9]come from forward back.

[10]Q What difference does it make for you as an

[11]neurosurgeon? Why do you care whether pressure is

[12]coming from frontwards back or from backwards front? Is

[13]it important to you at all?

[14]A It's extremely important, because it very

[15]much tells us where we operate from. If the pressure is

[16]from the bones that we have called the laminae, this can

[17]be approached from behind and removed. From behind you

[18]can't with any degree of safety reach past the spinal

[19]cord and remove the disk that we have described pushing

[20]from forward back.

[21]So that if there were a very large disk, our

[22]approach from behind would be inadequate, and we would

[23]rather have to perform something called an anterior

[24]cervical disectomy, or resection, which would allow us

[25]to go right to the disk.

[1]3995

[2]And the key factor is that the spinal cord

[3]can't just **[\*24]** be pushed out of the way; you can't get to

[4]the front of the spinal cord from in back. And in

[5]contradistinction, you can't get to the back of the

[6]spinal cord from in front.

[7]So it's very important to know whether the

[8]pressure is coming from behind or in front of the spinal

[9]cord.

[10]Q Just let me ask you this, Doctor: We've

[11]all--I assume some of us are experienced and heard about

[12]lumbar disks, and we may have known people that had

[13]surgery on a lumbar disk from behind.

[14]What's the difference--

[15]THE COURT: There's no spinal cord

[16]there, is that it, Doctor?

[17]THE WITNESS: Correct.

[18]THE COURT: Next question.

[19]MR. RAPPAPORT: It saves us time.

[20]Q Doctor, I want to show you, if I may,

[21]Defendant's Exhibit C. Can you just put that up there,

[22]and Defendant's Exhibit--let's just deal with

[23]Defendant's Exhibit C, and we'll go through the rest.

[24](Witness complies.)

[25]Q Is that a film that was done with injection

[1]3996

[2]of the dye or without injection of the dye?

[3]A I don't think I see any dye, but I'm not--I

[4]don't see any dye on this picture.

[5]Q [\*25] Now, I want to ask you, sir, in your opinion

[6]--in your opinion, to a degree of medical certainty,

[7]does that picture depict an individual whose head is in

[8]hyperextension?

[9]A No, it does not.

[10]Q Why not?

[11]A Well, I can't--first of all, the term

[12]"hyperextension" is a very relative term, and it doesn't

[13]imply a certain position, but more importantly, a

[14]portion of the cervical spine that I can see is really

[15]rather straight on this x-ray.

[16]THE COURT: Doctor, on that x-ray can

[17]you determine--from that x-ray--whether or

[18]not there's any narrowing of the cervical

[19]canal?

[20]THE WITNESS: I am just--

[21]THE COURT: Using that x-ray alone.

[22]THE WITNESS: I would have to say no,

[23]as the simplest answer.

[24]THE COURT: You don't think that x-ray

[25]is sufficient to make a determination

[1]3997

[2]vis-a-vis narrowing, is that correct?

[3]THE WITNESS: Well, I can see the

[4]third cervical lamina, and that was the

[5]level where the narrow begins. I have not

[6]measured this x-ray, so--

[7]THE COURT: Forget about measuring.

[8]Eyeballing it for the moment. I take it the

[9] [\*26] other way--maybe I shouldn't take it.

[10]Were you able to determine on the

[11]x-ray of July 11, Defendant's B, without

[12]measuring initially, that from your viewing

[13]of it there appeared to be some degree of

[14]narrowing?

[15]THE WITNESS: I think that it looked

[16]as though I should measure it. I'm not sure

[17]if that answers your question.

[18]THE COURT: Well, are you saying that

[19]the x-ray without measurement raised a

[20]suspicion which justified measurement?

[21]THE WITNESS: Yes.

[22]THE COURT: That's my sense of your

[23]answer.

[24]THE WITNESS: Yes.

[25]THE COURT: Okay. Now, taking this

[1]3998

[2]x-ray, can you--does this x-ray raise the

[3]same degree of suspicion?

[4]THE WITNESS: Well, I think because I

[5]only see one level, it doesn't raise it as

[6]readily. Nevertheless, if I were to examine

[7]the x-ray, I would see that there was a much

[8]smaller canal at the C3 level than the C2

[9]level, and that may very well make me ask

[10]the question, is this canal narrow?

[11]THE COURT: Well, that's a question

[12]you would ask yourself as a neurological

[13]surgeon.

[14]THE WITNESS: Yes.

[15] [\*27] THE COURT: How about a radiologist

[16]about to do a myelogram? Is that a question

[17]you believe that radiologist should ask

[18]himself or herself?

[19]THE WITNESS: That is a thought

[20]process which I believe a radiologist who's

[21]going to do a myelogram runs through.

[22]THE COURT: Obviously--I'm sorry--I

[23]interrupted you?

[24]THE WITNESS: I can't answer either in

[25]general or any specific setting, but I think

[1]3999

[2]the answer is yes.

[3]THE COURT: Okay.

[4]Q Doctor, knowing what we know about the

[5]cervical stenosis, and even knowing what we know about

[6]the CAT scan later, in your opinion does that x-ray

[7]demonstrate hyperextension?

[8]A Yes.

[9]Q Can you tell hyperextension from an x-ray,

[10]one single x-ray?

[11]A No.

[12]THE COURT: Well, I'm not clear. If

[13]you can't tell hyperextension, how can you

[14]exclude hyperextension? Do you understand

[15]my question?

[16]THE WITNESS: I'll answer it in two

[17]ways. Number one, on the x-ray shown, I

[18]really don't see any degree of extension of

[19]the neck.

[20]THE COURT: No extension at all?

[21]THE WITNESS: On this x-ray.

[22] **[\*28]** THE COURT: Okay.

[23]THE WITNESS: Number two, the term

[24]"hyperextension" is really a relative term

[25]and I think it's difficult to define.

4000

[1]

[2]THE COURT: Let me see if I can--you

[3]said, Doctor, that the patient's neck should

[4]be mildly extended during the myelogram.

[5]THE WITNESS: Yes.

[6]THE COURT: All right. For the

[7]purpose of this discussion, let's say the

[8]hyperextension is anything that exceeds mild

[9]extension, okay? That's my definition for

[10]the moment.

[11]Do you understand?

[12]THE WITNESS: I understand what you're

[13]saying.

[14]THE COURT: That may not be an

[15]appropriate definition, but leave out

[16]hyperextension.

[17]THE WITNESS: Yes.

[18]THE COURT: Tell us whether or not you

[19]see anything--I take it you don't see

[20]anything--you don't see any extension at all

[21]on this x-ray?

[22]THE WITNESS: No.

[23]THE COURT: Not even mild extension.

[24]THE WITNESS: I really am not sure how

[25]to answer that question 100 percent. I mean

[1]4001

[2]is it 5 degrees extended beyond neutral? I

[3]really can't say from this single x-ray.

[4]THE COURT: When you said **[\*29]** mild

[5]extension, can you give that a number?

[6]THE WITNESS: Again, it's a relative

[7]statement depending on where the patient

[8]starts. Every x-ray, every lateral cervical

[9]spine film looks very different. If you

[10]tell the patient to stand there and you take

[11]an x-ray of his neck, each x-ray will look

[12]very different.

[13]If all x-rays were measured against

[14]each other, they may show very different

[15]angle from one to the next.

[16]So that I can't tell you that this

[17]x-ray shows that the head is extended at

[18]all, honestly.

[19]THE COURT: Go ahead.

[20]Q Now, Doctor, I want to show you Defendants

[21]Exhibit F.

[22](Shown.)

[23]Q Does that film indicate that there is dye in

[24]the neck at that point?

[25]A Yes, I do see contrast material or dye.

[1]4002

[2]Q Can you just point out to the jury, so they

[3]can know what you're looking at.

[4]You are comparing two x-rays now. You have

[5]up--because I have to do it for the record, Doctor--

[6]A I'm sorry. I put back up Defendant's

[7]Exhibit C, which is an x-ray that I do not see any

[8]contrast material or dye on, and I have left [\*30] up

[9]Defendant's Exhibit F. I can see, and I'm not sure if

[10]you can see from there, that there is a whitish

[11]appearance from here to here, and I'm sorry I can't say

[12]that better, which indicates that there is no contrast

[13]material or dye over this area.

[14]I do not see that whitish appearance here.

[15]MR. RAPPAPORT: Judge, do you have one

[16]of those crayon marking pencils?

[17]THE COURT: That's the one I gave you.

[18]MR. RAPPAPORT: Maybe. I won't

[19]stipulate.

[20]THE COURTS: Go ahead.

[21]Q Could you just take this pen and can you

[22]outline for us on Defendant's Exhibit F the white dye

[23]that is in the spinal canal?

[24]A In front of the spinal cord I would draw a

[25]line approximately like that.

[1]4003

[2]Q Make it as dark as you can.

[3]A I'm sorry. Below the level of C3 I can't

[4]see as well. Behind the spinal cord, where I know the

[5]spinal cord lies, I'll draw a line like that, which then

[6]tapers down and I believe, although I'm much less

[7]certain, that the line continues about there, and then

[8]again I don't see enough of the contrast material to

[9]really allow me to draw it any [\*31] further.

[10]Q You indicate that the contrast material

[11]begins to taper down. Does that have any significance

[12]to you as a doctor?

[13]A That is the narrowing of the spinal canal

[14]that we have been speaking about.

[15]Q Now, in your opinion, Doctor, to a degree of

[16]medical certainty, does that x-ray indicate that the

[17]patient's head has been hyperextended?

[18]A I cannot say that there's any evidence of

[19]hyperextension on this x-ray.

[20]Q Can you say whether or not, from that x-ray,

[21]from any x-ray, that there's any more extension than

[22]should have been done in this particular patient?

[23]MR. WIESEN: Objection.

[24]THE COURT: Overruled.

[25]MR. WIESEN: Leading.

[1]4004

[2]A No, I can't.

[3]THE COURT: I'm not clear, Doctor.

[4]Are you saying that the x-ray itself cannot

[5]be the basis for an opinion one way or the

[6]other? Is that--

[7]THE WITNESS: Could I have the

[8]question back?

[9]THE COURT; Let me see if I can.

[10]THE WITNESS: Okay.

[11]THE COURT: Can you tell us, does that

[12]x-ray give you enough information concerning

[13]the position of the patient's head, [\*32] neck and

[14]shoulders and body for you to determine to

[15]what extent his neck is being extended?

[16]THE WITNESS: I can determine from

[17]looking at this x-ray that there is not a

[18]single degree of extension of his neck.

[19]THE COURT: All right.

[20]Q Doctor, I would like to show you a

[21]photograph that's been introduced by plaintiff's

[22]counsel, which is Plaintiff's--

[23]THE COURT: Drawing.

[24]MR. RAPPAPORT: Okay.

[25]Q --a drawing--

[1]4005

[2]THE COURT: What exhibit is it?

[3]MR. RAPPAPORT: Plaintiff's Exhibit 5.

[4]THE COURT: Okay.

[5]Q Aim. I correct, Doctor--or let me ask you

[6]this: Does that drawing depict what hyperextension

[7]would appear like?

[8](Shown to witness.)

[9]A Well, it's certainly indicating that this

[10]gentleman has his head pushed back to a significant

[11]degree, and again we've sort of wrestled with the

[12]definition of hyperextension. Assuming that his head.

[13]normally was sitting straight on his neck, that would to

[14]me indicate a significant degree of extension.

[15]Q Does the x-ray that we referred to during

[16]the myelogram indicate that same degree [\*33] of extension?

[17]A No, it does not.

[18]Q Does it even come close?

[19]A No, it does not.

[20]MR. WIESEN: Objection.

[21]THE COURT: Sustained.

[22]The jury will disregard the question

[23]and the answer.

[24]Q Doctor, you also indicated to us previously

[25]that before your surgery you saw the CAT scan films of

[1]4006

[2]the patient that were taken on July 13, 1984, is that

[3]right?

[4]A Yes.

[5]Q Although we had it before, I want to make

[6]sure it's clear: Can you tell us what the difference is

[7]between what we're seeing in a CAT scan and myelogram,

[8]as far as technique or anything else involved?

[9]A The CAT scan gives us the ability to see

[10]what I'll define as slices of the neck. So that by the

[11]technology, which I can't explain, essentially makes a

[12]slice, and it's as if it were putting up a thin section

[13]of the neck.

[14]It shows us bony structures, soft tissue

[15]structures, and in this case it shows us the contrast

[16]material.

[17]Q Doctor, I want to show you what's been

[18]marked as Defendant's Exhibit J in evidence, which is

[19]the CAT scan, or part of the CAT scan.

[20] **[\*34]** (Shown.)

[21]Q And if and when the jury gets to look at

[22]that up close, could you tell us, please, first of all,

[23]if there is--let me just move back.

[24]When the jury is going to look at that, how

[25]would they find the spinal cord and what would the

[1]4007

[2]normal configuration of the spinal cord be without

[3]compression?

[4]MR. WIESEN: Objection.

[5]THE COURT: Overruled.

[6]MR. WIESEN: The jury is going to look

[7]at it.

[8]THE COURT: The jury's going to look.

[9]at it, presumably, if they want to. They

[10]will have all of the exhibits, including the

[11]x-rays and CT scans, in the jury room.

[12]MR. RAPPAPORT: Thank you, your Honor.

[13]A I'm sorry, do you want--

[14]THE COURT: How would a lay person

[15]examining that x-ray or that CAT scan

[16]determine what is the spinal cord?

[17]THE WITNESS: Okay. Unfortunately--

[18]THE COURT: Just tell us.

[19]THE WITNESS: Well, I mentioned that

[20]this CAT scan was done with the presence of

[21]the contrast material or the dye---

[22]THE COURT: It was?

[23]THE WITNESS: --in place. I can see

[24]it. And this study was the one done on July

[25] [\*35] 13th. On the lower right picture, for

[1]4008

[2]example, we can see the bony structures in

[3]front--this is the front and this is the

[4]back. We can see the bony structure, we can

[5]see the space where the spinal cord runs,

[6]and we can see the structure that we call

[7]the lamina, or the structure from behind.

[8]Unfortunately, I even had to get very

[9]close to see it, but I see a very thin black

[10]area surrounded by a thin white area that

[11]represents the spinal cord partially

[12]surrounded by contrast material.

[13]That is, I can see the spinal cord in

[14]there. I'm sorry, I'm sure they can't see

[15]it from here.

[16]THE COURT: When they get close up,

[17]what do they look for, a dark area

[18]surrounded by a white area?

[19]THE WITNESS: Correct, within the

[20]confines of this area of bone or this

[21]tunnel, as I've described it earlier, there

[22]is a very thin, flat, dark area with a

[23]little line of white going by it. That

[24]dark, black area is where the spinal cord

[25]lies.

[1]4009

[2]THE COURT: Doctor, in performing a

[3]CAT scan, is there any period of time, any

[4]interval of time, that you have to wait

[5] [\*36] after instilling the contrast material,

[6]before taking the x-rays?

[7]THE WITNESS: If the CAT scan is done

[8]immediately as the myelogram is completed,

[9]there may be too much dye, which will

[10]confuse the picture. You will get what's

[11]called averaging, and it may not be able to

[12]see the opening--

[13]THE COURT: Assuming you are not doing

[14]a myelogram, you are doing a CAT scan, there

[15]are CAT scans done with contrast, are there

[16]not?

[17]THE WITNESS: That's mixing

[18]terminology. When a CAT scan is done with a

[19]contrast, the contrast is injected into a

[20]vein.

[21]THE COURT: That's not the same

[22]metrizamide that would be used in connection

[23]with the myelogram?

[24]THE WITNESS: No, it is not.

[25]THE COURT: Okay, go ahead.

[1]4010

[2]Q Insofar as the configuration of a normal

[3]spinal cord, what shape would it take?

[4]A It should be fairly round, perhaps a little

[5]bit wider than deep, but basically round.

[6]Q Does the CAT scan that you have up in front

[7]of you indicate any pathology or abnormalities in regard

[8]to Mr. Carson's cervical canal and spinal cord?

[9]A The **[\*37]** myelogram--

[10]THE COURT: This is the CAT scan.

[11]THE WITNESS: I'm sorry. The post-

[12]myelogram CAT scan indicates, number one, I

[13]that there is a very narrowed spinal canal

[14]and, number two, that the spinal cord is

[15]very flattened within that narrowed canal.

[16]That is the pathology which is

[17]visible.

[18]Q Can you tell us at approximately what

[19]levels, and I'm going to give you the other--I'll call

[20]it sheet, which has been marked as Defendant's Exhibit

[21]L, and I know the jury can't see it, but can you just

[22]tell us what levels the CAT scan designates or shows the

[23]beginning of the stenosis, where its most severe point

[24]is?

[25]A This CAT scan is labeled, and I believe

[1]4011

[2]correctly, to indicate C6-C7. Now, on the model, as I

[3]mentioned, we are talking about cervical vertebrae.

[4]This is C1, cervical 2, C3, C4, C5, C6, C7. So the

[5]upper pictures begin at the lower part of the canal, and

[6]each slice, or cut, which is basically slicing across

[7]this--I guess if I do it this way, it slices across

[8]this, and then we can look right at it--is going higher.

[9]The level that first starts **[\*38]** to show stenosis

[10]is around the 5-6 level, and progressively, as we go up,

[11]the space becomes narrower. This is approximately 4-5.

[12]It's very narrow here. And on Defendants L, we

[13]continue up, we see a good deal of narrowing--I'm sorry,

[14]this is not the right sheet. This is another version of

[15]the same picture.

[16]Q Let me show you--you are right. Let me show

[17]you Defendant's Exhibit K.

[18](Shown to witness.)

[19]A Okay. We have come down here from 6-7 to

[20]5-6 to 4-5. Now, when they write 4-5, they are telling

[21]us the two levels between which the bone--between which

[22]you are seeing the picture.

[23]So as we're going up, this area would be

[24]called 6-7, 5-6, 4-5, but it's progressively coming up.

[25]Now, I believe I have the right picture, and

[1]4012/25

[2]we see a continuation of the narrowing at 3-4, and by

[3]2-3 there's very little narrowing again. So that on the

[4]films it's shown to run from approximately 5-6 to

[5]somewhere around the third cervical level.

[6]Q Now, with the patient presenting with

[7]neurological signs and symptoms as the hospital record

[8]indicates, and in light of this CAT **[\*39]** scan, in your

[9]opinion, what was the appropriate treatment for this

[10]patient?

[11]A In this patient, given the clinical setting

[12]that I was presented with, the appropriate treatment was

[13]to perform an operation called a cervical laminectomy to

[14]attempt to relieve the pressure on the spinal cord.

[15](Continued on next page.)

[16]

[17]

[18]

[19]

[20]

[21]

[22]

[23]

[24]

[25]

[1]4026

[2]Q Now when you perfrom on a cervical laminec-

[3]tomy are you relieving the pressure from the front

[4]or from behind?

[5]A From behind.

[6]Q Now if possible -- well if you can do

[7]it from there could you use the model or any means

[8]and explain to the jury -- let me back up for a second.

[9]Let me show you a blow up of the operative report and

[10]you have read I am sure this operative report before,

[11]is that right?

[12]a Yes, it is.

[13]q Does this operative report contain therein

[14]actually step by step which you did use with an instru-

[15]ment do do this procedure?

[16]MR. WIESEN: Objection.

[17]THE COURT: Sustained.

[18]MR. RAPPAPORT: I am not sure

[19]I understand the problem.

[20]THE COURT : It is a leading question. [\*40]

[21]Q Can you tell from reading this operative

[22]report the instruments that were used?

[23]MR. WIESEN: Objection.

[24]THE COURT: Overruled.

[25]A NO.

[1]4027

[2]Q Can you tell how the instruments were

[3]used from this operative report?

[4]A No.

[5]Q In your opinion is it important to put

[6]in an operative report those two things that is what

[7]instruments are used and specifically how they are

[8]used?

[9]A No.

[10]Q Why not?

[11]a it would be incredibly cumbersome to describe

[12]every single maneuver that was done during a procedure.

[13]You have -- suffice it to say that when you perform

[14]a cervical laminectomy very strict procedures are

[15]followed which are routine and not be defined by

[16]but if you will or step by step. It would be impossible

[17]to do that. It would be impossible for anyone to recall

[18]every single maneuver that was performed.

[19]Q Doctor you were deposed by Mr. Wiesen's

[20]office in this case?

[21]A Yes, I was.

[22]Q You reviewed that transcript before you

[23]took the stand today?

[24]MR. WIESEN: Objection your Honor.

[25]THE COURT: Overruled. I [\*41] take  
it you looked over your deposition?

[1]4028

[2]THE WITNESS: Yes.

[3]Q Were you asked at any place in that

[4]deposition --

[5]THE COURT : Sustained.

[6]MR. RAPPAPORT: Judge is it the

[7]asked part --

[8]THE COURT: I sustained the objection.

[9]MR. RAPPAPORT: I am just trying

[10]to figure out how to rephrase.

[11]THE COURT: I will discuss that

[12]with you after lunch I am sure the

[13]doctor will be back after lunch.

[14]MR. RAPPAPORT: Do you want to

[15]break at this point your Honor?

[16]THE COURT: No, no, no, by all

[17]means.

[18]Q Doctor can you tell us please you said

[19]that -- can you tell us how a cervical decompressive

[20]laminectomy is performed in a case such as this?

[21]MR. WIESEN: Objection your Honor.

[22]THE COURT: Overruled.

[23]Q That means you can answer the question.

[24]A I was trying to decide how best to answer

[25]it.

[1]4029

[2]THE COURT: All right. I

[3]A I will use both the model and the x-rays.

[4]Now I will place the x-rays in the position

[5]that the patient was operated in which was the reverse

[6]of what we were looking at --

[7] **[\*42]** MR. WIESEN: Your Honor --

[8]THE COURT: He is saying how it

[9]was generally done.

[10]MR. WIESEN: Thank you.

[11]THE COURT: That was the question.

[12]MR. RAPPAPORT: Right.

[13]THE COURT: So I presume he is

[14]answering the question.

[15]Q Can you recall the specifics of how it

[16]was done in this particular case?

[17]A I need help in answering that because

[18]again if you are asking me --

[19]THE COURT: doctor that is a very

[20]simple question. You remember this par-

[21]ticular operation to the extent that

[22]you can describe what happened here as

[23]opposed to the way you generally do this

[24]procedure.

[25]THE WITNESS: Both are essentially

[1]4030

[2]the same.

[3]THE COURT: You remember this

[4]procedure?

[5]THE WITNES:S Not entirely in

[6]the sense again of every single step

[7]but I think I can --

[8]THE COURT: Is it your testimony

[9]that you did this procedure the way you

[10]do this operationgenerally?

[11]THE WITNESS: Yes.

[12]THE COURT: So tell us how you

[13]do the operation generally.

[14]Q Could you tell us?

[15]A Okay. I have placed the x-rays the way

[16]we operate [\*43] on the patient which is facing downward.

[17]so that the back of the neck is up here. That is

[18]represented by this area here. I will tip this a little

[19]extra. The bone or the lamina which we need to approach

[20]is right here. To perform the procedure you make incis-

[21]ion up and dowh which is difficult to show on this

[22]x-ray but project this out and back until we come to

[23]the bone. We then push the muscle aside so that we

[24]basically have a view from behind of the bone from

[25]there to thre.

