



SUFFOLK ACADEMY OF LAW
The Educational Arm of the Suffolk County Bar Association
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BILLY LEVINE TRIAL TECHNIQUE SERIES #2
“OPENING STATEMENTS”

FACULTY

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Peter Kopff, Esq.
Hon. R. Bruce Cozzens

Program Coordinator: Paul Devlin, Esq.

October 11, 2018
Suffolk County Bar Association, New York



Billy Levine Trial Techniques Series #2

Opening Statements

5:45 – 6:30 Lecture by Hon. R. Bruce Cozzens

6:30 – 6:40 Break

6:40 – 7:25 Lecture by David Dean

7:25 – 7:35 Break

7:35 – 8:20 Lecture by Peter Kopff

8:20 – 8:30 Questions and Answers

Biography of Justice R. Bruce Cozzens

Justice Cozzens was elected to the Supreme Court, 10th Judicial District (Nassau and Suffolk Counties) in 1997. He currently is the Presiding Justice in the Trial Assignment Part of the Supreme Court, Nassau County. Justice Cozzens also maintains a full Differentiated Case Management calendar as well as trying both jury and non-jury civil cases. Each morning, Justice Cozzens addresses the new prospective jurors. He explains the jury selection process and thanks them for their service to the community. Prior to taking the bench, he was an attorney in private practice and a founding partner of a Long Island civil litigation firm. Justice Cozzens also is an Adjunct Professor at the Hofstra University School of Law where he teaches a practical skills course. He holds a B.A. Degree from the University of Virginia and a J.D. from Pace University School of Law. He is a member of the Nassau County Bar Association, the Nassau County Women's Bar Association, and the Lawyer-Pilot's Bar Association. He is married to the former Mary Ann Meyer of Roslyn, New York.

David J. Dean



David J. Dean, who joined Sullivan Papain Block McGrath & Cannavo PC over 20 years ago as a nationally recognized trial attorney, is responsible for trying some of our largest and often most challenging and complex cases.

David J. Dean is a senior trial attorney on all matters in the Firm's practice. Mr. Dean was the Chief Trial Counsel for the plaintiffs in the Agent Orange Class Action, representing more than two million Vietnam Veterans in their claims against seven chemical companies. His work was described in published Federal Court decisions as "extraordinary" and of "exceptional quality." David's exceptional trial skills were evident in the civil trial of the 1993 bombing of the World Trade Center, where, as the lead trial attorney, he obtained an unprecedented verdict against the Port Authority for its failure to take steps to prevent the terrorist attack.

David won a \$92 Million verdict against the city of New York on behalf of a victim of excessive police force. He won a \$25 million verdict for a laborer injured at a worksite and a \$24.5 million verdict for a man who tripped on the stairs of an apartment building causing him to become a paraplegic. He obtained a verdict against the Transit Authority for \$28.5 million for a woman whose leg was severely injured when she was struck by a train. He also won a \$19.1 million verdict for a man whose hand was caught in a closing train door. He has obtained many multiple million-dollar verdicts in a number of different types of medical malpractice cases. Such results are only a small sample of his work, which has earned him a respected and feared trial reputation.

David has been named in Super Lawyers magazine as one of New York's top lawyers, and has also been listed in The Best Lawyers in America. A national legal publication recently named David as "one of America's great trial lawyers." David has also received the highest rating (AV®) from Martindale-Hubbell Peer Review Ratings.* A 1961 graduate of Georgetown Law Center, David joined the firm in 1997 and has been a Member since 1999. He has often lectured at various law schools and bar associations on all aspects of trial practice.

Awards and Recognition

- Named 2018 Lawyer of the year for New York City Personal Injury Litigation-Plaintiffs by receiving the highest votes from his peers
- Named in Super Lawyers magazine as one of New York's Top Lawyers
- The Best Lawyers in America
- One of America's Great Trial Lawyers
- Highest Rating (AV®) from Martindale-Hubbell Peer Review Ratings

Education

- Georgetown University Law Center, Washington, District of Columbia – 1961





INTRODUCTORY BIOGRAPHY

Peter C. Kopff has tried complicated medical malpractice cases since his first medical malpractice defense verdict in May 1977. Recognized by top plaintiff's counsel as fearless and effective at trial, his clients have won defendant's verdicts on liability and causation in New York State and federal courts.

Peter has a special interest in economic issues. His cross-examinations of economists have turned juries against exaggerating plaintiff's counsel and have been featured in state bar seminars.

Recognized as one of America's top trial lawyers by The National Law Journal based on repeated defense victories against New York's most revered plaintiff's trial counsel, Mr. Kopff has been featured for his innovative courtroom tactics in The New York Law Journal and The National Law Journal.

Peter is an active participant in state and defense bar association education for attorneys. He is an alumnus of Princeton University (1970, BA). He has lectured at his alma mater Albany Law School (1975, JD) on trial techniques, and he has received their Distinguished Alumnus Award and served on the Board of Trustees for more than a decade.

When assigned a case early on, he pursues technical defenses for dismissal with success affirmed in the appellate courts barring Complaints for Worker's Compensation and Statute of Limitations. He also pursues mitigation and culpable conduct defenses where patients have history of smoking in cancer, heart, lungs or circulatory cases. This defense can greatly assist in jury trials on the issue of damages.

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Maximizing Damages: Plaintiff's Point of View

David Dean, Esq.

I. Overview

- a. Successfully maximizing damages must start in jury selection and continue through your opening, the manner in which you present your direct examination, your selection of demonstrative evidence, the presentation of appropriate economic and non-economic experts and will culminate in your summation in which you will put all the damage components together in order to successfully persuade the jury to award your client very substantial verdict

II. Voir Dire

- a. Explain the concept of damages and when questioning, use "open to the concept" rather than harsher language.
- b. Ask the "substantial" question
- c. Alertly weed out the malcontents and establish basis for peremptory challenges
- d. Be mindful of the January 09 guide "Implementing New York Civil Voir Dire Law and Rules" (A copy can be obtained at www.nycourts.gov). See III.B. "JHO may question a challenged juror but may not rehabilitate that juror by eliciting a promise to be, to follow the judge's instructions or to be unbiased. Generally, JHOs

should err on the side of caution and excuse jurors when there is a possibility of bias."

- e. Workshop the damage claimed. For example, economic loss of the services of a housewife or loss of mom's or dad's care and guidance.

- f. Juxtapose "substantial damages" and "insurance"

- g. Remind the jury that as much as they would want to, they don't have the power to heal your client and all they can do is award damages

- h. Deal with a juror's fear and reluctance to award damages.

- i. Deal with the burden of proof. Your alternative: "More likely than not."

- j. Explain (although not citing PJI: 2:280.1) The duty to consider loss of enjoyment of life, pain and suffering your client has and will in the future endure ("endure" is another good jury word).

- k. Don't lose your best juror on the sympathy issue. Pre-conditioning a juror before the defendant has a chance

- l. Discuss (but don't cite, PJI: 2:227) that the plaintiff is entitled to "a sum of money that would justly and fairly compensate the plaintiff for all losses resulting from injuries plaintiff sustained"

III. Opening

- a. Almost always, it is the most important part of the case. To the extent possible, and within the limitations set by the court and your adversary, it is the time to persuade.
- b. When, if ever, do you ask for money damages?
 - 1. Specific dollar amounts from pain and suffering should not be discussed. However, if you are going to present solid, unshakeable expert economic testimony, it is appropriate to bring it up now and mention that it is only part of (the lesser part) of your damage claim.
- c. Maximize damages by humanizing your client. Find the story. Everyone has one and you will want to tell it at the very beginning.
- d. Maximizing damage bonus: the defendant's egregious conduct. Always look for it and if it is there, this is the time to discuss it for the first time (Don't bring this up in jury selection!).
- e. The increasing and beneficial use of demonstrative evidence in an opening and how to get it in.
- f. How to combat your adversary's objections by saying "The evidence will show"

IV. Direct examination

- a. Your client's attitude: courage is always better. The stage IV example.
- b. Of course, pain can be elicited from your client, but it is often much more effective if the plaintiff acknowledges periods of remission.
- c. Third party testimony involving the plaintiff's disability is often far more effective than the plaintiff's own statements.
- d. How to deal with grave visible disabilities. Human nature, and the "elevator operator example?"
- e. The use of demonstrative evidence is limited only by your imagination.
 - 1. Some examples:
 - i. Day in the life video;
 - ii. Positive x-ray blow-ups;
 - iii. Blow-up of hospital records with transcribed highlights;
 - iv. Prosthetic parts; and
 - v. Pictures of decedent.
- g. Plaintiff's claimed disabilities and the Sherlock Holmes Syndrome
- h. Showing the injuries: demonstration and/or photographs?

V. Specific Damage Areas

- a. Limited conscious pain and suffering.

1. Proof through expert medical testimony, police and hospital records, witnesses, family, friends and bystanders.
 2. Have your treating or expert physician discuss what happens to a body as it dies.
- b. What if the defendant's expert physician writes a report that you like better than your own? May you call the defendant's doctor as your own witness to give the findings and conclusions expressed in his report? Yes. *Gilly v. City of New York* (69 N.Y. 2nd 509)
1. May you call your own treating for whom you have never served a 3101(d)(1) and have him discuss causation, although he has never given it in his exchanged report? Yes. *Logan v. Roman* decided Jan 27, '09 (2nd Dep't.) The case holds that a 3101(d)(1) requirement does not apply to treating physicians.
 2. May your treating doctor testify as to permanency, even though he has not stated it in his report? Yes, as long as it is in the Bill of Particulars. Permanency is not a new injury. *Hughes v. Webb* (2nd Dep't 2007) 40 AD 3rd 1085, 837 N.Y.S. 2d 698.
- c. Conscious pain and suffering includes the fear of impending death
1. Offers great summation materials

2. Recent cases of compensation for limited conscious pain and suffering include the following:

- i. *Lubecki v. City of New York*, 304 A.D.2d 224, 758 N.Y.S.2d 610 (1st Dep't 2003), the Appellate Division approved an award of \$3 million for decedent's conscious pain and suffering and pre-impact terror where the decedent died within one hour of being shot, but first went through a harrowing ordeal as a hostage.
- ii. *Givens v. Rochester City School District*, 294 A.D.2d 898, 898, 741 N.Y.S.2d 635, 636 (4th Dep't 2002), where "decedent collapsed and lost consciousness" "[w]ithin five minutes of being stabbed" and was pronounced dead "[l]ess than an hour later", an award for pain and suffering was reduced to \$300,000.
- iii. *Rodd v. Luxfer USA Limited*, 272 A.D.2d 535, 709 N.Y.S.2d 93 (2nd Dep't 2000), plaintiff's decedent sustained a wound to the left side of his chest when the Oxygen tank he was refilling exploded; the decedent became "unresponsive" upon hospital admission 30 minutes after an explosion'. The Court allowed \$300,000 for conscious pain and suffering.
- iv. *Ramos v. La Montana Moving & Storage, Inc.*, 247 A.D.2d 333, 669 N.Y.S.2d 529 (1st Dep't 1998) the Court allowed \$900,000 for 15 to 30 minutes of conscious pain and suffering when plaintiff's decedent was struck and killed by a drunk driver. Decedent was initially struck by the rear end of defendant's tractor trailer, then twice run over by the truck's rear wheels. Decedent suffered excruciating crushing injuries and lived approximately 15-30 minutes in extreme pain.
- v. *Glassman v. City of New York*, 225 A.D.2d 658, 640 N.Y.S.2d 139 (2nd Dep't 1996), the Court allowed \$500,000 for pain and suffering despite the fact that it was established that the plaintiff "was only minimally conscious before she died". Plaintiff suffered head injuries, bruises on brain surface, multiple rib fractures,

injury requiring removal of her spleen, fractured left arm, multiple scrapes and bruises. She underwent an emergency laparotomy to staunch bleeding. She died a terrible death. She suffered lunge force trauma from the impact where by her body was thrown to the ground. She experienced conscious pain and suffering from 11:09 a.m.-1:35 p.m., which was documented by hospital records. She expired at 4:55 p.m.

- vi. *Torelli v. City of New York*, 176 A.D.2d 119, 574 N.Y.S.2d 5 (1st Dep't 1991), lv. Den., 79 N.Y.2d 754, 581 N.Y.S.2d 282 (1992) the Court allowed an award of \$250,000 for approximately 15 minutes of pain and suffering.
- vii. *Maracallo v. Bd. Of Ed. Of City of New York*, 2 Misc.3d 703, 715-716, 769 N.Y.S.2d 717 (2003), aff'd 21 A.D.3d 318, 800 N.Y.S.2d 23 (2005) the Court increased an award of \$1 million to \$1,250,000, for decedent's six minutes of suffering while drowning. Plaintiff's minor decedent drowned in a wave pool. He experienced approximately 6-7 minutes of physical pain, terror and knowledge of impending death. An expert testified that after finally going under water the second time, decedent suffered for a terror filled period of 6-7 minutes, during which he was in a conscious state with awareness of impending death. This period was in addition to and followed by a period of fright and panic which took place as he came up for air 1, maybe 2 times. Decedent was caught in the current and his body violently propelled against metal intake screen on filtration system.
- viii. *Twersky v. Busche*, 37 A.D.3d 704, 830 N.Y.S.2d 725, 726 (2nd Dep't 2007), the Appellate Division for the Second Department allowed \$1,000,000 for a period of about 2.5 hours of consciousness in which the decedent, who had been struck by a van while crossing the street, "experienced considerable pain." Decedent remained conscious until anesthesia and surgery and experienced considerable pain from broken femur, collar bone and ribs, collapsed lungs and excessive internal bleeding.

