102332
D. Mayer

Supreme Court of New York.
Richmond County
Robert L. GELTZER, Trustee of the Estate of Joseph Testaverdi and Theresa Testaverdi, Plaintiffs,
v.
Harvey LEVENTHAL, M.D., Victor Ho, M.D., and Neuroscience Associates of New York, Defendants.
No. 12932/94.
November 4, 1999.

(Partial Transcript of David Alan Mayer, M.D.)

Name of Expert: David Alan Mayer, M.D.
Area of Expertise: Health Care-Physicians & Health Professionals >> Surgeon Unspecified
Case Type: Medical Malpractice-Facility >> Clinic/Center/Group
Case Type: Medical Malpractice-Physicians & Health Professionals >>Neurosurgeon
Jurisdiction: Richmond County, New York
Representing: Plaintiff

Appearances:
Thomas F. Bello, Esq.
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220 East 42nd Street
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By: Sean F. X. Dugan, Esq., of counsel.
Before: Honorable Gerard Rosenberg, Justice, and a jury.

ELIZABETH W. CRUZ

OFFICIAL COURT REPORTER.

THE COURT: Counsel, are we ready to proceed?

MR. BELLO: Yes, your Honor.

THE COURT: Let's bring the jury in.

(Whereupon, the jury enters the Courtroom.)

THE CLERK: I note for the record all sworn jurors and their alternates are present and in their proper seats.

THE COURT: Good morning, members of the jury.

Welcome back.

I hope you had a pleasant evening.

We are continuing with this case.

Mr. Bello, you may call your next witness.

MR. BELLO: Thank you, your Honor.

Good morning, ladies and gentlemen of the jury.

Good morning.

Plaintiff calls Dr. David Mayer.

DR. DAVID ALAN MAYER, called as a witness, having been first duly sworn, was examined, and testified, as follows:

THE CLERK: Please be seated.

In a loud, clear voice for the record, please state and then spell your full name.

THE WITNESS: David Alan, ALAN MAYER, M.D..

THE CLERK: Business address?

THE WITNESS: 19 South Down Road, Huntington, New York, 11743.

THE COURT: You may inquire, counsel.

MR. BELLO: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. BELLO:

Q Good morning, Dr. Mayer.

A Good morning.

Q Please try and keep your voice up, Dr. Mayer, so we can all hear.

Preliminarily, are you a physician licensed to practice medicine in New York State?

A Yes.

Q Are you licensed in other states, in addition to New York State?

A Florida as well.

THE COURT: When were you so licensed in New York?

THE WITNESS: Since 1973, Judge.

THE COURT: Thank you.

Continue, Mr. Bello.

Q Your other license from Florida, when were you licensed in that state?

A 1974.

Q Is there a particular area of medicine within which you specialize, Doctor?

A General surgery.

Q Can you give the ladies and gentlemen of the jury an idea of your educational and medical background, beginning with college and carrying it forward?

A I graduated a summa cum laude from Lafayette College and attended Cornell University Medical College and did my surgical training at New York Hospital, Cornell Medical Center.

Q Doctor, do you have any fellowships?

A Yes. I did a fellowship in oncologic and head and neck surgery at Memorial Sloan Kettering in New York.

Q Just what is a fellowship? What does that mean?

A It's additional training that some surgeons may elect to do in addition to their standard five year surgical training.

Q You also mentioned you did a residency.

A Correct.

Q Where was that residency?

A New York Hospital.

Q In what field did you do that residency?

A General surgery.

Q Doctor, does surgical medicine have within it various subspecialties?

A Yes.

Q Is head and neck surgery one of those subspecialties?

A Yes, it is.

Q Following the completion of your residency in the field of head and neck surgery, did you go on to do any further specialized training?

MR. DUGAN: I object to the form only, Judge.

THE COURT: Objection sustained.

Q Did you have any training after your residency?

A The fellowship training at Memorial Sloan Kettering.

Q And does every doctor who specializes in surgery perform a fellowship?

A No.

Q Did you perform more than one?

A No, I did not.

Q Is there such thing in medicine or surgery called board certification?

A Yes.

Q Can you explain to the jury first what it means to be board certified?

A Board certified is a standard examination that they give to all surgical graduates of recognized residencies that certifies the surgeon as competent to practice surgery in this country.

Q And are you board certified in the field of surgery?

A Yes.

Q When were you board certified?

A I was board certified in 1979 and recertified twice, the most recently being one month ago.

Q And when was the second board certification?

A 1991.

Q Did you have to take a separate test for that?

A Yes. It was a full day examination.

Q And you passed that test?

A Yes.

Q And are you certified by any other boards?

A No; just American Board of Surgery.

Q Are you a diplomate as well?

A Yes.

Q What does it mean to be a diplomate?

A Well, that simply means to get the certificate, that you have satisfied the qualifications of the American Board of Surgery and have passed their examinations.

Q And you did that?

A Yes.

Q Doctor, are you a member of any professional societies?

A Probably about 50 of them. I don't know if --

Q Could you tell ?? the more significant ones?

A I am a fellow of the American College of Surgeons, the International College of Surgeons and numerous societies for minimally invasive therapy, and I think the jury would probably be bored hearing a litany of the societies.

Q You mentioned minimally invasive. What does that mean?

A That is minimal access surgery.

It is surgery performed through smaller incisions with quicker recovery for the patient and faster return to work.

So, it's one of the more advanced cutting edge methods of surgery that we perform now.

Q By the way, are you in private practice?

A Yes, I am.

Q Is there a name of your practice?

A Minimally Invasive Surgery Center.

Q That is also located in Long Island?

A Correct.

Q And, Doctor, as a surgeon, have you received any honors or awards over the course of your career?

A Yes, I have.

Q Could you tell us some of them?

A Well, my work has been chosen to be exhibited at the national meeting of the American College of Surgeons twice; my research on wound healing and recently on new methods for laparascopic hernia repair.

Q And do you hold any director's positions?

A I direct the Minimally Invasive Surgery Center and the surgical intensive care units at my hospital.

Q Doctor, have you made any publications in the field of surgery?

A Yes.

Q Approximately how many?

A More or less about 30 publications.

Q And, in addition to the writings and publishings, do you have any academic appointments?

A Yes.

Q What are they?

A I am an associate professor of surgery at New York Medical College.

Q Can you tell us what hospitals you are affiliated with?

A Mainly the North Shore University Health System.

It's approximately five hospitals on the north shore of Long Island, and I am still associated with New York Hospital as well.

Q Doctor, can you summarize briefly your experience from 1978 in surgery?

A I have been in private practice with a case load of approximately 800 major cases per year during that time span and performing then in the field of general surgery.

Q Do you perform a portion of those surgeries on head and neck?

A Yes, sir, a good portion.

Q Doctor, have you made any major presentations in your lifetime?

A Yes.

Q What would they be?

A Well, we are presenting and lecturing fairly regularly at local hospitals and organizations, but also at the national surgical society meetings as well.

Q What are your professional activities?

A Mainly as a practicing general surgeon, but also I teach usually five residents at a time, holding regular conferences for them and teaching them in the operating room.

Q Do you have any community activities?

A Yes.

Q What are they?

A Well, I am on the board of directors of my local synagogue and the YMCA in Huntington and numerous charitable organizations.

Q And, Doctor, you mentioned that you specialize in the area of head and neck surgery.

Can you tell us a little bit more about the head and neck surgery area that you specialize in?

MR. DUGAN: Judge, I have a form objection.

THE COURT: Overruled.

Q You can answer.

A By virtue of my fellowship training on the head and neck service at Memorial Sloan Kettering, I have had additional intensive training in that area beyond that of a general surgeon, and, in addition, performing possibly hundreds or thousands of these procedures over 23 years would qualify me as an expert in this area of surgery.

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

THE COURT: That portion at the very end is stricken.

The jury is to disregard that.

Q Doctor, in the head and neck surgery that you do, do you encounter any nerves in the head and neck surgery area?

A Yes, all surgeons that perform head and neck surgery have to be intimately acquainted with the nerves in the

area.

Q Are you familiar with the right recurrent laryngeal nerve?

A Yes.

MR. BELLO: Your Honor, may I point to the board that's been marked an exhibit?

THE COURT: Sure.

Which one?

MR. BELLO: I believe 1 and 2.

THE COURT: Yes, all right.

THE COURT: That is Exhibit 1, is that it?

MR. BELLO: Plaintiff's exhibit 2.

Q Doctor, looking at that board which is marked Plaintiff's Exhibit 2, can you explain to the jury in general what that whole area is, the larynx?

If you want to get up, you can point to it.

THE WITNESS: May I?

THE COURT: Yes, you may.

A This would really be the area of the neck that we would be looking at in the area on me, just to acquaint you.