[1]4031

[2]From here to here. We then remove the bone

[3]that is called the lamina and over the levesl of C3

[4]throughC6 which I believe is what the operative report

[5]states the bone from here to here is removed.

[6]THE COURT: What the C2 --

[7]A In general a portion of the second cervical

[8]lamina has to be removed to allow exposure of the C3.

[9]It tends to be an overlapping. This is the second cervical

[10]lamina and this is the third. It is difficult to remove

[11]the third without removing a portion of the second.

[12]More than likely only a portion of the second lamina

[13]was removed. The goal is to remove the lamina which

[14]is this **[\*44]** bone from here to here at each level to allow

[15]more space for the spinal canal. You open up the spinal

[16]canal to make the tunnel bigger if you will

[17]Q Doctor just if I can turn to the operative

[18]report. It says the incision was taken down through

[19]the skin subcutaneous tissue. Muscle tissue-

[20]THE CORT : That is not tissue.

[21]That is muscle fascia.

[22]Q I read it wrong. Muscle fascia.

[23]The pectoralis muscles were then disec-

[24]tured off the spinous process. Is that what you -- just

[25]again what that means.

[1]4132

[2]A I have described that portion of the operation

[3]where we cut through the tissue down to the bone and

[4]then push the muscle aside so we can see from here

[5]to here.

[6]Q Then it says adequate hemostasis was

[7]achieved with coagulation. What do we mean by hemostasis

[8]and coagulation?

[9]A When we cut through any tissue and you

[10]cut through muscle you invariably cut through blood

[11]vessels. Hemostasis stopping the blood. A coagulation

[12]is a device which is used to coterize or in simplest

[13]terms cook the tissue. By cooking the tissue in a

[14]very small area it actually closes off any **[\*45]** blood vessel

[15]that may be bleeding. So obtaining hemostasis by cor-

[16]tering means stopping the bleeding by cooking any blood

[17]vessel you can find.

[18]Q Now it goes on doctor it says utilizing

[19]the Rongeurs. I will stop at that point. What is

[20]a Rongeur? We hve heard some talk about a Rongeur

[21]coudl you tell us what it is anddescribe it to the

[22]jury so they understand it as simple as you can.

[23]A A Rongeur is a general term used to describe

[24]an instrument which can remove bone. It is somewhat

[25]similar to a plyers in some cases but it is. basically

[1]4033

[2]an instrument which has two jaws --

[3]THE COUR: T We have seen one.

[4]THE WITNESS: You have?

[5]THE COURT: Yes.

[6]A Two cups which will come together and

[7]cut through the bone. I that adequate?

[8]A Are there different types of Rongeurs?

[9]A Yes, there are.

[10]Q Are there different types used during

[11]a surgical procedure such as this?

[12]A Yes, there are.

[13]Q Could you tell us what the two types

[14]of Rongeurs are?

[15]THE COURT: He didn't say there

[16]are different Are there just two types.

[17]THE WITNESS: [\*46] It is appropriate

[18]to talk about only two types in this setting.

[19]THE COURT : Go ahead.

[20]A The two types of Rongeurs and I will

[21]give the names and explain the difference

[22]difference is something called the Lexel Ronguer

[23]which looks like a plier and you squeeze the handle

[24]down at this end and the cups come together and bite

[25]off some bone. That is the Leksell ronguer. And

[1]4034

[2]Kerrison basically does the same thing but it does

[3]it differently. There is something that is called

[4]the foot plate that traps one edge of the bone and

[5]a face plate that is pushed down against it by using

[6]again a handle that you squeeze and it again basically

[7]does the same thing by amputating the bone it pushes

[8]it together and cuts the bone off. Those are the

[9]two main types of Rongeurs used.

[10]I want you to assume for the moment in

[11]this case that a neurosurgeon has testified that in

[12]the area of the cervical tenosis one should never use

[13]the second one--

[14]A The Kerrison

[15]Q the one with the blade and introduced

[16]under the lamina in contact with the dura would you

[17]agree or disagree with that [\*47] statement?

[18]A I agree with that statement in this sett-

[19]ing.

[20]Q Did you in this case ever introduce the

[21]blade of a -- of that type of Rongeur underneath the

[22]lamina in contact with the dura?

[23]A In the setting of severe cervical stenosis

[24]or narrowing one does not introduce anything under

[25]bone that will compress the dura. I stated earlier

[1]4035

[2]that I can not remember every detail of this operation

[3]but I can state whenever presented with this situation

[4]one very very carefully does not introduce anything

[5]under the bone which compresses against the dura.

[6]So I can state with a degree of absolute certainty

[7]that was not done during this case.

[8]q Is there anything in your operative report

[9]or anything in the hospital chart that exists that

[10]indicates you took the second Rongeur, the one with

[11]the blade and put it underneath the lamina and put

[12]it in contact with the dura?

[13]MR. WIESEN: Objection.

[14]THE CORT Sustained.

[15]q Is there anything in the operative records

[16]that indicate that?

[17]MR. WIESEN: Objection.

[18]THE COURT: Sustained.

[19]Q Can you help **[\*48]** me in phrasing the question?

[20]THE COURT: Well the operative

[21]reports and the hospital records speak

[22]for themselves. We have been through

[23]this a number of times.

[24]MR. RAPPAPORT: Okay but not

[25]by my witness Judge. Okay I will

[1]4036

[2]follow the court's ruling.

[3]the court; That is appropriate

[4]cross examination not direct of your

[5]own client.

[6]MR. RAPPAPORT: Okay.

[7]Q Doctor if you don't use the Rongeur

[8]wher eyou stick the blade under how do you remove the

[9]lamina? How was it done?

[10]MR. WIESEN: Asked and answered.

[11]MR. RAPPAPORT: It was not.

[12]THE COURT: Objection overruled.

[13]A The main instrument that was used is

[14]the Lexel Rongeur. It functions by not having to really

[15]pass beyond the edge of the bone it can be right up

[16]to the edge of the bone and catch on the bone and in

[17]squeezing together rmove the bone. You do not have

[18]to put anything underneath the bone and displace

[19]the dura to do that.

[20]Q Doctor it says in addition utilizing

[21]the Rongeur the spenous processes and arches were remove

[22]dfrom C2 to C5 vertebra. There was a one sotrometer

[23]rent **[\*49]** in the dura. The distal aspect of the laminectomy

[24]which was repaired with 40 silk. Let meaks you about

[25]the rent in the dura.

[1]4037

[2]I want you to assume for the moment that

[3]we have had two neurosurgeons testify that a rent in

[4]the dura in and of itself is not an indication that

[5]anybodyin -- did anything wrong.

[6]Do you agree or disagree with that?

[7]A I agree.

[8]Q Could you tell us how it is that one

[9]can get a rent in the dura and if you could, could

[10]you give us some idea of the measurement of the close-

[11]ness of where you are operating in relationship to

[12]the spinal cord? I want to give the jury some idea

[13]of what you are seeing and how you are doing it.

[14]Let me back up a second. are you doing

[15]this operation with your naked eye?

[16]A Yes.

[17]Q Could you give us an idea doctor how

[18]it is that one can have a rent in the dura or let me

[19]pullback now. What is a rent in the dura?

[20]A More simply stated it is a tear

[21]in the layer of tissue surrounding the spinal cord

[22]and the spinal fluid.

[23]Q you are the third neurosurgeon that has

[24]said that is not an indication **[\*50]** --

[25]MR. WIESN: Objection.

[1]4038

[2]THE COURT: Sustained.

[3]Q How can it come about during this procedure

[4]even though you are doing it in the best of hands?

[5]A I have described as best I could the manner

[6]in which the Lexel Rongeur works. When -- we must

[7]recall that the bone was pressing very hard against the

[8]dura and the spinal canal so the dura is pushed up

[9]against it. I mentioned too that we do not want to

[10]use an instrument that pushes the dura away because

[11]we don't want -- we don't have the space to push the

[12]dura away and sneak under the spinal canal without

[13]potential doing soem harm to the spinal cord so we

[14]tried within with this instrument to shave off. You

[15]have to get to the level where the bone and dura touch

[16]each other without the specific recollection that is

[17]probably the mechanism in which the hole in the dura

[18]or the nick in the dura was created . It is also

[19]possible that the dura was actually stuck to some of

[20]the ligaments which underlie the bone. It is possible

[21]that in the process of moving that ligament the small

[22]tear could have been produced as well.

[23] **[\*51]** ?Q Now doctor what is the distance between

[24]the lamina and the sinal cord below: Can you give

[25]us some idea of how close it is to each other?

[1]4039

[2]THE COURT: In this type of situa-

[3]tin.

[4]Q Especially in this type of situation.

[5]A You presume there is no distance. There

[6]may be a milimeter or two milimeter thick sinal fluid

[7]but you don't allow yourself the luxory of presuming

[8]that. You presume the bone is pushig down to where

[9]the spinal cord is. If I look at the x-ray I can see

[10]a very thin layer of contract and that impleis that

[11]there is perhaps amilimeter or two of which is supposedly

[12]a one fiftieth of an inch but we don't even presume

[13]that much space exists. I would say it is pushed up

[14]against the bone.

[15]TEH COURT : Was there any epidural

[16]fat in that area?

[17]THE WITNESS: There can be but

[18]ther emay not be.

[19]THE COURT: You can'ttell

[20]I take it from this operative report

[21]wh whethr or not thee was or not in this

[22]case?

[23]THE WITNESS: No, I can't.

[24]Q Dos the severe cervical stenosis have

[25]any effect on whether any epidural fats may be there?

[1] [\*52] 4040

[2]A When stenosis is present chronically

[3]at the highest level of stenosis it is more common

[4]not to find any epidural fat over a period of time

[5]it disappears.

[6]q When there is no epidural fat is there

[7]anything in between the dura and the lamina?

[8]A I mentioend there isa ligament it has

[9]a name called theligamentum flavum. It is a structure

[10]which runs from the outer surface the top surface of

[11]the lamina below and inserts underneath the lamina

[12]above. I am sorry I can't dra that better but there

[13]may be some ligamentum flavum between the bone and

[14]the spinal canal -- excuse me and the dura between

[15]the bone and ura at the lower end of each lamina so

[16]that there is that potential tissue there.

[17]More over there are veins that can run

[18]up and down in the space between thebone and the dura.

[19]These may or may not be present under any circum-

[20]stances.

[21]Q Now doctor it says here that the rent

[22]in th dura was repaired with 40 silk. How was that

[23]done?

[24]A A silk suture on a very fine needle is

[25]-- and using a needle holder is used to close one

[1]4041

[2]edge of the dura **[\*53]** to the other edge of the dura. I

[3]am not sure how to go beyond that. It is sutured tog-

[4]ether with one, two, three, whatever, number of stitches.

[5]THE COUR:T You can't tell the

[6]number of sutures that were used

[7]in the report?

[8]THE WITNESS: No.

[9]q Doctor I ant you to assume someone testiied

[10]in this courtroom that the rent in the dura was five

[11]sontometers or two inches. Would you agree with that?

[12]A Do you want me to assume

[13]THE COURT: assume that based

[14]not only on the operative report but

[15]based on examination of CT scans taken

[16]of thiS Patient later to show a communi-

[17]cation between the subnarachnoid space

[18]and the epidural space at the levelling

[19]of mid C4 and the assumption

[20]that what is being described here as

[21]t the rent at the C6 level, there was

[22]testimony that since you have a communi-

[23]cation at the mid C4 level the rent was --

[24]THE RENT TRAVERSED THE AREA BETWEEN C6

[25]and mid C4 Which has been described as

[1]4042

[2]five sonometers. I

[3]THE WITNESS: The question is?

[4]THE COURT: do you agree with

[5]that?

[6]THE WITNESS: In this case, no. [\*54]

[7]THE COURT: Next question.

[8]q Doctor let's assume for the moment that

[9]there is a communication at C4. I want you to make

[10]that assumption that is a communication of CSF. I

[11]want you to assume that there is CSF build up in the

[12]potential space that has been created by the surgery.

[13]Assume that also. Does that mean doctor because the

[14]fluid is at the level of C4 that must --

[15]MR. WIESEN: Objection.

[16]THE COURT : Let him finish.

[17]Q Does that mean a five sonometer tear

[18]in the dura?

[19]THE COURT: Sustained.

[20]Q Well doctor --

[21]THE COURT: Of what significance

[22]if any is the fact that the CT scan

[23]revealed a communication between the

[24]subarachnoid space and epidural area

[25]at the mid C4 level?

[1]4043

[2]THE WITNESS: The Ct scan did

[3]not reveal communication.

[4]THE COURT Well let's assume it

[5]did.

[6]THE WITNESS: Okay.

[7]THE COURT: Some radiologists

[8]at Harlem Hospital said it did doctor.

[9]That is what the record indicates. Whether

[10]he or she was right or wrong for the

[11]purpose of this question let's assume

[12]that was a correct interpretation [\*55] of

[13]the x-ray and indeed that interpretation

[14]has been made by at least one or perhaps

[15]two other doctors who have looked at

[16]it. Let's assume that all three of them

[17]are correct. What significance if any

[18]is that?

[19]THE WITNES:S If it is -- if it

[20]says there is a rent at C4 and it is

[21]corr, then that means by definition

[22]it means there is a rent at C4.

[23]I am not sure what question I

[24]am asnwering exactly.

[25]THE COURT: I am asking you what

[1]4044

[2]significance. Assume a CAT scan taken

[3]on the 31 of July this is now 18 days

[4]after the operation reveals this communi-

[5]cation between the subarcahnoid space

[6]and epudural space mid C4 level does

[7]that have any significance vis a vis

[8]this rent that is described in Dr. James

[9]operative report?

[10]THE WITNESS: It is not the same

[11]rent.

[12]THE COURT So it has no significance

[13]vis a vis that rent is that correct,

[14]is that your answer?

[15]THE WITNESS: Assuming all hypo-

[16]thetical, yes.

[17]THE COURT: All right. Why don't

[18]we break at this point.

[19]MR. RAPPAPORT: Can I just --

[20]THE COUR:T On this topic on

[21] **[\*56]** the rent?

[22]MR. RAPPAPORT: Yes.

[23]THE COURT: All right.

[24]MR. RAPPPORT: I --

[25]THE COURT : I think you are going

[1]4045-4065

[2]passed that which we are talking about

[3]a repair of the rent and on that topic

[4]we can talk about after lunch.

[5]MR. RAPPAPORT: All right.

[6]TH COUR:T All right we will re-

[7]convene at 2:15 p.m.

[8]Do not discuss the case.

[9](Whereupon the jury recesses for

[10]lunch at one p.m.)

[11]

[12]

[13]

[14]

[15]

[16]

[17]

[18]

[19]

[20]

[21]

[22]

[23]

[24]

[25]

[1]4066

[2]A F T E R N O O N S E S S I O N

[3]THE COURT: Bring in the jurors.

[4](Jurors enter.)

[5](Dr. DiGiacinto resumes the witness

[6]stand and testifies further as follows:)

[7]THE COURT: Good afternoon, members of

[8]the jury.

[9]Go ahead, Mr. Rappaport.

[10]MR. RAPPAPORT: Yes, your Honor.

[11]DIRECT EXAMINATION

[12]BY MR. RAPPAPORT (CONTINUING):

[13]Q Doctor, solely for the purpose of this

[14]question, I want you to make the assumption that the

[15]rent in the dura was 5 centimeters, or 2 inches. Will

[16]you make that assumption?

[17]A Yes.

[18]Q Does the size of the rent, [\*57] be it 1

[19]centimeter, 2 centimeters, 10 centimeters, determine how

[20]a neurosurgeon will close the rent?

[21]A No, it does not.

[22]Q Could you explain to the members of the jury

[23]why the size of the rent does not matter and what

[24]determines how you control it?

[25]A The concern is to bring the two edges of the

[1]4067

[2]dura back together. Assuming a straight cut in the

[3]dura, we have to bring the two edges together, number

[4]one. So that if the two edges can be brought together,

[5]that is that requirement.

[6]The second requirement is, in bringing the

[7]two edges together, we don't restrict the tube to a very

[8]narrow diameter so as to compress what's inside it. So

[9]that if we can, number one, get the two edges together

[10]and, number two, get the two edges together without

[11]narrowing down the opening, we would close it by closing

[12]one edge to the other edge.

[13]Q Assuming you see with your own eyes that you

[14]can't do it without constricting, what would you do?

[15]A Then you would insert a patch of some other

[16]material, usually some of the patient's own fascia,

[17]which is the lining of the muscle, **[\*58]** to allow the edges to

[18]be closed without having to pull them tightly and

[19]constrict what's inside.

[20]Q Can you see with your eyes whether or not

[21]the dura is being constricted by the repair?

[22]A Yes.

[23]Q Is there room in the dura--could you tell us

[24]what the dura is?

[25]A The dura is the lining of the entire nervous

[1]4068

[2]system. It begins at the brain, or it covers the brain,

[3]the entire brain, it runs down the entire spinal canal

[4]to cover up the spinal cord, and in the lower spinal

[5]canal to cover up nerve roots before they exit to go to

[6]the arms and legs, etc.

[7]Q Is there room in the dura--excuse me. Is

[8]there room between the spinal cord and the dura?

[9]A Under normal circumstances, yes.

[10]Q Where you have an atrophic spinal cord,

[11]would you have more or less room between the spinal cord

[12]and the dura?

[13]A More.

[14]Q Why?

[15]A The amount of material, which in this case

[16]is the spinal cord, inside the tube is smaller;

[17]therefore there's more room around it; therefore there's

[18]more distance between the spinal cord and the dura.

[19]Q Now, Doctor, I [\*59] want you to make the

[20]following assumption. I want you to assume that someone

[21]has testified in this courtroom that you repaired the

[22]dura in this case by stitching and constricting the

[23]spinal cord.

[24]Would you make that assumption?

[25]A I will.

[1]4069

[2]Q If we assume that to be true, what that

[3]doctor is saying to be true, would a later CAT scan

[4]taken of that spinal cord give an indication of a

[5]constriction?

[6]A Yes, it would.

[7]Q And could you explain that so the jury could

[8]understand, if they look at a later CAT scan, what if

[9]anything they should see?

[10]A Well, the constriction of the dura around

[11]the spinal cord would look very much like it prior to

[12]removing the bone. The narrowed down section of the

[13]dura would have very little space between it and the

[14]spinal cord, and might indeed, in this hypothetical

[15]situation, be compressing the spinal cord, just as the

[16]bone had been prior to its removal.

[17]Q Have you reviewed the CAT scan that was

[18]subsequently taken of this patient?

[19]A Yes, I have.

[20]Q By the way, did you ever go in, back in and

[21]reoperate and **[\*60]** remove" any stitches that some neurosurgeon

[22]said you put in to give this impression?

[23]A No.

[24]Q Did the subsequent CAT scan films which we

[25]have give any indication at all of any compression of

[1]4070

[2]the dura?

[3]MR. WIESEN: Objection to the leading.

[4]THE COURT: Overruled.

[5]A No.

[6]Q And--

[7]MR. RAPPAPORT: I want to lead, but I

[8]won't.

[9]Q When and if the jury, if they want to see

[10]the film, and they are going to look at. the later CAT

[11]scan, how would they tell whether or not the dura has

[12]been constricted or not at that point?

[13]MR. WIESEN: Objection.

[14]THE COURT: Overruled.

[15]A What the subsequent CAT scans show is very

[16]clearly that the spinal cord is visualized and the dura

[17]is visualized around it and there is actually space

[18]between the spinal cord and the dura.

[19]Q You say it's obvious. What would they look

[20]for?

[21]A Well, these CAT scans which were done post-

[22]operatively were not done with any of the dye,

[23]metrizamide, injected. So that in this case you would

[24]see the spinal cord as a gray area, the spinal fluid

[25]around the **[\*61]** spinal cord as a little darker, and then the

[1]4071

[2]dura itself as a white ring.

[3]The spinal cord was somewhat rounder than it

[4]was on the earlier study; it's like the hole in the

[5]donut, if you will. The donut is the spinal fluid and

[6]then the icing on the donut is the dura. And that's

[7]what will be seen, three concentric circles.

[8]Q And the fact that the three concentric

[9]circles are round on the subsequent CAT scans, what does

[10]that say in regard to whether there was constriction or

[11]not constriction?

[12]MR. WIESEN: Objection.

[13]THE COURT: Assume they are round.

[14]Q Assume they are round.

[15]A That there was no constriction.

[16]Q When we say assume they are round, did you

[17]see them?

[18]A They are basically round. I mean you

[19]couldn't take a compass and perfectly match it, but they

[20]are essentially round, yes.

[21]Q Now, Doctor, I want you to assume further

[22]that one neurosurgeon has testified in this case, at

[23]least his deposition has been read, that you should have

[24]left, should have intentionally opened the dura and left

[25]it open.

[1]4072

[2]And I want you **[\*62]** to further assume that

[3]another neurosurgeon in this case has testified that

[4]that was not the practice in 1984.

[5]MR. WIESEN: Objection, your Honor.

[6]THE COURT: Overruled.

[7]Q Would you make that assumption?

[8]A Yes.

[9]Q Doctor, in your opinion, was it good and

[10]accepted medical practice in the year 1984 to

[11]intentionally open up the dura and leave it open during

[12]a procedure such as this?

[13]A No, it was not.

[14]Q Why not?

[15]A The process which is compressing the spinal

[16]cord is the bone restricting the space around it. When

[17]the bone is removed, the dura no longer is pressing

[18]against the spinal cord. There is more than ample space

[19]for the spinal cord, there is nothing more to be gained

[20]by opening up the dura and leaving it open.

[21]Q What years was it that you trained, that you

[22]had your training?

[23]A I first became a resident in neurosurgery in

[24]1974.

[25]Q At any time during your training were you

[1]4073

[2]ever taught to leave the dura open?

[3]MR. WIESEN: Objection.

[4]THE COURT: Sustained.

[5]Q At any time during your training did **[\*63]** you

[6]ever leave the dura open in a procedure such as this?

[7]A No.

[8]Q Now, Doctor, there came a time--let me ask

[9]you this: How did you get involved in this case? How

[10]did you get called in?

[11]A I was the neurosurgeon attending on

[12]emergency calls on the date in question. I was called

[13]from Harlem Hospital, and I cannot be certain who called

[14]me. More than likely one of the residents at the

[15]hospital, either in neurology or neurosurgery.

[16]THE COURT: Where were you when you

[17]got the call?

[18]THE WITNESS: I don't recall, except

[19]that I was not in the hospital.

[20]Q Do you recall at about what time it was that

[21]you were called?

[22]A Some time between 2 or 3:00 and 5:00. I'm

[23]really not too specific about that.

[24]Q Now, when you say you were on call, what is

[25]your obligation when you are on call?

[1]4074

[2]What does that mean for a neurosurgeon to be

[3]on call?

[4]A My obligation is to be available at all

[5]times for emergency case, for any case that I may be

[6]consulted on. It means that I'm responsible to be

[7]available so that I can come to the hospital within [\*64] a

[8]short period of time and take care of any problems that

[9]may come up.

[10]THE COURT: As I understand it then,

[11]there was no neurosurgeon in Harlem Hospital

[12]physically present, is that correct?

[13]THE WITNESS: Correct.

[14]THE COURT: So that if they needed a

[15]neurosurgeon, they had to call either you or

[16]some other neurosurgeon who was on duty or

[17]call at that particular point?

[18]THE WITNESS: Correct.

[19]Q There was an affiliation, was there not,

[20]that existed between two hospitals, Harlem and another

[21]hospital, as far as you knew?

