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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: TRIAL TERM PART 16
----- X

JOSE BARREIRO, an infant by his mother and
natural guardian, JACQUELINE GUERRERO and
JACQUELINE GUERRERO, individually,

Plaintiffs,

INDEX NUMBER:

- against - 101038/96

THE MT. SINAI HOSPITAL,

Defendant.

----- X

60 Centre Street
New York, New York
May 8, 2001

BEFORE:

HONORABLE ALICE SCHLESINGER, Justice
and a Jury

APPEARANCES:

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Attorneys for the Plaintiffs
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OFFICIAL COURT REPORTERS

1 Soudry - by Plaintiffs - Direct

2 A F T E R N O O N S E S S I O N.

3 THE COURT: Mr. Steinberg is offering 13A
4 through L, which constitutes a written assessment of the
5 activities of daily living. Are you objecting or not?

6 MR. SANGER: I'm sorry?

7 THE COURT: Mr. Steinberg is offering into
8 evidence what's been marked as 13A through L, A through
9 E in evidence. They were the activities of daily living
10 from Mr. Provder. Are you objecting?

11 MR. SANGER: Of course, yes.

12 THE COURT: I'm sustaining that objection. I
13 don't think that's necessary. We heard a lot about that
14 from other witnesses. I'm sustaining that objection.

15 (The jury entered the courtroom.)

16 THE COURT: Mr. Steinberg, do you have a
17 witness?

18 MR. STEINBERG: Yes. At this time, with the
19 Court's permission, the plaintiff calls to the stand
20 Michael Soudry.

21 M I C H A E L S O U D R Y,

22 1700 Broadway, New York, New York, called as a witness
23 by and on behalf of Plaintiff herein, having been first
24 duly sworn, was examined and testified as follows:

25 THE CLERK: Please state your name and address
26 for the record.

1 Soudry - by Plaintiffs - Direct

2 THE WITNESS: Michael Soudry, M-I-C-H-A-E-L
3 S-O-U-D-R-Y, 1700 Broadway, New York, New York.

4 THE COURT: S-O-U-D-R-Y.

5 Mr. Soudry, keep your voice up so we can hear
6 you.

7 Mr. Steinberg.

8 DIRECT EXAMINATION

9 BY MR. STEINBERG:

10 Q Good afternoon, Mr. Soudry.

11 A Good afternoon.

12 Q Can you tell us, what is your profession?

13 A I'm a forensic economist. I'm employed by a
14 consulting company by the name of Eco-Stat.

15 Q What kind of business is Eco-Stat in?

16 A We provide consulting, determining economic
17 damages in litigation matters, in cases such as this and
18 personal injury, wrongful death, wrongful termination.

19 We calculate what's the economic damage to
20 the plaintiff. We are hired both for plaintiff and
21 defendant.

22 Q Can you tell us about your educational
23 background?

24 A I have a BA in economics. I graduated 1990 from
25 the Hebrew University in Jerusalem. I have a Master's in
26 business administration with a major in finance. I

Soudry - by Plaintiffs - Direct

1 graduated 1993 from Hebrew University in Jerusalem.

2 Q Can you tell us about your employment history?

3 A I was employed for two and a half years with the
4 Bureau of Statistics in Israel. I was in charge of
5 industrial survey analyzing and collecting data on
6 production, prices, and I did that for two and a half
7 years. Then I start working here in Manhattan for Israeli
8 Economic Mission for about two years. I was employed as
9 an economist. I've covered U.S. and Israel economy
10 internal and providing economic information.
11

12 Thereafter I start work with Eco-Stat as a
13 forensic economist providing economic analysis for
14 litigation matter, and if it's necessary, I come to court
15 and explain the methodology I use.

16 Q Have you been asked to do that both on behalf of
17 plaintiffs and on behalf of defendants in analyzing what
18 the economic loss of a particular person is?

19 A Yes, we do. Not in the same case, but in
20 different cases we are asked for plaintiffs or defendants,
21 yes.

22 Q Have you been qualified as an expert to testify
23 about such matters in the courts of the State of New York?

24 A Yes, I was.

25 MR. STEINBERG: At this time I ask Mr. Soudry
26 be qualified as an expert in the field of economic

1 Soudry - by Plaintiffs - Direct

2 analysis.

3 THE COURT: All right. Mr. Sanger?

4 MR. SANGER: No objection.

5 THE COURT: No objection?

6 MR. SANGER: No objection.

7 THE COURT: He will be qualified without
8 objection to give opinions in this area.

9 Q Now, Mr. Soudry, have you been paid to do an
10 economic analysis with regard to the economic loss of Jose
11 Barreiro?

12 A I personally was not. But the company that I was
13 employed for, yes, was paid.

14 Q Have you ever met Jose Barreiro?

15 A No.

16 Q For purposes of doing an economic analysis, is it
17 necessary to meet Mr. Barreiro or young Jose Barreiro in
18 order to form an opinion about the economic loss that he
19 suffered?

20 A No, it's not.

21 Q Why not?

22 A My analysis is based on the information that's
23 given to me and applying the economic and statistical
24 assumption which I will explain later. There's nothing
25 about me meeting him that will affect my judgment in this
26 case.

1 Soudry - by Plaintiffs - Direct

2 Q What sorts of materials did you refer to?

3 A My primary source was the life care plan of
4 expert doctor, Mr. Provder, his vocational report. Also I
5 relied on statistical and economic references in the U.S.

6 Q You personally have not decided what Jose can or
7 cannot do, but you're basing on it on the report of
8 Mr. Provder?

9 A Yes.

10 Q Have you also been informed that Jose Barreiro
11 will never be functionally commercially employable?

12 A Yes. I was informed.

13 Q Now, in your analysis did you consider inflation?

14 A Yes.

15 Q Can you explain what inflation is?

16 A Inflation is increasing price over time of goods
17 and services. If we look at prices in time periods, we
18 see changes in the prices. The changes is the index,
19 that's called inflation, or also known as the CPR,
20 consumer price index.

