TRIAL TRANSCRIPT OF DEBRE DWYER, PH.D; 2012 Trial Trans. LEXIS 95

SUPREME COURT OF NEW YORK, QUEENS COUNTY, CIVIL TERM PART 23

Index No. 10262/07

October 10, 2012

Reporter
2012 Trial Trans. LEXIS 95 *

ODELYA TORBATI, an infant by her mother and natural guardian, MAHBABEH RISMANI, and MAHBABEH RISMANI, individually, Plaintiffs, -against- NORTH SHORE UNIVERSITY HOSPITAL, NORTH SHORE-LONG ISLAND JEWISH HEALTH SYSTEM, Defendants.

Expert Name: Debra Sabatini Dwyer, Ph.D., M.S.

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Counsel

[*1] PEGALIS & ERICKSON, LLC, Attorneys for Plaintiffs, Lake Success, New York, BY: STEVEN E. PEGALIS, ESQ., JAMES B. BAYDAR, ESQ.

MARTIN, CLEARWATER & BELL, LLP, Attorneys for Defendants, New York, New York, BY: SEAN F.X. DUGAN, ESQ.

Judges

BEFORE ROGER N. ROSENGARTEN, SUPREME COURT JUSTICE, And a Jury

Proceedings

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[1]THE COURT: Are you ready with your next witness?

[2]MR. PEGALIS: I am.

[3]THE COURT: Let's get the jurors.

[4](Whereupon, the jury entered the courtroom.)

[5]THE COURT: Parties stipulate to the proper

[6]placement of the jurors?

[7]MR. PEGALIS: Yes, your Honor. **[*2]**

[8]MR. DUGAN: So stipulated.

[9]THE COURT: Please have a seat everybody. I hope

[10]you had a good night and pleasant morning and at least we

[11]waited for the weather to pass before you had to come.

[12]We are now ready to continue with the plaintiff's

[13]case.

[14]And Mr. Pegalis, would you call your next

[15]witness.

[16]D E B R A D W Y E R, P h D, called as a witness by

[17]plaintiff, having been duly sworn, was examined and

[18]testified as follows:

[19]THE CLERK: Lower your hand and be seated.

[20]Speaking into the microphone in a loud, clear

[21]voice state your name for the record and spell your name,

[22]please.

[23]THE WITNESS: Sure. Debra Dwyer. D-E-B-R-A

[24]D-W-Y-E-R.

[25]THE CLERK: Your business address?
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[1]THE WITNESS: Is Stony Brook University Health

[2]Sciences Center. That's level two of the Health Sciences

[3]Center, Stony Brook, New York 11793.

[4]THE CLERK: Thank you.

[5]THE COURT: I am going to ask you to keep your

[6]voice up so everybody can hear you.

[7]THE WITNESS: Sure.

[8]THE COURT: Thank you.

[9]Mr. Pegalis.

[10]DIRECT EXAMINATION

[11]BY MR. PEGALIS:

[12] **[*3]** Q. Ms. Dwyer, what is your profession?

[13]A. I'm a professor. I am the chairperson of health care

[14]policy and management at Stony Brook University and I'm a labor

[15]economist.

[16]Q. And are you familiar with a report that has been

[17]prepared and served in this case with regard to inflation

[18]figures concerning different aspects of care for Odeliya

[19]Torbati?

[20]A. Yes, I am.

[21]Q. And are you prepared to give expert testimony

[22]concerning inflation figures with regard to each of those

[23]categories for the remainder of Odeliya Torbati's life?

[24]MR. DUGAN: Objection.

[25]THE COURT: Overruled.

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[1]A. Yes, I am.

[2]Q. Would you tell us your background, education,

[3]experience and qualifications with regard to such testimony?

[4]A. Sure.

[5]I received my bachelor's degree in economics from

[6]Queens College in Flushing. I went on to get my master and my

[7]PhD in economics from Cornell University. From there, I did a

[8]post doc at the Center for Policy Research in Syracuse

[9]University and then I worked for two years with the Social

[10]Security Administration doing disability research. And from

[11] **[*4]** there, I went to Stony Brook University where I was a professor

[12]of economics for eight years and then I took over as the

[13]chairperson in health care policy and management. My

[14]qualifications are in the areas of health economics and labor

[15]economics where I studied the labor statistics, health

[16]statistics and the markets in each.

[17]THE COURT: I think at that rate her fingers are

[18]going to fall off.

[19]THE WITNESS: Sorry about that.

[20]Q. Without you repeating everything -- you can if you

[21]wish -- what is it about this background that enables you to

[22]express an opinion based on a reasonable degree of medical

[23]certainty concerning the accuracy of these inflation rates?

[24]MR. DUGAN: Objection.

[25]THE COURT: I think you mean economic certainty.
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[1]MR. PEGALIS: I said medical certainty?

[2]THE COURT: Yes, you did.

[3]Make that economic certainty.

[4]THE WITNESS: Okay.

[5]MR. DUGAN: I object.

[6]MR. PEGALIS: It's just called a reflex, your

[7]Honor.

[8]THE COURT: I know.

[9]A. I am not a medical expert but I'm an economist. And

[10]what that means is I am trained to do research **[*5]** in the area of

[11]economics. So much of my research has been in studies of the

[12]disabled and the labor market, the relationship between work

[13]and disability. And in doing so, I do have to project earnings

[14]and I have to project earnings capacity. I have to look at

[15]expenses and I have to project them into the future so I have

[16]to use these kind of inflation rates all the time in my

[17]research.

[18]Q. In arriving at these inflation rate statistics, did

[19]you use from now going backwards economic experience? And if

[20]so, explain what you did and why you did it.