[22]A Harlem is affiliated with Columbia-

[23]Presbyterian, but--yes.

[24]Q Now, if you are not in the hospital and you

[25]are on call, are you reachable 24 hours a day?

[1]4075

[2]MR. WIESEN: Objection. It's just

[3]been answered.

[4]THE COURT: Well, presumably, if

[5]you're on call, you have to be someplace

[6]where you can be reached. You have either a

[7]beeper or at a telephone, correct?

[8]THE WITNESS: Correct.

[9]MR. RAPPAPORT: That's what I'm trying

[10]to establish.

[11]THE COURT: All right. The answer is

[12]yes.

[13]MR. RAPPAPORT: **[\*65]** Okay.

[14]Q And how were you reachable back then?

[15]THE COURT: He doesn't remember.

[16]Well, you had a beeper or you were in

[17]your office, I take it, or some other

[18]hospital?

[19]THE WITNESS: Correct.

[20]THE COURT: You don't remember the

[21]specifics at this point.

[22]THE WITNESS: No, I don't.

[23]THE COURT: Okay.

[24]Q Now, I want you to assume this was a Friday,

[25]Friday the 13th, and for how long would you be on call,

[1]4076

[2]you being the emergency doctor on call?

[3]A Rotation which is set up at Harlem Hospital

[4]runs from 7 a.m. Monday morning to 7 a.m. the following

[5]Monday morning, so I'd be on call for that entire

[6]period.

[7]Q So, in other words, for Saturday and Sunday

[8]you would also be the neurosurgeon on call, is that

[9]right?

[10]A Yes.

[11]Q Now, when you came to the hospital, do you

[12]recall meeting with Mr. Carson and talking with him?

[13]A Yes, I do.

[14]THE COURT: You have a recollection of

[15]this now?

[16]THE WITNESS: Yes.

[17]THE COURT: Okay.

[18]Q And do you recall specifically what you said

[19]to him and what he said to you at [\*66] that time?

[20]A I recall the sum and substance of the

[21]conversation, rather than the specific exchange.

[22]Q From what you can recall, can you tell us

[23]what the sum and substance you recall you said to Mr.

[24]Carson and he said to you when you came in on the 13th

[25]of July, 1984?

[1]4077

[2]A At about the time I saw Mr. Carson I was

[3]also reviewing, or had just reviewed, his x-rays, and

[4]had reviewed the chart to become aware of his

[5]neurological picture and how it was changing.

[6]The sum and substance of what I said to him

[7]was that it appeared that he had very severe pressure

[8]on his spinal cord, and that this was causing him to

[9]develop a neurological deficit. Exactly what words I

[10]used, weakness or paralysis, I'm not sure. And that

[11]because of the amount of pressure and because of the

[12]severity of the situation, he should be immediately

[13]taken to surgery to remove the pressure from the spinal

[14]cord in hope of stopping the process and reversing it.

[15]And again the sum and substance of his

[16]conversation to me was that he understood what I was

[17]talking about and agreed that we could proceed with [\*67] the  
[18]surgery.

[19]Q Now, I want to take you back to the  
[20]operative report. We have gone through what's page one,  
[21]and I want to take you to page two.

[22]And it says on page two, immediately upon  
[23]removing the bone, there was bulging of the cord. Okay.

[24]First of all, Doctor, can you explain to us  
[25]what it means that there was a bulging? What is the

[1]4078  
[2]process you are seeing?

[3]A The first important thing to mention about  
[4]that sentence is that the word "cord" should be replaced  
[5]with "dura." We're not looking at the spinal cord,  
[6]we're looking at the dura. The dura is the membrane  
[7]that we have discussed earlier that means the nervous  
[8]system that is between--underlying the bone and is  
[9]between us and the spinal cord itself.

[10]Bulging literally means a ballooning out of  
[11]the dura, indicating that it has been decompressed.

[12]Q I'm sorry, indicating what?

[13]THE COURT: That it has been  
[14]decompressed.

[15]A That the pressure has been taken off it.

[16]Q Now, Doctor, it also indicates that the  
[17]epidural space was drained with two hemovac drains.

[18]What's a hemovac drain? [\*68]

[19]A A hemovac drain is a thin tubing with  
[20]multiple small holes in it that you put in the wound to  
[21]allow to be drawn off any fluid that may accumulate in

[22]the wound.

[23]Q Doctor, post-operatively, that is, after the

[24]operation was finished, were you aware of Mr. Carson's

[25]condition?

[1]4079

[2]A Yes, I was.

[3]Q Could you tell the members of the jury

[4]essentially what his condition was at that point?

[5]A From the time of the end of surgery when he

[6]woke up from the anesthesia on, he had very little left-

[7]over or residual movement in his upper and lower

[8]extremities and very little sensation left as well.

[9]Q Doctor, at that point, if you wanted to,

[10]could you have ordered and taken a CAT scan of this

[11]patient?

[12]MR. WIESEN: Objection to the form,

[13]your Honor.

[14]THE COURT: Overruled.

[15]A Yes.

[16]Q Did you order a CAT scan for this patient?

[17]A No, I did not.

[18]Q Doctor, I want you to tell us, what would a

[19]CAT scan post-operatively of this patient show? In

[20]other words, if you would do it, what would you look

[21]for? Could you explain it to the jury? [\*69]

[22]A It could potentially show a collection of

[23]fluid in the region of the operation. It could show

[24]swelling of the spinal cord. It could show a collection

[25]of fluid, which would be a form of fluid, and

[1]4080

[2]potentially demonstrate whether or not there was

[3]compression of any of the structures.

[4]Q Let's deal with each of those things one at

[5]a time. One of the things you told us it could show

[6]would be a collection of blood, is that correct?

[7]A Yes.

[8]Q Were you concerned about a collection of

[9]blood as being responsible for any compression upon this

[10]patient's spinal cord?

[11]A No, I was not.

[12]Q why not?

[13]A Two reasons. Number one, there were drains

[14]in place which were removing fluid and were removing any

[15]blood which potentially would accumulate in the space.

[16]Number two, we discussed earlier what would

[17]happen if the spinal cord stopped working entirely in

[18]the region of the problem and in the region of the

[19]surgery. If blood had collected and caused compression

[20]of the spinal cord in this area, the patient, in

[21]addition to not being able to move, would also **[\*70]** lose the

[22]ability to breathe on his own.

[23]Since, number one, we were treating a

[24]potential of blood collecting in the wound by having two

[25]drains in place, and, number two, the patient was

[1]4081

[2]spontaneously breathing from the end of the surgery and

[3]from then on, it was felt that this was strong evidence

[4]that there was no compression of the spinal cord.

[5]Q Doctor, you spoke about interfering with

[6]bleeding from blood, and we have heard some testimony

[7]about a potential space that had been created by the

[8]surgery.

[9]Can you interrelate the two and explain to

[10]us how the compression worked and how the drains worked?

[11]I know it's detailed, but it's very important.

[12]A If you recall, we performed a laminectomy

[13]from C3 through C6, including part of C2 perhaps. When

[14]we do that, we basically create a single space

[15]running from C3 to C6.

[16]If anything accumulates in that area, it

[17]will compress across that whole area, since there's

[18]nothing separating the top, middle and bottom, it's all

[19]one pot, if you will.

[20]So that the significance of that is that we

[21]know breathing is controlled [\*71] by the C4 level, or just

[22]above the halfway mark, if you will. The significance

[23]therefore is that if there was a blood clot that was the

[24]cause of the patient's increased weakness, it would have

[25]also stopped him from breathing.

[1]4082

[2]Q The other thing that you told us about is

[3]that you could be worried about a collection of fluid,

[4]is that cerebrospinal fluid, for example?

[5]A Yes.

[6]Q Were you concerned about cerebrospinal fluid

[7]in this particular case causing his neurological deficit

[8]at that point?

[9]A No, I was not.

[10]Q Could you tell the members of the jury why

[11]not?

[12]A For the same reason that we have discussed

[13]earlier. There are two hemovac drains, two drains

[14]drawing off any fluid that might have potentially

[15]collected in the space. These drains were functioning

[16]at all times, and therefore eliminated that as a

[17]possibility.

[18]Q Were you able to rule out a swelling of the

[19]cord, which is the other possibility, without a CAT

[20]scan?

[21]A No.

[22]Q Were you, however, treating this patient for

[23]a swelling of his spinal cord?

[24]A Yes.

[25] **[\*72]** Q How would you be doing that?

[1]4083

[2]A The only means we have available for

[3]treating that swelling is with an anti-inflammatory

[4]medication called Decadron. This is a steroid which is

[5]specifically used to prevent, as much as possible,

[6]swelling of tissues within the nervous system.

[7]Q Doctor, assume for the moment that a CAT

[8]scan was taken and that it showed swelling of the spinal

[9]cord. Would the treatment for that be any different

[10]than had already been instituted without a CAT scan?

[11]MR. WIESEN: Objection, your Honor.

[12]THE COURT: Sustained.

[13]Q Would the treatment be any different if you

[14]saw swelling on a CAT scan?

[15]A No.

[16]Q Doctor, are there any risks involved in

[17]taking a patient such as this and having a CAT scan done

[18]immediately post-operatively?

[19]A As we mentioned earlier, the risks and

[20]benefits are always things that we balance. Here we

[21]felt with absolute certainty that there was not anything

[22]compressing the spinal cord and that the only thing that

[23]the CAT scan would potentially show us would be

[24]something that we would not be able to treat in any

[25] **[\*73]** manner that we weren't.

[1]4084

[2]The risk of taking the patient from one

[3]floor to another floor, putting him in the CAT scanner,

[4]taking him out of the CAT scanner, and bringing him back

[5]to the floor was therefore greater, because of the

[6]possibility of even further damage of a very, very

[7]fragile spinal cord, than not doing the CAT scan.

[8]And since we felt very strongly that it

[9]could not possibly show us anything that we would treat,

[10]we did not feel it was indicated to perform a study.

[11]THE COURT: How long did you remain in

[12]the hospital that night, Doctor?

[13]THE WITNESS: More than likely until

[14]the patient--

[15]THE COURT: No, do you have a

[16]recollection? That's my question.

[17]THE WITNESS: Specific recollection,

[18]no.

[19]THE COURT: Okay.

[20]THE WITNESS: Other than I did

[21]accompany--

[22]THE COURT: You don't have a specific

[23]recollection as to how late you stayed, I

[24]take it?

[25]THE WITNESS: Other than that I

[1]4085

[2]accompanied the patient to the recovery

[3]room.

[4]THE COURT: All right. Do you

[5]recall--at that point was the patient awake

[6] [\*74] or still asleep?

[7]THE WITNESS: At that point he was

[8]recovering from anesthesia, he was waking

[9]up.

[10]THE COURT: Okay. Go ahead.

[11]Q Doctor, you mentioned that the patient

[12]post-operatively was breathing. Did you consider that

[13]to be a big deal, that he was breathing?

[14]MR. WIESEN: Objection, your Honor.

[15]THE COURT: Sustained.

[16]Q What would happen if there was any further

[17]interference with this patient's spinal cord, if the

[18]lesion ascended, went up higher?

[19]A He would have lost the ability to breathe on

[20]his own without the assistance of a respirator.

[21]Q And would that be significant for a patient?

[22]A oh, I certainly think that having to be on

[23]the respirator for the rest of your life is worse than

[24]not having to be on a respirator, so, yes.

[25]Q Doctor--

[1]4086

[2]THE COURT: I take it being paralyzed

[3]is worse than not being paralyzed as well.

[4]THE WITNESS: Without question.

[5]Q Doctor, it certainly wasn't a good thing for

[6]this patient to be paralyzed, we agree on that?

[7]A Absolutely.

[8]Q Doctor, do you have an opinion, sir, [\*75] to a

[9]degree of medical certainty, as to what his cause for

[10]his paralysis was?

[11]A With a degree of medical certainty, I feel

[12]that the cause of his paralysis was what I would call

[13]intrinsic swelling of the spinal cord. The spinal cord

[14]itself was losing function because it was swelling

[15]within itself--I'm using the same words to define what

[16]I'm saying--I'm sorry.

[17]Q What's the effect of the spinal cord

[18]swelling within itself? In other words, the fibers

[19]swelling.

[20]A The swelling of the spinal cord will cause

[21]progressive loss of neurological function. The

[22]distribution of the swelling and the degree of the

[23]swelling will define what's lost and what is preserved.

[24]Swelling too may compromise the amount of

[25]blood that can flow to the spinal cord.

[1]4087

[2]Q Other than the medication he was receiving,

[3]was there anything else that could be done for intrinsic

[4]cord swelling?

[5]A No.

[6]Q Is it, in your opinion, Doctor, for

[7]intrinsic cord swelling, to bring the patient back into

[8]the operating room to operate?

[9]A No.

[10]MR. WIESEN: Objection, your Honor. **[\*76]**

[11]THE COURT: Sustained.

[12]The jury will disregard the question

[13]and the answer.

[14]Q Is reoperation an option to treat intrinsic

[15]cord swelling?

[16]MR. WIESEN: Objection.

[17]THE COURT: Sustained.

[18]Q How do you treat intrinsic cord swelling?

[19]THE COURT: He's already told us.

[20]Q Is there any other way to treat intrinsic

[21]cord swelling?

[22]A No.

[23]THE COURT: Doctor, you wrote a note

[24]on the 16th, did you not?

[25]THE WITNESS: I believe I did.

[1]4088

[2]THE COURT: Look at your note, if you

[3]will.

[4]THE WITNESS: Is it here?

[5]MR. RAPPAPORT: I haven't come to

[6]that, Judge.

[7]THE COURT: I know.

[8]THE WITNESS: Do you have a page?

[9]THE COURT: Yes, 38.

[10]THE WITNESS: Yes, I see it.

[11]THE COURT: The middle--you wrote

[12]three paragraphs. You see it?

[13]THE WITNESS: Yes, I do.

[14]THE COURT: In the third paragraph,

[15]the middle paragraph, you say, I suggest

[16]intrinsic cord problem which has further

[17]evolved.

[18]You see that?

[19]THE WITNESS: I suspect intrinsic.

[20]THE COURT: I suspect.

[21]THE WITNESS: [\*77] Yes, I do.

[22]THE COURT: Then you indicated three

[23]possibilities, right?

[24]THE WITNESS: Yes.

[25]THE COURT: Tumor, transverse myelitis

[1]4089

[2]of unknown etiology, or contusion. Is that

[3]correct?

[4]THE WITNESS: Superimposed on

[5]compromised cord.

[6]THE COURT: On compromised cord.

[7]THE WITNESS: Yes.

[8]THE COURT: That was your thinking

[9]three days after the operation. Is that

[10]correct?

[11]THE WITNESS: Throughout that period.

[12]yes.

[13]THE COURT: Go ahead.

[14]Q Doctor, while we are on that note, could you

[15]read for us the entire note on the top on the 16th?

[16]A Post-op course confusing. Patient has

[17]become essentially quadriplegic immediately post-op with

[18]some preserved position sensation and touch, but

[19]spasticity. This appears to be an extension of pre-op

[20]state.

[21]Q Stop. One second. What do you mean when

[22]you say in the record on July 16, 1984, "this appears to

[23]be an extension of pre-op state"?

[24]A When he was presented to me initially, he

[25]had very significantly lost a lot of neurological

[1]4090

[2]function, and this was different from **[\*78]** a state he had

[3]been somewhat shorter. It was my fear at that time that

[4]his spinal cord was losing function because of damage to

[5]it. When he continued to lose function in the face of

[6]the pressure having been relieved, I felt that that had

[7]continued, that that process had continued, and even

[8]though he no longer had pressure on the spinal cord, the

[9]spinal cord itself continued to get worse and worse.

[10]Q Now, when you say--just read the next--

[11]THE COURT: You thought it was getting

[12]worse and worse because of a tumor,

[13]transverse myelitis or a contusion

[14]superimposed on the compromised cord?

[15]THE WITNESS: That was my overall

[16]differential diagnosis, yes.

[17]THE COURT: Go ahead.

[18]Q Now, you have, patient breathing well on his

[19]own but diaphragmatic. Is that right?

[20]A Yes.

[21]Q Then going to where we have been reading, I

[22]suspect intrinsic cord problem. When you say intrinsic

[23]cord problem, what do you mean by the word "intrinsic"?

[24]A Within the substance of the spinal cord

[25]itself, rather than anything outside of the spinal cord

[1]4091

[2]acting on it.

[3]Q **[\*79]** And, Doctor, you say, which has further

[4]evolved, that is, tumor---were you able to rule out

[5]tumor?

[6]A I felt that tumor had been effectively ruled

[7]but by the pre-operative myelo-CAT scan combination.

[8]Q You say transverse myelitis. Is that the

[9]end of that word?

[10]A Yes, transverse myelitis.

[11]THE COURT: Question mark.

[12]THE WITNESS: Questioned etiology.

[13]Q Were you able in your own mind to rule that

[14]out?

[15]A It's really a difficult rule-out. It's

[16]almost repeating intrinsic cord problem, because

[17]myelitis is inflammation of the spinal cord, and in one

[18]form or another, that was probably part of what we were

[19]dealing with.

[20]Q And, Doctor, I want you to assume, before I

[21]get to the next point, that a neurosurgeon in this case

[22]has testified that just by doing the procedure itself

[23]one can have some movement or contusion of the spinal

[24]cord which can lead to intrinsic cord swelling.

[25]MR. WIESEN: Objection to that, your

[1]4092

[2]Honor.

[3]THE COURT: That's my recollection.

[4]MR. RAPPAPORT: That was Dr. Krieger.

[5]I'll give you the page.

[6] [\*80] THE COURT: Go ahead.

[7]MR. WIESEN: Yes, I want to read it

[8]too.

[9]THE COURT: Please. I've overruled

[10]the objection.

[11]Q Assuming Dr. Krieger said that, okay, would

[12]you agree that that could happen during the procedure

[13]even in the best of hands?

[14]A Yes.

[15]Q And is that what you are referring to when

[16]you say, or contusion superimposed on compromised cord?

[17]MR. WIESEN: Objection to the leading,

[18]your Honor.

[19]THE COURT: Sustained.

[20]Q What do you mean by, contusion superimposed

[21]on compromised cord?

[22]A I actually mean something must broader than

[23]what you have restricted me to. Any- and everything

[24]that the patient did for some time had the potential of

[25]damaging his spinal cord. As I mentioned to you, he had

[1]4093/105

[2]an extremely narrowed canal, so there was really no

[3]extra space, and so that any--as we've mentioned--cough,

[4]turn, nod yes, no, eating food, essentially anything

[5]that he did had the potentially to hit or contuse the

[6]spinal cord.

[7]That contusion, without restricting its

[8]time, but rather saying over any period of time from

[9]before **[\*81]** the surgery through the surgery, is what I was

[10]referring to.

[11]And in saying, superimposed on a compromised

[12]cord, I'm indicating that this is a cord which just

[13]barely is surviving anyhow, because it's been so

[14]compressed for so long, so that anything superimposed on

[15]that, any insult added to this cord, which was barely.

[16]making it, was enough to cause this process of

[17]irreversible intrinsic cord swelling.

[18]Q Now, Doctor, that was on the 16th. I want

[19]to go back in time. The surgery was done the 13th. Do

[20]you have any recollection whether or not you were in a

[21]hospital--

[22]THE COURT: Saturday or Sunday.

[23]Q --Saturday, July 14th?

[24]A I am certain that I was in the hospital on

[25]either Saturday or Sunday. More likely Saturday, but I  
cannot specifically tell you what time, etc., etc.

[1]4106

[2]Q Doctor in the hospital chart on page

[3]36 there is a note by Dr. James is that right?

[4]A Yes, there is.

[5]Q And he was your assistant during the

[6]procedure?

[7]A To the best of my recollection, yes.

[8]Q it says, am I reding right, "Case already

[9]discussed with Dr. DiGiancinto". **[\*82]**

[10]A It does say that.

[11]Q And doctor --

[12]THE COURT: Gentlemen step up

[13]here a moment.

[14](Whereupon there is an off the

[15]record discussion at the side bar out

[16]of the hearing of the jury.)

[17]THE COURT: Go ahead.

[18]q I don't know what I was saying --

[19]THE COURT : The note that Dr.

[20]James the case was already discussed

[21]with Dr. Giancinto the note on the 14th.

[22]Q It indicates increased decadron. For

[23]what purpose was Decadron being increased?

[24]A We hd discussed already the only potentiall

[25]means for helping this process is with an anti-

[1]4107

[2]inflammatory steroid. Since he hd exhibited continued

[3]loss of function it was felt even though he was on

[4]a substantial does of Decadron it would be under even

[5]further in some hope of reversing the process.

[6]Q What does Dr. James write for his impress-

[7]ion on July 14, 1984?

[8]A Cervical cord edema with quadraparesis.

[9]Q When we said edema is that another word

[10]for swelling?

[11]A Yes, it is.

[12]THE COURT: You also that note

[13]indicate repeat the metricimide CT would

[14]be considered.

[15] [\*83] THE WITNESS: Yes -- which note?

[16]THE COURT: Your note, not Dr.

[17]James' note.

[18]THE WITNESS: Yes.

[19]Q you say will be considered.

[20]A Yes.

[21]Q Was it done?

[22]A No it was not.

[23]Q Why in your consideration wasn't it done?

[24]I think we already discussed the reasoning

[25]but in short I felt that there is no chance of finding

[1]4108

[2]a treatable lesion and the only thing it might have

[3]shown us was there was cord swelling and signs that

[4]is not treatable the risk of doing the study was greater

[5]than anything we can learn from it to attempt to benefit.

[6]the patient.

[7]THE COUR: In your note you refer

[8]to cord swelling at all?

[9]THE WITNESS: I am implying it

[10]in discussing transverse myelitis or

[11]contusion on compromised cord.

[12]THE COURT : You don't use the

[13]term intrinsic cord swelling.

[14]THE WITNESS: I used the term

[15]intrinsic cord problem.

[16]THE COURT : Which could be a tumor

[17]transverse myelitis or a contusion?

[18]THE WITNESS: Correct.

[19]Q The last paragraph you say we will keep

[20]on Decadron?

[21]Q What is the purpose of the Decadron-

[22] **[\*84]** THE COURT: You are talking about

[23]Dr. James' note?

[24]MR. RAPPAPORT: No, I am referring

[25]to the note you are reading.

[1]4109

[2]THE COURT: All right.

[3]Q You know --

[4]THE COURT: Please, please, please.

[5]A I think I have already told you Decadron

[6]was the one thing we had to offer since the only treat-

[7]able thing that potentially existed was cord, intrin-

[8]sic cord problem, intrinsic cord swelling, intrin-

[9]sic cord edema.

[10]Q I see you have one further note on July

[11]23 which is page 40 of the record.

[12]A I see that note.

[13]Q The fact that you don't have any other

[14]note does that mean to you that you didn't see the

[15]patient?

[16]A No.

[17]MR. WIESEN: Objection.

[18]THE COURT: Overruled.

[19]Q Could you read to us what your July 23

[20]note says?

[21]A I will read the note it states no signifi-

[22]can't clinical improvement. Problem discussed with

[23]patient. He is aware of long standing problem with

[24]the cord and atrophy an also is aware of guarded prognos-

[25]is.

[1]4110

[2]THE COURT: That is your hand-

[3]writing?

[4]THE WITNESS: Yes.

[5] [\*85] THE COURT: Is that line just

[6]a crossing --

[7]THE WITNES: Yes.

