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Supreme Court of New York.
New York County
Steven MASKANTZ,
v.
Michael HAYES.
No. 2001-102868.
2001.

DR. ARIK HAUSKNECHT, 225 West 35th Street, New York, N.Y. 10001, called as a witness on behalf of the defendant, being first duly sworn, was examined and testified as follows:

MR. SULLIVAN: May I inquire.

DIRECT EXAMINATION

BY MR. SULLIVAN:

Q. Doctor, are you licensed to practice medicine in the State of New York?

A. Yes, I received my license to practice medicine and surgery in New York State 1992.

Q. Can you tell the jury something about your educational background?

A. Certainly.

I graduated from Duke University in 1987, majoring in physical anthropology.

I graduated from Mount Sinai Medical School in 1991, with a medical degree.

I completed one year of medical internship at Beth Israel Medical Center in New York.

Q. Would you tell the jury what an internship is?

A. After a doctor finishes medical school, they then go through a training program and they are basically, there are basically different levels:

Internship is the first year, residency are the years after that.

Depending on your choice of, professional choice of field, you either do medical or a surgical internship.

Then following the internship, you would go into your specialized residency, in my case, I did a neurology residency.

So after my year of medical internship at Beth Israel Medical Center, I completed a year of neurology residency training at Mount Sinai Medical Center and I completed my final two years of neurology residency at New York Hospital Cornell Medical Center and Memorial Sloan Kettering Cancer Center in 1995.

Q. Doctor, are you board certified?

A. Yes, I am currently double board certified.

I'm board certified in neurology by the American Board of Psychiatry and Neurology, and I'm board certified in pain management by the American Academy of Pain Management.

Q. Doctor, would you briefly tell us what neurology is?

A. Neurology is the field of medicine which deals with the treatment and evaluation of disorders of the nervous system.

The nervous system includes the brain and spinal cord and nerve roots.

So the typical problems that a neurologist treats are neck pain, numbness and weakness, head injury, anxiety, depression, memory problems.

Q. What is pain management?

A. Pain management is the field of medicine which specializes in the treatment and evaluation of pain and the consequences of that pain have on an individual and their everyday functions.

So as a pain management specialist, it is my responsibility to find out what is causing the pain and how can we alleviate that pain and maximize that person's function on an everyday basis.

Q. How does one become board certified?

A. Board certification is basically the highest level of qualification that a physician can achieve in their chosen field.

So, for example, in the field of neurology, after completing an accredited residency training program and sitting for a series of examinations and completing one year of practice after residency, one is then granted the privilege to sit for the board examination.

In neurology there is a full day of multiple choice questions and then there is a full day of questions, answers and examination of patients in front of a board of live examiners.

Q. Do you have any hospital privileges?

A. Yes. I am currently in private practice.

I maintain an office in New York City and in Queens.

I'm affiliated with several different hospitals, including Beth Israel Medical Center, Peninsula General Hospital and Long Beach Medical Center.

It is my responsibility there as attending physician to see patients in the emergency room, on the floors and to assist with the training of other residents in topics involving neurology and pain management.

Q. Where do you do that training, in all three hospitals?

A. Yes.

Q. Doctor, can you describe the private practice, your private practice to the jury.

A. Currently, I have an adult neurology and pain management practice.

I primarily treat patients with neurologic and pain management disorders.

At times, I'm also retained as an expert in some type of litigation such as in this case.

Q. You've testified in court before?

A. Yes, I testify approximately once or twice a month.

Q. Do you primarily testify for plaintiffs or defendants?

A. Usually when I testify it's on behalf of one of the patients that I have been treating in my office.

So that would be a plaintiff, but on occasion, I do testify on behalf of defendants.

Q. When you do come into court, like you are here today, are you compensated for your time away from the office?

A. Yes, my fee for the time away from the office is $500 per hour.

Q. Prior to coming here today, were you also asked to prepare a report with regard to Mr. Maskantz?

A. Yes. I saw Mr. Maskantz in my office on July 29 of 2003. At that time, I took a history. I did a physical examination. I reviewed extensive records and diagnostic tests and I wrote a report of my findings.

Q. Doctor, who requested that you do that examination?

A. I was requested by your law firm.

Q. At that point, did you also charge us a fee or did you charge Mr. Hayes a fee?

A. There was a fee of $500 for that.

Q. Did you prepare a report after you did that examination?

A. Yes.

Q. You have that report with you?

A. Yes, I do.

Q. Before today, did you and I get together and review this case?

A. We spoke briefly last night, yes.

Q. Where did we do that?

A. In my office.

Q. Doctor, if you need to refer to your report, just ask. Please don't read from it. Okay?

A. Understood.

Q. When did you see Steve Maskantz?

A. He presented to my office on July 29 of 2003.

Q. What is the first thing you did with Mr. Maskantz when he came in?

A. He was asked to fill out some paperwork and provide photo identification.

Then he came into the office and I explained to him the purpose of the evaluation -- that I wasn't his treating physician.

I wasn't there to render treatment. I was there to do an independent evaluation.

Q. You asked him to fill out some paperwork. Was that paperwork for –

A. It was basically just to help me in writing my report and evaluating the patient.

It contains some historical information like who you're treating with, what medications are you on, what problems are you experiencing now.

Q. What did he tell you as far as his history with regard to this incident. Excuse me.

A. What the patient told me was that he had sustained a head injury with a concussion and that he was actively treating with a psychologist, Dr. Robins, a neurologist, Dr. Brown and a physiatrist, Dr. Goldenberg.

He indicated to me that he was on various medications, including Zoloft, which is an antidepressant, Trazidone, which is antipsychotic, Norvasc, which is a hyperintensive, Divan, which is a hyperintensive, Lexapro, which is an antidepressant, as well as Temazepam, which is a sleeping pill and sedative.

Q. Doctor, did you take a history from Mr. Maskantz with regard to his physical and mental condition prior to March 9 of 2000?