[21]A. Okay. Pertaining to the report and the inflation

[22]statistics?

[23]Q. Yes.

[24]A. What I did was used data from the Bureau of Labor

[25]Statistics which is federal statistics. I go back 20 years and
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[1]I look at the trends over the last 20 years. And prices have

[2]changed. If you think about it, recently I went to the store

[3]and bought a slice of pizza and it was --

[4]MR. DUGAN: Objection.

[5]THE COURT: Overruled.

[6]A. I was trying to explain why we do this.

[7]So as most of you know, prices have gone up over time.

[8]And prices go **[*6]** up differently over time. So we go back and take

[9]an average. So I said I was going in to get a slice of

[10]pizza and I was surprised it was 2.50 for a plain regular

[11]slice. Back when I was a kid it was 50 cents a slice. So --

[12]MR. DUGAN: Judge, I object and move to strike.

[13]THE COURT: Overruled.

[14]A. So prices change over time. And they tend to go up.

[15]And that's what we call the inflation rate. That inflation

[16]rate does fluctuate with the business cycle so we have to go

[17]back 20 years to make sure that we get an average. We don't

[18]take one particular point in time that might have been an

[19]outlier, an extreme situation. So when you go back 20 years,

[20]prices on average have risen about three percent overall.

[21]Q. And can you state for us with regard to each of the

[22]health care subjects what your -- whether your opinion would be

[23]AN appropriate inflation rate for the remainder of Odeliya

[24]Torbati's life?

[25]A. It is with a degree of -- reasonable degree of
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[1]economic certainty. Do you want me to go through each of

[2]these?

[3]Q. Please.

[4]A. Okay. So the inflation rates we used, there were **[*7]** two

[5]reports put out. The first one was in May of 2011 and we used

[6]20 years, from 1986 to 2006. There has been a little bit of a

[7]change so we updated those numbers to go back to 1992 to the

[8]present. So it really reflects the last 20 years because there

[9]have been changes. The inflation rates have come down very,

[10]very slightly. So we are going to use the more conservative

[11]inflation rates.

[12]So for medical evaluations, the inflation rate based

[13]on the Bureau of Labor Statistics and Consumer Prices is four

[14]percent per year. Keep in mind that in health care overall

[15]over the last 20, 25 years prices have been rising faster which

[16]you probably have heard so it's more in the range of 5.2

[17]percent where before the inflation rate tended to be around

[18]three percent. You might see them slightly higher in some

[19]medical categories but then slightly lower in some of the

[20]others.

[21]Q. You know what? I use the analogy of the highway and

[22]50 miles an hour. We are on a 20-mile-an-hour highway. Slow

[23]down.

[24]A. I apologize. I am sorry.

[25]Therapeutic evaluations, three percent per year.
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[1]Therapies, so **[*8]** that would be physical, occupational, three

[2]percent per year. Equipment and aids, that's the category

[3]that's lower inflation so it's two percent per year. Supplies

[4]are also at two percent per year. Aids are at two percent per

[5]year. Wheelchair, two percent per year. Orthopedic equipment,

[6]two percent per year. Transportation, two percent per year.

[7]Home care attendant, three percent per year. Live-in day

[8]programs, three percent per year. A guardianship or

[9]conservator, three percent per year. Residential placement,

[10]four percent per year.

[11]And that's it on the medical. Did you want me to do

[12]income?

[13]Q. Okay. Yes. You were also asked to project out

[14]impaired ability to be gainfully employed. What would be the

[15]loss to Odeliya Torbati and explain what you did and why you

[16]did it.

[17]A. So what I did was I went to the census data again,

[18]federal statistics. And I took the average high school

[19]graduate's salary, annual salary back in 2010. And that --

[20]Excuse me for one minute. I just have to get the

[21]rate.

[22]Sorry about that.

[23]I got from census data used for female high school

[24] **[*9]** graduates. And that rate was $ 32,227. Because that was 2010

[25]dollars, I increased it by three percent, 3.15 percent to get
1066

[1]$ 34,289 per year. So that's based on the average high school

[2]female graduate salary.

[3]Q. And what would that figure increase over a lifetime?

[4]A. At a rate of 3 percent per year.

[5]Q. And --

[6]A. For 49 years is what I would --

[7]Q. That was my next question. 49 years represents a work

[8]expectancy?

[9]A. Yes. So what you use, the standard age of retirement

[10]would be the normal age of retirement under the Social Security

[11]system, which for Ms. Torbati would be age 67. If she is a

[12]high school graduate we assume she starts to work at 18, which

[13]would give you a work life of 49 years for a typical high

[14]school graduate.

[15]Q. Why did you use the statistics for a typical high

[16]school graduate? Why didn't you use a graduate from medical

[17]school or law school or graduate from college? Why didn't you

[18]use those statistics?

[19]A. I have no information to go on regarding her expected

[20]education level. So I used the high school level, which is

[21]being very conservative, **[*10]** because the majority of people do go

[22]to college these days, have some college.

[23]Q. And would the average earnings be the same, less or

[24]more if there is a college education and then work? Or even

[25]beyond being a doctor or a lawyer or an engineer.

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[1]A. Clearly, it would be higher.

[2]MR. DUGAN: Objection.

[3]THE COURT: The objection is sustained.

[4]Leading, sir.

[5]Q. What is the significance of advanced education in

[6]relationship to loss of earnings?

[7]A. The return on a college education is positive.

[8]Meaning you would earn more if you had some, any college

[9]education.

[10]Q. So a high school degree was conservative? Did you say

[11]that?

[12]A. Yes. Using a high school diploma is conservative.

