TESTIMONY OF DR. ALI ERAJ GUY; 1989 Trial Trans. LEXIS 311

SUPREME COURT OF NEW YORK, NASSAU COUNTY, TRIAL TERM, PART XXX

Index # 18736/84

June 23, 1989

Reporter
1989 Trial Trans. LEXIS 311 *

HARRY STONE and SELMA STONE, Plaintiffs, - against - DR. PETER LANGAN, DR. CARL A. WEISS, GARDEN CITY ORTHOPEDIC ASSOCIATES, Defendants.

Expert Name: Dr. ERAJ GUY, M.D., F.A.A.P.M.R.

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Counsel

[*1] METNICK, MARCUS & SCHUCHMAN, ESQS., Attorneys for plaintiffs, BY: ROBERT B. MARCUS, Esq., of counsel.

VARDARO, JOHS, DE TOLLA & HELWIG, ESQS., Attorneys for defendants, BY: FREDERICK C. JOHS, Esq., of counsel.

Judges

BEFORE HON. JOHN F. O'SHAUGHNESSY, Justice and a Jury.

Proceedings

1 2

[2]THE COURT: Ready for the jury?

[3]MR. MARCUS: Yes, Your Honor.

[4](The trial resumed in the presence of the

[5]Jury.)

[6]THE COURT: Good morning, ladies and gentlemen.

[7]I indicated to you when we started trial

[8]that any time we might be late it would be my

[9]fault. I will tell you this morning **[*2]** it was my

[10]fault, I had another matter which I thought had

[11]a short hearing so -- the attorneys were here

[12]promptly, they are ready to go, and I believe

[13]the parties are all present.

[14]Will you proceed now?

[15]MR. MARCUS: Yes, Your Honor.

[16]At this time I would offer in evidence the

[17]following stipulation which counsel has seen,

[18]the office records of Doctor Patrick DeRosa as

[19]plaintiffs' exhibit # 6.

[20]MR. JOHS: So stipulated. No objection,

[21]Your Honor.

[22]THE COURT: Mark it, please.

[23]
[24](Documents received and marked Plaintiff's

[25]Exhibit # 6 in evidence.)

[1]3

[2]THE COURT: All right.

[3]MR. MARCUS: I call Doctor Guy to the stand.

[4]
[5]A L I G U Y, called as a witness on behalf of Plaintiffs,

[6]having been first duly sworn by the Clerk

[7]of the Court, was examined and testified

[8]as follows:

[9]THE CLERK: Please be seated, sir, and in

[10]a loud clear voice state your name and address

[11]for the record, please, spelling your last name.

[12]THE WITNESS: My name is Doctor Ali Guy, G-u-y.

[13]My address is 247 Third Avenue, New York, New York,

[14]10010.

[15]THE CLERK: **[*3]** First name, doctor?

[16]THE WITNESS: Ali, A-l-i.

[17]MR. MARCUS: May I proceed, Your Honor.

[18]THE COURT: Go ahead.

[19]MR. MARCUS: Good morning, ladies and gentlemen.

[20]
[21]DIRECT EXAMINATION

[22]BY MR. MARCUS:

[23]Q Good morning, Doctor Guy.

[24]A Good morning.

[25]Q Doctor, are you a physician duly licensed

[1]4

[2]to practice medicine in the State ci' New York?

[3]A Yes.

[4]Q When were you so licensed?

[5]A 7 - '85.

[6]Q And, Doctor, would you tell us please what your

[7]educational background is?

[8]A I did my medical school training at Northeastern

[9]University in Dominican Republic. I did my internship

[10]At Mount Sinai School of Medicine, Bronx Veterans' Administration

[11]Hospital, in the field of internal medicine. Did another

[12]year of general medicine at Cabrini Medical Center and

[13]then I did another three years of residency in physical

[14]medicine and rehabilitation at Mount Sinai School of

[15]Medicine.

[16]Q Doctor, do you have a specialty to which you

[17]restrict your practice of medicine?

[18]A I do.

[19]Q What is that, if I may ask?

[20]A Physical medicine **[*4]** and rehabilitation.

[21]Q Would you explain to the jury please exactly

[22]what that specialty entails?

[23]A Well, it is a combination of orthopedics

[24]and neurology. None-operative orthopedics, and also

[25]has some physical therapy training in it as well.

[1]5

[2]Q And, Doctor, are you associated with any

[3]hospitals at the present time?

[4]A Yes, I am.

[5]Q What hospitals?

[6]A I am affiliated with Cabrini Medical School,

[7]which is a major teaching hospital of the New York Medical

[8]College, and I have recently submitted my application

[9]for Orthopedic Institute in Manhattan for staff physician.

[10]Q That is the Hospital for Joint Diseases?

[11]A That is right.

[12]Q Doctor, did there come a time when I asked

[13]you to review the matter of Harry Stone?

[14]A Could you repeat the question, please?

[15]Q Yes. Did there come a time when I asked

[16]you to review the case of Harry Stone?

[17]A Yes.

[18]Q Okay. About when was that?

[19]A A few months age.

[20]Q And at that time did I ask you to review

[21]certain records?

[22]A Yes, you did.

[23]Q And did I supply you with **[*5]** certain records?

[24]A Yes, you did.

[25]Q Which ones? What did I give you

[1]6

[2]A You supplied me with the record of Doctor

[3]Weiss, Doctor Langan, the hospital records, the pretrial

[4]testimony of Mr. Stone, Doctor Langan, and report of

[5]Doctor DeRosa.

[6]Q Did you have -- in connection with Doctor

[7]DeRosa's reports, did you also look at the arthrogran report

[8]and bone scan reports?

[9]A I did.

[10]Q And did you have an opportunity to look

[11]at the flat plate x-rays taken by Doctor Bellows when

[12]the patient first experienced complaints?

[13]A I did.

[14]Q And this morning did you have an opportunity

[15]to look at the arthrogram files that are in evidence?

[16]A Yes, I did.

[17]MR. JOHS: Your Honor, before we go any further

[18]I have an objection to this physicians' testimony

[19]at this trial.

[20]THE COURT: All right, let's go outside.

[21](The following took place without the Jury

[22]being present.)

[23]
[24]THE COURT: All right.

[25]MR. JOHS: Your Honor, the basis for my objection

[1]7

[2]to Doctor Guy's testifying is, number one, he's already

[3]told us that he wasn't **[*6]** licensed to practice medicine

[4]in the State of New York until July of 1985. The

[5]care and treatment rendered here concerns April 1983.

[6]In addition to that he's told us that his

[7]specialty is physical medicine and rehabilitation,

[8]and that he did a three-year residence in physical

[9]medicine and rehabilitation at an institute here

[10]in New York.

[11]He's only applied for privileges, a staff

[12]physician at Orthopedic Institute, he's not a staff

[13]member there and he's had no experience in orthopedic

[14]surgery. In fact he's specifically testified

[15]that he's involved in non-operative field of orthopedics.

[16]As such I think that his competency to testify

[17]here is improper and he should not be allowed

[18]to testify against two board certified orthopedics.

[19]In addition to the fact that Doctor DeRosa's subspecialty

[20]is orthopedics.

[21]And I don't think this physicians' experience

[22]is in any way competent in this case.

[23]THE COURT: Mr. Marcus?

[24]MR. MARCUS: First of all, Your Honor, it

[25]is as well Mr. Johs knows, in the State of New York

[1]8

[2]any physician licensed to practice medicine can give

[3] **[*7]** testimony, including opinion testimony in a medical

[4]malpractice action.

[5]There is but a single license in the State

[6]of New York governing all physicians regardless

[7]of specialty. Mr. Johs has his remedies [ILLEGIBLE TEXT] pointing

[8]out to the jury that Doctor Guy is a specialist --

[9]not an orthopedist but in physical medicine and

rehabilitation.

However, as the witness has already pointed out we haven't come close to exploring his qualifications as yet. He is a specialist in what he defines as orthopedic medicine or non-operative orthopedics which is precisely the kind of treatment that was involved in this particular case.

And had Mr. Johs waited, and as he undoubtedly discovered I'm sure, I anticipated that Doctor Guy is thoroughly familiar with the particular mechanism of injury which the treatment rendered here, and he has expert testimony to offer in that regard.

As to whether or not he was licensed to practice in the State at the time of the incident itself I think that is equally irrelevant if he can

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render opinion testimony as to what the standards

[*8] were in 1983. And if he has no knowledge and knows nothing of that based on his training, he was a student at that time, that is certainly competent and all that goes to the weight to be afforded his testimony by the jury.

I do not believe any of this is a basis for invalidating this witness's testimony.

THE COURT: Objection overruled.

MR. MARCUS: Thank you, Your Honor.

(The trial resumed in the presence of the Jury.)

THE COURT: Continue, Mr. Marcus.

[15]MR. MARCUS: Thank you, Your Honor.

[16]
[17]DIRECT EXAMINATION

[18]BY MR. MARCUS: (Cont'd.)

[19]Q Doctor Guy, after reviewing the documents

[20]and records that you have outlined for us, did you also

[21]review any particular literature or other materials

[22]to which you were privy that you feel would be a benefit

[23]to you in formulating your views and opinions which

[24]you are about to give?

[25]MR. JOHS: Objection to any review or literature.

[1]10

[2]THE COURT: Overruled.

[3]THE WITNESS: Shall I answer.

[4]Q Calls for a yes or no, Doctor.

[5]A Yes, I did.

[6]Q Okay.

[7]And, Doctor, did there come **[*9]** a time when you met

[8]with me and we discussed this case?

[9]A Yes, we did.

[10]Q When was that?

[11]A This morning.

[12]Q Okay.

[13]And what was the SUM and substance of that conversation,

[14]please?

[15]A We basically went over the medical records.

[16]I had some questions with you answered for me.

[17]Basically exchange of medical information and

[18]more depth as to the patient's condition.

[19]Q Did I advise you as to the testimony of

[20]the witnesses thus far in this case?

[21]A (No response.)

[22]Q Did I tell you what they had testified to?

[23]A Yes.

[24]Q Now, Doctor, let us begin, if we can, with the

[25]x-rays, Plaintiff's Exhibit # 1 -- the x-rays of Doctor Bellows.

[1]11

[2]Now, you examined these x-rays, did you not?

[3]A Yes, I did.

[4]Q You saw the x-ray report and the report

[5]of Doctor Langan -- of Doctor Weiss as to what those

[6]x-rays demonstrated?

[7]A Yes, I did.

[8]Q And was Doctor Weiss essentially correct

[9]in what he saw in those x-rays?

[10]A Yes, he was.

[11]Q So that you would agree with him that the

[12]x-rays showed -- minimal narrowing **[*10]** of the acromioclavicular

[13]joint?

[14]A Yes, I do.

[15]Q And, Doctor, what would the clinical significance,

[16]if any, would be of that minimal narrowing of the Acromio-

[17]clavicular joint.

[18]A Very little clinical significance.

[19]Q And did you also agree with him that there

[20]was no soft tissue calcification shown on those x-rays?

[21]A Yes, I do.

[22]Q And what would the clinical significance, if

[23]any, be of that finding?

[24]A If you have some soft tissue calcification it

[25]could be consistent with tendonitis or calcium deposits

[1]12

[2]within a joint which would interfere with the normal

[3]range of motion of that joint.

[4]Q Would that be one of possible causes for

[5]a -- what is commonly known as a frozen shoulder or

[6]restriction of movement in the joint, calcification?

[7]A For you to have calcification to cause restrictive

[8]range of motion it would have to be an enormous amount

[9]of calcification where it would show on plain x-rays.

[10]Q By the way, Doctor, as part of and parcel

[11]of your training in your medical specialty were you

[12]trained in the reading and interpretation of x-ray **[*11]** studies?

[13]A Yes, I was.

[14]Q Were you trainee in the reading and study

[15]of such specialized studies as arthrograms?

[16]A Not as in depth as I was with plain x-rays.

[17]Q Have you been trained in arthrograms at all?

[18]A Briefly, superficially.

[19]Q Are you in a position to read arthrograms?

[20]A If it is a major care -- tear which is clearly

[21]evidenced, yes.

[22]Q Okay. Do you in the course of your practice

[23]as Doctor Weiss and Doctor Langan have testified, they

[24]do rely upon radiologists to take x-rays and interpret

[25]them for you?

[1]13

[2]A Sorry. What is the question?

[3]Q Do you rely upon radiologists to take x-rays

[4]of your patients and interpret their, for you?

[5]A Yes, I do.

[6]Q They have the specialized training to do

[7]that, is that correct?

[8]A That's right. That's right.

[9]Q Now, Doctor, would you agree with Doctor

[10]Weiss' finding that the articulating surface of the

[11]humerus was smooth in those x-rays?

[12]A Yes, I do agree.

[13]Q And what is the clinical significance, if

[14]any, of that?

[15]A That it was basically no fragments or **[*12]** any

[16]arthritis going on within that joint. There was no

[17]chronic infection present.

[18]These are the basic clinical significances.

[19]Q Doctor, in looking at those flat plate x-rays

[20]of Doctor Bellows, did you find any evidence of destruction

[21]in the region of the humeral head with the junction

[22]of the tuberosity?

[23]A No such evidence present.

[24]Q Would such a condition have shown up on

[25]these flat plate x-rays?

[1]14

[2]A Yes, it should have.

[3]Q And, Doctor, did you find any evidence in

[4]looking at those flat plates regions of bony fragmentations

[5]in soft tissue separated from the parent bone by at

[6]least a centimeter?

[7]A No such evidence present.

[8]Q And would such a condition have shown up

[9]on the flat plate x-rays?

[10]A It should have.

[11]Q Okay. Doctor, did you find any evidence

[12]on the flat plate x-rays of a torn rotator cuff?

[13]A No evidence. But you can't really diagnose

[14]a rotator cuff by just x-rays alone.

[15]Q Now, turning, if we can, to the arthrogram

[16]and to the arthrogram report of Doctor Fagenberg.

[17]These are the records of Doctor DeRosa, **[*13]** if you

[18]want to look at this, Doctor.

[19]Looking at the arthrogram films yourself, did

[20]you find any basis for disagreement with the conclusions

[21]of Doctor Fagenberg as to what the arthrogram studies

[22]showed?

[23]MR. JOHS: Objection.

[24]THE COURT: May I have the question again,

[25]please?

[1]15

[2](Question read by the Court Reporter.)

[3]THE COURT: Sustained as to form.

[4]Q Doctor, in looking at the arthrogram films

[5]would you agree with Doctor Fagenberg's conclusions

[6]that they demonstrate some destruction in the region

[7]of the humeral head, the juncture with the tuberosity?

[8]A Yes.

[9]MR. JOHS: Objection.

[10]THE COURT: Sustained.

[11]Q Doctor, what did you -- did you find evidence

[12]in looking at the arthrograia films of destruction in

[13]the region of the humeral head at the juncture with

[14]the tuberosity?

[15]MR. JOHS: Objection.

[16]THE COURT: Sustained.

[17]Q Doctor, what did you find in the arthrogram

[18]studies?

[19]A Basically I found Doctor Fagenberg's report

[20]pretty much outlined beautifully, there is destruction

[21]in the region of the humeral head **[*14]** at the junction with

[22]the tuberosity. There was some bony fragmentation in

[23]soft tissue which was separated from the parent bone

[24]by at least a centimeter. These were either traumatic

[25]induced or were the effect of local infection.

[1]16

[2]MP. JOHS: Objection. That's not what the

[3]report says, Your Honor.

[4]THE COURT: Yes. Sustained. The jury will

[5]disregard the last comment.

[6]Q Now, Doctor, is the arthrogram studies demonstrate

[7]what are sometimes referred to as bony abnormalities?

[8]A Yes.

[9]MR. JOHS: Objection.

[10]THE COURT: I will permit it.

[11]MR. JOHS: I have an additional problem, this

[12]is not a claim in the bill of particulars.

[13]THE COURT: I'll permit the question.

[14]A The answer to your question is yes, there

[15]is some abnormality.

[16]Q Doctor, do you have an opinion with a reasonable

[17]-- withdrawn.

[18]Doctor, did you find any evidence in these x-ray

[19]studies of proliferative synovitis?

[20]A Yes, I did.

[21]MR. JOHS: May I have a clarification to -- as

[22]to what x-ray studies he is talking about?

[23]MR. MARCUS: The arthrogram studies.

