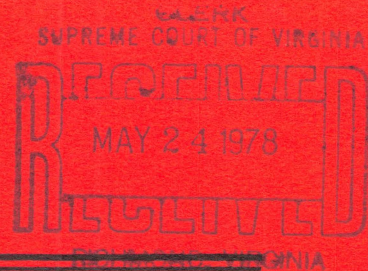


220VA892



---

IN THE  
**Supreme Court of Virginia**  
AT RICHMOND

---

RECORD NO. 771476

---

LOUIS Q. PUGSLEY,

.....Appellant

v.

PHYLLIS W. PRIVETTE,

.....Appellee

---

APPENDIX

---

Norman F. Slenker, Esq.  
1012 North Utah Street  
Arlington, Virginia 22201

Counsel for Appellant



## TABLE OF CONTENTS

## APPENDIX PAGES

1. MOTION FOR JUDGMENT FILED AUGUST 14, 1975 .....	1-6
2. ANSWER AND GROUNDS OF DEFENSE FOR DEFENDANT PUGSLEY DATED SEPTEMBER 12, 1975 .....	7-9
3. JUDGMENT ORDER DATED JUNE 10, 1977 .....	10-15
4. NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR DATED JUNE 21, 1977 .	16-19

### JURY INSTRUCTIONS

5. JURY INSTRUCTION NUMBER 1 .....	20
6. JURY INSTRUCTION NUMBER 2 .....	21
7. JURY INSTRUCTION NUMBER 3 .....	22
8. JURY INSTRUCTION NUMBER 7 .....	23
9. JURY INSTRUCTION NUMBER 8 .....	24
10. JURY INSTRUCTION NUMBER 14 .....	25-26

### EXCERPTS FROM TRANSCRIPT OF HEARING ON FEBRUARY 23, 1977 BEFORE THE HONORABLE JAMES C. CACHERIS AND JURY

11. TESTIMONY OF PHYLLIS W. PRIVETTE .....	27-34
12. TESTIMONY OF DR. CHRISTOPHER J. MURPHY, JR. ....	35-48
13. TESTIMONY OF DR. BARRY S. STAUCH .....	49-85

### EXCERPTS FROM TRANSCRIPT OF HEARING ON FEBRUARY 24, 1977 BEFORE THE HONORABLE JAMES C. CACHERIS AND JURY

14. TESTIMONY OF DR. MYRON PAUL BERGER .....	86-121
15. TESTIMONY OF BHYLLIS W. PRIVETT .....	122=171
16. TESTIMONY OF DR. JEREMY STOWELL .....	172-190
17. TESTIMONY OF DR. WILLIAM C. AMOS .....	191-198
18. TESTIMONY OF LULA HOLLEY .....	199-208

### EXCERPTS FROM TRANSCRIPT OF HEARING ON FEBRUARY 28, 1977 BEFORE THE HONORABLE JAMES C. CACHERIS AND JURY

19. TESTIMONY OF DR. HENRY HASKINS FERRELL, JR. ....	209-236
20. TESTIMONY OF AGNES KATHLEEN MARKS .....	237-263
21. TESTIMONY OF DR. HOWARD TREICHLER .....	264-276

EXCERPTS FROM TRANSCRIPT OF HEARING ON MARCH 1, 1977  
BEFORE THE HONORABLE JAMES C. CACHERIS AND JURY

22. TESTIMONY OF DR. ALLEN HALL .....	277-290
23. TESTIMONY OF LOUIS Q. PUGSLEY .....	291-356
24. TESTIMONY OF AGNES KATHLEEN MARKS .....	357-364
25. DISCUSSION BETWEEN COURT AND COUNSEL .....	365-402

EXCERPTS FROM TRANSCRIPT OF HEARING ON MARCH 2, 1977  
BEFORE THE HONORABLE JAMES C. CACHERIS AND JURY

26. DISCUSSION BETWEEN COURT AND COUNSEL .....	403-405
27. PLAINTIFF'S EXHIBIT NUMBER 1 (One page only) - AUTHORIZATION FOR MEDICAL AND SURGICAL PROCEDURES .....	406

PHYLLIS W. PRIVETTE  
3908 Annandale Road  
Annadale, Virginia,

Plaintiff

v.

LOUIS Q. PUGSLEY  
Seven Corners Medical Arts Building  
Falls Church, Virginia

WILLIAM H. COOPER  
820 N. Stafford Street  
Arlington, Virginia

THE FAIRFAX HOSPITAL ASSOCIATION  
3300 Gallows Road  
Falls Church, Virginia  
Registered Agent:  
Frank P. Iams  
3300 Gallows Road  
Falls Church, Virginia

HEINZ OTTO SILBERSIEPE  
Route 2  
Catlett, Virginia

KATHLEEN MARKS  
3316 Woodburn Village Drive  
Annandale, Virginia

Defendants

FILED  
IN CIRCUIT COURT  
CLERK'S OFFICE

AUG 14 1975

W. FRANKLIN GOODING  
CLERK, FAIRFAX COUNTY, VA.  
WRIT TAX PAID. \$ 25.00  
DEPOSIT. . . . 30.00

MOTION FOR JUDGMENT

COUNT I  
Medical Malpractice

1. Plaintiff is an adult citizen of the United States and a resident of Annandale, Virginia.

2. Defendant, Louis Q. Pugsley is a physician licensed to practice medicine in the State of Virginia whose specialty is obstetrics and gynecology. At all times relevant hereto, defendant Pugsley was engaged in the practice of medicine as a



member of the medical staff of The Fairfax Hospital, under its supervision and control, and in furtherance of the hospital's business.

3. Defendant, William H. Cooper is a physician licensed to practice medicine in the State of Virginia whose specialty is obstetrics and gynecology. At all times relevant hereto, defendant Cooper was engaged in the practice of medicine as a member of the medical staff of The Fairfax Hospital, under its supervision and control, and in furtherance of the hospital's business.

4. Defendant, The Fairfax Hospital Association owns and operates The Fairfax Hospital in Fairfax, Virginia, and at all times relevant hereto held itself out to members of the community as having available facilities, staff and personnel competent in the care and treatment of gynecology and surgical patients in accordance with good medical practice.

5. Prior to August of 1974, plaintiff was suffering from vaginal bleeding and engaged defendant Pugsley as a physician to examine, diagnose and treat her. Defendant Pugsley accepted plaintiff as his patient, and upon his recommendation she was admitted as a surgical patient to The Fairfax Hospital on August 14, 1974, for him to perform an exploratory laparotomy.

6. On August 15, 1974, plaintiff was operated upon by defendant Pugsley who was assisted by defendant Cooper. During the operation and prior thereto, when plaintiff was their patient, defendants Pugsley and Cooper, individually as as members of the medical staff of defendant hospital, under its supervision and control, and in furtherance of its business, negligently and carelessly failed to use due and reasonable care in the following particulars: defendants failed to make timely, proper and thorough

physical and diagnostic examinations which would have ascertained that plaintiff at the time of surgery had only one functioning kidney and extensive endometriosis; failed to advise plaintiff of the risks of surgery and of those complications which may arise, given her medical condition and the surgery to be performed; failed to identify plaintiff's ureter through the use of X-ray, a catheter or another specialty; failed to perform the operation without cutting or otherwise causing an opening in plaintiff's ureter all of which resulted in the escape of urine and the resulting severe medical complications and catastrophic period of hospitalization which followed, including renal failure, recurring infection, formation of major abscesses; a pulmonary embolism, a ureteral vaginal fistula, meningitis, or intracranial bleeding and a prolonged critical condition during which time plaintiff remained essentially comatose and only responsive to pain.