[13]Q. When you say you went back 20 years on an inflation

[14]rate for medical costs, if you went back 30 years, would the

[15]inflation rate be higher, the same or less?

[16]A. If we go back 30 years, it would be higher because the

[17]inflation rate has been coming down a bit with the economy the

[18]way it is. So the last 20 years represents a lower inflation

[19]rate than say the '70s, '80s. **[*11]** What we typically use is the

[20]last 20 years because that is within a reasonable degree of

[21]economic certainty. We do expect a business cycle and 20 years

[22]has been established as a reasonable time frame by which to

[23]capture one of those spells.

[24]Q. And, of course, should Odeliya live a normal lifespan,

[25]for another 70 years, you projected out a cycle that covered 20
1068

[1]years?

[2]A. Right.

[3]Q. To project that over the future for 70 years, is that

[4]correct?

[5]A. That's right. I can explain that. You're right that

[6]she is expected to live another 70 years. I used 20 years

[7]again because we do expect peaks and troughs. We expect the

[8]business cycle to go up and down like a roller coaster. And 20

[9]years tends to capture a cycle. So I can say that in the 20

[10]years that I have been doing this kind of research it always

[11]hovers around three percent when you use those averages so

[12]using three percent has been very standard in all of research.

[13]THE COURT: Is it fair to say we really don't

[14]know what will happen in the next 70 years but the practice

[15]of economists is to use an average over the past **[*12]**

[16]to predict the future?

[17]THE WITNESS: Yes.

[18]THE COURT: Is that correct?

[19]THE WITNESS: Yes, that's correct.

[20]MR. PEGALIS: Thank you very much.

[21]THE WITNESS: Thank you.

[22]THE COURT: Mr. Dugan?

[23]MR. DUGAN: Thank you, Judge

[24]CROSS-EXAMINATION

[25]BY MR. DUGAN:
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[1]Q. Good morning, Ms. Dwyer.

[2]A. Good morning.

[3]Q. My name is Sean Dugan. I represent North Shore

[4]University Medical Center in this case.

[5]Using your statistics, when Odeliya retires, what will

[6]her annual high school income be, high school graduate income

[7]be?

[8]A. I am not prepared to project the precise amount into

[9]the future. So if it's 32,000 now, you will just grow at three

[10]percent for the next -- the 50 years.

[11]Q. And please do that for us.

[12]THE COURT: Do you have a calculator with you?

[13]A. I would need a calculator to do that. And it's really

[14]more than just a calculator. There are projections. I usually

[15]use a spreadsheet to do that kind of analysis.

[16]Q. Because that number would be about $ 600,000 a year,

[17]right?

[18]A. Probably in the **[*13]** ballpark. So $ 30,000 today --

[19]Q. In your projections, you're telling this jury a high

[20]school graduate when Odeliya retires, according to your

[21]projections, would be making over $ 600,000 a year based on your

[22]projections; fair statement even though you didn't bring your

[23]calculator to court?

[24]THE COURT: As a ballpark.

[25]A. As a ballpark figure, that's correct.

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[1]Q. Thank you.

[2]Did I hear you say you're a full professor?

[3]A. Not a full professor. Associate professor.

[4]Q. Associate professor. What's the bottom rung of

[5]academia?

[6]A. In terms of faculty? Assistant professor.

[7]Q. So assistant professor and then the next level is

[8]associate professor?

[9]A. Right.

[10]Q. What's the next above associate professor?

[11]A. Full professor.

[12]Q. You're not a full professor; fair statement?

[13]A. Fair statement.

[14]Q. Your major interest is in policy, economic policy as

[15]it pertains to health care, right?

[16]A. That's correct.

[17]Q. In health care, the inflation rate generally dropped

[18]last year, did not increase at three percent a year last **[*14]** year;

[19]fair statement?

[20]A. Fair statement.

[21]Q. And with the new legislation that was passed, the

[22]anticipation of you health policy people is that the increase

[23]of medical care will decrease as we go forward; fair statement?

[24]A. That is subject to controversy and predictions and it

[25]depends on some assumptions.
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[1]Q. Depends on --

[2]A. Some assumptions. The health care reform is so

[3]complex and things are moving in so many different directions

[4]that what's going to happen to the price levels can go either

[5]way. And we can't use those kinds of projections that are not

[6]certain in this kind of analysis.

[7]Q. Now, sticking with your projection of over $ 600,000

[8]when Odeliya retires, a year, that assumption is based on a

[9]misapprehension, is it not?

[10]A. In what way?

[11]Q. Your figures that you calculated for the jurors start

[12]out with the average income of a female high school grad.

[13]Remember saying that?

[14]A. Yes.

[15]Q. Well, it should start out with the beginning salary of

[16]a female high school grad and then increase off that, right?

[17]A. So I could have **[*15]** used a starting salary and I just took

[18]overall average salary for a high school grad in 2010, yes.

[19]THE COURT: Well, do you know what the average

[20]female high school graduate earns when she first graduates,

[21]gets her first job?

[22]THE WITNESS: If you give me one second --

[23]THE COURT: I think that's what you're referring

[24]to, is that not, Mr. Dugan?

[25]MR. DUGAN: Yes, Judge, thank you.
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[1]THE WITNESS: Yeah, it's not on the census data

[2]that I brought with me but my guess is -- my best educated

[3]guess, having not looked at that in the recent past, is it

[4]would be within the ballpark of 28 to 30, maybe. But it

[5]wouldn't make all that much of a difference in the end.

[6]Q. It would actually be closer to $ 20,000 that an average

[7]beginning high school graduated woman would make, fair

[8]statement?

[9]A. I'm not able to answer that at this time.

[10]THE WITNESS: Can I speak to that or do I have to

[11]wait?