Additional Cases of Compensation for Limited Conscious Pain and Suffering:

1. *Filipinas v. Action Auto Leasing*, 48 A.D.3d 333, 333, 851 N.Y.S.2d 550 (1st Dep't 2008), the Appellate Division raised an award to \$750,000 where plaintiff's decedent was struck in the head by van's side mirror and sustained serious head injuries, but "was heavily medicated and/or sedated" within an hour of the accident.
2. *Glaser v. County of Orange*, 54 A.D.3d 997, 998, 864 N.Y.S.2d 557, the Court reduced the pain and suffering award to \$350,000 where plaintiff's decedent was fatally injured after the rear axle of a dump truck came loose and struck his windshield. Decedent was conscious for only 2-3 minutes after the initial impact.
3. *Gersten v. Boos*, 57 A.D.3d 475, 477, 870 N.Y.S.2d 56 (2nd Dep't 2008), where plaintiff's decedent was struck by a vehicle as she crossed the county roadway and was conscious for 5-10 minutes, an award for pain and suffering was reduced to \$350,000.
4. *Dowd v. New York City Transit Authority*, 78 A.D.3d 884, 885, 911 N.Y.S.2d 460 (2nd Dep't 2010), the Court allowed \$1,200,000 in pain and suffering in a case where plaintiff's decedent was run over by a bus twice, was still conscious when the paramedics arrived, but lost consciousness after going into cardiac arrest 18 minutes after the impact. She was pronounced dead 1.5 hours after the accident.
5. *Gonzalez v. New York City Hous. Auth.*, 77 N.Y.2d 663, 666-670, 569 N.Y.S.2d 915 (1991), the Court allowed an award of \$350,000 for pain and suffering where plaintiff's decedent died from asphyxia by gagging within either minutes or the hour of an assault.
6. *Campbell v. Diguglielmo*, 148 F. Supp. 2d 269, 276, No. 97 Civ. 7351 (CBM) (S.D.N.Y. 2001), the Court approved a jury award of \$2,500,000 for pain and suffering as a result of the mental anguish suffered by plaintiff's decedent when he "perceived that he was about to be shot, was conscious for at least a short time after he was shot and was denied assistance as he died."

VI. Loss of Parental Care and Guidance

- a. Remember it is until age 21, not 18, that parents statutorily owe a legal duty of support to a child. You can certainly consider, as well, if the evidence warrants, that the parent would have contributed to the support of the child beyond the age of 21 (NY PJI 3rd 2:320).
- b. The support time is not computed at the age of the child at time of trial, but the age at the time of the parent's death.
- c. The loss of parental care and guidance can extend far beyond the age of adulthood.
- d. Essential for both the trial and appellate support: You must elicit specific and powerful examples of parental care and guidance. For example, specific examples of how father was backbone of family, role model, many sacrifices to support/influence career choices, all my friends respected him, working two jobs, Mr. Fixit around the house, always urged me to continue my education and go to college. Mom strength of family, wisest person I know, my role model, never too busy to help out, guided me throughout my life, drove me to school, when older spoke to me every day.
- e. Can grandchildren recover from loss of grandparents' guidance?
Yes. *Gonzalez v. NYCH&H* 77 NY 2nd 663 held, almost 20

years ago, that appropriate was the award of \$100,000 for loss of grandmother's guidance.

f. Awards for loss of parental care and guidance for infant children include the following:

1. The Second Department has on at least four different occasions approved awards for parental guidance of at least \$1,000,000 per child. *Paccione v. Greenberg*, 256 A.D.2d 559, 682 N.Y.S.2d 442 (2nd Dep't 1998) (where a mother was survived by two children, ages 6 and 2, allowing \$1,500,000 per child just for loss of parental guidance); *Zawacki v. County of Nassau*, 299 A.D.2d 542, 750 N.Y.S.2d 647 (2nd Dep't 2002) (approving past loss and future loss of \$1,500,000 to each of two children in a case in which, according to the Court's opinion, one child was 6 years short of 21 and the other child was 8 years short of 21); *Bogen v. State*, 5 A.D.3d 521, 772 N.Y.S.2d 869 (2nd Dep't 2004) (allowing \$1,250,000 for past and future parental guidance to one minor child, according to facts noted at 2002 WL 31932127); *Bryant v. New York City Health & Hospitals Corporation*, 250 A.D.2d 797, 673 N.Y.S.2d 471 (2nd Dep't 1998), modified on other grounds, 93 N.Y.2d 592, 695 N.Y.S.2d 39 (1999) (where the

Court allowed \$1,100,000 [broken down as \$250,000 past, and \$850,000 future] for loss of parental guidance to the decedent mother's one child). Other recent appellate decisions include *see also Adderly v. City of New York*, 304 A.D.2d 485, 757 N.Y.S.2d 735 (1st Dep't 2003) (approving unstated sum for past loss of parental guidance and \$1 million for future loss of guidance for a necessarily very young daughter inasmuch as the decedent-mother was herself said to be only 20 years old); *Carlson v. Porter*, 53 A.D.3d 1129, 1133-1134, 861 N.Y.S.2d 907, 911-912 (4th Dep't 2008) (approving awards of \$250,000 for past parental guidance and \$750,000 for future loss of guidance for each of three children "under the age of ten").

- g. It is crucial that the trial lawyer delve and explore into the past life of the decedent and his/her relationship with the children. Every loss of a parent carries a story. And that story, by the way, is virtually unimpeachable.

VII. Expert Testimony to prove damages

- a. Expert testimony from an economist is essential in cases involving loss of household services, loss of income and projected medical expenses. You must lay the proper evidentiary groundwork.

1. When projecting future lost wages, offer documentary, and if possible, testimonial evidence. Past income tax returns (properly redacted), contracts of employment, and testimony from an employer as to decedent's work habits and prospects for advancements are all important.
 2. When projecting future medical expenses, be sure to lay the proper groundwork. Consider testimony from a physician as to the present and future medical needs and their costs. Life care planners often present powerful supportive testimony. In amputation cases, testimony from a prosthesis maker is important. You must give your economist appropriate evidentiary foundation.
- b. The economist is the last step. Using projected life expectancy, yearly increases in costs of specific hospital, medical and drug items, he'll arrive at final figures.
1. Put the figures on large boards and don't forget to introduce them (Hopefully, the jury will be able to see this evidence when they deliberate).
 2. Let the economist do all the work- interrupt only when necessary to keep the jury's attention.

- c. Certain Medical needs have a two fold damage impact: money and emotion. For example, catheters, diapers, etc.
- d. The defendant's dilemma with an economist: to have or not to have one. Does the defendant's attorney wish to run the risk of two economists fighting over money.

VIII. Summation

- a. Almost always ask for a specific sum of money, but consider leaving options open for jury to decide in other categories.
- b. Shall you write the figures down?
- c. Shall you publish some of the testimony?
- d. Empower the jury to change your client's life.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU : TRIAL TERM PART 37

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VITO LORE and ELIZABETH LORE, : Index No.
9660/2009

Plaintiffs, :

-against- :

LEONARDO P. FLORENDO, M.D. and : Openings
ST. FRANCIS HOSPITAL, :

Defendants.
-----x

100 Supreme Court Drive
Mineola, New York 11501
October 13, 2011

B e f o r e :

HON. JOHN M. GALASSO,

Justice, and a Jury

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BONNIE LEVINE, CSR., RMR.,
Official Court Reporter

1 (Whereupon, the following are the requested
2 openings:)

3 MR. DEAN: I thank you, your Honor.

4 May it please the Court, Mr. Justice Galasso,
5 Madam Forelady, ladies and gentlemen of the Lore jury,
6 that's Betty (indicating); Betty Lore, that young looking
7 69 year old gal sitting there, and that's Joe sitting
8 next to his mom, and that's Nicole sitting next to her
9 brother, counsel (indicating).

10 I look forward to this. Thanks for your
11 patience the last several days. I'm glad you all
12 returned.

13 Let me tell you what this case is about. One
14 day before the operation, on the 4th day of December of
15 2006, Vito and Betty walked into St. Francis Hospital.
16 It was an overnight procedure. That's what it was
17 supposed to be. Nineteen weeks later they carried him
18 out on a stretcher to spend the next thirteen months in a
19 rest home where, by the way, he is today. He is
20 helpless. He cannot take care of himself, he relies upon
21 others for every task. He cannot stand, he cannot walk,
22 he cannot change his own diapers, he cannot feed himself,
23 he cannot roll over. That is the way he is now, and that
24 is the way he will be forever. I promise you that that
25 will be the evidence in this case, and it will not be

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1 disputed. That's his condition. He is, for all intents
2 and purposes, quadriplegic. He has the tiniest ability
3 to move his hands just a little bit. That's about it.
4 He can control -- he knows when he's urinating; knows
5 when he's about to, and he can't do anything about it;
6 taking care of himself, and he certainly can't walk to
7 the bathroom. He must be taken care of by others.

8 Now in the rest home -- and he was home for
9 three years after this, and it was helpers that were paid
10 for, of course, and then at night Betty, who would, after
11 being there at all times, would be getting up three times
12 a night to change her husband's diapers. Now, because of
13 respiratory problems, he's in a rest home, but we're
14 hoping he's going to come home again. And his wife, whom
15 you'll meet either tomorrow or Monday, and you will find
16 that -- we'll be saying the same thing -- you'll find
17 that you will have admiration and sympathy for Betty.
18 She's tough, and she's angry, and I have pleaded with her
19 not to have her anger come across, but if it does, be a
20 little patient with her because of what's happened to her
21 husband.

22 Why are we here. We are here because Leonardo
23 Florendo, who's sitting over there in the corner
24 (indicating), caused such catastrophic injuries as a
25 result of carelessness, as a result of negligence, as a

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1 result of frightening incompetence that on a little
2 simple procedure Vito ended up brain damaged. That's
3 what's happened. And it's because of the negligence and
4 conduct of Dr. Florendo that we're here today.

5 Now, Vito at the time was 71. Let me tell you
6 just a little bit about him. As of now he and Betty had
7 been married for 46 years. He's now 76, and you will
8 see, you will evaluate this, but you're going to see it's
9 a heck of a family. The brother and the sister get
10 along, they love their mom and dad, they're very close,
11 they were very close, they are very close. Vito has the
12 blessings of having a great and supportive and loving
13 family. He was always a hard worker. Betty was 23 when
14 they were married. Veto was 30. He worked for Pan AM
15 for 35 years. Then he worked for Canada Dry. Betty
16 worked for more than 25 years. They raised their kids,
17 and when Vito was 69, that was the time that the golden
18 years started. Betty says that they were the best years
19 you could imagine. They went away to Europe a couple
20 times. They would savor their life. Vito loved to walk
21 on the boardwalk. He was a bicyclist, and above all he
22 was really involved in the Knights of Columbus. Now, why
23 do I say that? Because tomorrow you're going to see a
24 little bit about him, but he was everything at the
25 Knights of Columbus; he was the door opener, he was the

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1 bartender, he was the waiter, he was the MC, he was the
2 guy who would go to veterans' homes and do what the
3 people in charitable organizations do. He lead an active
4 life. Now, for a 71 year old guy he was in pretty good
5 shape. He had a heart problem, and on three occasions he
6 had been to St. Francis before and had been operated on
7 by a Dr. Greenberg for an aortic valve work and
8 replacement, so he had this operation. And the last time
9 that he was there -- and this is between '68 or '69 and
10 '71 -- the last time he was there he had, in essence, a
11 pacemaker put in. Now, these pacemakers have to have
12 their battery changed, so this is the reason why Vito was
13 back on December 4th for their December 5th procedure; to
14 have his battery changed. It is a minor procedure. I
15 promise you you're going to see that it's a little
16 incision. The fancy word is, I think, subclavicular
17 area. But it's a little incision up here (indicating).
18 The doctor comes in -- Dr. Greenberg, who is his heart
19 guy -- comes in, changes the battery, boop, boop, boop,
20 puts it back in and that's all, he can go home. That's
21 what happens if you have this type of an apparatus.
22 That's why it's just such a minor procedure. That's why
23 he figured he was getting home the next day. So how does
24 Dr. Florendo come in. Vito goes to the anesthesia room
25 on the morning of December 5th; anesthesia room at St.

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1 Francis Hospital. Now, he never met Dr. Florendo. He
2 didn't hire Dr. Florendo. He didn't know anything about
3 Dr. Florendo. Florendo comes in and says, I'm the
4 anesthesiologist. Now, Vito just assumes, as all of us
5 would, that he's supplied by the hospital. Dr. Florendo
6 is on the hospital staff. In the consent for procedures
7 it says, I understand that one of the following
8 anesthesiologists on staff at the hospital may be
9 involved in my case, and there's Dr. Florendo's name.
10 Dr. Florendo was asked at his sworn examination, If I
11 were to look at a list of all the doctors in the
12 Department of Anesthesia on the Table of Organization
13 from the head on, would your name be there? Yes. Yes;
14 member of the department. Yes. We didn't know that he
15 was, like, not paid by the hospital. We didn't know that
16 when he sent the bill, as he did in this case, the bill
17 goes and the check goes to his home. And I'll tell you
18 what else we didn't know. You're going to be surprised
19 at this. We didn't know that Dr. Florendo was not Board
20 certified. Now, Board certification is something that
21 doctors have. Board certification -- 24 different
22 medical specialties -- you don't have to remember that --
23 but 24 different medical Board certifications for medical
24 specialties. In order to become Board certified
25 obviously you have to pass tests. You have written

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1 tests, you have oral tests; tests in your field, tests to
2 determine how much experience and skill you have, tests
3 to determine whether or not you can deal with medical
4 crises, tests to determine whether you understand
5 anatomy, tests to determine your qualifications as a
6 doctor. That's Board certification. Dr. Florendo tried,
7 took the test, he flunked the test. He took the test, he
8 flunked the test a second time, and then he gave up
9 trying to take it. He was not Board certified, and there
10 might be a look of surprise in your face, but I'm telling
11 you that's what we discovered later on.