21 The Bureau of Labor and Statistics measure
22 that index and we could see what was the inflation last
23 year, what was the inflation two years ago, ten years ago
24 and for any time period we need to. That's the
25 inflation. You probably are all familiar with that. If
26 you are trying to track prices, we see the effects of

Soudry - by Plaintiffs - Direct

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inflation.

Q Would that be the type of situation where when I was a kid you can get a piece of pizza for 20 cents and now it costs a buck and a half?

A Yes. We can calculate the change, the percent change from one period to another. If we want one month, one year, six months, ten years, four years, up to us when we make the analysis what we want to look at.

Q Now, Mr. Soudry, when you calculated your economic analysis, can you tell us how you went about doing that and whether or not you discounted your findings to present value?

A In my analysis what I did, I used Mr. Provder's determination of cost for each item. I applied inflation to the future to the end of Jose's life expectancy. I keep the number in the future value. Because it's my understanding in the court of New York, the present value calculation is done by the courts later on.

Just to give you understanding. Present value is the ability of money to earn interest. If I have to give you a hundred dollars, now that's a hundred dollars. But if I have to give you a hundred dollars next year, right now it costs me less. I could put aside \$95, that will earn interest, by the next year it will be a hundred dollar. All my numbers are in future values. I

1 Soudry - by Plaintiffs - Direct

2 did not make the calculation for present value. I did not
3 discount them to present value. That would be done by the
4 Court, according to my understanding.

5 Q Okay. Did you prepare any charts or other ways
6 to help you explain to the Court and jury what your
7 findings were?

8 A Yes.

9 MR. STEINBERG: We have taken the liberty of
10 premarking these exhibits as Exhibit 15A through K, and
11 Exhibit 16.

12 THE COURT: For identification?

13 MR. STEINBERG: For identification.

14 If you would be kind enough to come down and
15 explain what your calculations are and how you came to
16 your conclusion.

17 (Witness leaves the stand.)

18 A Basically what I will show you here, it's about
19 11 or 12 pages that I prepared according to Mr. Edmond
20 Provder.

21 For each item he identified as needed in the
22 life care plan. I prepared a table that will show the
23 prices over time throughout Jose's life expectancy. And
24 for each item -- we'll start, the first thing I had to
25 do. He was born in July 28, 1993. In July he will be
26 eight years old.

1 Soudry - by Plaintiffs - Direct

2 For a person eight years old, the life
3 expectancy reach to year 2066. At the time it will be
4 almost 73 years old, 72.8 years old. This is based on
5 U.S. life expectancy tables.

6 The first thing I have, all the table are
7 similar. I will go in detail and the rest will follow.

8 The first table Jose valuation costs.
9 Mr. Provder estimated valuation and he gave ranges. I use
10 the average of each range. And my first column is here.
11 I'm starting with the present, the year 2001. Jose age
12 eight. I have costs of rehabilitation plan. \$1,250 for
13 that year.

14 Now, for me to make an estimate or
15 projection into the future, especially for that kind of
16 time period, we have to take into account inflation.
17 Prices will not stay the same as they are now. We know
18 this from the future. There are projections of inflation
19 to relevant time period. They are for short and longer
20 time period.

21 In this case most of the things I'm
22 projecting here are medical services. They increase
23 historically and chronically above the general inflation.
24 Last year the CPR increase by 3.4 percent. Medical
25 services increased by 4.2 percent. Historically we see
26 medical services raising much higher than the general

Soudry - by Plaintiffs - Direct

1
2 inflation. If we look at 40 years of average inflation
3 rate, the medical services, it's about six percent per
4 year. What I'm using here, three percent to the year 2005
5 and thereafter 4.2 percent.

6 My source of doing that is based on the
7 Social Security Trustee's Report. They have a long-term
8 projection to the year 2075. They make projections of
9 what earnings, wages will increase by. Although, as I
10 told you, medical services increase higher than inflation
11 and wages, my assumption in the long run, they will
12 increase as wages. Again, I'm using three percent to 2005
13 and 5 percent.

14 (Continued on next page.)
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Soudry - By Plaintiffs - Direct

Q All right.

A So we will go -- first year, 2001, Jose's age 8, he has a rehab plan evaluation of 1,250 per year -- and Provder mentioned it -- every three years to age twenty-one, and then every five years thereafter.

So, as you see, my number is -- is increasing by three percent, and every three years -- every year, but I'm mentioning the three years, I am accumulating, and after age twenty-one, the interval changes to every five years.

Then getting the -- physical therapy evaluation, 740 per year, first year, and estimating the cost all over his life expectancy.

Evaluation of occupational therapy, 784, speech therapy evaluation, 259, educational assessment, 1,478, and that column, the one before the end, is annual cost.

Summarizing the 1,250, plus 740, plus 784, plus 259, plus 1,478, and I am getting \$4,511.

The last column is the cumulative, cumulative every year, the total cost.

If you look at the year 2010, you will be -- Jose will be 17 years old, the annual cost at that time will be 5,619, and the cumulative cost up to that point will be \$32,070.

1 Soudry - By Plaintiffs - Direct

2 I am doing the same thing.

3 And here (indicating), you see the interval
4 change.

5 If you look at the year 2040, the age, 47,
6 at that year, there is no rehabilitation plan cost, we
7 have physical therapy of 916, we have occupational therapy
8 of -- evaluation of 970, and we don't have speech and
9 education assessment, and for that year, we have total
10 annual cost of 1,965, and the cumulative is 88,673.

11 Q If I can ask you, by "cumulative cost," you have
12 added up what it costs each year to get to total where we
13 are at any particular year?

14 A Yes.

15 Q Okay.

16 A So, looking at the end of life expectancy,
17 projecting his cost for evaluation, I find the total cost
18 to 202,498.