[12]THE COURT: You have to wait for questions.

[13]Q. It's true that about 30 percent of the high school

[14]graduated women will not reach a work retirement age of 67;

[15]fair statement? **[*16]**

[16]A. About right.

[17]Q. That's why the work life tables indicate that an 18-

[18]year-old, in fact, has a 32 year work life expectancy? You

[19]doubled that, didn't you.

[20]A. I have no way of predicting whether Ms. Torbati will

[21]be able to -- would be willing and able to work the 49 years.

[22]That is the norm of the work life.

[23]Q. Actually, that's not the norm of the work life. The

[24]norm of the work life --

[25]MR. PEGALIS: Let her finish her answer.

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[1]THE COURT: Please let her finish her answer.

[2]A. The labor force participation rates of women have been

[3]changing more dramatically than for men over the last few

[4]decades and it continues to evolve in the direction of more

[5]women working longer work lives. And what I'm basing it on is

[6]the economic damages associated with a full work life for Ms.

[7]Torbati because I don't have reason to suspect otherwise. It

[8]could be adjusted if we were going to take into account reasons

[9]why women may have slightly lower work lives.

[10]Q. The statistical work life expectancy of a high school

[11]graduated female being 32 years as opposed to your higher

[12] **[*17]** figure, you are certainly familiar with the Journal of Forensic

[13]Economics, are you not?

[14]A. Yes.

[15]Q. You contribute to that journal, right?

[16]A. No, I have not.

[17]Q. You're familiar with Dr. Skoog, Ciecka and Krueger's

[18]statistical analysis of work life entitled the Markov Process

[19]Model of Labor Force Activity? Are you familiar with that

[20]article?

[21]A. Not that one particularly, no.

[22]Q. The statistics out there promulgated by the government

[23]and by educational institutions such as your own study across

[24]the board the number of high school graduate females, among

[25]other subgroups, how long they actually work in the work force;
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[1]fair statement?

[2]A. Yes.

[3]Q. And that number keeps on coming back to about 32

[4]years, right?

[5]A. It's shorter than the male work life. I'm not up to

[6]date on the actual numbers. I haven't been studying women and

[7]men's labor force participation rates since I am doing health

[8]policy.

[9]Q. You're here testifying to the jury about women's work

[10]force.

[11]A. Yes, and I have expertise to take the data and provide

[12]the inflation **[*18]** rates and within a reasonable degree of economic

[13]certainty give you a ballpark estimate of what the damages are.

[14]Q. We'll examine that further.

[15]You're familiar with the BLS work life expectancy

[16]tables by gender and education for a high school graduated

[17]woman - -

[18]A. Yes.

[19]Q. -- right?

[20]31.884 years work life expectancy; fair statement?

[21]A. I don't have it in front of me but you can show me

[22]or --

[23]Q. Sure.

[24]MR. DUGAN: Judge, may I approach?

[25]THE COURT: Go ahead.
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[1]Q. The BLS tables.

[2]A. Okay. So this is for 18-year-old females in 2003, a

[3]life --a work life of 32 years. That's correct.

[4]Q. Now, what that is telling us is that statistically,

[5]since no one has a magic ball, statistically among all of the

[6]women who graduated from high school, the studies show they

[7]have a work life expectancy of 32 years, right?

[8]A. According to this table. Actually, 2003 is possibly a

[9]mistake. The table doesn't have a date on it; the article

[10]does. Do you have the date? Because this is evolving in the

[11]direction of higher.

[12]Q. Well, the **[*19]** Journal of Forensic Economics has the same

[13]32.86 work life expectancy and is date 2011. Would you like to

[14]look at that one?

[15]MR. PEGALIS: Mr. Dugan is reading from something

[16]that's not in evidence.

[17]THE COURT: The objection is sustained. The jury

[18]will disregard what Mr. Dugan just said.

[19]Q. I will show you the tables contained in the 2011

[20]Journal of Forensic Economics referable to characteristics of

[21]initially active women with high school diplomas referable to

[22]the work life expectancy at different ages. From 2011.

[23]MR. DUGAN: May I approach, Judge?

[24]THE COURT: Yes.

[25]A. Once again, the paper is dated 2011. In my
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[1]experience, sometimes the data used and the paper, the research

[2]in question has been done years before that. So there is no

[3]date on the table itself.

[4]But the point is taken that for a high school female,

[5]the work life is considered less than 49 years, which is what I

[6]had used. However, remember that I said I was conservative in

[7]my prediction that she wouldn't go to college so --

[8]Q. So we should have the calculation of 32 years. That

[9]would be **[*20]** a more accurate prediction based on work life

[10]expectancy; fair statement?

[11]A. Work life expectancy for a female high school

[12]graduate. So if you maintain the conservative assumption then

[13]yes, it would probably be about 10 years less than what I put

[14]in the report.

[15]Q. Well, you put in 49 years.

[16]A. Right.

[17]Q. 32 years is 17 years less.

[18]A. Because I still don't have a date for 32 years and I

[19]said that the trajectory is upward. So if I'm estimating that

[20]it's between 32 and 36, maybe, or 37, I'm not sure.

[21]Q. Now, you told us that you came in to apply

[22]percentages of inflation --

[23]Before we leave -- okay. Let's turn away from lost

[24]income and turn to medical expenses.

[25]You told us that you applied a percentage of
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[1]inflationary increase over years to figures that someone else

[2]gave you; fair statement?

[3]A. Yes.

[4]Q. For instance, we heard yesterday from Ms. Lajterman

[5]that a neuropsychology visit was priced at $ 3,000 a visit.

[6]Your neuropsych visit is priced at what?