This would be more or less the voice box and the main nerves that we are dealing with today are called the recurrent laryngeal nerves.

They are two nerves that innervate not only the vocal cords and phonation, but also some of the intrinsic muscles of the larynx as well.

There are differences in the way these nerves run on the right and left sides which are quite remarkable.

On the left side, they originate from the vagus nerve as it runs and wraps around the aortic arch, the main blood vessel in your chest, and it runs up in the groove between the trachea and the esophagus and hugs the groove.

So, on the left side the nerve is not particularly susceptible to operative injury because it hides in the groove.

On the right side, however, the nerve has a much more unpredictable course, and occasionally even does not recur and come up in the groove where you would expect it, but can come in laterally from the vagus, and up to one or two percent of cases called a non-recurrent nerve.

As you can imagine, any surgery done in this area, if not carefully identified, the nerve could be in jeopardy.

Even if the nerve runs in its usual location up the side of the tracheal esophageal groove into the larynx, on the right side it often -- it does run from a more lateral course.

So, even in an area where it is not coming in laterally, it still can be susceptible to operative injury.

So, the right side has many more anatomic variants in the position of the nerve compared to the left and is more

perilous when we operate on the right side.

That would be the main point to make.

Q Doctor, can you show us the relationship between the right recurrent laryngeal nerve and the right vocal cord?

A Well, the recurrent nerve runs into the larynx and innervates or supplies nerve stimulus to the vocal cord.

So, it runs into the larynx and innervates the cord.

Q When you say "innervates" --

A Controls the action of the cord.

Q Injury to the right recurrent laryngeal nerve, what effect would that have on the right vocal cord?

A If the injury were complete, such as a transsection, it would have a paralyzed vocal cord.

Q What effect would that have on the body or on the human anatomy?

A The person would have a permanent hoarseness and occasionally some difficulty in swallowing as well, but the hoarseness would be a constant result.

Q Would a person lose voice entirely?

MR. DUGAN: I object to him leading.

THE COURT: Objection sustained.

Q Is there any other injury that can occur from an injured right recurrent laryngeal nerve?

A Occasionally retraction or stretching injury can occur to the nerve where it's not inadvertantly divided, such as if one came in an abnormal non-recurrent fashion.

Often those are just cut at surgery, but sometimes the nerves, with retractors, the nerves are stretched and we get what we call retraction injury, that's a medical term for stretching, and the injury can be temporary or permanent.

Some, about. I would say, 20 percent would be permanent injuries with stretching and about 70, percent would be temporary and may improve after four or six weeks time.

(Witness resumes the stand.)

Q Doctor, you have reviewed, haven't you, certain records on my behalf on this case?

A Yes.

Q And did those records include that of doctor --

MR. DUGAN: Objection.

THE COURT: Objection sustained.

Q What records did you review?

A I reviewed the hospital records from St. Vincent's Hospital on Mr. Testaverdi.

I reviewed the operative and office records of Dr. Ho and Leventhal, and I reviewed the operative note of the orthopedist whose name escapes me at the moment, your Honor, I apologize.

THE COURT: Dr. Urs, is it?

Q Dr. Urs?

A Yes.

Q And you and I have discussed this case in the past?

A Yes, we have.

Q And you are paid to appear here today, aren't you?

A That is correct.

Q Doctor, approximately how many head and neck surgeries have you done involving the right recurrent laryngeal nerve?

A I would say, I would estimate four or five hundred.

Q And have you ever been involved in a procedure called anterior cervical decompression?

A Yes.

Q Let me point to the other charts.

MR. BELLO: May I change that, your Honor?

THE COURT: Sure.

(Pause.)

THE COURT: That is exhibit what?

MR. BELLO: Sorry, this is exhibit number 3 for identification.

THE COURT: Okay.

Q Doctor, now looking at exhibit number 3, can you tell the jury and the Court what procedure is used in the anterior cervical decompression?

A Yes.

THE WITNESS: Would I be allowed to stand, your Honor?

THE COURT: Yes, you may.

A My involvement in this operation is not from the neurosurgical or orthopedic standpoint in that I do not operate on the discs and bone, but frequently I am asked by the spine surgeons to assist them in the approach.

MR. DUGAN: Judge, I will object.

THE COURT: Overruled.

Q Go on.

A What that means is they want me to expose --

THE COURT: I am going to sustain the objection now.

Next question.

Q You said that you have been involved in surgeries of this type?

A Yes.

Q In what capacity?

A I am asked to --

MR. DUGAN: Objection.

THE COURT: Objection sustained.

THE COURT: Just tell us what you do.

Q What you do, not what you are asked to do, but what you actually do?

A I make the incision and dissect the tissues down to the vertebral column so that they can do their disc surgery.

It is called an exposure. I do the exposure for the spine surgeons.

Q And in this type of surgery, is the right recurrent laryngeal nerve in the surgical field?

A The majority of surgeries that I have been asked to do the exposure for were on the left side.

Q Is there a reason for that?

A That is correct.

MR. DUGAN: I object to that.

THE COURT: Objection sustained.

Q Is there any benefit from doing this type of surgery from the left side as opposed to the right side?

MR. DUGAN: Objection.

THE COURT: Sustained.

Q What are the benefits, if any, of doing the surgery from the left side?

MR. DUGAN: Objection.

THE COURT: Sustained.

Q Doctor, looking at the chart, could you explain what the procedure is in this surgery?

A Yes.

THE COURT: Which surgery are we talking about?

Let's be more specific.

Q Anterior cervical decompression in the Testaverdi matter.

MR. DUGAN: Judge, may I have a voir dire, Judge?

THE COURT: Yes, you may.

Just answer his questions now, Doctor, just specifically about this procedure.

MR. DUGAN: You may be seated, Doctor.

VOIR DIRE EXAMINATION

BY MR. DUGAN:

Q Doctor, I am Sean Dugan.

I represent doctors Leventhal and Ho.

Doctor, the five hospitals associated with the North Shore University Health System, can you lust tell us what those are?

A Yes. University Hospital in Manhasset, Huntington Hospital, Syosset Hospital, Glen Cove and Stonybrook, which actually is not part of the health system, but is on the north shore.

Q Doctor, at no one of those hospital?? sir, are you privileged or qualified to perform an anterior cervical decompression at C6-C7, fair statement?

A Yes.

Q Doctor, if you attempted to do such an anterior cervical decompression, the chief of surgery would immediately tell you to stop, true?

MR. BELLO: Objection.

THE COURT: Objection is now sustained.

Counsel, I don't know where you are going with this, but I won't --

I will allow you to do this during cross-examination, so please have a seat.

Continue later on.

MR. BELLO: Thank you, your Honor.

THE COURT: Go ahead, Mr. Bello.

MR. BELLO: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. BELLO: (continued)

Q Doctor, again, you have reviewed the medical records in this case, haven't you?

A Yes.

Q And this case involves an anterior cervical decompression, is that correct?

A Yes.

Q Tell us what is the nature of that surgery first?

A Regarding the exposure for the decompression?

Q Yes, you can get up again. I hate to make you get up and down.

THE COURT: Go ahead.

(Witness complies.)

A In order to expose the spine area so the spine or neurosurgeon can do the decompression, I make an incision along the neck, usually in the left side.

We tunnel down behind the strat muscle called the sternocleidomastoid muscle which runs down here.

We tunnel down behind the thyroid gland.

The chart is rather confusing, but here is the front of the neck and here is the back. Here is the spine.

So, we want to reach the spine for the surgical procedure.

Q Doctor, one minute, if I may. How are we looking at this person on the chart?

A We would be looking as if you transected the neck and you are looking right at what we call a sagittal section, and you are looking --

THE COURT: You are looking down at it, is that it?

THE WITNESS: You are looking down from the top of the patient where this would be the front, this would be the back, there would be, say, the right or left.

Q Could you point to the right recurrent laryngeal nerve on that?

A That would be right here.

Q Could you point to the C6 and C7 disc?

A Well, it's hard to say the level, but assuming the disc would be in this area.

Q And you mentioned that you would make an incision.

Where would you make the incision on the photograph?

A We would make the incision up here in the front of the neck.

It can be either transverse or down, and we dissect the tissues, pulling the muscle to the side and tunnelling down behind the thyroid gland.

This would be the larynx or trachea and this would be the esophagus, and the esophagus, larynx and the thyroid gland, and would all get pushed up anteriorly to the front of the neck and the carotid artery and jugular vein get pushed to the back and we tunnel right in here down to the spine.

So, this would be the method.

Q And on your chart, is the right recurrent laryngeal nerve in the surgical field?

A That is correct.

Q And when you say you push aside, how do you -- what tools do you use to push aside?

A We do the dissection with a forcep and a dissecting scissor, and there is some blunt dissection as well.

So, you would use a sponge to push tissue and even your fingers.

