1998 WL 34382295 (N.Y.Sup.) (Expert Trial Transcript)
Supreme Court of New York.

PETT,
v.
BETH ISRAEL MED. CTR.

No. 122524/98.
1998.

(Transcript of Dr. Ali Guy)

Case Type: Premises Liability >> Public Property
Case Type: Premises Liability >> Slip/Trip & Fall
Jurisdiction: New York
Name of Expert: Dr. **Ali Guy**
Area of Expertise: Health Care-Physicians & Health Professionals >>Physiatrist/Rehabilitation Medicine

Representing: Unknown

But the things is, you know in the recent events of September, several Court Officers were lost and on Friday there's going to be a memorial service.

When I mentioned it yesterday, I thought it might be concluded by the morning, but it won't be. I don't think it will be, so I'd rather not have you come in and then we can't proceed.

So assume that Friday you are off as far as this case. And I would think that on Monday we will probably have finished all the witnesses, probably. There could be somebody else, but probably on Monday we'll be reaching the lawyers' summations to you and my instructions and then your deliberations, which of course are open-ended.

I have no idea how long the deliberations will take, that's completely a function of the jury. So we're talking about going no later than the beginning of next week.

Does that answer your questions?

We'll mark the note as a Court Exhibit.

Are your ready to call a witness?

MR. OGEN: Yes, I call Dr. Ali Guy.

DR. ALI GUY,

called as a witness by and on behalf of Plaintiff herein, having been first duly sworn, was examined and testified as follows:

THE WITNESS: Doctor Ali Guy, A-L-I, Guy, G-U-Y. 7 Gramercy Park, New York, New York 10003.

DIRECT EXAMINATION

BY MR. OGEN:

Q Good morning, Dr. Guy.

A Good morning.

Q Are you duly licensed to practice medicine and surgery in New York State?

A Yes, sir, I am.

Q When did you receive your license?

A 1995.

Q And could you briefly go over your educational background.

A Yes.

Elementary school, I went to P.S. 20, Flushing, New York. Junior High School I went to P.S. 194. I went to Bayside High School. Went to Queens College. Medical school, I graduated from University of Northeast, Dominican Republic, June of 1981.

Afterwards I did three separate residencies. I did my first residency in the field of internal medicine at Mount Sinai School of Medicine for a period of 18 months. Then I did one year of general surgery at Cabrini Medical Center.

Then I did three years of physical medicine and rehabilitation at Mount Sinai Medical Center. I'm the director of the department of rehab medicine at Maimonides Medical Center.

I'm in charge of the neuromuscular equipment clinic at Hospital for Joint Diseases where-my duties are to examine the patients that come to the clinic and teach the residents from the NYU Medical Center.

I'm also on the staff of Cabrini Medical Center.

I'm board certified in the field of physical medicine and rehabilitation.

Q What does it mean to be board certified?

A To be board certified in my specialty is the highest level of specialization of a degree which you can obtain. It's analogous of a Ph.D. to a layperson.

To become board certified in my specialty you have to have the following prerequisites. You have to have training in two other specialties besides physical medicine and rehabilitation. That was accomplished by internal medicine and general surgery.

You have to satisfactorily complete a three-year training program in physical medicine and rehab. You have to pass the yearly examination as given by the department. You have to score at least 70 percent or higher.

Then once you finish, you have to take your boards, part one, which encompasses an eight-hour written examination which covers everything you have learned from beginning to the end.

You then have to be in private practice for a period of no less than 18 months, be sponsored by two doctors that are already board certified, preferably your former teachers.

You then fly to the Mayo Clinic in Minnesota where all the research and textbooks are written. You then take your boards, part two, which is an oral examination. It's half a day. It covers the following topics: Orthopedics, neurology, interpretations of x-rays, CAT scans, MRI and other principles of physical medicine and rehabilitation.

If you prove to these doctors that you are up to par, they pass you and give you a title of a Diplomate of the American Physical Medicine and Rehabilitation.

That title was obtained in May of 1989.

Q Were you ever a chief resident in any of your training programs?

A Yes, sir, I was the chief resident in physical medicine and rehabilitation for a period of six months during my Mount Sinai residency.

Q Are you a clinical instructor at any teaching hospitals?

A Yes, sir, I am. I'm a clinical instructor at Hospital for Joint Diseases, Orthopedic Institute, Downtown Manhattan.

I'm also a clinical instructor at Maimonides where I'm in charge of the department of rehab medicine, where my duties are-to be in charge of all the in-patient and outpatient rehab services, provide teaching to the orthopedic residents, to prepare them for their boards on the rehab section. Teach and train students from Touro College, the physical therapy students and physician assistance students. Also the medical doctors in that department.

Q What are the requirements to become a clinical instructor to teach?

A First you have to be board certified.

Second, you have to pass a credentials committee. The group of doctors, a panel of doctors that review your credentials and they judge and see if your knowledge and training and your credentials are up to par.

Third, you have to be in good standing with the medical board.

Fourth, you have to have the ability to teach.

Q Are you a member of any medical organizations?

A Yes, sir, I am.

I'm a diplomate. and a fellow of the American Board of Physical Medicine and Rehabilitation. I'm a member of the New York County Medical Society and a member of the New York State Medical Society.

Q Can you describe for the jury briefly what the field of physical medicine and rehabilitation-is.

A Yes.

This field is a medical specialty that was founded shortly after World War II by Dr. Howard Rusk, mainly the Rusk Institute at NYU is named after him.

This field deals with traumatic injuries to the body covering the whole body from-head to toe. We are trained in many, many different disciplines, including internal medicine, surgery, orthopedics, neurology.

Our job is to restore function to an injured patient, whether it's from a slip and fall, whether it's from a sports accident or birth defect or stroke or job-related accident.

Our job is to rehabilitate and bring an injured patient to the optimum letter of care to their preinjured state.

And we are also experts in disability and impairment evaluation. In fact, that's what I do at Maimonides. I get a lot of referrals for disability and impairment evaluation.

So we have training in all those areas and we restore function to an injured patient.

Q How does this field differ from the field of neurology and orthopedics?

A The field of orthopedic surgery deals with mostly the surgical aspect of traumatic injuries. They usually refer the nonsurgical cases to us in most hospitals and an orthopedic surgeon deals with the bony system.

We as physiatrists -- physiatrist is a doctor that practices my specialty which is physical medicine and rehabilitation.

Physiatrist concentrates on the whole body from head to toe, the internal organs, the heart system, the lung system, the musculoskeletal system and the neurological system. And we try to prevent surgery if at all possible and we get most of the patients from the orthopedic surgeons after they have performed surgery for the purposes of rehabilitation and continued care.

How this field differs from neurology is, a neurologist concentrates on neurological disorders of the central nervous system. We concentrate on the peripheral nervous system.

The peripheral nervous system covers the nerves and the segments to the arms and legs and the spine and the central nervous system covers specifically the brain and the spinal cord.

And, of course, there's an a great deal of overlap between what we do and what a neurologist does. We diagnose and we treat for the neurologist. They do mostly disorders like multiple sclerosis, Parkinson's Disease, Lou Gehrig's disease, so on and so forth.

So there's a great deal of similarity and overlap. They do mostly central nervous system, we do mostly spinal cord and peripheral nervous system.

Q You mentioned similarities and overlap.

Did you get formal training in neurology, orthopedics, internal medicine, general surgery and interpretation of things like x-rays, MRIs and CAT scan films?

A Yes, sir.

MS. MARINO: Objection, your Honor.

THE COURT: What are you objecting to?

MS. MARINO: It's leading.

THE COURT: This is just going through credentials.

Thank you.

A The answer is yes, sir.

Q Do you consider yourself to be a neurologist, an orthopedist or radiologist?

A No, sir. My title is physiatrist.

Q And have you had experience with hip replacement?

A I -have assisted on operating on over one hundred hip replacements-and I've treated thousands of patients that have had hip replacements that required rehabilitation after the procedure has been completed.

Q Does your field deal with traumatic injuries and are you considered a trauma expert?

A Yes, I deal with a lot of traumatic injuries. These are mostly patients that require rehabilitation.

Q Does your field also deal with disability and impairment evaluation?

A Extensively so, yes.

Q And do you do any such evaluations for people, all kinds of people?

A Yes, sir, I do evaluations in my hospital, Maimonides for orthopedic surgeons, internal medicine doctors, neurologists and other specialists.

Q Because you deal in the field of trauma and you - are a trauma expert, are you sometimes called into Court to testify?

A Yes, that is correct.

Q Have you ever been deemed an expert in your specialty in any courts, Supreme or Federal?

A Every time I've testified, yes, I have been.

Q How many times have you been at least an expert in the medical field?

A In my 15 year career, I would say somewhere between 110 and 125 times. It could be slightly less or slightly more.

Q Have you ever been turned down as an expert in the field of medicine?

A No, sir.