[8]MR. RAPPAPORT: I didn't hear

[9]what you said.

[10]THE COURT: I asked him if the

[11]line with atrophy is just his way of

[12]crossing the letter "T" in the word.

[13]MR. RAPPAPORT: What did he say?

[14]THE COURT: Yes.

[15]MR. RAPPAPORT: I have no further

[16]questions.

[17]THE COURT: Go ahead.

[18]MR. RAPPAPORT: Can I just have

[19]one second, Judge?

[20]THE COURT: Sure.

[21]CROSS EXAMINATION

[22]BY MR. WIESEN:

[23]Q Doctor I represent Mr. Carson and I am

[24]going to ask you some questions.

[25]Do the specifics of this case stand out

[1]4111

[2]in your memory as you sit here now?

[3]A I have fragments of specific memory,

[4]yes.

[5]Q is it because of the results were so

[6]unusual that it as a case stands out in memory

[7]as opposed to the other multiple laminectomie?

[8]A I think that factor along with the

[9]type of pathology and along with the fact I have been

[10]sked to review everything related to the case very

[11]often all of those factors worked together.

[12]Q So can I conclude from what you said

[13]because **[\*86]** of the uniqueness of case that the specifics

[14]of the case stand out in your memory?

[15]A I think that is fair, yes.

[16]THE COURT : That is what he said.

[17]Q Now, doctor the first contact you ahd

[18]with Mr. Carson professionally of course was when,

[19]what time?

[20]A Some time just before five o'clock on

[21]the day of the surgery.

[22]Q Just at five o'clock.

[23]THE COURT: Just before, he said.

[24]A I am not sure if that means three o'clock

[25]or 3:30 or four.

[1]4112

[2]THE COURT: Do you remember where

[3]in the hospital this occurred?

[4]THE WITNESS: To the best of my

[5]recollection this was in the operating

[6]area outside of the operating theater.

[7]THE COURT: So he had been

[8]brought down or up -- do you know what

[9]floor the oprating room was on?

[10]THE WITNESS: On the. fifth floor.

[11]THE COUR:T He had been brought

[12]to the fifth floor and to an area immediately

[13]outside of the oprating room?

[14]THE WINNESS: That is the best of

[15]my recollection.

[16]THE COURT: I take it that was

[17]shortly before the operation was about

[18]to begin?

[19]THE WITNESS: I believe [\*87] so but

[20]I can't state that with certainty.

[21]THE COURT: All right.

[22]Q Doctor maybe this will refresh your

[23]recollection.

[24]Do you recall giving testimony under

[25]oath July 18, 1989?

[1]4113

[2]A If that is the date of my examination

[3]before trial, yes.

[4]q Did there come a time when the transcript

[5]was mailed to you by Mr. Rappaport's office?

[6]A I don't recall how I obtained the trans-

[7]cript but I did --

[8]THE COURT: You got it?

[9]THE WITNESS: I got it.

[10]Q And when you got it whether it was mailed

[11]to you, delivered to you or sent parcel post, were

[12]you told that if there were any corrections in it please

[13]do make such corrections and advise counsel so that

[14]my office could be advised of any corrections?

[15]a To the best of my recollection I did

[16]not receive a copy of the EBT any time within relation-

[17]ship to doing that.

[18]THE COURT: Well in any event

[19]were you told at any time to read it over and make

[20]sure that your testimony was accurate?

[21]THE WITNESS: No that is what

[22]I was leading up to. I did not receive it with that

[23]request.

[24] **[\*88]** THE COURT: All right that is

[25]your answer. You were never told is that correct?

[1]4114.

[2]THE WITNESS: Yes to the best

[3]of my recollection.

[4]THE COURT: All right, next

[5]question.

[6]Q Well doctor when did you get a copy of

[7]this?

[8]YOu did say you got it some time but

[9]you are not sure of the manner of which.

[10]When did you get the transcript of your

[11]sworn testimony?

[12]A I believe at some time when I was meeting

[13]with Mr. Rappaport or shortly before that.

[14]THE COURT: How long ago was that?

[15]THE WITNESS: Within the last

[16]two or threemonths.

[17]THE COURT: All right.

[18]Q So is it your testimony here under oath

[19]that this transcript, this transcript which was certified

[20]by the Cort Reporter in August of 1988 was not handed

[21]to you in any sahpe or manner until sometime in 1990?

[22]A That is the best of my recollection.

[23]Q And that was when youmet with Mr. Rappaport

[24]to prepare for this trial?

[25]A I believe that I received it before

[1]4115

[2]I met with Mr. Rappaport but sometime around that period.

[3]Q Then you received it then in anticipation

[4] [\*89] of your meeting with Mr Rappaport in order to prepare

[5]you for trial, fair enough?

[6]A Yes.

[7]Q And that would have been within the last

[8]month or so?

[9]THE COURT: Two or three months

[10]he said.

[11]THE WITNESS: I think two or three

[12]months.

[13]Q how long ago?

[14]AAround that period of time. If someone corrected

[15]me I wouldn't disagree with them.

[16]This is June. Did you get it in June?

[17]A I am sure it was sometime before that

[18]but I would honestly have difficulty stating with cer-

[19]tainty whether it was January,m March, December of

[20]'89. I just don't recall exactly when.

[21]THE COURT: How about April or

[22]May?

[23]THE WITNESS: Possibly, yes.

[24]Q DID You make any corrections in it at

[25]that time?

[1]4114

[2]A I never filled out a sheet of corrections,

[3]no.

[4]Q Whether you filled out a sheet or not,

[5]did you advise Mr. Rappaport there were corections

[6]that you wished to make in your sworn testimony which

[7]you gave two years ago?

[8]AI did not advise mr. Rappaport of any such

[9]corrections.

[10]Q Do we assume therefore that there were

[11] **[\*90]** no corrections that you wished to make?

[12]A you can not assume that, no.

[13]Q Doctor, didn't Mr. Rappaport, I want

[14]you to assume he is an experienced counsel, didn't

[15]he tell you if there are any corrections in your sworn

[16]testimony please let me and my office know so I can

[17]advise the other side that you are changing your sworn

[18]testimony?

[19]A he did not specifically advise me of

[20]that yet I am aware of that requirement and I -- in

[21]having read through it there is I believe one word

[22]which is incorrect it should be a not somewhere in

[23]there. It was not of any great significance and I

[24]would be glad to read throgh it and find it for you

[25]but that was the only question. Basically the testimony

[1]4115

[2]I gave is represented properly in the EBT.

[3]Q Doctor you are aware of that require-

[4]ment because you testified in other cases have you

[5]not?

[6]A I have given other EBT's correct.

[7]Q That is testimony doctor you know that

[8]do you not?

[9]A I understand that.

[10]Q Thank you. Is it your testimony now

[11]that whatever correction you wanted to make the --

[12]in the last two or [\*91] thre emonths was a not or a comma-

[13]THE COURT: He wanted to insert

[14]the word not in some answer but apparently

[15]It is not a significant change as I under-

[16]stand your testimony.

[17]THE WITNESS: That is correct.

[18]THE COURT Go ahead.

[19]Q Doctor do you recall your question and

[20]answer with regard to when you first contacted with

[21]this man --

[22]THE COUR: T Tell us --

[23]Q On page 12 line 18.

[24]A I do recall such questioning, yes.

[25]TH COURT : Well your recollection

[1]4116

[2]seems a little hazy now and Mr. Wiesen

[3]is going by enlarge will ask you whether

[4]or not you gave this answer back in 1988

[5]and perhaps your recollection was a little

[6]clearer.

[7]Q "Question: Approximatley what time was

[8]it when you first contacted with him?

[9]"Answer: Some time around five p.m.

[10]on the 13th."

[11]Is that accurate, sir?

[12]MR. RAPPAPORT: Objection.

[13]THE COURT: Overruled.

[14]a Yes.

[15]Q And doctor I want you to assume from

[16]the hospital record that Mr. Carson was taken down

[17]to the operating room at 5:15. I want you to assume

[18]that.

[19]A Yes, **[\*92]** I will.

[20]Q Will you then conclude that five minutes

[21]before he went into that operating room is the first

[22]professional contact yo had with hmi?

[23]a I arleady testified it was some time

[24]around there.

[25]THE COURT: If it was five o'clock

[1]4117

[2]or five minutes before. If it was

[3]earlier it was five minutes before or

[4]I if it was later it was five minutes after.

[5]Q Doctor you are awareness of Mr. Carson

[6]problem was some time between three p.m. and five p.m.

[7]of that veyr same day?

[8]A Yes.

[9]Q You don't know whether or not it was

[10]3:30 or four or 4:3.0 or what?

[11]A Correct.

[12]Q Can you tell us and his Honor did ask

[13]youw here were you --

[14]THE COURT: He doesn't remember.

[15]MR. WIESEN: I am not asking for

[16]the address doctor.

[17]Q Were you in another hospital? Were you

[18]somewhere in your office? Were you travelling somewhere

[19]or what?

[20]A I do not recall. I was in New York City.

[21]Q Do you know where you were?

[22]A I was in the New York City somewhere

[23]besides Harlem Hospital.

[24]Q you ahve no idea or recollection about

[25]this [\*93] specific case or unique case?

[1]4118

[2]THE COURT: He has no recollection

[3]where he was when he was first communi-

[4]cated with.

[5]Q Do you have a beeper doctor?

[6]A Yes, I do.

[7]Q Do you have a telephone in your car?

[8]A No, I do not.

[9]Q Can you recall if you can -- if you can

[10]not recall where you were can you recall by what means

[11]you got the first communication?

[12]A Either by telephone or by responding

[13]to a page through my beeper.

[14]Q Do you recall how far were you from Harlem

[15]Hospital?

[16]A I was in Manhattan so the furest south

[17]I would be is 59 Street and the closest I might be

[18]would be at 113 Street but within two or three miles

[19]of Harlem Hospital.

[20]Q Well doctor being a resident of Manhattan, on

[21]A friday afternoon in July, you do knowt hat traffic

[22]an be enormous, true?

[23]A I can be, yes.

[24]Q How far --

[25]THE COURT : He doesn't know.

[1]4119

[2]I taske it 59th Street is Roose-

[3]velt hospital?

[4]THE WITNES:S Yes.

[5]THE COURT : 113 Street is

[6]St. Luke's?

[7]THE WITNES:S Yes.

[8]TEH COURT: Where [\*94] is your

[9]office?

[10]THE WITNES:S 57 Street.

[11]THE COURT: East?

[12]THE WITNESS: East.

[13]THE COURT: You were in one of

[14]those three places?

[15]THE WITNESS: Yes, or home.

[16]TEH COURT: Where is your home?

[17]THE WITNESS: 75 Street.

[18]Q When you got this on the telpehone did

[19]you get a resume of what the case was about?

[20]AS To the best of my recollection I did.

[21]Q Someone on the phone told you what the

[22]case was about?

[23]A To ghe best of my recollection.

[24]q how long was the phone conversation?

[25]A I don't ercall.

[1]4120

[2]Q It could have been very short doctor?

[3]A Yes.

[4]Q IN response to that phone call you went

[5]to the hospital?

[6]A Yes.

[7]Q And you indicated to this court in answer

[8]to Mr. Rappaport's questions that even before speaking

[9]to Mr. Carson you reviewed some of the records?

[10]A I testified that at about the time that

[11]I was speaking to Mr Carson meaning a minute before,

[12]during or after I reviewed both the records and the

[13]x-rays that were made available to me.

[14]Q Did you review any of the tests **[\*95]** that

[15]had been done on him?

[16]the court; When you say tests,

[17]what do you mean?

[18]MR. WIESEN: Well there were

[19]CT scans.

[20]THE COURT: That is what he is

[21]talking about I take it you are including

[22]the myelogram and CT scan?

[23]THE WITNESS: Yes.

[24]Q What about the other tests the blood

[25]test and other multiple of tests that were done?

[1]4121

[2]A I do not recall specifically which tests

[3]I was aware of the results and which tests I was not.

[4]It would not be my custom --

[5]THE COURT: All right that is

[6]your anwer.

[7]A It would not be my custom to go beyond

[8]that.

[9]Q Now doctor do you recall whether or not

[10]you looked at the x-rays that were taken other than

[11]the mylogram and CT scan?

[12]A I can not recall if I saw every myelogram

[13]film or if I saw x-rays other than those of the myelogram.

[14]I am not -- I can not be specific enough to be sure.

[15]Q This may all have been in a matter of

[16]a few minutes before the operation started?

[17]A Yes.

[18]Q And doctor you were shown some x-rays

[19]I thik n by Mr. Rappaport and I would like to direct

[20]your **[\*96]** attenton to them if I may.

[21]THE COURT : Which ones do you

[22]wish Mr. Wiesen?

[23]MR. WIESEN: I would like to ask

[24]the doctor if he would kindly plcae on

[25]the board Plaintiff's 4 and I want you

[1]4122

[2]assume doctor --

[3]AI don't have that.

[4]THE COURT: That is an AP. Do

[5]you wnat that a cervical spine AP of 7/11/84? Is that

[6]what you want?

[7]MR. WIESEN: I am looking for

[8]your Honor the lateral x-ray that was taken-

[9]TEH COURT: That's Deendant's

[10]B. The doctor has that up there. It is the flat latera.

[11]Q I put them away so we wouldn't lose them.

[12]I didn't want to have a repeat of what happened.

[13]THE COURT: It is the lateral

[14]of 7/11/84.

[15]Q Doctor I hand you Defendant's exhibit

[16]B. Is that the x-ray that was taken on July 11, 1984?

[17]A yes, it is.

[18]Q And can you recall whether or not you

[19]looked at it that, monring -- that aftenon before you

[20]operated on him?

[21]A no, I can not.

[22]Q When was the first time you looked at

[23]that x-ray?

[24]THE COURT : Well assuming you

[25]didn't look at it then when was the first

[1]4123

[2]time you **[\*97]** looked at it.

[3]MR. WIESEN: He just testified-

[4]THE COURT: He said he doesn't

[5]recall if he looked at it. Assuming

[6]you didn't see it on the fternoon of

[7]the 13th when did you see it for the

[8]first time?

[9]THE WITNES:S At osme time when

[10]I was reviewing the case with Mr. Rappaport.

[11]THE OCURT: within the last several

[12]months?

[13]THE WITNESS: Yes.

[14]Q Doctor does that x-rray show narrowing-

[15]THE COURT: He said it does.

[16]MR. WIESEN: Pardon me your Honor?

[17]THE COURT : He said it does.

[18]Q And in determining that doctor were you

[19]able when you saw Mr. Rappaport were able to determine

[20]that with your naked eye?

[21]A Well --

[22]THE COURT: What he testified

[23]to is he was able to determine it deserved

[24]another look with measurements, it that

[25]correct.

[1]4124

[2]THE WITNESS: Correct.

[3]THE COURT: Okay.

[4]Q And in looking at the --

[5]THE COURT: He already testified

[6]yes.

[7]Q Now doctor would you in your opinion

[8]tell this court whether or not a radiologist --

[9]THE COURT: He already testified

[10]in response to **[\*98]** my question that a competent

[11]radiologist should have made the same

[12]ob observation.

[13]Q Would you agree doctor that the failure

[14]to make that observation wouldn't be in accord--

[15]THE COURT: Would not be in accord

[16]with good radiological practice.

[17]THE WITNESS: I agree.

[18]Q Did Mr. Rappaport when you met him tell

[19]you that the radiologist at harlem Hospital, Dr. Balmir,

[20]appeared in this court a few days ago and testified

[21]that that x-ray shows no narrowing?

[22]A He did not tell me that.

[23]Q Did he tell you that?

[24]A No, he did not.

[25]Q Did mr. Rappaport when you were preparing

[1]4125

[2]for trial tel you that Mr. -- that Dr. Malbir did say

[3]on at least two occasions and more over it

[4]make any difference to him whether or not

[5]showed narrowing or not, did he tell you that?

[6]A I don't recall his relating to me.

[7]q I want you to assume that he said that

[8]was not realy important to him because he takes his

[9]own x-rays before the myelogram and I would like you

[10]to look at the lateral x-ray taken of Mr. Carson without

[11]metricimide on the 13th.

[12]THE COURT: **[\*99]** That is Defendant's

[13]Exhibit C.

[14]MR. WIESEN: Yes your Honor.

[15]Yes, that is Defendant's C.

[16]Do you have Defendant's Exhibit

[17]C Mr. Rappaport?

[18]THE COURT: No Mr. Rappaport said

[19]he put all of those x-rays away.

[20]MR. WIESEN: Okay.

[21]THE COURT: If you are interested

[22]inw hat he testified about Defendant's

[23]C, he testified that is not necessarily

[24]an x-ray that you can rely on but it

[25]raises all so the suspicion of narrowing

[1]4126

[2]but not as great a suspicion as the other

[3]one that seems to be my recollection

[4]o of your testimony is that correct?

[5]THE WITNES: SThat is correct.

[6]THE COURT: All right that is

[7]his testimony.

[8]Q It may be up here but I would like to

[9]point out to the jury if I may. It is Defendant's

[10]B, your Honor.

[11]THE COURT: No Defendant's C.

[12]MR. WIESEN: Do yo have Defendant's

[13]C.

[14]TEH COURT: He doesn't he said

[15]he put it in the envelope,

[16]MR. RAPPAPORT: I will get it

[17]for you.

[18]THE COURT: it was here a moment

[19]ago because Mr. Rappaport used it on

[20]his direct examination.

[21]MR. RAPPAPORT: Judge **[\*100]** are you

[22]sure it is C. Because I have the one

[23]with the dye --

[24]THE COURT: No it is with no dye.

[25]Defendant's exhibit C. That is the

[1]4127

[2]x-ray that Dr. Balmir testified he relied

[3]on to conclude there was no narrowing.

[4]MR. RAPPAPORT: I have it your

[5]Honor.

[6]q Doctor would you please put that on the

[7]shadow box? Would you put it in the lateral fashion?

[8]A You mean up like this?

[9]Q Yes.

[10]A Okay.

[11]Q now doctor this white area here is that

[12]the patient's shoulder?

[13]A This represents the patient's shoulder.

[14]Q And does not this x-ray isn't this the

[15]patient's chin over here?

[16]A Yes, it is.

[17]Q And isn't that patient's head tilted way

[18]back doctor?

[19]a I can not tell that from this x-ray.

[20]Q Well doctor if this is his shoulder and

[21]this is the occiput of the back of his head isn't

[22]it obvious that patient's head is tilted way back?

[23]A No, it is not.

[24]Q Doctor do you see narrowing of his cervical

[25]spine in that x-ray?

[1]4128

[2]A I previously testified that we can see

[3]the level at C3. This x-ray contains a **[\*101]** degree of what

[4]we call a magnification of which the radiologist who

[5]does the x-ray and sets up the tube is aware of. One

[6]must compensate for that degree of magnification in

[7]deciding whether or not there is any evidence of narrowing

[8]thee? I can not

[9]A I can not testify as to what the radiolo-

[10]gist felt was going on.

[11]THE COURT I take it the question

[12]is what do you see when you look at it.

[13]THE WITNESS: The problem is I

[14]know what the other x-ray showed.

[15]THE COURT: Well if you will doctor

[16]can you put out of your mind what the

[17]other x-ray showed because the radiologist

[18]does not remember if he bothered to look

[19]at the other x-ray. Again the problem

[20]THE WITNESS: Again the problem

[21]is having not set up the machinery

[22]and the plate I don't know how much

[23]magnification there is and that would

[24]very much impact on what the measurement

[25]f the canal would be. In a perfectly

aligned x-ray whether it was no sig-

[1]4129

[2]nificant magnification the measurement

[3]of 12 or 13 which I gave earlier would

[4]apply. When there is magnification you

[5]must compensate for that --

[6] **[\*102]** THE COURT: Wouldn't the magnifica-

[7]tion magnify the canal uniformly so if

[8]another portion was narrow you can see

[9]the other portion?

[10]THE WITNES:S What it would do

[11]is make the narrow portion a little

[12]wider.

[13]THE COURT: Would it make the

[14]normal portion wider than that?

[15]THE WITNES:S Yes.

[16]q Doctor because of the magnification are

[17]you saying to us that you would need some mathematics,

[18]you need a calculator to do it relative to the size

[19]of the vertebra are enlarged?

[20]A I don't think I am capable of doing that

[21]but I think the answer to your question is yes, I would

[22]need to know how far the tube and the plate were from

[23]the patient to know how much magnification. Taking

[24]t degree of magnification I can then measure the

[25]anal as best I could and reach some conclusion about

[1]4130

[2]the real diameter.

[3]Q Doctor in order to make the conclusion

[4]as to whether or not there is narrowing or not you

[5]would need a calculator and --

[6]THE OCURT: He said he would have

[7]to know how much the magnification was

[8]in order to determine how to reduce

[9]it to natural size **[\*103]** I take it, is that

[10]correct?

[11]TEH WITNESS: Yes.

[12]q Now doctor the fact of the matter is

[13]that it is impossible to know whether there is narrow-

[14]ing of Mr. Carson's spine by this x-ray, true?

[15]A I can't state that, no.

[16]Q Well doctor let me see if I can help

[17]you. Did you look at the CT scan of the cervical spine

[18]of Mr. Carson that was taken on July 13?

[19]A yes, I did.

[20]Q When you prepared for trial were you

[21]told or did you note that according to the radiologist

[22]at Harlem Hospital they say that the most prominent

[23]at the narrowing is at C5, C6 level where the measures

[24]8 milimeters, do you recall that, doctor?

[25]A I don't recall it. I don't question

[1]4131

[2]it but I don't recall it. I --

[3]q Well let me show it to you doctor.

[4]A Certainly.

[5]THE COUR:T This is the x-ray

[6]report of that particular CT scan.

[7]THE WITNES: That is what is

[8]stated in the report.

[9]Q Okay. Doctor assume for the moment that

[10]the radiologist and these radiologists are not Dr.

[11]Balmire they are two others, so you are clear on that.

[12]A yes.

[13]Q These **[\*104]** are two other radiologists and

[14]they say this man's narrowing Mr. Carson's narrowing

[15]is at C5, C6 level, right. Assume that.

[16]a They state that the greatest narrowing

[17]is at C5, C6.

[18]Q Does this x-ray show C5 and C6?

[19]A No, it does not.

[20]Q 5 and 6 are covered up are they not?

[21]A Yes, they are.

[22]Q Would you agree therefore doctor that

[23]a doctor in radiology who says he relied on this x-

[24]ray to determine that there was no narrowing would

[25]be a departure from good and accepted medical practice?

[1]4132

[2]A I think that the radiologist looking

[3]at this x-ray can see a portion of the spine that was

[4]if not just as narrow very close to it and would base

[5]his opinion on that. I have to state that he could

[6]not make any comment about what was going on at C5,

[7]on the basis of this x-ray.

[8]Q Doctor do you see narrowing at C1, 2,

[9]3 which is what is shown here?

[10]A I see no narrowing at C1 and no narrowing

[11]at C2 and we discussed my impressions at C3 and to

[12]decide whether there is a degree of narrowing based

[13]on the degree of magnification.

[14]Q Well doctor I want [\*105] you to assume that

[15]any doctors have come in here and stated you could not

[16]make such a decision fairly and accurately based on

[17]this x-ray from several reasons. One, it is not a good

[18]x-ray to determine that. Two, it shows only three

[19]of the vertebra and a little part of four, and therefore

[20]to rely upon this to make a determination of whether

[21]there is narrowing would be bad practice.