[7]A. I didn't -- I only took prices from the medical expert

[8]and I gave the inflation **[*21]** rate. Are you asking me for the

[9]inflation rate?

[10]Q. I am asking you for the assumption of the dollars to

[11]which you project the inflation rate, your assumption, and my

[12]question is this: A few months ago you were here testifying in

[13]Queens County in Reyes against Marketing Works. Do you

[14]remember that?

[15]A. Yes.

[16]Q. "Question: I would like you to assume that Dr.

[17]Richter testified that Mr. Reyes would benefit from visits with

[18]a neuropsychologist monthly."

[19]MR. PEGALIS: Excuse me, your Honor. I am going

[20]to object to what Mr. Richter has in another case, what his

[21]neuropsychological benefits might be in relationship to

[22]this case. It's a different person.

[23]THE COURT: I assume it has to do with expenses,

[24]is that correct, sir?

[25]MR. DUGAN: Correct, Judge.
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[1]THE COURT: The objection is overruled.

[2]MR. PEGALIS: If it relates to inflation I have

[3]no objection. But if it relates to the amounts of the cost

[4]of the service, I do object.

[5]THE COURT: The objection is overruled.

[6]Q. So you let me start again.

[7]THE COURT: Do you remember testifying in that

[8] **[*22]** case?

[9]THE WITNESS: Yes.

[10]Q. Okay. "You were told that the life care planner for

[11]the neuropsychologist said that the visits would be twice a

[12]month for six months at $ 150 per visit in today's dollars.

[13]"Answer: Yes.

[14]"Did you take that into account when you prepared the

[15]chart?

[16]"Yes."

[17]You gave those answers at that time, right?

[18]MR. PEGALIS: That's my point, your Honor.

[19]A. I am not clear on the question.

[20]THE COURT: In this case, there was no testimony

[21]about a neuropsychologist. It was neurology. It was an

[22]MD. A psychologist is not an MD and the prices are

[23]different. The objection is sustained.

[24]Q. Based on --

[25]Okay. Let me ask you then another one. Physical
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[1]therapy costs, in that case, you were asked to assume $ 125 per

[2]session in today's dollar, right?

[3]A. Yes. Well, I'm assuming you have it in front of you.

[4]I don't have it in front of me.

[5]Q. I will show it to you.

[6]MR. PEGALIS: Your Honor, what the costs might be

[7]for someone else doesn't necessarily mean it's the same

[8]service or same costs for this.

[9] **[*23]** THE COURT: He is going to question her about the

[10]inflation rate.

[11]MR. DUGAN: May I approach, your Honor?

[12]MR. PEGALIS: The inflation rate is different.

[13]That I don't object to.

[14]Q. It's this case and I circled the testimony.

[15]THE COURT: The question may relate to the

[16]extended expense over the years rather than --

[17]THE WITNESS: Yes.

[18]THE COURT: In other words, how she extrapolates

[19]to that figure.

[20]Q. So a few months ago you were asked to assume that the

[21]costs for a session of physical therapy was $ 125 per session.

[22]Today you were asked to assume that the cost of physical therapy

[23]as per Ms. Lajterman was $ 150 a session, right?

[24]MR. PEGALIS: Your Honor, again, I am going to

[25]object. It's different people.

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[1]THE COURT: The objection is sustained.

[2]Q. Your function is to take whatever numbers the lawyers

[3]give you and apply a multiplier which is the rate; fair

[4]statement?

[5]A. Fair statement.

[6]Q. So if they give you a high number and you multiply

[7]that by three percent you're going to get a higher number than

[8]if you get a reasonable number, **[*24]** multiply by the same three

[9]percent; fair statement?

[10]MR. PEGALIS: Objection to the form of the

[11]question.

[12]THE COURT: Sustained as to form, the word

[13]reasonable. Why not use higher and lower.

[14]Q. A lower number with the same percentage would give a

[15]lower dollar figure; fair statement?

[16]A. Sure. Yes.

[17]Q. So you're simply multiplying by what you're saying the

[18]percentage of inflation will be over the next 20 years and

[19]that's what you're projecting, right?

[20]A. That's absolutely right. I am not a medical expert so

[21]I cannot say what the value of the actual medical services

[22]required would be. That would have to come from a medical

[23]expert.

[24]Q. So you're taking -- usually that comes from a doctor,

[25]right?

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[1]A. Yes.

[2]Q. Not a nurse?

[3]A. A medical expert can be --

[4]He is laughing because he saw the passion come into my

[5]face.

[6]I work in a school of health technology and management

[7]and I see the training of all types of medical experts. And

[8]it's a fuzzy line to be able to say that you need an MD when

[9]you have other types of providers **[*25]** giving services.

[10]Q. And the difference between --

[11]MR. DUGAN: Withdrawn.

[12]Q. Before you came here, did you investigate the

[13]statistics on the cost, the annual cost of a person living in

[14]an assisted living facility?

[15]A. I did not.

[16]Q. Did you investigate the cost of a home health aide on

[17]an hourly basis in the greater New York area?

[18]A. I did not investigate it. I took it as given from the

[19]medical -- the life planner.

[20]Q. Are these my papers or your papers?

[21]A. Yes.

[22]Q. I don't want to take your file.

[23]MR. DUGAN: Okay. Thank you. I have nothing

[24]further.

[25]THE COURT: Thank you.
1082

[1]Redirect, Mr. Pegalis?

[2]REDIRECT EXAMINATION

[3]BY MR. PEGALIS:

[4]Q. You were asked about why you didn't use the starting

[5]salary for an 18-year-old who was just starting out. And you

[6]said you used the average --

[7]A. Right.

[8]Q. -- work life expectancy. Is that what you said?