12 Now, if Vito's lying there waiting for
13 anesthesia he's not going to say, By the way, are you
14 Board certified? Nobody does that. But they produce a
15 doctor who wasn't Board certified. They produce a doctor
16 who we assume is on the staff. And also, when
17 Dr. Florendo is examining -- all this catastrophe happens
18 and a lawsuit is brought, and now he's examined under
19 oath, and we ask him about what happened that day. And
20 we asked on Page 31 of his deposition, we asked, Did
21 something unusual happen? His answer's, I didn't -- I
22 don't remember that.

23 Well, I'm telling you something unusual
24 happened. His patient almost died. His patient
25 sustained brain damage. His patient and his patient's

b1

1 family has had their life destroyed. That's unusual.
2 That's not supposed to happen. Dr. Florendo doesn't
3 remember that.

4 So what happened. At 9:57 that morning we're
5 now in the operating room. At 9:57 in the morning two
6 drugs are given; Propofol and Versed. Both of those
7 are -- as you may have heard recently Propofol in the
8 news -- Propofol and Versed are given by Dr. Florendo.
9 Let me emphasize this. This is not the type of
10 anesthesiologist procedure where someone else does the
11 breathing. It's the patient who's doing the breathing.
12 It's called MAC; modified anesthesia care, and it's where
13 the doctor gives them sedatives, and he's just kind of
14 watching to be sure nothing bad happens. Something
15 surely bad happened here, but this is the type of
16 anesthesia that he's given. As a matter of fact, by the
17 way, you didn't even have to give any sedatives in this
18 case because several months later, when Vito finally, on
19 the 23rd of February of '07, when he finally had the
20 battery changed they didn't even give any sedatives.
21 What do you do? You give a little boop, boop, boop, dull
22 the area, go in, change the battery. That's how it was
23 done later on.

24 But anyway, sedatives were given, and then --
25 again, and you'll see all the blown up records -- and

b1

1 then again at ten after ten more medicine was given; more
2 Propofol was given. So what happens? In order to
3 understand what happens we got to do a little basic
4 anatomy. Now, I'm going to remind you of something we
5 both know. There are two passageways where the mouth is;
6 one to breathe and one for food. I mean, that's basic
7 anatomy, and you'll see here two different passageways
8 (indicating); the breathing passageway (indicating),
9 where the air from the nose and the mouth comes down,
10 goes into the lungs, and the eating passageway. That's
11 the esophagus; the eating passageway where the food goes
12 down into the stomach. Two basic passageways, two basic
13 functions, both functions that we need to live. But
14 they're both up here (indicating), both tubes, both
15 passageways, both the windpipe -- we'll call the trachea
16 the windpipe -- and also the esophagus for the stomach,
17 they're both right up here (indicating). Now, all of us,
18 all of us in our life, whether it's our lives where you
19 have a little baby almost a year old, whether you have
20 grandchildren, whether you have grown children, all of us
21 in our lives have had situations where we've thrown up,
22 or loved ones have thrown up. Nobody in this courtroom
23 hasn't thrown up. There are words to describe it. Okay?
24 Regurgitation. That's the fancy medical word, third one
25 down; regurgitate. Okay. Throw up, vomit, and some

b1

1 lesser words I used to use in college, but the point is
2 it happens to all of us. And you get a little bad taste
3 in your mouth, we understand that, and for various
4 reasons you put your head down and you get that vomit
5 out. That's okay, and that happens in life. That's
6 okay. However, something catastrophic can happen if the
7 vomit doesn't go out our mouths, the vomit goes into the
8 windpipe. Why? Because it impedes breathing. Now, how
9 do we breathe? You know, the air goes down in that
10 windpipe and goes into our lungs. We got one on the left
11 and one on the right, and it's exchanged in the blood --
12 the oxygen goes in, in our body, the carbon dioxide comes
13 out and is exhaled. It's essential. The way we -- and
14 every, every, every tissue of our body, our heart, our
15 brain, surely, every tissue of our body needs oxygen. I
16 know you know this. I know you know this, but we have to
17 have oxygen to live. It's essential. And the way to get
18 oxygen into our bodies is taking that air, you know, down
19 the windpipe, into our lungs where the oxygen is
20 disbursed with the blood. That's how we live. So you
21 can't under any circumstances in the world harm that
22 procedure. Why? Because we can die. We know that. I
23 mean, try holding your breath for a period of time. I
24 don't want you to do it now, please. I don't want to be
25 known as a lawyer who asked the jury to hold their breath

b1

1 and passed out during my opening. You can't hold your
2 breath for awhile without something bad happening to you.
3 If you stop breathing, ultimately if you stop breathing
4 you're going to die. We know that. And this is -- so it
5 is crucial for our well-being, and I know you know this.
6 It's crucial for our well-being that our breathing is not
7 in any way impaired. The worst thing that can happen on
8 the operating table other than the patient, boom, dying
9 right in front of you, the worst thing that can happen is
10 aspiration. That is a fancy medical word meaning an
11 aspiration -- very, very important -- worst thing that
12 can happen is aspiration, which is food particles or
13 other foreign objects going into our windpipe down into
14 our lungs. That is a catastrophe. You know where I'm
15 going. But that is a catastrophe. Can't happen because
16 -- why? Because the food particles, food clumps get
17 stuck in our lungs, that impedes our breathing. If it
18 impedes our breathing either our brain is going to die,
19 we're going to die, our heart is going to die, awful
20 things are going to happen.

21 Now, Vito's on the table. Because of the
22 sedation, you know, all of his reflexes aren't there,
23 because our bodies have protective mechanisms, so this
24 doesn't happen ordinarily; little valves and stuff like
25 that that you -- you will hear the word glottis, we don't

b1

1 have to go into that now, but some protective mechanisms,
2 but he's been sedated. The degree of his sedation is
3 something I'll be talking to the doctor about, but
4 anyway, he's lying there, and at 10:15 something happens.
5 At 10:15, without any sound, he's lying there, vomit
6 comes from his mouth. It's not like he's coughing, it's
7 just -- and we know that there's some sedation issues
8 because he's not, like, coughing it up, it's just flowing
9 out of his mouth. It's coming from his stomach, flowing
10 out of his mouth. That vomit has been described -- I'm
11 sorry but I have to do this -- in two different ways.
12 Some doctors calling it in the hospital record oatmeal
13 like, others call it a chunky -- like chunky chicken
14 soup, but, in any event, you got vomit coming out of a
15 patient's mouth, a patient who's under sedation. This is
16 a medical emergency, no doubt about it. Why? Because he
17 can aspirate, or she can aspirate, and that patient can
18 die. You have to respond. The way to respond is to
19 intubate. Intubate is just a fancy medical word meaning
20 put a tube down into your lungs. You put oxygen down
21 into your lungs. Why? Because you got -- that's the way
22 to live. That's the way to prevent brain damage. That's
23 the way a patient can survive. That's the way to deal
24 with this emergency; you intubate him. Intubate is
25 essential. Take that tube, patient's mouth is open and

b1

1 we put a little thing, keep the tongue down, put the tube
2 in his mouth, how long does it take; maybe a minute or
3 two? Maybe a minute or two. That's okay. That
4 intubation saves lives. Intubation is the right
5 procedure. Intubation is what has to be done. You put a
6 tube right down into the windpipe and let that -- and the
7 oxygen is connected to the tube, and the oxygen flows
8 into the lungs, and the guy is saved, and there's no
9 brain damage. That's the way to do it. You got to do it
10 right away. I'm going to ask you to remember a number,
11 and the number is twenty-eight minutes. It took
12 Dr. Florendo, it took Dr. Florendo twenty-eight minutes;
13 twenty-eight minutes to intubate Vito; twenty-eight
14 minutes in the best place in the world to give medical
15 care. Why? Because you're in an operating room. The
16 machine to intubate is, what, maybe a foot away, maybe a
17 foot-and-a-half away? It's not like you're in the desert
18 someplace, not like you're in a car, not on a sidewalk,
19 you're in an operating room where all that stuff is
20 available to you. You have the tube. You got to
21 intubate right away. Twenty-eight minutes. We know
22 there was brain damage. I'm going to show you in a
23 minute that there was brain damage. Twenty-eight minutes
24 is -- twenty-eight minutes isn't bad if you're waiting
25 for a bus, I suppose. Twenty-eight minutes is

b1

1 catastrophic if you don't have oxygen, if you have major
2 breathing difficulties. And we know that there were
3 major breathing difficulties because here's the record:
4 10:15, patient started to vomit with difficulty of
5 breathing. That's an emergency. Not only does
6 Dr. Florendo screw up the time of intubation, and
7 twenty-eight minutes is a lifetime, or a life sentence,
8 but he does exactly the wrong thing.

9 Now, he does other bad things. You know he
10 puts his head on the side, which is right, but you have
11 to put your whole body on the side. He puts his head up.
12 That's wrong. You got to put your feet up. Mind boggles
13 at things he gets wrong, but the worst thing he gets
14 wrong, the worst thing he gets wrong is this is what he
15 does: He takes a mask -- okay -- Vito's mouth is open,
16 takes a mask and puts the mask over Vito's nose and
17 Vito's mouth. Now, it's sealed, and then starts what is
18 known as bag him. There's a bag right here (indicating),
19 and you force oxygen into the mouth. You're going to
20 say, Wait a minute. What about all that vomit that was
21 in his mouth and into his lungs? What happens to that?
22 Well, the pressure of the oxygen into his mouth courses
23 the vomit down. I mean, that's -- and we have an expert
24 who's going to say this as well. That's the worst thing
25 to do. Initially, Dr. Florendo did his best to suction

b1

1 Vito out, but we know he didn't do a good job because
2 there are reports, and we know that there was -- when
3 they finally did this, and they finally looked into his
4 lungs, Flexible bronchoscope passed, white particulate
5 matter present in endotracheal tube, trachea and both
6 mainstream bronchi. Those are the major things going
7 down into the lungs. So we know there was stuff there.
8 How did it get there? Well, forcing it down where
9 oxygen's going into the mouth and pushing the oxygen --
10 what he wanted to do was get oxygen down into his lungs.
11 Instead of putting a tube down and supplying the lungs,
12 which you have to do, instead he puts oxygen in his
13 mouth. Guy can't breathe. Pushes oxygen here and forces
14 all the crap there down into his lungs. That's terrible.
15 Terrible. I don't know what he did. He said he was
16 never faced with this type of thing before. I don't
17 know. But as a result Vito sustained brain damage. I
18 don't think that's really an issue, but here is an
19 electroencephalogram taken on December 8th, and says,
20 This is an abnormal EEG, bilateral cerebral dysfunction.
21 They test their cells and stuff in the brain. Abnormal
22 bilateral cerebral dysfunction. I don't really even
23 think that that's an issue.

24 Finally, twenty-eight minutes later, he was
25 intubated. And, you know, they took him out of the

b1

1 operating room before they intubated him and they put him
2 in another room and intubated him. I don't know why.
3 Operating room is the best place to do these procedures.
4 Took him out of the room and put him in recovery room. I
5 don't know why. Another example of why -- I want to be
6 gentle and just say simply negligence, but it's just
7 terrible practice. So what happens to Vito? Well, he's
8 almost dead, and they put a lot of tubes in him to put
9 the air in him of course. They paralyze him. They give
10 him a drug to paralyze him, and he's that way for a few
11 days. Then something else happens. Now, I want to
12 emphasize that what something else happens is only
13 because Vito is still in the hospital. Vito shouldn't
14 have been in the hospital. He should have been long
15 gone. He should have had that procedure and been out of
16 there. He should have been intubated, feeling fine, and,
17 Good-bye, Vito, but what happens is that a few days later
18 his stomach, because he has tubes all over him, his
19 stomach isn't working properly, and it's a little slow,
20 so what do they do. They give him a drug called Reglan,
21 and that drug has a very unusual -- and very rare,
22 admittedly -- side effect -- can cause a condition which
23 can raise his temperature, and Vito's temperature is
24 raised, and really raised -- and when I give you the
25 number you're not going to believe it, but I assure you

b1

1 this is the number -- it goes up to 109. Ever heard of
2 anyone with 109? 109. That certainly doesn't help him.
3 Now, the hospital does what they're supposed to and they
4 put him on a cold bed. You know, they put ice -- they
5 pack him with ice and try to get it down, but 109. Gee,
6 he shouldn't have been there at all. They're only doing
7 this because of the mammoth screw up by Dr. Florendo.

8 What else happens to Vito. You'll see a little
9 of it tomorrow, but he develops bed sores that are really
10 pretty bad. I mean, bad. It's what happens if you lie
11 in bed and you can't move. It happens -- fancy medical
12 word is decubitus ulcers, but these are bed sores that
13 cause infections and all other problems. But everyday
14 his family is at his bedside. Everyday Betty is fighting
15 like hell, and just to show you, here's something that on
16 the 7th -- and here's the note: Patient was active and
17 independent. He had resumed usual activity. Three
18 years, couple times operation. Resumed his usual
19 activities of working as a waiter and bartender for
20 Knights of Columbus and playing cards with friends and
21 volunteering at veterans' homes. Patient was admitted
22 for AICD -- that's what we're talking about; that is
23 pacemaker -- generator change. He was found unresponsive
24 and is now in the Coronary Care Unit. His wife said, My
25 concern is that my husband walked in for AICD -- she

b1

1 knows AICD -- change, and now he's gonna walk out of
2 there. They empathize with her and validated her
3 expression of anger and fear. You can understand that.
4 Anger what happened and fear for her husband.