[24] **[*15]** MR. JOHS: Objection

[25]THE COURT: I'll permit it.

[1]17

[2]Q Would you tell the-jury what proliferative

[3]synovitis is?

[4]A Okay. You see proliferative synovitis in

[5]certain medical conditions such as rheumatoid arthritis,

[6]degenerative arthritis, which occurs with just aging process.

[7]It is also seen with trauma, it is also seen with chronic

[8]infections where the bones and cartilage gets bigger

[9]and bigger and it interferes with the normal range of

[10]motion and the normal motion within that joint capsule.

[11]THE COURT: What is it? What is proliferative

[12]synovitis?

[13]THE WITNESS: The snovia is one of the linings

[14]within the capsule of a joint, and in this case the

[15]shoulder joint. Its function is to have lubrication

[16]within that joint so the joint can move freely

[17]through its normal range of motion. And when it is

[18]proliferative, in other words it grows, it is --

[19]gets bigger and bigger and it thickens and interferes

[20]with that normal range of motion. Therefore you

[21]get decreased range of motion.

[22]THE COURT: Would that also be called hypertrophy?

[23]THE WITNESS: Yes, hypertrophy process **[*16]** is

[24]another name for it.

[25]Q Doctor, in examining those films that -- did

[1]18

[2]you find any evidence of disruption of the shoulder

[3]capsule?

[4]A Yes.

[5]MR. JOHS: Objection.

[6]THE COURT: No, I'll permit it.

[7]A Yes, I did.

[8]Q And how is that demonstrated in an arthrogram,

[9]Doctor?

[10]A With the x-ray vision, infiltration spread

[11]of the dye within the area where it should not go.

[12]Q What does that indicate, Doctor?

[13]A That indicates that there was a rotator

[14]cuff tear.

[15]Q In other words the capsule is no longer

[16]intact?

[17]A That's right.

[18]Q Can you tell from looking at an arthrogram

[19]the extent of tear of the rotator cuff to any degree?

[20]A Well, it must be a pretty big tear for the dye --

[21]MR. JOHS: Objection. Are we talking about

[22]this arthrogram or any arthrogram?

[23]THE COURT: This arthrogram.

[24]A Refers to this arthrogram.

[25]MR. JOHS: All right, I still object.

[1]19

[2]THE COURT: Overruled.

[3]A For the dye to spread into these areas where

[4]it has spread the -- th tear has to be substantial,

[5]a **[*17]** major tear, otherwise it will not infiltrate into

[6]those areas.

[7]Q What is the clinical significance of that

[8]finding, if any?

[9]A Of a rotator cuff tear?

[10]Q Well, I'll -- withdrawn, I'll cone back to it.

[11]Doctor, what is chronic adhesive capsulitis?

[12]A Chronic adhesive capsulitis is result of

[13]certain medical conditions that restrict the range of

[14]motion in the shoulder, where the normal range of motion

[15]is markedly diminished and sometimes -- the term "frozen

[16]shoulder", which is inappropriate used by many men,

[17]including some physicians, occurs where the shoulder

[18]is literally frozen in its place.

[19]The shoulder is like no other joint in the body,

[20]you have four articulations going on at the same time,

[21]and as the result of this disuse or any kind of problem

[22]within the joint capsule, that joint has a tendency

[23]to freezing up or not having the full range of motion.

[24]Q Now, you refer to this as result of other

[25]things, is that right?

[1]20

[2]A (No response.)

[3]Q Is that correct?

[4]A That is correct.

[5]Q And would it be correct to say adhesive

[6]capsule **[*18]** is not in and of itself an originating disease

[7]or injury?

[8]A That is correct.

[9]Q Okay. It results from some disease process

[10]or injury?

[11]A That is correct.

[12]Q and what kind of disease process or injury

[13]could result in that kind of a condition developing?

[14]A Well, in an elderly person the first thing

[15]that comes to my mind, and should come to the mind of

[16]any physician, should be rotator cuff tear. It is the

[17]most common.

[18]Other possibilities are rupture of the biceps tendon.

[19]Any form of a tendonitis of the muscles involved in

[20]the shoulder joint, anything of a degenerative or arthritic

[21]condition within the joint capsule, which again has

[22]hypertrophy of the structures within that joint capsule

[23]which interferes with the normal range of motion. Tumors --

[24]the list is very long. I can go on and on and on.

[25]Q Now, Doctor, are you trained in diagnoses

[1]21

[2]of these various conditions with a view towards ultimate

[3]treatment?

[4]A Absolutely.

[5]Q Would it be fair to say that the treatment

[6]of this condition falls within the purview of your area

[7]of medical **[*19]** specialization?

[8]A Absolutely.

[9]Q So unlike your limited familiarity with

[10]arthrograms, you are quite familiar with the diagnosis

[11]and treatment of shoulder injuries?

[12]A That is correct.

[13]MR. JOHS: Objection.

[14]THE COURT: I'll permit it.

[15]Q Doctor, what exactly is the rotator cuff

[16]and how does it tear? What are we talking about here?

[17]A The rotator cuff is a combination of four

[18]muscles, the upper splenius, inferior splenius , the

[19]teres minor and subscapularis. These are the four muscles

[20]that insert -- they overlap one another over the shoulder

[21]joint, and their job is to maintain the shoulder in

[22]its proper place.

[23]And when you get a tear in the rotator cuff it

[24]results from a few possibilities. In the young individuals

[25]it is usually related to trauma, such as the football

[1]22

[2]player when he gets tackled, he falls on this shoulder

[3]and his shoulder bangs against the ground hard, it tears.

[4]In the elderly people it is the result of degeneration,

[5]the natural aging process. The tibia bone becomes weakend

[6]and people that have positions where constantly reaching

[7] **[*20]** over their heads to reach for objects, it also predisposes

[8]this muscle groups to tear in the future.

[9]And again, trauma as well.

[10]Q Now, you talk about muscles, there are also

[11]something called tendons involved here?

[12]A Yes, there are.

[13]Q What is the difference between a muscle

[14]and tendon?

[15]A A tendon attaches the muscle to the bone.

[16]Muscle we all know what is.

[17]Q And what is a ligament?

[18]A A legament attaches muscle to another muscle.

[19]Q And in this, particular case when we are

[20]talking about the rotator cuff, what exactly are we

[21]talking about? Any particular portion of these muscle

[22]groups?

[23]A We are usually referring to the end portion

[24]of these muscle groups that insert upon this superior

[25]portion of the shoulder.

[1]23

[2]Q That would be the tender, and --

[3]A Yes.

[4]Q Now, when we talk about these muscles and

[5]tendons, are we talking about something that is like

[6]a cord, a single strand, or a wire, or are we talking

[7]about fibers connected in some way? Could you explain

[8]that for the jury? Could you describe what we're talking

[9] **[*21]** about with tendons?

[10]A Best we can dc is picture a rope or escalator

[11]which holds bunch of fibers in between together, holding

[12]that structure in its proper place.

[13]Q And when we talk about tears, do we talk

[14]about complete tears, partial tears, what are we referring to?

[15]A We have both, we have partial tears which

[16]are incomplete, and we have complete tears.

[17]Q And what is the most common occurrence in

[18]elderly people?

[19]A Incomplete tears.

[20]Q Okay. And that would be where some of the

[21]fibers, but not all of them?

[22]A That is correct.

[23]Q Doctor, is it possible for some of the fibers

[24]to tear and for the patient -- the individual not to

[25]even realize it?

[1]24

[2]A Yes, it is possible.

[3]Q And when we are talking about these degenerative

[4]changes, are we talking about gradual increased tearing

[5]over a period of time?

[6]A Gradual increased weakening with resultant

[7]tearing of these fibers.

[8]Q And is it possible, Doctor, under that kind

[9]of scenario for a person to have no experience of any

[10]pain or problem and then one day feel a pop or something

[11] **[*22]** and suddenly experience pain and limitations of notions

[12]as result of this kind of a degenerative process?

[13]A Absolutely. As I mentioned to you before,

[14]picture it as a form of a rope intertwined, you have

[15]incomplete tears and then it takes one little thing

[16]to just carry it over and snap it.

[17]Q Now, Doctor, you're aware, are you not,

[18]that Mr. Stone underwent a manipulation under general

[19]anesthesia?

[20]A Yes, I'm aware.

[21]Q Are you familiar with that procedure?

[22]A Yes, I am.

[23]Q You just do not perform the, do you?

[24]A No, I do not.

[25]Q Okay. Have you yourself referred patients

[1]25

[2]for that procedure?

[3]A No, I have not.

[4]Q Are you familiar with the diagnostic mechanism

[5]for determining whether or that that procedure is appropriate

[6]or not?

[7]A Yes, I am.

[8]Q Would you tell us please what the manipulation

[9]is designed to do?

[10]A Manipulation under general anesthesia, what

[11]it is designed to do is to break up all the adhesions,

[12]all the fragments that are stuck to one another that

[13]prevents that shoulder, that joint, from going through

[14] **[*23]** its normal range of motions. And by doing that you

[15]are actually breaking up structures, whatever they might

[16]be, done, tendons, ligaments, sometimes even nerves.

[17]The brachial plexus which inserts right in the

[18]armpit, right below the shoulder joint.

[19]Q Now, Doctor, with regard to this manipulation

[20]-- manipulations generally, are there certain times

[21]when it is clinically indicated and other times when

[22]it is not clinically indicated?

[23]A Yes.

[24]Q Can you tell us, please, when it might be

[25]indicated and when it might not be indicated, generally?

[1]26

[2]A Well, I can tell you from my own experiences,

[3]I can quote you the literature --

[4]MR. JOHS: Objection.

[5]THE COURT: Yes. Sustained.

[6]Q Tell us what you know of it, Doctor?

[7]A According to the literature --

[8]MR. JOHS: Objection.

[9]THE COURT: Don't tell us about the literature,

[10]tell us what you know.

[11]THE WITNESS: Okay.

[12]A Most of these injuries, rotator cuff injuries

[13]are incomplete, and ninety percent or more of these

[14]they resolve on their own with aggressive physical therapy.

[15] **[*24]** I'm talking about aggressive physical therapy,

[16]I'm talking about thirty-six months time, it is continuous

[17]improvement going on, you know, on for twelve or eighteen

[18]months.

[19]MR. JOHS: I will object, not being responsive.

[20]THE COURT: Yes, it isn't at this point.

[21]THE WITNESS: I'm sorry.

[22]Q Doctor, listen carefully to the question

[23]and guide yourself accordingly.

[24]A I will try.

[25]Q By the way, Doctor, have you ever testified

[1]27

[2]before in a court? --

[3]A No, I have not.

[4]Q Doctor, talking about the manipulations

[5]themselves, are there certain risks of a manipulation

[6]under general anesthesia of which you are familiar?

[7]A Yes, there are.

[8]Q Tell us please what those risks include?

[9]A Fracture.

[10]Q Of what?

[11]A Of the humerus, injury to the brachial plexus.

[12]The brachial plexus is like a whole network of

[13]all the nerves that underneath as in one central point,

[14]and from there they give branches to other nerves that

[15]go down your arm. If there is a tear here, the results

[16]are devastating, other complications, could be tearing

[17]of the **[*25]** tendons and ligaments and muscles within the

[18]joint capsule or around the joint.

[19]These are the basic complications.

[20]Q Could a manipulation under general anesthesia

[21]cause a complete tear of a rotator cuff?

[22]A Yes.

[23]Q Could it cause a partial tear of a rotator cuff?

[24]A Yes, it can.

[25]Q Doctor, in your opinion, with a reasonable

[1]28

[2]degree of medical certainty, are these risks which a

[3]person should have imparted to him before he is asked

[4]to decide whether or not to proceed with the manipulation?

[5]A Absolutely.

[6]MR. J0HS: Objection.

[7]THE COURT: What is the basis of the objection?

[8]MR. JOHS: Doctor already told us that he's

[9]involved in non-operative, so he wouldn't be involved

[10]in pre-operative inform consents to patients.

[11]MR. MARCUS: It is his knowledge that matters.

[12]MR. JOHS: He's also just testified that he

[13]never referred a patient for manipulation under

[14]general anesthesia.

[15]THE COURT; Objection sustained.

[16]MR. MARCUS: If Your Honor please, I would

[17]like a hearing out of the presence of the jury

[18]at this point.

[19] **[*26]** TEE COURT: Okay. As a matter of fact,

[20]let's take a short recess.

[21]Ladies and gentlemen, don't discuss the

[22]case among yourselves.

[23]Doctor, you may step down.

[24](Whereupon there was a recess as declared

[25]by the Court.)

[1]29

[2](Conference between the attorneys and the

[3]Court in Chambers.)

[4]THE COURT: Yes, Mr. Marcus, proceed.

[5]MR. MARCUS: If I understand the Court's

[6]ruling correctly -- and maybe I'm anticipating --

[7]the Court has refused to permit the witness to

[8]answer with regard to what is a preliminary informed

[9]consent question?

[10]THE COURT: Right.

[11]MR. MARCUS: On the basis of Mr. Johs objection

[12]that this doctor's not actually performing the

[13]procedure or referring patients for this procedure,

[14]as, yes, he's relatively young and his practice

[15]is quite new, he's therefore not competent to

[16]render opinion evidence as to whether or not the

[17]consent of the -- obtained was adequate or not.

[18]So I take it that is the direction?

[19]THE COURT: Generally, yes.

[20]MR. MARCUS: I would respectfully except,

[21]Your Honor. I think that is an unfortunate and

[22] **[*27]** severely narrow reading of what I believe the

[23]law is with regard to informed consent.

[24]With all due respect to the Court.

[25]I don't believe a physician has to actually

[1]30

[2]do it himself to be in a-position to know of it

[3]and know what is proper and what is not proper.

[4]I intend to establish with this witness

[5]that there are general standards which apply to

[6]any field of medicine in which any consent to

[7]anything -- to be obtained from the patient must

[8]be proceeded by certain disclosures.

[9]We got a little ahead of ourselves with

[10]this specific one, but generally I intend to use

[11]this witness to establish that the consent obtained

[12]here, even under Doctor Langan's own testimony

[13]was inadequate because of failure to disclose

[14]known risks front the procedure. I think he has

[15]already testified, without objection, as to the

[16]risks of this procedure which he is thoroughly

[17]familiar with. And I think therefore he can comment

[18]and render an opinion.

[19]Again, it is a matter of credibility. Mr.

[20]Johs has his options in cross-examination and

[21]summation as to whether or not the jury credits

[22] **[*28]** his view of what constitutes and informed consent

[23]verses that of the defendants.

[24]But I don't think it would be fair, proper

[25]or within the scope of the law to restrict him

[1]31

[2]simply because he hasn't done the procedure. As

[3]to what the risks of the procedure are, he's already

[4]testified, he knows what the risks are, and if

[5]he knows what informed consent is and what constitutes

[6]good consent and bad consent he should be entitled

[7]to render opinion testimony in that regard.

[8]THE COURT: Mr. Johs?

[9]MR. JOHS: As a physicist who has already

[10]told us that he doesn't perform manipulations

[11]and doesn't refer patients for manipulations,

[12]I don't see how his testimony could in any way

[13]be competent as to what an adequate informed consent

[14]would be in this situation.

[15]Additionally he's told us four possible

[16]risks of the procedure, none of which occurred

[17]in this incident, and none of what are alleged

[18]in the bill of particulars.

[19]MR. MARCUS: It is.

[20]Excuse me, I'm sorry. I didn't mean to

[21]interrupt.

[22]MR. JOHS: That's okay.

[23]He's also tell us about how a tear is caused, **[*29]**
[24]and it is caused by a degenerative process over

[25]a period of time. And he's also told us that

[1]32

[2]he can't read arthrograms, although he had some

[3]routine superficial training in the reading of

[4]arthrograms. So there is no way he can establish

[5]that any injury to the rotator cuff occurred during

[6]the course of this manipulation.

[7]On that basis I don't think that his testimony

[8]is concerned certainly with informed consent notifications.

[9]Additionally I was going to reserve my motion

[10]to strike the testimony because I think that on

[11]Mr. Stone's own testimony that he went out and

[12]did research prior to undergoing the procedure,

[13]I think informed consent is pretty much out of

[14]the door. But I'll make my motion at the appropriate

[15]time.

[16]THE COURT: I'm adhering to my ruling.

[17]MR. MARCUS: Is Your Honor going to prohibit

[18]this witness from answering any questions with

[19]regard to informed consent?