[9]A. Yes.

[10]Q. When a salary starts out, does it start out lower or

[11]higher than at the end?

[12]A. Lower.

[13]Q. And so you took the average?

[14] **[*26]** MR. DUGAN: Judge, I object to him testifying

[15]again. It's his expert.

[16]THE COURT: You are leading the witness, sir.

[17]Q. Why didn't you take the number at the end of the work

[18]life expectancy when that number is higher? Why didn't you use

[19]that number?

[20]A. Because that would exaggerate. I am trying to take a

[21]reasonable -- within reasonable economic certainty a salary

[22]that someone with her education level would be earning.

[23]Q. Now, you said that there was -- there has been -- you

[24]said things are changing in terms of women and the number of

[25]years they work and are in the work force. Can you please
1083

[1]explain what you meant by that expression "things are

[2]changing"?

[3]A. What I meant by things are changing is historically

[4]women have been entering the labor force and been committed to

[5]the labor force more than they ever have been. And that has

[6]been growing, particularly in the United States compared to

[7]other countries. So we see a lot more of dual career

[8]households and we see a lot more women need to go work at this

[9]point. So you don't see as many declines. And we also see a

[10]growing **[*27]** industry with child care and other arrangements to

[11]allow for that.

[12]Q. And are there women in the work force who are CEOs of

[13]joint corporations?

[14]A. Yes, there are. There's still not as many as men but

[15]that number is also growing.

[16]Q. And why didn't you use those numbers, $ 3 million a

[17]year? Why didn't you use that?

[18]MR. DUGAN: Judge, I object.

[19]THE COURT: Overruled.

[20]A. Not within a reasonable degree of economic certainty.

[21]I am using averages that sound reasonable, that would be

[22]considered reasonable within the profession.

[23]MR. PEGALIS: Thank you so much.

[24]THE COURT: Anything else, Mr. Dugan?

[25]MR. DUGAN: One. Thank you, Judge.
1084

[1]RECROSS EXAMINATION

[2]BY MR. DUGAN:

[3]Q. Just so we are 100 percent clear, do you have more

[4]recent statistics, which is what you're talking about, that

[5]indicate an 18-year-old female high school graduate is

[6]statistically expected to have a work life expectancy of 32

[7]years? Have you more recent tables than that?

[8]A. No, I do not at this time, not with me.

[9]Q. So those are the best tables to work with, a 32 **[*28]** year

[10]work life expectancy as opposed to a 49 year work life

[11]expectancy. Is that an accurate statement of the position

[12]here?

[13]A. It's a little uncertain because unlike inflation rates

[14]and the business cycle, the trends are going in one direction.

[15]They're not cycling. So it's difficult to get a 20 year

[16]average for women. All we have to go on is the current. And

[17]if we project they're going to change in the upper direction, I

[18]think it would be an underestimate to take what's given for

[19]today or five years ago.

[20]Q. Now, we have to examine that a bit. You're here today

[21]giving a statistical analysis, according to you, based on what

[22]we have today. And we have today a 32 year work life

[23]expectancy table today by national standards; fair statement?

[24]Is that fair?

[25]A. It is fair. And what we have --
1085

[1]MR. DUGAN: I move to strike everything after it

[2]is fair.

[3]THE COURT: That's all that he asked is yes or

[4]no.

[5]THE WITNESS: Okay.

[6]MR. DUGAN: Thank you.

[7]THE COURT: Anything else?

[8]RE-REDIRECT EXAMINATION

[9]BY MR. PEGALIS:

[10]Q. Speaking of statistics, one **[*29]** statistic that's 100

[11]percent certain is that Odeliya Torbati will never work at

[12]anything.

[13]MR. DUGAN: Objection, move to strike.

[14]THE COURT: Objection sustained.

[15]MR. DUGAN: Why is he saying inflammatory things

[16]like that?

[17]MR. PEGALIS: Because why? I would be happy to

[18]answer you, Mr. Dugan.

[19]THE COURT: Ladies and gentlemen, the jury will

[20]disregard the banter between the attorneys. It's not

[21]evidence in this case. And the objection was sustained to

[22]the question and you will disregard the question.

[23]MR. PEGALIS: Nothing further, your Honor.

[24]THE COURT: Thank you. You may step down. Have

[25]a good day.
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[1]THE WITNESS: Thank you. You too.

[2](Whereupon, the witness was excused.)

[3]THE COURT: Mr. Pegalis?

[4]MR. PEGALIS: No further witnesses, your Honor.

[5]The plaintiff rests.

[6]THE COURT: The plaintiff rests?

[7]Ladies and gentlemen, that's the end of the

[8]plaintiff's case. What we have to do now is some matters

[9]of law that have to be dealt with. I have to listen to

[10]certain motions, listen to legal argument, make certain

[11]legal decisions **[*30]** and that will take some time. So once

[12]again, you're getting a little longer lunch hour. We will

[13]resume at 2:00.

[14]In the meantime, once again, do not discuss the

[15]case amongst yourselves or with anybody else. Don't allow

[16]anybody to discuss it with you. And once again, should you

[17]run into these attorneys and any of the parties or

[18]witnesses during the lunch break, don't speak to them at

[19]all. And do not form any opinions in regard to this

[20]matter. And we'll see you 2:00. Okay?

[21](Whereupon, the jury left the courtroom.)

[22]THE COURT: Everybody can have a seat.

[23]Motions? Mr. Dugan, you're going to start the

[24]motions.

[25]MR. DUGAN: Judge, I move to dismiss against both
1087

[1]defendants based on plaintiff's failure to make out a prima

[2]facie case.

[3]THE COURT: You wish to be heard, Mr. Pegalis?