I always make it a point of identifying the recurrent nerve during the dissection to limit the chance of injury, the right side especially, that's mandatory because of its variability in the way that it runs, as we discussed before.

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

THE COURT: Denied.

Q And do you use retractors as well?

A Yes, we do.

Q What are they used for?

First let me ask, what are retractors?

A Retractors are spring loaded instruments that automatically hold the tissue apart so you can see in the operative field.

(Witness resumes the stand.)

Q You mentioned that you identify or isolate the nerve, right recurrent laryngeal nerve?

A Yes.

Q Why is that?

MR. DUGAN: Objection, Judge.

THE COURT: Sustained.

Q Is there any risk in not identifying the nerve?

MR. DUGAN: Objection.

THE COURT: Sustained.

Q When you identify the nerve, what is the purpose of identifying the nerve?

MR. DUGAN: Objection.

THE COURT: Sustained.

Ask the proper question, I will allow it, counsel.

Q What is the procedure in identifying the nerve first or isolating it?

A When operating on the right side of the neck, you first look in the area between the trachea and the esophagus to see if the nerve is running in a normal location.

About a third of them will come in quite laterally from the outside or even be above, more toward the surface above where the inferior thyroid artery runs.

Most of the nerves are well behind that and protected.

In addition, one would look for a non-recurrent nerve, a nerve that isn't running in the normal location, but coming directly from the carotid area and that vagus nerve right in from the side, that would be at risk for being cut inadvertently during such a procedure.

Q From your review of the medical records in this case, did Doctors Ho or Leventhal identify or isolate that nerve, the right recurrent laryngeal nerve?

MR. DUGAN: Objection.

THE COURT: Sustained.

Q Did you review the medical records in this case?

A Yes, I did.

Q Let me show you what has been marked --

MR. BELLO: Your Honor, I want do mark the next exhibit which is St. Vincent's medical records as Plaintiff's Exhibit 6.

THE COURT: Any objection to putting it in evidence, counsel?

MR. DUGAN: No, subject to the usual redactions.

THE COURT: We'll mark it in evidence as Exhibit 6.

(Whereupon, Plaintiff's Exhibit 6, was marked in evidence, as of this date.)

Q Doctor, did you review those medical records before coming here today?

A Yes, I did.

Q Would you turn to page 23 of the record entitled "Report of operation."

THE COURT: Counsel, maybe you can help him.

MR. DUGAN: Do you have the original?

THE COURT: That is the original.

It's not in order.

(Pause.)

MR. BELLO: Your Honor, on your copy it is marked page 24.

THE COURT: Okay.

Q Dr. Mayer, would you look at page -- what we have as page 24.

What is that document entitled?

A "Report of Operation."

Q What operation is that a report of?

A Anterior cervical decompression.

Q Of whom?

A Joseph Testaverdi.

Q And the date of the operation?

A 9-9-93.

Q And the surgeon who performed the operation?

A Dr. Ho.

Q Looking at where it says "procedure," would you review that, please?

(Pause.)

A Yes.

Q Can you read for us the first paragraph?

A "After the usual endotracheal intubation, the patient was placed in with his head in an extended position. A rolled sheet was placed in the interscapular space and the right paracervical skin incision and left iliac crest incision were marked.

A sterile prepare and drape was performed."

Q Just summarize what was done during that procedure.

A The patient was positioned for surgery and the incision sites were marked and noted.

Q Now, the second paragraph?

A "The skin incision in the neck was then made with a #15 blade and the avascular planes were followed to the prevertebral space. Intraoperative x-ray was obtained to confirm the operative level and then the longus coli muscle was taken down bilaterally.

"The self-retaining retractors were inserted and disc space was entered with a #11 blade. Free disc was removed and then the high speed air drill was used to perform an anterior decompression taking the interior portion of the C6 body and the superior portion of the C7 body.

"The posterior ligament was then identified and fragments of degenerated disc were pulled from the subligamentous space.

"There was a hole in the ligament and another free fragment of disc was also retrieved from the epidural space. A fairly prominent osteophyte was also found at this level on the left."

Q Doctor, thus far, would you agree that that was the proper procedure?

A No, I would not.

Q Why not?

MR. DUGAN: Objection.

THE COURT: Overruled.

Q Why not?

A The dissection, if performed as stated in the operative note, which we have to assume, made no effort to identify the course of the right recurrent laryngeal nerve, which I consider inappropriate.

Q Why is that?

MR. DUGAN: Objection, move to strike.

THE COURT: Objection sustained. That part is stricken.

Q What is it that you consider inappropriate, doctor?

MR. DUGAN: Objection.

THE COURT: Objection sustained.

Ask a proper question, counsel. Come on.

Q What, in your opinion, would you have done for the proper procedure to be performed?

MR. DUGAN: Objection.

THE COURT: Objection sustained.

You are going to have to ask the question properly, counsel, or I will not allow it.

Q Dr. Mayer, in this type of surgery, under the procedure that was utilized, does the right recurrent laryngeal nerve need to be identified?

MR. DUGAN: Objection.

THE COURT: Sustained.

MR. BELLO: We will go back to that, your Honor.

Q Read the next paragraph.

A "The decompression was thoroughly achieved and the ligament was opened to complete the decompression. The

epidural space was further explored but no other free fragments of disc or other compression could be appreciated."

Q Would you agree, explain for us what that procedure was?

A They went in and got into the interspace, removed the herniated disc fragments and made sure that there was no further compression of the nerve root.

Q The next paragraph?

A "The wound was copiously irrigated and attention was turned to the left iliac crest where a skin incision was made with a #10 blade.

"Self-retaining retractor was inserted and a subperiosteal dissection of the iliac crest was performed. The bone graft was harvested with curved and straight osteotomes and the iliac crest incision was closed, using 0 vicryl, 3-0 vicryl and a subcuticular skin closure was performed."

Q And the last paragraph?

A "In the neck, the bone plug was fashioned to fit the operative drill site and then the anesthesiologist gave general upward cervical traction. The bone plug was tapped securely into place. The wound was copiously irrigated. Scrupulous hemostasis was achieved and the incision was then closed in multiple layers using 3-0 vicryl and a subcuticular skin closure was performed.

"The dressings were applied with Steri-Strips, Betadine and 4 x 4's. The patient was awakened and taken to the recovery room in satisfactory condition."

Q Let's go back to -- you had stated that this was not proper procedure for this type of surgery.

MR. DUGAN: Objection.

THE COURT: Sustained.

Q You had stated that you disagreed with the procedure used?

MR. DUGAN: Objection.

THE COURT: Sustained.

Q Dr. Mayer, do you have an opinion, with a reasonable degree of medical certainty, as to whether or not there was any departure from accepted medical practice on the part of the doctors Ho and Leventhal in failing to identify and or isolate the right recurrent laryngeal nerve during the 1993 surgery?

MR. DUGAN: Objection.

THE COURT: Sustained.

You were doing all right until you got towards the end there.

Q Dr. Mayer --

THE COURT: That has to be left up for him, not for you.

Q Dr. Mayer, do you have an opinion, with a reasonable degree of medical certainty, as to whether or not there was any departure from accepted medical practice on the part of doctors Ho and Leventhal?

A Yes.

THE COURT: Do you have an opinion?

THE WITNESS: Yes, I do.

Q What is that opinion?

MR. DUGAN: Objection.

THE COURT: Overruled.

Q What is your opinion?

A I think that --

MR. DUGAN: Objection.

THE COURT: Overruled.

THE COURT: Go ahead, you can answer.

A I feel on reviewing this that there were two departures; one was failure to identify the right recurrent laryngeal nerve and the second was failure to document intermittent relaxation of the retraction during the case.

That is a very poor aspect of eliminating the stretching or traction injury to the nerve, periodically releasing the retractors, not keeping constant tension on the nerve.

THE COURT: What is the basis of your opinion, Doctor?

THE WITNESS: Personal surgical experience and review of the literature on the matter.

MR. DUGAN: Objection.

THE COURT: Objection, that part is stricken; review of the literature is stricken.

Jury is to disregard that.

Anything else is the basis of your opinion, Doctor?

THE WITNESS: No, sir.

THE COURT: Next question, counsel.

Q Dr. Mayer, on this departure, do you have an opinion --

THE COURT: Which departure are you talking about, counsel?

MR. BELLO: Failure to identify or isolate the right recurrent laryngeal nerve.

Q Do you have an opinion, with a reasonable degree of medical certainty, as to whether or not this departure was a substantial contributing factor to the injury that was sustained by Mr. Testaverdi?

A Yes.

THE COURT: Do you?

THE WITNESS: Yes.

Q What is the basis of that opinion?