[20]THE COURT: What else is there?

[21]MR. MARCUS: We just had a specific question.

[22]I am going to ask him if he's familiar with the

[23]term informed consent, with what it means, whether

[24] **[*30]** it has a medical definition for it, what you detail

[25]in general to a patient, what should not, wether he

[1]33

[2]means in this case, the risks and benefits were

[3]disclosed. I think they are perfectly proper

[4]questions.

[5]He doesn't have to do the procedure to know

[6]what the informed consent knowledge should be

[7]explained to the patient. He treats patients

[8]before and after they had the procedure, he's

[9]familiar with the injuries, what can occur because

[10]of the procedure. And it is part of his training

[11]to know about that, he has repaired and tried

[12]to repair the damage to somebody, or to prevent

[13]damage from occurring.

[14]The fact that he is not a surgeon does not

[15]in and of itself preclude him from rendering an

[16]opinion as to risks and benefits of any kind of

[17]procedure.

[18]This is a quasi-surgical procedure in any event.

[19]And the law is quite clear, Your Honor,

[20]that it doesn't matter whether or not the procedure

[21]was correctly performed or not.

[22]THE COURT: I understand that.

[23]MR. MARCUS: And we are not suggesting that,

[24]we're stating that the decision to dc the procedure

[25] **[*31]** was improper and based on inadequate investigations

[1]34

[2]and inadequate disclosure to the plaintiff.

[3]Even Doctor Langan testified that the only

[4]disclosure that he made was of the risk of fracture,

[5]he never said there were any other risks. He

[6]specifically denied that there was risk of torn

[7]rotator cuff from this procedure. He denied any

[8]other risks. And I think that creates an issue

[9]of fact, and this which has now been said, and

[10]it was permitted, it is in the record that these

[11]are known risks. Now we have a question of fact,

[12]and I think he should be able to testify that.

[13]these risks should have been disclosed.

[14]MR. JOHS: What I think I lost in translation,

[15]Your Honor, is that there has never been to this

[16]very point in time an allegation in the bill of

[17]particulars, or by testimony, that Mr. Stone's

[18]torn rotator cuff was caused by this procedure.

[19]MR. MARCUS: I'm not suggesting it is.

[20]MR. JOHS: What I don't understand, if they

[21]are not suggesting that it is, what is the purpose

[22]of all this? We know that the shoulder was not

[23]broken during the procedure, we know the humerus

[24] **[*32]** wasn't broken, we know the brachial plexus was

[25]not damaged in any way. So we know that death

[1]35

[2]is a risk of anesthesia and he is still alive.

[3]So regardless of all those risks, Mr. Stone has

[4]testified that he was in so much pain he wanted

[5]something to be done for the relief of pain.

[6]I don't think any reasonable person would

[7]disagree that he wanted to go -- undergo some

[8]sort of procedure to have a release from that

[9]pain. And whether these are risks of the procedure,

[10]and weren't relayed to the individual in this

[11]point in time as far as he perceived are immaterial

[12]and I still adhere to the fact that this physician-

[13]physicist is not competent to testify.

[14]MR. MARCUS: May I be heard along those

[15]lines, Your Honor?

[16]THE COURT: Yes.

[17]MR. MARCUS: First of all the claim here --

[18]and I think it is rather obvious, and specifically

[19]is that Mr. Stone had a medically manageable partial

[20]tear of the rotator cuff which was substantially

[21]exacerbated by this procedure which should never

[22]have been done in the presence of a rotator cuff

[23]injury. There is the urging by Mr. Johs to precisely **[*33]** --

[24]MR. JOHS: I don't want --

[25]THE COURT: Just a moment, gentlemen, please.

[1]36

[2]MR. JOHS: At this-point we are at this individual

[3]who is testifying is incompetent to even review

[4]an arthrogram and testify along the lines of arthrograms.

[5]THE COURT: That is not what we are talking

[6]about.

[7]MR. MARCUS: He doesn't have to be, the

[8]arthrogram is in evidence. We already know what

[9]the arthrogram shows Doctor Langan concedes what

[10]it shows. There is no question, there was a tear

[11]sufficient for the extravasation of fluid after

[12]the manipulation.

[13]What we are trying to maintain, and we already

[14]had testimony from this witness, and it it already

[15]in the record, Doctor Langan said it yesterday,

[16]there were no bony fragments -- no bony fragments,

[17]no damage within the. joint or the kind depected

[18]on the arthrogram on the original x-rays.

[19]We want this jury to conclude, and we have

[20]a right to introduce opinion evidence, that the

[21]trauma of the manipulation was the causative factor

[22]in doing this everybody says that a manipulation

[23]is trauma, that it is designed to break up **[*34]** tissue.

[24]THE COURT: Haven't we gone off the issue

[25]of informed consent?

[1]37

[2]And my original question to you, it would

[3]seem sometime ago, Mr. Marcus, was your talking

[4]of informed consent is based only on the informed

[5]consent that should nave been given for the manipulation,

[6]correct?

[7]MR. MARCUS: Correct. That it is required.

[8]If I may, Your Honor?

[9]THE COURT: Yes.

[10]MR. MARCUS: We are prepared to introduce

[11]evidence with this witness that before a manipulation

[12]would be undertaken, forgetting whether or not

[13]anybody knew about the rotator cuff or not, the

[14]patient should be told about various risks and

[15]alternatives.

[16]THE COURT: Attendant on manipulations?

[17]MR. MARCUS: Yes. And alternative treatment,

[18]and given the option at that point, because he's --

[19]is given sufficient information the deciding

[20]to go ahead the plaintiff himself testified yesterday

[21]that had he known of this he would not consent,

[22]he would have sought a second opinion. And while

[23]that does not bine the jury, it certainly is competent

[24]evidence, and the Second Department had so held.

[25] **[*35]** I think that is a clear issue in this case.

[1]38

[2]This witness is fully familiar with the

[3]risks and benefits of this procedure. He knows

[4]what it can do to patients and what it can't. do,

[5]and he is fully familiar with what informed consent

[6]is, and he should be allowed to testify to that.

[7]THE COURT: Okay, that is it then.

[8]I am prohibiting this witness from testifying.

[9]MR. MARCUS: You are adhering to your --

[10]THE COURT: Yes, I am.

[11]MR. MARCUE: May I know the basis for that

[12]so I can attempt to core it?

[13]THE COURT: Because I don't think he's fully

[14]qualified to testify with respect to that.

[15]MR. MARCUS: Because he doesn't do the procedure?

[16]THE COURT: Correct.

[17]MR. MARCUS: Just so the record is clear

[18]on that. I respectfully except on that, Your

[19]Honor.

[20]THE COURT: Okay.

[21](All parties present in the courtroom without

[22]the jury's presence, the following occurred:)

[23]
[24]THE COURT: Counsel?

[25]MR. MARCUS: Brefore we proceed, Your Honor, one

[1]39

[2]very unfortunate matter that I would have to cell

[3]to the Court's attention and put **[*36]** on the record;

[4]while we were in the back, in the Court's chambers

[5]deliberating over this issue, Doctor Guy was

[6]seated in the back and when I came out he was rather

[7]upset. And he advised me that Doctor Fontanetta,

[8]while we were out., turned towards him and in a

[9]whisper cursed him and made threatening and menacing

[10]gestures towards Him.

[11]Doctor Guy was quite upset by this, and

[12]disturbed by it.

[13]And I wish to put this on the record because

[14]in the event that Doctor Guy suffers any consequence

[15]of this, if he is hurt in any way, I want the

[16]record preserved that we are aware of this conduct.

[17]I think it is unfortunate that there may

[18]have been no witnesses to it, and I don't believe

[19]it will go any further then this. I hope certainly

[20]not. But I would at this point renew my notion

[21]to have Doctor Fontanetta excused.

[22]THE COURT: Do you know about this?

[23]MR. JOHS: I don't know anything.

[24]I'd like to make a statement.

[25]THE COURT: Co ahead.

[1]40

[2]MR. JOHS: The doctor is not a witness

[3]I spoke with Doctor Langan in the hall, and there

[4]was no determination that **[*37]** he had anything to do

[5]with this matter, nor did he look at any documents.

[6]THE COURT: Doctor Guy, what happened?

[7]DOCTOR GUY: Just this what Mr. Marcus said.

[8]THE COURT: What did he say to you?

[9]DOCTOR GUY: I was sitting here and he turned

[10]to me with gestures on his -- his face, he made

[11]threatening remark to me with the gestures, and

[12]he speared like this, but it appear to be F.U.,

[13]something to that sort.

[14]THE COURT: Doctor Fontanetta?

[15]DOCTOR FONTANETTA: Your Honor, I made. no

[16]gestures. I was locking at Doctor Guy, he looked

[17]over and he greeted me. I nodded my head.

[18]There were no gestures.

[19]MR. JOHS: Your Honor, if it is going to

[20]cause any problems I'll have Doctor Fontanetta

[21]excused. There is no problem. Until we are aware

[22]of what happened here.

[23]THE COURT: I really don't know how to react

[24]to that.

[25]MR. MARCUS: Your Honor, I don't know how

[1]41

[2]to react either.

[3]THE COURT: I see nothing in the testimony

[4]that would cause provocation on the part -- would

[5]there be any reason --

[6]DOCTOR FONTANETTA: Are you addressing me, **[*38]** sir?

[7]THE COURT: Yes

[8]PR. FONTANETTA: I think a lot of this testimony

[9]was really not medically sound.

[10]THE COURT: Well that may be, but I don't

[11]see any reason for that to cause any constant. I'm

[12]indicating --

[13]DOCTOR FONTANETTA: Excuse me. Doctor Cry

[14]said something to me first.

[15]DOCTOR GUY: That is not true.

[16]DOCTOR FONTANETTA: And I acknowledged his

[17]greeting.

[18]THE COURT: What did he say?

[19]DOCTOR FONTANETTA: Just hello, or how

[20]are you, something like that and I nodded and

[21]acknowledged his greating. I did not initiate

[22]anything.

[23]THE COURT: Well, I have no particular problem

[24]with whether you stay or go. of course -- there

[25]is no reason for communication at all as far as I

[1]42

[2]can see. But I don't see this as any big incident.

[3]MR. MARCUS: I hope not

[4]THE COURT: I hope it isn't.

[5]MR. MARCUS: I assume that it will not be

[6]an incident at all.

[7]THE COURT: I am not going to exclude Doctor

[8]Fontanetta.

[9]MR. MARCUS: The second matter, Your Honor,

[10]if I may, is that in order to preserve my record

[11]I would like to **[*39]** make an offer of proof with Doctor

[12]Guy to go forward on this issue.

[13]THE COURT: Why?

[14]MR. MARCUS: While Doctor Guy is a physicist,

[15]he won't send patients out for this manipulation,

[16]he has seen it done, he is familiar with it, so I

[17]would renew my application to allow him to testify.

[18]THE COURT: Well, that is an additional

[19]factor that we didn't have before.

[20]MR. MARCUS: I didn't know about it either,

[21]Your Honor, but I would like to establish it and

[22]I will do it out of the hearing of the jury, if

[23]you request, so that Mr. Johs' rights are preserved.

[24]I make the offer of proof at this time,

[25]Doctor Guy informed me --

[1]43

[2]THE COURT: Let's put the doctor back on and

[3]hear that now without the presence of the jury.

[4]And I will permit him, Mr. Johs, to question him

[5]as well.

[6]MR. MARCUS: Sure, that's why I'm making

[7]the offer.

[8]THE COURT: Come back on the stand. Have a

[9]seat, doctor.

[10]THE CLERK: Doctor Guy, you are still testifying

[11]under oath.

[12](The witness, Doctor Ali Guy, resumed the stand

[13]and further testified as follows:)

[14]THE WITNESS: **[*40]** Yes.

[15]
[16]DIRECT EXAMINATION

[17]BY MR. MARCUS:

[18]Q Doctor Guy, in your training you served

[19]as a resident physician, did you not?

[20]A Yes, I did.

[21]Q As a resident physician did you oversee

[22]the medical care and attention of patients, particularly service

[23]patients who did not have a private attending?

[24]A Yes, I did.

[25]Q And from time to time --

[1]44

[2]THE COURT: What do you mean by service patients?

[3]MR. MARCUS: Patients who are admitted either

[4]as through public assistance or perhaps in the

[5]Veteran's Administration Hospitals patients come

[6]in through the emergency room or through a clinic,

[7]Your Honor, would have no private attending would

[8]become what is known as service. Generally they are

[9]treated by an attending physician at the hospital.

[10]THE COURT: Okay.

[11]Q Doctor, from time to time were you called

[12]upon to treat shoulder conditions that led to manipulation

[13]under general anesthesia of those patients?

[14]A Yes.

[15]Q And did you yourself refer patients while

[16]a resident for general anesthesia?

[17]A Yes. If yet recall I said I did a rotation

[18] **[*41]** in general surgery, and part of my rotation in general

[19]ten stations, rotation through orthopedics for two months

[20]I scrubbed and assisted on some of these procedures.

[21]Q So that you have actually seen the manipulation

[22]performed?

[23]A Yes.

[24]Q And you have assisted in the performance

[25]or the manipulations?

[1]45

[2]A Well, as observer.--

[3]Q And you have as a resident physician ordered

[4]service patients -- or manipulations for service patients?

[5]A I myself didn't order, but my service ordered

[6]them. I was a part of that service.

[7]Q Were you the resident in charge of the case

[8]and then an attending would actually write the specific

[9]order?

[10]A Yes.

[11]Q Would you work up the patient for the manipulation

[12]in terms of what was required to present the case to

[13]the attending so that the attending then could write

[14]the order for the manipulation?

[15]A Yes.

[16]Q and through the course of that training

[17]did you become familiar with the requirements -- excuse

[18]me, withdrawn.

[19]Did you become familiar with the disclosures that

[20]were generally made by physicians **[*42]** to patients with regard

[21]to obtaining their consent to such a procedure?

[22]A Yes.

[23]Q And is it your testimony that you are familiar

[24]with what is required, generally, to obtain the informed

[25]consent of a patient for a manipulation under general

[1]46

[2]anesthesia, and specifically which should have been

[3]disclosed in this case for -- to this patient?

[4]A Yes.

[5]MR. JOHS: Just to preserve the record,

[6]I object to the form of that question as to what

[7]is required.

[8]THE COURT: Okay.

[9]MR. MARCUS: Well, this is out of the hearing

[10]of the jury.

[11]THE COURT: Yes.

[12]MR. JOHS: I understand.

[13]MR. MARCUS: That's my offer, Your Honor.

[14]THE COURT: You wish to question --

[15]MR. MARCUS: I believe that qualifies him

[16]sufficiently.

[17]CROSS-EXAMINATION

[18]BY MR. JOHS:

[19]
[20]Q Doctor Guy, you only had two months rotation

[21]through orthopedics?

[22]A Yes.

[23]Q When? At what institution was that?

[24]A Cabrini Medical Center.

[25]Q And who was your chief resident at that time?

[1]47

[2]A Doctor Waheed, w-a-h-e-e-d.

[3]Q And how many patients **[*43]** during that two-month

[4]period of time did you work up for manipulations under

[5]general anesthesia?

[6]A I don't recall the exact number, but that

[7]was a few.

[8]Q Certainly more than one?

[9]A Yes.

[10]Q Less than a dozen?

[11]A Yes.

[12]Q And as part of that work up you would give

[13]the informed consent?

[14]MR. MARCUS: Objection to the form, Your

[15]Honor. The patient gives the informed consent.

[16]MR. JOHS: I will put it a different way.

[17]THE COURT: Yes.

[18]Q Would you impart information to the defendant

[19]so they would be able to give an informed consent?

[20]A I don't recall if I was the one that actually

[21]gave the informed consent. I think I was pressent on

[22]one or two occasion when informed consent was given.

[23]Q Present on one or two occasions?

[24]A Yes.

[25]Q And on how many of the manipulation did you

[1]48

[2]assist, or I think you said you didn't actually assist

[3]you just actually observed?

[4]A Yes.

[5]Q How many did you just observe?

[6]A Two or three times.

[7]Q And I think you just told us that you never

[8]ordered a manipulation **[*44]** under general anesthesia?

[9]A That is correct.

[10]Q And two or three times you observed, did

[11]you ever have anything to do with the actual manipulation

[12]itself?