5 One side note: Months later they close up the
6 hole in the throat where they made a hole to help his
7 recovery when he was -- had oxygen pumped into him later
8 on; not of course the day of the procedure, but later on.
9 They closed up the hole in his throat so he could finally
10 talk, and Betty said, Please, your first words, just say
11 my name. I just want to hear you say my name again, and
12 he did; not very well. You're going to hear him speak;
13 not so good, but at least he could say her name, and he
14 can say a few things, and he's working on it, but all the
15 other problems -- his brain is affected to the degree
16 that he can't move his arms and his legs, and he has all
17 these speaking problems and all the rest, but it's not
18 affected to the degree that he doesn't know what happened
19 to him. He does. He knows what he had. He knows what
20 he missed. He knows what his life is. He's alert to
21 that degree. He knows, and somewhere along the line you
22 may say to yourself in your heart of hearts, This guy is
23 better off dead. He doesn't want that, and his family
24 doesn't want that. He loves his family, they love him,
25 and they want him, and he wants them. They see him

b1

1 everyday. They spend hours and hours, you'll see, at his
2 bedside. He doesn't want to die, and for him it's not
3 better off that he die. He wants to live. This is the
4 way he's living. It's a catastrophe, and it's all
5 because of a stupid, unprofessional, careless, negligent
6 anesthesiologist's care. I don't know why he dropped the
7 ball -- Dr. Florendo -- but he sure as hell did drop it,
8 and that's what we're going to show you.

9 Thanks for your patience.

10 THE COURT: All right. Defendant.

11 MR. MATTURRO: It please the Court, counsel,
12 the Lores, Dr. Florendo, I'm Anthony Matturro. I'm here
13 representing Dr. Florendo in a lawsuit that the Lores
14 have brought against Dr. Florendo.

15 This case is not about whether or not Mr. Lore
16 suffered an injury. This case is about whether or not
17 Dr. Florendo met the standard of care, and let me start
18 out by saying Dr. Florendo met the standard of care, and
19 Dr. Florendo denies that he committed malpractice in any
20 of the care that he provided to Vito Lore.

21 Dr. Florendo is now retired. He retired from
22 practice in September of 2007. Dr. Florendo is going to
23 be the first witness to the stand. He's going to appear
24 at the stand as Leo Florendo. He still holds a medical
25 degree. He has that degree. He no longer has a license

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CIVIL TERM PART 41

CHRISTOPHER ROBERTS,

Plaintiff,

- against -

NEW YORK PRESBYTERIAN HOSPITAL, NEW YORK
WEILL CORNELL MEDICAL CENTER and NAOMI
HAYASHI, M.D.,

Defendants.

360 Adams Street
Brooklyn, New York
September 17, 2008

B E F O R E :

THE HONORABLE LARRY MARTIN,
Justice of the Supreme Court

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DELL ASHBY
TERESA McGRATH
OFFICIAL COURT REPORTERS

4
1 MR. DEAN: Yes, Your Honor. May I?

2 THE COURT: Yes.

3 MR. DEAN: Thank you, Your Honor.

4 May it please the Court, Honorable Justice
5 Martin, Madam Forelady, and ladies and gentlemen of the
6 jury. That's my pal, Chris Roberts. He's sitting
7 there and maybe you can just see the head of Shea.
8 Shea is Chris's seeing eye dog. Shea's sole purpose in
9 life is to guide him, protect his master. And it
10 didn't have to be.

11 As I told you when we had the privilege of
12 meeting yesterday and the day before, this case
13 involves a mistake, a terrible mistake, that was made
14 by the defendant, Dr. Naomi Hayashi. (Indicating)

15 Dr. Naomi Hayashi is the person against whom this
16 lawsuit is brought. She is an employee of the
17 defendant, New York Presbyterian Hospital. And the
18 mistake that was made by Dr. Hayashi that I will talk
19 about in just a moment is going to make you angry, I
20 suspect. It is not a minor mistake. It is a serious
21 mistake that took Chris's vision.

22 Chris had low vision in his life. He was born
23 with low vision. And for the thirty-three years before
24 the encounter with Dr. Hayashi, he had low vision.

25 But, there is all the difference in the world

4 1 between low vision and no vision. There is all the
2 difference in the world between being legally blind, as
3 Chris was, and actually blind, as he is now.

4 For his life, Chris was legally blind. And that
5 means that he sadly fulfilled the requirements under
6 the law that anyone with more than twenty-two hundred
7 vision in his good eye is legally blind.

8 Our governor, let me remind you, is legally blind
9 and he is running the ship. There are more than two
10 million people in this country who are legally blind.

11 Chris was legally blind. And when I tell you
12 what he did, you will be impressed. Because I
13 represent to you that the evidence in this case is
14 going to be that Chris Roberts lead a life before the
15 encounter with Dr. Hayashi that was independent. He
16 savored his vision. His vision was limited, but it was
17 vision that he savored and it made him into a
18 productive person.

19 And the difference between low vision and no
20 vision is the difference between day and night. And it
21 is night for Christopher Roberts and it will always be
22 night for Christopher Roberts.

23 I will show you that they caused it. I will show
24 you that they took away the remaining vision that he
25 had. And I'll show you that it was done through a

4 1 mistake that was disgraceful, a mistake that violated
2 the basic principles of medicine, I'll tell you in just
3 a minute.

4 But, let me tell you this: It could have gone a
5 different way for Chris. Most of his friends now are
6 dead or in jail. But, because of his mom and because
7 of the influence of his church, he turned into a fine
8 young man.

9 At eleven, he learned to play the violin. He
10 began being interested in the theater as a result of
11 the influence of his church. And he went to a good
12 high school, Edward R. Murrow High School, and
13 Christopher then went on to college.

14 This is how he did it: With his low vision, he
15 had to read differently than the rest of us read. And
16 by the way, I was listening to His Honor's wonderfully
17 detailed and absolutely right-on-the-mark, appropriate
18 opening remarks to you. And you were instructed, as
19 you should be instructed, to evaluate every witness by
20 watching them, by looking at them, by seeing the
21 nuances, by looking into their eyes. The judge was
22 totally right in saying that.

23 We all can do that this in this room. Except
24 Chris. It's just another one of the many examples of
25 what has happened to him as a result of the defendants

4 1 depriving him of the low vision that meant everything
2 in the world to him.

3 The way Chris read is by taking a magnifying
4 glass. His right eye was shot for years and finally as
5 a result of an operation, he was completely blind in
6 his right eye. So, the vision that we're talking
7 about, his key to the world, his opening into the
8 world, was through his left eye, the left eye that was
9 so severely damaged and ruined by defendants.

10 So, what Chris used to do, the way he got through
11 high school and the way he got through college, was to
12 take a magnifying glass and he put it up close to his
13 eye. And he would read word by word, sentence by
14 sentence, paragraph by paragraph. That's how he did
15 it.

16 He also had a cable television, a closed-circuit
17 television, where he would use a camera and focus it on
18 the page that he wanted and he would see it in larger
19 letters on the television screen. That's how he got
20 by.

21 So, after graduating -- and he did very well at
22 Edward R. Murrow -- after graduating, Chris went to
23 college, University of Buffalo, where he majored in
24 art, where he nurtured his interest in the theater.
25 He wanted to become an actor. And he did acting at the

5
1 University of Buffalo, did Shakespeare, learned the
2 whole role of Othello. Did a number of plays by
3 distinguished black authors and did extremely well at
4 the University of Buffalo. It wasn't easy for him, but
5 that's the kind of a guy he was.

6 After his graduation from the University of
7 Buffalo, he stayed in the Buffalo area for a year. And
8 what he did there was to teach children, teach
9 children. Yes, he had an impediment, but he taught
10 children. He taught them drama. He taught them
11 expression. He taught them music.

12 Chris had been in the gospel chorus ever since he
13 was in high school and he remained in the gospel chorus
14 in college. And even when he came back -- and I'll
15 tell you about that in a minute -- he stayed in the
16 gospel chorus and he gave that expression of love for
17 music to the kids that he taught.

18 He also as a volunteer did Meals on Wheels;
19 that's a pretty good thing. That's where people get
20 around, and people as Chris and other volunteers, go to
21 the homes of people who can't get out, people who are
22 old, people who are needy, and bring them food. And he
23 did that, too.

24 And he did something else. You're going to say
25 "Did he, really?" He taught tae kwon do. Here is a

5
1 guy with low vision and he is doing that tae kwon do
2 stuff. I can't even raise my leg without it creaking a
3 little bit and he is doing that. And he smiles now and
4 he has a great sense of humor. He is doing that tae
5 kwon do, he is teaching. He is teaching these kids.
6 And then he comes back here.

7 Why? To fulfill even more his acting career.

8 So, he goes to -- now, he has a degree from the
9 University of Buffalo. Now, he goes to Brooklyn
10 College to get a master's degree with his, yes, low
11 vision, with the problems that he had in his eye, with
12 his inability to see out of his right eye, with that
13 low vision that caused him to be legally blind.

14 But, he succeeded and he gets a master's degree.
15 All the while, all the while, enjoying and loving the
16 gospel chorus, all the while helping kids. Master's in
17 theater. He wants to be an actor and he embarked upon
18 that and gets work.

19 He is good enough to have been called to Ireland
20 to work. He is good enough to have taken and been
21 admitted to Step 'N Wolf. Step 'N Wolf is a very, very
22 prestigious group of actors in Chicago. He did that.
23 He did Off Broadway stuff. He never made it to
24 Broadway, but he was trying.

25 He did a stint in Oz. He did As The World

5 1 Turns. He did Sex In The City. He did commercials.
2 Here was a guy who had low vision, who is doing all
3 this stuff.

4 Since he was nineteen, every summer, he would go
5 up to Spring Lake. Why? To be up at a camp for kids
6 who were blind and otherwise severely disabled. And he
7 helped those kids.

8 When he came back here after he got out of
9 college and getting his master's degree, he started
10 working for both the Henry Street Settlement and the
11 Lenox Hill neighborhood home. Doing what? Teaching
12 kids. Teaching kids movement. Teaching kids
13 expression. Teaching kids the tae kwon do. Teaching
14 children. He was an example. And I think you will
15 find that he is terrific.

16 I was looking at the hospital records in this
17 case and I smiled -- it's in evidence now -- because
18 here is a guy with low vision and one of the hospital
19 records shows that he went to New York Presbyterian
20 Hospital in 2000, got a cut. And you know from doing
21 what? Playing basketball. Playing basketball.

6 22 I promise you, you will see that Christopher got
23 all around this city, in and out of situations, crossed
24 streets and took buses, and traveled throughout our
25 city without the use of any aids whatsoever. No cane.

6 1 None of that stick for people who have really serious
2 visual impairments. Nobody on his arm. And no Shea.
3 He did it alone. He was completely independent.

4 That's part of what they took from him, his
5 vision, his independence.

6 I'm not gonna tell you for one moment that he
7 didn't have eye problems. He did. He had cataracts
8 and he had a condition called uveitis. He had that for
9 virtually his whole life.

10 And my adversary, I suspect, will show you a lot
11 of medicine, and put up a big old diagram of the eye,
12 and talk about complicated eye stuff --

13 MR. KELLER: This is argument at this point, Your
14 Honor.

15 THE COURT: Approach.

16 MR. DEAN: I'll leave it.

17 And I tell you this is a common-sense case
18 involving how --

19 MR. KELLER: Judge, it's argument.

20 MR. DEAN: This is what the evidence is gonna be.

21 The evidence will be that in this case, that you
22 will use your common sense to see how Chris was before
23 the 19th of October of 2005 and immediately how he was
24 after. And that is what I say that this case is about.

25 On October 19th of 2005, Chris went to New York

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1 Presbyterian Hospital. He did not go for any pressing
2 emergency reason, I promise you that. He went, as you
3 can well imagine, because people with low vision are
4 always looking to get better vision. I mean, it just
5 makes all the sense in the world.

6 And he arrived at the eye clinic on the eighth
7 floor at New York Presbyterian Hospital. It occurred
8 to him they may have some improvements, they may have
9 some new innovations in the field of eye medicine, eye
10 evaluation, that will help Chris's vision get better.

11 But, I tell you that he did not go because he had any
12 pressing problems.

13 As a matter of fact, that uveitis, that inflam-
14 mation of the eye, you will see from the hospital
15 records he hadn't had a flareup in six years. It's not
16 as if he had conditions that were making him go right
17 to the hospital.

18 So, he goes to the hospital that afternoon. He
19 walks in the hospital, no help by anybody. Nobody's
20 arm. Could get by as he had gotten by for thirty-three
21 years.

22 He goes into the hospital and in the eye clinic
23 the system is -- and I don't fault this -- the system
24 is that they have the new doctors, the young doctors,
25 the doctors in training, the residents, see people in

6
1 the eye clinic. Now, they see them with the ultimate
2 supervision of someone who is more experienced, the
3 attending, but it is the residents, people who are
4 first, second and third year -- Dr. Hayashi was a
5 second-year resident -- first, second and third year
6 residents who evaluate the people.

7 So, Chris goes in. He gives them his name. And
8 they take all the information, put it in the -- in a
9 box where the resident comes out and takes out the
10 names and sees them. It's kind of a by lot type of
11 thing, whichever resident gets there first, pulls out
12 the next name.