A. Yes, I did.

Q. What did you learn from that history?

A. The patient indicated to me that he had an extensive prior history of psychiatric problems, including depression, which he was involved in treatment; he had been hospitalized on multiple medications for the psychological conditions.

Q. Doctor, when you were asked to do the review of Mr. Maskantz, were you sent any other -- sent any documents by my office?

A. I reviewed extensive medical records, including those of St. Vincent's Medical Center.

Q. Doctor, stop right there.

Did the St. Vincent's Medical Center – I will show you what is in evidence as Plaintiff's 1.

Doctor, when the plaintiff was presented at St. Vincent's Medical Center on the day of this incident, could you tell the jury what medication he was on?

A. Certainly.

Q. You know -- strike that.

When he went to the hospital on March 9 of 2000, is there a section in the hospital report which asked Mr. Maskantz what medication he was on?

A. Yes, there is.

Q. With your experience working in emergency rooms, where is the nurse or doctor, where does the nurse or doctor get the information to put down in that part of the section?

A. It's either what the patient tells you or if he presents the pills or the pill bottle or a list of medications.

Q. Can you tell us what medications he was on on March 9, 2000?

A. He was on Effexor, which is an antidepressant and anxiety medication. He was on Trazidone, which is antipsychotic medication and he was on Prosom, which is a sleeping pill.

Q. Doctor, the medication that he was taking in March of 2000, is that consistent with what he was taking when you saw him 2003?

A. They were similar types of medications, yes.

Q. Let's start with the Efexor. What condition is that for?

A. Efexor is a selective serotonin re-uptake inhibitor. It's a medication that is effective for anxiety and depression.

Q. How about the Prosom?

A. Prosom is a medication similar to valium. It's basically a sleeping pill.

Q. Doctor, was there also a neurological examination that was done at the hospital on March 9 of 2000?

A. A neurologic consultation was requested due to the patient's complaints and a neurologic evaluation was performed during that consultation.

Q. Doctor, can you tell us the results of that neurologic consultation.

Let me lay a foundation.

What generally would a neurologist check for somebody who comes in and complains they have head pain from being head-butted multiple times?
A. As a neurologist, it is important to determine if there has been any damage to the neurologic system.

So a careful examination of the mental status, that would include the individual's orientation, their ability to speak and understand what is being said to them, their ability to concentrate and their memory function.

It would include a careful examination of the cranial nerves or the ability to see, hear, move your face, feel sensation on the face.

It would include a motor examination, basically a test of power in the arms and legs, a reflex examination, tapping various tendons with a reflex hammer to elicit a response.

A sensory examination to make sure that the spinal cord, the nerve roots were functioning properly.

Then to see if the individual is able to perceive different types of stimuli.

And an examination of the head, neck and back to determine if there were any overt signs of trauma, such as a fracture or bruising.

Q. Doctor, what is HEENT, what does that mean in the St. Vincent's medical records?

A. HEENT stands for head, ears, eyes, nose and throat. It basically covers the entire head and neck area.

Q. what were the findings from this neurologic exam that was done in the hospital with regard to Mr. Maskantz's neck?

A. There were actually two neurologic examinations performed, one by the emergency room physician and then he called in the neurology service and a consultation was done.

The one that indicates HEENT was by the emergency room physician, and he found on that portion of the examination PERRL, pupils equal, round and reactive to light, TMSWNL, tympanic membranes within normal limits, that is basically the eardrums.

They found positive photophobia, means that the patient was complaining that he was sensitive to light when the physician would shine the light in his eyes.

There was no hemotympanum, which would be blood in the inner ear.

There was no evidence of CSF leakage, that would cerebral spinal fluid.

Potentially, if an individual sustained a skull fracture, they could have CSF leakage.

Q. That would come from his ears?

A. Yes. The patient was noted to have a small abrasion in the right maxillary region. That would be basically your right cheek.

The patient was noted to have dried blood on the outside of the right ear due to a small laceration.

The patient was noted to have periorbital edema, that would be swelling around the eyes.

Q. There was a second neurological exam done, is that correct?

A. That is correct.

Q. Doctor, you mentioned PEERL.

What does that mean?

A. It basically means that the cranial nerves, 2, 3, 4 and 6 are intact.

There are 12 cranial nerves. The second one is for vision, the third, fourth and sixth, move the eyes up and down and back and forth.

So if the pupils are equal, round and reactive to light and the eyes are moving back and forth, that would be an indication that those cranial nerves are intact.

There has been no damage, at least to that portion of the nervous system.

Q. Let's move onto the examination that was done from the neurologist on call.

Can you tell us what his findings were with regard to Mr. Maskantz's neck?

A. On HEENT, head, ears, eyes, nose and throat, the patient complained of pain in his right jaw and cheek.

The tympanic membranes, the eardrums were intact and clear.

The patient complained of photophobia or sensitivity to light in the right eye when it was shined in.

Q. What about with regard to the neck? I think we are back a couple pages. With regard to the neck?

A. This is a different, this is not the neurologist. This is the surgeon that saw the patient.

Q. I apologize.

What were his findings?

A. The surgeon found that the patient had been assaulted and the patient reported to the surgeon that he lost consciousness.

The patient was complaining of mild low neck pain.

The surgeon found that his neck was supple.

Q. What does that mean?

A. That there was full range of motion. He could move it back and forth -- forward and backward and turn it sideways both ways; that there was no tenderness in the neck region itself.

And that the neurologic examination was completely normal at that time, based upon the surgeon's findings.

Q. Doctor, at St. Vincent's did they also send Mr. Maskantz for x-rays of his neck?

A. Yes.

Q. What were the findings with regard to the x-rays?

A. There was noted to be productive changes at C3-4 and C4-5.

That is basically osteoarthritis or degenerative joint disease. The cervical spine or the neck is divided up into seven different vertebrae and they're numbered accordingly.

There is a disk in between each of these vertebrae. It's numbered according to the position.