[13]A No.

[14]THE COURT: I'm adhering to my original ruling.

[15]We have the offer of proof, let's bring the

[16]jury in.

[17](The trial resumed in the presence of. the

[18]Jury.)

[19](The witness, Doctor Ali Guy, resumed the stand

[20]and further testified as follows:)

[21]
[22]DIRECT EXAMINATION

[23]BY MR. MARCUS: (Cont'd)

[24]Q Doctor, you have read the record, have you not,

[25]of the Garden City Orthopedic Group?

[1]49

[2]A Yes, I have. --

[3]Q And you read the examination before trial

[4]testimony of Doctor Langan?

[5]A Yes, I have.

[6]Q As well as the examination before trial

[7]of Mr. Stone?

[8]A Yes, I have.

[9]Q Doctor, I'm going to ask you to assume that

[10]certain evidence has been given in this courtroom referable

[11]to this case. I'm going to outline that for you now. When

[12]I'm done giving you that information I'm going to ask

[13]you some questions.

[14]I want you to assume that based on those facts

[15] **[*45]** I will ask you certain questions, all right?

[16]A Okay.

[17]Q Doctor, I want you to assume that the plaintiff,

[18]age sixty-five, worked for, at that time, approximately

[19]thirty-five years in his own hardware store, self--employed,

[20]no assistance except from his wife, where he handled

[21]an of the intake and distributions of the merchandise

[22]sold in the hardware store, including paints, [ILLEGIBLE WORD],

[23]and various housewares and hardware equipments he would

[24]accept delivery of the merchandise over the years, he

[25]would then unpack the merchandise, place it or shelves, often

[1]50

[2]shelves overhead; used stepladders about the store?

[3]and when customers would come in he would retrieve the

[4]merchandise wherever it was, be it on the shelf or otherwise;

[5]this also included garbage cans which were placed on

[6]these shelves overhead.

[7]I want you to assume further that the patient

[8]had no prior history, prior to April of 1983, of any

[9]complaints or indications of problems within and about

[10]his left shoulder joint, and that on a particular day

[11]in early April of 1983 while seated in his store he

[12]suddenly felt **[*46]** a popping or some other indication within

[13]the shoulder and experienced immediate pain in the shoulder,

[14]in the area of the bicipital groove, and a restriction

[15]of motion -- not a complete loss of all motion but a

[16]restriction, substantial restriction of the muscles

[17]of the left upper extremity.

[18]He reported this to his wife.

[19]The pain did not abate and within a day or two

[20]he was seen by an internist. The internist referred

[21]him for x-rays, and a.p. x-ray and oblique x-rays were

[22]taken; -- you have seer, these x-rays by Doctor [ILLEGIBLE TEXT]llows.

[23]I want you to assume that he was started on a

[24]course of indocin by the internist, and that one week

[25]later when the condition did not improve he sought the care

[1]51

[2]and treatment of an orthopedist and was seen by Doctor Weiss.

[3]I want you to assume further that Doctor Weiss

[4]examined the x-rays, reported the x-ray findings as

[5]you have previously described them; that Doctor Weiss

[6]conducted a physical examination of which Doctor Weiss

[7]has no independent recollection whatsoever, and that

[8]Doctor Weiss recorded a note in his office records that

[9] **[*47]** on physical exam there is tenderness and material in

[10]the bicipital groove. The doctor then noted that the

[11]patient has a, quote, frozen shoulder, close quote.

[12]But Doctor Weiss was sure it was due to muscle spasm

[13]at that point.

[14]I want you to assume that Doctor Weiss understood
[15]to treat the patient by giving him an injection of depo-medrol
[16]anteriorly with partial relief, and then a subsequent
[17]injection of eight c.c.'s of xylocaine with depo-medrol
[18]into the joint posteriorly.
[19]I want you to assume that according to Doctor
[20]Weiss' records the patient was encouraged to carry out
[21]pendulum exercises and apply heat; that the patient
[22]was given some tylenol number three with codine and
[23]some follow-up indocin which he had already started;
[24]that the patient was told to return within a week to
[25]be rechecked and if unimproved would be reinjected
[1]52
[2]I want you to further assume that the doctor at
[3]that point stated that ultimately manipulation of the
[4]shoulder and under general anesthesia may be necessary
[5]if the problem does not progress rapidly.
[6]And I want you to further assume that the doctor
[7] **[*48]** in testifying had no other independent recollection
[8]of anything to do with that examination, his findings
[9]or treatment.
[10]I want you to further assume that the plaintiff
[11]-- testified to substantially the same history as that
[12]contained in the doctor's notes, that the plaintiff
[13]and his wife appeared at the doctor's office, that the
[14]plaintiff was examinee for a couple of minutes by Doctor
[15]Weiss who moved his arm about -- through a range of
[16]motions; that the doctor performed no other kind of
[17]examinations upon him other than the movement of the
[18]arm and the examination of the arm; that the doctor

[19]injected him as described in doctor's note; that soth

[20]the -- that the doctor claimed that he prepared for the

[21]injection as a general rule by swabbing the ares which

[22]an iodine swab or some clear iodine swab followed by

[23]the injection.

[24]I want you to further assume that the testimony

[25]of the plaintiff is that he followed the doctor's instructions

[1]53

[2]religiously as to the exercise but obtained no improvement

[3]and returned to the doctor's office four days later -- a

[4]few days later, excuse me, and was seen **[*49]** by the other

[5]doctor, Doctor Langan.

[6]I want you to assume that there is no office records

[7]of that visit to Doctor Langan on April 15th other than

[8]a billing record indicating an injection into the shoulder

[9]which Doctor Langan said would have undoubtedly consisted

[10]of marcaine and depo-nedrol.

[11]I want you to assume that the plaintiffs nave

[12]testified that the examination by Doctor Langan was

[13]substantially the same as the examination by Doctor Weiss,

[14]and that it consisted or moving the arm around through

[15]various degrees of motion.

[16]And I want you to further assume that Doctor Langan

[17]referred the patient to a physical therapist for an

[18]intensive course of physical therapy.

[19]I want you to assume that the patient undertook

[20]the physical therapy with the physical therapist, attended

[21]the sessions, carried out the exercises both in the

[22]office and at home, and was treated with various modalities,

[23]which have been described to you in the other doctor's

[24]office records.

[25]I want you to further assume that the patient's

[1]54

[2]condition did not improve, although there is no indication

[3] **[*50]** that it worsened.

[4]I want you to further assume that after undergoing

[5]this physical therapy when the condition did not improve

[6]the patient returned to the doctor's office, was seen

[7]again by Doctor Langan who reinjected the patient on

[8]or about April 28th, and at that time indicate:: that

[9]the plaintiff should undergo a manipulation under general

[10]anesthesia.

[11]I want you to assure further that Doctor Langan

[12]has testified that he has no independent recollection

[13]of that visit, that his notes read simply, got no improvement

[14]despite physical therapy and injection. I reinjected

[15]him but he does not feel much improved. Plan to manipulate

[16]in near future under g.a.

[17]I want you to further assume that Doctor Langan

[18]in describing his general practice and procedure told

[19]us what it was that he advised the plaintiff of concerning

[20]the manipulation, and that plaintiff thereupon consented

[21]to the manipulation, and undertook -- underwent the

[22]manipulation on or about May 2nd.

[23]I want you to assume further that at no time was

[24]there -- is there any evidence that there was any discussions

[25]of other diagnostic **[*51]** teste and procedures such as an

[1]55

[2]arthrogram, ultrasound or any other diagnostic test

[3]or procedure other than what we have described there.

[4]Now, assuming all of those factors, Doctor, I

[5]will ask you a few questions if I may.

[6]Doctor, do you have an opinion with a reasonable

[7]degree of medical certainty as to whether or not the

[8]pre-operative diagnosis, work-up, care and treatment

[9]of Harry Stone by the defendant physicians constituted

[10]a departure from good and accepted medical practice

[11]in 1963?

[12]MR. JOHS: Objection.

[13]THE COURT: Come up, gentlemen.

[14]Step down, please.

[15](Conference at the Bench between the Court

[16]and Counsel.)

[17]
[18]THE COURT: Overruled.

[19]Q Do you have such an opinion, Doctor?

[20]A Yes, I do.

[21]Q Is your opinion that there was departure?

[22]A Yes, there was.

[23]Q Would you tell us why and the basis for

[24]your opinion, please?

[25]MR. JOHS: Objection.

[1]56

[2]THE COURT: Yes?

[3]MR. JOHS: It appears the Doctor is reading

[4]from something.

[5]THE WITNESS: I have his notes right in front

[6]of me..

[7] **[*52]** MR. JOHS: Okay.

[8]THE COURT: I'll sustain an objection as to form.

[9]MR. MARCUS: I don't think that -- I think

[10]the objection was only to find --

[11]MR. JOHS: No. I object to the question and

[12]I want to know if he was reading.

[13]THE WITNESS: I'll put everything away.

[14]MR. MARCUS: I'll rephrase the question.

[15]Q Doctor, you don't have to put those away,

[16]you can look at them.

[17]A All right.

[18]Q Doctor, what is the basis for your opinion?

[19]A Basically just going over through the medical

[20]notes of that office visit --

[21]Q Which office visit are we talking about?

[22]A April 12, 1933.

[23]Q First visit by Doctor Weiss?

[24]A Yes.

[25]Q Okay.

[1]57

[2]A There is a lot of things missing from the

[3]notes such as the most important thing, in the physical

[4]exam there is no mention of the active range of motion,

[5]manual muscle power testing, sensory or neurological

[6]findings. All these are very very important to this

[7]patient's condition, and --

[8]Q Let's stop right there.

[9]Doctor, with a patient presenting with these complaints

[10]is there an **[*53]** accepted examination technique and procedure

[11]for evaluating complaints of this kind?

[12]A Yes, there is. There is even a book out

[13]by Doctor --

[14]THE COURT: Don't tell us about books.

[15]MR. MARCUS: Okay.

[16]THE WITNESS: Okay. I'm sorry.

[17]A Yes, there is.

[18]Q Let me ask you how long such an examination

[19]takes?

[20]A About a half hour.

[21]Q Could you tell us, please, what an accepted

[22]examination of the shoulder to evaluate the use at this

[23]time should entail?

[24]A First of all it should make mention as to

[25]tender areas, the -- if there is any protrusion of any

[1]58

[2]bony structures, the range of motion, the manual muscle

[3]power testing, the sensory examination.

[4]Q What is manual muscle power testing, what

[5]does that mean?

[6]A Okay. Manual muscle power testing, you

[7]test the strength of each muscle group, and if there

[8]is any weakness certain things come to mind. For instance,

[9]in the shoulder joint, if a person in the abduction,

[10]which is this way, can not do that, that would indicate

[11]a significant rotator cuff tear or injury. And if there

[12]is weakness of **[*54]** the other muscles within the shoulder

[13]joint, it would indicate maybe there might be a pinched

[14]nerve in the neck or cervical radiculopathy, which is

[15]medical terminology, could be process.

[16]All these things have to be systematically reached,

[17]ruled out by history and physical examinations.

[18]Q Now, what else would such an examination

include?

A Also palpation of the other joints around the shoulder, the acromioclavicular, being the sternoclavicular joint, the glenohumerus joint, all these have to be palpated and checked for tenderness.

Q Doctor, are there specific tests referable to the complaints that this patient may evince as reported

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in the doctor's records, for example the anterior tenderness in the bicipital groove?

A There are two tests that would have been probably indicated in this case. One is when anybody -- a patient complains to a doctor of tenderness over the anterior aspect of a shoulder, there is a test which is done, the Jorgenson's test, was that you put the patient a elbow in flexion, such as this --

Q Would you stand up and demonstrate **[*55]** that easier for the jury to see.

A You ask the patient to put his elbow in flexion such as this, and you have one hand supporting his elbow and you have another hand supporting his wrist and you ask him to externally rotate his arm at the same time you pull down on his wrist. And if there is any pop or any severe pain in the area, bicipital groove, that would indicate a problem with that bicep tendon.

Q Could that test be performed even if there was a significant restriction of motion due to advanced capsulitis in the joint?

A Absolutely. As I showed you, I made no

[24]movement, it is pretty much stationary. You don't need

[25]much movement within the joint.

[1]60

[2]Q Is the failure to perform such a test, to

[3]evaluate the bicipital tendon, a departure from good

[4]and accepted medical practice in your opinion?

[5]MR. JOHS: Objection.

[6]THE COURT: No, I'll permit.

[7]A In my practice I would do it and I think

[8]it is a departure.

[9]Q Now, Doctor, are there any specific tests

[10]which should have been performed referable to rotator cuff?

[11]A Yes. There is a test **[*56]** which is called the

[12]drop sign.

[13]Q Stand up and demonstrate that one.

[14]A When you ask the patient to abduct his shoulder

[15]if the rotator cuff injury is significant they are unable

[16]to do it, or if they are able to bring it out the arm

[17]just drops. This will significant and it would indicate

[18]a severe rotator cuff injury.

[19]Q One second.

[20]Doctor, I want you to assume that because of restrictions

[21]in the shoulder the patient could only abduct to eighty

[22]degrees as found in the January shoulder evaluation, sir.

[23]Would abduction limited to eighty degrees prevent the

[24]administration of such a test?

[25]MR. JOHS: Objection.

[1]61

[2]THE COURT: No, I'm going to permit it.

[3]MR. JOHS: Could I have a clarification as to

[4]whether that is passive or active abduction?

[5]THE COURT: All right.

[6]Q Does it matter, Doctor?

[7]A Yes. It should be active. Active is what

[8]the patient does, passive is what the doctor does.

[9]Q Okay.

[10]Assume that abduction is limited -- which kind

[11]of abduction is used for this test, passive or active?

[12]A Active.

[13]Q All right. **[*57]** Assume that active abduction

[14]is limited, eighty percent, would you perform such a

[15]test?

[16]MR. JOHS: Objection.

[17]THE COURT: Yes. Sustained.

[18]MR. MARCUS: What is the basis of the objection

[19]and the sustaining of it, Your Honor?

[20]THE COURT: Come up.

[21](Conference at the Bench between the Court

[22]and Counsel.)

[23]
[24]Q Doctor, I want you to assume that the physical

[25]therapist a few days later found that abduction, without

[1]62

[2]specifying active or passive, was limited to eighty degrees;

[3]would such a finding with active or passive abduction

[4]being limited to eighty degrees, would it be possible

[5]to perform this test?

[6]A Yes.

[7]MR. JOHS: Objection.

[8]THE COURT: Well, I'll -- I'll permit the

[9]question. Overruled.

[10]A Yes. It is possible because when you have

[11]significant tears all you need is about forty-five degrees,

[12]and the patient cannot even bring up the arm to forty-five

[13]degrees, and it just drops.

[14]Q And would you consider -- Doctor, do you

[15]have an opinion with reasonable degree of medical certainty

[16]as to whether or not the failure to administer **[*58]** that test

[17]constitutes a departure from good and accepted medical

[18]practice?

[19]A Yes.

[20]Q What is your opinion?

[21]A Yes, it was a departure.

[22]Q Okay. And were there any other departures

[23]that you found on that first visit?

[24]A Yes. The -- very poor documentation. The

[25]term "frozen shoulder", that is not correct medical terminology.

[1]63

[2]And frozen shoulder is not a diagnosis, it is as the

[3]result of a primary diagnosis.

[4]I don't think the notes indicate that there is

[5]an actual primary diagnosis.

[6]My diagnosis would have been much different from

[7]this doctors' from the very beginning.

[8]MR. JOHS: Objection, and move to strike that

[9]portion as not responsive.

[10]THE COURT: Yes.

[11]Q Doctor, do you find a medical diagnosis from

[12]-- in that note at all? Any medical diagnosis?

[13]A I do not.

[14]Q Is the absence of a medical diagnosis and

[15]the prescribing of treatment at that point a departure?

[16]A Yes, it is.

[17]MR. JOHS: Objection.

[18]THE COURT: I'll permit it.

[19]Q Doctor, I want you to turn your attention --

[20]withdrawn.

[21] **[*59]** Doctor, what of the second visit of April -- April

[22]15th I believe it was, is that correct?

[23]April 15h, I don't want to misstate it -- the one

[24]for which there is no office records at all.

[25]Did you find any departure too with regard to that

[1]64

[2]particular visit?