13 And Chris, because he really cares about this
14 brings -- and certainly because he wants them to know
15 about it -- brings about forty or fifty pages of his
16 medical records. He doesn't want them to guess about
17 what is going on, so he brings under his arm his
18 medical records in a binder, in a folder, so that
19 whomever is going to take a look at him can see.

20 Dr. Hayashi takes his name. Calls Christopher
21 Roberts and brings Chris into her room. Into an
22 examining room. And after taking information and going
23 through information, starts doing tests.

24 In order to do those eye tests, it's required,
25 and this is appropriate, that Christopher's contact

6 1 lens has to be removed. The contact lens, the lens on
2 his left eye. Chris had been eating peanuts before
3 that, nothing wrong with that, but he asks the doctor
4 if she would take out his lens because he didn't want
5 to get salt and stuff on the lens. That makes sense.

6 Dr. Hayashi, by the way, doesn't remember it that
7 way. She thinks Chris takes out his lens. Doesn't
8 make a difference. This is not the issue in this case.
9 But, here it comes.

10 Now, Christopher's lens is out. What do you with
11 the lens? You put it in contact solution.

12 So, Dr. Hayashi walks down to the nurse's
13 assistant, nurse's stand, reaches in the closet and
14 takes out a bottle of solution. Walks back and takes
15 that solution, and puts it in a contact lens case.

16 Chris doesn't have the solution, nor a case. Nor
17 does anyone fault him for not bringing it.

18 Ready? Dr. Hayashi never looked at the label of
19 the contact lens solution. Now, that is Medicine 101.
20 That is what you learn the first day of medical school.
21 That's what moms do all the time, and dads, I'm sure.
22 If you're gonna give somebody some medication or
23 something, or a solution, guess what? You take a look
24 at what you're giving them. I mean, that's just you
25 have to do that.

7
1 And had Dr. Hayashi followed this basic, basic
2 medical premises, she never would have given him this
3 solution because it called Clear Care. And the
4 solution and the warning, the warning on the Clear Care
5 solution, says don't use a flat lens case, Clear Care
6 only works with a special lens case provided. She
7 didn't use the special lens case.

8 Don't remove from case unless and until six hours
9 later. Why? Because this Clear Care had hydrogen
10 peroxide. You know that stuff that bubbles, the
11 hydrogen peroxide.

12 Now, you have to wait for the hydrogen peroxide to
13 be neutralized. This is in evidence and you will have
14 an opportunity to look at it. This is the warning
15 provided by the manufacturers of Clear Care. Clear
16 Care is an one-bottle solution for cleaning and
17 disinfecting, and it doesn't work if you just keep the
18 lens in for a couple of hours, but more than that. The
19 hydrogen peroxide isn't neutralized and it is capable
20 and did burn.

21 Now, one would think that if you're gonna put a
22 lens in, the only pathway between a fellow with low
23 vision and the rest of the world, you're gonna put a
24 lens in his left eye, the very least that this doctor
25 could have done would have been to look at the bottle.

7
1 Instead, she didn't. Didn't look at the bottle. Gave
2 him the wrong solution.

3 This solution never neutralized. And as a matter
4 of fact, it also says, it also says that it's not to be
5 put directly on the eye. And clearly, you will see in
6 a moment that was done. I mean, everything went wrong.

7 Now, Christopher is just there trusting the
8 doctor, because that's what we do. Wasn't checking
9 and saying what kind of a solution do you have, let me
10 see the warnings on this bottle, he just assumes that
11 everything is okay.

12 As I said, they're admitting that it was a
13 mistake, just like they're admitting today is Wednesday.
14 Of course, it was a mistake. But we caught 'em, we
15 caught 'em. I'll tell you about that in a second.
16 They have to admit there is a mistake because we caught
17 them.

18 So, Christopher's contact lens is put in the
19 contact holder. The solution, the improper solution,
20 is used. The solution that had under it's warning --
21 not suggestions, not by the way don't do this, warnings
22 warnings, warnings. Don't do this. Don't do this.
23 That's where it's put.

24 And Chris is tested, he goes through various
25 tests. A couple of hours later, it's time to put the

7 1 lens back in Christopher's eye, okay? Dr. Hayashi said
2 to put back in the lens. Chris says okay.

3 So, Chris takes the lens out of the contact lens
4 holder, and puts -- as you're supposed to do, puts a
5 couple of drops of Clear Care on the inside of the
6 contact lens. You do this for lubrication, you do this
7 for the vacuum effect, and this is what he does. Puts
8 the contact back in his eye.

9 I tell you, it felt like a hot poker. A couple
10 seconds later, he starts to scream. Dr. Hayashi is out
11 of the room. He starts to scream. He is down on his
12 knees, arms flailing. He's screaming and he's
13 frightened.

14 Why shouldn't he be? Why shouldn't he be
15 frightened? Dr. Hayashi comes in. They hear him down
16 the hall screaming, he is screaming. It's not as if a
17 little smack on the head and that's it, he is screaming
18 because this burning solution and solution that he just
19 put in the contact lens, as well, this burning solution
20 is now in his eye. Virtually every one of the warnings
21 have been violated.

8 22 Dr. Hayashi says it was only three seconds
23 between -- from the time he put it in his eye until the
24 time he got it out. That's a lot of baloney. I will
25 show you that it is.

8 1 It was many times that, forty-five seconds, maybe
2 a minute of this burning. By the time -- and
3 Christopher can't get it out. His eye is all shut.
4 His hands are trembling. This is his life. This is
5 his vision here.

6 Dr. Hayashi says he took it out. He didn't; she
7 took it out.

8 They irrigate his eye. That's what you're
9 supposed to do. But, the damage had been done. He
10 couldn't see.

11 He waits awhile. He still can't see. His eye is
12 burning, yes. They wash it out. His eye is
13 nevertheless burning.

14 And then finally when he leaves, they have to
15 take him home. The same person who walked in the
16 hospital without assistance some hours before is now
17 escorted home because he can't see. They provide a car
18 for him. Thanks so much. They get him home.

19 The next day -- wait, I forgot to tell you this:
20 Christopher is there. Before he leaves, Christopher is
21 there and he can't see, his eye is in a great amount of
22 pain. And all of a sudden he hears "clunk" and he
23 knows what that is. Dr. Hayashi has thrown away the
24 solution. She threw it away.

25 He is smart enough to wonder what happened. And

8 1 he hears and he knows where the garbage is. He can't
2 see it, but he knows where the garbage can is because
3 that's where he had put the nuts that he was eating.
4 And he reaches in and he gets the solution, and brings
5 it to us. They never told him what it was.

6 They do an incident report in the hospital
7 record. And if you read that incident report as to
8 what happened -- and I know it's kind of far away and
9 you'll have it -- believe me, you will have it in front
10 of you. And I don't want to in any way limit your
11 seeing it now, but -- and that's why we enlarged it for
12 the key areas here. But, this is in evidence.

13 If you read that incident report done by the
14 hospital people, you'll never know that it was the
15 wrong solution and you'll never know that it was Dr.
16 Hayashi who did it. It's almost as if you read the
17 report like it's Chris's fault.

18 But, what is significant is that that incident
19 report is damning in that they say "acute burning."
20 Not a little stinging, not a little uncomfortable
21 stuff, acute burning when talking about his left eye.
22 The only eye that worked. The eye that had the low
23 vision, but the eye that allowed Chris to do all the
24 things that he did, and proudly, for those thirty-three
25 years. Now, acute burning in the hospital record.

8
1 Conjunctiva was inflamed, inflamed. Acute
2 burning. This is serious stuff. But, also if you read
3 it, you will never know that it was possible.

4 Chris was smart enough -- and you think they
5 would give him the stuff to cause the burning so maybe
6 he could take it to his personal doctor. Maybe he
7 could ask somebody what it says. Maybe he could see if
8 there were any antidotes. Maybe he could do something.
9 They hid it, they threw it away. And her excuse is I
10 didn't want anybody to be confused. Please.

11 And despite the fact that we suggest to you that
12 they destroyed, they tried to destroy the evidence, we
13 have it. And this is in evidence. And what this says
14 is that they should not have used that Clear Care.
15 There is no doubt about it. That's the mistake that
16 they acknowledge. It's a lot more than a mistake, it's
17 disgraceful medical conduct. It's basic medical
18 conduct that was violated.

19 You got something you're going to give to
20 somebody, you darn well better look to see what that
21 is. And you certainly better look to see if there are
22 any warnings. And they didn't do it.

23 The next day, if you can imagine, Chris goes to
24 his doctor. Now, Dr. Hayashi said would you like to
25 come back. Christopher says hell, no. I don't mean to

8 1 be disrespectful, he said hell no. Should he say, yes,
2 I would like you to treat me again?

3 So, the next day he goes to his doctor and here's
4 the real sad part. You know, people with limited
5 vision, what people with limited vision need is light,
9 6 you know. The more light the better. The more things
7 that are illuminated, the better. It's easier for you
8 to see.

9 What happened was that that light that he needed
10 so much has now become his enemy. Why? Because -- and
11 this happens right away, whenever now he sees light,
12 now the light is blinding him. Now it's too much light
13 because of the damage that was done to the tissues in
14 his eye.

15 The medical diagnosis was superficial punctate
16 keriotitis. It remains, as you will see, that certain
17 tissue in his eye was damaged and forever damaged. The
18 damage -- all the problems that you will see cleared
19 up, but the damage was permanent and it stayed.

20 So, he goes to the doctor and the doctor, you
21 know, you'll see the records, he now has something, the
22 fancy term is photophobia. And now -- something he
23 never had. And this is right after his eye is burned
24 by these people. Now he has this photophobia where the
25 light in his eye is so bright that there is a problem.

9
1 He goes back to doctors the next day. Same
2 thing, photophobia, still his eye is hurting. The eye
3 is hurting a little less, but it's the same problem.

4 He goes to an ophthalmologist five days later,
5 Dr. Sampson, still with the same difficulty. And here
6 is the thing: He goes to that same doctor four days
7 after that, on the 28th of October of 2005. And Dr.
8 Sampson tells him the worst thing that an eye doctor
9 can tell a patient. This is what the doctor says only
10 nine days after this catastrophic incident. The doctor
11 says, Christopher, I think you should now consider a
12 life of blindness. Nine days following the accident,
13 that is what that doctor is telling him, a life of
14 blindness.

15 A couple weeks after that, Christopher started to
16 take Braille lessons. And as you will see -- and you
17 have been more than patient with me, and I will finish
18 in just a couple of minutes. You have been more than,
19 more than patient, and I'm really very grateful for
20 that. As you will see, he lost his colors.

21 By the way, he said that is it what he misses
22 most, color. He never took a -- maybe a sunset is
23 beautiful, the color, an extraordinary painting or
24 something like that, but you don't think everyday about
25 color. That's what he misses most.

9
1 Things become dimmer, more and more darkness, and
2 just very, very soon after that, it was all over and he
3 is the way he is now. And it was permanent. He will
4 always be what he is now. He is blind and he is only
5 thirty-five years old.

6 So, there he sits, anxious to tell you his story.
7 To say that he is the way he is. The difference
8 between low vision and no vision. The difference
9 between day and night. The difference between being
10 legally blind and actually blind. The difference
11 between having an independent life and a life in which
12 he relies on others.

13 God bless his dog. God bless the people who wait
14 at the light and give him a hand. God bless the people
15 who say can I give you assistance.

16 But, that's not what he wants. As someone who
17 deeply believes in God, Chris will tell you that God
18 does not give us a cross that is so heavy that we can
19 not carry. But, this cross is very heavy.

20 MR. KELLER: May it please the Court, counsel,
21 ladies and gentlemen of the jury. I told you during
22 jury selection that there would be two sides to every
23 story. After listening to Mr. Dean, I tell you that
24 what I am going to tell you is so juxtaposed to what
25 you've just heard that you'll see how clearly there are

**Court of Appeals
of the
State of New York**

IN RE: WORLD TRADE CENTER BOMBING LITIGATION

STEERING COMMITTEE,

Plaintiff-Respondent,

– against –

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Defendant-Appellant.

**RECORD ON APPEAL
Volume II of X (Pages 1–709)**

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1

2 T2

3

MR. DEAN: Well, good morning.

4

May it please the Court, your Honor,

5

Mr. Foreman and ladies and gentlemen of this
extraordinarily important case. Colleagues who have
come in and out throughout this squeaking door and
above all, some, just some of the many victims of
February, 1992.

6

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13

The Court a moment ago said -- and surely
the Court was absolutely right, it is up to you to
determine the responsibility, if any, of the Port
Authority.

14

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26

I'm going to show you that there is plenty
of responsibility of the Port Authority, because you
will see that this was a terrorist's dream come true.
The underground public parking garage, underneath the
World Trade Center, which you will see and I promise
you will see this was a prime target at the time it
happened and long before, but that underground public
parking garage was totally, absolutely, unsupervised,
uncontrolled, unrestricted, free access, anybody could
drive in. They had an open door policy that would
shock you. That is right under the World Trade Center
was this garage where anybody could go.

Let me give you three phrases: Enormous

9/26/2005 0926/05- OPENINGS & GILHOOLY

1 Plaintiff's Opening - Mr. Dean
2 opportunity for terrorists. We're talking about the
3 garage, mind you. This is the garage. Where the
4 explosion was. Enormous opportunity for terrorists.
5 Two. Highly susceptible to car bombs, and a definite
6 security risk.

7 Now, enormous opportunity for terrorists,
8 highly susceptible to car bombings, a definite
9 security risk.

10 Now, you would think that these phrases, of
11 course, would be the phrases of the victims or perhaps
12 the victims' advocate. They weren't.