MR. OGEN: Your Honor, I'd like to introduce this doctor as an expert witness in the field of physical medicine and rehabilitation.

THE COURT: Any questions?

MS. MARINO: No, your Honor.

THE COURT: So everybody is in agreement that you are an expert, Doctor.

THE WITNESS: Thank you, Judge.

MS. MARINO: In rehabilitation.

THE COURT: That's what we are talking about, naturally. We are not talking about something else, we are talking about this.

Q Doctor, do you give lectures to various different groups?

A Yes, sir, I give lectures just about every walk of life. I give lectures to medical students, other doctors, nurses, fire fighters, police officers, attorneys.

In fact, once a year I give lecture to the entire Bar Association at Mount Sinai School of Medicine. Through those lectures attorneys get continued legal education seminar points.

Q When you give lectures, do you get compensated for that?

A No, I enjoy to teach. I don't do it for financial gains.

Q Do you do any volunteer work?

A Yes.

One half day a week for the past 11 years at the Hospital for Joint Diseases I run the neuromuscular equipment clinic. I see patients with birth defects, with spinal cord injury patients and the clinic is approximately half a day. I do it on a strictly voluntary basis. I don't get paid for this.

Q Okay.

Do you testify mostly for plaintiffs or defendants?

A I testify mostly for my patients. I guess the legal sector designates them as plaintiffs.

Q What percentage of your practice is devoted to treating patients or to teaching,?

A The vast majority, 95 to 98 percent of my time is devoted to treating patients and teaching and when I'm at the hospital, Hospital for Joint Disease and Maimonides, -as I am treating patients, I'm also teaching the residents or students that are assigned to me.

So I would say the vast majority.

Q Do you do any consultations for any other doctors?

A Yes, I do consultations for just about every specialist, spine surgeons, neurosurgeons, orthopedic surgeons, neurologists, cardiologists, internal medicine doctors, chiropractors, so on and so forth.

Q Is that done in the hospital or outside?

A Well, inside the hospital and outside the hospital.

Q And are you here today to render expert testimony regarding the plaintiff in this action, Gertrude Pett?

A Yes, sir.

Q Are you being compensated for your time to appear here today?

A Yes, sir.

Q And how much?

A My fee is 3,000 for half a day of testimony, 1,000 for pretrial preparation, a total of $4,000.

Q Did you cancel any of your appointments today in your medical schedule or patient schedule and spent time to prepare for this trial?

A Yes, sir.

Q What did you do to prepare for this trial?

A Basically review all the past medical records, go over the medical definitions of the case with you to educate you about the medical significance of her injuries.

Q And who--

MS. MARINO: Can I have the answer read back. I couldn't hear it.

THE COURT: Okay.

(Whereupon, the requested answer was read back by the Reporter.)

MS. MARINO: Thank you.

Q Who referred the patient to you?

A You did.

Q And what did you do when the patient came to you?

A I did what I was asked to do.

The purpose of my evaluation was to examine her, review pertinent past medical records and render an opinion about her current disability and impairment, prognosis and future medical needs.

Q Okay.

Could you please review for us briefly the patient's history, her physical examination and your findings and what it all means.

A Yes.

Well, the first time I saw the patient, only once, was July 2nd of this year, just a couple of months ago.

The patient came accompanied by Marc Chanti, the interpreter. As we all know she's deaf and mute. He helped me by sign language to get the history from her.

The history that I obtained was the patient was 64 --

MS. MARINO: Objection, your Honor --

THE COURT: I don't know what you are saying.

MS. MARINO: The witness is beginning to testify to what was told to him by Mr. Chanti and this is improper for a medical witness who has only seen the patient once and he's not a treating patient.

THE COURT: I don't know why you are testifying.

Okay.

Don't tell us what other people told you except if the doctor addresses --

MR. OGEN: I'm asking about her history.

THE COURT: Yes. And if it has to do with what another doctor reported to you that affected your diagnosis or treatment.

Go ahead.

THE WITNESS: Yes, Judge.

History obtained was the patient was 64 years of age.

On October 27, 1997 she went to Beth Israel Medical Center to visit her mom who was in a coma from a stroke --

MS. MARINO: Your Honor, this is hearsay.

MR. OGEN: Objection. It's all in the hospital record. Everything he's saying-is in the hospital record.

THE COURT: Thank you.

Overruled.

THE INTERPRETER: A little slower and louder, please.

THE WITNESS: Yes, sir.

THE COURT: We have a sign language interpreter.

THE WITNESS: Yes, sir, I'm sorry, Judge.

Q Please continue.

A She went to visit her mother at Beth Israel Medical Center. Her mother was in a coma from the stroke. She slipped and fell on a wet slippery floor, landed on her right hip.

She fractured the femoral neck of the right femur, required surgical intervention by way of a right hip replacement, which was performed at Beth Israel Medical Center two days later. That was performed on October 27, 1997.

Subsequently --

Q You mean October 29th?

A I'm sorry, October 29, 1997, two days after the fall.

Subsequently she had three other subsequent hip dislocations which also required admissions and a closed reduction.

When I first saw her, she complained to me of right hip pain with being very fearful about falling again and re-dislocating her right hip.

She complained to me about being fearful and anxious in walking in uneven terrain. She was afraid to walk outside of her house at the fear that if she falls she could not get the attention of others to assist her.

That was basically my history and I examined her.

Q Okay.

Tell us why medical history is important.

A 70 percent of a working diagnosis comes from the history. 10 percent comes from the physical exam, that's 80 percent. The remainder 20 percent comes from other diagnostic studies, such as x-rays, CAT scans, MRIs.

So a doctor can make a diagnosis only just by history alone. To give you two examples.

If a patient is an 50 year old male and complains of chest pain and the chest pain is crushing, subexternal, until proven otherwise, that's a heart attack waiting to happen. You admit the patient and you do all the tests to see if, in fact, there was a heart attack or no heart attack.

Second example. Any young patient under 45 years of age complains of right lower quadrant abdominal pain. Until proven otherwise, you admit the patient to the hospital, you rule out on appendicitis. If you don't do this, you have committed malpractice, an a departure.

So a history is very, very important.

Q Okay.

Can you please explain any medical diagnosis or terminology that you are going to need in explaining the patient's condition and please let me do if you need any demonstrative charts.

MS. MARINO: Objection.

THE COURT: You have to repeat-the question. I had trouble hearing you.

MR. OGEN: Okay.

Q Please explain any medical terminology that you are going to need in order to explain the patient's condition.

THE COURT: Oh, no, let's wait until we get to it.

MR. OGEN: Okay.

Q Are you going to need any demonstrative --

THE COURT: Let's wait until we get to it.

A I --

THE COURT: Hold it a second.

Q What were your findings of Ms. Pett?

A Yes.

The right hip was tender to touch. There was a long curvilinear scar, that means it was curved and the range of motion of the hip was diminished. It was only two-thirds normal range of motion.

The muscle power testing of the right hip was three grades weaker than normal. It was four minus over five. Normally it's five over five. Next it is five minus over five. Next it is four plus over five. Next is four or four minus over five.

So her hip, there was weakness. And there was a loss of sensation in the right lateral thigh and her gait was slow and antalgic. She walked with a limp.

Q Do you need a diagram to explain her condition further?

MS. MARINO: Objection, your Honor, no foundation for this.

THE COURT: Is there any aid that you brought with you to assist the jury?

THE WITNESS: Yes, Judge, I was going to mention my diagnosis and then use the models to explain it.

THE COURT: All right.

Are you going to be using the light box?

THE WITNESS: Yes, Judge.

Q Please explain your diagnosis.

A My diagnosis was status post, means the condition after, fracture of the femoral neck, I will show you what that is by way of x-rays and by way of models.

Status post right hip arthroplasty on October of 1997. Status post multiple dislocations of the right hip --

MS. MARINO: Your Honor, it appears to me the doctor is reading from a document that is not in evidence. I would ask that the Court please ask the doctor --

THE COURT: Is that the hospital records you are reading from?

THE WITNESS: It's a summary.

MR. OGEN: That is the x-ray report --

THE COURT: If you need to refresh your recollection, you may refer to that.

THE WITNESS: Yes.

MR. OGEN: The x-ray report we provided to them in the expert disclosure.

THE COURT: All right.

Continue.

A Status post multiple dislocations of the right hip. Permanent scarring to the right hip. Internal derangement of the right hip. Internal derangement of the lumbar spine. Status post celitis of the right leg when she was in the hospital.

Rule out lumbar disk bulge versus herniation. And reactive anxiety and depression.

Q Do you have an opinion with a reasonable degree of medical certainty that these injuries were related to her accident on October 27, 1997?

A Yes, sir, I do have an opinion.

Q And what is your opinion?

A That the answer is yes.

Q Please tell us why.

A Well, the patient went to the hospital. By history she never had any fractures to her right hip. And I have x-rays of prior hip x-rays never showing any fractures.