[4]MR. PEGALIS: I oppose.

[5]THE COURT: Pardon me? You oppose?

[6]MR. PEGALIS: I oppose.

[7]THE COURT: Motion denied. In the opinion of the

[8]Court, the plaintiff has made out a prima facie case. The

[9]motion is denied.

[10]Any other motions?

[11]MR. DUGAN: Yes, Judge. I **[*31]** believe the first

[12]through eighth cause of action from the complaint are

[13]already discontinued so I do not have to address them.

[14]THE COURT: Right.

[15]MR. DUGAN: Causes of action nine through

[16]thirteen I move to dismiss. Any claim as pleaded in the

[17]complaint in the causes of action nine through thirteen

[18]claims for negligent hiring. There is no such evidence

[19]that there was any negligent hiring by either defendant.

[20]I move to dismiss the allegations of reckless

[21]conduct and grossly negligent conduct. There is absolutely

[22]no evidence submitted in reference to either of those.

[23]Should I continue, Judge?

[24]THE COURT: Go ahead.

[25]MR. DUGAN: I move to dismiss the 14th cause of
1088

[1]action. There is no such separate cause of action for

[2]joint and several liability. It's not a cause of action.

[3]I move to dismiss the 15th cause of action based

[4]on lack of informed consent. There is no such claim in

[5]this case. There is no expert testimony on that point.

[6]I move to dismiss the 16th cause of action, the

[7]mother's claim. She has no direct injury and there is no

[8]evidence of any economic **[*32]** loss. And emotional distress, as

[9]we know, is not a recoverable item, and I wish to dismiss

[10]the 16th cause of action.

[11]THE COURT: Mr. Pegalis?

[12]MR. PEGALIS: I move to conform the pleadings to

[13]the proof. I think the net result of that, your Honor, is

[14]that what remains a question of fact for the jury will be

[15]limited to the departure and causation questions that will

[16]ultimately be submitted by your Honor as a result of the

[17]conference with counsel. And I think conforming the

[18]pleadings to the proof deals with such issues as whatever

[19]is in the complaint that's extraneous, it doesn't matter.

[20]THE COURT: Well, you've called no expert to say

[21]or presented no evidence that there was negligence in the

[22]hiring of the employees. Do you have any objection to that

[23]cause of action being dismissed?

[24]MR. PEGALIS: I don't know that it is a separate

[25]cause of action but --

1089

[1]THE COURT: The basic question is going to be put

[2]to the jury were the defendants North Shore University

[3]Hospital and the system, through the acts of their

[4]employees, did they depart from good and accepted medical

[5]practice. **[*33]** That's the bottom line, right?

[6]MR. PEGALIS: Of course. And I'm not quarrelling

[7]with what your Honor just suggested. Of course it's

[8]obvious. The point that your Honor made and any way your

[9]Honor wants to do it, but my thought is that conforming the

[10]pleadings to the actual proof, everything that's not part

[11]of the proof --

[12]THE COURT: It has the same effect.

[13]MR. DUGAN: It does not have the same effect.

[14]With all due respect, I am entitled to know before I start

[15]my case what causes of action I have to meet. The mother's

[16]cause is out. The inferred consent cause is out. Gross

[17]negligence is out. Joint and several liability is out

[18]other than as just indicated, that the hospital and the

[19]system accept responsibility for the acts of their

[20]employees. And I need it done now before I start my case

[21]as I am entitled by the CPLR. To simply say we'll conform

[22]the pleadings to the proof is not an answer to my motion.

[23]MR. PEGALIS: The mother does have a derivative

[24]cause of action so I would object to that being excluded.

[25]But the derivative cause of action is based on injury to
1090

[1]her daughter, **[*34]** not on her own injury.

[2]THE COURT: Well, what is her derivative cause of

[3]action, the loss of services of the child?

[4]MR. PEGALIS: Exactly.

[5]MR. DUGAN: There is no evidence of any loss of

[6]services of the child.

[7]THE COURT: There hasn't been any evidence

[8]presented.

[9]MR. DUGAN: That cause of action is gone.

[10]MR. PEGALIS: I disagree.

[11]THE COURT: She has -- well, I am going to

[12]reserve decision on it all and ask you to use your common

[13]sense in butting together your defense case. All right?

[14]MR. DUGAN: Can we at least get informed consent

[15]out?

[16]THE COURT: Is there any question of informed

[17]consent here?

[18]MR. PEGALIS: No, there is not.

[19]THE COURT: All right. So the informed consent

[20]cause of action is dismissed. Okay?

[21]MR. DUGAN: Negligent hiring and grossly

[22]negligent conduct, is that --

[23]THE COURT: There has been no testimony of any

[24]gross negligence.

[25]MR. PEGALIS: But feel free to put it in.
1091

[1]MR. DUGAN: So that --

[2]THE COURT: That will be dismissed.

[3]And negligent hiring, there has been no testimony

[4] **[*35]** the hospital or system was negligent in hiring any of their

[5]people. The only allegation is that the acts of their

[6]people are attributable to them, to the defendants.

[7]Therefore, that cause of action will be dismissed too.

[8]Okay? All right?

[9]MR. DUGAN: Thank you, your Honor.

[10]THE COURT: Make you happy?

[11]MR. DUGAN: Thank you.

[12]THE COURT: All right. Anything else? So you

[13]get a longer lunch too.

[14]MR. PEGALIS: We do, your Honor.

[15]THE COURT: On the Memorandum of Law you

[16]submitted in regard to the expert testimony, I read both

[17]memoranda of law and it seems that included in the

[18]defendant's memorandum is a lot more detailed reproduction

[19]of the 3101(d)(i) notice. It's full of specificity. But

[20]you say it isn't?