13 These phrases: enormous opportunity for
14 terrorists, highly susceptible to car bombings, a
15 definite security risk, were phrases used by the Port
16 Authority and in their documents. That's how they
17 described the underground public parking garage.

18 And you are going to say, Mr. Dean, are you
19 sure? I promise that I will show you evidence of that
20 and I'll show you that in a few minutes.

21 One of the tragedies of this case is that it
22 was so preventable. You will see that easily, easily
23 this should not, could not have taken place, except
24 for the negligence, the carelessness, the arrogance
25 and, indeed, the stupidity of Port Authority
26 personnel, and because of that, many people were

9/26/2005 0926/05- OPENINGS & GILHOOLY

1 Plaintiff's Opening - Mr. Dean
2 injured, families were destroyed, businesses
3 disrupted, in something that could have been
4 preventable, I promise that you will see that.

5 You are going to learn things about this
6 case that you have never learned before. You are
7 going to see documents, confidential documents, that
8 have not been described before. You will see those
9 documents, and you will see some of them in a few
10 minutes. I'm going to show you some as part of my
11 opening.

12 And you will see from the Port Authority
13 confidential documents the following:

14 Number one. The Port Authority knew that
15 the World Trade Center was a high risk for terrorism.

16 Two. They knew that the garage where this
17 took place was extraordinarily vulnerable for
18 terrorist actions.

19 Three. They knew that car bombs were the
20 terrorists' method of choice; and four, believe it or
21 not, it was almost as if they had a crystal ball,
22 because this very type of event was predicted by the
23 Port Authority years before it happened.

24 It's scary. It's scary, but it's true, and
25 I promise you that I will show you, that the Port
26 Authority was repeatedly warned by its own security

9/26/2005 0926/05- OPENINGS & GILHOOLY

1 Plaintiff's Opening - Mr. Dean
2 people and by outside consultants that this event was
3 going to happen, and they disregarded all preventive
4 measures to prevent this event. I promise you that
5 you will see that.

6 The solution was proposed to the Port
7 Authority, and you are going to figure it out before I
8 show it to you. The solution was proposed to the Port
9 Authority by its own people, and they disregarded that
10 solution. You'll see. I promise you that you'll
11 see.

12 So why is the Port Authority a defendant?
13 Because they are the owners, they are the landlord,
14 and they were of the World Trade Center, and as the
15 landlord of the World Trade Center, as you will hear,
16 they had an obligation, a responsibility to keep the
17 garage in a condition that was reasonably secure.

18 I'm not asking for the moon here. We'll
19 just see reasonably secure for the garage, and you
20 will see that they totally disregarded that mandate
21 and did not keep the garage reasonably secure.

22 World Trade Center, 16 acres, seven
23 buildings, underneath the World Trade Center were six
24 sublevels. You'll hear about that and you'll be able
25 to see it, I promise you, how it looked.

26 You'll see it in your mind, but the six

9/26/2005 0926/05- OPENINGS & GILHOOLY

1 Plaintiff's Opening - Mr. Dean
2 sublevels underneath the World Trade Center, and the
3 second sublevel was where the public parking garage
4 was, in the second sublevel. There was tenant parking
5 in the third and fourth sublevel, and you'll hear the
6 words B2 and B3 and B4.

7 B2, the second sublevel and I don't want to
8 do a lot of technical stuff with you, but B2, the
9 second level where the public parking garage was. You
10 will see that there were 400 public parking spaces.
11 You'll see that there were 1600 tenant spaces, and
12 you'll see that there were about, in the World Trade
13 Center, 50,000 tenants, and about 80,000 visitors a
14 day. That's their estimate.

15 One of their estimates was it was up to
16 200,000 visitors a day. Whatever it is, whether it is
17 80,000, 200,000, for their sake I'll go with the
18 lesser number. So we have 50,000 tenants, 80,000
19 visitors per day at the World Trade Center.

20 In order to get to the public parking
21 garage, there were two ramps that you could go to from
22 the street, and those ramps went directly into the
23 public parking garage, and you'll see those and how
24 they are described.

25 Now, surely -- and no way do I fault them
26 for this -- the World Trade Center was clearly a

9/26/2005 0926/05- OPENINGS & GILHOOLY

1 Plaintiff's Opening - Mr. Dean
2 profit-making commercial and retail business owned by
3 the Port Authority. I have no fault with that.

4 Surely, as you will see as such, the Port
5 Authority had an obligation, an obligation, as you
6 will see, to keep the public parking garage secure.

7 Surely, as you will see, they failed in this
8 obligation. I promise you that you will see, I
9 promise you that you will see that the Port Authority,
10 by its own documents, predicted this event. I don't
11 mean they predicted exactly the 26th of February,
12 1993, I'm not saying that they predicted exactly what
13 was going to happen.

14 You are going to say come on, Mr. Dean, did
15 they really? I'll show you. Why didn't they do
16 something about it? I will tell you why. Money.
17 That was the motivating factor behind the Port
18 Authority's decision not to correct a situation which
19 they conceded was enormously vulnerable to
20 terrorists.

21 You are going to say are you sure you can
22 show this? Yes.

23 Are you sure you have documents for me to
24 look at? Yes.

25 Now, there was a simple solution to this.
26 You'll find out about it and we'll talk about it in

9/26/2005 0926/05- OPENINGS & GILHOOLY

1 Plaintiff's Opening - Mr. Dean
2 just a second, but a simple solution to safeguard this
3 area. Very, very simple.

4 But let me talk to you about something
5 else. This is not 9/11. You have been told that and
6 assured that you will understand that and I know you
7 do. When we first had a meeting last week -- but
8 there is a vast difference between the February 26,
9 1993 bombing and 9/11.

10 No matter what your feelings are about who
11 is responsible, partially responsible for 9/11, if you
12 feel the government is partially responsible, if you
13 feel airports are partially responsible, that's not an
14 issue here, because I in no way claim that on 9/11 the
15 Port Authority was responsible. We make no such
16 claim, the Port Authority wasn't responsible.

17 But surely, as you will see, they bear great
18 responsibility for the February, 1993 bombing.

19 As you know, on the 26th of February, that
20 Friday afternoon, at about 12:18 in the afternoon,
21 that's exactly what happened in that sublevel,
22 sublevel 2.

23 There is a clear distinction between 1993
24 and 9/11. A clear distinction that you have to
25 promise me that you will understand, because this
26 trial lawyer's old bones have a feeling that somewhere

9/26/2005 0926/05- OPENINGS & GILHOOLY

Plaintiff's Opening - Mr. Dean

1
2 along the line the Port Authority lawyers are going to
3 be talking about bringing down the Twin Towers. I'll
4 bet you they use that word. Bringing these down.
5 February '93 terrorists were trying to bring down the
6 Twin Towers, and you are going to be thinking about
7 9/11. It is tough not to.

8 I know you'll hear those words, they were
9 bringing down, they tried to bring down the Twin
10 Towers. It is awfully difficult not to think about
11 that terrible day.

12 Look, you know when we talk about the World
13 Trade Center, we do with respect and sadness, I mean
14 gosh, yes. Surely. I mean, of course that's true.
15 But that doesn't -- and there is a reason, I suggest
16 to you, why they are going to be talking about
17 bringing down the Twin Towers because you'll have a
18 picture in your mind of those planes. But this isn't
19 the case.

20 You have to promise me, as you have, and
21 again, I'm going to urge you, that you understand that
22 and you'll say let's keep my eye on the ball. I'm
23 talking about what happened on February 26th of 1993,
24 eight years before, because the truth of the matter
25 that February 26, 1993 incident showed the world that
26 the Port Authority -- and the World Trade Center was

9/26/2005 0926/05- OPENINGS & GILHOOLY

1 Plaintiff's Opening - Mr. Dean

2 vulnerable.

3 Come to think of it. Here is something
4 else. This is not a criminal case. Very important
5 distinction. The terrorists -- you remember what
6 happened. I mean you remember that on the day, the
7 afternoon of February 26, 1993, one of the terrorists
8 drove back to the car rental place, there will be
9 evidence about this, one of the terrorists drove back
10 to the Ryder Truck Rental place in I think it was
11 Jersey City looking for his deposit back.

12 I mean remember that? They were looking for
13 a deposit back. He had blown up the truck and now he
14 comes back that afternoon and looks for the deposit
15 back. People at Ryder say, wait a minute, why do you
16 want your deposit back?

17 Well, the van was stolen.

18 They said well, how do we know?

19 Well, it was stolen, trust me.

20 Well, you have to give us a police report.

21 So the guy goes to the police station to
22 give a report that his van was stolen.

23 Guess what? Within a couple of weeks the
24 whole group of them were caught.

25 These, let me hasten to say, were terrorists
26 who had no intentions of being suicides.

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1 Plaintiff's Opening - Mr. Dean

2 We'll talk about car bombings in just a
3 second, but remember these terrorists intended to and
4 did park that van and get away. They weren't driving
5 to anything or anything of that kind.

6 These terrorists and they were bad and they
7 were evil and there is no question about it, my
8 goodness, of course, but the terrorists are captured,
9 and they are tried and they are convicted and they are
10 doing what, I think 240 years, something like that.

11 But now this is a civil case involving civil
12 responsibility against the Port Authority, who we say
13 could have prevented this if they followed their own
14 warnings.

15 You are going to say you talk about
16 warnings, you show me. I will, I will, I will, I will
17 in just a minute, but please understand the difference
18 between a criminal case, where the terrorists were
19 adjudicated a hundred percent responsible. Of course
20 they were, and the civil case where now we are saying
21 look to the Port Authority.

22 Look to the confidential documents of the
23 Port Authority. Look what they did. Because -- and
24 the way to understand this case, I think, is to say
25 what did the Port Authority know? When did they get
26 their own warnings?

9/26/2005 0926/05- OPENINGS & GILHOOLY

1 Plaintiff's Opening - Mr. Dean

2 What do they know? When did they get their
3 warnings, and what do they do about it? Right.

4 What do they know? When do they know it,
5 what do they do about it?

6 And if you analyze it, respectfully, I say
7 in that way, you are going to say, God, they just did
8 not follow their own security warnings.

9 Now, we know that the World Trade Center was
10 a symbol and a target. We know that the World Trade
11 Center symbolized American economic power, symbolized
12 capitalism, symbolized American might, symbolized
13 American freedom, symbolized America.

14 You remember that in CNN every time they
15 gave some financial news, CNN, travelling all over the
16 world, they would show the silhouette. I mean
17 everyone knew about the World Trade Center and without
18 question, as you will see in minutes, the Port
19 Authority knew that the World Trade Center was a
20 primary terrorist target.

21 Why? Because if something happened at the
22 World Trade Center it would be around the world in
23 minutes. American economic might would be attacked.
24 We Americans would be attacked. There were people
25 surely who wanted that.

26 And we know that car bombs, and you will

9/26/2005 0926/05- OPENINGS & GILHOOLY

Plaintiff's Opening - Mr. Dean

1 soon discover this, surely, car bombs were the
2 terrorists' method of choice. Why? It makes sense.
3 There is more to -- when I say car bombs, I'm also
4 talking about bombs in vans.
5

6 As I say, this was a 12 to 1,500 pounds of
7 explosives packed in a van, but I'll be using the word
8 car bomb, van bomb, truck bomb synonymously.

9 We know they were the terrorists' method of
10 choice for a reason. There was more to put in a car,
11 more explosive to put in a car or truck. You could
12 get it to a place easily enough, and above all, you
13 could get away. You set that detonator and you could
14 walk away and have, what, 11 hours and 59 minutes or
15 in some cases, depending upon the detonator, 23 hours
16 and 59 minutes, to leave, to escape. It was the
17 method of choice for people who wanted to get away,
18 and these actions by the terrorists certainly indicate
19 that they did want to get away.

20 One of the reasons why the garage was so
21 vulnerable is because that's where the vital building
22 functions were stored, in the sublevel area. It is
23 the heart of the building. It was like the roots of a
24 tree. The power, the electricity, the water, the
25 steam, all of the utilities, the communications. All
26 were in that sublevel area.

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Plaintiff's Opening - Mr. Dean

1
2 So if you wanted to bring the building to
3 its knees, then you go after and bomb the garage.
4 That's where everything was.

5 Please understand that we're talking about
6 what happened this very day and this very event. It
7 cannot be a case where you think, well, the terrorists
8 could have done it some other time at some other place
9 and here is the logic behind that.

10 We're talking about what happened to these
11 people. They were there at a particular time and a
12 particular place on that very day. So that this case
13 involves this day, this moment, 12:18 Friday
14 afternoon, February 26, could that have been avoided.
15 Because that's the key. It's not well, these
16 terrorists, those bastards, they will do other
17 things. We're not -- forgive me.

18 You know, I want to talk to you the way we
19 would be doing it sitting around a coffee table and
20 talking about it. I want to level with you and I want
21 to show you stuff. So please understand that when I
22 talk about that, I'm talking about this very event,
23 this very day.

24 Yes, they were bad people, but the Port
25 Authority for the worst type of reason, stupidly,
26 arrogantly, foolishly, made terrible decisions that

9/26/2005 0926/05- OPENINGS & GILHOOLY

1 Plaintiff's Opening - Mr. Dean
2 cost people. For money. They thought, and it wasn't
3 even -- we'll see in a minute, it wasn't even for
4 money, but that's what motivated them, not to take
5 their own recommendations.

6 At the end you are going to say, wait a
7 minute. If the Port Authority was never warned, if
8 the Port Authority didn't have the solution, if the
9 Port Authority just didn't have any of their
10 organizational reports, any of their security reports,
11 you are going to think, gee, common sense is going to
12 dictate that why in the world underneath the World
13 Trade Center would you allow public parking that
14 wasn't investigated, wasn't checked? In an area that
15 was so vulnerable. That's just common sense.