[3]A Well, the fact that there is no records is

[4]very bad, in terms of patient record keeping. And this

[5]in itself is a major departure.

[6]Q With regard to the third visit, the final

[7]visit prior to the manipulation, did you find any departures

[8]with regard to that visit?

[9]A The third visit, what date was that?

[10]Q April 28th.

[11]A I see no note here for April 28th.

[12]Q I believe there is a note, "Got no improvement

[13]despite physical therapy and injections."

[14]A Oh, okay.

[15]Again, there is no diagnosis -- there is no differential

[16]diagnosis, and again the doctor is -- in my opinion jumping

[17]the gun and resorting to manipulation by saying manipulation

[18]in near future. The patient hasn't had a good course of

[19]conservative therapy.

[20]Q Doctor, were there any significant -- in

[21]your opinion -- diagnostic **[*60]** tests and procedures that

[22]should have been done consistent with good and accepted

[23]practice which were not done prior to manipulation?

[24]A Yes. An arthrogram could have been ordered

[25]if the question of the diagnosis -- if the actual diagnosis

[1]65

[2]was of question another diagnostic test would have

[3]been helpful. The test you stick --

[4]MR. JOHS: I'm going to object.

[5]THE COURT: Sustained.

[6]Q Now, Doctor, do you see any indication

[7]in those records that a tear of the rotator cuff was

[8]considered by these physicians?

[9]A I do not.

[10]Q I want you to assume that they have testified

[11]as to no recollection beyond this of having a tear

[12]of the rotator cuff --

[13]MR. JOHS: Objection.

[14]THE COURT: What is the basis?

[15]MR. JOHS: It is an incorrect statement,

[16]there has been testimony to that effect.

[17]MR. MARCUS: If your Honor please, I think

[18]the only testimony was after the manipulation --

[19]THE COURT: Yes, overruled.

[20]Q Doctor, do you have an opinion with reasonable

[21]degree of medical certainty as to whether or not there

[22]was departure from good acceptable **[*61]** medical practice

[23]for the different physicians to fail to consider the

[24]possibility of a rotator cuff injury before taking

[25]this patient to a manipulation under general anesthesia?

[1]66

[2]A Yes.

[3]Q And what is your opinion?

[4]A (No response.?

[5]Q Was it departure?

[6]A Yes. Yes, it was a departure.

[7]Q and what is the basis for that opinion?

[8]A Well, not having an accurate diagnosis, ad

[9]not taking the proper precautions of taking the patient

[10]to a procedure which has a let of risks, complications,

[11]I feel is a departure from normal prudent medical practice.

[12]Q Now, Doctor -- I want you to assume further

[13]that the manipulations under general anesthesia was carried

[14]out and performed, and that immediately thereafter, and

[15]during the balance of the patient's hospitalization,

[16]he was subjected to a vigorous course of physical therapy,

[17]twice a day, that she showed improvement in range of

[18]motion, and some relief from pain, and that thereafter

[19]he was released to his home to continue exercises at

[20]home, and that approximately two weeks thereafter he

[21]developed a soft lump on **[*62]** the anterior portion of his

[22]shoulder, called the physician immediately and was seen

[23]by Doctor Langan on or about May 19th, 1983, at which

[24]time -- you will see the doctor's note, the doctor testified

[25]substantially in accordance with his note -- that he

[1]67

[2]aspirated twenty c.c.'s of clear yellow fluid from the

[3]lump, that he did not send the fluid to a laboratory

[4]for analysis or culturinn and sensitivity testing, that

[5]he drew no blood and did no blood work-up for this patient.

[6]I want you to assume that the plaintiffs' testimony,

[7]both of them, that when the fluid was drawn it appeared

[8]to them to be reddish in color, that Mrs. Stone said

[9]it seemed to have some [ILLEGIBLE WORD] in it, that the fluid was

[10]injected -- was withdraw in a hypodermic, placed in

[11]a stainless steel bowl, shallow bowl, the doctor looked

[12]at it, smelled it and threw it down the sink. The doctor

[13]having no independent recollection said that usual

[14]practice would be to hold the fluid up to the light and

[15]if it was clear and yellow there'd be no reason to do

[16]anything further with it,

[17]Assuming those facts, Doctor, do you have **[*63]** an opinion

[18]with a reasonable degree of medical certainty as to whether

[19]or not the post-operation care and management of this

[20]patient in conjunction with that lump constituted a departure

[21]from good and accepted medical practice?

[22]MR. JOHS: Objection.

[23]THE COURT: Come on up.

[24](Conference at the Bench between the Court

[25]
[1]68

[2]THE COURT: Objection sustained.

[3]Q Doctor, have you yourself ever aspirated

[4]joints in the body?

[5]A Yes, I have.

[6]Q Do you dc that regularly as part and parcel

[7]of your practice?

[8]A Yes.

[9]Q And in a normal healthy body joint have fluids

[10]in them, do they not, synovial fluid?

[11]A Yes.

[12]Q What color is snyovial fluid in general?

[13]A It is clear.

[14]Q It is not yellow?

[15]A No, it is clear.

[16]Q And -- if there is infection -- withdrawn.

[17]And does that color ever change or appear other

[18]than clear, the fluid -- excuse me, withdrawn.

[19]Does the fluid ever appear other than doer?

[20]A Yes.

[21]Q And have you yourself aspirated other than

[22]clear fluid from joints in the body?

[23]A Yes, **[*64]** I have.

[24]Q Have you cono that from shoulder joints?

[25]A I don't recall.

[1]69

[2]Q have you ever ASPIRATED fluid from cysts

[3]or lumps in and about joints in the body?

[4]A Yes.

[5]Q And what kind of fluid do you generally find

[6]there?

[7]A Well, if you withdraw fluid from a cyst sometimes

[8]it is clear, sometimes it is yellow, and somes it is

[9]white. White indicate severe infection.

[10]Q And if you were to withdraw reddish or pinkish

[11]fluid from a joint what would you expect?

[12]A It could also be indicative of instruction

[13]as well as some bleeding episodes going on within the

[14]joint.

[15]Q And, Doctor, would you have an opinion with

[16]a reasonable degree of medical certainty as to whether

[17]upon withdrawing fluid -- withdrawn.

[18]Doctor, I want you to assume that Doctor Langan

[19]testified that when he -- when the patient presented

[20]with his lump on the interior portion of his shoulder,

[21]Doctor Langan himself had never seen such a lump in the

[22]vicinity of the shoulder himself before, he had seen it

[23]in areas of the knees and of the hip, but had never seen

[24]it in and about **[*65]** the -- a shoulder before, that to this

[25]day he does not know what caused it, that he has no explanation.

[1]70

[2]for the presence of the lump, and that thereafter he

[3]aspirated fluid which was not clear but, according to

[4]his note, yellow, clear yellow as opposed to clear clear,

[5]and the plaintiff has testified that the fluid was bloody.

[6]Doctor, do you have an opinion with a reasonable

[7]decree of medical certainty as to whether or not the

[8]withdrawal of that fluid, be it clear, yellow or bloody,

[9]and the disposal of that fluid without first sending

[10]it to a lab for culture and sensitivity was a departure

[11]from good and accepted medical practice?

[12]A Yes, I believe it was.

[13]Q What would be the purpose of sending it to

[14]a lab?

[15]A Well, when you have microorganisms that are

[16]microscopic, you can't see them with the visibility,

[17]you don't necessarily have to get color change of fluid,

[18]you could have a clear fluid and there could also be

[19]organisms present within that joint fluid, and it should

[20]be sent to a lab for analysis.

[21]Q Doctor, is a lump, a soft lump containing

[22]fluid on the anterior **[*66]** portion of the shoulder a normal

[23]expected anatomical configuration?

[24]A Absolutely not.

[25]Q Is it indicative of something abnormal, some

[1]71

[2]untoward event?

[3]A Yes, it is.

[4]Q Is it good and accepted medical practice

[5]to explore to discover what is causing that so whether

[6]it is indicative to have some underlying discease process?

[7]A Absolutely.

[8]Q Would it be departure from good and accepted

[9]practice to simply aspirate the fluid and throw it away

[10]without doing any follow up?

[11]A No, that would not be the wise thing to do.

[12]Q Would that be a departure from good and accepted

[13]practice?

[14]A Yes, that would be a departure.

[15]Q Now, Doctor, you have seen the arthrogram

[16]report in evidence of Doctor DeRosa, and you have seen

[17]his report as to his findings, have you not?

[18]A Yes, I have.

[19]Q Doctor, do you have an opinion with a reasonable

[20]degree of medical certainty as to whether or not the

[21]departures that you have outlined to us now were a substantial

[22]factor -- for a substantial contributing factor in bringing

[23]about the injuries or conditions **[*67]** described in the arthrogram

[24]report and the report of Doctor DeRosa?

[25]MR. JOHS: Objection.

[1]72

[2]THE COURT: Come on up.

[3](Conference at the Bench between the Court

[4]and Counsel.)

[5]
[6]THE COURT: What is the basis of the objection.

[7]MR. JOHS: Basis for my objection is, number

[8]one, Doctor DeRosa's report, to my knowledge, is

[9]not in evidence.

[10]MR. MARCUS: It is part of --

[11]MR. JOHS: Is it attached to his office records

[12]here?

[13]MR. MARCUS: Sure it is. His findings are

[14]here, I gave his office records.

[15]MR. JOHS: His office records can go in,

[16]I have no opposition to that.

[17]MR. MARCUS: They are in.

[18]MR. JOHS: His office received that it doesn't

[19]necessarily mean it can be in evidence until I

[20]have the opportunity to cross-examine him. I'm

[21]going to object to any opinion subject to connection.

[22]MR. MARCUS: Substantiation --

[23]MR. JOHS: Yes.

[24]MR. MARCUS: He's coming in.

[25]MR. JOHS: Okay.

[1]73

[2]MR. MARCUS: Any other objection?

[3]MR. JOHS: NO.

[4]MR. MARCUS: Okay, fine.

[5]THE COURT: Do you want the **[*68]** question read

[6]back?

[7]THE WITNESS: Yes, please.

[8]THE COURT: I think we have something prefatory

[9]to that.

[10]Continue.

[11]MR. MARCUS: Can we have the question read

[12]back?

[13]THE COURT: Don't we have something prefatory?

[14]MR. JOHS: I believe, based on a discussion

[15]that the objection -- Mr. Marcus has indicated --

[16]THE COURT: I am overruling the objection

[17]subject to connection.

[18]MR. JOHS: Right.

[19]THE COURT: Then we'll read the question

[20]back.

[21]MR. MARCUS: I will withdraw the question,

[22]and let me rephrase it, if I may, Your Honor.

[23]Let's try it again.

[24]THE COURT: All right.

[25]Q Doctor, you have looked, have you not. at

[1]74

[2]the arthrogram report which is in evidence?

[3]A Yes, I have.

[4]Q Describe -- which describes certain injuries

[5]and findings as they existed within Mr. Stone's shoulder

[6]in June following -- about a month following the manipulation?

[7]A Yes, I have looked at the report.

[8]Q Doctor, based upon the other facts I have

[9]asked you to assume, and that Arthrogram report describing

[10]those injuries **[*69]** and conditions, do you have an opinion

[11]with a reasonable degree of medical certainty as to whether

[12]the departure you have described to us from good and

[13]accepted medical practice were a substantial factor or

[14]a substantial contributing factor in bringing about the

[15]plaintiff's injuries as described in that arthrogram

[16]report?

[17]MR. JOHS: Objection.

[18]THE COURT: Overruled.

[19]A Sorry, could you repeat the last part one

[20]more time?

[21]Q Do you have an opinion with a reasonable

[22]degree of medical certainty as to whether or not the

[23]departure from good and accepted practice that you found

[24]these doctors were guilty of constituted a substantial

[25]factor or a substantial contributing factor in bringing

[1]75

[2]about the injuries described in the arthrograr. report?

[3]A Yes.

[4]Do you want me to elaborate on it?

[5]Q No, not necessary.

[6]A Okay.

[7]Q Now, Doctor, I want you to assume that the

[8]plaintiff has testified that over a period of seven --

[9]several months following the manipulation, his restriction

[10]of motion and pain were at a particular level with gradual

[11]improvement **[*70]** to another level approximately six months

[12]after the manipulation, with motions somewhat improved,

[13]pain somewhat diminished, and that from a period of time

[14]approximately six months after the manipulation up to
[15]the present the patient has continued to experience restriction
[16]of motion on the -- approximately even plane, and intermitter
[17]pain in the shoulder, particularly pronounced with regard
[18]to weather changes. I want you to assume further that
[19]he was followed by Doctor DeRosa for six months and then
[20]seen on occasions thereafter, and that Doctor DeRosa
[21]will testify that as recently as November of 1987 --
[22]excuse me -- there was limitation of forward flexion,
[23]abduction, internal and external rotation, and that the
[24]patient was having pain though intermittently, it could
[25]be severe at times. That on physical examination in
[1]76
[2]November of 1987 the patient had abduction to ninety
[3]degrees without scapula motion, forward flexion to one
[4]hundred degrees without scapula motion, internal and
[5]external rotation were also limited to approximately
[6]twenty degrees.
[7]I want you to further assume that Doctor DeRosa
[8] **[*71]** will testify that the chances for a full recovery with
[9]regard to range of motion of the left shoulder were at
[10]best poor as of November of 1987, some four-and-a-half
[11]years after the manipulation.
[12]Now, Doctor, do you have an opinion with a reasonable
[13]degree of medical certainty as to whether or not the
[14]injuries described in the arthrogram report and the findings
[15]of Doctor DeRosa, and as described by the plaintiff himself
[16]in his testimony, constitutes a permanent injury?
[17]A Yes.
[18]Q Now, Doctor, do you have an opinion with

[19]a reasonable degree of medical certainty as to whether

[20]or not the defendants' departure from good and accepted

[21]medical practices that you described to us were a substantial

[22]factor for -- or a substantial contributing factor in

[23]rendering the plaintiff's condition permanent?

[24]A Yes.

[25]Q Could you explain that to us, what is the

[1]77

[2]basis for that opinion?

[3]A Well, if you -- if you refer to the results,

[4]the reports of the arthrogram, that pretty much explains

[5]it to you. It mentioned destruction of the humeral head

[6]at the junction with the tuberosity, **[*72]** some boney fragmentation

[7]in soft tissue separated from the parent -- separated

[8]from the parent bone. And he even mentions that either

[9]these are all traumatic causes or possibly the effect

[10]of local infection, which could not be stated radiologically.

[11]I don't think that was the effect of local infection,

[12]I think that was the effect of the trauma or tearing

[13]affect of the manipulation under general anesthesia.

[14]MR. JOHS: Objection and move to strike.

[15]THE COURT: Motion granted.

[16]MR. MARCUS: May we approach, Your Honor?

[17]TEE COURT: Yes.

[18](Conference at the Bench between the Court

[19]and Counsel.)

[20]
[21]THE COURT: I am overruling that and let

[22]the witness testify.

[23]MR. MARCUS: Could we have the question read

[24]back, please?

[25]MR. MARCUS: That has been answered and we

[1]78

[2]can have the answer read, we don't have to ask

[3]it again.

[4]THE WITNESS: Yes.

[5]THE COURT: All right.

[6]MR. JOHS: The answer stands?

[7]THE WITNESS: Yes.

[8]MR. MARCUS: Oh, all right, as long as the

[9]jury understand that the answer stands.

[10]THE COURT: Yes. **[*73]**
[11]Gentlemen, come up.

[12]Will you please step down, Doctor.

[13](Conference at the Bench between the Court

[14]and Counsel.)

[15]
[16]Q Now, Doctor -- Doctor, the departure that

[17]you have attested here -- to here today, from good and

[18]accepted practice, are you familiar with what was good

[19]and accepted practice in this area of examination and

[20]treatment of the shoulder and the specific complaints

[21]outlined here as they existed in 1933?

[22]A Yes.

[23]Q And did you obtain that information as part

[24]and parcel of your training as a physician?

[25]A Yes.

[1]79

[2]Q And your training in your area of specialization

[3]A Yes.

[4]Q and to your knowledge are the standards the

[5]same today as they were in 1983?

[6]A Yes.

[7]Q In this particular area of medicine?

[8]A Yes.

[9]MR. MARCUS. I have nothing further, Your

[10]Honor.

[11]THE COURT? Cross-examination, Mr. Johs.