She goes into the hospital, the hospital records confirm. She was lifted up, aided and taken for x-rays. The x-rays show a fracture of the femoral neck. She required admission. -She required surgery. She had multiple dislocations of the right hip. The records again indicated, the x-rays indicated.

And based on the history, the physical exam, the review of past medical records, it all is confirmatory that the accident was the competent producing cause of the patients problems.

Q And do you consider her injuries to be permanent?

A Yes, sir, they are permanent.

Q Why do you say that?

A Many reasons.

First of all, in the medical field, anything that lasts for more than one year is considered permanent. Number one. She has permanent scarring of her right hip.

Number two, she has weakness of the right hip. This is now approximately four years after. So anything that lasts after one year is considered permanent, four years is most definitely considered permanent.

She still has range of motion deficits in the right hip and weak muscle power. She still walks with an altered gait, which is affecting her lower back.

All these problems put together confirms the causation.

Q And what is your prognosis for the future for Ms. Pett?

A Prognosis means future outcome. She's left with a permanent partial disability. She's not totally disabled but she's permanently and partially disabled. And she's going to need future medical evaluations, expenses, treatments, physical therapy.

Q And do you have an opinion with a reasonable degree of medical certainty as to whether her medical condition is subject to being exacerbated or to secure again?

A Yes, sir.

Q What is that opinion?

A First of all, laws of physics. We know that cold contracts, makes a joint stiff. Heat expands, makes a joint less stiff. So the extremes of temperatures will have a role to play.

Lack of proper exercise, lack of proper walking will cause further atrophy or loss of muscle power to those muscles. And she's fearful of walking because she's afraid that she may fall again and re-dislocate the hip.

So as a result she doesn't walk, she stays fearful and tries to minimize her walking and as a result the muscles that are made weak, don't get a chance to get stronger. So it becomes a vicious cycle.

And also as time goes on, the hip replacement wears out. A hip replacement average life-span is anywhere between seven years to twelve years, average about ten. So every ten years she needs a new hip replacement, and a revision.

And once you dislocate the hip once, the chances of repeat dislocations are very, very high, because the hip falls out of it's track. Once a toy derails, one of those toy trains and the rail is bent or it's off it's track, it can re-fall off. Same analogy.

So once the hip socket, again I have the pictures I will show you, falls out of its track, the chance goes of re-dislocation is very, very high, repeat dislocations.

Q Once you have had three repeat dislocations are the chances even higher?

A Yes. Once you have multiple dislocations of three or more, the chances of further repeat dislocations can remains high.

Q Did you further discuss the condition using x-rays -- withdrawn.

Did you review any x-rays in preparation for today's testimony?

A Yes, sir.

MS. MARINO: May I see them?

THE COURT: While the lawyers are looking at these x-rays, I forgot to mention, I was just handed a note to remind me, that because there's going to be a Court program, special Court program also tomorrow, Thursday, at noon, there will be a longer lunch hour than usual. We will be breaking at 12:00 until 2:00 instead of 1:00 to 2:00 and it all relates to the incident of September.

MR. OGEN: With the Court's permission, may I approach the witness and show him the shadowbox?

THE COURT: Yes.

Q Dr. Guy, if you wouldn't mind stepping down so you can demonstrate to the jury some things.

CONT'D DIRECT EXAMINATION

BY MR. OGEN:

(X-ray film placed on shadow box.)

Q Dr. Guy, is this one of the x-rays that you examined?

A (Nodding.)

May I begin?

Q Yes, please.

A This is an x-ray of the patient taken in 1988, approximately nine years before this accident. This is the left hip. It's designated left. This is the right hip. This is the femur, the long bone that goes from the leg into the hip socket. This is the head of the femur. This is the femoral neck, okay. This is the greater trochanter. This is the lesser trochanter.

As you can see, the neck of the femur is approximately this long (indicating). The fracture was right along this femoral neck. Once you have a fracture along this area (indicating), along the femoral neck, on an x-ray you see the neck missing. So this is a normal x-ray. Now I will show you the x-rays when the hip broke.

(X-ray film placed on shadow box.)

This is the x-ray of Gertrude Pett - her name is here (indicating) - taken on October 27, 1997. This is the right side. This is the femur. This is the hip socket. This is the head of the femur.

As can you see, there's a crack or a breakage right along this area (indicating). This is the femoral neck. Okay?

Another film.

(X-ray film placed on shadow box.)

This again is the right side. This is the left side. On the left side you can clearly see the neck. Here (indicating) the neck is sort of impacted. You've lost it. And here's the fracture line (indicating).

There's two other films.

Q Yeah, did you review any films that show the hip postsurgery?

A Yes, sir.

(X-ray film placed on shadow box.)

This. is the hip replacement device. Whenever they do hip replacement, whether the joint is completely worn out or you have a bad fracture, you do a hip replacement. This is a metal-object, a metal rod with a shaft. This is the artificial metallic femoral neck right here (indicating). This is the ball and socket (indicating). This is the artificial or the metallic head of the femur sitting in the socket. So this is the surgical procedure that was performed on October 29, 1999.

MR. WENICK: '97.

Q 1997.

A I'm sorry, '97.

(X-ray film placed on shadow box.)

This is another view that shows how this ball and socket, it has been secured. It's secured with screws and cement. As a result, over time, wear and tear, the screw loosens, the cement loosens and this can break and this ball and socket can slip out of place very easily; from a fall, from extreme range of motion. Bring your hip too high or bend the hip too far out, you can pull it out of its socket.

Q Thank you.

A Okay.

(Witness resumes the stand.)

Q Dr. Guy, in order to explain the procedure that Miss Pett went through, would you need the assistance of a demonstrative aid?

A Yes. There's a diagram that shows that procedure also.

MS MARINO: I'm going to object, your Honor, to this witness' competence to describe the procedure.

THE COURT: If I understood you, of course it's the jury's recollection that controls so correct me, I thought I heard you say that you had assisted in hundreds and treated thousands afterwards?

THE WITNESS: Yes, Judge, that is correct.

THE COURT: Overruled. Overruled.

Q I'm going to show you what has been previously marked for identification as Plaintiff's Exhibit 3. If you need to step down, please step down.

(Witness steps down into well of the courtroom.)

Please describe for the jury the procedure.

A This is the femur. This is the tibia. This is the fibula. This is the hip socket. This is the femoral neck and this is the femoral head inside the hip socket (indicating).

When you have a breakage of the femoral neck you cannot attach this bone with this hip socket. So you have to do something artificial. So this is the artificial means, the hip replacement.

The way this procedure is done, you cut the portion off here (indicating) and you insert this metallic device. Nowadays it's made up of titanium. It's a very light metallic alloy and it lasts longer than steel. And this is the artificial or the metallic hip socket. This is the ball, this is the socket and this is the artificial or the metallic femoral neck (indicating).

So by way of this device, the patient is now able to stand and ambulate and have a range of motion significantly decreased.

Q Thank you very much, Doctor.

One last question. Does this diagram accurately depict the procedure that Miss Pett went through for her total hip replacement?

A Briefly, yes.

MR. OGEN: I'd like for this to be admitted into evidence as Plaintiff's Exhibit 3.

MS. MARINO: Objection. I'm going to object. There's a lot of extraneous matter on that particular diagram. There's been no testimony that this particular prosthetic device that's indicated in that photograph --

THE COURT: Is that the same one, same type?

THE WITNESS: It's very similar, Judge. Instead of the screws being on the bottom there, the screws are placed higher for security and stability, but it's very similar.

THE COURT: Are you offering this as an aid to the jury rather than a document in evidence?

MR. OGEN: Yes.

THE COURT: All right. We'll treat it that way.

MR. OGEN: Thank you.

(Witness resumes the stand.)

Q Dr. Guy, did you also review any medical records in preparation of today's testimony?

A Yes, sir.

Q I'm going to show you part of what has been previously admitted into evidence as Plaintiff's Exhibit 2 and Plaintiff's Exhibit 4 and ask you --

MR. OGEN: May I approach, your Honor?

Q -- and ask you to take a look at it and let me know if you've seen these documents before.

A Yes, sir.

Q What do you note those documents to be?

A These are the entire medical records from the Beth Israel Medical Center.

Q And could you review for the jury very briefly some of the pertinent information that's in those medical records?

A Yes, sir.

I'm going in the order that these were kept in. There is a discharge summary from Beth Israel Medical Center dated October 31st, 1997 indicating a diagnosis: “Right femoral neck fracture.”

Next line is indicating what procedure was performed. It states: “Right total hip arthroplasty.”

Arthroplasty is another name for hip replacement. That was performed on October 29, 1997.

Next note indicates the brief history. “61-year-old deaf white female complaining of right hip pain after a fall.”

And the diagnosis section: “The x-rays reveal a right femoral neck fracture. Patient was admitted to the hospital.”