7. As a result of the aforesaid negligence of the defendants, and each of them, and without any negligence on her part contributing thereto, plaintiff has sustained severe and permanent injuries including the medical complications set forth above, loss of feeling in portions of her face, body and limbs, control over her bladder, blurred vision, loss of sleep, loss of sense of balance, repeated infection, pain, suffering and mental anguish. As a further result of the aforesaid negligence of the defendants, and each of them, plaintiff has been unable to pursue her normal and usual activities including her gainful occupation as a registered nurse at The Fairfax Hospital and has incurred and will continue to incur expenses for her medical care and treatment, all in an amount which may not now be fully ascertained.



WHEREFORE, plaintiff demands judgment against defendants Pugsley, Cooper, and The Fairfax Hospital Association, and each of them, jointly and severally, in the amount of \$750,000 plus interest and costs.

COUNT II  
Assault and Battery

8. Plaintiff incorporates by reference the allegations of Paragraphs One through Four of Count I of the Motion for Judgment..

9. Defendant, Heinz Otto Silbersiepe, is a physician licensed to practice medicine in the State of Virginia whose specialty is anesthesiology. At all times relevant hereto, he was engaged in the practice of medicine as a member of the medical staff of The Fairfax Hospital, under its supervision and control, and was employed in the Department of Anesthesiology in furtherance of the hospital's business.

10. Defendant, Kathleen Marks, is a registered nurse licensed in the State of Virginia. At all times relevant hereto, defendant Marks was employed as an anesthetist in the Department of Anesthesiology of The Fairfax Hospital, under its supervision and control, in furtherance of the hospital's business.

11. Plaintiff incorporates by reference the allegations of Paragraph Five of Count I.

12. Prior to her admission to The Fairfax Hospital, on August 14, 1974, plaintiff requested and made arrangements for the Chief of the Department of Surgery, Dr. Allen Hall, to be present and available for consultation during the exploratory laparotomy to be performed by defendant Pugsley the following day. In the early morning of August 15, plaintiff was brought

to the operating room and there she inquired as to whether Dr. Hall was present in the operating room and available for consultation. Present among others was the operating surgeon, defendant Pugsley, his assistant, defendant Cooper, the anesthesiologist, defendant Silbersiepe, and the anesthetist, defendant Marks. Plaintiff was advised that Dr. Hall was not present and was apparently not available for consultation, whereupon, plaintiff immediately advised all present that she did not wish to go forward with the operation in Dr. Hall's absence. Notwithstanding this direction and contrary to her expressed wishes, defendants Pugsley, Cooper, Silbersiepe, Marks, and The Fairfax Hospital Association by and through its agents, servants and employees, members of its staff and others, anesthetized plaintiff and proceeded with the operation against her will, her protestations and without her authorization and consent, and in doing so, intentionally, and without justification, cause or excuse, committed an assault and battery upon plaintiff by administering anesthesia to her and by going forward and performing the operation upon her.

14. As a result of the aforesaid assault and battery upon the plaintiff by the defendants, and each of them, plaintiff sustained severe trauma from the anesthesia and surgery as well as those injuries arising from the negligence of the defendants, and each of them, as more fully set forth in Paragraph Six of Count I, which is incorporated herein by reference.

15. As a result of the aforesaid assault and battery upon plaintiff by the defendants, and each of them, and the injuries resulting as set for above, plaintiff sustained those damages set forth in Paragraph Seven of Count I which is incorporated herein by reference.



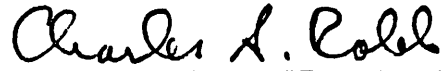
WHEREFORE, plaintiff demands judgment against defendants Pugsley, Cooper, Silbersiepe, Marks, and the Fairfax Hospital Association, and each of them, jointly and severally, in the sum of \$750,000 plus interest and costs.

WILLIAMS, CONNOLLY, & CALIFANO

By

  
David Povich

By



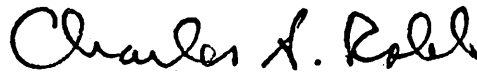
Charles S. Robb

A Member of the Virginia Bar

1000 Hill Building  
Washington, DC

Attorneys for Plaintiff

Plaintiff requests that this case be tried by jury.



Charles S. Robb

ANSWER AND GROUNDS OF DEFENSE  
for defendant Pageley

COMES NOW co-defendant Louis P. Pageley, M.D., by counsel, and for his answer and grounds of defense to plaintiff's Motion for Judgment previously exhibited against him states and alleges as follows:

COUNT I  
Medical Malpractice

1. The allegations in the first numbered paragraph of this Count will be admitted.

2. It will be admitted by this co-defendant that he is a licensed physician, practices medicine in the State of Virginia and pursues the specialty of obstetrics and gynecology. He will admit that he has staff privileges at the Fairfax Hospital, but all other allegations appearing in paragraph 2 will be denied.

3. The allegations appearing in paragraphs numbered 3 and 4 will neither be admitted nor denied and strict proof thereof demanded from the plaintiff.

4. The allegations appearing in paragraph 5 will be admitted.

5. It will be admitted that a surgical procedure was accomplished upon the plaintiff, as alleged in the 6th numbered paragraph of this Count, but all other allegations appearing in that paragraph will be denied, including the four specific charges laid to him therein.

6. The allegations appearing in paragraph 7 will be denied.

WHEREFORE the premises considered this defendant moves the Court for dismissal of Count I of the Motion for Judgment and that he be awarded costs in this behalf expended.



COUNT II  
Assault and Battery

7. This defendant will herewith reassert the responses made hereinabove to the allegations appearing in paragraphs 1 through 4 of Count I as and for his responses to claims set forth in paragraph 2.

8. The allegations appearing in paragraphs 9 and 10 as appear in Count II will neither be admitted nor denied and strict proof thereof demanded from the plaintiff.

9. This co-defendant herewith reasserts the responses hereinabove given to the allegations in paragraph 5 of Count I as and for his response to paragraph 11 of the Motion for Judgment.

10. As the allegations are phrased in the 12th numbered paragraph, they will be denied.

11. The allegations appearing in paragraphs 14 and 15 will be denied.

AND NOW by way of further answer and grounds of defense, it is affirmatively alleged by this co-defendant that the plaintiff herself is a Registered Nurse, having been employed for a number of years by a physician in the Northern Virginia area; that she was not uninformed with reference to physical examinations and diagnostic examinations, and, in fact, possessed considerable knowledge with reference to these matters far beyond that degree of knowledge and information possessed by the average member of society; that at all times mentioned in the Motion for Judgment, as well as for a number of years prior thereto, she possessed

such information as aforesaid which included knowledge and information concerning surgical procedures, the existence of disease, its nature and extent and indeed was well aware of her own physical condition. It is further affirmatively alleged that by virtue of her being a Registered Nurse of considerable experience and due to the knowledge that she had regarding surgery and of possible post operative complications, she freely and voluntarily gave an informed consent to all that was done for her by way of therapeutic measures, be they medical or surgical. Due to these factual matters, this co-defendant denies any responsibility to the plaintiff on any basis or for anything as concerns the care and treatment rendered to her. He further affirmatively alleges that at all times he met the standard of medical care prevailing in the community and as such cannot be held liable to the plaintiff.

WHEREFORE the premises considered this co-defendant moves for the dismissal of the entire motion for judgment with costs awarded in his behalf expended.

Louis Q. Pugsley  
Louis Q. Pugsley, by counsel

SLENKER, BRANDT, JENNINGS & O'NEAL

By /s/ Norman F. Slenker  
Norman F. Slenker, counsel for  
defendant Pugsley

I hereby certify that a true copy of the foregoing has been mailed, postage prepaid, to David Povich, Esq. and Charles S. Robb, Esq., counsel for plaintiff, 1000 Hill Bldg., Wash, D.C. and to Thomas J. Scanlon, Esq., counsel for defendants Fairfax Hospital and Kathleen Marks, 2021 K Street, N.W., Washington, D.C., this 12th day of September 1975.