A I feel that certainly injury to the right recurrent laryngeal nerve arising from failure to isolate and identify the nerve, as well as failure to inter?? ittently relieve retraction pressure on the nerve, certainly led to the permanent nerve injury and vocal cord paralysis that Mr. Testaverdi unfortunately has sustained.

Q And the basis for your opinion?

A Review of the case and literature review.

MR. DUGAN: Objection, move to strike.

THE COURT: That part is stricken.

Q Any other basis for your opinion?

A Personal surgical training and fellowship training, head and neck surgery.

MR. DUGAN: Objection, move to strike.

THE COURT: Overruled.

Denied.

Q Doctor, based upon your experience, was there a risk that should have been disclosed to the patient prior to surgery?

A In my opinion, absolutely.

Q What is the basis of your opinion?

A There is at least a ten, eleven percent incidence of hoarseness documented in the literature after --

THE COURT: That part is stricken.

Doctor, don't refer to any literature.

Jury is to disregard that.

You may rephrase your question, counsel.

The doctor can answer it properly.

Q What is the basis of your opinion in stating that this risk shouldn't have been disclosed to the patient prior to surgery?

A The incidence of the complication is so frequent that it would be the responsibility of the operating surgeon to fully inform the patient that temporary or permanent loss of voice could occur, and it may alter the patient's decision to go through with the procedure.

It would be part of what I would say the informed consent process.

Q Do you have an opinion, Doctor, with a reasonable degree of medical certainty as to whether or not there was a departure from acceptable medical practices on the part of doctors Ho and Leventhal in failing to advise and disclose

that risk?

MR. DUGAN: Objection.

THE COURT: Sustained.

Ask it the proper way, counsel.

Q Do you have an opinion, with a reasonable degree of medical certainty, as to whether or not there was any departure from acceptable medical practices on the part of Dr. Ho in that regard?

A To my knowledge, I can find no documentation that this risk was discussed with the patient, so the answer is yes.

Q Assuming it was not discussed?

A That is correct.

Q The answer is yes?

A Yes.

Q Would you turn to the intraoperative log?

MR. BELLO: Marked, your Honor, in your book, page 22.

A Yes, I have it.

THE COURT: Intraoperative log.

Q Doctor, what is that document entitled?

A Intraoperative log is a nursing record of the surgery maintained by the circulating operating room nurse in the operating room.

Q And in this log, what is the date of the operation?

A 9-9-93.

Q Upon whom was the operation performed?

A Joseph Testaverdi.

Q What was the nature of the operation?

A It was an anterior cervical decompression.

Q Is there on the form, is there a time that the incision was made?

A 8:40 a.m.

Q And there was a time of the closure?

A 10:25 a.m.

Q And who was the surgeon as listed on the form?

A Dr. Ho.

Q And the assistant?

A Dr. Leventhal and Dr. Urs.

Q In your practice or in your experience with surgery, how is this form filled out?

MR. DUGAN: I object to that, Judge.

THE COURT: How is it filled out?

In pen, how is it filled out.

Sustained.

Rephrase your question.

Q When is this form normally completed?

A It is completed --

MR. DUGAN: I object, Judge.

THE COURT: Objection sustained.

Q Is this form completed during surgery?

MR. DUGAN: Objection.

THE COURT: Objection sustained.

Q Have you dealt with these forms before?

A Yes.

Q When?

A During every surgery that we performed.

Q Is there someone who normally fills these forms out?

A Yes.

Q Who is it?

A What we call the circulating operating room nurse, the nurse who is not scrubbed in for the sterile part of the procedure.

Q And is this nurse generally there at the procedure?

A That is correct.

Q Observing the procedure?

A In addition, getting supplies, instruments, equipment that might be needed that weren't anticipated.

MR. BELLO: Could you give me a moment, please?

THE COURT: Sure.

(Pause.)

Q Doctor, one other question.

From your review of these records, can you tell us from which side this procedure was performed?

A The right side.

MR. BELLO: I have no further questions.

THE COURT: All right.

Let's take a short break and then we will come back with cross-examination by Mr. Dugan.

Members of the jury, don't discuss this.

I will call you back shortly.

(The jury is excused from the Courtroom.)

THE COURT: You may step down.

(Witness excused.)

(Recess taken.)

DR. DAVID ALAN MAYER, having been previously duly sworn, was examined and testified further as follows:

(Whereupon, the jury enters the Courtroom.)

THE CLERK: I note for the record all sworn jurors and their alternates are present and in their proper seats.

THE COURT: Mr. Dugan, you may cross-examine.

MR. DUGAN: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. DUGAN:

Q Dr. Mayer, sir, you are not a neurosurgeon, true?

A That is correct.

Q You have never been certified by the American Board of Neurological Surgery as an expert in that field, true?

A That is correct.

Q You have never done any fellowship training in neurosurgery?

A That is correct.

Q Your residency was not in neurosurgery, fair statement?

A Yes.

Q You yourself do not perform anterior cervical decompression procedures on the spine, fair statement?

A I am just called in to protect the recurrent nerve for the spine neurosurgeons.

I don't personally do the neurosurgery on the nerve root or the disc, correct.

Q On how many occasions -- well, withdrawn.

At which hospital do you say you are called in by the neurosurgeon to open the neck?

A Well, usually at Huntington Hospital, but also I was involved in many of these procedures during training at the Hospital for Special Surgery which we rotated through as New York Hospital residents.

Q Huntington Hospital doesn't even have a Director of the Department of Neurosurgery, does it?

A No, it's done by the spine surgeons there, not by neurosurgeons.

Q There are neurosurgeons at Huntington, Hospital, fair statement, sir?

A That is correct, but --

Q But neurosurgeons there do not do this type of procedure, fair statement?

A No, they do do some, but most are done by the spine surgeons.

Q Spine surgeons being orthopedic surgeons?

A With special training in this type of surgery, correct; not regular orthopedic surgeons. I think this type of surgery is done by either a neuro or spine surgeon.

Q Certainly not by a general surgeon, fair statement?

A Absolutely.

Q You haven't published in this field of this particular type of anterior cervical decompression, fair statement?

A Correct.

Q And you haven't published at all with reference to anything related to you being called in by these doctors at Huntington Hospital to help open the neck, fair statement?

A No, you wouldn't publish on that. That wouldn't be publishable --

Q You haven't published anything at all about protecting the recurrent laryngeal nerve, fair statement?

A That is correct.

Q Have you studied any of the neurosurgical textbooks referable to this issue of protecting the recurrent laryngeal nerve?

A Not neurosurgical, no.

Q Have you studied any of the neurosurgical journals referable to that issue?

A Most of the information I found --

Q No, Doctor, it is a yes or no. It is cross-examination.

Did you or did you not?

A No.

Q Doctor, you told us, you are board certified by the American Board of Surgery as a general surgeon, right?

A That is correct.

Q You are not board certified by the American Board of Surgeons with any subspecialty in vascular surgery, are you?

A No, I am not.

Q As a matter of fact, the American Board of Surgery does give a subspecialty certification to vascular surgeons, right?

A Yes.

Q But you never got such a special certification, fair statement?

A Just a yes or no, or may I answer?

Q You never got such a certification as a specialist in vascular surgery from the American Board of Surgery, true statement?

A True. I was trained before they had --

MR. DUGAN: Move to strike everything after "true," your Honor.

THE COURT: Everything after is stricken.

Just answer the question.

Q However, you hold yourself out in being board certified in both general and vascular surgery, do you not, sir?

A I make no such claim.

I tell the jury I am certified only in the American Board of Surgery.

THE COURT: Step back, let's not have any arguments.

MR. DUGAN: May have I this handed to the witness so he can look at his letterhead, your Honor?

THE COURT: Sure.

(Handing.)

Q On your letterhead, Doctor, you hold yourself out by being certified as a vascular surgeon, do you not, sir?

A No, I do not.

Q What do the words say in the top left?

THE COURT: Let's mark that, please, Defendant's C for identification.

Q Would you read it to us?

(Whereupon, Defendant's Exhibit C was marked for identification, as of this date.)

THE COURT: No, he can't.

Sustained.

Q Does it not say "certified," sir, on your letterhead?

MR. BELLO: Objection.

THE COURT: Sustained.

You can use it to refresh his recollection, counsel, but that's about it.

It is not in evidence.

MR. DUGAN: I offer it in evidence.

MR. BELLO: I object.

What is the purpose of it?

THE COURT: I know what it is, but let me see what it is.

MR. DUGAN: It is just for the letterhead, Judge, not for the contents.

THE COURT: Well, do you have a clean copy of this without anything being --

MR. DUGAN: I will get one, Judge.

THE COURT: Okay.

Let me speak to counsel over here.

Excuse us one moment. We will have a side bar.

(A side bar discussion was held off the record.)

MR. DUGAN: With the agreement, Judge, that it's just for the letterhead, not for the contents, we'll redact it later.