19 That is for evaluation costs.

20 Q That is presuming he is going to live an average
21 life span based on the tables?

22 A Yes.

23 Q He could live more, he could live less, but based
24 on the -- the statistic averaging of somebody -- somebody
25 who will have normal life expectancy, that is the way you
26 broke it down?

1 Soudry - By Plaintiffs - Direct

2 A Yes.

3 To age 73 years old.

4 Q All right.

5 A Next table is the cost of therapy.

6 The one before was the evaluation, this is
7 the therapy.

8 Therapy cost.

9 And again, it is based on the same thing, my
10 assumption, again, inflation rate of three percent to the
11 year 2005, thereafter, 4.2 percent per year.

12 If you look at the year 2002, for example,
13 Jose will be nine years old, case manager will cost 1,978
14 for the year, consultant will cost 288, physical therapy,
15 6,279, occupational therapy, 6,279, speech therapy, 6,477,
16 and the annual cost summarizing all the costs of therapy
17 that I just mentioned comes to \$21,300.

18 And up to that moment, the end of the year,
19 the cumulative cost will be 35,087.

20 It is just -- I am doing here computation,
21 doing the same thing all over, and, if I am looking at the
22 middle -- year 2030, age 37, the annual cost up to that
23 time period 122,069, and the cumulative cost is
24 1,834,559.

25 I am going to the end of his life
26 expectancy.

1 Soudry - By Plaintiffs - Direct

2 The cumulative cost comes to 11,786,561.

3 That is for therapy.

4 And we are talking here about 66 years of
5 calculation.

6 Q All right.

7 A The next item that Mr. Provder mentioned in his
8 report is cost of Jose's medical care costs, and again,
9 according to his report, the same items that he mentioned,
10 the cost of pediatrician up to age twenty-one, then cost
11 of internist from age twenty-one and thereafter to the end
12 of the life expectancy, neurologic throughout the life
13 expectancy.

14 And thereafter, the same items that
15 Mr. Provder, in his report, mentioned, I applied in my
16 report.

17 Again, I am using three percent to the year
18 2005, and thereafter, 4.2 percent, and it is the same
19 calculation, I am getting the cumulative cost for that
20 item to be 991,621.

21 That is cumulating all the medical costs
22 throughout Jose's life expectancy.

23 Q All right.

24 A The next item is, basically, x-rays, only x-rays,
25 and I am using -- here, I am using an inflation of three
26 percent through 2005, and thereafter, four percent, a

Soudry - By Plaintiffs - Direct

1 little -- little bit less than medical costs, and the
2 annual cost to the year 2002, 192, the cumulative to that
3 point is 285.
4

5 Throughout his life expectancy, in the year
6 2066, when he is 73 years, the cumulative cost is 55,661.

7 The next item is supply and equipment costs,
8 and again, this is based on Mr. Provder's report and his
9 testimony.

10 He gave two options, one for care at home
11 throughout Jose's life expectancy, the other option is to
12 go to some kind of a facility care.

13 Now, in my summary tables, I will show the
14 difference in that.

15 And in the case -- this is for the home
16 care, and the calculating throughout is work life
17 expectancy -- life expectancy -- sorry -- and again, I am
18 use -- in this item, I am using three percent throughout
19 the life expectancy because we are talking here about the
20 equipment and supply, it is not medical-related services,
21 it is more equipment in general will increase with
22 inflation.

23 I have cost of supplies, diapers, hospital
24 bed, bed seat, bath seat, bath chair, lift, mat, and
25 miscellaneous therapy.

26 And, if we take, again, full year -- because

1 Soudry - By Plaintiffs - Direct

2 the first year is partial in all my reports -- the
3 first -- year 2001, partial -- 2002, I have annual cost of
4 1,260, the cumulative cost for that two years, 3,124.

5 If I would pick up again the year 2030, Jose
6 will be 37 years old.

7 The annual cost of all his equipment and
8 supplies comes to -- in that year, 4,632, the cumulative
9 is 84,088, and, to the end of his life expectancy in the
10 year 2066, when he is 73 years old, the cumulative --
11 again, he -- it is partial year -- if I take the one year
12 before, 7,947, the cumulative through his life expectancy,
13 326,517.

14 Q All right.

15 Please continue.

16 A The next item in Mr. Provder's report,
17 positioning needs cost for Jose, it's included wheelchair,
18 cushion, seat, wheelchair maintenance for the wheelchair,
19 a stand, floor sitter, Dynovox and computer.

20 I am sure he explained all those items.

21 Again, the wheelchair -- a few of those
22 items have a different interval time period, and,
23 according to this report, I used the cost.

24 For example, for manual wheelchair, every
25 five years, replacement of the wheelchair, so, every five
26 years, I am applying the cost for Jose.

1 Soudry - By Plaintiffs - Direct

2 And again, I am using, in that table, the
3 inflation of three percent per year.

4 So, in the year 2000 -- first year, 2001,
5 the annual cost is 16,547. A cumulative cost is the same
6 thing, 16,547.

7 The year 2030, when he is 37 years old, the
8 annual cost is \$23,539, and the cumulative cost is
9 194,611, and, in the end of his life expectancy, the year
10 2066, the cumulative cost of positioning, the needs,
11 coming to 478,586.

12 Transportation costs with the van and lift
13 for the wheelchair, cost of the cellular phone, equipment
14 for the wheelchair.

15 And again, I am summarizing the annual
16 cost.

17 Mr. Provder submitted the first year he will
18 need a van will be year 2003, and I applying the cost of
19 21,748.

20 Again, I am using the three percent
21 inflation rate.

22 The year after the first year that he will
23 replace the van and take into account the replacement --
24 sale value of the van -- they could sell the van, get some
25 money so it will cost them less to buy a new one, so I am
26 using the 50 percent cost from the original, I am applying

1 Soudry - By Plaintiffs - Direct

2 the three percent inflation, so, in -- the next time they
3 will have to buy a van, in the year 2009, that will cost
4 \$12,984.