/s/ Norman F. Slenker



JUDGMENT ORDER

THIS CASE came before the court for jury trial on the merits Wednesday, February 23, 1977 and all parties, plus their counsel, were present and ready for trial. Selection of a jury panel began and after numerous challenges for cause a panel of 15 was declared by the court acceptable. The plaintiff struck three, as did the defendants, and the remaining nine jurors were all put upon their oaths to well and truly try the issues drawn in the case. It was agreed by court and counsel that two of the number would be designated as alternates since a protracted trial was anticipated and it was further agreed that the two alternates would be dismissed from the case just prior to the panel's deliberations.

After opening statements of counsel, plaintiff began presentation of her evidence and proof which consumed all of February 23rd and 24th and the court stood in recess on Friday, February 25th, but resumed on the morning of February 28th with the plaintiff continuing presentation of her case. The plaintiff rested her case on the afternoon of February 28, 1977, at which time she suffered a voluntary non-suit as to Fairfax Hospital on Count I of the Motion for Judgment regarding negligence.

Thereafter counsel for the defendants moved the court to strike the evidence and for the entry of Summary Judgment, citing numerous and diverse grounds therefor. After argument of counsel the court denied the motions in toto, to which action the defendants duly noted their objections and exceptions.

Co-defendant Louis D. Pugsley then presented his evidence and proof which extended during the afternoon hours of February 28th and during the morning and early afternoon hours of March 1, 1977, and upon resting, the co-defendants Marks, Silbersiepe and Fairfax Hospital produced their evidence and rested. All defendants, by and through counsel, then renewed their motions to strike the evidence and for the entry of Summary Judgment in their favor and after arguments of counsel and consideration thereof, the court denied all motions and indicated its belief that issues existed for jury resolution. To the denial of these renewed motions, all defendants duly noted their objections and saved appropriate exceptions.

Court and counsel then undertook to consider the tendered instructions and to the rulings of the court in the granting and refusing of the instructions, the aggrieved parties duly noted and saved their objections and exceptions.

The verdict forms were prepared by the court and reviewed by counsel. There were a number of these forms seeking to set forth all the possible verdicts on each of the two Counts in the Motion for Judgment, and after final arguments of counsel the case was submitted to the jury for deliberation.

During the course of the trial one juror was excused due to an emergency and prior to deliberation, the remaining alternate juror was also excused. The jury began deliberation around 2:30 P.M. on March 2, 1977 and returned with its verdict at about 9:00 P.M.

The verdict on the issues joined in Count I of the Motion for

Judgment, those allegations dealing with negligence and medical malpractice, was in favor of all defendants and against the plaintiff. On the issues joined in Count II of the Motion for Judgment, those allegations of assault and battery, the jury found in favor of the plaintiff against co-defendant Louis Q. Pugsley only and awarded her damages of \$75,000. Upon receipt of the verdict and upon the motion of counsel for co-defendant Pugsley, the jury was polled and that poll revealed a unanimous verdict. Thereupon counsel for Dr. Pugsley moved for and was granted ten days within which to file appropriate motions.

Within the allotted time the said co-defendant filed his motion to set aside the verdict and for alternative relief, as appears more specifically and clearly from that document which constitutes a part of the record here. These motions came before the court for argument on April 29, 1977 and after hearing arguments by counsel for co-defendant Pugsley and by counsel for the plaintiff, the court denied the motion in toto indicating that judgment would be rendered in accordance with the verdict of the jury. To this action of the court, co-defendant Pugsley duly noted and saved his objections and exceptions; whereupon

IT APPEARING TO THE COURT that the verdict of the jury as to form and substance is correct and appropriate and that a judgment ought to be entered in favor of all defendants and against the plaintiff as to Count I of the Motion for Judgment, and that a judgment in favor of the plaintiff against co-defendant Pugsley ought to be entered for \$75,000 on Count II of the Motion for Judgment; and



IT FURTHER APPEARING TO THE COURT that co-defendant Pugsley's post verdict motions ought to be overruled and denied; it is therefore

ADJUDGED AND ORDERED that the verdicts of the jury ought to be, and they are hereby, approved as to form and substance and that judgment ought to be, and it is hereby, awarded the defendants and against the plaintiff as to Count I of the Motion for Judgment and the allegations contained therein; and it is further

ADJUDGED AND ORDERED that the plaintiff ought to be, and she is hereby, awarded judgment in the amount of \$75,000 against co-defendant Louis Q. Pugsley only and that judgment ought to be and it is hereby awarded in favor of the other defendants and against the plaintiff on the allegations contained in Count II; and it is further

ADJUDGED AND ORDERED that co-defendant Pugsley's post verdict motions ought to be, and they are hereby, overruled and denied. To all of these actions by the court co-defendant Louis Q. Pugsley objects and saves his exception.

IT THEN APPEARING TO THE COURT that the said Louis Q. Pugsley desired to appeal the case, and upon his motion, by and through counsel, that the prepared transcript of proceedings ought to be made a part of the record herein and that a suspending bond in the amount of \$5,000 ought to be approved by the court, until such times as the appellate procedures have been pursued and exhausted in accordance with law, and upon the additional motion of co-defendant Pugsley that the St. Paul Insurance Companies,

or any of its affiliates, be approved as surety for said suspending bond; it is therefore further


ADJUDGED AND ORDERED that the filed transcript of proceedings, consisting of five (five) separate volumes, ought to be, and is hereby, made a part of the record in this case; and it is further

ADJUDGED AND ORDERED that a suspending bond ought to be, and is hereby, set and established in the amount of \$5,000 and the St. Paul Insurance Companies or any one of its affiliates ought to be, and they are hereby, approved as and for surety on such suspending bond pending appeal in this case provided that said bond be posted in accordance with law within 15 days from the entry of this Judgment Order and that thereafter the said Louis Q. Pugsley proceed with his appeal as provided by law.

AND THIS ORDER IS FINAL.

June

Signed and entered this 14th day of ~~MAY~~ 1977

 James C. Cacheris, Judge

J U D G E

SEEN AND EXCEPTED TO:

SLENKER, BRANDT, JENNINGS & O'NEAL

By /s/ Norman F. Slenker  
Norman F. Slenker, counsel for  
defendant Pugsley

SEEN AND AGREED:

DAVID POVICH  
AUBREY DANIELS, III

By /s/ David Povich  
Counsel for plaintiff


/s/ Thomas J. Scanlon

Thomas J. Scanlon, counsel for  
defendants Marks, Silbersiepe and  
Fairfax Hospital

A COPY TESTE:

JAMES E. HOOFNAGLE, CLERK

By.....

  
Deputy Clerk

## NOTICE OF APPEAL

COMES NOW co-defendant Louis Q. Pugsley, by counsel, and notes his appeal to the Supreme Court of Virginia from the final Judgment Order entered in this case on the 10th day of June 1977 and declares the following as and for his

### ASSIGNMENTS OF ERROR

1. The verdict of the jury and Judgment thereon is contrary to the law and the evidence and ought to be set aside.

2. The verdict of the jury and Judgment of the Court is without evidence, credible or otherwise, to support it or to support the amount of such verdict as well and it is therefore against the weight of the evidence.

3. The judgment entered and the verdict of the jury is improper and excessive on its face and shows to have been the result of a misconception or misapprehension regarding the application of the law under the evidence adduced and the amount of the verdict, as well as the fact of verdict itself, resulted from corruption or misconstruction of the issues in the case upon which the jury was to deliberate and render a verdict. The verdict is excessive, also, since it bears no relationship to the injuries sustained by the plaintiff and little, if any, reasonable relationship as proximately and directly causing the injuries and damages awarded under the nature and extent of the evidence and proof adduced at trial.