So the disk between C3-4 would be the C3-4 disk. A productive change would indicate that there has been some hypertrophy or bone spurs that occur at those levels, specifically in this case, C3-4, C4-5 and C5-6, which would be right in the middle of the neck itself.

Q. Doctor, those findings on that x-ray, is it possible that they would show up on an x-ray from alleged trauma that took place several earlier?

A. No. The findings on the x-ray of chronic and long-standing degenerative joint disease occurs slowly over the course of time.

So if it was identified on an x-ray on the date of the trauma, it indicates that it had been there at least three to six months, if not longer, before the actual incident occurred.

Q. Did they also do a CAT scan in the hospital?

A. Yes.

Q. What were the results of the CAT scan. Strike that.

What part of the body did they perform this CAT scan on?

A. The CAT scan was of the skull, face and the brain.

Q. What were the results of the CAT scan?

A. It was normal. There was no evidence of fractures. There was no evidence of bleeding inside of the skull or inside the brain.

There was no evidence of any brain injury.

Q. Did they also do an MRI?

A. Yes, they did.

Q. Doctor, what does an MRI show us?

A. An MRI is similar to a CAT scan, but it doesn't use radiation. A CAT scan and x-ray use x-rays and they show bone very well.

An MRI uses strong magnetic fields and it shows soft tissue very well.

So soft tissue would include the brain, the spinal cord, the nerve roots.

So an MRI is superior to the CAT scan or x-ray in showing these soft tissue structures.

Furthermore, an MRI, because the image is generated by computer, is much more sensitive. The computer can orient that image in a three dimensional way so that an examiner can look at that MRI and get a three dimensional picture of what is going on there.

Likewise, the MRI of the brain was completely normal. There was no evidence of swelling. There was no evidence of bleeding. There was no evidence of brain injury.

There was no evidence of swelling to the scalp or face either.

Q. Doctor, when you took the history, did you learn that Mr. Maskantz began treating about a month after this incident?

A. Yes.

Q. Who was that doctor?

A. The patient was seen by Dr. Mulhern.

Q. Was he seen by any other physicians, let's say from March of 2000 up until September of 2000?

A. He did see a neurologist, a Dr. Jonas, in April as well.

Q. Were there any other doctors, physicians, psychologists that he saw in that time period from March to September of 2000?

A. No. As far as I can discern, based on the records, based on what he told me, from March until September, those five months, he didn't receive any treatment at all.

Q. At some point then did he begin treating with Dr. Goldenberg?

A. Yes.
Q. Did you review those records as well?

A. Yes, I did.

Q. Doctor, in reviewing Dr. Goldenberg's records, did you note if she had reviewed any of the records from any of the doctors that he had seen from March of 2000, up until she began treating with him in September of 2000?

A. As far as I can tell, Dr. Goldenberg's review of any of the records of the treating doctors before her, she didn't review any of the hospital records.

She didn't review any of the prior records of his extensive psychological treatment that he had been, that he had received prior to the incident.

Q. Doctor, what is the problem with a doctor who doesn't see somebody for approximately six months after an alleged trauma, not reviewing the past medical history from the date of incident up until when she first sees him?

A. A large part of a doctor's diagnosis, large part of their opinion, is based upon what the patient tells you.

So if a patient is experiencing symptoms, these are subjective complaints. They emanate in and of themselves from the patient.

There is no way that an outsider can corroborate whether or not they're actually occurring.

So if a patient comes in and says, A, B, C, you have to assume that they're telling the truth.

If they're not telling the truth or A, B, C is inaccurate, it was really X, Y, Z, it can mislead a doctor in terms of their diagnosis and in terms of what is causing that person's problems.

So, for example, if a person comes in and says, I had an accident, I had a fight and I'm feeling very anxious and depressed, I'm having memory problems, but neglects to tell the doctor that he had anxiety and depression and memory problems before that, that would mislead the doctor in terms of their conclusion.

Q. Misleading in what way, in determining what was the cause?

A. Yes, exactly.

Q. Doctor, did you also review Dr. Brown's records?

A. Yes, I did.

Q. Dr. Brown did testing on Mr. Maskantz's cognition?

A. That is correct.

Q. From which you could see, from what you could see from Dr. Brown's records, did Dr. Brown look at any of these records from March to September?

A. No, likewise, Dr. Brown specifically indicated that he did not have any of these prior records.

And furthermore, Mr. Maskantz neglected to tell Dr. Brown that he had been on all these medications at the time he saw him and that he had this prior psychiatric history.

Q. Did you do a physical examination on Mr. Maskantz?

A. Yes, I did.

Q. Can you tell us, first tell us, after the patient is in the examining room, what is the first thing that you do -- or first thing rather that you did with Mr. Maskantz?

A. When he came to the room, the first thing we did was explain the purpose of the visit, asked him some questions.

Specifically, what symptoms he was having, what type of treatment he had had before, what treatment he was undergoing and, at that point, I left the room and asked him to remove all of his clothes and put on a gown.

I asked him to have a seat on the table. I cracked the door open a little bit to see when he was ready.

Then when I entered the room I performed a comprehensive neurologic and general physical examination.

And in this case, the neurologic examination included a mental status exam. The individual's orientation, their ability to speak and understand what is being said, their ability to concentrate, their ability to recall three items immediately at five minutes and at ten minutes, their ability to spell, to reverse spell, to calculate as well as insight and judgment.

I performed a careful cranial nerve exam to check the eyes, ears, mouth, muscles and sensation of the face.

A motor examination of the arms and legs, a reflex examination of the arms and legs, a sensory examination of the arms and legs and a mechanical examination of the neck and back range of motion.

Ability to perform certain activities such as walking, sitting, standing, hopping, performing jumping jacks, performing deep knee bends.

Q. What were your findings with regard to Mr. Maskantz when you saw him July 29, 2003?

A. I found that his mood was anxious. He seemed to be pressured and have some psychomotor agitation. He was kind of jumpy. When I asked him to repeat three items, a white car in front of a yellow house on York Avenue, he wasn't able to repeat it immediately.