THE COURT: You will redact it later.

Make that C in evidence.

(Whereupon, Defendant's Exhibit C, was marked in evidence, as of this date.)

THE COURT: All right.

Exhibit C is now in evidence.

Go ahead.

Q So, Dr. Mayer, just so that we are clear, your letterhead does say the words imprinted "board certified," next line "general and vascular," next line "surgery."

Did I fairly read your letterhead, sir?

A That is correct.

Q Have you taken the board to be a vascular surgeon?

A The American Board of Surgery examination --

Q Did you hear my question?

A May I answer, please?

Q Did you take the board to be subcertified as a specialist in vascular surgery by the American Board of Surgery?

A That is a different question than you just asked me.

THE COURT: Just answer that question.

Don't argue with counsel.

Let's go.

Just answer the question.

THE WITNESS: I don't know which question to answer, your Honor.

THE COURT: Rephrase the question and the doctor will answer.

Q Did you take a test to be certified by the American Board of Surgery as a subspecialist in general vascular surgery, Doctor?

MR. BELLO: Objection, your Honor.

THE COURT: Overruled.

A I don't understand the question. I am not able to answer it, I am sorry.

THE COURT: Next question.

Q Doctor, earlier you were looking at Plaintiff's 2 for identification, and those were some drawings in front of the jurors; do you recall that?

A Yes.

THE COURT: That's not your own, it's a chart.

Q The chart referable to the right recurrent laryngeal nerve is not generally accurate, does not generally accurately depict the course of the nerve; fair statement, sir?

A No.

Q In 98 percent of the times, the recurrent laryngeal nerve is not on the outside, as it is here, but rather is closer --

THE COURT: The outside of what, counsel?

Q The outside of a blood vessel called the right common carotid artery, but is generally, in 98 percent of the time, 99 percent of the time is between that structure and the -- what do we call this, trachea?

A Trachea.

Q Is that a fair statement, sir?

A No, because we're not pointing to the nerve. You were pointing to the vagus nerve.

Q What is titled here as the "anomalous right inferior laryngeal nerve not recurrent," is that the yellow structure here?

A No, it is not.

Q Is that what the chart says the yellow structure is, anomalous right inferior laryngeal nerve?

A You are pointing to the vertical structure, which is the vagus nerve.

The recurrent nerve is the transverse structure, as I instructed the jury earlier.

Q The transverse nerve is the right inferior laryngeal nerve?

A That is correct.

Q Is that anatomically correct in 98 percent of the cases, anatomically correct location?

A According to the drawings?

Q No, according to most of us sitting here.

In 98 percent of the people, is that where that --

THE COURT: According to anatomy.

Q Is that where that nerve courses?

A No, I mentioned only in one or two percent does it course across the neck in a non-recurrent fashion.

Q You have no opinion as to whether, in fact, in Mr. Testaverdi's case, this is an accurate depiction of where the nerves course, fair statement, sir?

A I think there is a higher likelihood it was non-recurrent in this case, but it may have been stretching retraction injury also, so you can't say with complete certainty.

Q With medical certainty you cannot say that this accurately, Plaintiff's two, accurately reflects where the nerve traversed, fair statement?

A With complete certainty, no, I cannot.

Q Have you testified before?

A Yes, I have.

Q How many times?

A Probably about ten times.

Q So, you know we're not talking about complete certainty, we are talking about -- just as you did when your lawyer was asking you a question-- reasonable medical certainty.

A That's correct.

MR. BELLO: I object to the form of the question.

THE COURT: Overruled.

Q With reasonable medical certainty, you cannot give this jury your opinion that, in fact, Mr. Testaverdi's nerve is in an anomalous position.

Is that a fair statement, sir?

A Yes.

Q Were you responsible for getting this chart together for plaintiff's counsel?

A No, I wasn't.

Q So, this is something he showed you?

A Well, I am well acquainted with Frank Netter's anatomical work, but Mr. Bello obtained the chart, correct.

Q By the way, in Mr. Testaverdi's case, aside from the location of the nerve, the level of the operation was down at about what level would we call this, C6, C7, would be down about where my pen is across the subclavian artery, fair statement?

A No. It was well above the subclavian artery. That is at the collarbone level.

Q And that's where C6-C7 is, right?

A Well, slightly above I would say, but --

A Do you want to go up here?

A That might be possible.

Q But, in any event, at least two or three vertebrae below where this anomalous nerve in this graph is located, fair statement?

A No. The nerve can recur at any -- a non-recurrent laryngeal can be at any level in the neck. That is just a hypothetical example.

That does not at all preclude it from being at the operative level.

That is an incorrect statement.

Q So, you have no opinion where the right recurrent laryngeal nerve coursed on Mr. Testaverdi --

A Exactly the point why it had to be identified at the time of surgery, because no operative surgeon --

MR. DUGAN: I move to strike everything after "exactly," Judge.

THE COURT: Stricken.

Jury is to disregard it.

Mr. Bello can ask you questions in redirect.

Answer Mr. Dugan's questions.

THE WITNESS: Yes, your Honor.

Q By the way, how did you first hear about this case?

A I was contacted by Mr. Bello for expert testimony.

Q Did you know Mr. Bello from another situation?

A No.

Q How do you know how he came to get your name?

A I am not sure.

MR. BELLO: Objection, your Honor.

THE COURT: Overruled.

A I am not really sure exactly how he got my name, to be honest.

Q Are you registered with any services?

A No.

Q Do you advertise yourself to come into Court on cases?

A Yes.

Q Where do you advertise your services to come in to testify in these malpractice cases?

A Usually in the law journals.

Q Any place other than the law journal that you advertise your services, the availability of your services?

A Not currently, no.

Q Had you in the past advertised in places other than the New York Law Journal?

A We had sent some promotional flyers out to some of the local firms in the Long Island area.

Q These were plaintiff's firms?

A Plaintiff and defendant firms.

Q Do we agree, Doctor, that in 98 or 99 percent of the cases, the right recurrent laryngeal courses not out here where it is on the graph, but much closer to the trachea?

A I don't agree with that.

Q Can you you give me a percentage?

A Because on the right side it doesn't hug the groove even if, in the 98 percent, it comes in more laterally and is more susceptible to injury.

On the left side it does hug the trachea.

Q We are just talking about the right.

When you talk about more laterally, you you are talking about more away from the trachea?

A That is correct. The anatomic course in a "normal case" which is probably only 50 or 60 percent as I mentioned, it is not, does not hug the trachea, and one must be wary of the nerve in the right side.

Q Doctor, would you agree, by the way, in the ten times that you have testified, they've only been for plaintiffs against doctors and hospitals, fair statement?

A No. That's incorrect.

Q More than one?

A Are you asking for --

Q Have you testified on more than one occasion for a plaintiff against a doctor or hospital?

A More than one occasion, yes.

Q How many of the ten?

A I really can't recall offhand.

Q How many years back have you been testifying in these types of cases?

A For quite a number of years.

Q Five, ten, twenty; you tell me?

A Mainly testified in the last ten.

Q Does "anomalous" mean other than normal?

A That is correct.

Q So, when the chart says -- still on Plaintiff's 2 -- "anomalous right subclavian artery" and it points to this structure, that means that the right subclavian artery in this graph is in an unusual spot?

A That is correct.

Q Now, Doctor, do you agree that the most common complication of an anterior cervical decompression at this level is hoarseness?

A I would say statistically, yes.

Q I mean a patient could die from the operation, that's a possibility, but a remote possibility I guess, right?

A Well, that couldn't normally be a surgical complication.

It would be more of an anesthesia complication, except under extraordinary circumstances.

Q A patient, I guess, could get paralyzed working on his backbone like that at this level?

A Possibly.

Q Infection is a possible complication?

A Yes.

Q Another possible complication is that the patient might not get better following the surgery of this sort, true?

A Correct.

Q And those are the reasons why doctors get what is called this informed consent from the patient, right?

A Well, I don't know if that's the reason,. The reason is to inform the patient of the inherent risks to the procedure so they can make an informed decision whether to proceed with the procedure.

Q On these, I realize you don't actually do the procedures themselves, but on these --

MR. BELLO: Objection, your Honor.

THE COURT: Overruled.

Q But patients --

THE COURT: Was that a question or what?

MR. BELLO: To form.

MR. DUGAN: I was moving into the question, Judge.

THE COURT: Then it's stricken, the jury is to disregard it.

Q These procedures are performed everyday in this country, thousands of times a day, right?

MR. BELLO: Objection, your Honor.

THE COURT: Sustained.

What are these procedures?

MR. DUGAN: We are only talking about anterior cervical decompressions.

Q That is all I am going to talk about, unless I preface my remarks to the contrary.

These procedures are performed hundreds of times every day in the country, right?

A I couldn't verify the frequency of the procedure.