[22]MR. RAPPAPORT: Objection to form.

[23]THE COURT: I have not heard a

[24]question yet so I don't know what to

[25]rule on. Let's hear a question.

[1]4133

[2]Q The question is would you agree with

[3]those?

[4]THE COURT: Well several doctors.

[5]Several doctors.

[6]MR. RAPPAPORT: Judge can I give

[7]a reason for myobjection?

[8]THE COUR:T No, the objection

[9]is overruled. Did you agree to that?

[10]THE WITNESS: The only judgment

[11]that could be made on this film --

[12]THE COURT : I take it you would

[13]or would not agree that is the question.

[14]THE WITNESS: At the levesl not

[15]seen I would not agree at the levels seen it is possible.

[16]Q Doctor is it important before amyelogram

[17]commences to know whether [\*106] or not a patient has a narrowed

[18]cervical canal?

[19]A I think that in performing a cervical

[20]myelogram for this particular problem one basically

[21]assumes that is a significant possibility whether it

[22]is shown on the bone x-rays or not.

[23]q Doctor can you answer my questions.

[24]I would appreciate it.

[25]THE COURT: All right, go ahead.

A Ask the question again.

[1]4134

[2]THE COURT: Dr. Balmir testified,

[3]the doctor who performed the procedure,

[4]that apparently the knoweldge of whether

[5]or not there is narrowing is knoweldge

[6]that would in no way affect the manner

[7]in which you would perform the procedure.

[8]THE WITNESS: I would agree with

[9]that.

[10]TH COURT: Next question.

[11]Q Would you agree therefore doctor that

[12]a person such as Mr. Carson who had a narrowed canal

[13]might be more susceptible to injury from extension

[14]of the cervical spine?

[15]A Yes.

[16]Q And because of the underlying compromised

[17]cord one would seek to avoid putting any stress on

[18]the cord through extension of the cervical canal?

[19]A Yes.

[20]Q Would you agree doctor, and I think in

[21] **[\*107]** answer to Mr. Rappaport's question that based on a

[22]particular x-ray it is very hard to determine what

[23]is hyperextension and what is just extension.

[24]A Yes.

[25]Q You agree that if you are going to do

[1]4135-4145

[2]a myelogram by the lumbar route, that some extension

[3]is necessary? I

[4]A Yes.

[5]

[6]

[7]

[8]

[9]

[10]

[11]

[12]

[13]

[14]

[15]

[16]

[17]

[18]

[19]

[20]

[21]

[22]

[23]

[24]

[25]

[1]4146

[2]Q You also agree that what is hyperextension

[3]for each individual--

[4]A I missed a word. I'm sorry.

[5]THE COURT: Hyperextension varies from

[6]person to person?

[7]MR. WIESEN: Your Honor read my mind.

[8]A Yes.

[9]THE COURT: Yes.

[10]Q It varies, right?

[11]A Yes.

[12]Q What is hyper for one neck may be just mere

[13]extension for another?

[14]A I agree with that.

[15]Q And the degree of impingement that might

[16]result from extension is relative to the diameter of the

[17]canal and the degree of extension?

[18]A Yes.

[19]Q In this particular case, Doctor, is it your

[20]testimony to the jury or--withdrawn.

[21]There was another x-ray in which the head

[22]and neck is **[\*108]** displayed, and maybe you have it in front of

[23]you, Doctor, with the metrizamide in it.

[24]A No.

[25]Q I show you Defendant's I, sir.

[1]4147

[2](Shown to witness.)

[3]Q Will you take a look at that? Would you put

[4]it in the vertical position, please?

[5](Witness complies.)

[6]Q Thank you.

[7]I think the jury will be able to get a

[8]better idea of what we're talking about if you do it

[9]that way.

[10]And looking at that, Doctor, isn't this the

[11]back of the man's head, that white area right there?

[12]THE COURT: There's a pointer, two

[13]pointers.

[14]MR. WIESEN: That will help me.

[15]THE COURT: The doctor will give you a

[16]pointer.

[17]MR. WIESEN: Okay.

[18]Q Doctor, and so the jury can see, is this the

[19]back of the man's head here?

[20]A Yes, it is.

[21]Q And is this his shoulder?

[22]A Yes, it is.

[23]Q Are you telling this jury--withdrawn.

[24]Is this his chin up here?

[25]A Yes, it is.

[1]4148

[2]Q Are you telling this jury that this x-ray

[3]does not show a man's head who is tilted back that way?

[4]A It shows extension.

[5] **[\*109]** Q My question was, Doctor--

[6]THE COURT: It shows the man's head

[7]tilted back. That's what he said.

[8]THE WITNESS: Yes.

[9]THE COURT: I take it extension means

[10]that the head is tilted back?

[11]THE WITNESS: Correct.

[12]THE COURT: And the chin is raised?

[13]THE WITNESS: Yes.

[14]Q Now, is it your testimony, Doctor, that you

[15]can't really tell whether this is hyperextended, using

[16]the word "hyper," and therefore dangerous to the

[17]patient, because you really don't have the other

[18]variables?

[19]A That is correct.

[20]THE COURT: Would you characterize

[21]this as mild extension, Doctor?

[22]THE WITNESS: Yes, I think that's a

[23]fair characterization.

[24]THE COURT: All right.

[25]Q Doctor, would you agree that good practice--

[1]4149

[2]withdrawn.

[3]Assume for the moment that Dr. Balmir knew

[4]or should have known that Mr. Carson has a

[5]narrowed--marked--severely narrowly cervical canal.

[6]Let's assume that.

[7]A Yes.

[8]Q Didn't good practice dictate that Dr. Balmir

[9]or one of the other of his assistants in there inform

[10]the patient that because of his condition, [\*110] if he feels

[11]anything, any pain, any unusual pain or discomfort, to

[12]let him know right away?

[13]Wouldn't good practice dictate that?

[14]A I would have a hard time answering that

[15]question, because I don't do myelograms and I'm not

[16]really sure what instructions are given to a patient. I

[17]don't know how else--

[18]THE COURT: All right. Your answer

[19]is, you're not in a position to offer an

[20]opinion as to whether or not if a patient

[21]complains of unusual sensations of pain

[22]during the myelogram it's advisable that the

[23]patient advise the doctor of that?

[24]You don't feel you can express an

[25]opinion on that?

[1]4150

[2]THE WITNESS: I think that the patient

[3]should advise the doctor of anything that

[4]has happened, yes.

[5]THE COURT: Do you think it's wise to

[6]tell the patient that?

[7]THE WITNESS: I probably would, but I

[8]think the question was, would it be proper

[9]medical standards, and that I can't answer.

[10]THE COURT: Okay.

[11]Q Are you answering that way, Doctor, because

[12]you're not familiar with the standards as governing

[13]radiologist, being you are a neurosurgeon? [\*111]

[14]A Correct.

[15]Q That's fair enough.

[16]Let's assume, Doctor, for the moment that

[17]this man were about to undergo a myelogram and the

[18]metrizamide is put into the lumbar spine.

[19]As the metrizamide moves toward the cervical

[20]canal, they take serial x-rays, right?

[21]A They may or may not take serial x-rays. He

[22]maybe under what's called fluoroscope, where the dye can

[23]actually be visualized as it's moving, without taking an

[24]x-ray.

[25]Q Well, I want you to assume in this case,

[1]4151

[2]not only was there a fluoroscope, but there were

[3]multiple x-rays--

[4]THE COURT: There are some x-rays of

[5]the lumbar spine with the metrizamide.

[6]THE WITNESS: Yes.

[7]Q Right up to the neck, approximately 13 or 14

[8]in number.

[9]A I will assume that, yes.

[10]Q Doctor, I would ask you this: Suppose that

[11]the metrizamide went up towards the neck, Mr. Carson had

[12]complained about electric shocks going into his arms.

[13]Would you state to this jury, in your

[14]opinion, would good medical practice dictate that this

[15]procedure be promptly stopped?

[16]A I do not think that it **[\*112]** would dictate that

[17]the procedure be promptly stopped, no.

[18]Q You don't feel that alerting the doctors to

[19]that problem, that they could stop after the one or two

[20]shots?

[21]A Their obligation is to obtain a study which

[22]shows to their satisfaction pathology. That's the point

[23]at which the study should be stopped, when they know

[24]what's going on.

[25]Q Doctor, assuming, as you've indicated, that

[1]4152

[2]Mr. Carson did have marked narrowing of his cervical

[3]spine.

[4]The myelogram could have been done without

[5]the head being extended at all, true?

[6]A Not in normal fashion, no.

[7]Q I wasn't asking that, Doctor. Please answer

[8]my question.

[9]A It could be done.

[10]Q Could a myelogram be done without extension?

[11]MR. RAPPAPORT: Judge, I--

[12]THE COURT: Please. Don't comment on

[13]answers.

[14]I take it it could be?

[15]THE WITNESS: It could be done, yes.

[16]Q And that would be called an external

[17]injection?

[18]A No, that has no relationship to what you

[19]just said.

[20]Q Doctor, can't you do--at least if you are

[21]aware of it, and tell us if you [\*113] are--can't you do a

[22]myelogram in 1984, or couldn't it be done, by injecting

[23]the metrizamide between C1 and C2 instead of L4-5?

[24]A Yes, it could be.

[25]Q And if you did it that way, you wouldn't

[1]4153

[2]need to have the same degree of extension that you would

[3]need the other way, true?

[4]A No.

[5]Q Well, if you elevated the head somewhat and

[6]injected the metrizamide at C1-C2, the metrizamide,

[7]instead of going towards the brain, would be going

[8]towards the feet?

[9]A That would be true.

[10]Q And really if you put it at C1-C2 you'd be

[11]shown the same area, C1-2-3-4, as it went down, as you

[12]would the other way? In other words, I'm just reversing

[13]the table, true, Doctor?

[14]A No.

[15]Q Well, Doctor, when you put it in the L4-5,

[16]you have to elevate the feet so that the metrizamide

[17]goes towards the neck, because that's what you want to

[18]illuminate, right?

[19]A That is true.

[20]Q If you reversed it, wouldn't you be doing

[21]the same thing, only illuminating the neck first, as it

[22]went down towards the feet? True, Doctor?

[23]A Let me see if I can answer the question [\*114] this

[24]way: Well--

[25]Q See if you can answer--

[1]4154

[2]A The answer is no.

[3]THE COURT: He disagrees with that.

[4]Next question.

[5]Q Doctor, we've had several doctors here, at

[6]least several who say that by doing it that way you can

[7]illuminate the neck, the cervical spine, take the x-rays

[8]that way, and thereby avoid the risk of extension.

[9]Would you agree with that?

[10]MR. RAPPAPORT: Objection.

[11]THE COURT: Overruled.

[12]A No, I don't agree.

[13]THE COURT: He disagrees with that.

[14]Next question.

[15]Q Doctor, would you agree that if you wanted

[16]to do. it that way, however, you would need a radiologist

[17]who has special training?

[18]A I would agree that someone who had not done

[19]a C1-C2 puncture should not do that.

[20]Q My question then--

[21]THE COURT: The answer is yes.

[22]Q And the reason somebody who has not had

[23]special training and experience doing it that way is

[24]that you can puncture the spinal cord, right?

[25]A One could, yes.

[1]4155

[2]Q And therefore, by having someone attempt to

[3]do it that way, you would be increasing the [\*115] risk to the

[4]patient, true?

[5]A In competent hands the risk would not be

[6]increased with someone who had that experience, because

[7]it is a safe procedure.

[8]Q All right.

[9]A It's more involved than the lumbar.

[10]Q Thank you.

[11]In competent hands, Doctor, by putting the

[12]metrizamide in C1-C2, your testimony is--

[13]THE COURT: The risk would not be

[14]increased.

[15]Q It would not be increased in competent

[16]hands?

[17]THE COURT: That's what he just said.

[18]Q To turn it around, in incompetent hands, by

[19]a radiologist who didn't have the training and

[20]experience, the risk would be increased, true?

[21]A You are talking strictly about the C1-C2

[22]puncture, yes.

[23]Q That's what I'm talking about.

[24]THE COURT: He said yes.

[25]Q There's another means of introducing the

[1]4156

[2]metrizamide, is there not?

[3]A Yes.

[4]Q Okay. And that's from the base of the skull

[5]down, right?

[6]A That is correct.

[7]Q And does that require specialized training

[8]in order to avoid having an additional risk imposed upon

[9]the patient?

[10]A I think [\*116] just as with the C1-C2 puncture,

[11]it's something that can be done; the more often you

[12]done it, the less likely it is you'll have

[13]complications.

[14]Q Doctor, were you told at any time in the

[15]course of your preparation for this trial that the

[16]doctor who did this took the examinations to become a

[17]board certified radiologist and failed twice and still

[18]does not have certification? Did he tell you that?

[19]A No.

[20]Q Now, Doctor, do you actually remember the

[21]details of the surgery? His Honor asked you about--

[22]THE COURT: He said he doesn't. He

[23]was testifying as to what or how this

[24]operation is routinely done.

[25]Correct, Doctor?

[1]4157

[2]THE WITNESS: Yes.

[3]THE COURT: If I may, before we get to

[4]the surgery, you wrote a pre-surgical note,

[5]did you not?

[6]It's on page--it looks like 36, or 35,

[7]or 30. It's dated 7/13. Do you see it,

[8]Doctor? It should be chronological.

[9]THE WITNESS: 33.

[10]THE COURT: What is it, 33?

[11]THE WITNESS: Yes.

[12]THE COURT: Okay. And the first

[13]sentence says: This patient has marked

[14]cervical and cord compression--you [\*117] are

[15]abbreviating--C3-C6, secondary to

[16]spondylosis, correct?

[17]THE WITNESS: Yes.

[18]THE COURT: Now, Doctor, is that

[19]something that somebody--is there something

[20]--did you write this note before you saw the

[21]x-rays of the patient?

[22]THE WITNESS: I'm sure I wrote that

[23]after I saw the x-rays.

[24]THE COURT: Okay. So that this is

[25]something that you didn't have to be told,

[1]4158

[2]this is something you could observe from the

[3]myelogram and the CAT scan, is that correct?

[4]THE WITNESS: Yes, it is,

[5]THE COURT: Then you wrote: He is

[6]weaker post-myelogram. You see that?

[7]THE WITNESS: Yes.

[8]THE COURT: All right. Now, obviously

[9]that's something that you didn't observe

[10]yourself, that's historical, somebody told

[11]you that?

[12]THE WITNESS: That is correct,

[13]except--

[14]THE COURT: Do you recall whether or

[15]not that's something the patient told you?

[16]THE WITNESS: No, I do not.

[17]THE COURT: Do you recall--I take

[18]you don't recall whether or not that's

[19]something that one of the doctors who you

[20]were consulting with told you, is that

[21]correct? **[\*118]**

[22]THE WITNESS: I would have reached

[23]that conclusion--

[24]THE COURT: No, no. Listen to my

[25]question.

[1]4159

[2]That's historical, and that's

[3]something somebody imparted to you, is that

[4]correct?

[5]THE WITNESS: For the most part, yes.

[6]THE COURT: Okay. But you don't know

[7]who told you that?

[8]THE WITNESS: No.

[9]THE COURT: Next question. Go ahead.

[10]Q Doctor, do I understand your testimony that

[11]you don't have a specific recollection of this

[12]operation?

[13]A I have a recollection of portions of the

[14]operation, but I do not have a recollection of the

[15]entire picture and procedure, no.

[16]THE COURT: You don't recall what role

[17]Dr. James had, if any?

[18]THE WITNESS: I recall that I did the

[19]entire operation.

[20]THE COURT: He was just standing and

[21]watching?

[22]THE WITNESS: That is correct.

[23]Q Doctor--

[24]THE COURT: If I may.

[25]I take it this is not the first

[1]4160

[2]operation you performed at Harlem Hospital.

[3]THE WITNESS: No.

[4]THE COURT: Were you aware that there

[5]was at that time, and presumably still is,

[6] [\*119] but certainly there was at that time, a rule

[7]at Harlem Hospital requiring that either the

[8]surgeon or one of the residents dictate an

[9]operative report?

[10]THE WITNESS: No, I was not aware of

[11]that, your Honor.

[12]THE COURT: I see. Did you yourself--

[13]do you recall yourself ever dictating an

[14]operative report at Harlem Hospital?

[15]THE WITNESS: I recall never dictating

[16]an operative report.

[17]THE COURT: Okay. You've never--it's

[18]your testimony that--when did you first

[19]become associated with Harlem Hospital?

[20]THE WITNESS: 1978.

[21]THE COURT: 1978?

[22]THE WITNESS: Yes.

[23]THE COURT: And I take it you

[24]performed many operations there?

[25]THE WITNESS: Yes.

[1]4161

[2]THE COURT: And you have never

[3]dictated an operative report, is that your

[4]testimony?

[5]THE WITNESS: That is my testimony.

[6]THE COURT: Have you ever co-signed an

[7]operative report dictated by somebody else?

[8]THE WITNESS: No, I have not.

[9]THE COURT: Have you ever co-signed an

[10]operative report written by somebody else?

[11]THE WITNESS: Not to the best of my

[12]recollection. **[\*120]**

[13]THE COURT: So then you have no idea

[14]whether or not the operative reports written

[15]or dictated accurately reflect the

[16]operations that you perform?

[17]THE WITNESS: That is correct.

[18]THE COURT: Is that your practice,

[19]Doctor?

[20]THE WITNESS: It doesn't affect the

[21]performance of the operation.

[22]THE COURT: No, no. Doctor, I take it

[23]it's appropriate that the hospital record

[24]contain an operative report that accurately

[25]describes what occurred in the course of the

[1]4162

[2]operation.

[3]THE WITNESS: Yes.

[4]THE COURT: You don't know if the

[5]operative reports of your operations are

[6]accurate, is that correct?

[7]THE WITNESS: I make--I customarily

[8]read over the operative report. That's not

[9]what I was asked.

[10]THE COURT: Oh. All right. Is it

[11]your testimony that you read over every

[12]operative report of all your operations,

[13]presumably dictated or written by somebody

[14]else?

[15]THE WITNESS: I decline to say every,

[16]but for the most part, yes.

[17]THE COURT: For the most part are they

[18]typewritten or handwritten?

[19]THE WITNESS: Handwritten.

[20] **[\*121]** THE COURT: Go ahead.

[21]You are unaware this is not in accord

[22]with hospital policy or rules?

[23]THE WITNESS: I have never been

[24]informed that it's not in accord with

[25]hospital policy.

[1]4163

[2]Q Doctor--

[3]THE COURT: Put the box down, Doctor.

[4]THE WITNESS: Off or down.

[5]THE COURT: Just put it down.

[6](Witness complies.)

[7]Q Doctor--

[8]THE COURT: How. about at Roosevelt

[9]Hospital, are those handwritten reports?

[10]THE WITNESS: No, they are not.

[11]THE COURT: They are typed?

[12]THE WITNESS: Yes.

[13]THE COURT: And you dictate them

[14]yourself?

[15]THE WITNESS: Yes.

[16]THE COURT: Next question.

[17]Q Doctor, you have been a member of the staff

[18]at Harlem Hospital since 1978, you said?

[19]A That is correct.

[20]Q And did you, Doctor, in the four years

[21]between 1978 and 1984 learn that one of the rules of the

[22]hospital, set down rules governing the surgery

[23]department, is that the attending doctor who does the

[24]operation must see to it that the operation report is

[25]typed out?

[1]4164

[2]THE COURT: He's unaware of this. I

[3] **[\*122]** just asked that question.

[4]Q Are you aware that it was one of the rules

[5]of the hospital?

[6]THE COURT: He doesn't know. He's

[7]unaware of it, and he's still unaware of it.

[8]THE WITNESS: That is correct.

[9]THE COURT: All right.

[10]Q Now, Doctor, you did this operation with Dr.

[11]James, is this your testimony?

[12]THE COURT: He said Dr. James just

[13]observed.

[14]Q Well, Doctor, do you recall being asked

[15]these questions on page 48--starting at 47? When you

[16]read this two or three months ago, do you recall these

[17]questions and these answers:

[18]"Question: By custom and practice,

[19]when you perform a procedure such as this,

[20]who would have been cutting with the

[21]scalpel, you or Dr. James?

[22]"Answer: The skin incision might be

[23]made by either of us.

[24]"Question: What type of scalpel that

[25]was used in the performance?

[1]4165

[2]"Answer: I have no idea."

[3]Do you recall giving those answers, first?

[4]A Yes, I do.

[5]Q Continuing on page 48. Do you recall this

[6]question and the following answers that you gave to

[7]these questions:

[8]"Question: **[\*123]** During the course of this

[9]procedure what type of device was used to

[10]cut through the bone?

[11]"Answer: I mentioned we used a

[12]variety of rongeurs. I cannot specifically

[13]state which ones we used.

[14]"Question: Who was it actually

[15]used the rongeurs, you or Dr. James?

[16]"Answer: I don't have a specific

[17]recollection. Possibly both of us. More

[18]than likely, I did the majority of that

[19]portion of the procedure."

[20]Do you recall that, Doctor, giving that

[21]answer to that question, under oath, in August of 1988?

[22]A Yes, I do.

[23]THE COURT: I take it it was true?

[24]THE WITNESS: Yes.

[25]THE COURT: So Dr. James was not.

[1]4166

[2]merely an observer?

[3]THE WITNESS: It's saying that Dr.

[4]James, as an observer, it is indicated by me

[5]that he did either very little or none of

[6]the operation. In giving testimony such as

[7]that, I do not rule out the possibility that

[8]he made the skin incision, for example, and

[9]possibly even did some of the very

[10]superficial portion of the bone work. There

[11]is no question in my mind, as I've never in

[12]my career allowed a resident to do any **[\*124]** of

[13]that portion of the operation which involves

[14]neural structures whatsoever.

[15]Therefore, by far the greater

[16]majority, and more than likely all of it,

[17]was done by me. For me to state

[18]unequivocally that he didn't touch a rongeur

[19]would not be accurate.

[20]THE COURT: Have you ever been

[21]involved in training residents who were

[22]residents in neurosurgery?

[23]THE WITNESS: Yes, I have.

[24]THE COURT: And how do residents in

[25]neurosurgery get hands-on experience in

[1]4167

[2]doing this kind of operation?

[3]THE WITNESS: Residents in

[4]neurosurgery have either a four- or

[5]five-year training program, the first three

[6]or four of which they will observe surgery,

[7]and during their last year will actually

[8]perform the surgery.

[9]THE COURT: So that I take it a

[10]neurosurgical resident, a senior

[11]neurosurgical resident, would handle the

[12]rongeurs and do perhaps the entire operation

[13]under the supervision of an attending

[14]surgeon?

[15]THE WITNESS: That is correct.

[16]THE COURT: You've done that?

[17]THE WITNESS: Yes, I have.

[18]THE COURT: So when you said a

[19]resident, **[\*125]** you meant a surgical resident?

[20]THE WITNESS: Correct.

[21]Q Is it your testimony, Doctor, at this point

[22]that in removing the lamina you were the only one who

[23]was removing the lamina, as you indicated, with the

[24]rongeur?

[25]A That is correct.

[1]4168

[2]Q Do you remember this question and this

[3]answer, on page 61, which you gave under oath two years

[4]ago:

[5]"Question: During what course of the

[6]procedure were the Kerrison rongeurs used

[7]and during what course of the procedure were

[8]the Leksell rongeurs used?