4. The verdict of the jury ought to be set aside and judgment N.O.V. rendered in favor of this co-defendant since

the verdict rendered as to other defendants in the case, when qualitatively analyzed with respect to the verdict against this co-defendant shows on its face that it is contradictory and was the result of improper construction or consideration by the jury.

5. The court erred in failing to grant this co-defendant's Motion to Set Aside the Verdict and/or award this co-defendant judgment N.O.V. or, in the alternative, award a new trial.

6. The verdict of the jury ought to be set aside as hereinabove mentioned, in view of the following specific errors committed during the course of the trial with reference to the admissibility of evidence and the granting of instructions tendered by the parties, as follows:

a) The court erred in submitting to the jury for resolution any issue at all on Count II in the Motion for Judgment, that concerning "Battery".

b) The court erred in admitting into evidence plaintiff's Exhibit #2, the financial records and bills of hospital confinement, bills from Fairfax Medical Consultants, in the absence of any evidence proximately or directly relating those bills to any battery committed by this co-defendant. These bills should not have been admitted on the additional ground that they, on their face, show charges for the original elective procedure, pulmonary embolism, intracranial bleeding and other complications and maladies for which no claims were made by the plaintiff in the suit and which were specifically excluded by



her counsel during the course of trial and in his summation.

c) Plaintiff's Exhibits 4, 5 and 6 were erroneously admitted into evidence since they did not meet the legal criteria established by the Supreme Court of Virginia as recoverable damages proximately and directly related to any battery by this co-defendant.

d) Plaintiff's Exhibit #7 should not have been admitted into evidence, and it was error so to do, since there was no evidence or insufficient evidence proximately and directly tying those damages to any conduct of this co-defendant.

e) The court erred in granting plaintiffs Instructions 2, 3 and 7, those having reference to the issue of battery, since there was no evidence to support such issue and indeed plaintiff's evidence negated the existence of such issue.

f) The court committed error in submitting the issue of abandonment to the jury and in granting plaintiff's Instruction No. 8 since there was no evidence adduced supportive of that issue.

g) The court committed reversible error in granting plaintiff's Instruction No. 14 with regard to damages in that there was no evidence to support the various numbered paragraphs in said instruction.

As to each and all of the errors herein complained of and assigned, this co-defendant duly noted and saved his objection and exception in the manner and form prescribed by law.

Signed this 21st day of June 1977.

Louis Q. Pugsley  
Louis Q. Pugsley, by counsel

SLENKER, BRANDT, JENNINGS & O'NEAL

BY Norman F. Slenker  
Norman F. Slenker, counsel for  
defendant Pugsley

CERTIFICATE

I hereby certify that a true copy of the foregoing Notice of Appeal and Assignments of Error has been mailed, postage prepaid, to David Povich, Esq., counsel for plaintiff, 1000 Hill Building, Washington, D. C. and to Thomas Scanlon, Esq. counsel for co-defendants <sup>marks,</sup> Silbersiepe, and Fairfax Hospital, 2021 K Street, N. W., Washington, D. C. 20006, this 21st day of June 1977.

Norman F. Slenker

JURY INSTRUCTION NO. /

When a nurse anesthetist administers an anesthesia or drug intravenously without the authorization from the patient, the act is <sup>^</sup>an assault and battery.

C.f. Lane v. United States, 225 F.Supp. 850 (E.D.Va., 1964).

JURY INSTRUCTION NO. 2

When a surgeon performs an operation without authorization from his patient, the act is <sup>a</sup> ~~an assault~~ and battery.

Lane v. United States, 225 F.Supp. 850 (E.D.Va., 1964).

JURY INSTRUCTION NO. 3

A battery is defined as the slightest touching of a person, if done in an unlawful or unauthorized manner.

C.f. Virginia Jury Instructions, §46.01.



JURY INSTRUCTIONS NO. 7

Every person has a right to complete and perfect immunity from unlawful assault and battery, and complete protection against any violence whatever, whether perceptible injury results from it or not. And if you believe from a preponderance of the evidence that the defendants committed an unjustifiable and unlawful battery upon the plaintiff as defined in the other instructions of the Court, then you shall return your verdict in favor of the plaintiff.

JURY INSTRUCTION NO. 8

It was the duty of the defendant surgeon to continue his services to the plaintiff as long as they were necessary and continue throughout his treatment of the plaintiff.

JURY INSTRUCTION NO. 14

If from the evidence and the other instructions of the Court you find your verdict in favor of the plaintiff, then in assessing the damages to which she is entitled you may take into consideration any of the following which you believe from the evidence to have resulted from the conduct of the defendants:

1. Any bodily injuries sustained and the extent and duration thereof;

2. Any effect of any such injuries upon her health according to its degree and probable duration;

3. Any physical pain and mental anguish suffered by her in the past; [and any which may be reasonably expected to be suffered by her in the future;]

4. Any disfigurement [or deformity] resulting to her and any humiliation or embarrassment associated herewith;

5. Any inconvenience and discomfort caused in the past and any which will probably be caused in the future;

6. Any doctors, hospital, nursing and medical expenses incurred in the past and any that may reasonably be expected to occur in the future;

7. Any loss of earnings in the past by reason of being unable to work at his calling;

out

8. Any loss of earnings and/or lessening of earning capacity she may reasonably be expected to sustain in the future;

and from these as proven by the evidence your verdict should be for such sum as will fully and fairly compensate the plaintiff for the damages sustained by <sup>her</sup> ~~him~~ as a result of the negligence. [not to exceed the sum sued for in the Motion for Judgment.]

1 All right. Would you state your full name and  
2 address, please?

3 A My name is Phyllis Privette.

4 Q That's not loud enough.

5 A My name is phyllis Privette. And my address is  
6 3908 Annandale Road, and I live in Annandale, Virginia.

7 Q That's still not loud enough.

8 A I live in Annandale, Virginia.

9 Q All right. Maybe if you pulled it a little bit  
10 closer to you.

11 A Annandale?

12 Q Yes.

13 How old are you?

14 A I am forty-four.

15 Q And your family status? Are you married or divorced?

16 A I am divorced.

17 Q Do you have any children?

18 A Two.

19 Q Mrs. Privette, when did you first come to the  
20 Virginia area?

21 A In February of 1968.

22 Q Have you lived here essentially from that time on?

23 A Yes. I lived in the same house.

1 Q Is it correct that you are a registered nurse?

2 A I am.

3 Q In the State of Virginia?

4 A I am.

5 Q Where did you obtain your training and your  
6 license?

7 A The University of Alabama is the name of the school  
8 now. At that time it was Jefferson Hillman Hospital. But  
9 it has been all put together and is now the University of  
10 Alabama. I obtained it in 1953 in Alabama, Birmingham,  
11 Alabama.

12 Q You were registered at that time in Alabama?

13 A I was.

14 Q Now, I will come back to your training as a nurse  
15 and your nursing experience, but I want to get, if I could,  
16 some time before the luncheon recess the matter of your  
17 first admission to Fairfax Hospital in May of 1970; is that  
18 correct?

19 A The surgery that I had for the hysterectomy was  
20 in May of 1970.

21 Q Yes. Who performed that operation?

22 A Dr. Martel.

23 Q Do you know his first name?



1 Q Now, did there come a time in which that was  
2 scheduled?

3 A There did.

4 Q When was that?

5 A Well, when I left his office at this -- this time  
6 in June when I was in his office, and it was discussed that  
7 I needed to have surgery. I told him that I would like to  
8 have another doctor present which was Dr. Allan Hall. And  
9 it wasn't that I didn't have confidence in him, because if  
10 I had not had confidence in him, I would not have been going  
11 to him. But Dr. Hall was a surgeon, and I was very  
12 apprehensive. I had been having this bleeding since fall of  
13 1973. It was a nuisance to say the least. And so I wanted  
14 a surgeon present.