Q Is it an infrequent procedure, Doctor?

MR. BELLO: Objection, your Honor.

How is one supposed to know whether it's infrequent?

THE COURT: Overruled.

If he can answer it, Doctor.

A I am really not able to answer that.

Q Fine, next question.

Q The reason you are not able to answer it is because you yourself don't perform them, is that what we are talking about?

MR. BELLO: Objection.

THE COURT: I am going to sustain it.

Q Is that a reason why you can't answer the question?

THE COURT: Sustained.

Just ask him a question.

Q Doctor, you told us you did not review the deposition transcripts; that you only reviewed the hospital charts in this case and some office records.

MR. BELLO: Objection, that's not his testimony.

THE COURT: Overruled.

MR. BELLO: Your Honor, he never testified --

THE COURT: Overruled.

Be seated, Mr. Bello.

BY MR. DUGAN:

Q I would like to read to you from the deposition of Dr. Leventhal on the issue of informed consent, from page 20, line 8, Doctor Leventhal's deposition transcript, which was taken on April 16, 1998.

MR. BELLO: I would object, your Honor.

THE COURT: Overruled.

THE COURT: Anybody have a copy for me in the meantime?

THE COURT: Yes, Judge, I handed them up to you.

THE COURT: Page?

MR. DUGAN: Page 20, your Honor, line 8.

THE COURT: Go ahead.

Q Question to Dr. Leventhal, at his deposition, which occurred on April 16, 1998:

"Question: Can tell me what the complications were that you described to Mr. Testaverdi in that conversation?

"Answer: Yes, there are a number. Lack of total relief, recurrence, hoarseness, potential problems with the spinal cord; that he was going to have a fusion and that there would be a great deal of pain from the fusion, from the donor site for the bone and the general complications that can happen at any time from general anesthesia."

On page 46, line eleven.

THE COURT: Go ahead.

Q Question to Dr. Leventhal: "Do you recall when you explained complications pertaining to hoarseness with the surgery with Mr. Testaverdi.

"Answer: I told you that we started talking about the potential complications on July 26, which included hoarseness.

"Question: Did you talk about hoarseness on that date?

"Answer: Of course.

"Question: At any time between July 26 and August 23, did you speak about the complications involving hoarseness with Mr. Testaverdi?

"Answer: Yes.

"Question: When did you do that?

"Answer: Again, I would have done it on August 23," continuing on page 48.

Line 15, "Question: When was the next time after August 23, 1993 that you spoke to Mr. Testaverdi about possible hoarseness associated with the surgery?

"Answer: Not just hoarseness but all the potential complications that could evolve on August 23.

"Question: After August 23?

"Answer: When did I next?

"Question: Where was the next time that you discussed complications with Mr. Testaverdi?

"Answer: I know he called to discuss the results of a myelogram and the scan, and again since the myelogram and the scan indicated that he needed an operation for the left radiating pain over the phone, I again would have gone over all the potential complications with him."

On page 89 of Dr. Leventhal's transcript.

THE COURT: 89 now?

MR. DUGAN: Yes, your Honor, line 10.

THE COURT: Go ahead.

Q "Question: When was that phone conversation?

"Answer: We had one the day after the myelogram."

Question, page 90, line five, "Question: What did you say to Mr. Testaverdi regarding Dr. Ho performing or participating in the surgery?

"Answer: We went through the potential complications again which we have gone over enough times, I think, and that Dr. Ho and Dr. Urs would be involved in the surgery, in that Dr. Ho was my associate; that I had, would go over the myelogram and cat scan films, and that Ho and I would be doing the neck part of the surgery and Dr. Urs would be doing the fusion."

MR. BELLO: I note for the record that was objected to at the deposition.

THE COURT: What was?

Overruled.

Q Doctor, in addition to that testimony of Dr. Leventhal in his deposition transcript, we have what has been marked as Plaintiff's A for identification, a blowup of the informed consent sheet from St. Vincent's Medical Center --

THE COURT: Defendant's A you mean.

MR. DUGAN: Defendant's A for identification.

Q Of the St. Vincent's Medical Center, which Mr. Testaverdi agreed he signed, and I want you to assume that Dr. Leventhal will testify he signed before the operation.

Assuming that evidence, would you agree an appropriate informed consent was obtained, sir?

A No, I would not. I don't understand why --

MR. DUGAN: I move to strike everything after "I", your Honor.

THE COURT: It is stricken.

Jury will disregard it.

Q Did you know that Mr. Testaverdi took off from work for two weeks in August to consider whether he wanted to undergo the surgery?

MR. BELLO: Objection, your Honor.

That is not --

THE COURT: Overruled.

A No, I did not.

Q You didn't read his deposition transcript either?

A I believe I saw his deposition transcript, but I don't recall that one particular point.

Q Do you have a report, by the way, that you generated for purposes of this case, other than the evidence that is in front of you?

THE WITNESS: No, I did not generate any other report.

MR. BELLO: Your Honor, are we referring to-- what report is counselor referring to?

THE COURT: Counsel, let's be more specific.

MR. BELLO: Are you referring to --

Q No, that's just your letterhead, Doctor.

That that is nothing to do --

THE COURT: I am going to sustain an objection.

I am going to strike that testimony.

You may ask another question, properly, please.

Q Is there a report that you ever generated?

A Yes.

Q What is the date of that?

A 10-19-99.

Q Other than that, is there any other time you put pen to paper, referable to this -- your review in this case, sir?

A Aside from some just personal notations, no.

Q Did you have those personal notations with you, by any chance?

A No, I do not.

Q Doctor, you also mentioned the surgical approach for the skin incision; do you recall that part of the discussion?

A Yes.

Q Do you agree, sir, that most neurosurgeons approach this pathology with a skin incision on the right?

A Do I agree with that? No. I do not agree with that.

Q I said do you know. Do you know that to be a fact?

MR. BELLO: I thought the question was do you agree.

THE COURT: Rephrase the question.

Come on.

THE COURT: Wait, Doctor, I am sustaining an objection; please, counsel, please object the correct way.

Q Doctor, do you agree that most neurosurgeons approached this pathology, again I am not going to keep on going back, but this particular pathology, with an incision on the patient's right?

A No, I do not agree with that.

Q Well, in that regard, with reference to most neurosurgeons approaching this from the right, are you aware of an article entitled "Anterior approaches to the cervical spine" --

MR. BELLO: Objection, your Honor.

THE COURT: Overruled.

He is allowed to ask the question.

Q -- by Dr. Julian Hoff, who is a professor and chief of neurosurgery at the University of Michigan Medical Center at Ann Arbor, Michigan, and by David Waters, M.D., who is another neurosurgeon at the University of Michigan Medical Center, which article was published in Clinical Neurosurgery in 1982.

MR. BELLO: Objection, your Honor.

THE COURT: Overruled.

Are you?

THE WITNESS: No. No, I am not.

Q Doctor, with reference to the issue of whether standard neurosurgical practice --

Well, I will ask you, are you aware, sir, or do you agree, sir, that most neurosurgeons in 1993 did not identify, isolate the right recurrent laryngeal nerve during this type of surgery?

A I think it was imperative upon them to identify it if they used the right approach.

I think most of them that used the left approach --

MR. BELLO: Objection.

THE COURT: It is stricken.

The jury is to disregard it.

Just answer the question, Doctor.

Mr. Bello can ask you a question in redirect.

Q Are you aware, sir, that most neurosurgeons do not identify and isolate the right recurrent laryngeal nerve during the cervical decompression procedures?

A I couldn't comment on that.

In my experience they do, but I couldn't comment on a national trend in 1993.

I would consider it poor practice not to identify it.

THE COURT: That is stricken.

Doctor, please just answer the question.

Q Well, on the issue of neurosurgeons not identifying the right recurrent laryngeal nerve, are you familiar with Operative Neurosurgical Techniques, Their Indications, Methods and Results by Dr. Henry H. Schmidek and Dr. William H. Sweet?

MR. BELLO: Objection to the form.

THE COURT: Overruled.

Q Both neurosurgeons.

Are you aware of the text, sir?

A Not personally, no.

Q On the issue of the neurosurgical standards of care referable to the approach to this pathology and to whether or not the standards of neurosurgical care was to identify and isolate the right recurrent laryngeal nerve; are you familiar with the text Vascular Surgery edited by Dr. Robert Rutherford, who is a professor of surgery, the Chief of Vascular Surgery section of the University Hospital?

A Yes, I am familiar with that text.

Q Do you consider this text authoritative?

A Not on that particular subject, no; but in vascular surgery in general, yes.

Q But not on that subject because you disagree with what these authorities say?

MR. BELLO: Objection.

THE COURT: Objection sustained.

Jury is to disregard it.