5 The annual cost at this time will be
6 \$19,859, and the cumulative cost is \$47,762.

7 At the end of his life expectancy, the year
8 2066, the cumulative costs of transportation related come
9 to 538,103.

10 As I mentioned before, Mr. Provder gave two
11 options, one, home care, and the other option is facility
12 care.

13 This table shows the home care option.

14 According to the estimate that Mr. Provder
15 gave, home renovation of \$40,000, home care attendant --
16 and that is based on the 36 hours per week.

17 And, if we look at the year 2002, the cost
18 for home care is \$27,476, and the cumulative cost after
19 that up to that moment, 45,260.

20 After age twenty-one, we are going to 24
21 hours, so the cost increased.

22 In the year 2020, 19 years from now, when he
23 is 27 years old, the cost for home will cost 260,426, and
24 the cumulative cost up to that moment -- up to that time
25 will be 1,947,044.

26 Applying inflation rate all the way to the

Soudry - By Plaintiffs - Direct

1
2 year 2066, and the cumulative costs at that time, in the
3 year 2065, the cost for one year, applying the inflation
4 rate of three percent to the year 2005, and thereafter,
5 4.2 percent, the annual costs come to 1,591,708, and the
6 cumulative cost is 34,975,517.

7 Q All right.

8 A In the facility care option, we have home care,
9 the same up to age twenty-one, and thereafter, the cost of
10 facility, entering the facility, and then again, I am
11 applying inflation rate to the initial cost at today's
12 dollar, I am getting -- the cumulative, will be, under
13 this option, 36,287,817.

14 The last table is summary tables.

15 I am, basically, summarizing, for the home
16 care option and for the facility care option, all the
17 items that Mr. Provder, in his life care testimony,
18 provided to you, which is evaluation, therapy, medical
19 care, lab, supply and equipment, position needs,
20 transportation care, home care, and -- home care and that
21 option, and then I have the column annual cost and
22 cumulative cost.

23 I will go in the year 2000 -- in the first
24 year -- 2001, the first year that I am starting my
25 calculation, the cumulative cost of all of life care costs
26 come to \$57,851.

1 Soudry - By Plaintiffs - Direct

2 In the year 2010, when he is 17 years old,
3 the annual cost at that year, \$88,426, and the cumulative
4 cost is 743,781.

5 I will choose another year.

6 In the year 2040, when he is 47 years old,
7 from -- from summarizing all the costs, the annual cost in
8 the year 2040 comes to \$89,447, the cumulative cost is
9 14,575,935.

10 And the -- in the end of his life
11 expectancy, the year 2066, the cumulative cost is
12 51,653,064.

13 That, again, is in future values. We are
14 not talking about today's dollars.

15 Those are big numbers, and -- we are talking
16 about the year 2066.

17 So, that is before present-value
18 calculations.

19 In the facility care option, the supply and
20 equipment is ending in the year -- when he is 21 years
21 old, and the other difference I have here, I have facility
22 care, the facility care option for his care, and, if I am
23 using the year 2003, the annual cost, 30,024.

24 So -- 91,221 -- and the cumulative is
25 208,660.

26 He is at home until age 21, then he is

Soudry - By Plaintiffs - Direct

1 moving to facility care.

2
3 And, in the end of his life expectancy,
4 again, in the year 2066, the cumulative cost is
5 50,379,600.

6 That is future value.

7 Q Now, Mr. Soudry, in addition to the living costs
8 and the facility costs, did you also make a projection
9 with regard to lost earnings that Jose would have been
10 able to attain had he not been in this condition?

11 A Yes.

12 I made the projections earnings based on the
13 vocational report that was prepared by Mr. Provder.

14 Q Can you tell us about that, sir?

15 A Yes.

16 Again, I prepared another table.

17 I am using a -- data from the '99 money and
18 income of the United States.

19 Mr. Provder's, in his vocational report,
20 mentioned that but for the medical condition that Jose
21 has, he would have been expected to graduate from high
22 school or from two year college.

23 Based on that, I estimated what would be
24 an -- earning projections of a high school graduate and
25 two years college graduate, and this table is divided in
26 two, the '99 earnings for high school graduate and

1 Soudry - By Plaintiffs - Direct

2 applying inflation rate of three percent to the year 2005,
3 and 4.2 percent, and I am calculating the cumulative
4 cost.

5 I am using a work life expectancy for a high
6 school of 38.6 years, and that will be the year 2050, when
7 he is 57 years old.

8 That is, basically, a compressed work life
9 expectancy.

10 People are leaving the work force, coming
11 back, periods of unemployment, periods they are not
12 working.

13 My tables are compressed.

14 We can use retirement age of 62, 65.

15 I am using 57 for high school graduate,
16 which gives about at least five to seven years of period
17 that you are not employed and not earning money.

18 For high school graduate, the cumulative --
19 I have here a profile analysis.

20 When you start age 19, with the \$18,483 high
21 school graduate, '99, the year 2012, applying wage growth
22 rate, we're getting a -- annual earnings of \$29,435, and
23 the cumulative is \$42,874.

24 I am doing the same thing like I did before,
25 and my cumulative for the high school -- high school is
26 5,169,835.

1 Soudry - By Plaintiffs - Direct

2 That is the cumulative earning for a high
3 school graduate.

4 And, for a two-year college entering the
5 work force two years later, and he will be age 59, work
6 life expectancy of 39 years, the cumulative earnings is
7 7,359,198.

8 Q Thank you very much.

9 You may resume the witness stand.

10 (Whereupon, the witness resumed the witness
11 stand.)

12 Q The calculations that you made and the tables
13 that you used, are those generally accepted in the
14 economic community as the tables which -- by which you
15 calculate lost earnings and future increased costs?