15 And as I stated before, Dr. Hall had done surgery  
16 on me. And I just wanted nothing taken out that didn't need  
17 to be, nor did I want anything put in that was not necessary.  
18 Dr. Pugsley is a GYN doctor. And so he knows GYN. But I  
19 wanted a surgeon present. And so we discussed this. I went  
20 out and made an appointment with his secretary for surgery.

21 Q Whose?

22 A Dr. Pugsley. Upon leaving his office, I made an  
23 appointment for surgery. His receptionist made the appointment.

1 called the hospital and made the appointment and gave me the  
2 date. And I went to my employer.

3 Q What was the date?

4 A This was in June.

5 Q When was the date for the surgery you were given?

6 A Sometime in July. I went to my employer who  
7 happens to be Dr. William Amos, and I told him that surgery  
8 had been scheduled. And he said that it was --

9 MR. SCANLON: (Interposing) Objection.

10 THE COURT: Sustained.

11 BY MR. POVICH:

12 Q You can't say what he said. You had to reschedule  
13 the operation?

14 A I had to reschedule the operation, because it was  
15 not convenient at that time. And it was -- after all, I had  
16 been bleeding since early fall. So, it was considered as  
17 being an elective.

18 Q Elective? What was elective?

19 A Elective surgery to be done. So, our vacation  
20 came up in August. And it would be for a period of two  
21 weeks, so I could have it done then. And I would be well and  
22 able to go back to work when we came back from vacation.

23 So, I called his office and told him that we would

1 have to reschedule it. And in the meantime, I called -- I  
2 called Dr. Hall's office because what I -- what I was unable  
3 to say while --

4 Q (Interposing) You can't say what he told you.

5 A Not what he told me. All right. I told him when  
6 I made my first visit with him that I wanted him present  
7 when I had surgery. I wanted him present if anything had  
8 to happen. This was in early fall of 1973.

9 Q Right.

10 A He made no response.

11 Then when I called Dr. Pugsley's receptionist,  
12 told her when we could set up surgery again, and she told me  
13 the books were opened for them. So, I called Dr. Hall's  
14 receptionist and told her that I was scheduling surgery for  
15 sometime in August, and I wanted to make sure that Dr. Hall  
16 was going to be there, would not be on vacation or the like.

17 The books were open at Fairfax Hospital for surgery.  
18 The appointment was made for me to go in the hospital on the  
19 14th day of August and to have surgery on the 15th day of  
20 August. I knew this approximately three weeks ahead of time.

21 And I again called Dr. Hall's office and spoke  
22 with his receptionist to find out the time, told her the  
23 time that I was having surgery, and to make sure that he knew

1 about it. So, I did not hear from her. And so two days  
2 later I called her again. And she assured me all --

3 MR. SLENKER: (Interposing) Objection, Your Honor.

4 THE COURT: Sustained.

5 THE WITNESS: All right. I called her two weeks  
6 later. I called her two days later, I mean, and --

7 BY MR. POVICH:

8 Q (Interposing) After you did that, what did you  
9 do?

10 A After I did that?

11 Q What was the purpose of calling two days later?

12 A Because I had not heard from her to have -- to see  
13 that it was all right with his schedule.

14 Q So, you called her back?

15 A So I called her back two days later.

16 Q After that call, did you then --

17 A (Interposing) It was all right.

18 Q Then you went and did what?

19 A I scheduled surgery at Fairfax Hospital through  
20 Dr. Pugsley's office.

21 Q For what day?

22 A I was to go in on the 14th, and I was to have  
23 surgery on the 15th.

1 Q Now, did you --

2 A (Interposing) Of August.

3 Q Did you then again meet with Dr. Pugsley?

4 A Yes. About a week before surgery, I realized that  
5 I had some venereal warts. And since I was going to be under  
6 anesthesia, I wanted to find out if it would be all right  
7 to have them taken care of at the same time.

8 Q Okay. Are these on the exterior of the vaginal,  
9 rectum area?

10 A They're on the rectal area, and they're like little  
11 tags of skin.

12 Q Okay. This normally would be done preoperatively,  
13 but while you were in the operating room before the other  
14 operation was performed?

15 A I don't really know.

16 Q But it was done during the course of anesthesia  
17 for that operation?

18 A Well, since I was under anesthesia and it would  
19 not be hard, I wanted to find out if it could be done.

20 Q Did you have any other discussion with Dr. Pugsley  
21 one week before?

22 A I told him at that time that I had set it up with  
23 Dr. Hall, and Dr. Hall would be available.

1 Q Did Dr. Pugsley say anything about it?

2 A I don't recall that he said anything.

3 Q Then what was the next thing that occurred? Did  
4 you discuss the operation itself, what he was going to do,  
5 other than you wanted him to do the venereal warts and that  
6 you told him about Dr. Hall?

7 A No. I don't recall that there was any discussion.

8 Q What was the next thing that occurred?

9 A I was admitted to the hospital on the 14th day of  
10 August, and had the urinalysis, the blood work and the X-ray  
11 that was done for admission. And I went to my room.

12 Q Now, I don't want to ask you at this time about  
13 the conversations that you had with respect to whether Dr.  
14 Hall was there or not. We will pass over that for the  
15 moment, because I would like to put Dr. Murphy on the stand.  
16 But did there come a time then on the morning of the 15th  
17 when you were taken to the operating room?

18 A I beg your pardon?

19 Q Did there come a time on the morning of the 15th  
20 when you were taken to the operating room?

21 A Yes, I was taken to the operating room on the 15th.

22 Q Then were you subsequently operated on?

23 A I was.



1 Honor? I'm no different than my patients. In the last  
2 thirty-six hours, I've come down with an acute throat and  
3 cold and laryngitis. So if there is any question that's  
4 not clear, please feel free to ask me again.

5 THE COURT: All right. I told the jury that if  
6 they don't understand the answers of the witness or counsel,  
7 just to put up their hand to let us know. Thank you.

8 Whereupon,

9 DR. CHRISTOPHER J. MURPHY, JR.  
10 was called as a witness on behalf of the plaintiff, and  
11 having been previously duly sworn, was examined and testified  
12 as follows:

13 DIRECT EXAMINATION

14 BY MR. POVICH:

15 Q Doctor, would you try to speak the best you can  
16 so that we can hear you back here? Will you state your  
17 full name and address?

18 A Christopher J. Murphy, Jr.

19 Q Where do you live, Dr. Murphy?

20 A I live in Falls Church.

21 Q How old are you?

22 A Do you really want that answer? I was born in  
23 1908, October.

1 Q Are you a physician licensed to practice medicine  
2 in Virginia?

3 A Virginia and Washington, D. C.

4 Q Would you, without being too modest, tell the  
5 Court, please, and ladies and gentlemen of the jury your  
6 medical education and where you are licensed to practice?

7 A I am licensed to practice in Virginia and Washington,  
8 D. C. I was a Washingtonian.

9 I am a fellow of the American College of Surgeons,  
10 a fellow of the American College of OB-GYN. I belonged to  
11 many of the societies, South Atlantic, Southeastern, all the  
12 OB-GYN Societies. I am past president of the Virginia  
13 OB-GYN Society. I'm past president of the Alexandria  
14 Medical Society and the Alexandria Mental Health Association.

15 I'm on many committees. I happen to be now  
16 appointed by the State on a voluntary basis to -- when there  
17 is a law suit, the Virginia OB-GYN Society asks certain  
18 physicians to advise the plaintiff's attorney and the  
19 plaintiff. I'm on that.