There's another note here. It states: “Orthopedic history.”

“Chief complaint: “Right hip pain status post fall.”

Past medical history states: “60-year-old deaf white female slipped on water” --

MS. MARINO: Objection, your Honor. He's reading -- this witness is reading hearsay included in medical records.

THE COURT: Are these certified medical records in evidence?

MR. OGEN: Yes.

MS. MARINO: That's certainly true, your Honor, however portions regarding causation -- portions involving the causation of her alleged slip and fall are still hearsay to the extent that there's no basis for the writer to have made --

THE COURT: Do you know who wrote whatever it is you're reading from?

THE WITNESS: The orthopedic residents from the hospital.

THE COURT: And are these things that you would have relied on in forming your opinion that you're giving us here today?

THE WITNESS: Yes, Judge.

THE COURT: I'll allow it.

Q Please continue.

A As I was saying: “Patient slipped on water in hospital. Sustained fall. Complains of right hip pain.” So on and so forth.

Next note.

MS. MARINO: Your Honor, let me take a brief opportunity so that we can--THE

THE COURT: I realize you have a cold but the reporter doesn't hear you, I don't hear you and I don't know about the jury; I don't think the interpreter can hear you.

THE INTERPRETER: No, I can't.

MS. MARINO: May we take just a brief couple of minutes so I can see what order Dr. Guy has his records in? I'm at a distinct disadvantage in-not being able to flip through the pages as easily as he is.

THE COURT: Well, I'll have to ask the jury to step out, I'm sorry.

Please do not discuss the case.

MR. OGEN: He's just reading from some of the medical records in there. I don't see why -- I mean, it's in the same order that they got them. That's the way the hospital sent them.

THE COURT: I'll give them a couple of minutes.

MR. OGEN: Okay.

(Whereupon, the jury exits the courtroom.)

(Recess taken.)

(Witness resumes the stand.)

THE CLERK: Jury's entering.

(Whereupon, the jury enters the courtroom.)

(Sidebar conference off the record.)

THE COURT: Okay. Continuing.

You've had enough time to review whatever you needed to review?

MS. MARINO: Your Honor, I had sufficient time to put my chart in appropriate order.

THE COURT: Very good. Okay, okay.

MS. MARINO: So if the Doctor could just give the dates and the name of the document he's looking at, that would be very helpful.

CONT'D EXAMINATION

BY MR. OGEN:

Q Dr.-Guy, please continue.

A May I continue?

Q Please.

A The next hospital note is dated October 27, 1997. It states: “61-year-old female with right hip and femur pain after slipping and falling directly on to right hip.”

Next note: It states “Resident Note” on top. I do not see a date on this note.

It states: “Called to the 7th floor to assist person falling on floor. Told that the patient slipped on the floor. Patient complains of pain in the right hip. Transferred to a long board and a gurney to the emergency room with a nurset transport.”

Next, I'm looking at an operative report dated October 29, 1997. It states the pre-op and the postoperative diagnosis being fracture of the right femoral neck.

“Operation: Right total hip arthroplasty.” Estimated blood loss: 250 cc's.”

It's about a pint of blood.

Next note, I'm reading the date is September 30, 1998. It states: “61-year-old female complaining of a three-to-four day history of right hip pain.”

It states that, “Patient has had incontinence of bowel and bladder intermittently for one week.”

Next note is dated -- I can't read the date. The note states: “63-year-old hearing impaired female seen here twice so far. Complains of cough.”

Next note. “63-year-old female complaining of right hip pain after falling at home today. Patient was coughing a lot and sat down. Complained of right hip pain. Unable to walk. Yelled ‘help’ ”

Q Is there a date on that, Dr. Guy?

A The date, from all the photocopying, is missing. This is in reference to her second hip dislocation. On the bottom it says: “Right hip dislocation.”

Next note is dated December 8, 1999. It states: “Fell at home. Pain in the right hip. Was sitting on the floor at the scene. Could not get up.”

And the next page, same date. It states: “Relocation of the hip by orthopedics.”

Next note again is dated December 8, 1999. “Diagnosis: Right hip dislocation.”

It states: “Right posterior hip dislocation.”

(Whereupon, Barry Infeld relieved Vicki Glover as official court reporter.)

A Next note is the physical therapy notes dated 11/4/97. It states the patient is getting physical therapy. She's getting transfer training, sitting training, ambulation training. She's able to walk 60 feet twice with partial weight bearing and close contact guarding and verbal cues.

Next page is dated-- has multiple dates. It shows the patient's blood count of October 31, 1997, her hemoglobin was 9.16, normally it's 12 to 16, indicating she had significant blood loss.

Her hematocrit is 28.9, normally is 36 to 46, again indicating she has had severe blood loss.

And on subsequent dates, 11/1, 11/6, 11/2 it shows the blood count is slowly creeping up, but as of 11/12/97 it's still significantly low.

Next note is dated 10/3 1/97. It says admit through three Karpas, K-A-R-P-A-S rehab floor. It indicates the patient's medications.

The patient was taking Percocet for pain, a strong narcotics as well as iron supplementation for her blood loss.

Next page is a note dated 11/8/97, it's a doctor's order for pain medications, Percocet, 1 to 2 tablets every four hours as needed for pain.

Next note is the physical therapy orthopedic assessment, the diagnosis is status post right total hip replacement after falling and slipping on a wet floor.

MS. MARINO: I'm sorry, was there a date on that particular note?

THE COURT: What's that?

MS. MARINO: Was there a date on that particular document?

THE COURT: I don't know what you are saying.

MS. MARINO: Is there a date on that document, Judge?

THE COURT: You know you have the whole file. We are trying to get this doctor out of here by one o'clock, so every interruption you ask for another little thing. I gave you a recess so you could get the file in order.

Please do not interrupt the proceedings where you don't really have an objection to make.

MS. MARINO: Judge, I'm sorry. I just asked that the doctor please identify the date and the document before he read it that's all.

I'm sorry.

THE COURT: Please carry on.

A The date on the page is 10/29/97. At the top of the page it states physical therapy, orthopedic assessment.

Next document is the Beth Israel admitting sheet March 7, 1999. This is regarding the first hip dislocation.

Next is the hospital admitting and discharge summary diagnosis dated, admission date 3/7/99, discharge date 3/9/99.

Principal diagnosis: Right hip dislocation. Status post right total hip arthroplasty. Surgical procedures performed, closed reduction of the right hip under conscious sedation. That means the patient was awake when they put the hip back in socket. Next note is dated March 8, 1999. It states the patient is status post hip closed reduction, status post dislocation.

Next note is dated December 28, 2000. It states neighbor heard patient fall and fall out. Patient complaining of right hip pain. Objective exam. Shortening but no external rotation, positive pulse.

Next note. It is dated 10/17/2001. It states reduction of dislocated right hip. This is the third reduction of the right hip.

Q Sorry, what was the date on that?

A December 28, 2000.

Next note is dated -- again, I can't see the date. It is so eligible.

It states: 64 year old female tripped on the carpet and fell. Hit her right hip region. No head trauma, no loss of consciousness. Patient was on the floor for half hour prior to EMS coming.

Next note is dated December 28, 2000, it's the Beth Israel medication sheet. There's an order of fentanyl, 150 micrograms intravenous push. Fentanyl is a very, very strong painkiller, stronger than morphine. It's a synthetic morphine.

Next note is a date of December 28, 2000, morphine sulfate, four milligrams, IV push slowly. Morphine again is a very small painkiller.

Next note, fentanyl, 100 milligrams, I very burn, that's a strong killer again.

Next note is a note from the orthopedic service emergency room department dated -- again, I can't read the date, it's illegible. It states dislocation of the right hip. Orthopedic surgery located the hip in the emergency room.

Patient wearing a brace.

Next note is a note dated December 28, 2000, orthopedics note. It states that the patient is three years status post right total hip replacement and this is the second episode of dislocation. The first one was also caused by tripping. And they performed a closed reduction of the right hip.

That's basically it.

Q Thank you very much.

Now, having reviewed all these medical records and having reviewed the x-rays and having examined the patient yourself, do you have an opinion with a reasonable degree of medical certainty as to the effect that these injuries have had on Ms. Pett's overall condition?

A Yes.

Q What is that opinion?

A Well, multiple effects on the patient's condition.

First, once you fall and dislocate the hip, it's very painful. And having had a prior fall and having the hip requiring surgery and now the second time it happened, you become very fearful. You question yourself, you question your strength, you question your ability, you question the terrain which you are walking on and it leads to reactive anxiety. The anxiety is caused by the fear of falling and re-disclocating the hip.

So as a result the patient holds herself in a reflexed posture to prevent falling. That alters the normal gait pattern the way a patient walks. It alters the normal biomechanics and a normal alignment of the spine and the hips.