16 A Yes.

17 MR. STEINBERG: Thank you.

18 Your Honor, no further questions.

19 THE COURT: Mr. Sanger --

20 MR. SANGER: Thank you.

21 CROSS-EXAMINATION

22 BY MR. SANGER:

23 Q Mr. Soudry, at the very beginning, so I
24 understand, you have taken the numbers given you by
25 Mr. Provder, correct?

26 A Yes.

Soudry - By Plaintiffs - Cross

1
2 Q And, I would assume from that that you're not in
3 a position to argue the merits one way or the other, you
4 just accepted whatever numbers he gave you, correct?

5 A Correct.

6 Q And, all fairness, you didn't make any assessment
7 of those numbers, correct?

8 A Correct.

9 Q If he tells you that, for instance -- told you
10 that physical therapy in the year 2001, age twenty-one,
11 how -- age twenty-one, what year would that be?

12 A I'm sorry.

13 Q I'm sorry.

14 2013?

15 A 2013, he will be -- 2014, he will be 21 years
16 old.

17 Q So if Mr. Provder -- he never told you that all
18 of the medical expenses to age twenty-one would be paid
19 for by the Board of Education, did he?

20 MR. STEINBERG: Objection.

21 Not what the testimony was.

22 MR. SANGER: That is my question.

23 MR. STEINBERG: He is completely distorting
24 the testimony.

25 THE COURT: Objection is sustained.

26 MR. SANGER: All right.

1 Soudry - By Plaintiffs - Cross

2 Q Well, in discussions with Mr. Provder, did
3 Mr. Provder tell you that the medical expenses for
4 occupational therapy, speech therapy, education, until age
5 twenty-one, would be contained within the Board of
6 Education's system for disabled children?

7 Did he tell you that?

8 MR. STEINBERG: Objection.

9 THE COURT: Objection is sustained.

10 Again, that is not what the testimony was.

11 Q Your testimony -- your computations, the accuracy
12 of these computations, included the first twenty-one years
13 of this boy's life as if those expenses would be paid by
14 him or his parents, correct?

15 MR. STEINBERG: Objection, Judge.

16 MR. SANGER: I think that is --

17 THE COURT: That, I will allow.

18 Objection is sustained -- I'm sorry.

19 Objection is overruled.

20 MR. SANGER: Thank you.

21 THE COURT: You may answer.

22 MR. STEINBERG: Judge --

23 THE COURT: Come on.

24 I really don't like that.

25 You made the objection.

26 MR. STEINBERG: But it is so --

1 Soudry - By Plaintiffs - Cross

2 THE COURT: Mr. Steinberg, please.

3 MR. STEINBERG: All right.

4 THE COURT: Objection is overruled.

5 You may answer that question.

6 Do we want the question read back?

7 MR. SANGER: Yes.

8 Read it back.

9 A The cost -- the cost is the cost.

10 If you accept it as annually, it may cost,
11 not to Jose, but it could cost somebody else.

12 For me, I am making the projections.

13 Q Based upon your understanding, you made
14 computations.

15 There was no difference, based upon your
16 computations, as to whether the money -- who was going to
17 pay the money?

18 MR. STEINBERG: Objection, totally improper.

19 THE COURT: Mr. Steinberg, just relax,
20 please.

21 Objection is overruled.

22 (Continued on the following page.)

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1 Soudry - by Plaintiffs - Cross

2 Q When you made these computations, when you
3 estimated the year 2 all the way up to year 21 and
4 continued 22, 23, in your -- based upon your information
5 you were given, there was no difference where that money
6 was going to come up until age 21 and after age 21?

7 MR. STEINBERG: Objection.

8 THE COURT: That is consistent with what I
9 sustained earlier. Objection sustained. Objection
10 sustained.

11 Q Doctor, were you ever told by Mr. Provder that
12 from year 1 to year 21 --

13 THE COURT: What do you mean by year 1?

14 MR. SANGER: Withdrawn.

15 Q That from age 1 through age 21 that the cost of
16 rehab and the cost of all these therapies would be
17 included within the New York City educational system?
18 Were you told that?

19 MR. STEINBERG: Objection.

20 THE COURT: Sustained, because as I remember
21 Mr. Provder's testimony, what he's recommending is
22 additional therapy, therapy that's not necessarily
23 provided. I don't think that's a fair way of
24 questioning. I really don't. That wasn't his
25 testimony.

26 His testimony was that Jose is entitled to

Soudry - by Plaintiffs - Cross

educational services by the public school system until he's 21. Then he talked about what that included and what he recommended.

Q Were you told by Mr. Provder that the board of education provided certain -- pay the cost of certain medical expenses up to age 21 and then he recommended there be additional monies paid. Did he tell you what that was?

MR. STEINBERG: Objection, Judge. He's already testified. He's basing it on the testimony.

THE COURT: This is cross-examination. Mr. Sanger can attempt to make certain points in this way. Objection overruled.

A Yes, he did. I didn't speak with Provder on this personally. I just used his report. He mention in his report on page 5 that all what he recommends is in addition to what he's receiving now. Currently -- I'm reading from his report. Currently he receives two periods of therapy at school. He will require physical therapy on three time per week basis for his life expectancy. I believe this is in addition to what he's already receiving.

Q Doctor --

A I'm not doctor.

THE COURT: He has a master's degree, not at

1 Soudry - by Plaintiffs - Cross

2 Ph.D.

3 MR. SANGER: I'm sorry.

4 Q You came up with the inflation rate?

5 A Yes.

6 Q And on previous occasions have you come up with
7 inflation rates on other cases?

8 Withdrawn.

9 Have you testified in other medical
10 malpractice cases?

11 A Yes.

12 Q And those other malpractice cases, have you made
13 estimates as to inflation rates?

14 A I do for all of them.

15 Q In 1998 and for five years after 1998, your
16 recollection, what was the inflation rate from 1998 for
17 the next five years?