[9]"Answer: During the removal of the

[10]lamina, we are interchanging the use of one

[11]and another, depending on the most

[12]appropriate instrument for that particular

[13]bite, if you will."

[14]Doctor, do you recall giving that answer?

[15]A Yes, I do.

[16]Q And when you said, "we're interchanging the

[17]use of the rongeurs," were you referring to yourself and

[18]Dr. James?

[19]A I was referring to the generic we, rather

[20]than to myself.

[21]THE COURT: The royal we.

[22]THE WITNESS: The royal we. I'm

[23]sorry.

[24]THE COURT: Were there portions of the

[25]operation **[\*126]** in which you used this other type

[1]4169

[2]of rongeur?

[3]THE WITNESS: Yes.

[4]THE COURT: Okay.

[5]Q Now, Doctor, when you---withdrawn.

[6]The rongeur is the instrument that tore that

[7]aura, isn't that true?

[8]A If it was torn by an instrument, it was torn

[9]by a rongeur.

[10]Q I'm sorry, I can't hear.

[11]THE COURT: If it was torn by an

[12]instrument, it was torn by the rongeur.

[13]Q And, Doctor, is it your testimony now that--

[14]withdrawn.

[15]In answer to Mr. Rappaport's question, did

[16]you indicate that at the time of the surgery you don't

[17]recall the size of the rent, the tear in the dura?

[18]A I don't recall the absolute size--excuse me.

[19]I don't recall the absolute size of the rent, whether it

[20]was half a centimeterer 1 centimeter, no.

[21]Q Well, Doctor, would the nature of the repair

[22]to the dura depend upon the size?

[23]A No, it would depend on the size of the rent.

[24]Q If it was a two-inch tear in the dura,

[25]wouldn't good and accepted medical practice require, as

[1]4170

[2]you had testified, that instead of stretching it side to

[3]side, which would cause further [\*127] narrowing, that you put

[4]a patch in there?

[5]MR. RAPPAPORT: Objection to the form,

[6]as he testified.

[7]THE COURT: Sustained.

[8]MR. RAPPAPORT: I don't--

[9]THE COURT: Sustained. Sustained.

[10]Q Assuming for the moment, Doctor, that the

[11]tear in the dura was approximately 5 centimeters, which

[12]equates out to about two inches, right, Doctor?

[13]A Five centimeters is around two inches, yes.

[14]Q Assume for the moment that the tear was

[15]about two inches. Is it your testimony that in

[16]repairing a two-inch tear in the dura, better practice

[17]would dictate that a patch be put into it, rather than

[18]suture?

[19]A No.

[20]Q Doctor, isn't it a fact that if you had a

[21]two-inch tear and you sutured it, as it is demonstrated

[22]on. this middle figure, you would in effect be further

[23]compressing an already narrowed canal?

[24]A No.

[25]THE COURT: You are not compressing

[1]4171

[2]the canal. It's not the canal that's

[3]compressed, if anything is compressed,

[4]correct, Doctor? Is that correct?

[5]THE WITNESS: That's correct.

[6]Q So that if you did that with a two-inch, you

[7] **[\*128]** would be further compressing--

[8]THE COURT: He said no. He understood

[9]what you meant.

[10]Q You understood that?

[11]THE COURT: You knew he meant spinal

[12]cord rather than canal?

[13]THE WITNESS: Correct.

[14]THE COURT: Okay.

[15]Q And, Doctor, you heard the name Abbott

[16]Krieger?

[17]A Yes, I have.

[18]Q Highly competent neurosurgeon?

[19]A I have no idea.

[20]Q Would you agree, Doctor, chairman of the

[21]department, full clinical professor at the University

[22]Hospital of New Jersey, at least on the basis of that

[23]information, is a competent, highly qualified

[24]neurosurgeon?

[25]A I have no way of answering that question.

[1]4172

[2]Q Doctor, there are only about 250

[3]neurosurgeons in the State of New York, are there not?

[4]A I don't know.

[5]THE COURT: Board certified.

[6]Q Board certified.

[7]THE COURT: Do you know how many board

[8]certified--

[9]THE WITNESS: I don't.

[10]THE COURT: He doesn't.

[11]Q Do you know Dr. Kirshenbaum?

[12]A I know of him. I do not know him

[13]personally.

[14]Q Highly competent, highly experienced

[15]neurosurgeon? **[\*129]**

[16]A I do not know.

[17]Q In any event, Doctor, your testimony to Dr.

[18]Rappaport was that after this surgery you accompanied

[19]the patient to the recovery room?

[20]A That would be--

[21]THE COURT: That's what he said.

[22]THE WITNESS: That would be my normal

[23]custom, yes\*.

[24]Q Now, Doctor, you've just added some words

[25]that I have to ask you about. You say that is your

[1]4173

[2]custom, but you don't recall in this case.

[3]THE COURT: He has no specific

[4]recollection here, but that's his practice.

[5]Q I think, Doctor, you indicated before that

[6]there are certain things you remember about this case

[7]and other things you don't.

[8]A That is true.

[9]Q And in order for me to determine which you

[10]remember and which you don't, I'm afraid I have to ask

[11]you.

[12]A Quite all right.

[13]Q Do you remember, sir, accompanying Mr.

[14]Carson from the operating room to the recovery room on

[15]July 13, 1984?

[16]A I've answered that to the best of my

[17]ability, that it would be my normal custom.

[18]THE COURT: I take it you have no

[19]independent recollection?

[20]THE WITNESS: **[\*130]** No, I do not.

[21]Q Doctor, do you accept, sir, that good and

[22]accepted nursing practice was, when a doctor comes into

[23]a room where the nurses are in the recovery room or the

[24]patient, they notice the presence of the doctor?

[25]A They might or might not. They might not

[1]4174

[2]have known me and had no way of knowing who I was, for

[3]example, or they might--

[4]THE COURT: The answer is they may or

[5]may not.

[6]Q Doctor, if you walked into the recovery room,

[7]wouldn't the nurse, custom and practice, say, who are

[8]you?

[9]A No.

[10]Q You are looking at the patient that I'm

[11]taking care of, I would like to make a note who is

[12]looking at and treating my patient.

[13]Wouldn't that be good nursing practice?

[14]A I really don't know.

[15]Q Have you looked in this hospital record,

[16]Doctor, about the nurses' entries?

[17]A I'm sure I've looked at them at some point,

[18]but I don't specifically recall entries that were there

[19]or not there.

[20]Q Doctor, in looking through them, do you

[21]recall that the nurses listed doctors who came in to see

[22]the patient in many, many, many entries [\*131] in the hospital?

[23]A I don't recall whether I did or didn't.

[24]Q In any event, looking at it, did you see any

[25]mention anywhere on the 13th of your presence in the

[1]4175

[2]recovery room?

[3]THE COURT: There's no note--I don't

[4]think there's a note of any doctors present

[5]in the recovery room.

[6]MR. WIESEN: Well, if your Honor

[7]please, if you will note, there was one--

[8]THE COURT: Unless I misread the

[9]chart.

[10]MR. WIESEN: --where Dr. James was

[11]aware, they said.

[12]THE COURT: Yes. There's no note that

[13]the patient was seen by a doctor.

[14]MR. WIESEN: No.

[15]Q You see one place there where the recovery

[16]room nurse says, Dr. James aware?

[17]A I would be glad to be shown it.

[18]MR. RAPPAPORT: I'll stipulate.

[19]THE COURT: Please. Just a minute.

[20]Q I want you to assume, Doctor, that the

[21]recovery room nurse, in examining Mr. Carson, noted at

[22]one time initially that he did move his extremities, and

[23]then subsequently, by 7:00 the next morning, she noted.

[24]that he was not moving his extremities. I want you to

[25]assume that.

[1]4176

[2]There's [\*132] some equivocality about that.

[3]Earlier in the evening she indicated that Dr. James was

[4]aware of this. Were you advised by either Dr. James or

[5]the nurse that your patient was not moving his arms or

[6]legs once he awoke from the anesthesia?

[7]A I was definitely not advised by the nurse,

[8]because nurses would not generally make direct contact

[9]with me.

[10]Q Okay.

[11]A I was aware--

[12]Q Dr. James--

[13]THE COURT: Let him finish.

[14]A I was aware of the patient's course, and Dr.

[15]James would have been the person to communicate that to

[16]me.

[17]Now, I'm assuming that Dr. James was on

[18]night. It could possibly have been another resident.

[19]But I was aware of that course throughout.

[20]Q Doctor, to the extent that you have a

[21]recollection, can you tell us, did Dr. James communicate

[22]with you--

[23]THE COURT: Do you have a specific

[24]recollection of that, independent

[25]recollection?

[1]4177

[2]THE WITNESS: As I testified, I was

[3]aware of the patient's course throughout

[4]this period of time. The thing I cannot

[5]specifically recall is whether Dr. James

[6]called me or whether [\*133] some other resident

[7]that night called me.

[8]THE COURT: You have an independent

[9]recollection of communications from the

[10]hospital to you concerning the condition of

[11]this patient?

[12]THE WITNESS: Yes.

[13]THE COURT: Okay. Go ahead.

[14]You don't know who it was that kept

[15]you informed?

[16]THE WITNESS: I believe it was Dr.

[17]James, but I could not state with 100

[18]percent certainty.

[19]THE COURT: Go ahead.

[20]Q Doctor, during this surgery, you at one time

[21]did see the covering of the cord, did you not?

[22]A If you mean the dura, yes.

[23]Q And does the cord have a blood supply?

[24]A Yes, it does.

[25]Q And can a surgeon see the fact that the

[1]4178/85

[2]cord has a blood supply by whether or not there's

[3]pulsations?

[4]A That has no relationship to it at all.

[5]Q Doctor, doesn't the presence or absence of

[6]pulsations who or tend to demonstrate the viability of

[7]the cord?

[8]A No, it does not.

[9]Q What does pulsations demonstrate

[10]surgeon?

[11]A In the setting that we are discussing, it

[12]has no significance whatsoever.

[13]Q Doctor, my [\*134] question to you is, what do

[14]pulsations demonstrate--

[15]THE COURT: In any setting,

[16]patient.

[17]A Pulsations in the cervical region of the

[18]dura would indicate that the pulsations of the blood

[19]vessels in. the brain, which are causing the brain to

[20]expand with each pressure wave or each systolic pulse,

[21]are causing expansion of the brain, which compresses the

[22]spinal fluid around the brain and causes that pulsation

[23]to be transmitted down to the spinal cord region

[24](Continued on next page.)

[25]

[1]4186

[2]Q Doctor, on the basis of what you said wouldn't

[3]the presence or absence of pulsations observed in the dura

[4]be critical?

[5]A No, not at all.

[6]Q Do you recall in this case Doctor whether or

[7]not the dura was pulsating?

[8]A I do not recall.

[9]Q And is it your testimony to this jury is that

[10]it doesn't make a bit of difference whether it is

[11]pulsating or not?

[12]A Correct.

[13]THE COURT: That was what he testified.

[14]Q Doctor, I want you to assume that a full

[15]clinical professor of neurosurgery, Dr. Krieger, says that

[16]is a critical fact because whether it [\*135] is pulsating or not

[17]will determine whether you have a viable cord or not,

[18]would you agree with that?

[19]MR. RAPPAPORT: Object.

[20]THE COURT: Obviously.

[21]MR. RAPPAPORT: I object to the

[22]question.

[23]THE COURT: You can read the testimony.

[24]It may not be precisely what it is the doctor

[25]testified to.

[1]4187

[2]MR. RAPPAPORT: I will withdraw it.

[3]THE COURT: Go ahead. I take it you

[4]disagree?

[5]THE WITNESS: I disagree.

[6]Q Doctor, if you do agree that the presence or

[7]absence of pulsations may be critical --

[8]THE COURT: He said he disagreed.

[9]MR. WIESEN: I am sorry, sir, I thought

[10]he said he did agree.

[11]THE COURT: No, he disagreed. Dr. Krieger

[12]said according to my notes pulsation --

[13]according to my notes Dr. Krieger said pulsation

[14]indicates viability and lack of pulsation

[15]indicates that something is not right with the

[16]cord.

[17]MR. WIESEN: Well, your Honor --

[18]THE COURT: There is no question he

[19]said it, I wrote it down.

[20]Q Doctor, I want you to assume now I have the

[21]exact testimony of Dr. Krieger.

[22]MR. RAPPAPORT: What [\*136] page?

[23]Q I'm sorry, Page 853. I want you to assume

[24]that Dr. Krieger had read to. him your testimony which you

[25]gave back in August of '86, and I will start with that.

[1]4188

[2]Starting at the bottom of Page 851.

[3]MR. RAPPAPORT: Judge, there is no

[4]need -- I object.

[5]THE COURT: There is no need for this, he

[6]disagrees with Dr. Krieger's testimony.

[7]MR. WIESEN: Well, maybe after he hears --

[8]THE COURT: Please this is a very basic

[9]disagreement. He disagrees with it. There is

[10]no purpose in reading it to him. He disagrees

[11]with it. I think my notes are sufficient, are

[12]we don't have to have it re[ILLEGIBLE TEXT]. Next question.

[13]Q May I ask you this, Doctor, is the presence of

[14]pulsation a reflection of the transmission of the blood

[15]pressure to the spinal core and the surrounding fluid

[16]containing space and it is an indication of whether or not

[17]this transmission is occurring normally, would you agree

[18]with that?

[19]A Partially.

[20]Q Would you agree that it is an indicator of

[21]the viability of this fluid nervous system network, and

[22]the lack of pulsation indicates [\*137] that somethin? is not

[23]right.

[24]THE COURT: [ILLEGIBLE TEXT] just read that to the

[25]doctor, and he said he disagreed with that.

[1]4189

[2]Q Doctor, is it your testimony that you don't

[3]recall in this case whether there was pulsations --

[4]THE COURT: He has already said that.

[5]Q When you did this operation, Doctor, did you

[6]fully anticipate that Mr. Carson would be improved by the

[7]surgery?

[8]A One cannot fully anticipate that under any

[9]circumstances.

[10]THE COURT: That was your object?

[11]THE WITNESS: That was my object, yes.

[12]THE COURT: Doctor, you read this

[13]operative chart?

[14]THE WITNESS: Yes.

[15]THE COURT: You are aware of the note by

[16]various physicians from the 17th, 18th, 19th,

[17]and 20th relating to their observations of some

[18]improvement in neurological function in this

[19]patient?

[20]THE WITNESS: Yes.

[21]THE COURT: Did you see the patient

[22]during that period?

[23]THE WITNESS: It is my testimony and my

[24]custom that I am at the hospital three days a

[25]week. I therefore feel certain that I saw him

[1]4190

[2]on those occasions.

[3] [\*138] THE COURT: Now, if assuming your

[4]observations differed from theirs, would you

[5]have written it in accord with your practice,

[6]would you have written a note saying I don't

[7]know what these people are talking about, I

[8]see no improvement in neurological function of

[9]this patient?

[10]THE WITNESS: I did write such a note.

[11]THE COURT: That was or the 23rd?

[12]THE WITNESS: But it states that the

[13]patient has been essentially quadriplegic from

[14]the time of surgery on.

[15]THE COURT: Is the sense of that note

[16]that you disagreed with the observations made

[17]by the various doctors who noted improvement

[18]from the 17th to the 20th?

[19]THE WITNESS: I think the important

[20]factor is quote unquote quadriplegia, a little

[21]bit of movement or a wiggle of the toe or

[22]finger does not make the patient anything

[23]except quadriplegic. Proper densely

[24]quadriparetic. If one differentiates between

[25]quadriplegia which is no movement at all and

[1]4191

[2]quadriparetic which is very weak movement,

[3]there is certainly, a distinction. If one

[4]walks from a functional aspect can the patient

[5]get up and walk or will [\*139] the patient be unable

[6]to get up and walk, that is what is the note

[7]essentially quadriplegic since the time of

[8]surgery is related to. Does that help?

[9]THE COURT: Well, somebody wrote a note,

[10]I can't make out the name, I think Dr. Cohen

[11]-- no, Dr. Booker wrote a note which post-op

[12]laminectomy recovery and regaining power in

[13]limbs. The the next note by Dr. Cohen patient

[14]continues to make progress and then the next

[15]note --

[16]MR. RAPPAPORT: Well, Judge, you didn't

[17]read the findings to him.

[18]THE COURT: Patient continued to show

[19]improvement. Were you in accord that the

[20]patient was showing improvement and recovering

[21]and regaining power in his limbs during that

[22]period?

[23]THE WITNESS: I was aware that the

[24]patient's neurological examination was varying

[25]and that different observers felt there was a

[1]4192

[2]different degree of strength returning.

[3]THE COURT: What did you feel?

[4]THE WITNESS: There was no point at

[5]which I felt he was indicating that he could

[6]make a functional recovery meaning getting

[7]enough strength to either get up out of bed

[8]and ambulate [\*140] or have enough strength in his

[9]arms to use them from a functional point of

[10]view. That was a rather steady state with a

[11]small variation up and down from now moving

[12]this finger to moving this finger a little

[13]bit. But never was there a situation where

[14]the patient improved so I can say he increased

[15]one functional grade if you will. He is going

[16]to be able to do more things at this point

[17]then he could before. He never showed that

[18]kind of improvement. There is no question

[19]that at times he improved a little sit and

[20]improvement is moving from nothing to moving

[21]the finger an inch. That is improvement, but

[22]that is not functional improvement.

[23]THE COURT: Did you see this patient

[24]after the 23rd at all?

[25]THE WITNESS: Yes, I did.

[1]4193

[2]THE COURT: When was the last time as

[3]best you can recall?

[4]THE WITNESS: I have to look in the

[5]chart for the last note.

[6]MR. WIESEN: There is another note, your

[7]Honor, the 27th.

[8]THE COURT: All right, the 27th. Did

[9]you see the patient after the 27th?

[10]THE WITNESS: Yes, I did.

[11]THE COURT: But you made no further

[12] **[\*141]** notes?

[13]THE WITNESS: By this time his entire

[14]management was more in the hands of medicine

[15]then infectious disease.

[16]THE COURT: Because he developed

[17]meningitis?

[18]THE WITNESS: For other problems, yes.

[19]THE COURT: Go ahead.

[20]Q Doctor, do I understand your testimony and

[21]please correct me if I am. wrong, but you said you did

[22]visit this patient in the recovery room and you remember

[23]that?

[24]THE COURT: No, he says he doesn't have

[25]an independent recollection but that is his

[1]4194

[2]practice is he accompanies the patient to the

[3]recovery room.

[4]Q Are you sure of that, Doctor?

[5]THE COURT: That is his practice. He

[6]doesn't remember.

[7]Q Do you recall this question and answer that

[8]you gave under oath in August of 1989?

[9]MR. RAPPAPORT: What page?

[10]Q This is Page 91 at Line 18.

[11]"QUESTION: When does the record indicate

[12]that the patient was taken from the recovery

[13]room?

[14]"ANSWER: I find a note in the nurses'

[15]record Page 841, at 7:30, and it is the first

[16]7/14 note that makes me suspect that 7:46

[17]arrived on Ward 9 South from recovery **[\*142]** room via

[18]stretcher therefore I believe he was in the

[19]recovery room overnight.

[20]"QUESTION: Under those circumstances

[21]Would it have been your custom and practice to

[22]Visit the patient in the recovery room?

[23]"ANSWER: No."

[24]Do you recall giving that answer under oath,

[25]Doctor?

[1]4195

[2]A Yes, sir, I do.

[3]Q Having heard that would you agree Doctor that

[4]your recollection of this case would have been better in

[5]July of '88 than it is now almost two years later?

[6]THE COURT: But it was not testified that

[7]his recollection in this case, he was testifying

[8]about his custom and practice.

[9]MR. RAPPAPORT: Thank you.

[10]Q Well, Doctor, when you say it was your

[11]and practice to visit your --

[12]THE COURT: It wasn't his custom and

[13]practice to visit the patient in the recovery

[14]room, that is what he testified. He testified

[15]it was his custom and practice to accompany

[16]patient to the recovery room.

[17]MR. WIESEN: Your Honor, I fail --

[18]THE COURT: Please, next question.

[19]MR. WIESEN: All right.

[20]THE COURT: Go ahead.

[21]Q Doctor, is it your testimony [\*143] then that you

[22]visited him --

[23]THE COURT: It is his testimony that he

[24]has no specific recollection at all, but it is

[25]custom and practice to accompany the patient to

[1]4196

[2]the recovery room, that is his testimony.

[3]Q All right. Then Doctor, let me ask you this,

[4]were you there when awoke from anesthesia?

[5]A He awoke from anesthesia in the operating room.

[6]Q And did you at that note that he couldn't move

[7]his arms and legs?

[8]A I noted that he was significantly weak at that

[9]time to the best of my recollection, yes.

[10]Q Would you look at the recovery room nurses

[11]notes Doctor and tell us what she notes.

[12]A She notes various things. One note indicates

[13]that he could move his arms and legs and one note

[14]indicates that he can't.

[15]Q In any event, Doctor, when you learned from

[16]about his inability to move his arms and legs, did you

[17]return to the hospital that night?

[18]A I believe I was aware of it before I left the

[19]hospital.

[20]THE COURT: His testimony is that he saw

[21]the patient again over the weekend most likely

[22]on Saturday, that is my recollection of [\*144] your

[23]testimony. Although you have no specific

[24]recollection, is that correct?

[25]THE WITNESS: Yes.

[1]4197

[2]THE COURT: Again, you're testifying

[3]based on your usual custom and practice,

[4]correct?

[5]THE WITNESS: That is correct.

[6]Q Doctor, assuming for the moment that you

[7]returned on Saturday by that time you knew, did you not

[8]either from Dr. James or the nurse that he was not moving

[9]his arms and legs, true?

[10]A Yes.

[11]Q And Doctor, did you at that time take or write

[12]any order for his continued care?

[13]A I do not believe that I personally wrote any

[14]orders at that time.

[15]Q Doctor, there are separate sheets in the

[16]hospital record that are entitled Doctors orders.

[17]A There are.

[18]Q would it be fair to say not only you, but

[19]other residents were authorized to write for the patient?

[20]A That is correct.

[21]Q would you kindly turn to the the doctor's order

[22]sheet for July 13th, 14th, 15th, and 16th.

[23]THE COURT: We will look at that after

[24]the break. We will reconvene in about fifteen

[25]minutes. Do not discuss the the case amongst

[1]4198

[2] **[\*145]** yourselves or with anyone else.

[3](Whereupon the jury takes a recess at

[4]4:15 P.M.)

[5](Whereupon the trial takes a recess at

[6]4:15 P.M.)

[7](Whereupon the trial resumes at 4:40 P.M.)

[8](Whereupon the jury enters the courtroom

[9]at 4:40 P.M.)

[10]THE COURT: Go ahead, Mr. Wiesen.

[11]Q Doctor, I am going to try and be as quick as I

[12]can be. Doctor, on the 13th when you were ready to

[13]operate you noted he was weaker post-myelogram --

[14]THE COURT: I noted that.

[15]Q You noted on the basis of your examination

[16]comparing that with the examination that was conducted

[17]prior to the myelogram you compared your exam just at the

[18]time of surgery with the time as the examination performed

[19]on Mr. Carson just prior to the myelogram, true?

[20]A I compared my examination to examinations

[21]available in the chart. Which specific examinations I

[22]cannot state.

[23]Q Doctor, would you answer my question.

[24]THE COURT: The answer is he compared his

[25]examination with the examinations in the chart.