16 But they were warned. They knew it. And,
17 and they knew it in plenty of time. Very important.

18 If the Port Authority got these warnings
19 maybe several weeks before February of '93, several
20 months, then you wonder, well, maybe they didn't have
21 time to implement the warnings. Maybe they -- we have
22 to give them a break because they needed some time.

23 These warnings, as to the vulnerability of
24 the garage, as to the type of event that was going to
25 happen, ready for this -- they knew it eight years
26 before. Eight years at least they knew it and didn't

9/26/2005 0926/05- OPENINGS & GILHOOLY

Plaintiff's Opening - Mr. Dean

do anything about it.

Eight years without telling tenants, without telling visitors, without telling New Yorkers who brought themselves and their families, their kids, their grandparents, whatever.

Eight years the Port Authority knew that they were vulnerable, that the public parking garage was extraordinarily vulnerable, and when we talk vulnerable, we don't mean talking about a little crack in the road. We don't mean we're talking about somebody falling and hurting their shin.

We're talking about explosions that would and can and did kill people and maim people. That's serious stuff. That's what we're talking about, vulnerability, and they did nothing about it.

Let me get to the evidence.

You are saying yes, you are telling me that and maybe -- but I want to see it. You are going to.

Here we go.

In 1983 you will recall the problem in Lebanon. There were those two events, terrorists bombing of the marine barracks, 241 marines killed, terrorists bombing of the U.S. embassy, bad stuff.

The then head of the Port Authority, to his credit -- remember the gentleman, Peter Goldmark -- to

9/26/2005 0926/05- OPENINGS & GILHOOLY

1 Plaintiff's Opening - Mr. Dean
2 his credit starts to think, you know, World Trade
3 Center, terrorists parking, we better do something
4 about this.

5 In the 1983 era, he forms a group to
6 investigate how vulnerable are we and what should be
7 done. As part of his duties, Goldmark goes to
8 Scotland Yard.

9 Now, you're thinking -- and at that point
10 surely Scotland Yard was involved with an Irish
11 problem and those bombings and so on and so forth and
12 he met with Scotland Yard officials.

13 And he explains to Scotland Yard that the
14 World Trade Center is right above a public parking
15 garage where there is unlimited access by anybody.
16 I'm not kidding you about this, unlimited access by
17 anybody, and he explains this to Scotland Yard.

18 What do you think Scotland Yard's reaction
19 is? With a typical English reservation they say, I
20 don't think that's a good idea or yes, I understand
21 it. Hardly. Scotland Yard was appalled.

22 Let me show you. Here is the memo. August
23 4, 1984 from Peter Goldmark.

24 Can everyone see?

25 From Peter Goldmark, who is a -- the head of
26 the Port Authority. Visit to Scotland Yard. How

9/26/2005 0926/05- OPENINGS & GILHOOLY &

1 Plaintiff's Opening - Mr. Dean
2 about this? Here it is taken from the actual
3 document. They are appalled -- talking about Scotland
4 Yard -- they are appalled to hear we had transient
5 parking, that means public parking -- transient
6 parking directly underneath the Towers at a facility
7 like the World Trade Center. Appalled. Not -- not a
8 little upset about it.

9 Scotland Yard is appalled. Why shouldn't
10 they be? Is that the dumbest thing that you can think
11 of? If you have a building that's a prime terrorist
12 target as this was, and you'll see documents that show
13 it was, to have public parking where somebody could
14 explode a car bomb? With transient parking? I would
15 think so.

16 So now there is a terrorism assessment in
17 1984. Wait until you see this. A terrorism
18 assessment. Here is the confidential document.

19 This is their terrorism -- this is not some
20 guy that went out and they hire. This is the
21 confidential document from the Port Authority about
22 the World Trade Center.

23 The World Trade Center should be considered
24 a prime target for domestic as well as international
25 terrorists. It is a high risk target.

26 Then it goes on to say, it is therefore

9/26/2005 0926/05- OPENINGS & GILHOOLY

Plaintiff's Opening - Mr. Dean

obvious that the potential for a terrorist attack upon the World Trade Center is a real possibility and the results could be catastrophic. This is in the words of the Port Authority.

What does it say about public parking? The parking lots are accessible to the public and are highly susceptible to car bombings. This is not me talking. This is the Port Authority's confidential document. The parking lots are accessible to the public and are highly susceptible to car bombings.

(Whereupon, Myron Calderon relieved Lee Ruthen as the official court reporter.)

(Continued on next page.)

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1 Plaintiff's Opening - Mr. Dean

2 T3

3 MR. DEAN: (Continuing) There is another Port
4 Authority internal report. Bomb-laden truck attack.
5 Listen to this.

6 Given the recent truck bombings in Lebanon, it
7 is important to consider the potential impact for such
8 an attack on the World Trade Center. The strategic
9 positioned truck or van could cause extensive
10 structural damage to the World Trade Center as well as
11 large number of casualties.

12 Taking into account its vulnerable high
13 profile, symbolic quality. There appears to be
14 justification for genuine concern in anticipation of an
15 attempted terrorist act directed against elements of
16 the World Trade Center complex.

17 Now, this is the internal report, the Port
18 Authority internal report. Not my stuff. Their stuff.
19 That is what they say.

20 So in 1985 they send out, they have a
21 confidential report, someone by the name of Mr.
22 Schnobolk. It goes out to someone that says you
23 certainly would agree the World Trade Center is highly
24 vulnerable. That is their confidential document. The
25 World Trade Center is highly vulnerable to the parking
26 lot. That is what is going on with that quote.

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Plaintiff's Opening - Mr. Dean

1 After it says highly vulnerable to the parking
2 lot, it says with little effort terrorists could create
3 havoc without being seriously deterred by the current
4 security measures.
5

6 We know that. You can go in and out of the
7 parking lot and no one checks you. As a matter of
8 fact, you know what these terrorists did? They didn't
9 even -- because they went down the ramp, they didn't
10 even get a ticket to the public parking. They didn't
11 park right in the public parking area. They went up.
12 They took a right, they went around, and they parked on
13 the ramp.

14 No one stopped them and no one checked them.
15 They didn't do anything to prevent them, to look at
16 them, to stop them at all. They left the truck there.
17 You will see where. They just walked away.

18 How could that be, how should it be. Isn't
19 that wrong?

20 Now, I want to talk to you about -- thank you
21 for bearing with me. There is much to talk about and I
22 really do appreciate. It is no fun to just listen and
23 not participate, but I really am grateful for your
24 patience and your continued patience.

25 You are going to be hearing a word called the
26 officer's special plan, the OSP and I will tell you

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Plaintiff's Opening - Mr. Dean

1
2 what that is. Besides, let me -- I have had internal
3 reports, but I know the threat of terrorism, I believe
4 it exists, what shall I do about it? And this is what
5 he does.

6 He forms a very, very important committee for
7 investigations, investigators called the OSP and the
8 OSP, good security people, in order to do a report and
9 they take four to six months to do this report, they go
10 to the people in the building, they go to other
11 high-rise places, they go to -- they look at all the
12 plans, they look at the people and interview them at
13 work, they talk to the FBI, they talk to the CIA, they
14 talk to the Secret Service, they go abroad and talk to
15 people abroad. They do a very detailed analysis of
16 vulnerability of the World Trade Center.

17 This is a big-time intensive, thought out
18 appropriate report. And the mandate in this Office for
19 Special Planning Public Safety Department, and this,
20 again, is, of course, this is a Port Authority group.

21 The mandate says in response to the executive
22 director's concern and he did have a concern and the
23 fact that in 1983 and 1984 two-thirds of all the
24 incidents classified as terrorists occurred in the
25 United States -- occurred in the New York-New Jersey
26 area.

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Plaintiff's Opening - Mr. Dean

1 I was sitting here as some of you were being
2 examined by one of the lawyers whose not going to open
3 to you, another lawyer is, but I heard as you did the
4 fact that this was what, the first terrorist attack on
5 American shores? What is that, that is not true.

6 There are other terrorist attacks. If it were
7 the first terrorist attack, that doesn't excuse the
8 Port Authority, but there were other terrorist attacks
9 and in this mandate it talks about it.

10 Anyway, this -- and you will see this because,
11 by the way, throughout this trial and when you
12 deliberate you are going to have all the evidence so
13 you will be able to see this and you will be able to
14 analyze this, but the essence of it, we are forming and
15 asking you to evaluate the vulnerability of the World
16 Trade Center.

17 And here is something from the OSP report.

18 Parking for 2,000 vehicles in the underground.

19 Let me stop you for a moment. I am not even
20 talking about 2,000 vehicles. I am talking about 400.
21 The other 1600 was tenant parking and the tenants had
22 been identified, they had passes and they can say
23 anybody can forge anything, yes, I am sure somebody can
24 forge stuff, but I am not even talking about
25 restricting tenants, please understand that. I am only
26

9/26/2005 0926/05- OPENINGS & GILHOOLY

1 Plaintiff's Opening - Mr. Dean

2 talking about the 400 spaces.

3 Presents -- and there it goes -- an enormous
4 opportunity, enormous opportunity for terrorists to
5 park an explosive filled vehicle that can affect
6 vulnerable areas.

7 This is their own report.

8 And then it speaks about how vulnerable the
9 World Trade Center is and it meets -- surpasses, meets
10 and surpasses all the classic elements of the target
11 process. Symbolic value acceptable, vulnerability,
12 lack of recuperability, this guys drove in and set the
13 detonator and walked the heck out. That is in their
14 report how vulnerable, how vulnerable that parking was.

15 Here comes the prediction.

16 Another one.

17 A time-bomb laden vehicle could be driven into
18 the World Trade Center and parked in the public parking
19 area.

20 The driver could execute the elevator into the
21 World Trade Center with his business unnoticed at a
22 predetermined time. The bomb could be exploded in the
23 basement. The amount of explosives used will determine
24 the severity of the damage to the area.

25 This is their report, commissioned by the head
26 of the Port Authority, evaluated by professionals that

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1 Plaintiff's Opening - Mr. Dean

2 he selected and this is what he said.

3 And this is what they said.

4 Now, they made a recommendation and by this
5 time you know what the recommendation was, eliminate
6 public parking. Eliminate the 400 spaces.

7 Isn't that the only appropriate, sensible
8 recommendation to make if you have public parking
9 underneath the World Trade Center, prime target
10 vulnerable area. Well then eliminate public parking.

11 And that is what they just recommended. Here
12 is the OSP report recommendations: Eliminate all
13 public parking in the World Trade Center.

14 What do they say about it? It constitutes a
15 definite security risk. Explosives readily conceal
16 within a vehicle.

17 Now, I only have a couple of more to show you,
18 but this is again their reports, their documents, they
19 are the ones that are saying this is how bad it is and
20 they are the people who make the recommendations
21 eliminate all public parking.

22 The very agency whose purpose was to determine
23 are they vulnerable and what can you do about it and
24 this was mind you in 1985, eight years that they didn't
25 tell the public how vulnerable they were and what could
26 happen. Eight years.

9/26/2005 0926/05- OPENINGS & GILHOOLY

Plaintiff's Opening - Mr. Dean

1 But they say in the report if you don't do
2 this, we will do a compromise. Here is the compromise,
3 it said in the report.
4

And there were three of them:

5 Provide manned entrances to the public parking
6 area. Get a guy there. Have him take a look.
7

8 You are going to see -- we will talk about it
9 in a couple of minutes, you will see pictures of these
10 terrorists. The defendant is going to bring a big
11 screen that pops up and you are going to see the
12 scariest guy you can imagine.

13 There is a guy in the middle with a sheik who
14 looks mean and nasty. These other guys, if you saw
15 them on a plane, you would get the stewardess and say
16 check this guy out and they are going to make this huge
17 picture of these terrorists to make you think how bad
18 they are. They are scary looking.

19 Well, if they are that scary, then don't you
20 think if there were manned entrances to the parking
21 area, that what affects you in saying these are scary
22 looking guys, may very well get the guy who passes on
23 the people.

24 Restrict pedestrian entrance, that is less
25 concern and here is one, subject vehicles to random
26 inspections. Doesn't that make sense? If you put up a

9/26/2005 0926/05- OPENINGS & GILHOOLY

1 Plaintiff's Opening - Mr. Dean
2 sign vehicles are subject to random inspections, isn't
3 that a deter it if someone is coming in with
4 explosives. These guys don't want to get caught.

5 If you have random inspections of the vehicles
6 and they know you have random inspections of the
7 vehicles, isn't that a legitimate deterrent?

8 So we say the simplest solution was simply to
9 avoid the public parking entirely. That makes sense,
10 but I can't persuade you says the OSP people, the big
11 shots to take that course, here is a compromise.

12 Now I want to tell you what happened.

13 Mr. Goldmark left, the executive director and
14 a new executive director, the guy's name is Steve
15 Berger, he is the guy in the Port Authority. Mr.
16 Berger rejects them all. I will show you.

17 Here is the -- from their documents here is
18 the suggestion eliminate all public parking and here is
19 Berger's answer and the answer to the other big wigs in
20 the Port Authority: The inconvenience to tenants and
21 substantial loss of revenue make this impractical.

22 Now, I will show you how dumb that answer is.

23 The inconvenience to tenants. What you do is
24 take the 400 parking spaces that are public and make
25 them available to tenants so the tenants who had 1600
26 spaces to begin with, remember there are 1,500 tenants,

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Plaintiff's Opening - Mr. Dean

1 you would think they are parking at a premium, so
2 instead of having 1,600 parking spaces now you have
3 2,000 parking spaces, that doesn't seem to be
4 inconvenient to tenants.
5

6 And even if it were, we say it is not, even if
7 it were, we are talking about life. We are talking
8 about people, but -- they claim it is inconvenient to
9 tenants and that is nutty and here it is substantial
10 loss of revenue.