Q With reference to the issue of the surgical approach to this pathology, being through the right side of the neck and not isolating and preserving the recurrent laryngeal nerve, do you recognize Vascular Surgery Principles and Practice by Dr. Frank J. Veeth up at Montefiore; do you know Dr. Veeth?

Well regarded man, right?

A Yes, he is.

Q Dr. Robert W. Hobson, are you familiar with him?

A No.

Q Dr. Russell A. Williams?

A No.

Q And Dr. Samuel E. Wilson.

Are you familiar with this text, sir?

A Yes.

Q Do you consider this authoritative?

A On what?

Q Do you consider this to be an authoritative text referring to the issue?

A On general vascular surgery?

Q We are talking about the issue of the approach to the pathology on the right side of the neck and whether one habitually identifies the right recurrent laryngeal nerve?

MR. BELLO: Objection to the form.

Q I couldn't hear your answer.

THE COURT: Overruled.

A I do not recognize that as an authority on that subject.

Q With reference to this issue of the neurosurgical practice of approaching this pathology that Mr. Testaverdi had from the right, and the neurosurgical practice of not identifying the right recurrent laryngeal nerve, on that issue, you certainly heard of Youmans' Neurological Surgery text, right?

A I have not heard of it.

Q Vascular Disease and Trauma?

A There are hundreds, if not thousands, of texts.

I have not heard of that, sir.

Q Have you heard of Dr. Youmans?

A No.

Q Youmans, I am sorry. YOUMANS.

On these issues, of the approach to use and whether neurosurgeons identify and preserve the right recurrent laryngeal nerve for this particular pathology, did you read the article in the Journal of Neurosurgery: Spine, just published in October of 1999 on Assessment of Recurrent Laryngeal Nerve Stress and Injury During Anterior Cervical Spine Surgery by doctors W. Scott Jellish, Dr. Randy H. Jensen, Dr. Douglas E. Anderson and John F. Shea from the Department of Neurosurgery at Loyola University Medical Center; are you familiar with the article?

A No.

Q Are you familiar with the Journal of Neurosurgery: Spine?

A I do not generally read that journal.

Q Doctor, you were asked to read different parts of the hospital chart as to -- and if we can give the doctor the hospital chart of St. Vincent's-- as to who was listed as performing surgery; don't close it.

It took me awhile to find that.

We do have a September 9, 1993 anesthesia record from St. Vincent's, right?

A Yes.

Q The anesthesiologist was Dr. Yalamanchile, and Dr. Yalamanchile listed the surgeons as being, on the bottom left, Dr. Leventhal/Ho/Urs.

Did I correctly read that?

A Yes.

THE COURT: What page is that?

MR. DUGAN: 18, your Honor?

A But that page makes no distinction as to who did the operating and who was the assistant.

MR. DUGAN: Move to strike everything after the word "yes".

THE COURT: Just answer the question.

The jury will disregard it.

Q Doctor, you were asked to look at the operative log which is page 22, I think it is in that general vicinity.

I think you went too far.

THE COURT: Intraoperative log?

MR. BELLO: Number 22 on yours.

THE COURT: I have it.

Q Doctor, assume it says that the surgeons were Ho, Leventhal, Urs.

MR. DUGAN: I am asking him to assume.

MR. BELLO: If he is going to refer to an exhibit.

THE COURT: The entire exhibit is in evidence and counsel can ask him to assume.

Nothing wrong with that.

Go ahead.

MR. BELLO: But it is in front of him, your Honor.

It is not in front of him now.

THE COURT: He is asking him to assume.

Let him question.

I will let you question too, counsel.

Q Assume that to be so, okay?

A I am not sure what am I assuming to be so?

Q That a different part of the chart.

The intraoperative log book, instead of listing Dr. Leventhal/Ho/Urs, lists Ho/Leventhal/Urs, assuming that to be so, okay?

A (No response.)

Q Is that okay?

A I am not sure what response you would like me to give you.

Q Will you assume --

THE COURT: You are going to assume, aren't you?

THE WITNESS: Yes.

THE COURT: Okay, that is the answer.

Q I will read to you from from Dr. Ho's deposition transcript which you have up there, Judge.

THE COURT: I have it right here.

Q From when he was deposed on May 22, 1998 on page 28?

THE COURT: Go ahead.

Q Line 17, question by plaintiff's counsel to Dr. Ho, "On this particular surgery to Mr. Testaverdi, were you an assistant surgeon, a surgeon or something else?"

"Answer: I think it would be more appropriate to say co-surgeon. Probably if you wanted to go that far, I would be -- I would say I would be the assistant surgeon. I wasn't the primary surgeon under the circumstances, but we both were there and both did the operation. So, it's sort of inaccurate to say one over the other. We are both qualified, so you can say either/or."

And on page 43, line 12, another question to Dr. Ho, "Question: In performing this particular surgery to Mr. Testaverdi, did you perform the majority of the surgery; did Dr. Leventhal, was it equal?

"Answer: We were both there, and I don't know whether you can say who did more or what. It's impossible to really separate.

"Question: In the prior surgeries that you had done with Dr. Leventhal, was that always the case that you did it equal, or was there always a primary surgeon or secondary surgeon?

"Answer: In my mind, a primary surgeon is the guy who saw the patient in the office and then scheduled the operation. When you come to the operating room, you need two sets of hands, so both surgeons worked together. It's not like, well, I am only going to do this because I am the assistant. You work to help one another because you want to help the patient. I think it's unrealistic.

"We've been working together a lot of years so I know what he does, he knows what I do, we work together, we work as a team. It's not a competition. It's unfair to try to separate the two surgeons from what we are doing as a team."

My question, sir, is have you been associated with another surgeon in your practice over the past say ten years?

A No, I have not.

Q Now, by the way, Doctor, are you aware that on page 26 of Dr. Ho's deposition, he was asked on line 9:

"Question: To your own independant recollection, as you sit here today, was there any complications involved in this particular surgery?

"Answer: No.

"Question: In reviewing this operative report as you sit here today, are any complications indicated on the operative report?

"Answer: No.

"Question: In your opinion, as you sit here today, did the surgery go according to plan? Was it successful?

"Answer: Yes."

Doctor, the surgery took what, about an hour and 50 minutes from start to finish?

A Yes.

Q Standard time to perform this procedure, correct?

A Yes.

Q Let me continue reading Dr. Ho's deposition transcript where plaintiff's counsel was asking him questions on page 26.

MR. BELLO: May we approach?

THE COURT: He's allowed to use this, counsel.

Overruled.

Q Line 23.

In this particular type of surgery, in your professional, medical opinion, is it necessary to first identify the right recurrent laryngeal nerve prior to continuing with the surgery?

"Answer: I just want to repeat, in my opinion, is it necessary to --

"Question: Yes.

"Answer: For this surgery, no.

"Question: Is there a reason why it's not necessary for this surgery in your opinion?

"Answer: We just don't visualize the nerve.

"It's not necessary to doing the operation.

"Question: What about visualizing the larynx?

"Answer: You're wrong in anatomically trying to describe the surgery. It's not necessary to visualize the larynx, but

we are working next to it.

"Question: Is it necessary to isolate the larynx in any way in this particular surgery?

"Answer: No."

MR. BELLO: What page are you on?

MR. DUGAN: 27, line 22.

Q "Question: In your professional medical opinion, is it necessary to isolate the right recurrent laryngeal nerve?

"Answer: No."

Q Did you read Dr. Ho's deposition transcript?

A I saw that.

Q And finally I would like to read to you from Dr. Yalamanchile's deposition before trial transcript of June 1, 1998.

We just said he was the anesthesiologist on the September 9 procedure, right?

A (No response.)

Q Assume that to be so for the sake of the question, okay, Doctor?

A Yes.

Q Assume Dr. Yalamanchile was the anesthesiologist for this procedure.

On page 46, line 21, question to the anesthesiologist "Now, do you recall if both doctors Ho and Leventhal were present during the entire surgery?

"Answer: Yes.

"Question: Yes they were present?

"Answer: Yes, they were present.

"Question: Are there any records in the hospital charts that would indicate that both doctors were present during the entire surgery?

"Answer: Yes.

"Question: What records would those be?

"Answer: The anesthesia records. Right here. (Indicating.)

"Question: Is that your handwriting, Doctor?"

And again, sir, the reference is to the anesthesia sheet that we are looking at just a moment ago.

The doctor's answer is correct.

"Question: By putting the three surgeons names in that particular spot, does that mean that -- what does that

indicate or what does that mean?

"Answer: All three surgeons were involved in the surgical process.

"Question: Does that mean that all three surgeons were present during the entire procedure?

"Answer: Dr. Leventhal and Dr. Ho were present during the entire surgery.

"Dr. Urs was not.

"Question: Do you recall that from your own independent recollection, or is there somewhere in the hospital records that indicate that?