Then I said, let's try again, calm down, everything is okay.

I want you to remember this because I'm going to ask you a couple of times, a white car in front of a yellow house on York Avenue.

Q. What are testing somebody when you ask them to remember those three things?

A. You're testing a couple of different parts of the brain.

It tests the ability to comprehend or understand what is being said to you. So if I say to somebody, if I give somebody a command, if the part of their brain that processes that information is not functioning properly, that would be known as a receptive aphasia.

They wouldn't understand what is being said to them.

So it tests for aphasia. It tests for memory, the ability to immediately recall as well as short term memory.

Q. What were your findings with regard to Mr. Maskantz's short term memory?

A. With encouragement, his short term memory was intact.

After I repeated it again, he was able to repeat the sentence back to me. He was able to recall it at five minutes as well as ten minutes.

Q. What about his long term memory?

A. His long term memory was intact. That would be what is your telephone number, what is your Social Security number, this type of information that is laid down in the brain for a long period of time.

Q. Doctor, what are conditions that can effect the ability, your short term memory?

A. Well, certainly psychological factors such as anxiety and depression can effect your ability, your memory.

If you're feeling anxious or depressed it can impair your ability to concentrate and it can impair your ability to recall this type of information.

And certainly your short term memory, as well as neurological testing in general, relies on a great deal of effort on the individual that is being tested.

So if I'm asking somebody to recall something and they are purposefully not recalling it, then can skew the results of that test.

Q. How about if they are anxious?

A. Yes.

Q. What if they are depressed?

A. It can, yes.

Q. How about the medication that is used. Let's deal with Mr. Maskantz, would that skew -- how about the medication, the sleeping pills you mentioned?

A. Certainly medication can have an effect on an individual's cognitive state.

These – in general, antidepressant medications and antianxiety medications and psychotic medications and sedatives, like the sleeping pills, do have a negative side effect on the brain in terms of causing drowsiness and a mental dullness.

It can effect your ability to concentrate. It can effect your memory.

Q. What did you find with regard to his cranial exam, the cranial nerves?

A. The remainder of his mental state exam was normal. The cranial nerve examination was completely normal.

Q. How about the motor functions?

A. The motor strength was completely normal. He had full power in his hands, arms, legs and feet.

Q. Doctor, when you say normal, is that an objective or subjective exam that you're testing or are you basing it on some type of norm that has been set forth and that is accepted in the medical community?

A. The finding of his strength being intact was an objective finding. That is to say, it didn't depend on what he was telling me or what he was doing.

If somebody came into my office and said, I'm having weakness in my arms, that is a subjective complaint.

I, as an outsider, have no way of knowing whether or not that person is truly weak.

If I then perform a physical examination using my eyes, using my hands, I can determine if, in fact, there is any loss of strength.

Motor strength is graded on a scale of zero to five with five being full strength and zero being paralysis.

And these are published standard guidelines.

In this case, all of his motor strength was at the five level.

Q. How about reflexes, Doctor?

A. The reflexes were completely intact. They were slightly brisker at the knees than in the arms and ankles, but that is not an abnormal finding.

Q. How were they bilaterally? Was there any deficit from one side to the other?

A. No, they were the same on both sides or symmetrical.

Q. is that –

A. That is a normal finding.

Q. How about the sensory exam. Tell us what you did.

A. I tested his ability to perceive various stimuli, including light touch, pin prick and visuoauditory sensation in the various dermatomes which are received by the nerve roots of the neck and of the back, and this case his sensory examination was completely normal.

He could feel these different sensations in all different parts of his body.

Q. What about the mechanical examination that you did?

A. On the mechanical examination the patient demonstrated a ten percent loss of lateral flexion in the cervical spine on both sides.

So normally, an individual can bend their head to 60 degrees on both sides. In this case, he lacked approximately the final ten percent of his ability to bend his neck back and forth, consistent with the arthritis that had been identified on the x-rays.

The remainder of the range of motion in his neck, forward and backward, turning sideways was normal.

Q. Did you test the lower back?

A. Yes. The range of motion in the lower back was completely normal.

Q. When you did the sensory exam, what are you testing for?

A. Basically you're testing for a pinched nerve or what is known as radiculopathy.

Q. Again, can you tell us what test you actually did to test that?

A. Light touch would be with my fingers and asking the person, do you feel this, does it feel the same on both sides.

Pain would be with pin prick, that is asking the person to feel the prick, does it feel the same on both sides, does it feel the same everywhere, arms and legs and vibration is performed with a tuning fork, putting the vibration on different areas of the dermatome and asking the person do you feel vibration, does it feel the same or different than other areas.

Q. Did you do a functioning exam?

A. Yes.

Q. What is that?

A. Functional examination basically is evaluating different types of activities.

So, for example, in this case, I evaluated his ability to ambulate or walk, his ability to get on and off the examination table, his ability to sit down and to get up from a seated position, his ability to walk on his toes, his ability to walk on his heels, his ability to hop on each foot, his ability to perform deep knee bends up and down and his ability to perform jumping jacks.

In this case, he was able to do all these activities without any obvious difficulty or without any obvious pain.

Q. Doctor, did you review an EMG done by Dr. Goldenberg?

A. Yes.

Q. What did you find with regard to the EMG?

A. The findings were limited to the paraspinal region or just the muscles over the neck itself.

And in fact correlated directly with the degenerative changes that had been identified on the x-rays.

So I think that the EMG finding, as well as that minimal loss of motion were related to the arthritis that he had in his neck.

Q. Doctor, did you find there to be any cognitive problems with Mr. Maskantz?

A. No, to the contrary. I found him to be cognitively intact when I saw him, with the exception of that initial inability to recall that sentence.