[12]CROSS-EXAMINATION

[13]BY MR. JOHS:

[14]
[15]Q Good morning, Doctor.

[16]A Good morning.

[17]Q May we have -- you say the standards are

[18]the same today as they were in 1973?

[19]A In this capacity. **[*74]**
[20]Q Are you familiar with -- are you familiar

[21]with the status of arthrography in 1983 here in Nassau

[22]County?

[23]A I believe it was the same in New York City

[24]at the same time.

[25]Q Okay. Are you aware that there are only

[1]80

[2]three radiologists that performed arthrograms here in

[3]Nassau County at that time?

[4]MR. MARCUS: Objection on the ground of material

[5]absolutely immaterial.

[6]THE COURT: Yes. Sustained.

[7]Q Doctor, let's go back to your training. When

[8]did you enter school in the Dominican Republic?

[9]A I believe it was in -- *78. 1978.

[10]Q and how many years did you attend school

[11]down in the Dominican Republic?

[12]A Three-and-a-half years.

[13]Q and then what did you do?

[14]A Did my residency.

[15]Q It was a three-and-a-half year program?

[16]A Medical school?

[17]Q Yes.

[18]A Three years and non-stop, no vacations.

[19]Q And you entered a residency immediately?

[20]A I entered that was gap from the time I graduated.

[21]The residency began July first, I graduated after that

[22]deadline, so I started my residency July of '82.

[23]Q **[*75]** Did you ever undertake what is called the

[24]"fifth pathway", Doctor?

[25]A No.

[1]81

[2]Q What is the "fifth pathway"?

[3]A Fifth pathway is a requirement for medical

[4]students that study in Mexico.

[5]Q What did you do in order to transfer your

[6]education from the Dominican Republic to enter into

[7]a residency here?

[8]A Be certified by a special examination, the

[9]E.V.F.M.G. examination.

[10]Q And did you skip an internship?

[11]A No. There was -- there is no longer any

[12]internship, you go into a straight residency.

[13]Q and that was in what -- where are we talking

[14]about, 1982?

[15]A That's right.

[16]Q So you were a resident in 1982?

[17]A Yes.

[18]Q I thought you testified you did internship

[19]at Mount Sinai Hospital?

[20]A Okay. Some people call the first year internship.

[21]some call it residency. I call it internship because

[22]I thought the lay person may not know the difference

[23]between the two.

[24]What is the difference between the two, Doctor?

[25]A Well, in the past when you did internship

[1]82

[2]you had a rotation, you would do four months internal

[3] **[*76]** medicine, four months of general surgery, four months

[4]of obstetrics and gynecology, and four months of something

[5]else.

[6]They did away with internships, or flexible internship

[7]as they call it, and now they have a straight residency.

[8]You devote the whole entire thing to one specialty.

[9]Q So that's one year?

[10]A That's right.

[11]Q And what was that specialty?

[12]A Internal medicine.

[13]Q Not orthopedic?

[14]A No.

[15]Q In fact you didn't even rotate during that

[16]one year through orthopedic residency program?

[17]A No, I did not.

[18]Q And then you entered a residency program

[19]at Cabrini Hosptial?

[20]A Yes.

[21]Q And that was in general surgery?

[22]A Yes.

[23]Q And how long was that program?

[24]A Twelve months, one year.

[25]Q And did any of that time involve a rotation

[1]83

[2]through orthopedic surgery?"

[3]A Yes.

[4]Q How long was that?

[5]A Approximately two months.

[6]Q Two months?

[7]A Yes.

[8]Q So in those first two years you had two months

[9]training in orthopedic surgery?

[10]A Yes.

[11]Q And then **[*77]** you entered a three-year residency

[12]in physical medicine and rehabilitation?

[13]A I did another six months of internal medicine

[14]to fill in the gap for the time my residency begun in

[15]physical medicine and rehabilitation.

[16]Q And your three-year residency in physics1

[17]medicine and rehabilitation didn't include any rotation

[18]through orthopedic surgery, did it?

[19]A Yes, it did.

[20]Q How long?

[21]A Approximately two or three months.

[22]Q Another two or three months?

[23]A Yes.

[24]Q And up to this date I think you told us earlier

[25]you never practiced in the field of orthopedic surgery?

[1]84

[2]A No orthopedic medicine, yes.

[3]Q So would it be fair to say then, since 1982

[4]in all of your training to date you have had a total

[5]of four to five months training in orthopedic surgery?

[6]A That is correct.

[7]Q And your title, as we would know it, as a

[8]physicist, is that correct?

[9]A Yes, that is correct.

[10]Q What is a physicist?

[11]A That is a specialty in medicine and rehabilitation

[12]which is, to explain to the lay person, is a combination

[13]of orthopedic, **[*78]** non-surgical orthopedics. We do essentially

[14]similar things as the orthopedist does except we don't

[15]operate and we don't put casts on fractures. What we

[16]do is treat the patient after the cast has come off and

[17]we do follow the patient after the surgical procedure

[18]has been done. We also are involved in the other orthopedic

[19]injuries, neck pain, shoulder, back pain, shoulder pain,

[20]ankle pain, et cetera.

[21]Q The affiliation you presently have, that

[22]is with Cabrini?

[23]A Yes.

[24]Q As -- what is your status at Cabrini?

[25]A I am a staff physician.

[1]85

[2]Q Ana I believe you told us you applied for

[3]staff privileges to the Orthopedic Institute?

[4]A Yes.

[5]Q You haven't been accepted?

[6]A You have to go through a regular protocol

[7]of paper work red tape, it takes some time.

[8]Q In fact, Doctor, did you ever apply to enter

[9]a pediatric program before you went to physiology?

[10]A I did not.

[11]Q You are board certified?

[12]A Yes, I am.

[13]Q When were you board certified?

[14]A 5-30-89.

[15]Q Last month?

[16]A That is right.

[17]Q And you are **[*79]** board certified in physiology?

[18]A That's right.

[19]Q And, Doctor, you told us that you were first

[20]contacted about this case a few months ago?

[21]A Yes.

[22]Q And you were given some records of Doctors

[23]Weiss and Langan, the hospital chart -- I presume that's

[24]from Nassau Hospital?

[25]A Yes.

[1]86

[2]E.B.T.'s of Doctor Larigar: and Mr. Stone?

[3]A Yes.

[4]Q And a report of Doctor DeRosa?

[5]A Yes.

[6]Q Before you came here today did you ever have

[7]the arthorogram?

[8]A I had the report.

[9]Q The film?

[10]A No. The film, no, I had the report.

[11]Q Did you ever have the X-rays from Doctor

[12]Bellows?

[13]A The X-rays -- I saw them here.

[14]Q Okay. And you saw -- did you even lock at

[15]the arthrogram here?

[16]A Yes, I did.

[17]Q I think you told us that your training at

[18]arthrograms was superficial at best?

[19]A That is right.

[20]Q Doctor, would it be fair to say that in your

[21]practice you rely upon the radiologist and his report

[22]in making a diagnosis?

[23]A For the terms of the arthogram, yes.

[24]Q What about in terms of **[*80]** flat-plate X-ray?

[25]A If it is a simple -- thing, I can read. If

[1]87

[2]I have questions as to any doubt I consult with the radiologis

[3]Q But if you had any doubt about the arthrogram

[4]you wouldn't know because you rely upon the reports,

[5]you can't read an arthrogram?

[6]A That is true.

[7]Q And you didn't read this arthrogram, did

[8]you, Doctor?

[9]A I looked at them.

[10]Q and you sit here today can you tell us, Doctor,

[11]when the injuries as reflected in the reports of Doctor

[12]Fagenberg occurred?

[13]A When the injuries occurred?

[14]Q Yes, when those injuries occurred?

[15]A I don't think he mentions when the injuries

[16]occurred.

[17]Q And you can't certainly tell us when they

[18]occurred, is that correct?

[19]A Well, if I recall the original X-rays that

[20]were taken by Doctor Weiss mentions nothing. The report

[21]and the films itself mentions nothing of any abnormality

[22]within the congruity of the capsule, the joint, and no

[23]calcification or other abnormality that one would expect

[24]of any pathology being present other than just acromioclavicular

[25]joint narrowing.

[1]88

[2] **[*81]** Q In fact you didn't see anything concerning

[3]adhesive capsulitis in the flat plates, did you?

[4]A No.

[5]Q And are they readable in flat-plate X-rays?

[6]A Some -- sometimes you can have some clues

[7]that would allude to possibility of adhesive capsulitis.

[8]Q But adhesive capsulitis is not present in

[9]a flat-plate X-ray?

[10]A No.

[11]Q So it will be fair to say that you don't

[12]know whether or not Mr. Stone was suffering from adhesive

[13]capsulitis at the time the first X-rays were first taker.?

[14]A Well, based on the history and based on the

[15]reports of the X-rays, that possibility is far remote.

[16]However, the possibility exists that he could have had

[17]some capsulitis due to some other problem beginning to

[18]form. But that I cannot be certain for sure.

[19]Q What does the term chronic adhesive capsulitis

[20]mean to you?

[21]A Something f a long maturing, something more

[22]than a three to six months duration.

[23]Q So the finding of Doctor Fagenberg in his

[24]arthrographic record, that indicates chronic capsulitis,

[25]and that is reported in mid-June of 1983, some month-and-a-half

[1]89

[2] **[*82]** after Mr. stone is first seen by Doctors Langan and Weiss,

[3]indicates that Mr. Stone was suffering from chronic adhesive

[4]capsulitis for sometime, certainly longer then a month

[5]or month-and-a-half, is that correct?

[6]A It is possible.

[7]Q And you can't tell us because you can't review

[8]the arthrogram?

[9]A Right.

[10]Q And proliferative synovitis, what is that,

[11]Doctor?

[12]A What it is I mentioned before. Proliferative

[13]synovitis is when you have hypertrophy of synovial membrane

[14]which is inside the joint capsule. And as result of

[15]hypertrophy you have thickening, compression, and it

[16]interferes with normal range of that joint.

[17]Q And that is something that cannot be seen

[18]on a flat-plate X-ray, is that correct?

[19]A (No response.)

[20]Q Yes or no, Doctor, can that be seer.?

[21]MR. MARCUS: If you can answer it yes or

[22]no, Doctor.

[23]A I can't answer that yes or no because sometimes

[24]-- again as I mentioned to you before, you can have some

[25]thickening calcification within the joint, that, could

[1]90

[2]allude to that possibility. You can have some tissue

[3]swelling, some **[*83]** soft tissue swelling that could be evident

[4]on X-ray, that could, again, allude to that possibility.

[5]Q That would be -- just be seen and sometimes

[6]they wouldn't be a definitive finding of proliferative

[7]synovitis?

[8]A No.

[9]Q And you think there was more findings that

[10]you referred to, some disruption of the humeral head?

[11]MR. MARCUS: Disruption of the joint capsule.

[12]MR. JOHS: I don't have the report.

[13]Q Doctor, may I have it?

[14]THE COURT: Yes, I have it.

[15]Q What does it say, they use disruption?

[16]A It is destruction in the region of the humeral

[17]head at its junction with the tuberosity.

[18]Q And that is not seen on flat-plate X-rays,

[19]is that correct?

[20]A Yes, that should be seen on the flat-plate.

[21]Q It should be?

[22]A Yes.

[23]Q Did you see it or. the flat X-ray?

[24]A No, not on the original.

[25]Q Would it be fair to say that the destruction

[1]91

[2]bone, by way of being able to view it in the shoulder

[3]area, would be seen on flat-plate X-ray?

[4]MR. MARCUS: Objection to form, Your Honor.

[5]THE COURT: Overruled.

[6] **[*84]** A No, this --

[7]MR. MARCUS: The shoulder area we are talking

[8]about --

[9]THE COURT: Objection is overruled.

[10]You want the question read back?

[11]THE WITNESS: No.

[12]A If you are talking about what is says here

[13]destruction in region of humeral head, you're taxing

[14]about bone, and if you are talking about destruction

[15]of bone it should be visible on flat films.

[16]Q Okay.

[17]And destruction of bone can occur from a chronic

[18]condition, is that correct?

[19]A Certain chronic conditions, yes.

[20]Q In fact I think you even told us it could

[21]occur from a degeneration of the joint space?

[22]A Yes.

[23]Q It could occur from long standing chronic

[24]adhesive --

[25]A I said chronic infection.

[1]92

[2]Q Chronic infection?

[3]A Yes.

[4]Q Okay. And a tear of the rotator cuff occurs

[5]as result of degenerative process, is that correct?

[6]A Yes.

[7]Q And you can't tell us as you sit here today

[8]whether or not Mr. Stone had a tear before he ever saw

[9]Doctor Weiss, is that correct?

[10]A I can't tell because I didn't examine him.

[11]I'm just going by **[*85]** the reports that are made available

[12]to me.

[13]Q Okay. And you certainly can't tell by reviewing

[14]the Arthrogran whether or not Mr. Stone had a tear of

[15]the rotator cuff prior to the time he saw Doctor Weiss?

[16]A I cannot tell, but that is the first --

[17]Q Thank you, Doctor.

[18]Doctor, this aspiration of the lump, you said it

[19]was departure to not send that fluid to a lab, is that

[20]correct?

[21]A Yes.

[22]Q Okay. and let me ask you as a general medical

[23]question, if you aspirate the purulent fluid would there

[24]be an odor to that?

[25]A Yes. Not always, sometimes.

[1]93

[2]Q And you would send that to a lab and the

[3]lab would send back a slip that would report the results,

[4]that would be correct?

[5]A Yes.

[6]Q Would it be departure to not have a lab slip

[7]indicating the results of findings in your office chart

[8]so you had a complete and accurate office chart?

[9]A Well, you should have the results, and it

[10]should be documented in the progress report. When you

[11]don't have the lab results, as long as it is documents

[12]in your medical progress reports, that's sufficient. **[*86]**
[13]Q Let me ask you, the lab slip that they do

[14]a culture and sensitivity reveals what that organism

[15]would be sensitive to so you could prescribe the proper

[16]medication, is that correct?

[17]A That is correct.

[18]Q And if a joint space were infected what would

[19]be the treatment for that?

[20]A Antibiotic.

[21]Q And would that be oral or I.V.?

[22]A Depends or. the severity of the infection

[23]that would determine whether it would be intravenous

[24]antibiotic or oral antibiotic.

[25]Q And staphylococcus, that's normal skin contaminant

[1]94

[2]isn't it, Doctor?

[3]A Yes.

[4]Q You never saw lab slips pertaining to this

[5]fluid, did you?

[6]A I did not.

[7]Q You never saw a lab slip from Doctor DeRosa

[8]concerning this fluid, did you?

[9]A I did not.

[10]Q So you don't know what this infection was?

[11]A From -- I saw report from Doctor DeRosa that

[12]in his report mentions of a staphylococcus being present

[13]in the fluid that he sent off.

[14]Q Staphoreous?

[15]A I believe that was staphoreous.

[16]Q And that is a normal skin contaminant?

[17]A Normal skin **[*87]** contaminant but not a joint,

[18]that's abnormal.

[19]Q Let me ask you, Doctor, there are situations

[20]that arise that -- where a sample of fluid gets ontaminated

[21]when it is extravasated or aspirated from an individual,

[22]is that correct?

[23]A That shouldn't happen if proper antiseptic

[24]techniques are observed.

[25]Q It shouldn't happen, but it does?

[1]95

[2]A It can happen.

[3]Q And you don't know whether it happened in

[4]this case or not?

[5]A Again, I am just going by the reports that

[6]have been provided to me from Doctor DeRosa saying that

[7]it did happen.

[8]Q Doctor, I believe you testified earlier that

[9]ligaments connect muscle to muscle, is that whet I understood

[10]you to say?

[11]A Yes.

[12]Q Isn't it a fact, Doctor, that ligaments: connect

[13]bone to bone?

[14]A I'm sorry. I mean -- I mean bone to bone,

[15]yes, that was my mistake.

[16]Q Doctor, you mentioned this Jorgenso's test?

[17]A Jorgenson's test.

[18]Q Can that be found as defined an item in either

[19]Dorian's or Stedman's dictionaries?

[20]MR. MARCUS: Objection, Your Honor. He has

[21]to lay a foundation **[*88]** for those books first as to

[22]whether or not the Doctor regonizes --

[23]THE COURT: It is cross-examination.