As a result, the patient walks unevenly and she also was found to have a leg discrepancy on more than one occasion. It means that the hip is rotated, so the patient is either walking unevenly or walking with a hip rotated. This is a form of a compensatory mechanism to compensate for the problem that she has.

And also the patient still has weak hip muscles. Once you cut the muscles to do surgery, the muscle fibers do not become completely reattached. They heal with permanent scarring and it heals with atrophy.

Atrophy means the loss of muscle size, so you are always going to have weakness. Once you have atrophy, the vast majority of patients never recuperate from that atrophy, especially once they have had two and three further dislocations.

So once you have atrophy, once you have cutting of the muscle fibers, once you don't exercise properly, it leads to continuous loss of muscle power.

Q So, Dr. Guy, let me ask you this:

If someone would say that the muscle has healed completely and that her muscle power has returned to normal, would you agree or disagree with that?

A I would say I respectfully disagree. It makes no sense in the medical context.

Q Now, having reviewed all the medical records and with your experience and background, do you have an opinion as to what is the reasonable value of the medical expenses that Ms. Pett has had to incur to date?

A I had a chance to look at the hospital records and review the certified hospital bills and I did a brief --

MS. MARINO: Objection.

THE COURT: What is the objection?

MS. MARINO: Objection with regard to foundation of the medical paying of the bills.

THE COURT: We have had this discussion before the jury came in. I don't know why you are returning to that. There was an agreement amongst all the lawyers about how that would be handled, so don't waste time.

Q Continue.

A Yes, it was approximately $80,000. That does not include the doctor's office and/or hospital visits.

Q And do you have an opinion as to what types of medical treatment Ms. Pett will need in the future?

A Yes, sir.

Q What is that opinion?

A Since she's left with a permanent partial disability, she will require periodic medical supervision. She will need to see at least a physiatrist at least once per month and the proximate cost of that visit would be $100.

She would need to see an orthopedic surgeon at least, at least four times per year. The visit is $100.

Repeat annual x-rays to make sure the hip and the socket are properly aligned. That will cost approximately $150.

She's going to need physical therapy for the rest of her life because as she becomes sedentary and doesn't walk around, the muscles will continue to weaken. Minimal would be 20 to 30 physical therapy sessions per year at a cost -- $100 per session.

The hip replacement lasts approximately ten years. She's going to need another hip replacement in ten years, that will cost $15,000 just for the hip replacement alone.

And then she will need physical therapy three times per week for the six months at a cost of $100 per session. I believe that cost would be something like seven to $8,000.

She's going to have at least one hip dislocation once every other year, at least, based on her history. And the costs associated with that, with the hospital stay, x-rays, the doctors' exams and everything is approximately $5,000.

She requires a hospital stay after each hip replacement or closed reduction. It's seven to $800 per day per hospital stay.

And periodic pain medications for pain and inflammation and transportation to and from a doctor's office, preferably by an ambulette, because she's unsafe to travel on her own in the city streets because of the fear of recurring fall and dislocations. Ambulettes charge $75 for each way, a round trip would be $150.

Q And how about MRIs and x-rays?

A For her lower back she needs a CAT scan or MRI. The proximate cost for CAT scan is $500. An MRI is $900.

She is also going to need an EMG for the lower back to see-why she has that shooting pain down the right leg and the sensory deficit in the right lateral thigh. The cost for an MRI is approximately $1,200.

Q And the medical expenses that you mentioned, that would be for the rest of her life?

A That is correct.

Q Thank you very much.

A You are welcome.

MS. MARINO: Your Honor, may I have an opportunity to review the doctor's file?

MR. OGEN: Objection.

THE COURT: Are you talking about --

MS. MARINO: His own file.

THE COURT: Yes.

MR. OGEN: May I just take a look at that file?

THE COURT: I don't know why all these things don't happen at nine o'clock in the morning.

CROSS-EXAMINATION

BY MS. MARINO:

Q Doctor, you testified on direct that you testified in court on prior occasions?

A That's correct, ma'am.

Q About how many times have you testified in court?

A I believe I said approximately 110 to 120 times. It could be slightly less or slightly more.

Q Is that within 15 years, ten years, five years?

A Fifteen years.

Q And on many of these court appearances you were asked by plaintiffs to testify as an expert in their behalf, is that correct?

A On the patients that I treated, yes.

Q Have you ever testified in a case where the individual you are testifying for was not your patient?

A That is correct, yes.

Q Okay.

And approximately what percentage of the testimony that you give as an expert based on individuals who were not your patients?

A Very few. The vast majority are my patients.

Q What percentage?

A If I had to pick a percentage, I would say one percent, two percent, maybe less.

Q Do you consider Gertrude Pett a patient?

A No. If she sees me again and follows my advice, then she will be a patient. She was seen once for the purpose of evaluation for disability and impairment.

Q Of the times that you testified in court, have there been other times that you were asked to testify but didn't have to go and testify?

A On very rare small occasions.

Q So most of the testimony that you have given, which is 110 to 120 times in court over a 15 year period, that has been -- you haven't reviewed the case for the purpose of trial first?

A No, no, no. Let me make the record clear.

The vast majority of those people who I testify for are actual patients that I had treated for numerous years or months.

Q Were you contacted by plaintiff's attorney in connection with this case?

A On Gertrude Pett?

Q Yes.

A Yes.

Q Were you contacted by letter or by telephone?

A By telephone.

Q Do you have any notes of the conversation that you had with plaintiff's attorney?

A I do not.

MR. OGEN: Objection.

THE COURT: You have the file there.

He already said he was introduced by the patient through counsel.

MS. MARINO: I understand that. I want to find out if there were any notes of the conversation.

THE COURT: You have the file in front of you.

MS. MARINO: No, I gave it back to him.

THE COURT: You have it.

MS. MARINO: I'll withdraw the question, your Honor.

Q The file that you have in front of you right now comprises everything that you have on-this case that you relied upon in forming your opinions and giving your testimony today?

A Yes.

Q There are no other documents that you relied upon in connection with your testimony today?

A No.

Q Did you at any time make any notes when you went through and digested your records?

A No, I made no notes.

Q Did you make any personal notes or jottings when you examined Ms. Pett?

A No, I dictated the report and I have the report in my possession.

Q You didn't make any handwritten notes?

A It was dictated simultaneously with the first evaluation.

Q Okay.

Doctor --

THE COURT: Do you have a question?

MS. MARINO: Yes, I do, your Honor.

Just a moment. I'm trying to go through my papers here.

Q Do you recall, Doctor, testifying in a case of Jennifer Davies and Eugena Kramer sometime in 1997 in the Supreme Court?

MR. OGEN: Objection.

THE COURT: Overruled.

A Yes, I do remember.

Q Okay.

Was Ms. Davies your patient?

A Yes.

Q And for how long was she your patient?

A Three years.

Q Were you paid for testifying for Ms. Davies?

A If you ask me if I got compensation for my time, yes. I didn't do it for free.

Q How much did you charge to testify?

A Same fee.

Q That would be $3,000 -- that is a day in Court or $3,000?

THE COURT: The way we are going now will be a week. Please, let's get this going.

Q May I have an answer.

A Same as today.

Q $3,000 for half a day?

A $3,000 for half a day.

THE COURT: Which is why I'm trying to get this doctor out of here by one o'clock.

Next question.

Q Do you recall your conversation with plaintiff's attorney when he retained you to represent the plaintiff?

MR. OGEN: Objection.

THE COURT: Sustained.

Q What did plaintiff's attorney tell you with regard to what you would be reviewing?

MR. OGEN: Objection.

THE COURT: What's the objection?

MR. OGEN: Hearsay, work product.

THE COURT: Well, the thing is we are not going to make you a witness here. Maybe you can amend that question.

Q What, if anything, did Mr. Ogen tell you you would be examining plaintiff for?

MR. OGEN: Objection.

THE COURT: Did there come a time at the very beginning of your involvement with this case that you were aware that this patient had sustained a broken hip and hip replacement?

THE WITNESS: Yes, Judge.

Q Did Mr. Ogen tell you to evaluate this patient for anything other than hip?

MR. OGEN: Objection.

THE COURT: What did you understand to be the purpose of your examination?

THE WITNESS: This was the essence of my conversation with Mr. Ogen that I recall.

He called me, asked me if I would be interested in doing a disability and impairment evaluation on this patient, that is deaf mute that had sustained a hip fracture, that has had three dislocations and has had surgery.

He wanted me for the purpose of disability and evaluation, review her medical records and render a report.

Q Did you discuss payment with him at that time?

A Discuss payment, no.

Q When was this?

A This was sometime at the end -- middle of June, end of June.

Q Based upon that, did you schedule an appointment with the plaintiff?

A That was done through my office. Somebody called and made an appointment and the patient came, I got the records and I made the evaluation.

Q Did you get the records before you did the evaluation or after the evaluation?

A The records were there when the patient was there.