Q. Now, you said that you reviewed Dr. Brown's records with regard to the cognitive testing, is that correct?

A. Yes.

Q. Dr. Brown's records – he performed a number of tests, is that correct?

A. That is correct.

Q. Can you tell us what those tests depend on?

A. Neurological and neurocognitive testing is basically performed by asking an individual to answer a question, or asking an individual to perform a task.

Those responses, those answers are then analyzed and compared to standardized guidelines to determine if they fit any specific pattern such as a brain injury or depression or anxiety.

So in a very large part, these tests depend on the response of the person that is being tested.

Q. Doctor, in Mr. Maskantz's case, when he took these exams, was he on any medication?

A. Yes, he was.

Q. What medication was he on?

A. At the time he saw Dr. Goldenberg, on September 6 of 2000, he admitted to being on Efexor, Trazidone, Prosom.

Dr. Brown saw him several days later, saw him on 9/15, nine days later.

The patient did not report any medications to Dr. Brown. I assume that he was on the same medications, although I do not know for sure.

Q. Doctor, tell us what the effect of the medications that he was taking, the various medications would have on his ability to answer the questions asked in these cognitive tests?

A. Certainly these medications can cause sedation or drowsiness and impair your ability to concentrate and to recall.

So that certainly could skew the results if you performed these tests while you were on these medications and performed poorly and didn't tell the doctor that you were on these medications.

And the doctor might misinterpret those results.

Q. Doctor, are these tests timed?

A. Yes.

Q. Are some of them untimed?

A. Yes, they are.

Q. Dr. Brown depended mainly on the answers that Mr. Maskantz gave, is that correct?

A. These tests are entirely dependent on the response of the person that is being tested, what they say, what they do.

Q. Doctor, in reviewing those tests, were the majority of the tests under a time constraint?

A. Many of them were, some of them were not.

Q. Doctor, after doing your examination, taking into account Mr. Maskantz's history, with a reasonable degree of medical certainty, do you have an opinion as to whether Mr. Maskantz suffered a cognitive injury in the incident of March 9 of 2000?

A. I do. In my opinion, he didn't sustain any cognitive injury. He didn't sustain any brain injury.

Q. Why not?

A. He had a long history of psychiatric problems. He had been on multiple medications.

There was evidence of some minimal head trauma with no loss of consciousness and I didn't find the results of the neuropsychological testing to corroborate a brain injury.

I think they showed anxiety and depression which he's had for a long time.

Q. Doctor, with a reasonable degree of medical certainty, with regard to the neck, can you tell us whether the conditions shown in the x-ray and EMG, are they related to the incident of March 9 of 2000?

A. No. The degenerative joint disease, osteoarthritis is a chronic condition. It occurs slowly over the course of time.

It's clear that it was there before the accident based upon the x-rays that were done in the hospital.

I find it unlikely that this patient sustained a traumatic disk herniation or radiculopathy.

In the hospital, his neck exam was normal. He received no treatment for his neck for six months after the accident.

If he really had a traumatic disk bulge or herniation or pinched nerve, he would have been treating long before that.

MR. SULLIVAN: Thank you, Doctor. No further questions.

THE COURT: We'll take a ten minute break.

(Recess.)

(Jurors enter the courtroom.)

THE COURT: You may be seated. You have some more questions?

MR. SULLIVAN: Just a few.

DIRECT EXAMINATION

BY MR. SULLIVAN: (Continued:)

Q. Doctor, did you review a hospital record from March 22 of 2000, with regard to Mr. Maskantz?

A. From NYU Medical Center, yes, I did.

Q. Doctor, what were the findings at NYU Medical Center when he presented there some 13 days after this incident?

A. The patient was complaining of headaches, nausea, vomiting, memory loss and fever.

On physical examination, his neurologic evaluation, including the motor, reflexes, sensory, cerebellum and balance testing was normal.

Once again, a CAT scan of the head was normal. The patient was discharged the next day with a diagnosis of gastritis which is an inflammation of the stomach, posttraumatic concussion syndrome, viral syndrome and fever.

Q. Did he also have ulcers?

A. They performed what is known as an EGD, endoscopic gastroduoenostomy.

They found he had ulcers in his stomach.

Q. With a reasonable degree of medical certainty, can you tell us whether those ulcers were caused by the incident of March 9 of 2000?

A. No, I don't believe that the incident of March 9, 2000, caused these ulcers.

It's possible for ulcers to occur over the course of time due to stress, but in this case, they wouldn't have been, there wouldn't have been enough time for that stress to actually have caused the ulcers.

Q. How about the, a similar question with the gastritis?

A. Gastritis and ulcers are basically the same thing. Gastritis is the technical medical term for ulcers.

Q. How about the same question with respect to the viral syndrome and fever?

A. Viral syndrome and fever is due an infection. That's not caused by trauma.

MR. SULLIVAN: Thank you, Doctor. Now I really have no further questions.

MR. BECKER: May I proceed, your Honor.

THE COURT: Yes, you many.

CROSS-EXAMINATION

BY MR. BECKER:

Q. Good afternoon, Doctor.

Doctor, you testified in court, on an annual basis, about how often, sir?

A. About once or twice a month. So about 18 times a year.

Q. Approximately how often on behalf of the patients?

A. About 75 percent of the time on behalf of the patients.

Q. Have you ever testified in any cases or reviewed or testified in any case for Mr. Sullivan's office anytime before?

A. I believe in the last five years, I have testified once for a patient, a client of his and on occasion he was cross-examining me representing a defendant on a patient of mine.

Q. Have you reviewed any medical records with respect to any cases that Mr. Sullivan was involved with other than those?

A. A few, I believe, yes.

Q. How many?

A. Maybe two or three.

Q. So prior to your examining Mr. Maskantz, and at his request, you had some contact with him professionally before, is that correct?