20 And I'm also on the Maternal Child Welfare Board  
21 at the State level representing Virginia OB-GYN now going  
22 around and evaluating all the hospitals in this area, which  
23 is Loudoun, Prince George, Alexandria, Arlington and Fairfax,

1 as to the care of obstetrical practice and pediatrics.

2 Q Where did you go to medical school?

3 A Local, George Washington.

4 Q You are licensed to practice in Virginia and in  
5 the District of Columbia?

6 A Yes.

7 MR. POVICH: Your Honor, I offer him as an expert  
8 OB-GYN in order to give an opinion as to the standard of  
9 care practiced by OB-GYNs in this community.

10 THE COURT: Do either counsel wish to question  
11 his qualifications at this point?

12 MR. SLENKER: Not at this point, Your Honor.

13 THE COURT: Mr. Scanlon?

14 MR. SCANLON: No.

15 THE COURT: Proceed.

16 BY MR. POVICH:

17 Q Doctor, did there come a time in which you were  
18 asked to review a case involving the care and treatment  
19 rendered to Phyllis Privette?

20 A Yes.

21 Q In connection with your review of the matter,  
22 did you inquire and were you shown records concerning the  
23 hysterectomy which was performed on her in May of 1970 in

(The medical records  
previously identified as  
Plaintiff's Exhibit No. 1-A  
were received in evidence.)

BY MR. POVICH:

Q Doctor, I show you what has been marked as  
Plaintiff's Exhibit 1-A. I show you specifically the  
operative notes in connection with that operation and ask  
whether or not that was the operative note that was  
dictated with respect to the operation performed by Dr.  
John Martel, in May of 1970, in Fairfax Hospital for the  
hysterectomy.

A Leon Martel. Yes, I reviewed his record. And I  
read Dr. Martel's and the pathology diagnosis which confirms  
it.

Q Let me ask you this. Is there anything remarkable  
with respect to the operation that was performed by Dr.  
Pugsley in August of 1974 insofar as that 1970 hysterectomy  
was concerned?

A Well, the one thing on the hysterectomy that Dr.  
Martel -- mind you, I'm talking about friends of mine. Dr.  
Martel did a very complete record here. He took the uterus  
out and did not take the ovaries. And he mentioned at that

1 do it. And the main reason why we do that is because we  
2 get into a lot of adhesions and can't find the ureter. At  
3 least you can put your hand down under the adhestions and  
4 feel that catheter. Now, you know where the ureter is.  
5 Otherwise, it's a mass of tissue. Then you can disect the ovary  
6 and all after that.

7 So, the standard procedure is in the area if you  
8 read the previous note and with that amount of adhesions,  
9 you would have a urologist put in the IVP and put in uretal  
10 catheters.

11 BY MR. POVICH:

12 Q Now, Doctor, in this case, you have also been  
13 shown, I believe, a postoperative IVP or intravenous pyelogram;  
14 is that correct?

15 A Yes.

16 Q I show you in the record what is called an  
17 intravenous pyelogram which was done on August 19, 1974,  
18 and advise you that that would have been four days post-  
19 operative. Assuming that that pyelogram, Doctor, had been  
20 done postoperatively instead of postoperatively and that  
21 in fact there had been an IVP done beforehand, what would  
22 those findings of that pyelogram indicate to you?

23 A This intravenous pyelogram here states there is

1 a nonfunctioning right kidney.

2 Q All right. That would have alerted you then --

3 A (Interposing) That would have alerted us to be  
4 more careful with the right ureter because we don't want to  
5 cut it and lose two kidneys on a patient. So, you would  
6 be more alerted and have a great tendency to put a uretal  
7 catheter in.

8 Q Is it your testimony then or can you give us your  
9 opinion then as to what the standard of care would be where  
10 you had done an IVP preoperatively as to how you would  
11 perform the operation postoperation?

12 A I feel the operation would be performed in the  
13 same way except the uretal catheter would have been put  
14 into the ureter. I mean I can't explain against technique  
15 or anything else except for the fact knowing you are going  
16 to run into adhesions you should have a uretal catheter  
17 in there, particularly when a patient has got a kidney  
18 already lost.

19 Q Doctor, if you have your catheters in at the time  
20 of the operation, what assistance is that to you in order  
21 to determine whether or not there has been any injury to  
22 the ureter during the course of the operation?

23 A I don't think the catheter would necessarily

1 show us injury that we would do in an operative procedure.  
2 But we are taking steps to prevent doing damage.

3 Q I see.

4 If there was some question, Doctor, as to whether  
5 or not the ureters had been injured during the course of the  
6 operation, what would be the standard practice to check out  
7 kidney function postoperatively?

8 A We would follow up with an IVP and find out  
9 whether we had a leaking from the ureter into the  
10 peritoneal cavity or into the vaginal cuff.

11 MR. POVICH: I have no further questions.

12 THE COURT: Mr. Slenker.

13 CROSS EXAMINATION

14 BY MR. SLENKER:

15 Q Doctor, do you have the IVP reading there for  
16 the 19th of August?

17 A Yes.

18 Q Have you got that right in front of you?

19 A Yeah.

20 Q All right. This paragraph right here where it  
21 says, "Infusion of Renografin 60" which is the dye which  
22 is used, would you read what Dr. Berger said with reference  
23 to the left kidney?

1           On that same basis, a lot of times we do not find  
2 a fistula to five, six, seven, or eight days postop when a  
3 patient is complaining of urine coming through the vagina.

4           Q     Yes, sir.

5           A     So, you don't find it immediately.

6           Q     As a matter of fact, do you know in this case  
7 how long it was after the surgery that there was first found  
8 the leakage of urine through the vagina?

9           A     No, I couldn't answer that truthfully.

10          Q     Did you ever look at the records to ascertain that?

11          A     Yes, I did, but I have forgotten. I don't know  
12 whether it was eight days or what. I could look it up in  
13 the record, but I really couldn't answer you truthfully.

14          Q     A fistula normally takes a minimum of five days,  
15 does it not, to form?

16          A     Generally five to fourteen days.

17          Q     So, the surgery we are talking about here was  
18 done on the 15th of August. Here on the 19th of August,  
19 the radiologist within four days reports nothing wrong with  
20 the left ureter; isn't that correct?

21          A     That's right.

22          Q     Now, as a matter of fact, Dr. Murphy, an IVP will  
23 simply show you, will it not, where the structures are and



1 THE COURT: Overruled. He can answer it.

2 A All I can say is that the chances of complications  
3 would have been percentagewise -- I can't give you the  
4 percent -- decreased. But that doesn't mean that without  
5 the catheters, he wouldn't have run into the same trouble.

6 BY MR. SLENKER:

7 Q You can have the same trouble that you perceive  
8 was encountered here even with the IVP and even with  
9 catheters in ureters?

10 A But decreased instance.

11 Q Decreased instance of it.

12 Do you know what the percent is in the literature  
13 or if there is a percentage or if it's published?

14 A No. I really couldn't answer that per se because,  
15 again, it varies upon the type of pelvis you've got, if you  
16 have got a carcinoma or you have got some congenital defect.  
17 Those things you can't see until you get in. But most of  
18 us are going to run someday into some complication when you  
19 do enough surgery. If you have no complications, you are  
20 not doing enough surgery. I don't mean percentage. I mean  
21 the more experience you have, the better you should be in  
22 handling the case.

23 Q Can you tell the Court and members of the jury if

1 Q All right, sir.

2 You don't find anything in Dr. Pugsley's records,  
3 do you, Doctor, to indicate indeed he didn't give total  
4 attention and caution to this procedure?