Q Had you had the opportunity to go through the records when you did the-evaluation on the plaintiff?

A Yes, I had some of the records, not all the records on the initial evaluation.

Q Which of the records did you have?

A They are right here in my possession.

Q So what are the dates of the records that you have?

A They are basically summaries. They are in my report, the report of July 2, 2001. Whatever I reviewed is in that report.

Q Doctor, you testified that you rendered a report here?

A Yes.

Q You rendered that report concerning your examination-of the plaintiff?

A Yes, that's correct.

Q Do you have an independent recollection of that examination without looking at your records?

A I do have an independent --

Q Close your file and testify from that independent recollection.

A Yes.

Q Who was with plaintiff when she came with her examination?

A Marc Chanti. He was standing right in-the back.

Q Where was that held?

A In my office at 7 Gramercy Park.

Q Do you remember -- did you have an opportunity to who at a clock or watch to make a determination as to when that examination began?

A No, that's not something that I normally do.

Q So that you wouldn't know when it ended either, is that correct?

A No, that is correct.

Q Did you examine her in the examining room?

A Yes.

Q Did you ask her to remove her clothes?

A I gave her a gown and asked Mr. Chanti to leave.

Q Mr. Chanti was not present when you did the examination?

A Yes, he was.

Q Okay.

Was he present after she put the gown back on?

A Here's what happened. She came in --

Q No, no, I'll go step-by-step.

THE COURT: In other words, was -- did she have some sort of a tie or rope on her when he was there?

THE WITNESS: She had the gown.

Q The examination was done in Mr. Chanti's presence?

A Yes, because I needed him to communicate with the patient.

Q Did you have any communication via handwriting with the patient?

A No.

Q When was the last time you testified in any kind of Court or administrative proceedings?

A Approximately three, four weeks ago, if my memory serves me correctly.

Q And what was the context of that?

A The context of it?

Q What was the administrative tribunal, was it in the Supreme Court?

MR. OGEN: Objection.

THE COURT: I didn't understand the question. Prior to this case?

MS. MARINO: Yes, prior to this case.

Q When was the last time you gave testimony prior to this case?

MR. OGEN: Objection.

THE COURT: In some other case?

MS. MARINO: Yes.

MR. OGEN: He already said three, four weeks ago.

THE COURT: Yes.

Move on.

MS. MARINO: I'm just asking whether it was in Court for plaintiff --

THE COURT: What difference does it make?

MS. MARINO: Judge, it makes a lot of difference.

THE COURT: It does?

MS. MARINO: Yes.

Q The file you brought with you today is a total and complete file that you reviewed for Ms. Pett in connection with giving testimony today?

MR. OGEN: Objection, asked and answered.

THE COURT: Sustained.

Ask a new question.

Q In your review of those Beth Israel records, did you come across any records that relate to the 1988 hip x-ray that you displayed previously?

A No.

Q So there is no record that goes along with that 1988 x-ray?

A I did not see. If it exists, I could cannot find it, I did not see it.

Q So you don't know why she was x-rayed in 1988?

A That is correct, I do not know.

Q You don't know if she was x-rayed in 1988 because she had complaints of pain or any or problems in her hip?

A I simply don't know.

MR. OGEN: Objection, foundation.

THE COURT: Sustained.

Q Doctor, when you did the report, you said you did this contemporaneously with your examination?

A Correct.

Q Were you dictating while you were examining her?

A No. The way it works, I take the history and I examine the patient. I dictate it when the patient goes. Sometimes I have a lot of scrap sheets of notes, I scribble stuff on it. Once I dictate it, the scribble sheets, I get rid of it and that's it.

Q You don't know if you had any scribble sheets on this?

A I don't remember.

Q Everything that you did, which you might have put on scribble sheets, you put into this report, is that correct?

A Yes. This report includes the history and my examination.

Q Okay.

Whatever findings you made were included in this report?

A That's right.

Q The information given to you would be in this report as well?

A Yes.

Q This is a complete report?

A Yes.

Q And when you were preparing this report, did you prepare it knowing that Ms. Pett was involved in a personal injury action with Beth Israel Medical Center?

A Yes.

Q You knew there was litigation involved that you could potentially be asked to testify as a medical expert for Ms. Pett, is that correct?

MR. OGEN: Objection.

THE COURT: I didn't hear the question.

MS. MARINO: Could you read it back?

(Whereupon, the requested question was read back by the Reporter.)

MR. OGEN: Objection, we have had this already.

THE COURT: Yes, sustained, we know he was called by a lawyer.

CONT'D CROSS-EXAMINATION

BY MS. MARINO:

Q What was the first thing you did in connection with your physical examination of Miss Pett? Other than take the history, the physical examination of Miss Pett?

A It's right there in my notes. The first thing I did was took her vital signs; blood pressure --

Q Doctor, I'm asking you to testify now from your independent recollection.

THE COURT: Is this something you always do?

THE WITNESS:. Yes.

THE COURT: You always take vital signs?

THE WITNESS: Yes.

THE COURT: So you did the same thing in this case, right?

THE WITNESS: Yes.

THE COURT: Next question.

Q And when you checked her blood pressure and her pulse, was it normal?

A Yes.

Q Okay. What else did you do?

A I examined the areas of her chief complaint. Then I did range of motion, a muscle power testing, a neurological examination, a gait analysis.

THE COURT: Next question.

Q Is there anything else that you did?

A May I be allowed to look through my notes?

Q If you need to refresh your recollection, that's fine.

THE COURT: All right. Tell us every single thing you did.

THE WITNESS: Okay.

I took her vital signs; blood pressure, pulse, respiration. I examined her head, ear, nose and throat. I examined the lungs, the heart. I examined the extremities. I examined the neck. I examined the back.

I did a straight leg raising test. I examined the right hip. I did range of motion and muscle power testing. I checked for sensation, for reflexes and her gait. That's it.

MS. MARINO: Judge, if I may, one moment.

THE COURT: What's that? I don't hear you.

MS. MARINO: I'm sorry, Judge. If I may just have a moment to organize my documents. This podium is very small.

THE COURT: I am stressing this because I want this doctor finished by 1:00. I don't want to find-out that he has to come back this afternoon.

Q Doctor, let's talk about the straight leg raise test that you performed on plaintiff.

A Okay.

Q How did you perform that straight leg raise test? Was she lying down, standing up?

A Lay the patient on the table and very gently and slowly lifted up the leg.

Q Did you lift it yourself or did she lift it?

A I lifted it myself.

Q Was the leg completely straight at that time?

A Yes.

Q It wasn't bent in any area or anything like that?

A No.

Q What was the significance of that test? Why did you perform that particular test on her?

A Because the patient complained to me of lower back pain. If you have an abnormal straight leg raising test, it can be indicative of damage to the nerve roots in the lower back or the disks or a combination of both.

Q Did you perform any other testing to determine whether there were any neurological problems in her back?

A Yes.

Q What tests did you perform?

A Muscle power testing and a sensory exam and it indicated that there might be a possibility of a neurological compromise stemming from her back.

Q Doctor, what is a toe extensor?

A A toe extensor?

Q Toe extensor.

A That's a muscle that controls toe extension.

Q Did you do a toe extensor test?

A I checked all the muscle groups. That was normal.

Q Does the toe extensor, Judge -- I'm so sorry.

Does the toe extensor, Doctor, relate to any level in the lumbar spine?

A In itself alone? No. It can. If you have weakness of a toe extensor, it means there's nerve damage either locally or stemming from the lumbar spine because all the nerves that go to your legs originate in the lower back.

So if you ask me the question does a weakness of a toe extensor in itself indicate a pathology in the lumbar spine in itself, no. Toe extensor checks the L5 and/or the L5-S1 nerve root.

Q And you performed that?

A That was normal, yes.

Q So that would indicate that L5-S1 is normal; is that correct?

A Clinically, yes.

Q Clinically. Where are L5 and S1 located?

A In the lower back or in the legs.

Q Indicate for the jury where L5 and S1 is located in the spine.

THE COURT: Well, do you have some way for him to do it? Did you bring a model of a spine for that purpose?

MS. MARINO: Well, I do have a Netter book that we can use.

THE COURT: I don't know what you have, but how can the doctor point it out without some demonstrative tool?

Q Perhaps, Doctor, you can describe.

THE COURT: Okay. Describe it.

THE WITNESS: May I stand, Judge?

THE COURT: Don't use yourself.

A book won't help because it's too small. The jury can't see it.

MS. MARINO: Okay.

Q Doctor, you indicated that there could be some defect in the plaintiff's lumbosacral area; is that correct?

A Yes.

Q According to your diagnosis, you diagnosed a potential -- a possible condition in her lumbosacral spine; is that correct?

A That is correct.

Q What is the lumbosacral spine made up of? What constitutes -- what levels constitute the lumbosacral spine?

A L1 through S1.