[21]And, of course, it goes without saying that an

[22]expert's testimony must be limited to what is in the

[23]3101(d) or other notices that may have been gotten from

[24]that expert including perhaps a report and not go beyond

[25]that. So I will deal with each objection and whatever
1092

[1]question you object to as it is raised.

[2]MR. PEGALIS: I would ask, so that I don't have

[3] **[*36]** to be jumping up, I would ask for an offer of proof. For

[4]example, plaintiff's disclosure set forth specifically what

[5]the plaintiff's neuroradiology expert observed on the MRI

[6]images in great specificity. It involved the white matter,

[7]subcortical white matter, if it was diffuse, involved the

[8]cortex. There were changes in the gyri and sulci, et

[9]cetera. No disclosure whatsoever was received by the

[10]defendant's neuroradiologist. I have no idea what this

[11]neuroradiologist is going to say she sees on these images.

[12]I have no idea.

[13]I see Mr. Dugan has something set up. Evidently,

[14]this doctor is going to get on the witness stand and say

[15]here, members of the jury, I see A, B, C and D. I have no

[16]idea what she is going to say. That's number one.

[17]Number two, the defendant's neuroradiology expert

[18]is going to opine that the infant did not suffer any injury

[19]from hypoxia or any other event during labor, delivery or

[20]the neonatal care of this case. Fine. I know when it

[21]didn't happen based on anticipated proof.

[22]Well, the expert will comment on potential causes

[23]of alleged injuries. The expert doesn't state **[*37]** what the

[24]injury is. All we know is that the expert is going to

[25]comment about PVL. We don't even have a disclosure that
1093

[1]the expert believes there is PVL. I guess it's implied.

[2]That's what the expert is going to say. But we have no

[3]disclosure concerning the opinion of the expert that there

[4]is PVL. That's what the expert is going to say, fine. I

[5]can't say I am surprised at that. Then we have no idea

[6]what the opinion of this expert is concerning when the PVL

[7]happened other than it happened before labor and delivery.

[8]THE COURT: Wasn't there a stipulation as to

[9]that?

[10]MR. PEGALIS: Well, if that's a stipulation --

[11]THE COURT: What was the stipulation? Excuse me.

[12]MR. PEGALIS: -- then I have no problem.

[13]THE COURT: Excuse me. What was the stipulation

[14]entered into by the parties fairly early in this trial?

[15]MR. PEGALIS: The stipulation was that the

[16]placental pathology showed changes revealing that there was

[17]hypoxia up to one week before the birth of the child. If

[18]that is the opinion of this expert as to when there was

[19]hypoxia and when that hypoxia caused the PVL then I **[*38]** have no

[20]objection. Then I am not surprised. On the other hand, if

[21]the expert comes in and says no, that's not when the injury

[22]took place but yes, that's when there was hypoxia but

[23]that's not when the injury took place, it took place some

[24]other time, let me now tell you Mr. Pegalis when it occurs

[25]because I know nothing has been disclosed to you before
1094

[1]about when it occurred from me, and now I can tell you when

[2]it occurred, now I am going to tell you what the basis of

[3]my opinion is, I have no idea what that basis is. I have

[4]no idea what this expert is going to base her opinion on,

[5]the expert. This neuroradiology expert is going to

[6]disclose, is going to say there were no departures from

[7]good practice. That should be fun. Wait to hear what the

[8]neuroradiologist --

[9]MR. DUGAN: Judge, I object. He goes on forever.

[10]It's the same thing.

[11]MR. PEGALIS: Cut it out. This was deliberate on

[12]their part. It was deliberate.

[13]THE COURT: Okay.

[14]MR. DUGAN: Judge, may I be heard?

[15]THE COURT: Mr. Dugan?

[16]MR. DUGAN: Thank you.

[17]THE COURT: Mr. Dugan?

[18]MR. DUGAN: This **[*39]** has become a common effort on

[19]Mr. Pegalis' part. He tried the same thing over the summer

[20]with my partner Bruce Habian, crying that he did not know

[21]what the defense was. The defense is that his claims are

[22]not based on the medicine and we deny the claims. The

[23]expert neuroradiology response that you referred to on page

[24]four, paragraph eight, specifically says that the

[25]neuroradiologist is going to comment on the testing of the
1095

[1]head imaging studies including the presence of PVL in the

[2]baby and the expert is going to talk about potential

[3]causes. Had Mr. Pegalis really objected to this, he would

[4]have objected months ago, not after he flies his expert

[5]back to California.

[6]THE COURT: All right. Thank you. Once again, I

[7]will make rulings as objections are made. I am not going

[8]to preclude anybody from anything at this point. Okay?

[9]MR. DUGAN: Thank you. You have an exception,

[10]sir. All right?

[11]We'll see everybody 2:00.

[12]MR. PEGALIS: I don't take exception because I

[13]will make my objections and your Honor can rule.

[14]THE COURT: I am not going to make any

[15]preliminary rulings at **[*40]** this point.

[16]MR. PEGALIS: And I take -- the only request that

[17]I think your Honor is not granting is I asked for an offer

[18]of proof and --

[19]THE COURT: I don't think he is required to give

[20]an offer of proof at this point.

[21]MR. PEGALIS: He would be if your Honor ruled

[22]that way and he is not required if you do not rule that

[23]way.

[24]THE COURT: Okay. Thank you.

[25]MR. DUGAN: Nice try, Mr. Pegalis.
1096

[1](Whereupon, a luncheon recess was held.)

[2](Whereupon, Senior Court Reporter Donna Sadowski

[3]was relieved by Senior Court Reporter Laurie DeBiasi.)

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