18 A What inflation rate? CPI or the medical
19 services?

20 Q For medical services -- withdrawn.

21 Do you remember the case of -- does this
22 case rings a bell? Mandrewcoxis versus the County of
23 Westchester?

24 A No. I testified?

25 Q In Westchester County before Justice Donovan?

26 A I don't recall. Possible.

1 Soudry - by Plaintiffs - Cross

2 THE COURT: Give the date.

3 Q July 23, 1998?

4 A I don't recall at the moment.

5 Q How many cases did you testify to in the year
6 2001?

7 A This year, I think about five cases.

8 Q How about the year 2000?

9 A Something 10, 12 cases.

10 Q How about 1999?

11 A I don't remember. I have at least -- it's
12 mentioned on the list, the case name. It could be
13 verified. It's possible I testified there. I just don't
14 remember.

15 Q Well, let me ask you this question. In 1998 you
16 were given certain medical projections by Dr. Charash's
17 testimony in the medical case. Then you were asked do you
18 have a prediction as to lost earnings at the various
19 inflation rates and you said, yes, I do. In 1998 and for
20 the next five years what was the inflation rate for lost
21 earnings?

22 A What I testify? I don't remember. Tell me.

23 Q Five years after 1998 would still be today?

24 A Yes.

25 Q Would you be surprised to see: I used 2.5
26 percent which I consider to be low conservative, a rather

Soudry - by Plaintiffs - Cross

1
2 low conservative rate which I expect it will be for the
3 next five years?

4 A Let me explain that. You're reading portions of
5 my testimony which is misleading. In this particular
6 case, if I remember correctly --

7 Q You recall the case?

8 A No. The use of 2.5 percent, which the attorneys
9 ask us to use it, to show regular projections and to make
10 another version of a lower percentage. We using 2.5
11 percent, which was average of the CPI. It was not the
12 medical services and not earnings. We show that, too, as
13 another version. It's not my opinion. It's based on he
14 asked me to make a conservative, very conservative
15 projection. I made it.

16 Q That conservative projection which would have
17 been for 1998 and five years thereafter. Yes or no?

18 A That was to the extent of the life expectancy in
19 this case was 2.5 percent.

20 Q My question was, in 1998 you said that the low
21 conservative rate of inflation would be 2.5 percent which
22 will be the rate for the next five years?

23 A The attorney in this case asked me to assume 2.5
24 percent. If I was asked to assume 1 percent, I will do
25 the same calculation.

26 Q Who asked you to assume 2.5 percent?

1 Soudry - by Plaintiffs - Cross

2 MR. STEINBERG: Objection.

3 THE COURT: Mr. Steinberg, please. Mr. Sanger
4 is entitled to talk about the rate of inflation and try
5 to cross-examine on that. I'll allow it.

6 Q Let me read the question before that. Listen to
7 the question that was posed to you:

8 "QUESTION: But you are basing your
9 projections" --

10 THE COURT: Cross-examination or direct?

11 MR. SANGER: It's direct, your Honor.

12 THE COURT: Direct or cross?

13 MR. SANGER: It's direct.

14 THE COURT: Okay. Fine.

15 Q You know who Fitzgerald and Fitzgerald are?

16 A I do. This is a request that he's doing with all
17 cases with us. He's asking to give us the same
18 projections which is the very consistent in our practice.
19 That's what I show you. Actually this year and last year
20 the three percent is conservative. Wages and earnings
21 increase and inflation increasing more than three
22 percent. We have been using actually 3.5 for the year
23 2005 and thereafter 4.2. Mr. Fitzgerald, his practice ask
24 us to bring another set of calculations with 2.5 percent,
25 sometimes it's 2.25 percent and we do that.

26 Q Did you say I also use two -- your quote: I used

1 Soudry - by Plaintiffs - Cross

2 2.5 percent which I consider to be low conservative, a
3 rather conservative rate of inflation which I expect it
4 will be in the next five years?

5 MR. STEINBERG: Objection. Asked and
6 answered.

7 THE COURT: That was the testimony.

8 Q Did you say that?

9 A I could tell you --

10 THE COURT: What is your testimony?

11 THE WITNESS: I don't recall?

12 A I can't recall.

13 Q In this case, did you pick a high and low
14 inflation rate?

15 A Which case?

16 Q In this case you are testifying today?

17 A I gave my projections, which is based on the
18 Social Security Trustee's Report, what they expect
19 inflation rate would be.

20 Q In 1998 did you expect the inflation rate for the
21 next five years to be approximately 2.5 percent?

22 THE COURT: Yes or no?

23 A No.

24 Q That was not your opinion?

25 A No.

26 Q Is that something Mr. Fitzgerald asked you to

Soudry - by Plaintiffs - Cross

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say?

A To do, yes.

Q Mr. Fitzgerald asked you to say, testify the inflation rate was 2.5 percent?

A No. He ask me to calculate all the calculation that I did at that time, which is not reasonable for me to remember in '98, to do it based on 2.5 percent inflation rate. I could give you the inflation rate for those years if you want. They're known.

Q I understand that. I'm asking the testimony here, 2.5 percent, you don't recall saying that?

A No, I don't recall. I'm saying this is a very conservative estimate.

Q There in your explanation the year 2005 you changed the inflation rate?

A Yes.

Q What is the basis of your changing the inflation rate in the year 2005? That's in the future.

A Yes.

Q Did you make some sort of calculation that the inflation rate would change in 2005?

A No.

Q You did not?

A I assume it will change on average, yes.

Q It's your opinion that in the year 2005 the

Soudry - by Plaintiffs - Cross

1
2 inflation rate will change?

3 A No.

4 Q Well --

5 A You have to give me chance to explain.

6 Q Mr. Soudry, in this case, I want to understand
7 your motive or your thinking in this case. In this case,
8 you did change the inflation rate in the year 2005?