Q And L5 was normal and S1 was normal based upon your clinical findings; is that correct?

A That is correct.

Q Did you perform any knee jerk tests?

A Yes.

Q What were the results of your knee jerk tests?

A Normal.

Q And did you perform an ankle jerk test?

A Yes.

Q Was that normal as well?

A Yes.

Q Now, the ankle jerk-and the knee jerk tests, these are reflex tests; are they not?

A That is correct.

Q This is where you can sit a patient, say for the knee jerk test, on a cot or in a chair of some sort and tap the knee to see if the knee reflexes were normal; is that correct?

A That's correct.

Q And the ankle reflex, how did you do the ankle reflex?

A You can do it two ways. You can do it with the patient sitting on a chair-with their legs dangling. You hit the Achilles tendon and you look for the response. Or you can have the patient kneel on a chair and hit him on the Achilles, or you can have him laying down and you tap on the Achilles.

Q So the knee jerk and the ankle jerk tests indicate -- don't the knee jerk and ankle jerk tests indicate that there is no pathology at L3 and L4 and S1 as well?

A You're absolutely strongly mistaken. That does not rule out such pathology absence.

Q Is it clinically indicative of such absence?

A If you don't have it or if you do have it?

Q If you have a normal knee jerk and a normal ankle jerk, isn't that indicative, indicative clinical finding of a normal L3, L4 and S1?

A The answer is no. You need other criteria. You need muscle power, you need sensory exam, and to confirm it you need an EMG test.

You can have a perfectly normal ankle jerk and still have an L5-S1 radiculopathy. It means the fibers that were affected were the sensory fibers and not the motor fibers.

You can have mixed fibers affected and you can get different clinical findings depending on which fibers are affected.

Q Did you perform an EMG test on Miss Pett?

A I did not.

Q Do you have the equipment, diagnostic equipment in your office to perform an EMG test?

A I do.

Q But you didn't perform one on July 2nd when you saw the plaintiff? Yes or no.

A I did not.

Q You didn't perform it?

A No.

Q You just indicated that there could potentially be a problem with her lumbosacral spine. She could potentially have a radiculopathy there?

A Yes, that is correct. And I indicated what had to be done for it.

Q You never actually made a diagnosis based on any diagnostic tests that you performed?

A Based on a clinical assessment.

Q Okay. So you would -- in order to give an opinion within a reasonable degree of medical certainty, it would be useful for you, would it not, to have an EMG test?

A I'm sorry?

Q It would be useful for you to have an EMG test result in order to make --

MR. OGEN: Objection. Lack of foundation.

THE COURT: Overruled.

A The EMG would confirm the exact level of the injury and shed light as to the severity of the problem. You can also have a clinical diagnosis based on a history and a physical exam. You don't always have to have an EMG. The EMG confirms.

As I indicated, 70 percent of the working diagnosis comes from the history, and 10 percent from the physical exam. The remaining 20 percent is confirmed by objective diagnostic studies.

So to answer your question, I don't always have to have an EMG-to diagnose. The EMG confirms my diagnosis.

Q So Doctor, when you wrote your report did you indicate that the diagnosis was a rule out lumbosacral radiculopathy, or did you write --

A I wrote down rule out lumbosacral radiculopathy, yes.

Q So rule out means I'm not a hundred percent sure. Might be, might not be; I need further information?

A That is correct.

Q I want further information to make that determination, that diagnosis?

A Clinically, that is correct.

Q Within a reasonable degree of medical certainty I need more information?

A That is correct.

Q Doctor, you never examined Miss Pett prior to the July 2nd examination that you testified to?

A I did not.

Q So did you have any -- did you ever have the opportunity to see her walk and to watch her gait pattern prior to the total hip replacement?

MR. OGEN: Objection.

THE COURT: Well, if he didn't see her, he didn't see her walk.

You never saw her before?

THE WITNESS: That is correct.

Q You never saw her before. So you don't know whether she walked quickly before or slowly before; is that correct?

A That is correct.

Q And you don't know whether she walked in any particular way before. You didn't have the opportunity to observe her; is that correct?

A That is correct.

Q Let's go back to the straight leg raise, Doctor. Did you have any concern doing the straight leg raise of a prosthetic hip to 75 degrees?

A First of all, hip flexion to 90 degrees is perfectly safe. As long as you go very, very slowly, you are supporting the leg and you have your hand on the hip socket so it doesn't dislocate, it's very safe. If you don't do it slowly the way I indicated, it might be unsafe.

Q How many times did you raise the leg up?

A Once.

Q Now, you indicated you checked -- you examined her for her range of motion; is that correct?

A For the other joints, yes.

Q Did you do it also for the hip?

A Yes, I did.

Q Did you do it for both hips?

A I did.

Q Now, when you did the range of motion for her hips, what position was her body in?

A I'm sorry?

Q Was she standing? Was she sitting?

A She was sitting.

Q And was this active range of motion testing or passive range of motion testing?

A Passive range of motion.

Q Now, Doctor, you testified previously that everything in your report was correct, and this report essentially --

A No, that's not what I said.

MR. OGEN: Objection.

Q What did you testify to?

MR. OGEN: Objection.

THE COURT: Sustained. Sustained.

Q Did you tell me the report was complete?

THE COURT: Tell you what?

Q Did you testify that the report was complete?

MR. OGEN: Objection.

A My report -

MR. OGEN: She's characterizing his testimony.

THE COURT: Is your report complete?

THE WITNESS: My report is complete. It has two small mistakes in it. Typo errors.

Q Typographical errors?

A Yes. If you'd like to know what they are, I can tell you.

THE COURT: Is there anything else?

MS. MARINO: Yes, of course.

THE COURT: Of course?

MS. MARINO: I'm sorry, yes.

THE COURT: Well, let's go. It is almost 1:00.

Q Doctor, you recommended that plaintiff have some physical therapy at this time; is that correct?

A Yes.

Q And you said she needs continuous physical therapy essentially for the rest of her life?

A As needed, yes.

Q Do you know if she's ever had any prior physical therapy?

A From the hospital records we know she did. She was admitted to Beth Israel. She had physical therapy there, yes.

Q Do you know if she had physical therapy subsequent to the admission at Beth Israel Hospital?

A That I'm not sure about.

Q Do you know if she was given physical therapy by Visiting Nurse Service or any other agency that may have been taking care of her post --

THE COURT: When?

MS. MARINO: Sorry?

THE COURT: When?

Q -- post discharge after the total hip replacement?

MR. OGEN: Objection.

THE COURT: What?

MR. OGEN: Form.

THE COURT: What?

MR. OGEN: Objection to the form of the question.

THE COURT: Well, let's not take time to ask it again.

Is that something you would know?

THE WITNESS: I'm not a hundred percent sure. I recall looking through the notes there was something from a visiting nurse going to her house. This is, again, by memory. I'm not a hundred percent sure.

Q What were the-notes that you were picking through, Doctor?

A These. These here in front of me.

THE COURT: The hospital records.

Q All right, the hospital records.

If there had been physical therapy notes that were post --

THE COURT:. Sustained.

Q If there were other medical records that would indicate that she --

THE COURT: Sustained.

MR. OGEN: Objection.

Q In connection with forming your opinion with regard to whether or not Miss Pett needs additional physical therapy, would it be necessary for you to review prior physical therapy records?

MR. OGEN: Objection.

A No, it would not be.

Q Would you agree that there are hip precautions that are in place after hip surgery, total hip replacement?

A Yes. I believe I mentioned some of them earlier.

Q What are those precautions?

A You don't want to do hip flexion past 90 degrees. You want to avoid abduction past 50 percent range of motion.

Q What is abduction?

A Bringing your legs away from the body.

You want to avoid abduction and you want to avoid the internal and external rotation past 50 percent normal range of motion.

Q Are there any particular activities or any particular positions that would be contraindicated as part of a total hip precaution?

A If you're laying in bed, to crisscross your legs, that's contraindicated.

Q Would sitting in a chair with your knees above your hip replacement be contraindicated?

A Again, if it's under 90 degrees, no. If it goes above 90 degrees, yes.

Q Would crossing your legs be contraindicated, Doctor?

A I believe I just mentioned, if you lay in bed and you cross your legs, yes.

Q What about while seated; is that a problem?

A If you cross your legs above the knee it can be contraindicated. If you cross your legs at the ankle, no, that's fine.

Q Doctor, you're not an orthopedic surgeon; are you?

A I already said I'm not.

Q And you said you were director of Physical Medicine and Rehabilitation at Maimonides; is that correct?

A Yes.

Q Do you supervise other physical medicine and rehab doctors, or do you have orthopedists in your service that you supervise?

A I supervise the doctors in my department.

Q So those would be physical medicine and rehab doctors?

A Yes. I also teach the other house staff.

Q And you also supervise physical therapists?

A While it's being performed directly, no.

Q Would they be under your department?