5 MR. POVICH: Objection, Your Honor. I believe  
6 he's testified as to the fact he felt there was no lack of  
7 attention and caution, and what he didn't do preoperatively  
8 and operatively --

9 THE COURT: (Interposing) Are you asking him  
10 within the standard of care?

11 BY MR. SLENKER:

12 Q Within the standard of care, you certainly don't  
13 indicate that Dr. Pugsley did anything other than give total  
14 time and attention to the operation he performed, do you?

15 MR. POVICH: Objection.

16 THE COURT: Go ahead. You can answer.

17 A I think he was sincere, and I think he did what  
18 he thought was best.

19 BY MR. SLENKER:

20 Q Was it within the standard?

21 A Within the standard except for the fact of placing  
22 uretal catheters.

23 Q Can you tell the members of the jury this

1 complication would not have occurred if the catheter was in  
2 place?

3 A I think the percentage would go very high. Eighty  
4 percent chance of not occurring.

5 Q Can you say it would not have occurred?

6 A No, I can't.

7 Q Nobody can say that?

8 A Nobody. The Man up there (indicating).

9 Q He may know about it.

10 A Yeah.

11 Q But not doctors?

12 A No.

13 Q As a matter of fact, Dr. Murphy, is there a risk  
14 involved in doing the IVP prior to a procedure of this type?

15 A There is a risk to doing any procedure. There is  
16 a risk to doing X-ray of pelvises. There is a risk in  
17 giving IVPs. There is always a percentage of risk in every  
18 procedure. An IVP is not without -- I mean if a patient was  
19 allergic, they try to skin test them to the dye that was used.  
20 But there is no procedure in medicine today that we can  
21 guarantee that there's not a risk.

22 Q Is there a risk involved in the insertion of the  
23 catheters in the ureters?

1           A     Yes.

2                               RECROSS EXAMINATION

3                               BY MR. SLENKER:

4           Q     Dr. Murphy, I thought I understood you to say  
5           that one of the reasons that catheter was within the standard  
6           in 1974 was because of the condition of endometriosis that  
7           Dr. Pugsley knew about prior to his surgery?

8           A     Yes. But I did state, I think at that time, that  
9           we had Dr. Martel's report showing that when he did the  
10          hysterectomy, that the ovaries were bound down in adhesions.  
11          And therefore, the second man going in knows he's got a  
12          potential of running into other complications. And that is  
13          why you were to insert the uretal catheter, just to make  
14          it easier on yourself and be able to find it.

15          Q     Does the presence of endometriosis lead you to  
16          conclude and say that the standard of care would require  
17          the catheters in '74 when Dr. Pugsley did his procedure?

18          A     I would say, and I think I gave you a figure  
19          about fifty percent of the men would do it.

20          Q     I see.

21                       Now, Dr. Martel's diagnosis and the reason why he  
22          decided to do his exploratory laparotomy was the diagnosis  
23          of endometriosis, wasn't it?

1           A     Yes.

2           Q     Should he not therefore have used the catheters?

3           A     No.

4           Q     Why not?

5           A     Because you don't have that much involvement.

6     You can get into tissue that has never been operated on  
7     before. But once it's been operated on, you have got scar  
8     tissue you are dealing with. Here he is going in her the  
9     first time. I have a question here whether -- and I think  
10    I told you that some men would have removed the ovaries at  
11    the first operation. Others wouldn't.

12          Q     Some would have?

13          A     Some would, yes.

14          Q     Even without the catheters in the ureter?

15          A     Because as long as the ovaries are there, you are  
16    still going to produce estrogen hormone which stimulates your  
17    endometriosis.

18          Q     All right. Had Dr. Martel chosen to remove the  
19    ovaries at the time of the first operation, he would be  
20    doing that without the catheters being in the ureter?

21          A     I don't think he needed the catheters at that time.

22          Q     Would there be greater risk, or were those ureters  
23    a greater risk at the time of his operation when he's taking

1 out the uterus than at the time that Dr. Pugsley did his  
2 procedure in 1974?

3 A Greater with the second operation. Every time  
4 that you go into an abdomen, you have more adhesions and  
5 more chances of complications.

6 Q When you do the total abdominal hysterectomy  
7 and remove the uterus, aren't you dissecting out the uterus  
8 and all of its component parts which takes you down to the  
9 lower part of the abdomen to the cervix? You have to dissect  
10 out the cervix at the same time, don't you?

11 A Yeah. But the bladder is off of there, too.

12 Q But in stripping the bladder and in stripping  
13 the tissue to get the uterus out, you are in much closer  
14 proximity to the ureter in the lower part of the pelvis  
15 than Dr. Pugsley ever was?

16 A No, not necessarily so because he's got adhesions.  
17 It's bound down and you have got other tissues involved there.

18 Q In the total abdominal hysterectomy, you remove  
19 the uterus and the cervix?

20 A And portions of the tubes.

21 MR. SLENKER: Okay.

22 I think that's all.

23 THE COURT: Mr. Scanlon?

1 Q Would you, Dr. Strauch, give your educational  
2 background?

3 A I attended Dartmouth College. I graduated in  
4 1965 from the Johns Hopkins Medical School. I did an  
5 internship and two years of residency in internal medicine  
6 at Yale University School of Medicine. I did a fellowship  
7 in nephrology, which is kidney disease, at the Yale  
8 University School of Medicine. I spent two years as a  
9 fellow at the National Institute of Health. I spent two  
10 years on the full-time faculty at Yale Medical School. And  
11 I began private practice in this area about three and a half  
12 years ago.

13 Q Are you licensed to practice medicine in Virginia?

14 A Yes.

15 Q And any other jurisdictions?

16 A Washington, D. C. and Maryland.

17 Q And Maryland.

18 Are you a member of any society?

19 A I am a member of the Fairfax County Medical  
20 Society, the Virginia Medical Society, and the American  
21 Society of Nephrology.

22 Q Doctor, do you have hospital privileges?

23 A I have hospital privileges at Fairfax Hospital,

1 Arlington Hospital, and Commonwealth Doctors Hospital and  
2 Northern Virginia Doctors Hospital.

3 MR. POVICH: Your Honor, I submit that he is an  
4 expert to testify and give his opinion on the matter of  
5 nephrology and with respect to his care and treatment in  
6 this case of Phyllis Privette.

7 MR. SLENKER: I think he is well qualified in  
8 his field of nephrology but certainly not in OB-GYN.

9 MR. SCANLON: I agree with Mr. Slenker.

10 THE COURT: Okay. Proceed, sir.

11 BY MR. POVICH:

12 Q Did there come a time, Dr. Strauch, when you  
13 concerned yourself or were concerned with the care and  
14 treatment of Phyllis Privette?

15 A I saw Mrs. Privette in consultation on August 19,  
16 1974.

17 Q August 19, 1974.

18 Where was it?

19 A At Fairfax Hospital.

20 Q Do you know why you were called in?

21 A I was called in because of a presumptive  
22 diagnosis of kidney failure.

23 MR. SLENKER: Of what?



1 THE WITNESS: Kidney failure.

2 BY MR. POVICH:

3 Q At that time, were you practicing at Fairfax  
4 Hospital?

5 A Yes.

6 Q You had been brought in there as a consultant  
7 to diagnose Mrs. Privette for her kidney failure?

8 A Yes.

9 Q What is it? You say you are a nephrologist?  
10 What is a nephrologist?

11 A A nephrologist is an intern who is trained in the  
12 specialty of kidney diseases. Those are situations in which  
13 the kidneys either have a medical problem within them or  
14 some problem in function.

15 Q At the time you were called in, did you have an  
16 opportunity at that time to review her chart and examine  
17 Mrs. Privette?

