

**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. DiGiacinto 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. DiGiacinto, 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]Q 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 ptients.

[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 Exhiit 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. DiGisncinto. 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 there to the progressed to weakness in his
[18]leg and subsequent thereto it progressed to where he
[19]had a buckeling 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 sinal 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]caeld 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 and 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 space, 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 shoved 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 discectomy, 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 perform on a cervical laminectomy are you relieving the pressure from the front
[3]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 isa 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 wold be incredibly cumbersome to describe

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

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

[14]a cervical laminectomy very strict procedures are

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

[16]bit 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]TEH COURT: I will discuss that

[12]with you after lunch I am sure the

[13]doctor willbe 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 tha 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]aain 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]TEH 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 turning to the operative
 [18]report. It says the incision was taken down through
 [19]the skin subcutaneous tissue. Muscle tissue-
 [20]THE COURT : That is not tissue.
 [21]That is muscle fascia.
 [22]Q I read it wrong. Muscle fascia.
 [23]The paraspinal muscles were then dissec-
 [24]ted 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 coagulating. What do we mean by hemostasis
 [8]and coagulating?
 [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 coagulating

[12]is a device which is used to corterize 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]couldl 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 plyer 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 caleld
[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 COURT 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 rmeove the bone. Youdo 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 sontometer

[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 atear

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

[22]and the spinal fluid.

[23]q you are the thidr 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 culd the manner

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

[7]recal that the bone was pressing very had 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 sontometers. 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 comjunication 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 creaed by the surgery.

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

[14]fludi is att he level of C4 that must --

[15]MR. WIESEN: Objection.

[16]THE COURT : Let him finish.

[17]Q Does tha mean a five sontometer 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]corrct, 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 COURT: On this topic on

[21] [*56] the rent?

[22]MR. RAPPAPORT: Yes.

[23]THE COURT: All right.

[24]MR. RAPPAPORT: 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]THE COURT: 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]AFTERNOON SESSION

[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]ye 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 reading right, "Case already
[9]discussed with Dr. DiGiacinto". **[*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. Giacinto 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 discusssing 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 laminectomy?

[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 COURT: He had been brought
[12]to the fifth floor and to an area immediately
[13]outside of the operating room?
[14]THE WITNESS: 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]YYou 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 : Wellyour 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 yoru 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 have 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 furthest 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 hve been very short doctor?

[3]A Yes.

[4]Q IN response to that phone cal lyou wetn

[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]TEH COURT: That is what he is

[21]talking about I take it you are including

[22]the meylogram 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]TEH COURT: All right that is

[6]your answer.

[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 myelogram 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 think by Mr. Rappaport and I would like to direct

[20]your [*96] attention 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 place on

[25]the board Plaintiff's 4 and I want you

[1]4122

[2]assume doctor --

[3]I don't have that.

[4]THE COURT: That is an AP. Do

[5]you want 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]THE COURT: That's Defendant's

[10]B. The doctor has that up there. It is the flat lateral.

[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, morning -- that afternoon 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 afternoon of

[7]the 13th when did you see it for the

[8]first time?

[9]THE WITNESS: At some time when

[10]I was reviewing the case with Mr. Rappaport.

[11]THE COURT: within the last several

[12]months?

[13]THE WITNESS: Yes.

[14]Q Doctor does that x-ray 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]job 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 really 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]there? 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 WITNESS: What it would do

[11]is make the narrow portion a little

[12]wider.

[13]THE COURT: Would't 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 magiification 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 millimeters, 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 COURT: 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 sine 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 narrowingbased

[13]on the degree of magnification.

[14]Q Well doctor I want **[*105]** you to assume that

[15]ny odctors have come in here and stated you culd not

[16]make such a decision fairly and accurately based on

[17]this x-ray fro 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 my objection?

[8]THE COURT: 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 levels not

[15]seen I would not agree at the levels seen it is possible.

[16]Q Doctor is it important before a myelogram

[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 knowledge of whether

[5]or not there is narrowing is knowledge

[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 centimeter or 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. Kreiger 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]Decadron 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 concern 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 l

[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]