A Yes, they would be under my department.

Q How about occupational therapists as well?

A Yes.

Q Doctor, when did you perform your last hip replacement surgery?

A The last time I assisted was at Hospital for Joint Diseases. That was during my training at Mt. Sinai.

Q And what year was that?

MR. OGEN: Objection, irrelevant.

THE COURT: I'll allow it.

A I would say sometime in '96 or '97.

Q Would you agree, Doctor, that -- withdrawn.

Do you currently perform any joint replacement surgery, Doctor?

A I do not.

Q Let's go back to- your examination.

THE COURT: Next question, please.

MS. MARINO: It's based upon a piece of paper I've got to get my hands on.

Q Doctor, do you know when Miss Pett last took a trip on public transportation?

A I do not know.

Q Do you know when she last took a trip outside of New York City?

A I do not know.

THE COURT: Sustained.

MR. OGEN: Objection.

THE COURT: These are not medical questions.

Q Based upon your medical testimony and your opinion, is it unsafe for the plaintiff to be traveling on New York City streets?

THE COURT: Sustained.

Q Doctor, do you know when plaintiff last went food shopping for herself?

MR. OGEN: Objection.

THE COURT: Sustained.

Q Do you know -- Doctor, is it your testimony that the tests that you did for range of motion were passive as opposed to active range of motion?

MR. OGEN: Objection, asked and answered --

THE COURT: Sustained.

MR. OGEN: -- couple of times.

Q In a passive range of motion diagnostic test, do you physically put the patient through the motions or does the patient go through the motions by herself?

MR. OGEN: Objection, asked and answered.

THE COURT: Sustained.

MS. MARINO: I didn't ask that question before.

MR. OGEN: He said he lifted the leg.

Q Is there any participation from plaintiff -- was there any participation from plaintiff?

In other words, did you ask her to lift her leg when you did the range of motion test?

A When I did the range of motion for the other shoulders -- for the other joints, it was active range of motion. For the hip I did that. That's passive range of motion. That's with the strict precaution not to dislocate the hip again, the fourth time.

Q Did you do the left range of motion -- left hip range of motion active or passive?

MR. OGEN: Objection.

A Right hip was passive. All the others were active.

Q So the left hip was active range of motion?

A That is correct.

Q Now, when you did the muscle testing, you performed muscle testing on her arms; is that correct?

A That is correct.

Q That was normal?

A Yes.

Q And you performed muscle testing on her left leg and it was normal?

A Yes.

Q When you performed the muscle testing on her right leg, how does one perform the muscle testing, Doctor?

A You ask the patient to hold the leg in place. You exert pressure on it to-see if the leg gives way and you compare it with the other side.

Q And you would have to ask the plaintiff or the patient to do something, right? You would have to ask her to raise her leg?

A Simply resist my hand. That's all.

Q So the patient could decide at what level of strength she wanted to use to resist your hand?

A No, I feel the resistance based on what the patient gives.

Q Doctor, do you know if plaintiff engages in any walking activities?

MR. OGEN: Objection.

THE COURT: Sustained.

Q Do you know if the patient has done any walking, say, this summer?

MR. OGEN: Objection.

THE COURT: Sustained.

Q Is plaintiff capable of walking outside of her house?

A Yes.

Q Is plaintiff capable of, say, traveling?

MR. OGEN: Objection.

THE COURT: Sustained.

Q Say plaintiff wanted to get on a bus, in your opinion could she do that?

MR. OGEN: Objection.

THE COURT: Can she. You mean can she step up to the bus?

MS. MARINO: Sure.

Q Is she capable to get up on the bus?

THE COURT: Can she climb high steps?

A If they have special handicapped-accessible buses, yes. The normal steps, like Greyhound, no, that's dangerous.

Q How about a New York City bus?

THE COURT: He says if it has the handicapped access, yes.

Q Do you know how much plaintiff weighed when you examined her on July 2nd?

A I did not weigh her.

Q Do you know if she gained any-weight in between the date of total hip replacement and the date that you examined her?

A That was not discussed.

Q Now, Doctor, you testified from hospital records that painkillers were given to the plaintiff while she was in the hospital?

A Yes.

Q You testified that she was given morphine; is that correct?

A Yes.

Q And Fentan --

A Fentanyl, F-E-N-T-A-N-Y-L.

Q These are powerful painkillers?

A That is correct, yes.

Q And the general function of a painkiller is to kill pain; is that correct?

A I think everybody knows what it's supposed to do.

Q So it would be anticipated if somebody were taking painkillers, that they weren't feeling in pain at that particular time, correct?

A It depends on the dosage and the severity of the pain.

Q Did you have an opportunity to review the dosage of either of those drugs?

A Yes. Morphine sulfate was 4 milligram. Fentanyl, one point was 50 micrograms and another place was 125 or 150. Those are pretty strong dosages.

Q Doctor, did you examine plaintiff's range of motion in her back?

A Yes.

Q Did you find that to be normal?

A That was normal, yes.

Q Is the only manual muscle testing that you performed on plaintiff's right leg, was it a flexion test in a sitting position or was there any other manual muscle testing that you performed?

MR. OGEN: Objection. Multiple grounds.

THE COURT: Sustained.

MR. OGEN: First of all, asked and answered.

THE COURT: Sustained.

Q Other than what you just described for the jury as the manual muscle testing you performed on plaintiff's right leg, did you perform any other type of manual muscle testing on that leg?

MR. OGEN: Objection.

THE COURT: Sustained.

Q During your examination on July 2nd, did you perform manual muscle testing in any position other than sitting?

MR. OGEN: Objection.

THE COURT: Sustained.

MR. OGEN: He never said it was sitting.

THE COURT: What's that?

MR. OGEN: He said she was laying down, not sitting.

Q Did you say she was lying down when you performed --

THE COURT: He's already told us what tests he performed. Have you, Doctor?

THE WITNESS: -Yes. Yes, I have.

THE COURT: Okay.

Q Doctor, you didn't write those results down anywhere, did you?

A It's right here in my report.

MR. OGEN: Objection.

Q Okay. But other than -- withdrawn.

The number that you ascribed, 4 minus over 5, did you use any type of equipment to arrive at that number?

A There is no type of equipment. It's the standard manual muscle power-testing which all doctors use.

Q And you determined that 4 minus over 5 yourself?

A That is correct.

MR. OGEN: Objection.

Q Did you recommend to Miss Pett that she come back to you for any aftercare?

A I recommended to her what she needs. That's her choice. If she wants to come back to me she can. If she wants to go elsewhere, she can. Or if she chooses not to have any care, that's strictly up to her.

Q But as of this date, you don't have an appointment to see her in the future?

A I do not.

Q Doctor, you found her right hip to be diffusely tender. Can you explain what that means?

A Diffuse means the whole area. Tender means painful to touch.

Q How did she tell you it was painful?

A By facial expressions.

(Whereupon, Barry Infeld relieves Vicki Glover as official court reporter.)

CROSS EXAMINATION (CONTINUED)

BY MS. MARINO:

Q Does that mean the skin is tender or does that mean there is scar tissue?

A There is underlying tissue.

Q You indicated plaintiff's hip is weak, is that correct?

A That's correct.

Q You are not talking about the titanium hip replacement --

A I'm talking about the muscle power.

Q What if any muscles in her right hip is weak?

A The entire, all the muscles. The right hip flexors, the extensors, all the muscle groups.

Q Other than --

THE COURT: Don't repeat the testimony.

Is this your last question?

MS. MARINO: I don't know, Judge.

THE COURT: How much do you have? I've been asking you for a long time. It is now after one.

MS. MARINO: Maybe another ten minutes.

THE COURT: What?

MS. MARINO: Maybe another ten minutes.

THE COURT: You have redirect?

MR. OGEN: So far no.

THE COURT: All right.

Can the jury sit for another ten minutes?

All right.

Q Did you perform any additional tests to isolate which muscles in her right hip were weak?

A That would be contraindicated because of her condition. Her hip would re-dislocate.

Q The only signs of weakness you found in her hip were from the manual muscle testing?

MR. OGEN: Objection.

THE COURT: Sustained.

Q Did you do a positional testing, such as look for a Trendelenburg sign?

THE COURT: This witness has told us every test he did.

MR. OGEN: Objection.

Q Do you know what the Trendelenburg test is?

A I do. In this case it's contraindicated.

Q What muscle groups were tested?

MR. OGEN: Objection.

THE COURT: Sustained.

Q Thank you, Doctor.

A Okay.

THE COURT: What's that?

MS. MARINO: I said thank you, Doctor.

THE COURT: You have no questions?

MS. MARINO: No, Judge.

MR. OGEN: No redirect.

THE COURT: Thank you.

Have a nice lunch.

We will resume at 2:15.

Thank you, Doctor.

THE WITNESS: Yes.

(Witness excused.)

(LUNCHEON RECESS)

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