A. That is correct.

Q. Approximately how many years have you known him, sir?

A. I believe two years.

Q. As a neurologist, are you familiar with hospital protocol in Metropolitan New York?

A. Yes.

Q. What hospitals are you familiar with?

A. Beth Israel Medical Center, Peninsula General Hospital and Long Beach Medical Center.

Q. Doctor, in your experience as a physician, when an individual is brought to the emergency room in a hospital, if after evaluation by a team of doctors, and your experience in the last number of years, if a – based upon that evaluation, the doctor believes it is safe to allow the patient to go home, to be discharged that day, that is what normally happens?

A. I'm not sure I understand the question.

THE COURT: Why don't we talk about this case.

Q. Under what set of circumstances is it normally decided, based on your experience, to keep a patient in the hospital as an inpatient following emergency room evaluation?

A. If the patient is either medically unstable or the patient has complaints that present the doctor from discharging him.

Q. According to your review of the St. Vincent's Hospital records, was it a decision, was a decision made after evaluation of Mr. Maskantz in the emergency room, on March 9, 2000, to keep him in the hospital as an inpatient?

A. Yes, he stayed there.

Q. Doctor, based upon your review of these records, what was the reason a decision was made to keep him in the hospital?

A. Based on the persistent complaints that he had because no doctor ever found anything objectively wrong with him, and all tests were normal.

The CAT scan was negative. The MRI was negative. X-rays were negative. Everything was normal.

Q. So is it your testimony, sir, that the only reason Mr. Maskantz was kept in the hospital was based on persistent complaints?

A. Yes.

Q. Doctor, is there an indication in this hospital record that there was a finding of dried blood in his right ear?

A. On the outside of his right ear due to a small laceration by the emergency room physician, yes. Two other doctors looked in the ear and found it normal, no blood, no cerebral spinal fluid and the tympanic membrane was normal.

Q. was there a finding in this hospital that Mr. Maskantz had blurred vision in his right eye?

A. No. That was the complaint. When the ophthalmologist saw him, everything was normal.

Q. Doctor, if you look at the area in the hospital record where there is consultation request March 9, 2000 –

A. Which one – the ophthalmologist?

Q. No. I think it follows at page – after March 11, there is a consultation request date 3/9.

A. Why don't you show it to me so we're talking about the same thing.

(Handing.)

That is the ophthalmology consult.

Q. is there an indication of the status of trauma to the right eye?

A. Yes, status post trauma to right eye. Everything else is normal.

There were no objective findings. Just his complaints of trauma.

Q. Is there a discussion, about four lines down, about edema?

A. I'm not sure where you're referring to.

(Handing.)

It says no edema. There is no swelling. That says zero with a line through it.

That means nil, no, no edema. There were no findings, no objective findings.

Q. is there a finding at this consultation of a diffused headache?

A. That is his complaints. You can't find a headache. That is what he told the doctor.

The doctor's exam was completely normal. There was nothing wrong.

Q. Doctor, you reviewed a lot of medical reports with respect to Mr. Maskantz, did you not?

A. Yes, I did.

Q. Did you review medical reports of Dr. Mulhern, one of his doctors?

A. Yes, I did.

Q. According to your review of that report, what were his findings?

MR. SULLIVAN: Objection.

THE COURT: Come up.

(Off the record discussion.)

THE COURT: Sustained.

Q. Sir, did you review the hospital record of the New York University Medical Center?

A. Yes, I did.

Q. Was Mr. Maskantz admitted following a visit to the hospital on March 22, 2000?

A. He remained overnight, yes.

THE COURT: Does that mean he was admitted?

THE WITNESS: Yes, he was admitted overnight.

Q. According to your review of the records, what was the reason he went to the NYU Medical Center?

A. Basically went – went to Dr. Mulhern and complained he was throwing blood and she told him to go to the hospital.

Q. Did Mr. Maskantz follow the direction of his doctor and go to the hospital?

MR. SULLIVAN: Objection.

THE COURT: Sustained. Disregard the question.

Q. You reviewed the hospital records, did you not?

A. Yes, sir.

Q. What findings were there in the hospital records according to your own review in the NYU Hospital record?

A. The patient had ulcers. The CAT scan was normal. His neurologic exam was normal.

They sent him home the next day.

Q. Was there a finding of impairment of short term memory?

A. That is what he complained of. That wasn't a finding. That is what he said.

No doctor found that.

Q. is there an indication that Mr. Maskantz, at the NYU Hospital, was seen by the neurology service on March 22, 2000?

A. Yes.

Q. The next sentence in your report, sir, does it state his short term memory was impaired?

A. That is what the patient said, yes.

Q. Then according to your report, sir, the remainder of his neurologic exam, including motor reflexes, sensory, cerebellum and balance testing was normal?

A. That's right. Everything the doctor did was normal. It's only what he said that was abnormal.

Q. Was there a finding in the hospital of short term memory impairment?

A. No, that is what the patient said.

The doctor relied on the patient. You can't test short term memory without the patient responding.

Q. Mr. Maskantz was kept overnight at NYU Hospital, was he not?

A. Correct.

Q. There was a finding of gastritis, is that correct?

A. That's correct.

Q. There was a finding of viral syndrome, is that correct?

A. Correct.

Q. There was a finding of a fever, is that correct?

A. Correct.

Q. Doctor, was there also not a finding of post-concussion syndrome?

A. Based on what the patient said, yes.

Q. Was there a finding of post-concussion syndrome?

A. I just told you, based upon what the patient said, yes.

Q. Sir, is that a positive finding?

A. No, it's based on what he was saying. There were no objective positive findings.

Q. Is it correct to state you're telling this jury that the findings in the hospital records of NYU Medical Center, on March 22 and March 23, 2000, of post-concussion syndrome, following this incident about ten days earlier, is not a positive finding?

A. I don't know what you mean by positive finding.

Was it an objective finding on the physical exam, no, there is no objective positive finding.

It was based on what the patient said. He said he got hit in the head. He said he lost consciousness. He said he had headaches. He said he had dizziness. He said he was throwing up.

The doctor concluded that he had a concussion. There was nothing objective or positive that was found.