[24]A I don't know. I didn't look it up in Stedman's

[25]dictionary.

[1]96

[2]Q Stedman's is preity common medical dictionary,

[3]isn't it, Doctor?

[4]A Yes.

[5]Q In fact I am sure that you have looked up

[6]certain things in Stedman's Medical --

[7]A As a matter of fact for this case I looked

[8]nothing up in Stedman's Dictionary.

[9]Q During the course of your training over the

[10]last eight years you used the dictionary?

[11]A Yes, sure.

[12]Q What about Dorian's?

[13]A Yes, I used Dorian's also.

[14]Q Doctor, you told us frozen shoulder is not

[15]an accepted medical term?

[16]A That is correct.

[17]Q Doctor, you have read manuals, haven't you

[18]ever read any medical text on orthopedic surgery?

[19]A Yes.

[20]Q And in those medical texts have you read

[21]-- have you seen the phrase "frozen shoulder" used?

[22]A Used as synovitis and sometimes they put

[23]down in parentheses frozen shoulder.

[24]Q And in fact in Doctor Weiss' initial note

[25]he put in, quote, frozen **[*89]** shoulder, didn't he?

[1]97

[2]A Yes.

[3]Q and in fact there are numerous articles written

[4]in all kinds of orthopedic journals that address the

[5]condition commonly known as frozen shoulder, is there

[6]not?

[7]A They also state that you not -- should not

[8]state -- you, that is the family doctor --

[9]Q Are you familiar with the publication entitled,

[10]"Orthopedics"?

[11]A Yes.

[12]Q You are familiar wit that?

[13]A Yes.

[14]Q Are you familiar with an article that was

[15]resently reported in Orthopedics, approximately eight

[16]pages long, entitled, "Frozen Shoulder"?

[17]MR. MARCUS: Objection. Can we have a date?

[18]THE COURT: Yes.

[19]MR. JOHS: The date is, I believe, May of 1983.

[20]MR. MARCUS: We're talking about the use of

[21]material --

[22]THE COURT: No. I will permit it, it is

[23]cross-examination.

[24]A I'm sorry, what was it?

[25]Q I am sorry, June of '89, this month's issue

[1]98

[2]of Orthopedics, are you familiar with it -- with an article

[3]in there entitled, "Frozen Shoulder"?

[4]A Again, many journals use the words "frozen

[5]shoulder", and the authorities **[*90]** caution us not to use

[6]frozen shoulder.

[7]Q Who are the authorities, Doctor, that you

[8]are referring to?

[9]A Well, that I recall top of my head, Sayre.

[10]Q Sayre?

[11]A Sayre is considered the father of orthopedics.

[12]Q Can you give me his spelling? I never heard

[13]of him.

[14]A Considered the father of orthopedics.

[15]Q What is the spelling?

[16]A C-y-r-i-a.

[17]Q Did you ever hear of Cambell on Orthopedic

[18]Surgery?

[19]A Yes.

[20]Q Pretty reliable volume, isn't it?

[21]A Yes.

[22]Q And in fact would you be surprised to learn

[23]that there is a whole chapter directed to frozen shoulders

[24]in Cambell's on Orthopedics?

[25]A I imagine there might be.

[1]99

[2]Q So it is not such an uncommon medical term

[3]then, Doctor?

[4]A Again I repeat, you must -- the physician,

[5]Doctor Renke, my medical training at Mt. Sinai, all our

[6]instructors taught us not to use that medical terminology.

[7]Q When was your training in Ms. Sinai, that

[8]was 1983?

[9]A That was from '84 to '87.

[10]THE COURT: '87.

[11]Q '84 to '87?

[12]A Yes.

[13]Q A **[*91]** year after this particular incident?

[14]A Yes.

[15]Q what are some of the causes of quote, unquote,

[16]frozen shoulder, Doctor?

[17]A Well, there are many, you have tendonitis

[18]problems, rotator cuff problems, and most common cause

[19]of it is a tearing, a rotator cuff tear, tendons, ligaments,

[20]sprains -- marrowing of the acromioclaviular joint,

[21]arthritis, tumors, cervical radiculopathy, which means

[22]pincned nerve in the neck, lack of mobilization or use

[23]of the shoulder, infectious process --

[24]A I think narrowing of the A.C. joint is one

[25]of the causes?

[1]100

[2]A Yes.

[3]And there was narrowing there on Mr. Stone's

[4]A.C. joint in one of the X-rays?

[5]A One of the many causes.

[6]Q That was one of the causes?

[7]A Yes.

[8]Q With respect to Mr. Stone?

[9]A Yes.

[10]Q And you saw that because you could review

[11]flat-plate X-rays, you saw that there was narrowing of

[12]the A.C. joint?

[13]A There was.

[14]Q Okay. Would it be fair to say that if a

[15]person who has chronic adhesive capsulitis in his left

[16]arm, immobilized for a certain period of time, he can

[17]develop **[*92]** frozen shoulder?

[18]A If he keeps his arm immobile? Yes, he can.

[19]It leads to adhesive capsulitis.

[20]Q and within a week of keeping your arm immobile

[21]can lead to a frozen shoulder?

[22]A It is hard to say because it is on an individual

[23]basis.

[24]Q So it certainly could, is that a fair statement?

[25]A it is possible, yes.

[1]101

[2]Q Doctor, you said" that a -- I believe you

[3]said that it was departure from -- on the part of Doctor

[4]Weiss to not test muscle power, strength, at that first

[5]office visit?

[6]A Muscle power testing and range of motion.

[7]Q Okay. Do you have the Nassau Hospital chart

[8]in front of you?

[9]THE COURT: I have some.

[10]Q Here we go. We will use the one that is

[11]in evidence.

[12]In fact -- while you are looking at that --

[13]MR. JOHS: For a moment, Your Honor, I ask

[14]that I be permitted to review the documents that

[15]the Doctor brought here today.

[16]THE COURT: I'll tell you, while we are doing that

[17]suppose we take a short recess.

[18]I'm mindful of the fact that we are -- I

[19]told you we are going to work only half-t-day today,

[20] **[*93]** and I want to finish this up.

[21]MR. MARCUS: which ones?

[22]MR. JOHS: I don't think we can break that up.

[23]THE COURT: Off the record.

[24](Off-the-record colloquy between the Court

[25]and counsel.)

[1]102

[2]THE COURT: We will take a short recess.

[3](Whereupon there was a recess as declared

[4]by the Court.)

[5]
[6]-oOo-

[7](The trial resumed in the presence of the

[8]Jury.)

[9]
[10]CROSS-EXAMINATION

[11]BY MR. JOHS: (Cont'd)

[12]Q Just to bring you up to date, Doctor, I think

[13]the last question pertained to the fact that you said

[14]it was departure on the part of Doctor Weiss to not do

[15]a muscle power - strength test, and I asked you to look

[16]at the Nassau Hospital chart. Do you have that in front

[17]of you now?

[18]A Is this it?

[19]Q If you would be so kind as to turn to physical

[20]therapist evaluation and consultation, dated 5-2-83?

[21]A Yes. Okay.

[22]Q Do you have that, Doctor?

[23]A Yes.

[24]Q Doctor, there is a history portion to that

[25]evaluation?

[1]103

[2]A Yes, there is.

[3]Q And on line # 3 of that history it says patient

[4]has experienced **[*94]** pain ir, left shoulder upon elevation

[5]in either flexion or abduction of very sharp nature three

[6]weeks p.t.a., prior to admission. Patient subsequently

[7]did not move his left upper extremity and developed a

[8]frozen left shoulder. Is that what that says, Doctor?

[9]A Wait a second. I must be on the wrong page,

[10]I'm sorry.

[11]I have it.

[12]Q Perhaps if I locked at it I could point it

[13]out.

[14]A Complains pain per left shoulder, elevation.

[15]Yes, I have it. Okay.

[16]Q So failure to move this left upper extremity

[17]can lead to frozen shoulder?

[18]A Yes.

[19]Q And that is what happened here to Mr. Stone

[20]according to this history?

[21]A How can I answer that question? I don't

[22]know.

[23]Q You don't know? Okay.

[24]Well, going down to physical exam portion, Doctor,

[25]line # 4 of that?

[1]104

[2]A Yes.

[3]Q Strength not evaluated this time secondary

[4]to lack of active motion, is that what that says, Doctor?

[5]A Yes.

[6]Q In other words that would imply that you

[7]need active motion in order to strength -- test strength

[8]in that region, is that correct? **[*95]**
[9]A That is correct.

[10]Q So if patient comes in to Doctor Weiss on

[11]day one and has no strength in left arm and can't have

[12]active range of motion, it wouldn't be possible to perform.

[13]that test, would it be, Doctor?

[14]MR. MARCUS: Objection to the form of the

[15]question.

[16]THE COURT: There is no mention of inactive

[17]range of motion itself there. There is no mention

[18]of any range of motion.

[19]Q Well, let's go to record keeping then, Doctor.

[20]If I understand you correctly, is it your testimony

[21]then that everything that a doctor does for a patient,

[22]or considering in treating a patient should be entered?

[23]A All pertinent -- most definitely pertinent

[24]information pertaining to finding out a differential

[25]diagnosis. His recommendations to treatment of the patient

[1]105

[2]should be documented in the medical records.

[3]Q Okay. And if it is not it is a departure?

[4]A Yes.

[5]Q Okay. But that doesn't necessarily mean

[6]that departure leads to injury to the patient, does it?

[7]A Sometimes it could.

[8]Q Okay. Sometimes there is departure that

[9]never leads to an **[*96]** injury to the patient, is that fair

[10]enough?

[11]A Yes.

[12]Q And in fact that entry is not made in the

[13]office chart on day one that. there is no active range

[14]of motion but in fact it appears in the hospital chart

[15]some two weeks later --

[16]MR. MARCUS: Three weeks, counsel.

[17]A Yes.

[18]Q -- three weeks, some three weeks later, okay,

[19]doesn't necessarily mean that whether there was active

[20]range of motion or not lead to injury to patient, does

[21]it not?

[22]MR. MARCUS: Objection to the form of the

[23]question.

[24]THE COURT: No, I will permit it.

[25]A I'm sorry, could you repeat the last question?

[1]106

[2]THE COURT: We will have it read back.

[3]MR. JOHS: I'll make it easier.

[4]THE COURT: Fine.

[5]Q Doctor, let me ask you this way; does the

[6]fact that there is no notation in Doctor Weiss' initial

[7]office visit as to active range of motion indicate that

[8]there was any injury that resulted from that depature

[9]to Mr. Stone?

[10]MR. MARCUS: Objection to the form of the

[11]question.

[12]THE COURT: No.

[13]A It does not reflect that there was injury

[14]performed. **[*97]**
[15]Q Thank you.

[16]A But --

[17]THE COURT: Let him finish his answer.

[18]MR. JOHS: Okay.

[19]A But you could not derive at a proper diagnosis.

[20]from lack of insufficient examination. I don't know

[21]if that -- if that was performed, I don't know if he

[22]actually did a full examination. If he did this diagnosis

[23]might have been different, and his treatment --

[24]Q But you don't know whether he did or didn't?

[25]A I don't know.

[1]107

[2]Q So is your testimony then is purely speculative?

[3]A Based on the reports provided to me.

[4]Q Okay. So you don't know that if that first

[5]examination, whether that test was done or not?

[6]A If I remember correctly the doctor himself

[7]doesn't have any further recollection of anything differently

[8]other than what he put down on the records.

[9]Q That is correct.

[10]Okay.

[11]And based upon his examination at that time he

[12]mads a diagnosis of frozen shoulder, is that correct?

[13]A Yes.

[14]Q That's what it says in the records?

[15]A That is what it says.

[16]Q In fact he did recommend certain treatments,

[17]did he not? **[*98]**
[18]A Yes.

[19]Q And he recommended pendulum exercises and

[20]applied heat?

[21]A Yes.

[22]Q And he prescribed medication for pair.?

[23]A Right.

[24]Q Well, that's a form of treatment, is it not?

[25]A He says here --

[1]108

[2]Q Doctor, very simply, please, is that a form

[3]of treatment?

[4]A That is a form of treatment.

[5]Q Okay

[6]A Can I just add something?

[7]Q No.

[8]A Okay.

[9]Q Doctor, assuming that Mr. Stone attempted

[10]to undertake the exercises as well, and went to a physical

[11]therapist, and had no improvement, is it your testimony

[12]that the manipulation under general anesthesia was contraindication?

[13]A It was ray testimony that that procedure was

[14]premature, and when you have -- you don't go to general

[15]manipulation under general anesthesia when the patient

[16]has not been given a full conservative course yet. So

[17]based on that fact, yes, I do think that was departure

[18]from correct medical practice to jump the gun and to

[19]go to manipulation under general anesthesia.

[20]You see, the results speak for themselves.

[21]Q Well, we did see that **[*99]** results spoke for themselves

[22]Doctor, and would it surprise you to know that Mr. Stone

[23]testified that after the manipulation under general anesthesia

[24]and as Mr. Marcus posed to you in his hypothetical earlier,

[25]the plaintiff had increased range of motion ant decreased
109

[1]pain?

[2]A As a matter of "fact I knew very well about

[3]that. I'm not a bit surprised that that happened because

[4]that usually does happen after manipulations because

[5]the range of motion improves. At first it improves,

[6]I see it all the time, and it goes back and you lose

[7]that range of motion and you get a worsening affect.

[8]Q Well, Mr. Stone has already told us that

[9]he has improved range of notion and less pain as he sits

[10]here today, would that indicate that he had progressive

[11]getting better affect?

[12]A With chronic rotator cuff injuries after

[13]acute episodes subside, for one or two years after they

[14]are usually improvement of pain, but the range of motion

[15]is diminished and stays diminished.

[16]Q Did Mr. Marcus tell you that Mr. Stone stood

[17]here yesterday and stood up and showed us that he can

[18]now do this, he can **[*100]** now do this, he -- that he can now

[19]do this, and he can lift his hand up here; did he tell

[20]you that?

[21]MR. MARCUS: Objection to the last gesture.

[22]I don't recall the doctor -- Mr. Stone raising

[23]his hand over his shoulder.

[24]THE COURT: Yes.

[25]MR. JOHS: Strike.

[1]110

[2]Q With the first three?

[3]A That is not checking the range of motion

[4]of the shoulder. The most important ranges are the abductio

[5]internal and external rotations.

[6]Q As you sit here today you don't know what

[7]they are on Mr. Stone?

[8]A Maybe on Mr. Stone --

[9]Q Doctor, as you sit here today?

[10]A I don't know.

[11]Q Okay. And in fact you can't tell us whether

[12]the plaintiff had a torn rotator cuff before he came

[13]to see Doctor Weiss, at the time of the manipulation

[14]or prior to undergoing -- prior to leaving their care

[15]and treatment in May of 1983, can you?

[16]A I may not know but the history suggested

[17]that.

[18]Q You can't give us a definitive statement?

[19]A Definitive statement --

[20]Q In fact, Doctor, it is within the realm of

[21]medical probability or possibility that the **[*101]** rotator cuff

[22]tore sometime between the time Mr. Stone left Doctors

[23]Weiss and Langan's care and the time he actually had

[24]an arthrogram, is that correct?

[25]A That it tore --

[1]111

[2]Q That he could have sustained a tear during

[3]that time?

[4]A How?

[5]MR. MARCUS: Objection to the form of the

[6]question.

[7]Q Well, Doctor, a month went by and --

[8]MR. MARCUS: Car. we get an answer to the

[9]question.

[10]MR. JOHS: He said how, I'm trying to explain.

[11]THE COURT: All right, go ahead..

[12]Q A month went by during which time he continued

[13]under agressive course of physical therapy and also returned

[14]to work. And he has told us that at work he climbs ladders

[15]and he lifts stuff at work.

[16]MR. MARCUS: Objection, Your Honor. That

[17]was not the testimony as to what he did afterwards.

[18]THE COURT: All right.

[19]Q Let's leave out the down time. Up until

[20]the rime he returned to work is it possible that he sustained

[21]a tear of the rotator cuff --

[22]MR. MARCUS: Just as to possible, the word

[23]"possible", anything is possible.

[24]THE COURT: Rephrase it.

[25] **[*102]** Q Doctor, is it within the realm of medical

[1]112

[2]probability that he sustained that tear within that four

[3]or five month period?

[4]A I don't see how it could be possible, there

[5]was no history of trauma, nothing suggestive to that.