9 A On average, yes.

10 Q And do you have any basis upon which you made
11 that change?

12 A Yes.

13 Q What is the basis upon which -- is that basis
14 some sort of government projection?

15 A Yes, Social Security Trustee's Report.

16 Q Social Security --

17 A Trustee's report.

18 Q -- Trustee's Report?

19 A Yes.

20 Q Did the Social Security Trustee's Report say that
21 2005 the inflation rate would change?

22 A They showing the projection all the way to the
23 year 2075 to be at actually 4.3 percent --

24 Q Mr. Soudry --

25 A -- from the year 2005.

26 Q Mr. Soudry, 2075 is long past what we're talking

1 Soudry - by Plaintiffs - Cross

2 about here. You made a change in the inflation rate in
3 the year 2005. You say that's based upon the Social
4 Security?

5 THE COURT: Trustee's?

6 A Trustee's Report.

7 Q Trustee's Report. My question is, is there is
8 such a report --

9 A Yes.

10 Q -- printed and available to people?

11 A Yes.

12 Q Does that report say in the year 2005 inflation
13 rate will changed? Yes or no.

14 A It shows the number year by year and it shows
15 2005, it goes to long-term average projections of 4.3
16 percent per year. Could be higher, lower. I have no way
17 of knowing. I have no way of knowing if it's going to be
18 exactly 2005. It's average.

19 Q There is something written that it will change to
20 4.5?

21 A It shows. It's a table.

22 THE COURT: It shows 4.3 percent, right?

23 THE WITNESS: Because in 1999 the same report
24 shows 4.2 percent. I kept it 4.2.

25 MR. SANGER: No further questions.

26 THE COURT: Any redirect?

Soudry - by Plaintiffs - Redirect

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REDIRECT EXAMINATION

BY MR. STEINBERG:

Q It's your understanding the proper rate up until 2005 is 3.5?

A Currently.

Q You use three?

A I use three. If I have to do now, as I said, a medical in 2000, medical services increased by 4.2 percent. I'm using 3 percent. When I'm using -- I'm doing new report currently, now I'm using on average of 3.5 percent. Just remember, average means one could be higher, one could be lower. No one could tell you when and how. On average 3.5 percent to the 2005.

Q The numbers you projected, the numbers over time and that's the hard numbers what's going to be spent as opposed to the hearing that's going to take place after the jury makes the award when the Court will discount to present value?

MR. SANGER: Objection.

THE COURT: Yes.

MR. STEINBERG: No further questions.

THE COURT: Thank you very much.

MR. STEINBERG: One thing. I'd like to put Mr. Soudry's report into evidence.

THE COURT: The report as indicated by the

1 Soudry - by Plaintiffs - Redirect

2 chart 15A to K and 16?

3 MR. STEINBERG: Yes.

4 MR. SANGER: Objection.

5 THE COURT: I'll overrule it. If the jury
6 involves itself with those kinds of calculations, I
7 think this would be an aid. I will allow 15A through K
8 to be admitted over objection, as well as 16.

9 You have your exception.

10 Why don't we mark those.

11 Before we do, Mr. Steinberg, what are we going
12 to do now?

13 MR. STEINBERG: We're going to view a
14 day-in-the-life film. I believe about 20 minutes.

15 THE COURT: Why don't we mark that. You can
16 sort of be setting that up while we mark that.

17 We'll mark the tape 17 for identification.

18 Don't you want to offer 17, if the jury is
19 going to see it?

20 MR. STEINBERG: I offer 17.

21 THE COURT: Mr. Sanger, I assume you've seen
22 it?

23 MR. SANGER: No objection.

24 THE COURT: You don't object.

25 MR. SANGER: No.

26 THE COURT: 17 will be admitted without

Soudry - by Plaintiffs - Redirect

objection.

(Plaintiff's Exhibit 17 marked in evidence;
tape.)

THE COURT: We're about to show this. As I understand, Mr. Steinberg, this is about a 20-minute film showing the day in the life of Jose.

MR. STEINBERG: Yes.

THE COURT: Can you tell us when it was taken?

MR. STEINBERG: December 15, '99.

THE COURT: December 15, '99.

(Plaintiff's Exhibit 17, tape, played.)

(Plaintiff's Exhibit 15A through K, and Plaintiff's Exhibit 16 marked in evidence.)

(Continued on next page.)

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(Videotape being played.)

THE COURT: All right.

Is that still plugged in?

MR. STEINBERG: Yes.

THE COURT: All right.

Mr. Steinberg, do you have anything else?

MR. STEINBERG: Your Honor, Plaintiffs
rests.

THE COURT: The Plaintiff rests?

MR. STEINBERG: Yes.

THE COURT: Plaintiff rests.

Folks, that is the important milestone.

Mr. Sanger, if I understand, you do have
witnesses you want to call, correct?

MR. SANGER: Absolutely.

THE COURT: All right.

MR. SANGER: Yes, absolutely.

THE COURT: And, as I think I mentioned
yesterday, I did not compel Mr. Sanger to bring his
first witness today.

He has struggled about it, but he
prevailed.

So, folks, we are making progress.

Just to remind you, we don't have court
tomorrow. Tomorrow is Wednesday.

Proceedings

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2 We are going begin with the defense case,
3 hopefully, move right along with those witnesses.

4 So, please, come back Thursday morning at
5 9:45.

6 And, I appreciate your being punctual.

7 And we will get started right away.

8 Let me just say every day, I think I advise
9 you, please, to keep an open mind, not to form any
10 conclusions.

11 Of course, it is particularly important now
12 the Plaintiff has rested.

13 But, of course, you have only heard one side
14 of the case, although, of course, that's always
15 subject to cross-examination.