11 There wouldn't have been any substantial loss
12 of Revenue and loss of revenue because you rent those
13 spaces to the tenants. Why didn't someone think about
14 that? And if there were a loss of revenue and there is
15 not, but if there were, how about weighing that. Let
16 me see lose a little money, save some lives. What do
17 you think? We are talking about Port Authority and
18 they made money.

19 Now, that is why -- and you know, yes, I am a
20 trial lawyer. Yes, I am an advocate for the victims,
21 but I will tell you that really bothers me.

22 Here is the next one. You know those guys
23 outside the ramps we are talking about provide manned
24 entrances to the public parking areas. How about this
25 for an answer? Too expensive. They have some guys
26 outside in the entrance going down to the parking lot.

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1 Plaintiff's Opening - Mr. Dean

2 They say it is too expensive, we reject it and it will
3 not deter a terrorist.

4 How do we know it won't deter a terrorist? If
5 these guys -- and when you see the pictures, we got a
6 copy of what they are going to show you. You know,
7 these guys look ugly.

8 If these guys drive in, maybe you do a little
9 thinking about saying let me check that van.

10 So please, your thought that it won't deter a
11 terrorist effort, that is crazy and let me give you:
12 Subject vehicle to random inspection. And their answer
13 vehicle searches cannot be done without probable cause.
14 Here is the answer to that. That is a lie.

15 I am not suggesting that it is may be a little
16 untrue, that is totally false. They could and you can
17 inspect a vehicle without having probable cause that a
18 crime is being committed.

19 We know that and for them to say we can't say
20 random inspection of vehicles because we don't have
21 probable cause, that is totally, absolutely false.

22 Before when I called them stupid and you
23 thought these guys are big shots in the Port Authority,
24 how can you do that. That is how I can do that.
25 Vehicle searches cannot be done without probable cause.
26 Totally wrong.

9/26/2005 0926/05- OPENINGS & GILHOOLY

1 Plaintiff's Opening - Mr. Dean

2 So they didn't do it. They didn't do it.

3 I will do these quickly.

4 There was another report, the SAIC report.

5 And the next year vehicle access to and exit from the
6 subgrades of the World Trade Center are for security
7 officers.

8 By the way, the SAIC did not recommend that
9 they close the parking garage because they were told we
10 made a decision not to close the parking garage, so if
11 you are told anywhere from the opening statement or any
12 time the SAIC didn't recommend close it, the reason is
13 because when they were given the second opinion they
14 said we are not closing the parking garage but here
15 this will -- look at this.

16 This is what the SAIC does, this report, 1986
17 report. They do a graph. They do a graph with regard
18 to terrorist attack inside, the sabotage, outside theft
19 and this is the report that the Port Authority is
20 given.

21 How about here is maximum for terrorist attack
22 and here is existing. Look how close the existing
23 attack is and look at the contrast to the maximum
24 terrorist attack. Didn't anyone read this?

25 Here is the last one.

26 We are close to wrapping up. I want to talk

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Plaintiff's Opening - Mr. Dean

1 about a few more things and you have been wonderful.

2 They do a report in 1991 Burns and Roe and
3 naturally Burns and Roe, it says in the aftermath of
4 Middle East events there will be a significant increase
5 in international terrorist activities. We know that.
6

7 Burns and Roe are something else and I have to
8 save some stuff for the trial for cross-examination,
9 but they figure out, they do some kind of a survey that
10 really is strange to behold. They do a report and in
11 the survey they said well, this was a product of a lot
12 of brainstorming for this organization and they do a
13 vulnerable area and rating chart and in this outside
14 outfit they put the parking garage.

15 I will show you the vulnerability factor way
16 down low.

17 They are going to show you this big blowup so
18 you will see it from them. They put a vulnerability
19 factor of seven to the parking garage which is seven
20 times more than the window washing machine, don't ask
21 me, but the Concourse is 50 times more vulnerable than
22 the parking garage.

23 This is by Burns and Roe, report that they are
24 going to cite and they are going to have a big picture
25 of, and I am anxious to be asking whoever is going to
26 present this, how in the world they figure this one

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1 Plaintiff's Opening - Mr. Dean
2 out. You mean it is 50 times easier in the Concourse
3 to bring in explosives than it is in the garage?

4 Fifty times easier maybe to bring in a truck
5 bomb in the Concourse than in the garage? But the
6 garage is seven times more vulnerable than the window
7 washing machine.

8 I don't know what to make of this report, but
9 I do know that report, however flawed it is,
10 nevertheless says terrorism was on the march and it
11 was.

12 1991 the Gulf War and we know that -- many in
13 the intelligence community knew that the loss and
14 humiliation in the Gulf War had to lead to a renewed
15 desire for terrorist attacks. That is totally obvious
16 and in 1993 it happened.

17 Do you think now that that could have been
18 preventable?

19 I have five minutes, okay with you? Just
20 please wait it out.

21 I have spoken to you about this scary
22 picture they are going to show you and what I am going
23 to ask you to think about.

24 They are also going to show you a picture of
25 the things that the Port Authority is responsible for.

26 The Port Authority is responsible for all port

9/26/2005 0926/05- OPENINGS & GILHOOLY

Plaintiff's Opening - Mr. Dean

1 facilities within 25 miles of the Statue of Liberty and
2 I will show you the PATH train and in that is an old
3 picture, big old picture of the Statue of Liberty in
4 the middle of this.

5
6 The Port Authority has nothing to do with the
7 Statue of Liberty. The only relevance to the Statue of
8 Liberty is that the mandate is 25 miles around the
9 Statue of Liberty, but you will see the biggest picture
10 of all is the Statue of Liberty and when you see that,
11 you will remember that it is not the Port Authority's
12 business, it is federal.

13 As you know, it is federal land, but they are
14 going to show you that anyway. They are also going to
15 talk about the risk assessment in 1985 and when they
16 say, they will say it is not considered -- talking
17 about the World Trade Center, not the garage -- it is
18 not considered to be a high risk situation at present.
19 And they say low risk factor, whatever that means.

20 You will see that high risk was defined by the
21 person who prepared the report at 80 percent.

22 If high risk is 80 percent, maybe medium is
23 50 percent and low risk must be 20 percent. I will
24 tell you that there is not a person in this courtroom
25 who would take the elevator down if they knew there was
26 one out of five chance the elevator was going to crash

9/26/2005 0926/05- OPENINGS & GILHOOLY

1 Plaintiff's Opening - Mr. Dean

2 and kill them.

3 There is not a person in this courthouse who
4 would take a plane if they knew that there was
5 20 percent chance you would die.

6 So whether it is high risk or low risk or
7 whatever risk, a risk is a risk as I am sure you will
8 agree and this was a risk to people.

9 I am not asking you to hold the Port Authority
10 to a standard where like shoes have to be examined in
11 the airports and things like that, we do body searches.
12 I am just saying what was reasonable at that time and
13 if it is not reasonable to have some control over the
14 vehicles that come in under the World Trade Center, I
15 don't know what reasonable is.

16 They had an obligation to provide reasonable
17 security in that garage and they sure as heck did not
18 do that.

19 I am not saying that every other building, you
20 may live in a building with underground parking garage
21 underneath the building or you may work in a building
22 with underground parking, and you will say well if
23 there is underground parking here, why the World Trade
24 Center?

25 Why is Mr. Dean asking for more at the World
26 Trade Center? Because it was the World Trade Center.

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Plaintiff's Opening - Mr. Dean

A singular extraordinary complex known throughout the world.

One of the witnesses who will testify says the most famous building in the world and goodness knows it was a terrorist target, so any defense. Well, you know, other buildings didn't have it, you will understand we are talking about World Trade Center singular.

I am not asking that they make it a fortress. I am not telling you that all terrorist attacks can be prevented. Some can't. I am not asking for anything unusual.

I am just saying for goodness sakes in the garage underneath the World Trade Center, do something. First of all, don't allow public parking. You are not losing any money even though that was a concern of yours, but if you were, so what.

So there we are.

You have been enormously patient with me in this extraordinary case. I tell you that our proof is going to be that the Port Authority had an obligation to people as well as businesses to make the garage reasonably secure.

They failed utterly to follow their own recommendations, their reasons were horribly wrong and

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Plaintiff's Opening - Mr. Dean

I say shame on the Port Authority. Shame on the Port
Authority.

Thank you.

THE COURT: All right.

We will take a 15 minute recess at this time.

Don't discuss anything about the case.

Keep an open mind. See you in 15 minutes.

(At this time the jury then left the
courtroom.)

(Whereupon, Lee Ruthen relieved Myron Calderon
as the Official Court Reporter.)

(Continued on next page.)

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1

2 T4

3

COURT OFFICER: Jury entering.

4

(Jury enters courtroom.)

5

THE COURT: Please be seated.

6

7

Mr. Kasowitz will now give you the opening statement on behalf of the defense.

8

OPENING STATEMENT BY MR. KASOWITZ:

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Good morning, ladies and gentlemen. My name is Marc Kasowitz and I'm one of the lawyers representing the Port Authority in this case.

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I want to introduce you to first of all Mr. Hood, our client from the Port Authority. Mr. Hood. You may have met him earlier during jury selection, but I want to make sure you saw him here today.

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Then I'd like to introduce you to the other members of our team, the other folks who are representing the Port Authority.

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First is Aaron Marks who you spent sometime with already, you are not done with him yet. He and I and Mark Ressler are going to be representing the Port Authority during the next several weeks in this trial. As is Davis Ross.

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On any case, the jury gets to see the men and women lawyers who stand up in front of them to

OPENING STATEMENTS:

DEFENSE ATTORNEY PERSPECTIVE

Well prior to the deposition of your client, you should have selected a theme for the defense of your case. This theme and the factual evidence to substantiate it at trial must be referenced in depositions, your opening statement, your presentation of evidence and in your summation.

1. **Theme** – To select the theme, you must have comprehensive knowledge of the medical records, relevant medical literature, and expert testimony that will be offered in favor of your client.

2. **Opening Statement**

(a) **Style** – Jurors love a story. Clearly acquaint the jury with who your client is and the important issues in the case. Don't exaggerate but be forceful.

(b) **Disclosure of Paginated Medical Records** – My own practice is to offer my adversaries paginated copies of all medical records that will be used in evidence weeks prior to the trial. I serve these on all parties. In recent years all counsel have accepted this offer. It saves everyone a hassle when we agree, prior to the trial, as to which records will be in evidence. It also positions you to tell the judge, after jury selection, that all counsel have agreed on the records in evidence. Most judges will allow you to mark the records in evidence prior to opening statements. You should offer to provide a copy to the trial judge, as well as have a copy that will be the official record in evidence for the jury.

One advantage to this system is that there is a complete copy available to every lawyer for review prior to trial. Thus, if you want to use a blow-up or a visual, the historical objection that

nothing is in evidence is easily overcome. All counsel will have agreed what will be in evidence.

(c) **Visual Aids** – Jurors will retain perhaps 30% to 40% of the spoken word. When visual aids are used in conjunction with your oral presentation, the jurors will retain approximately 70% of the information discussed. It is effective for counsel to use visual aids to help the jurors comprehend and retain the information that will be given at any point in the trial. Many old school judges are inclined not to allow visual aids with opening statements. It is your obligation to ask the judge before your opening statement if visual aids will be permissible. I give copies of those visual aids to all counsel and to the court. It is the better practice to discuss the issue of visuals before the jury enters the courtroom.

(d) **Details** – At the outset of the trial, the jury is eager to know what the case is about. It is important that each attorney fully informs the jury about their client, the chronology of the events, the essential information relating to the underlying medical condition and any modalities of treatment or surgery. Introducing damages is also helpful, both for the plaintiff and for the defendant. Confirm with the judge before your opening statement whether you will be permitted to read from medical records. If you are not permitted, you can certainly read from prepared notes. The more you can do from your memory, the better.

(e) **Comprehensive** – I recommend a comprehensive presentation of your claims in a complicated medical malpractice case. I take the same approach in other catastrophic injury or legal malpractice cases. If you have a strong case, bring your ammunition and use it in your opening statement. A University of Chicago Law School study, found that 80% of jurors decide the case based on opening statements. Bopp, P. C. (*Winning Your Trial in Opening Statement*, ATLA Winter Convention Reference Materials February, 2001).

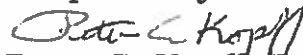
Some information is best saved for your summation.

(f) **Motions in Limine** – Where the Department of Health has made findings adverse to your client, get a ruling from the judge before your opening statement as to what information will be permitted from the Department of Health's finding.

3. **Sample Opening Statements:**

1. *Alicia Morris* case, Supreme Court, Saratoga County, obstetrical death with newspaper coverage published the first day of jury selection.
2. *D&D Power, Inc.* Supreme Court, Albany County, legal malpractice case involving bank loan default and claim of fraud by counsel.
3. *Champion* case, Supreme Court, Kings County, wrongful death of father of daughter with cerebral palsy, loss of parent in extended family.
4. *Gallen v. The Valley Hospital*, Supreme Court, Rockland County, suicide case with death of a broker fired by his employer Chase. Presentation of economic issues in opening statement.
5. *Reilly v. St. Charles Hospital and Rehabilitation Center*, Supreme Court, Suffolk County, 2009, uterine rupture during labor with brain injured newborn girl. Discussion of child's injuries and defense theory of causation.

Respectfully submitted,



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