[6]Q Well, trauma, Doctor, trauma is defined as

[7]a number of different ways, is it not?

[8]A Yes.

[9]Q It doesn't have to be one specific traumatic

[10]incident, the wearing down of this joint over a period

[11]of time could be called traumatic, is that correct?

[12]A Excuse me. Repeat that?

[13]Q Wearing down over a period, degenerative

[14]process, isn't that a form of trauma?

[15]A Not in my definition.

[16]Q Not your definition?

[17]A No.

[18]Q In your definition what is trauma, Doctor?

[19]A Trauma is when you get hit with a blow, that

[20]is -- or a blow is exerted on that joint. That is my

[21]definition of trauma.

[22]Q Would you agree, Doctor, that ninety-five

[23]percent of all rotator cuff injuries are not induced

[24]by trauma?

[25]A In which age group are you talking about?

[1]113

[2]Q Let's use the forty-five or sixty-rive ages.

[3] **[*103]** A Induced by trauma, is that correct?

[4]Q Yes.

[5]A Yes.

[6]Q Ninety-five percent?

[7]A Yes.

[8]Q Okay. Let me ask you as part -- I know you

[9]are not an orthopedic surgeon, I know you only had five

[10]months training in orthopedics, but in your training

[11]are you aware that when a repair of a rotator cuff injury

[12]is performed in a patient that has chronic adhesive

[13]capsulitis, part of that procedure is a manipulation

[14]of the shoulder before you repair the rotator cuff?

[15]A I'm sorry. Just rephrase it one more time,

[16]please.

[17]Q When a repair of a torn rotator cuff is

[18]performed in a patient that has chronic adhesive capsulitis,

[19]are you aware that part of that procedure involve? a

[20]manipulation to break up the adhesions?

[21]A First of all the repair of the rotator cuff is --

[22]Q Doctor --

[23]A I can't base -- answer that question based

[24]on the way you phrased it.

[25]Q Well, Doctor, there are rotator cuff injuries

[1]114

[2]with incumbent adhesive capsulitis underlying it, is

[3]that correct?

[4]A Yes.

[5]Q Where a patient suffers from chronic adhesive

[6]capsulitis **[*104]** and undergoes a repair of rotator cuff, part

[7]of that procedure is a manipulation, is that correct?

[8]A Not as far as I know, no.

[9]Q You never heard that?

[10]A No.

[11]Q You never learned of that?

[12]A No. You don't --

[13]Q Have you ever repaired -- observed a repair

[14]of a rotator cuff?

[15]A Yes, I have.

[16]Q was that --

[17]A You only do a repair to rotator cuff where

[18]it is a severe rotator cuff, and you also take the patient's

[19]age into consideration, and his life style in to consideration

[20]If a person is sixty or seventy years old, has multiple

[21]medical problems and his life style is just sedentary

[22]you leave it alone.

[23]MR. JOHS: I move to strike as not responsive,

[24]has nothing to do with the question.

[25]A It depends on --

[1]115

[2]THE COURT: State the question again.

[3]Q Q Quite simply, I'm asking, Doctor, are you

[4]aware in a patient that has chronic adhesive capsulitis

[5]and a torn rotator cuff --

[6]A Partial or complete?

[7]Q Let's just understand either partial or --

[8]A Differs. Treatment differs.

[9]Q Okay, use partial.

[10] **[*105]** Has partial tear of the rotator cuff and underlying

[11]chronic adhesive capsulitis, when they undergo a repair

[12]part of that procedure is a manipulation to looser, the

[13]adhesions; are you aware of that?

[14]A Again, that manipulation should not be done

[15]in initial stages, it should only be done when it fails

[16]conservative therapy.

[17]Q Is it done, Doctor?

[18]A I'm answering your question. It is done

[19]after the patient fails conservative therapy.

[20]Q In fact I think you told us that during your

[21]residency you observed a couple of manipulations under

[22]general anesthesia; is that correct?

[23]A Yes.

[24]Q So that was an accepted procedure in 1983

[25]for that?

[1]116

[2]A For that, or that particular problem.

[3]Q Okay. Would it be fair to say that there

[4]are two schools of thought in the field of orthopedics,

[5]Doctor, one aggressive therapy and one conservative therapy?

[6]A There are many schools of thought and many

[7]schools of thought in answer to your question, yes there is.

[8]Q The aggressive school of thought is not necessary

[9]departure of good and accepted practice by orthopedists

[10] **[*106]** with reference to these particular injuries, or any injuries

[11]by orthopedists?

[12]A (No response.)

[13]THE COURT: In general.

[14]Q As a general medical proposition?

[15]A If you pursue one school of thought and. you

[16]run into problems and complications then you obviously

[17]are wrong. Common sense tells you you should try the

[18]least invasive and the less dangerous treatment first.

[19]Q And in doing that you use your best judgment

[20]to make that determination?

[21]A Yes.

[22]Q Sometimes you make errors in judgment?

[23]A And if you make an error in judgment you

[24]pay for them.

[25]Q Doctor, is record keeping -- a departure

[1]117

[2]from a proper record keeping didn't lead to --

[3]A Anytime --

[4]THE COURT: We haven't gotten a complete

[5]question.

[6]MR. MARCUS: Doctor, listen to the question.

[7]THE COURT: Please answer the question.

[8]THE WITNESS: I am sorry.

[9]MR. JOHS: I'll withdraw the question.

[10]Q Doctor, do you have Doctor DeRosa's records

[11]in front of you?

[12]MR. MARCUS: Mo, they are right here.

[13]A Yes, I think I do. I do.

[14]MR. MARCUS: **[*107]** No, you don't.

[15]A Okay.

[16]Q I'm showing you his records. Do you have

[17]a copy of the records with you, Doctor?

[18]MR. MARCUS: Not that.

[19]A Not this. I have something typed.

[20]Q Okay. So that -- let me show you -- that

[21]is the actual doctor's office notes. And I believe it

[22]is whe entry for July --

[23]MR. JOHS: May I approach just a moment,

[24]Your Honor, because I don't have a copy.

[25]THE COURT: Sure.

[1]118

[2]Q The. entry for 6--24-83. Could you react that

[3]entry, Doctor?

[4]MR. MARCUS: If it is legible.

[5]A Aspirated fluid, fluid sent to lab for sensitivity

[6]and culture.

[7]Q That's total entry for that visit, is that

[8]correct, Doctor?

[9]A Yes.

[10]Q And I believe you told us that appropriate

[11]record keeping on the part of a doctor would indicate

[12]that when those results come back front the lab they make

[13]entries in the chart concerning what exactly the results

[14]were, is that correct?

[15]A Either you make an entry in the chart or

[16]you have a copy on your chert, somewhere in the back.

[17]MR. MARCUS? Your Honor, I'm going to object.

[18]Doctor **[*108]** DeRosa is not a defendant in this case,

[19]he's not on trial here.

[20]THE COURT: It is cross-examination.

[21]Q Doctor, a: any time after that entry of Doctor

[22]DeRosa's chart is there an indication that a result came

[23]back from the lab and what those results were?

[24]A I think there is a note here -- no, that's

[25]dated much later.

[1]119

[2]Q Yes. There is no indication, is there, Doctor?

[3]A I don't see it.

[4]Q Okay.

[5]MR. MARCUS: Excuse me. Excuse me. Counselor,

[6]there is in that office record a laboratory report

[7]annexed to the other hospital record.

[8]MR. JOHS: Objection to categorizing.

[9]MR. MARCUS: Yes, it is categorizing.

[10]THE COURT: You will have an opportunity,

[11]Mr. Marcus, to redirect, and this is not the way.

[12]MR. MARCUS; I apologize, Your Honor.

[13]I apologize, in Jobs, sorry.

[14]Q Doctor, have a look at that whole chart there,

[15]the subpoenaed records of Doctor DeRosa. Do you see

[16]a lab slip attached to that chart?

[17]A No, I don't,

[18]Q so according to you, Doctor, the fact that

[19]there is no lab slip and the fact that there is no subsequent

[20] **[*109]** entry reflecting the results of that aspirated fluid

[21]would be a departure from good and accepted medical practice,

[22]at lest with respect to the record keeping of one's practice,

[23]would it net?

[24]A Well, I have to quantify a little tit, if

[25]I may?

[1]120

[2]Q Okay.

[3]A If you leave out -- you don't have to put

[4]down ever minute thing, but if that pertains to a patient's

[5]case, ad it adversely affects that patient, it should

[6]be included.

[7]Q And I think you told us that it was your

[8]understanding it was staphoreous infection, right?

[9]A Yes.

[10]Q That has an affect on the patient, doesn't it?

[11]A He obviously put the patient on antibiotics

[12]from his typewritten notes.

[13]Q And --

[14]A I don't know.

[15]Q And the condition resolved itself within

[16]a period of ten days according to Mr. Stone, do you know

[17]that?

[18]A No, I didn't know what happened after that. No.

[19]Q Okay. And in fact what happened after that

[20]isn't even reflected in Doctor DeRosa's notes, is it?

[21]A Not from what I can see.

[22]Q So there is an absence in the notes, that

[23]doesn't necessarily **[*110]** mean it caused Mr. Stone an injury,

[24]does it, Doctor?

[25]A This particular case maybe not.

[1]121

[2]Q Okay.

[3]Doctor, how did it come about that you were contacted

[4]by the plaintiff to testify in this case?

[5]A Well, Mr. Marcus contacted me. We discussed

[6]the case with me, he told me I'll send you the records,

[7]look them over and tell me - what you think of it.

[8]Q Did you ever render a written report?

[9]A No.

[10]Q And the first time you met with Mr. Marcus

[11]was this morning?

[12]A On this case?

[13]Q Yes.

[14]A Yes.

[15]Q Thanks, Doctor.

[16]MR. JOHS: No further questions.

[17]THE COURT: Redirect?

[18]MR. MARCUS: I just have a couple, Your Honor.

[19]REDIRECT EXAMINATION

[20]BY MR. MARCUS:

[21]
[22]Q Bear with me, we are almost done.

[23]A Yes.

[24]Q Doctor, we wore talking before about how

[25]-- you told Mr. Johs that the narrowing of the acromioclavicular

[1]122

[2]joint, the A.C. joint, could" become the competent producing

[3]cause of a frozen shoulder, correct?

[4]A I did.

[5]Q What about a minimal narrowing, Doctor, as

[6]found in Doctor **[*111]** Bellows X-rays and the reports of Doctor

[7]Weiss himself, would a minimal narrowing cause that condition

[8]A Highly unlikely.

[9]Q Doctor, looking at that arthrogram report

[10]and Doctor Bellows X-rays, and the other records that

[11]you saw covering the period of time between the two,

[12]that is at the beginning of treatment and at the -- immediate!

[13]after the treatment rendered by the defendants, did they

[14]indicate to you whether or not Mr. Stone's shoulder injury

[15]got significantly worse in that time period?

[16]MR. JOHS: Objection.

[17]THE COURT: Sustained.

[18]Q Doctor, do you have an opinion with reasonable

[19]degree of medical certainty as to whether or not based

[20]upon the records you reviewed and were shown, Mr. Stone's

[21]shoulder injury worsened, improved or remained the same

[22]between the time of Doctor Bellows X-rays and the time

[23]of the arthrogram?

[24]MR. JOHS: Objection.

[25]THE COURT: Sustained.

[1]123

[2]Q Doctor, do you have an opinion with a reasonable

[3]degree of medical certainty as to whether the rotator

[4]cuff tear that was demonstrated on the arthrogram was

[5]the same at the time **[*112]** of Doctor Bellows examination, assuming

[6]it existed then, less or worse then it was at the time

[7]of the arthrogram?

[8]MR. JOHS: Objection.

[9]TEE COURT: No, I'll permit it.

[10]A I believe it was worse, and I believe that

[11]result of the injury also made worse.

[12]Q Okay. By the way, do you think the defendant

[13]made proper antiseptic technique in applying the injection

[14]into Mr. Stone?

[15]A Well, I don't know exactly what procedure

[16]they followed.

[17]MR. JOHS: Objection.

[18]THE COURT: Yes, sustained.

[19]Q Doctor, I want you to assume that each of

[20]the defendant physicians testified that they used a swab,

[21]one said he used iodine swab, either clear or colored

[22]liquid, the other physician said he used a betidine swab,

[23]and that they swabbed the area and injected the area

[24]immediately thereafter. The plaintiff testified that

[25]it was a clear liquid or. a swab. Doctor Weiss, I believe,

[1]124

[2]testified that in some casses he would take some cotton

[3]and dab it and sometime he had liquid on the cotton

[4]he had it already prepared.

[5]Do you have an opinion with reasonable degree of

[6] **[*113]** medical certainty whether or not that kind of technique

[7]was accepted or not?

[8]A Usually after you apply that solution you

[9]should wait --

[10]MR. JOHS: Objection.

[11]THE COURT: Sustained.

[12]Q Doctor, where did you look up your Jorgenson's

[13]test to verify your telling --

[14]MR. JOHS: Objection.

[15]THE COURT: Sustained.

[16]MR. MARCUS: Your Honor, it was asked of

[17]him on recross -- it is redirect.

[18]THE COURT: I understand that. I'll sustain

[19]the objection.

[20]MR. MARCUS: I have no further questions.

[21]MR. JOHS: I have two, sorry.

[22]THE COURT: Based on what he just talked

[23]about now.

[24]MR. MARCUS: I haven't been able to ask anything

[25]new.

[1]125

[2]MR. JOHS: Yes, based upon what he was just

[3]asking about now.

[4]RECROSS-EXAMINATION

[5]BY MR. JOHS?

[6]
[7]Q Doctor, if I'm not mistaken you don't know

[8]when this tear in the rotator cuff occurred with respect

[9]to Mr. Stone, is that correct?

[10]A I'm -- I don't know, I don't know exactly

[11]when it started, but I know when it got worse.

[12]Q Well, Doctor, you never had the benefit of

[13]an arthrogram **[*114]** report other than the one from Doctor Fagenberc

[14]taken some three weeks after Mr. Stone left the care and

[15]treatment of Doctors Langan and Weiss, is that correct?

[16]A Yes.

[17]Q So you don't know whether the tear, if there

[18]was a tear, was worse at the time of Doctor Fagenberg's

[19]report because he had no benefit of a prior arthrogram?

[20]A I believe, based on initial history, I thought

[21]it should have been, or was probably had a partial tear

[22]of the rotator cuff and that procedure make it worse.

[23]Q Your opinion as that he had a partial rotator

[24]cuff tear at the time of the first visit?

[25]A Yes, that is --

[1]126

[2]Q And that is your opinion?

[3]A That is my opinion.

[4]Q And, Doctor, to make that diagnosis I think

[5]you told us the drop-arm test was one?

[6]A That's only positive for severe rotator cuff

[7]tear.

[8]Q Okay. And you would need active abduction

[9]in order to perform that test, is that correct?

[10]A At least forty-five to sixty degrees, and --

[11]Q And if there was no motion of the left arm

[12]you couldn't perform the test?

[13]A Again, if it was as little **[*115]** as forty-five

[14]to sixty degrees of abduction, which was the case, you

[15]should have been --

[16]Q Well, do you know that was the case?

[17]A Well, I have a report from physical therapist

[18]Jan Voder --

[19]Q That report doesn't reflect whether those

[20]were active or passive, does it?

[21]A I don't know.

[22]MR. MARCUS: We will stipulate that it is

[23]silent as to that.

[24]MR. JOHS: Okay.

[25]Q Just as adduced?

[1]127

[2]A That's right, that is true.

[3]Q So you honestly don't know then. Doctor?

[4]A I honestly don't know.

[5]THE COURT: Is that it?

[6]MR. JOHS: That's it.

[7]THE COURT: Thank you.

[8]MR. MARCUS: Nothing further, Your Honor.

[9]TEE COURT: Thank you.

[10](Witness excused.)

[11]
[12]THE COURT: Okay, we will recess now, as

[13]I told you, until Tuesday morning at 9:30.

[14]I trust that you will enjoy the weekend and

[15]we will see you back hers on Tuesday morning at

[16]9:30. Meantime don't discuss this case amongst

[17]yourselves or with anyone else, or permit anyone

[18]else to discuss it with you. Please keep an open

[19]mind.

[20](Whereupon the **[*116]** Court adjourned for the day.)

[21]
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[23]
[24]
[25]

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