[1]4199

[2]but he does not remember which specific prior

[3]examination he was comparing it to. **[\*146]**

[4]Q In any event what you saw when you met him on

[5]the 13th just before surgery and examined him, you

[6]compared what you noted with what the doctors had note

[7]his condition just prior to the myelogram --

[8]THE COURT: He already answered that

[9]question.

[10]Q Can you answer --

[11]THE COURT: Please, he answered it. Next

[12]question.

[13]Q Doctor, this surgery including the repair of

[14]the rent took two hours, correct?

[15]A I believe that is what the operative records

[16]states, yes.

[17]Q would you agree, sir, in the usual and

[18]ordinary practice for this kind of surgery removing it

[19]from C-2 to C-6, carefully removing the bone, the lamina,

[20]as you pointed out meticulously in order not to touch t[ILLEGIBLE TEXT]

[21]cord, repairing the rent should take about four hours?

[22]A No, it would not.

[23]Q I submit to you. Doctor, you rushed this

[24]operation to get out of there, is that true?

[25]MR. RAPPAPORT: Objection. I withdraw

[1]4200

[2]that objection.

[3]THE COURT: I take it your disagree with

[4]that?

[5]THE WITNESS: I disagree with that.

[6]THE COURT: Next question. [\*147]

[7]Q Now, Doctor, postoperatively, you saw this

[8]patient how many times within that week?

[9]THE COURT: He said he saw the patient

[10]three times within the week.

[11]THE WITNESS: I saw the patient over the

[12]weekend and most likely three times during the

[13]week. Perhaps more.

[14]Q I think just before the break I had asked you

[15]to please return to the orders --

[16]THE COURT: That is where we were.

[17]Q Would you do that, please.

[18]MR. RAPPAPORT: It starts on Page 191.

[19]MR. WIESEN: Thank you.

[20]Q Doctor, starting on the 13th, do you see any

[21]order by you?

[22]A I have one page of orders dated the 13th and

[23]I do not see any orders by me, no, I do not.

[24]Q Do you see any order by Dr. James on the 13th.

[25]THE COURT: All of the orders are by

[1]4201

[2]Dr. Saith.

[3]Q No.

[4]THE COURT: There is one order by a

[5]doctor whose name I can't read.

[6]THE WITNESS: I do see orders by

[7]Dr. James, on Page 191.

[8]THE COURT: All right, you are right.

[9]Page 191.

[10]Q Doctor, on the 13th there are orders here by

[11]Dr. James, okay, and that is preoperatively, [\*148] would you say?

[12]A No, that is postoperatively.

[13]Q Okay, this is 9:45 A.M. in the morning.

[14]A I believe it is 9:45 P.M. only because I know

[15]the surgery on the 13th was completed around that time.

[16]Q Any note by you postoperatively? Any order by

[17]you postoperatively?

[18]A No.

[19]Q Okay. Let's turn the other page. May I take

[20]a look at it with you. Thank you, Doctor. Okay, on the

[21]13th of July there is an order by Dr. Saith for Valium,

[22]right?

[23]A Yes, there is.

[24]Q And then the next order with regard to Mr.

[25]Carson is on the 15th, which is Sunday.

[1]4202

[2]MR. RAPPAPORT: Objection, you skipped a

[3]page.

[4]THE COURT: Wait, on the 13th.

[5]Q The surgery was on the 13th?

[6]THE COURT: All right.

[7]MR. WIESEN: Thank you.

[8]THE WITNESS: If I may --

[9]THE COURT: There is no question.

[10]Q There is an order there by Dr. Di --

[11]something, is that you?

[12]A No.

[13]Q Then there is an order on the 14th by Dr.

[14]Booker.

[15]A Yes.

[16]Q I want you to assume Dr. Booker was an intern,

[17]do you see that?

[18]THE COURT: Go ahead. [\*149]

[19]Q There is an order by Dr. James on the 14th for

[20]Decadrone 20 milligrams.

[21]A Yes.

[22]Q Another order on the 14th by Booker.

[23]A Right.

[24]Q How about the 25th, an order by Dr. Booker?

[25]So far, Dr. Saith on the 13th and 15th. No order by you

[1]4203

[2]through the 15th.

[3]A That is correct.

[4]Q How about the 16th?

[5]A I don't see any order by roe.

[6]Q How about the 17th?

[7]A I don't see any order.

[8]Q How about the 18th?

[9]THE COURT: I am up to the 23rd and I

[10]have not seen an order by this doctor.

[11]THE WITNESS: I don't see any order

[12]written by me.

[13]THE COURT: Did you write any orders at

[14]all, Doctor?

[15]THE WITNESS: I would really have to

[16]review --

[17]THE COURT: I am up to the 27th which is

[18]the last date, and there is no order by you.

[19]THE WITNESS: I don't see any.

[20]Q Doctor, you ere the attending surgeon in

[21]charge of Mr. Carson and you never wrote an order

[22]concerning his care and treatment?

[23]A That is correct.

[24]Q Now, other than orders, Doctor, you doctors

[25]have what is known as progress notes, **[\*150]** is that right?

[1]4204

[2]A Correct.

[3]Q Progress notes are important, are they because

[4]it is a record of a doctor's observations of his patient's

[5]condition, fair enough?

[6]A That is correct.

[7]Q Those progress notes and the observations of

[8]the surgeon in this case would be very important to the I

[9]other people who are dealing and treating that patient,

[10]true?

[11]A It would be a factor, yes.

[12]Q Between the operation of the 13th and the

[13]20th, there is only one note, and that is the 16th, right,

[14]that is the only progress note --

[15]THE COURT: That this doctor wrote.

[16]Q Any other notes in the --

[17]THE COURT: This doctor wrote a progress

[18]note on the 16th and 23rd, and a 27th, a

[19]progress note.

[20]MR. RAPPAPORT: Correct.

[21]Q Is it your testimony to this jury you saw him

[22]three or four times that week after the surgery?

[23]A Yes.

[24]Q Anywhere in that hospital record that reflects

[25]your presence within the confines of that building?

[1]4205

[2]A Not within the best of my knowledge.

[3]Q On the 16th, Doctor, you said consider a CAT

[4]scan. [\*151]

[5]THE COURT: He did.

[6]Q Doctor, at that time you were confused about

[7]his condition, and you were considering various things,

[8]right?

[9]A Yes.

[10]Q And you talked about the possibility of a

[11]tumor. You talked about the possibility of transverse

[12]myelitis, and then you talked about a possibility of a

[13]contusion. Did you Doctor, at that time despite setting

[14]forth your differential diagnosis you never mentioned

[15]edema, swelling --

[16]THE COURT: I asked that question and the

[17]doctor agreed. It is not in the note. Next

[18]question.

[19]Q Doctor, you have now told this Court and jury

[20]that you were not too concerned about the collection of

[21]fluid and fluid in this patient.

[22]A I was not concerned about it, correct.

[23]Q Isn't it fair to say Doctor that every surgeon

[24]is concerned about bleeding post-op in a patient?

[25]A Yes, it is.

[1]4206

[2]Q And isn't it fair to say that that is one of

[3]the things that you want to address such a patient

[4]suddenly turn sour after a surgery?

[5]A I think that is an appropriate statement, yes.

[6]Q I think you indicated to Mr. **[\*152]** Rappaport in this

[7]case you were not too concerned because there were drains in

[8]place.

[9]A Among other reasons that is true.

[10]Q Doctor, in looking at the hospital record did

[11]you see that the drains came out a day and a half after

[12]the surgery?

[13]A That is correct.

[14]Q Then, there would no longer an escape of

[15]fluid, is that correct?

[16]A That is true.

[17]Q If you look at the nurse's notes you will see

[18]the bandage on the incision was dry somewhat, every

[19]leakage of blood and fluid going on was not coming outside

[20]of his body.

[21]THE COURT: Assuming there was leakage.

[22]THE WITNESS: Assuming there was leakage

[23]and that is a true statement.

[24]Q Doctor, if you had leakage of blood and fluid

[25]in there that could cause further damage to the spine?

[1]4207

[2]A It could if it occurred.

[3]Q Doctor, the only way that we would know what

[4]occurred between the time of the operation and the 28th of

[5]July some eighteen -- some fifteen days later, had you

[6]taken a CAT scan?

[7]A No.

[8]Q Well, a CAT scan would have determined whether

[9]or not there was leakage [\*153] in there, would it not?

[10]A It would have given some indication, yes.

[11]Q And at one time you even indicated that maybe

[12]you ought to take it, right, Doctor?

[13]THE COURT: He wrote that on the note,

[14]it was considered. The note of the 16th.

[15]Q Since you considered it, Doctor, why didn't

[16]you write the note or write an order?

[17]A Because I decided it was not necessary, and

[18]that in fact, as I had testified the potential to do more

[19]harm than good existed.

[20]Q Now, Doctor, the danger of having a build up

[21]of fluid and blood further damaging his cord, you would

[22]agree is greater than the risk of going through a CAT scan?

[23]A Not in this setting.

[24]Q You doctors always have what is known as a

[25]balancing of benefit versus risk, is that correct?

[1]4208

[2]A That is correct.

[3]Q on the one hand you are talking about putting

[4]this man through a CAT scan which is basically a

[5]non-invasive procedure versus the possibility that he

[6]might have blood and fluid building up in there which

[7]would destroy the rest of his spinal cord, weren't you

[8]weighing those possibilities, Doctor? **[\*154]**

[9]A I was not weighing the possibilities that

[10]there was blood and fluid in there because I did not feel

[11]that was the clinical picture we were seeing an I have

[12]testified to this point.

[13]Q Doctor, we did find cut fifteen days later, I

[14]am sorry, eighteen days later on the 31st, that there was

[15]a lot of fluid in there.

[16]A No, we did not, we found out there was no

[17]fluid in there.

[18]Q Didn't the hospital report that?

[19]A No, they did not.

[20]Q Well, Doctor, on the CAT scan of the 31st

[21]doesn't the hospital record say there is fluid in there?

[22]A Are we talking about the first CAT scan done

[23]postoperatively?

[24]THE COURT: No, the 31st.

[25]Q Isn't that the first CAT scan?

[1]4209

[2]A I am asking the date.

[3]THE COURT: Please. Do you recall that

[4]the radiologist reported observing fluid on the

[5]CAT scan?

[6]A I both recall the report and the CAT scan

[7]which showed no fluid.

[8]THE COURT: Assuming the reports of the

[9]radiologists saying that they observed fluid,

[10]you disagree with that observation?

[11]THE WITNESS: I do not --

[12]THE COURT: [\*155] You say you didn't see any

[13]fluid at all?

[14]THE WITNESS: If I said I didn't see the

[15]potential for a half of cc for fluid I would be

[16]misstating myself. No large amount of fluid

[17]whatsoever.

[18]THE COURT: How about on the next CAT

[19]scan, did you see more fluid?

[20]THE WITNESS: Yes, I did.

[21]THE COURT: Next question.

[22]Q Now, Doctor, would you turn to the report of

[23]the radiologist at Harlem Hospital, sir.

[24]A Can you help me with the page?

[25]THE COURT: That is a hard one to find.

[1]4210

[2]It is on the back of another report. I don't

[3]know what page it is on. I found it before.

[4]MR. RAPPAPORT: I have it.

[5]THE COURT: What page is it on?

[6]MR. RAPPAPORT: Give me one second.

[7]Page 465 is the CAT scan.

[8]THE COURT: That is right. 465.

[9]THE WITNESS: I don't have that.

[10]THE COURT: It is on the back of

[11]something.

[12]THE WITNESS: I only go up to 449, I am

[13]sorry.

[14]THE COURT: It is another volume.

[15]MR. RAPPAPORT: Here take mine.

[16]THE COURT: Go ahead.

[17]Q Would you read that to the jury, please.

[18]A Carson, Dwight, **[\*156]** CAT examination of

[19]post-cervical laminectomy, clinical diagnosis post-op

[20]meningitis. Findings, please note ENT run number 6956.

[21]CAT examination of a status post-cervical laminectomy from

[22]C-2 to C-6 with metrisimide (ph.) contrast demonstrates a

[23]posterior epidural collection of CSF on the lower left of

[24]C-2, to the middle level of C-4. A small area bubble is

[25]noted at the level of the lower C-2 vertebra. The

[1]4211

[2]indication of the subarachoid space at mid C-4 level is

[3]noted. No abnormality of neck is visualized. I am sorry,

[4]no evidence of abnormality of the neck is visualized.

[5]Conclusion. Posterior epidural collection in parenthesis

[6]CSF fluid close paren. small air bubble at the level of

[7]C-2.

[8]Q NOW, they are referring to, are they not,

[9]fluid that was in the epidural space, right, Doctor?

[10]A Yes.

[11]Q Would you tell the jury where is the epidural

[12]space.

[13]A Around the dura.

[14]Q That fluid connected or communicated with the

[15]subarachnoid space, right, Doctor?

[16]A That is what the report states.

[17]Q So the fluid was not also outside of the dura

[18]but outside of [\*157] the dura, but under the subarachnoid where

[19]the cord is, right, Doctor?

[20]A Your statement is correct, yes.

[21](Continued on the next page.)

[22]

[23]

[24]

[25]

[MISSING PAGE 4212-4225]

[1]4226

[2]Q Would it be fair, Doctor, to say that that

[3]fluid that they reported that was underneath the.

[4]arachnoid as well as the dura was there since the time

[5]of the. surgery?

[6]A The fluid that was underneath the arachnoid

[7]and the dura has been there all along, yes.

[8]Q So all along, since the surgery, this man

[9]had fluid under the arachnoid and fluid over the dura,

[10]right?

[11]A That's a different statement than you just

[12]made earlier.

[13]Q The fluid over the dura was something that

[14]just started after, Doctor?

[15]A The--

[16]Q Withdrawn.

[17]Doctor, when you, assuming you did it, made

[18]a hole in that dura, underneath the dura is what is

[19]known as the arachnoid, right?

[20]A Correct.

[21]Q The fluid that we're talking about is under

[22]the arachnoid, right?

[23]A That is correct.

[24]Q There's no fluid between the arachnoid,

[25]which is the lower membrane, and the dura, [\*158] which is the

[1]4227

[2]outer membrane, true?

[3]A True.

[4]Q In order to get fluid from underneath the

[5]arachnoid, the hole had to go through the dura and

[6]through the arachnoid, true?

[7]A That would be necessary, yes.

[8]Q And this fluid that was pouring out, this

[9]pouring out from the arachnoid and the dura to collect

[10]there 18 days later--

[11]MR. RAPPAPORT: Objection to the form.

[12]THE COURT: Well, let's say leaking.

[13]MR. WIESEN: Not pouring.

[14]Q --was coming out from under the arachnoid

[15]through the dura when they saw it.

[16]A You haven't created a hypothetical case.

[17]You're asking me this case--

[18]THE COURT: Well, what they report is

[19]a communication with the subarachnoid space

[20]in the mid-C4 level, is that correct?

[21]THE WITNESS: That is what the report

[22]states.

[23]THE COURT: If that report is

[24]accurate, then cerebrospinal fluid, which

[25]they observed collecting outside the dura,

[1]4228

[2]was coming through this defect in the

[3]arachnoid through this communication, is

[4]that correct?

[5]THE WITNESS: If what they're

[6]reporting is correct, [\*159] that would be true.

[7]THE COURT: Go ahead.

[8]Q Do you have any reason to believe--

[9]THE COURT: He's already testified

[10]that he disagrees with this report.

[11]Q Well, Doctor, the hole that you made in the

[12]dura was at C6, was it not?

[13]A As my memory is refreshed by the operative

[14]report, I believe that is true.

[15]Q So the answer is yes?

[16]THE COURT: Yes.

[17]Q Doctor, where they saw the accumulation of

[18]fluid was at C4, right?

[19]THE COURT: They saw a communication

[20]between the outside of the dura and the

[21]subarachnoid space at mid-C4.

[22]Q Wouldn't it be fair to say, Doctor, that the

[23]tear in the dura--

[24]THE COURT: Assuming it's the same

[25]hole or tear, that would be--assuming that--

[1]4229

[2]that would be a tear from C6 to C4?

[3]Assuming that.

[4]THE WITNESS: I can't assume that--

[5]THE COURT: No, assuming for the

[6]purpose of the question. We're trying to

[7]shorten this.

[8]THE WITNESS: For just assuming, yes.

[9]THE COURT: The answer is yes.

[10]Q The other alternative would be that there J

[11]were two tears in the dura, one at C6 **[\*160]** and one at C4, and

[12]you repaired the one at C6 but you forgot to repair the

[13]one at C4? Isn't that the other alternative, Doctor?

[14]A That is another alternative.

[15]Q In any event, Doctor, you disagree with them

[16]that there was any fluid in there and did you, sir, when

[17]you saw that, order a CT scan to determine whether or

[18]not they were wrong or not?

[19]THE COURT: Just a moment.

[20]Doctor, do you have any recollection

[21]whether or not you saw that 7/31 CT scan at

[22]that time?

[23]THE WITNESS: Yes, I did.

[24]THE COURT: You did see it. Now you

[25]are talking about an independent

[1]4230

[2]recollection?

[3]THE WITNESS: I know I saw the scan

[4]when it was done. I know I reviewed the

[5]first post-op CT scan the day or shortly

[6]after the day it was done, so therefore I

[7]did see it at that time.

[8]THE COURT: Then you advised the

[9]radiologist that you disagreed with their

[10]interpretation?

[11]THE WITNESS: I did not see the report

[12]of the CAT scan reach the chart.

[13]THE COURT: Okay.

[14]Q Doctor, that would be important to you as

[15]a surgeon, would it not, to know whether [\*161] or not there

[16]was post-op bleeding, number one?

[17]THE COURT: Sustained. We have been

[18]through this.

[19]Q Doctor, do you know whether or not the

[20]sutures that you put into the dura had opened up in

[21]those 18 days post-op?

[22]A I do not know.

[23]Q ell, Doctor, you didn't order a CT scan at

[24]any time and they had one done on the 31st. Who ordered

[25]the one on the 31st?

[1]4231

[2]A I do not know who specifically wrote the

[3]order.

[4]Q Isn't it a fact, Doctor, that you never

[5]ordered a CAT scan but finally, on about the 24th, the

[6]infectious disease experts, came into Mr. Carson's case?

[7]True?

[8]A I believe around the 24th they became

[9]involved, yes.

[10]Q And when they became involved, they decided

[11]to investigate the problem that Mr. Carson was having,

[12]isn't that true, Doctor?

[13]A That is true.

[14]Q Are they the ones that suggested to you and

[15]the other surgeons that maybe you are missing the boat

[16]entirely on this patient? Do you recall that, Doctor?

[17]MR. RAPPAPORT: Objection to the form,

[18]Judge.

[19]THE COURT: Sustained as to form.

[20]Do you recall **[\*162]** having a discussion with

[21]any of the doctors from the infectious

[22]disease group who were investigating this

[23]man?

[24]THE WITNESS: No, I don't.

[25]THE COURT: Next question.

[1]4232

[2]Q Well, Doctor, will you look at the ID note?

[3]THE COURT: What page is that?

[4]Q Note of July 24th.

[5]A Could you give me a number, sir?

[6]MR. RAPPAPORT: 48, Doctor.

[7]THE COURT: Page 48, Doctor. That's

[8]the one that's up on the easel.

[9]MR. WIESEN: I want the one before

[10]that.

[11]THE COURT: There's one on page 46, if

[12]that's what you are interested in.

[13]Q Do you recall any conversations, Doctor,

[14]with the infectious disease doctors, like Dr. Jackette?

[15]Incidentally, Dr. Jackette is an attending?

[16]A That is correct.

[17]Q Do you recall a conversation with Dr.

[18]Jackette or any of the others in his department

[19]concerning what you ought to do with your patient?

[20]A I don't recall specific conversations, no.

[21]Q Well, Doctor, I direct your attention to the

[22]note of July 25th. Do you have it in front of you?

[23]A I believe I do, yes.

[24]THE COURT: Page **[\*163]** 48.

[25]THE WITNESS: Yes.

[1]4233

[2]Q What is that word before it says neurology?

[3]Reconsult?

[4]A Yes.

[5]Q Does that mean reconsult neurology, meaning

[6]let's get back to neurology and talk to them about this

[7]patient?

[8]A Yes.

[9]Q And it says, evaluate for possibility of

[10]collection, question mark, epidural, causing increased--

[11]that arrow up means increased, doesn't it?

[12]A Yes.

[13]Q --cord compression, in addition to

[14]meningitis. Do you remember any of them talking to you

[15]about that and said, Doctor, in neurology, you ought to

[16]evaluate this man because possibly he's got a collection

[17]of fluid in there, epidural, causing increased cord

[18]compression in addition to his meningitis?

[19]Do you remember them talking about that?

[20]A Well, the note states, consult neurology. I

[21]am neurosurgery, not neurology. So I don't know if they

[22]would have, on the basis of that, presumably, have

[23]contacted me.

[24]I do remember being involved in the

[25]patient's care at this time, and I cannot recall whether

[1]4234

[2]I spoke to Dr. Jackette, whether it was communicated to

[3] **[\*164]** me through someone else or whether I had read the chart.

[4]Q Doctor, you said you were going there three

[5]times a week. Didn't you read that note in your

[6]patient's chart?

[7]A I'm sure I did.

[8]Q Well, once you read it on the 25th or 4th or

[9]whenever you were there, did you go ahead and take this

[10]as an attending doctor's suggestion and order a CAT scan

[11]be done?

[12]A I did not feel at any point in the patient's

[13]course, including on that day, therefore, that there was

[14]any clinical evidence of compression of the spinal cord

[15]by a collection of fluid.

[16]Dr. Jackette is an infectious disease

[17]doctor, and the question that she asked was one of

[18]neurology. She did not make a decision independent of

[19]neurology.

[20]Q Doctor, on the 25th were you still the

[21]attending doctor in charge of this patient?

[22]A I do not know for certain if the patient was

[23]still on neurosurgery at this time, but I was the

[24]attending neurosurgeon involved, yes.

[25]Q Doctor, this is only 12 days after the

[1]4235

[2]operation. Had you finished with him? You did the

[3]operation and turned him over to another [\*165] department?

[4]A That was not my testimony. The patient

[5]would most appropriately--

[6]Q Is that your testimony?

[7]THE COURT: Let him finish.

[8]MR. RAPPAPORT: Let him finish.

[9]A The patient would most appropriately be on

[10]the service and be most closely managed by the service.

[11]that dealt with the most acute problem. I do not

[12]recall, quite honestly, if the patient was on

[13]neurosurgery or on medicine, or I do not believe there

[14]were patients on infectious disease. I do recall,

[15]however, throughout this period of time, being aware of

[16]what was going on with the patient, being aware of

[17]infectious diseases' suspicion of an abscess, feeling

[18]clinically that it was not there at any time.

[19]Q Doctor, they were talking about the

[20]collection of fluids, pus, right, or blood--they didn't

[21]know what--which was compressing this man's spinal cord

[22]causing damage to it and causing meningitis, isn't that

[23]what they we're talking about?

[24]A They were talking about evaluating for the

[25]possibility of such a collection.

[1]4236

[2]Q Okay. And it's important to know if that

[3]was happening, [\*166] wasn't it, Doctor?

[4]A Yes.

[5]Q Isn't it a fact, Doctor, that even though

[6]this note was written on the 25th and you testified in

[7]court to the jury that you read this note or became

[8]aware of it, that you never ordered another CAT scan,

[9]until they finally ordered one on the 31st of July, six

[10]days later?