"Answer: From my own recollection.

"Question: From your own independant recollection, was Dr. Urs only involved in the actual bone graft part of the surgical procedure?

"Answer: Correct.

"Question: From your own independant recollection, did Dr. Ho perform the majority of the surgery, Dr. Leventhal or something else?

"Answer: Both were involved in the surgery.

Question to Dr. Yalamanchile at his deposition, "Were they both involved equal or was one assisting the other?

"Answer: Both involved equal.

"Question from your own independant recollection, is it your recollection that one was the primary surgeon and one was the secondary or assisting surgeon?

"Answer: No."

You have no basis for disputing Dr. Yalamanchile's answers, do you, sir?

A Yes, I would dispute them. I have never heard of someone not taking responsibility as --

MR. DUGAN: Judge, I move to strike.

THE COURT: That is stricken.

I don't want to tell you any more, Doctor, please.

THE WITNESS: Your Honor --

THE COURT: Don't face the Court and don't question the Court.

THE WITNESS: Yes, sir.

THE COURT: I make the decisions here.

Mr. Bello can question you later about whatever you want to say now, but just answer counsel's questions, that is all.

'HE WITNESS: All right, your Honor, sorry.

Q Continuing with Dr. Yalamanchile's deposition of page 23, "Question, as you sit here today --"

THE COURT: What line?

MR. DUGAN: I am sorry, page 23, line 3.

Q "Question: As you sit here today, are you aware of any complications that occurred in that particular surgical procedure?

'Answer: No.

'Question: Does the chart indicate that there were any complications in this particular surgical procedure?

'Answer: No."

Do you dispute Dr. Yalamanchile's statements in that regard too?

A Absolutely.

Q Now, doctor, if you know -- I will withdraw it.

Doctor, are you familiar with treatment for hoarseness due to cord paralysis due to recurrent laryngeal nerve injury?

A That is not my area of expertise to comment on that.

I am familiar generally but I am not an expert in that area.

Q Are you familiar generally with teflon injection?

A Yes.

Q And is that a way to attempt to cure hoarseness in such a patient?

A It's been used, but I am not an expert on the efficacy of it.

MR. DUGAN: If I can have a moment, I think I am finished up.

Give me a second.

MR. DUGAN: I have no further questions, your Honor.

Thank you.

THE COURT: All right.

Redirect.

REDIRECT EXAMINATION

BY MR. BELLO:

Q Thank you, your Honor.

Dr. Mayer, looking at, do you still have the intraoperative log in front of you?

A No, I do not.

THE COURT: Step up here and help him find it.

Come on, Mr. Bello.

(Pause.)

THE COURT: Just look at this copy that counsel is providing you with.

(Handing.)

Q Doctor, on that log sheet, who is listed as the surgeon?

A Dr. Ho.

Q What would that indicate as to Dr. Ho's participation in the surgery?

MR. DUGAN: Objection to that.

THE COURT: Overruled.

A He would be the primary operating surgeon for the case.

Q And as a primary operating surgeon in this type of surgery, what would his function be?

MR. DUGAN: Again I will object.

THE COURT: Overruled.

A With his assistant's help, he would be the one actually doing the surgery, dictating the operative note and taking responsibilities as the primary surgeon for the patient.

Q And based upon your review of the medical records in this case, was that the case with -- was that the role that Dr. Ho played?

A That was my opinion, yes.

Q Doctor, you were also asked about your letterhead and specifically the title listed on your letterhead.

(Handing.)

Q Could you read what it says in the left hand corner of your letterhead?

A David A. Mayer M.D., FACS, FICS, Board Certified General and Vascular Surgeon.

Q Are you board certified in general surgery?

A Yes.

Q Are you board certified in vascular surgery?

A The American Board of Surgery --

MR. DUGAN: Objection, Judge.

THE COURT: Objection sustained.

Just answer the question.

Q Are you board certified in vascular surgery?

A It is impossible to give a yes or no answer to that.

THE COURT: Fine.

Next question, counsel.

Q Is there a reason why it lists vascular surgery?

A Yes, because when one in this country is certified by the American Board of Surgery, you are listed as qualified to perform general and vascular surgery, despite the fact that additional subspecialties examination is offered.

So, your certification by the American Board carries with it the ability to practice general and vascular surgery in this country.

Q You were also asked some questions by Mr. Dugan regarding the position of the right recurrent laryngeal nerve before surgery; do you recall those questions?

A Yes.

Q Is there any way to know prior to surgery as to what the right recurrent laryngeal nerve's course will be?

A No, there is not.

Q When do you find out?

A You either find out when you are doing the exposure and identifying the course of the nerve, or you find out inadvertantly, as in Mr. Testaverdi's case, when it's been damaged, when the nerve is not looked for and protected.

Q You were also asked some questions by Mr. Dugan regarding your opinion, as you stated, about the informed consent in this case; do you recall those questions?

A Yes.

Q Based upon your review of the records in this case, is there any indication that Mr. Testaverdi was properly informed of the risks and complications?

A There is no written evidence anywhere in the records or doctor's notes that this complication was ever discussed with him preoperatively.

Q Finally, Doctor, you were asked about the anesthesia record which was page 18 in your Honor's book.

A Yes.

Q Do you have that in front of you, Doctor?

A Yes.

Q Doctor that record, can you tell who the responsible surgeon was on this matter?

MR. DUGAN: Objection.

THE COURT: Objection sustained.

Q Will you read, please. who the surgeons were off of that record in this case?

A Leventhal, Ho and Urs.

Q And is there any indication as to who the responsible surgeon was?

MR. DUGAN: Objection.

THE COURT: Sustained.

Q What is under the name of Leventhal?

A They are all just listed under a box, surgeons, so I couldn't comment further on that.

Q Doctor, you were asked about the testimony of Dr. Ho.

Do you recall that?

A Yes.

Q And specifically you were asked on page 26 line 23 "Question: In this particular type of surgery, in your professional medical opinion, is it necessary to first identify the right recurrent laryngeal nerve prior to continuing with the surgery?

"Answer: I just want to repeat in my opinion, is it necessary to?

"Question: Yes.

"Answer: For this surgery? No.

"Question: Is there a reason why it's not necessary for this surgery, in your opinion?"

THE COURT: Are you saying yes and answer?

Otherwise it will go right back.

Q "Question: Is there a reason why it's not necessary for this surgery, in your opinion?

"Answer: We just don't visualize the nerve.

"It's not necessary to do in the operation."

Do you agree with that testimony?

A No, I do not.

Q Why not?

A I think we can see the result of not visualizing it very clearly sitting across the Courtroom.

MR. DUGAN: I object and move to strike.

THE COURT: That is stricken.

Jury is to disregard it.

Q Would you tell us why you don't agree with that?

A I think the right side is perilous due to the high incidence of abnormal course of the recurrent nerve, and I think it's imperative to rule out a non-recurrent nerve or an abnormal location that can be inadvertantly injured in the approach.

MR. BELLO: Thank you, your Honor.

Your Honor, if you give me one minute, I think I am --

THE COURT: One minute because I want to send the jury to lunch.

MR. BELLO: May we approach?

(A side bar discussion was held off the record.)

MR. BELLO: No further questions of this witness.

THE COURT: All right.

RECROSS EXAMINATION

BY MR. DUGAN:

Q Doctor, the American Board of Surgery does certify as subspecialists general vascular surgery, true?

A No, it is incorrect.

MR. DUGAN: No further questions, Judge.

THE COURT: Anything further, counsel?

MR. BELLO: I didn't hear the answer because he was in my way.

THE COURT: He said no, that's not true.

That's it.

Anything further?

MR. BELLO: Nothing at all, your Honor, thank you.

THE COURT: Any further witnesses?

MR. BELLO: Not today.

THE COURT: Okay, Doctor, you may step down.

Thank you very much.

(Witness excused.)

THE COURT: Anything this afternoon, counsel?

MR. BELLO: Not this afternoon.

(A side bar discussion was held off the record.)

THE COURT: Mr. Bello?

MR. BELLO: Plaintiff rests, your Honor.

THE COURT: Plaintiff rests.

All right. All right.

Members of the jury, I am going to let you go for the day.

What will go on now is there are certain questions that I must consult with counsel.

That, of course, does not concern you, those questions of law, and Mr. Dugan informs me that the first witness for the defense will be here tomorrow morning at 10:00.

So, please do not discuss this, have a pleasant rest of the day, a pleasant evening and I will see you tomorrow morning at 10:00.

(The jury is excused from the Courtroom.)

THE COURT: What are we going to do about motions now?

Do you want to come back after lunch and I will listen to motions for plaintiff and defendant?

All right. All right.

Be back here 2:30.

I will entertain motions.

* * *

It is hereby certified that the foregoing is a true and accurate transcript of the proceedings.