In fact, everything was negative. The CAT scans were negative. The neurologic examination was negative.

Q. Doctor, did you review the entire New York University Hospital record?

A. To the best of my knowledge, yes.

Q. Do you have it with you today?

A. Yes.

Q. Doctor, can you turn to that section in emergency room entitled, "progress notes."

A. Once again, show me where you're looking.

(Handing.)

Yes. Is there a question?

Q. Could you read where it says, "progress notes" starting with the words 'St. Vincent's.'?

MR. SULLIVAN: Objection.

THE COURT: Come back here.

(Off the record discussion.)

Q. Doctor, when you examined Mr. Maskantz, how much time did you spend with him?

A. About an hour.

Q. You saw him on one occasion?

A. That is correct.

Q. How many years after the incident did you see him?

A. I saw him July, 2003. The incident was March of 2000 – approximately three and a half years, a little less.

Q. Doctor, would it be fair to state that physicians that examined the patient within a relatively short time after an accident are in a better position to evaluate that patient's condition than someone like yourself who sees him three and a half years later?

A. I don't understand the question. They would be in a better position at that point in time, but they wouldn't be in a better position overall, because they don't have the benefit of seeing what has happened over those three and a half years, seeing all the doctors' reports, seeing all the test results.

Q. Doctor, can an assault and a concussion cause a short term memory loss?

A. It can. I don't think that that is the case here, but it's possible.

Q. Of course, Doctor, you never examined Mr. Maskantz until three and a half years after, is that correct?

A. That is correct.

Q. Doctor, according to your review of the NYU Hospital records, did Mr. Maskantz indicate that he had short term memory loss to the staff at the hospital?

A. The patient told the neurologist "I have a 'concussion' " and the neurologist concluded that the patient had a post-concussion syndrome.

Q. According to the hospital records, did Mr. Maskantz initially tell the staff at NYU that he had attempted to go to St. Vincent's Hospital, but he couldn't remember the name of the doctor?

MR. SULLIVAN: Objection?

A. Not that I'm aware of.

THE COURT: Just a minute. Come up.

(Off the record discussion.)

Q. Doctor, I'm going to show you this section.

THE COURT: Do you know whether he did that?

THE WITNESS: No. I know he went to the hospital. I don't know if he remembered his doctor's name or not.

Q. Does this refresh your recollection that you saw this in the hospital record.

(Showing.)

A. What is the question?

MR. BECKER: Could the reporter read back the last question.

MR. SULLIVAN: Could we approach real quick.

(Off the record discussion.)

THE COURT: Does that refresh your recollection that it was in the hospital record the patient said he couldn't remember his doctor's name.

Q. Is there an indication that he initially went to St. Vincent's Hospital and he couldn't remember the doctor's name?

A. The patient was in St. Vincent's Hospital for three days.

THE COURT: Are you asking did he go to St. Vincent's Hospital before NYU? Is that your question?

Q. The question is: Is there an indication in this record that the patient, immediately prior to March 22, 2000, initially went to St. Vincent's Hospital?

THE COURT: No, no. Come up here.

(Off the record discussion.)

Q. Is there an indication in the NYU Hospital record --

THE COURT: No, no, sir. Just ask it differently. That is not an indication.

Q. According to the NYU Hospital record, did the patient tell the staff at NYU Hospital that he had the day before gone to St. Vincent's Hospital, but couldn't remember the name of his doctor?

A. It said he was on the neurology service from the 9th to the 12th. We already talked about St. Vincent's Hospital.

THE COURT: He's talking about that note. Take a look at that note.

Q. If you look at the hospital record, that paragraph, does that refresh your recollection if that is what he indicated to the hospital staff?

A. It says he went yesterday to St. Vincent's Hospital, but couldn't remember the name of MD.

We now that is not true. He was actually in Dr. Muller's office and was sent directly to the hospital.

Q. Could that be an indication of short term memory loss?

A. No, I don't believe so.

Q. You don't believe so?

A. No.

Q. Sir, do you know what a head-butt is?

A. Yes.

Q. If a patient sustains a head-butt one time that goes on for a short period of time and is butted in the head on a number of occasions, can that create a concussion?

MR. SULLIVAN: Objection.

THE COURT: Sustained. It's a hypothetical question. You have to ask the question properly.

Q. According to testimony in this case, Mr. Maskantz had stated that he was head-butted by the defendant on March 9, 2000, several times.

MR. SULLIVAN: Objection.

THE COURT: Come on up, gentlemen.

(Off the record discussion.)

Q. Doctor, assume there was testimony by Mr. Maskantz in this courtroom that on March 9, 2000, he was head-butted by the defendant 15 to 20 times.

Can that occurrence cause a concussion?

A. The term 'concussion' means loss of consciousness.

It's possible that a head-butt could cause a loss of consciousness, but it is clear in this case that that did not happen.

THE COURT: Can you tell us why, Doctor?

THE WITNESS: Based on the hospital record, the patient specified denied loss of consciousness.

Q. In this case there was testimony by Mr. Maskantz that he was head-butted by the defendant 15 to 20 times.

Can that cause short term memory loss?

A. It's possible. I don't think that it has in this case, but it is certainly possible.

Q. According to the St. Vincent's discharge summary, the first paragraph after history of present illness, can you read the first three lines?

A. From my records, it says the patient is a 46 year old gentleman with a past history of depression and hyperparathyroidism who was assaulted and beaten in the head, legs and chest.

The patient fell down with questionable loss of consciousness.

Q. By questionable loss of consciousness, according to your reading of the hospital record, does that mean that is inconclusive?

A. No, basically he told the triage nurse I didn't lose consciousness. He told the emergency room physician, I didn't lose consciousness. He told the neurologist, I didn't lose consciousness. He told the neurologist I didn't lose consciousness. He told the surgeon that he lose consciousness.

So because he was giving conflicting information, because what he was saying was inaccurate, they couldn't conclude definitively.