16 Now the Defendants will have an opportunity
17 to put on their witnesses who, of course, will be
18 cross-examined by the Plaintiff, so, premature to form
19 any conclusions.

20 So, having said that, have a lovely evening
21 and a nice Wednesday.

22 See you all Thursday morning.

23 Thank you.

24 Take the jury out.

25 (Whereupon, the jury filed out of the
26 courtroom.)

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MR. SANGER: I have an interesting motion.

THE COURT: I am interested because I do want to hear motions now, since the Plaintiff has rested.

MR. SANGER: First motion I want to make is with respect to Mr. Provder's testimony, and, more particularly, with respect to his having given a range of value.

I move to strike any testimony except the lowest values that he gave for the following reason.

He is an expert whose testimony was called upon.

The only reason he can be here is because he possessed some unique knowledge to help to enlighten the jury.

This individual has given a range low and high.

The jury has no human way possible to decide what is the -- whether high or low, and to do that will be pure speculation.

What you have had invited is speculation.

The only thing that, for certain, we know, that the lowest value is a reasonable value.

And, there is no speculation about that.

If we were to give this case to the jury

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with that poster, we would be saying to the jury the value of speech therapy runs between 100 and 300.

Now they have no way of possibly making that judgment except upon what he said, and he gives a range, so, therefore, any number other than the lowest number will be pure speculation on the part of the jury. They have to speculate.

To every single range that he gives, I would more than acquiesce in the fact that the lowest range was acceptable, but that -- with anything else but that, that will be pure speculation on the part of the jury.

And, that was the very reason that we bring experts in, so the jury doesn't have to speculate.

THE COURT: It is an interesting motion.

As far as you know, has that been made before and there is any --

MR. SANGER: I would think there is case law on it, your Honor.

My deep-seated belief, there is case law on that.

THE COURT: Do you have anything to provide to the Court?

MR. SANGER: Right now, I don't.

But this is not a matter of first

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impression.

And, it is so clear and obvious that -- I have never, in my career, had anybody say, you have a range, it could be a thousand for the operation or 5,000.

Coming from the expert --

THE COURT: Mr. Sanger, I certainly understand your point. It is not that esoteric --

MR. SANGER: I agree.

THE COURT: -- or difficult, but I would appreciate your researching this matter.

Mr. Steinberg, what do you wish to say?

MR. STEINBERG: I would certainly oppose that motion, Judge.

There are testimony that, not only would it be impossible to tell what therapy would be available at the time, that it was only fair that he give the range of the lowest that is available, the most expensive would be, all of which are reasonable under the circumstances.

THE COURT: But, Mr. Sanger's obvious point -- let's assume the range for physical therapy is 100 to 120 an hour.

Let's just say --

MR. STEINBERG: All right.

Proceedings

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2 THE COURT: -- 100,, fine, that is low-end,
3 but the jury would choose 110, for example, as an
4 average.

5 Wouldn't that be pure speculation as to how
6 the quality of physical therapy of 110 is somehow
7 better or something that is -- Jose receives when, in
8 fact, they haven't been given any information with
9 regard to how different between 100 and 110?

10 MR. STEINBERG: All right.

11 THE COURT: Not as if anybody came to
12 testify about what \$100 an hour of physical therapy
13 consists of as opposed to 110 or 120 or whatever.

14 That is Mr. Sanger's point.

15 MR. STEINBERG: All right.

16 THE COURT: Right?

17 MR. SANGER: Right.

18 MR. STEINBERG: I understand that.

19 But again, the jury has to be given the
20 option that --

21 THE COURT: Let me rephrase the question.

22 MR. STEINBERG: All right.

23 THE COURT: How could I, as the Court,
24 arguably, justifiably, if the -- the jury, by their
25 verdict, chose the higher end of each of these ranges,
26 when, in fact, there has been no testimony to

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substantiate that, what that means, or what -- what that really represents?

MR. STEINBERG: Well, I understand.

But again, Mr. Provder testified that these are all reasonable ranges, that a certain one may be available at certain times, other ones at other times.

It will be reasonable for the jury to conclude that in order to protect this boy, they would have to give what they feel, under the circumstances, would be sufficient funds to allow him to have the things that Mr. Provder has indicated that he needs.

THE COURT: Let me just say one other thing, then I will reserve judgment.

If anybody wants to give me cases, I will be happy to read them.

Let me just say one other thing in regard to that.

It seems to me fairly clear, from Mr. Provder's testimony, that anything within that range, including the lowest numbers, would be adequate or satisfactory, otherwise, he wouldn't have given them.

MR. SANGER: I would --

THE COURT: It would seem to me.

But maybe I am wrong.

Proceedings

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2 MR. STEINBERG: That notwithstanding, your
3 Honor, what he did in order to come up with the ranges
4 of available, let's say, therapists, for instance, he
5 went to more than one source.

6 Clearly, it would have been proper, had
7 counsel chosen to do, to say, isn't it a fact that
8 there are other therapies available, some more
9 expensive, some less expensive?

10 He testified that these things are
11 necessary, that there is no guarantee which one he is
12 going to be able to have at the time, so it is
13 reasonable, giving the Plaintiff the benefit of the
14 doubt, to presume that if, in fact, the jury decides
15 to make a determination that Jose's entitled to this
16 money for each of the things that -- that Mr. Provder
17 has said he needs, that there is no guarantee he is
18 going to get the minimum price or the maximum price.

19 He testified, of course, that a life care
20 planner would be the one to determine what is the best
21 price at the time, the cheapest price at the time.

22 This is what is available now.

23 As he stated during his cross-examination,
24 for instance, speech therapy is something that he
25 needs, that he has ordered, there just aren't enough
26 speech therapists to go around.

Proceedings

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MR. SANGER: Thank you.

THE COURT: All right.

Se you all Thursday morning.

(Whereupon, the court was adjourned to
Thursday, May 10th, 2001 at 9:45 a.m.)