[11]A The--

[12]THE COURT: The doctor never ordered a

[13]CAT scan. That's his testimony.

[14]A Yes.

[15]Q In any event, Doctor, you didn't order it,

[16]Dr. James didn't order it, but they ordered it, and they

[17]found this fluid that you. have just read--

[18]THE COURT: The doctor disagrees with

[19]that conclusion, but that's what the x-ray

[20]report states.

[21]MR. WIESEN: Okay.

[22]Q Now, Doctor, didn't you on the 27th write in

[23]there that we'd better do one as an emergency? You said

[24]you didn't consider a CAT scan. Look at your note of

[25]the 27th, Doctor.

[1]4237

[2]A Yes, I see it.

[3]Q Would you read to the jury that note?

[4]Didn't you say, we'd better do a CAT scan as an

[5]emergency?

[6]A Yes, I did.

[7]Q You just said to them under oath you didn't

[8]think [\*167] it was necessary to do it.

[9]A I still stand by that statement.

[10]Q But two days later you said do it as an.

[11]emergency.

[12]A I. was asked by the infectious--is there a

[13]question? I'm sorry.

[14]THE COURT: Doctor, your note says

[15]this patient requires emergency CT--is that

[16]the first sentence?

[17]THE WITNESS: Yes.

[18]THE COURT: Go ahead.

[19]THE WITNESS: I'll read the note.

[20]THE COURT: Go ahead, read the whole

[21]note.

[22]THE WITNESS: This patient requires

[23]emergency CT of neck without contrast to

[24]look for abscess collection. Patient

[25]consents but is unable to sign. Patient

[1]4238

[2]agrees to procedure verbally.

[3]Q So are you saying, Doctor, that you felt

[4]that he needed it, not only did he need it, but he

[5]needed it as an emergency, but you're not going to order

[6]it because his arm is paralyzed and he can't write his

[7]name on it, even though he had verbally consented?

[8]MR. RAPPAPORT: That's not what he

[9]said.

[10]THE COURT: Sustained.

[11]Q Doctor, did you not order that CT scan

[12]because you felt he couldn't put his name on that?

[13]A I did [**\*168**] not order or not order the CAT scan.

[14]I was asked by infectious disease to attempt to

[15]prioritize the getting of the CAT scan, which I did not

[16]feel clinically was necessary, but which infectious

[17]disease did.

[18]To aid them in obtaining something that they

[19]felt was necessary, but which I did not feel was

[20]necessary, I wrote that note.

[21]THE COURT: Wait a minute.

[22]Doctor, is it your testimony that you

[23]wrote a note that the patient required an

[24]emergency CAT scan in a situation in which

[25]you didn't think it was necessary at all?

[1]4239

[2]MR. RAPPAPORT: Judge, finish reading

[3]the note.

[4]THE COURT: Is that correct?

[5]THE WITNESS: Infectious disease--

[6]THE COURT: No, Doctor, is that

[7]correct?

[8]THE WITNESS: I'll answer the question

[9]I think this way.

[10]THE COURT: Sure.

[11]THE WITNESS: Infectious disease felt

[12]very strongly that they wanted a CAT scan,

[13]number one. Number two, I did not feel that

[14]the patient was showing any signs of cord

[15]compression, but because infectious diseases

[16]felt so strongly that they wanted this scan,

[17]I attempted to give this [**\*169**] priority on the

[18]list--on the back-up list of CAT scans, to

[19]get it done as soon as possible.

[20]THE COURT: You mean they couldn't get

[21]it themselves, they needed you to write the

[22]note?

[23]THE WITNESS: It would help.

[24]THE COURT: And in order to assist

[25]them, you wrote a note for an emergency CAT

[1]4240

[2]scan that you didn't think was necessary.

[3]THE WITNESS: I did not feel to any

[4]degree at all that it was as necessary--in

[5]fact, I did not feel it was necessary, as

[6]was later borne out, when the CAT scan was

[7]done, showing no fluid collection.

[8]Q Doctor, isn't it a fact that the fluid that

[9]was allowed to continue coming out of that tear in the

[10]rent--that tear in the dura--caused this man to have

[11]spinal meningitis on top of his other problems?

[12]A I cannot state that, no.

[13]Q You mean you can't state that with an

[14]absolute certainty, is that what you're saying, sir?

[15]A I don't have any basis to state it. The CAT

[16]scan which was done on the 31st did not show anything

[17]but a normal post-operative picture without a

[18]significant amount of fluid collection.

[19] **[\*170]** I cannot state that as the etiology of the

[20]meningitis.

[21]Q Doctor, in between the 31st and August 23rd,

[22]did you take Mr. Carson back to the operating room to

[23]try to clean out the fluid--

[24]THE COURT: He never reoperated on

[25]this patient.

[1]4241

[2]Q Doctor, would it be fair to say between July

[3]31 and August 23 fluid and pus continued to collect

[4]within his cervical spine area?

[5]A No.

[6]Q Will you look at the report of August 23,

[7]Doctor, of the radiologists? They did another CAT scan,

[8]did they not?

[9]THE COURT: What page was that on?

[10]MR. WIESEN: Do you have it handy?

[11]MR. RAPPAPORT: No.

[12]THE COURT: I can't find it. It's not

[13]in this chart.

[14]You can read it from the envelope.

[15]Read it from the envelope. That's the one

[16]on the back of something.

[17]Q Dr. DiGiacinto, there was a CAT scan done on

[18]Mr. Carson on August 23, was there not?

[19]THE COURT: August 31st--23rd.

[20]MR. RAPPAPORT: 23rd.

[21]A Yes, there was.

[22]Q Does the hospital record contain the report

[23]of that CAT scan?

[24]THE COURT: I can't find it in the

[25]hospital **[\*171]** record.

[1]4242

[2]MR. RAPPAPORT: Neither can I.

[3]THE COURT: There is, however, in the

[4]hospital record a note of that date, which

[5]has a drawing of what was seen on the CAT

[6]scan. CT scan shows fluid collection.

[7]Maybe that's not collection.

[8]THE WITNESS: What date?

[9]THE COURT: Here's the note.

[10]MR. RAPPAPORT: What page?

[11]THE COURT: What page is that, Doctor?

[12]THE WITNESS: It's 474. It might be

[13]73.

[14]THE COURT: Do you see the note that

[15]I'm referring to with a drawing?

[16]THE WITNESS: Yes, I do see it.

[17]THE COURT: With the CAT scan. But

[18]it's on the envelope.

[19]MR. WIESEN: We have it here.

[20]THE COURT: Yes, it's here. Mr. Rappa-

[21]port has it. The note is on the envelope.

[22]Q Doctor, perhaps you can make out this better

[23]than we can. Would you read the August 23 CAT scan

[24]report made by the radiologists at Harlem Hospital?

[25]A Neuro CT number 7228. This was a CAT scan

1 4243

[2]of the brain. Minimal ventricular dilatation especially

[3]temporal horns. Next, C2, 7229. Moderate enlargement

[4]of the posterior epidural collection **[\*172]** of cerebrospinal

[5]fluid, with extension up to the lower C1 vertebra level,

[6]down to upper T1. And another word I can't read, as

[7]another collection, and possibly I think as another

[8]collection under the subcutaneous fat plane, with no

[9]communication to the original collection at C7 vertebral

[10]level. Otherwise unchanged since 7/31.

[11]Q Doctor, are they saying that by August 23rd

[12]this fluid that was coming out of the rent in the dura

[13]had enlarged all the way up to C1 and all the way down

[14]to T1, the thoracic vertebra?

[15]A Yes.

[16]Q That is an extension of the fluid that had

[17]existed as noted by them on the 31st of July, right?

[18]A It is very important to note that that

[19]specifically states, noted to join the collection at C7

[20]which was previously observed.

[21]Q So there was leaking further up at C1 and it

[22]joined the fluid at C7?

[23]THE COURT: No, no.

[24]MR. RAPPAPORT: Objection.

[25]Q Doctor, the word, cerebrospinal fluid,

[1]4244

[2]extension up to C1 vertebral level, right, extended up

[3]to the C1 vertebral level?

[4]A Yes.

[5]Q I see you keep looking.

[6]THE [\*173] COURT: Please.

[7]MR. RAPPAPORT: I didn't hear what he

[8]said.

[9]Q Down to upper T1 vertebral level, right?

[10]A Yes.

[11]Q So, so far they are talking about the

[12]topmost bone of the neck, right?

[13]A Correct.

[14]Q To the topmost bone of the thoracic spine,

[15]that whole area from the top of the neck to the top of

[16]the mid-thoracic level, upper thoracic level.

[17]A That is correct.

[18]Q And then they say, and possibly as another

[19]collection--do you have that word, "possibly," Doctor?

[20]THE COURT: He said possibly. That's

[21]what he interpreted that to mean.

[22]A I'll read it as best I can. And possibly as

[23]another collection under the subcutaneous fat plane,

[24]with communication to the original collection at C7

[25]vertebral level.

[1]4245

[2]THE COURT: That's the communication

[3]between the subcutaneous fat collection and

[4]the epidural fat collection, is that what it

[5]means?

[6]THE WITNESS: I cannot truly interpret

[7]what they are asking.

[8]THE COURT: But it means that?

[9]THE WITNESS: I suppose so.

[10]THE COURT: Okay.

[11]THE WITNESS: I'm not [\*174] really certain.

[12]THE COURT: Okay.

[13]Q You interpret that word as "possibly,"

[14]Doctor?

[15]A As best I can. It may be something else.

[16]Q Okay.

[17]THE COURT: Is there a typewritten

[18]report in that envelope? Did anybody look?

[19]I take it not. Those are the request

[20]sheets: those are not the reports.

[21]Q Doctor, these appear to be requests by the

[22]referring surgeon. Can you make that out?

[23]A No, I cannot. It says physician's signature

[24]referring, but I can't read the name. This is printed,

[25]I believe, B-I-S-H-A-R-A-T. It looks as though he's

[1]4246

[2]printed his name and that's what I can get from that.

[3]Bisharat.

[4]Q And underneath that, Doctor, they have,

[5]myelogram, then an arrow, deterioration, and then they

[6]have an arrow, progressively weaker, and what's that,

[7]and paralysis?

[8]A Correct.

[9]Q Right?

[10]A Yes.

[11]Q Is this, Doctor, trying to show the

[12]progression of this man from myelogram to deterioration

[13]to progressively weaker and paralysis? Right, Doctor?

[14]A Yes.

[15]Q Doctor, when they say this, possibly

[16]collection with an [\*175] original collection at C7, when they

[17]refer to the original collection at C7, is that through

[18]the rent that you presumably repaired in the surgery?

[19]Can you assume that's what they meant?

[20]A The reference to C7 implies, number one,

[21]that the report of C4 really was C7 all along, because

[22]they talk about the original collection. Number two, it

[23]talks about fluid that was seen in the epidural space.

[24]It is normal to see a small amount of fluid in the

[25]epidural space for some time after any surgical

[1]4247

[2]procedure. So to say that it was CSF from the rent in

[3]the dura or whether it was normal post-operative

[4]finding, I cannot do.

[5]Q What about the fluid from C1 all the way

[6]down to T1, Doctor?

[7]A That's CSF. It came through an opening in

[8]the dura.

[9]Q Which you had repaired?

[10]A Yes.

[11]Q Presumably?

[12]A Yes.

[13]Q Now, Doctor, they say here, possible

[14]pseudomeningocele formation.

[15]A Yes.

[16]Q Would you tell us, Doctor, the pseudo-

[17]meningocele, is that a collection of fluid which causes

[18]compression on the cord?

[19]A No, it is not.

[20]Q Isn't **[\*176]** that what a meningocele is, Doctor, a

[21]cyst or a collection of fluid?

[22]A No, it is not. It is a collection of fluid,

[23]but I disagree with the second half your statement.

[24]Q Okay. So you agree it's a collection of

[25]fluid, but you say you disagree that that collection of

[1]4248

[2]fluid doesn't do the damage to this man's cord.

[3]A Correct.

[4]Q And the pus that was in there from the

[5]spinal meningitis, that doesn't do any damage to this

[6]man's cord either, right, Doctor?

[7]A There was no--

[8]Q Yes or no, please.

[9]THE COURT: Please, don't interrupt.

[10]A There's no evidence--

[11]Q Can you answer it--

[12]THE COURT: Please don't interrupt.

[13]A There was no evidence that there was any pus

[14]in that collection, and therefore I cannot answer the

[15]question as stated.

[16]But I can state that fluid--

[17]THE COURT: You have answered the

[18]question.

[19]A The fluid was not causing pressure.

[20]THE COURT: You said that already.

[21]Go ahead.

[22]Q Doctor, are you telling this jury that there

[23]was no pus accumulating in his neck in connection with

[24] **[\*177]** the spinal meningitis he had?

[25]A That is correct.

[1]4249

[2]Q Now, Doctor, your position has been, has it

[3]not, that all of his problems come from an edema of the

[4]cord, right, Doctor?

[5]A Yes.

[6]Q I'd like you, Doctor--I would like to ask

[7]you whether you agree with this testimony by a man who

[8]is chairman of the department of neurosurgery, full

[9]clinical professor in regard to that:

[10]"I would say"--

[11]MR. RAPPAPORT: I have to get it.

[12]MR. WIESEN: 3083.

[13]MR. RAPPAPORT: Just read it. I don't

[14]have it yet.

[15]Q The Court--Doctor, I would like you to

[16]listen to this. His Honor did speak to this witness and

[17]his Honor said to the witness:

[18]"I take it you are not in accord with

[19]the conclusion that Dr. James reached. All

[20]of these problems are caused by edema of the

[21]cord following the surgery?"

[22]The doctor stated:

[23]"I would say that you give the patient

[24]the benefit of the doubt. Since you don't

[25]know, that is a diagnosis of exclusion.

[1]4250

[2]Once they have excluded the possibility of

[3]it being a spinal cord tumor, constriction

[4]of **[\*178]** the cord from the dural sutures, and

[5]other treatable causes, then why not assume

[6]it's edema? But don't assume it's edema

[7]first, because what are the consequences of

[8]that being wrong? The consequences of being

[9]wrong are being paralyzed for the rest of

[10]your life. The consequences of being wrong

[11]by doing another operation or getting a CT

[12]scan and a myelogram are very minimal.

[13]"So, given those three choices, one,

[14]say it's edema and give Decadron; number

[15]two, do an exploration. If you are wrong,

[16]you might as well be wrong in giving the

[17]patient the benefit of having another

[18]operation with a chance that he could walk

[19]out of the hospital."

[20]Q Do you agree, Doctor, with that opinion--

[21]THE COURT: Obviously he disagrees

[22]with it.

[23]MR. WIESEN: I have no further

[24]questions.

[25]THE COURT: Mr. Rappaport?

[1]4251

[2]REDIRECT EXAMINATION

[3]BY MR. RAPPAPORT:

[4]Q Doctor, why do you disagree with that

[5]opinion?

[6]THE COURT: We have been through that

[7]already. That's repetitive. Sustained.

[8]Particularly at 23 minutes after 5.

[9]MR. RAPPAPORT: I didn't choose [\*179] the

[10]hour--

[11]THE COURT: The doctor has expressed

[12]his opinion very clearly in response to your

[13]questions as to why he felt that the risks of

[14]surgery were not--were not justified in this

[15]case. He's already testified to that.

[16]MR. RAPPAPORT: Right. I'm not

[17]pressing.

[18]THE COURT: Go ahead.

[19]Q Doctor, why were the infectious disease

[20]people ordering a CAT scan? What's their intention?

[21]What are they looking for?

[22]A They're looking for a possible site of

[23]meningitis, possible site of infection.

[24]Q You mentioned the word "abscess." Can you

[25]tell the members of the jury what an abscess is?

[1]4252

[2]A An abscess is a very consolidated collection

[3]of pus, very specifically there's nothing but a

[4]collection--I'm sorry, I'll use the word large

[5]collection of pus. That is an abscess.

[6]Q Why are the infectious disease people

[7]interested in whether or not there's an abscess or not?

[8]What part does that play in their treatment of

[9]meningitis?

[10]A It might indicate a possible source of the

[11]meningitis, it might indicate possible need for further

[12]treatment, it might **[\*180]** indicate that perhaps if there was

[13]an abscess there, it should be drained.

[14]Q Did any--let me ask you this: No one

[15]drained any abscesses, right? According to the record.

[16]A Correct.

[17]Q Did any CAT scan taken at any time

[18]demonstrate an abscess?

[19]A No.

[20]Q In fact, it ruled it out, didn't it?

[21]A Correct.

[22]Q Well, let me go back to this note, Doctor.

[23]I want you to assume for the moment that the man is

[24]pouring out, pouring cerebrospinal fluid. It's coming

[25]out by the buckets. Will you assume that for a moment?

[1]4253/65

[2]A Yes.

[3]Q I want you to assume that it's pouring out

[4]and it fills up that entire potential space that was

[5]created by your surgery, okay?

[6]A Yes.

[7]Q If that CSF was causing a compression on the I

[8]spinal cord, would you, me, the jury, the judge be able

[9]to see that on a CAT scan?

[10]A Most likely, yes.

[11](Continued on next page.)

[12]

[13]

[14]

[15]

[16]

[17]

[18]

[19]

[20]

[21]

[22]

[23]

[24]

[25]

[1]4266

[2]Q Do any of the CAT scans which you have

[3]reviewed demonstrated a compression of the spinal cord?

[4]MR. WIESEN: [\*181] Objection, your Honor.

[5]THE COURT: Overruled.

[6]A With the exception of the preoperative CAT

[7]scan, no.

[8]Q Am I correct Doctor that the August 23rd CAT

[9]scan that is the second one demonstrates a -- a greater

[10]collection of CSF than the initial one?

[11]A That is correct.

[12]Q Does the August 23rd CAT scan demonstrate a

[13]compression of the spinal cord?

[14]A On the contrary, it absolutely rules it out.

[15]Q Does the radiologist's report which you read

[16]to this jury a compression of the spinal cord?

[17]A No, it does not.

[18]Q Absent a compression of the spinal -- let me

[19]ask you this. You were asked about pulsations, okay?

[20]A Yes.

[21]Q Now, let me follow up and ask you why were

[22]pulsations not important to you in this patient concerning

[23]this operation on July 13, 1984?

[24]A For two reasons. Number one in doing a

[25]cervical laminectomy which is a very common operation, it

[1]4267

[2]is very frequently noted that you do not see pulsations.

[3]Number two, in this particular case we had very well

[4]defined limits of compression above and below. Knowing

[5]that compression [\*182] had been removed past the limits as

[6]demonstrated on x-ray I had no question in my mind that I

[7]there was anything else blocking or putting more pressure

[8]on the spinal cord. Therefore knowing that they very

[9]frequently are not seen and knowing that I had gone well

[10]beyond the level of compression there was no concern on my

[11]part as to whether or not pulsations were seen.

[12]Q Would it do a neurosurgeon any good to extend

[13]the laminectomy down further assuming there is no

[14]pulsations?

[15]A NO.

[16]Q Could you explain to the jury why it

[17]would have absolutely no effect?

[18]A Well, let me set the hypothetical case in

[19]which there was no pulsation and it was important to see

[20]pulsation. Pulsations come from the brain down so that if

[21]we were looking at C-3, 4, 5, and 6, we saw no pulsations

[22]and we wanted to cry and do something to see pulsations we

[23]would extend up toward the skull, i.e., removing C-2 and

[24]possibly C-1, because that is where the pulsations would

[25]come from not from going down lower.

[1]4268

[2]Q And Doctor, was there ever any pathology on

[3]anything demonstrating any problem above [\*183] C-2, C-1, or the

[4]brain stem or anything like that?

[5]A No.

[6]Q And insofar as the orders are concerned, Mr.

[7]Wiesen asked you about the orders, remember that?

[8]A Yes, I do.

[9]Q He told you that --

[10]THE COURT: I take it Doctor, it is not

[11]unusual for residents to write orders?

[12]THE WITNESS: It is customary.

[13]Q Indeed, every one of the orders was written by

[14]an intern or a resident for every one of those days as far

[15]as you can tell, correct?

[16]A As far as I can tell, yes.

[17]Q Last but not least, you have told us you were

[18]asked certain questions about a C-1, C-2 puncture.

[19]A Yes.

[20]Q Do you still have to extend the head somewhat

[21]with a C-1, C-2 puncture?

[22]A Yes, I did.

[23]THE COURT: The came decree you extend it

[24]with a lumbar puncture

[25]THE WITNESS: To perform a cervical

[1]4269

[2]myelogram, yes.

[3]Q Tell us why.

[4]A The goal of the extending the head is to pull

[5]the material at the level of the pathology. Leaving the

[6]head flexed whether it is done in C-1, C-2 puncture would

[7]either risk the fluid immediately running **[\*184]** up into the head

[8]or running down the spinal canal away from where you want

[9]to take the pictures, and in doing a myelogram you have to

[10]concentrate the fluid in the area of interest. In this

[11]case whether the puncture was done from above or below you

[12]still have to pull the material in the same region and

[13]that would require exactly the same positioning and

[14]exactly the same degree of extension of the neck.

[15]Q Just one thing came to mind.

[16]THE COURT: Don't raise our hopes.

[17]Q I won't raise our hopes.

[18]Doctor, there was a note that --

[19]THE COURT: What note are you referring

[20]to, and I will find it.

[21]Q The note about the emergency CT.

[22]THE COURT: That is the 27th.

[23]Q Okay. Does your note state the reason why the

[24]CAT scan is being asked for?

[25]THE COURT: For an abscess.

[1]4270

[2]THE WITNESS: To look for abscess?

[3]THE COURT: That is what it says.

[4]Q It wasn't for any of the reasons that Mr.

[5]Wiesen enumerated be it blood --

[6]THE COURT: Sustained. It says to look

[7]for abscess collection. That is what the note

[8]says.

[9]Q Did the CAT scans **[\*185]** prove you right --

[10]THE COURT: Sustained as to form.

[11]Q All right, I have nothing further.

[12]MR. WIESEN: I have nothing further.

[13]THE COURT: Thank you, Doctor. Members

[14]of the jury, I promised 5:30. Would it be a

[15]substantial inconvenience to any of you if we

[16]started at 9 A.M. tomorrow?

[17]MR. RAPPAPORT: I can't do it.

[18]THE COURT: I wasn't asking you, I was

[19]asking the jury. We want to get three doctors

[20]in tomorrow and if we start at nine I think we

[21]can do it, and finish all of the proof in the

[22]case tomorrow, so I will ask you to set your

[23]alarm a little earlier and get here at nine.

[24]We will see you promptly at nine o'clock --

[25]MR. RAPPAPORT: Judge, before they

[1]4271

[2]leave --

[3]THE COURT: Please, please.

[4]MR. RAPPAPORT: I may not be here,

[5]Judge. Can we --

[6]THE COURT: Please, please.

[7]MR. RAPPAPORT: There is a witness --

[8]THE COURT: Please, please -- take the

[9]jury out.

[10](Whereupon the jury leaves the courtroom

[11]at 5:35 P.M.)

[12](Whereupon there is an off-the-record

[13]discussion at sidebar.)

[14](Whereupon the trial **[\*186]** stands in recess at

[15]5:35 P.M.)

[16]\* \* \*

[17]

[18]

[19]

[20]

[21]

[22]

[23]

[24]

[25]