Q. Is it unusual for a patient who undergoes an assault experience to be unclear about whether or not he lost consciousness? Is that unusual?

MR. SULLIVAN: Objection.

THE COURT: Sustained. We're talking about this case.

Let me ask you: Can you quantify in every case whether it is unusual or not unusual?

THE WITNESS: No. If an individual loses consciousness, it is not uncommon for them to say, I'm not sure whether or not I lost consciousness.

It would be uncommon for them to say I did not lose consciousness definitively.

If the period of time goes by for which they're somewhat hazy, then they might say I'm not sure, I may have lost consciousness.

When they're saying no, I did not lose consciousness, that is a definite negative statement as to whether or not there was loss of consciousness.

Q. Doctor, can short term memory loss cause cognitive impairment?

A. I'm not sure I understand the question.

Short term memory loss is a cognitive impairment.

Q. It's a type of cognitive impairment?

A. Correct.

MR. BECKER: No further questions.

MR. FERNIER: No questions.

REDIRECT EXAMINATION

BY MR. SULLIVAN:

Q. Short term memory loss has more causes than being head-butted 15 to 20 times, is that correct?

A. Yes, it could be caused by anxiety and depression. It could be caused by the side effects of medication or it could be a willful response of a person who is feigning an injury.

Q. Mr. Maskantz went through St. Vincent's Hospital and he was kept there.

Why was he kept there?

A. Because of these multiple complaints that he had of various body systems which required a surgeon, an ophthalmologist, a neurologist, a CAT scan, an MRI.

When everyone saw him and said there is nothing wrong with him and all the test results were negative, then the doctors felt safe to let him go, despite his complaints.

Q. Doctor, would it be good medical practice with somebody who is complaining of multiple systems that you have described to us, to allow him to walk out of the emergency room?

A. No, the standard of care would necessitate that that person be cleared in that specific field of medicine.

If the patient is having neurologic complaints in the emergency room, the physician is not going to feel comfortable discharging that patient.

He's going to want the stamp of approval of the neurologist.

If the patient is having complaints of trauma, he's going to want the stamp of approval of the surgeon and, in this case, he had all those.

Q. Doctor, when Mr. Maskantz went to NYU Hospital, was there a procedure that was performed with regard to his complaints?

A. Yes.

Q. What was that procedure?

A. It was endoscopy, basically putting a scope down into his throat, into his stomach to see why he was bleeding.

They found that he had gastritis or irritation of the stomach lining, known as ulcers.

Q. Doctor, when you have this endoscopy done, is there sedation involved?

A. Yes.

Q. What kind of sedation?

A. Usually they give valium. In this case specifically they gave Versed intravenously through the vein.

Versed is a type of valium.

Q. How long would the recovering time be after this procedure finished that he would be kept in the hospital, say in a recovery room?

A. Recovery room usually an hour or two. In the hospital itself, probably four or five hours.

Q. If he came in at 2:00 in the afternoon, the procedure was performed sometime in the late evening, around 9:00, would it be uncommon for a patient to be kept until the next day to be discharged?

A. No, it would be customary to keep that patient overnight and discharge the following morning.

Q. Doctor, I want you to assume, for purposes of this question, Mr. Maskantz testified here in this courtroom that he also testified in a criminal proceeding involving Mr. Hayes.

I want you to assume, for purposes of my question, that he claims to have been head-butted 15 to 20 times.

I also want you to assume that he has told us or he's testified at points that there was no loss of consciousness.

And I want you to assume that he has testified that he never hit the ground.

Doctor, with a reasonable degree of medical certainty, could you tell us if that is consistent with the types of blows that he claims to have taken?

A. No. In my opinion, his complaints are not consistent with the details of the incident that occurred.

There are multiple inconsistencies and contradictions throughout the record. And based upon what he told me, the objective findings, the physical exam of the doctors, the diagnostic tests, these are all normal.

There is no objective evidence of injury or pathology. It's only what he says. It's only what does. It's only what he tells other doctors.

Q. Doctor, is there an underlying condition that affected Mr. Maskantz prior to this incident?

A. Yes. The patient has a preexisting psychiatric history, specifically severe clinical depression.

Q. Is it your feeling that he needs continued treatment for these conditions?

A. Yes.

MR. BECKER: Objection. Outside the scope of direct examination.

THE COURT: Sustained. Anything else?

MR. SULLIVAN: That is it.

THE COURT: Okay. Anymore?

MR. BECKER: Have you ever reviewed any records of Mr. Maskantz by a psychiatrist?

THE WITNESS: Yes.

MR. BECKER: Which records were those?

MR. SULLIVAN: Judge --

THE COURT: That is it. Anything else?

MR. BECKER: No.

THE COURT: Okay. Thank you very much.

Let me see you up here.

(Off the record discussion.)

THE COURT: Jurors, I'm going to excuse you for the day and ask you to come in tomorrow at 11:30, so I don't have you waiting around.

I expect, but this is not a guarantee, that you will hear closing arguments and summation tomorrow and you will deliberate tomorrow.

That is our schedule. That is unless something comes up, a legal issue could come up, a witness could take longer.

So, but in any event, I'm hoping that we will be able to give you this case for deliberation tomorrow.

So I wish you pleasant evening and remind you again not to discuss the case and we'll see you tomorrow at 11:30.

(The jurors were excused.)

THE COURT: I want cases on the continuing assault theory. I want a case on it tomorrow and I can't make myself any clearer.

I'm raising my voice because I'm tired of giving directions to Mr. Becker in which I ask you to bring me something and you don't bring it to me.

The second thing is I want to make it very clear about the hospital record -- NYU.

If it isn't here tomorrow certified, it's not coming in because the case is over. And I gave you a week to get it when it should have been here on your case.

And I left the door open on that. St. Vincent's came in. NYU is not here and I'm tired of this.

I want to see some cases on it.

(Off the record discussion.)

(Whereupon, the trial was adjourned to February 19, 2004.)