18 A I reviewed her chart and examined her.

19 Q What state was she in?

20 A She was in the intensive care unit seriously ill  
21 at that point.

22 Q What was the cause of her illness as far as you  
23 could determine?

1           A     It was complicated. She had three major features  
2 at that point. She was recovering from gynecological surgery.  
3 She had a pulmonary embolism, and she had renal failure as  
4 documented by blood tests.

5           Q     This was as of the 19th?

6           A     Correct.

7           Q     Is it fair to say that you essentially took over  
8 the management of her case?

9           A     I did not take it over on a full-time basis at  
10 that time. I participated to a very major degree and later  
11 became the attending physician of record.

12          Q     When did you take over the full-time management  
13 of her case?

14          A     Gradually over the ten days after the consultation.

15          Q     Tell me, what did you do after you first became  
16 involved on the 19th?

17          A     After discussing the case with the attending  
18 physician, we initiated several diagnostic studies.

19          Q     Designed to do what?

20          A     Designed to elucidate the reason that the kidneys  
21 were not functioning.

22          Q     Were you able to do that?

23          A     Not on the 19th.

1 Q Tell me what you did.

2 A On the 19th, the first day, it was a renal scan  
3 in which radioactive dye is injected to determine whether  
4 blood is flowing to the kidneys. The interpretation of that  
5 study was that there was no blood flow or insignificant blood  
6 flow to the right kidney and normal blood flow to the left  
7 kidney.

8 That was a confusing result compatible with either  
9 an absent left kidney or a kidney -- a left kidney to which  
10 the blood flow had been interrupted -- I'm sorry -- to the  
11 right kidney, or a left kidney that either was functioning  
12 normally or had some acute problem with it.

13 On the basis of that, we went on to the next  
14 study which is an intravenous pyelogram, which is a standard  
15 kind of kidney X-ray, where dye is injected and X-ray pictures  
16 are taken of the kidneys. And again, there was no evidence  
17 of a right kidney either being present or at least functional.  
18 The left kidney was present but picked up dye very poorly  
19 so that you could barely see it, and you could barely see  
20 the ureter or the tube leading down from the kidney to the  
21 bladder. This is consistent just simply with very poor  
22 kidney function.

23 Q So, there was some question as to the function

1 at all of the right kidney and a subnormal functioning of  
2 the left kidney?

3 A Correct.

4 Q What did you find then?

5 A I was concerned about three or four diagnostic  
6 possibilities at that point. And one of them that concerned  
7 me was an obstructive process in which the kidney on the  
8 left side perhaps was functioning normally, but the urine  
9 being formed in the kidney couldn't get out. And after that  
10 goes on for several days, the kidney itself will stop  
11 functioning normally because of back-up pressure.

12 And on that basis, I suggested and finally  
13 requested that a urologist be called in on the case to  
14 consider urological kinds of tests to either rule in or  
15 rule out an obstructive type of process.

16 Q And obstruction to the ureter?

17 A Correct.

18 Q What problem did that cause? Why did that have  
19 to be resolved?

20 A An obstruction to the kidney associated with  
21 kidney failure is producing the kidney failure which is a  
22 very major metabolic disarray for anybody to take.

23 Q Was it particularly important in this case

1 because she appeared to have only one kidney functioning?

2 A At this point, we didn't know whether she had  
3 one kidney or two kidneys. Certainly, with a single kidney,  
4 it becomes even more important to determine whether  
5 obstruction is present or not.

6 Q Did you do any other studies before the urologist  
7 was called in?

8 A There were some blood studies and some urine  
9 studies. And they were not really helpful in elucidating  
10 the specific diagnosis other than being consistent with  
11 the fact that the kidneys were not properly functioning.

12 Q When did you begin to get some more definitive  
13 information as to what the state of her kidney was?

14 A On the 22nd of August.

15 Q What happened on that date?

16 A Two things basically happened. And again, this  
17 is a very complicated situation. A lot of things were  
18 happening to the patient over those days between the 19th  
19 and the 22nd. But on the 22nd, we had preliminary evidence  
20 that the patient was passing urine out of the vagina.

21 And that would lead one to a presumptive diagnosis  
22 that something is happening to the ureter or the tube  
23 between the kidney and the bladder, that it had ruptured

1 and that now urine was being partially diverted and was  
2 coming out of the wrong structure, but it finally sought  
3 an entrance.

4 We had that preliminary evidence. And with that  
5 in mind and with the patient's generalized deterioration  
6 which had taken place over those three days, the urologist  
7 performed studies in which he examined the patient's bladder  
8 and the ureter from below to elucidate whether a fistula  
9 was or was not present and what was going on.

10 Q Was he able to ascertain that?

11 A He was able to --

12 MR. SLENKER: (Interposing) If Your Honor please,  
13 I think that this would perhaps best come from the urologist.  
14 I am informed that he is going to be a witness.

15 MR. POVICH: He is, Your Honor. But this is the  
16 individual who is essentially supervising by the 22nd the  
17 management of this case. He certainly is entitled to rely  
18 on his colleagues that are assisting him in this manner  
19 that he has brought into consultation.

20 MR. SLENKER: I had not understood that he had  
21 at this point of time assumed the primary care of this  
22 patient.

23 THE COURT: His testimony was from the 19th to the

1 29th.

2 MR. SLENKER: Ten days after --

3 THE COURT: (Interposing) Ten days after he was  
4 consulted. The 19th was the first consultation.

5 MR. SLENKER: It was ten days after that that  
6 he assumed the primary care. That is the basis for my  
7 objection because on the 22nd, I think he was not the  
8 primary man, were you, Doctor?

9 THE WITNESS: I am not sure who the primary man  
10 was on the 22nd.

11 MR. POVICH: Your Honor, in any event, he was a  
12 colleague neurologist.

13 THE COURT: The jury rules or the Federal rules  
14 don't allow it. He would have to stick with what he  
15 observed.

16 MR. POVICH: But he can relay, can he not, on his  
17 findings insofar as his treatment.

18 THE COURT: It's in the record.

19 BY MR. POVICH:

20 Q Is there an indication in the record for the  
21 patient as to what the situation was after he asked for  
22 the consult?

23 A There is an indication in the record and there are

1 X-rays.

2 Q Did you consult with those?

3 A I consulted with those, and I consulted with the  
4 urologist.

5 Q What was the situation then, Doctor?

6 A The procedure that was performed was a cystoscopy  
7 in which a tube was put up into the bladder. And the  
8 urologist gently injected dye up into the left ureter.

9 That's a decision we made prior to his doing the  
10 procedure together because we were very concerned that a  
11 fistula was present. And we didn't want him putting a  
12 catheter up there and possibly causing a fistula or at  
13 least leading us not to know that the fistula was there  
14 prior to his putting the catheter up.

15 He thus injected that dye. And it floated out  
16 of the ureter confirming the fact that there was a fistula  
17 present. And then again, as we jointly planned, he put a  
18 catheter up that ureter all the way to the pelvis of the  
19 kidney itself and left it in place in an attempt to drain  
20 the kidney and bypass the place where the ureter was broken.

21 Q You are now talking about the ureter on the left  
22 side; is that correct?

23 A Correct.



1 Q What did it indicate with respect to the ureter  
2 on the right side?

3 A The report of the urologist indicated that the  
4 right side ureter seemed to bind in a few centimeters or  
5 inches above the bladder, meaning it was a dead end at that  
6 point. He couldn't determine whether there was anything  
7 beyond it.

8 Q Are you talking in the sense of the stump at  
9 least as far as the dye?

10 A It was a stump.

11 Q That was going from the bladder up; is that  
12 correct?

13 A Correct.

14 Q Doctor, can you give us some indication as to how  
15 sick Mrs. Privette was during this period of time?

16 A On the 22nd, the patient went into essentially  
17 a comatose state. And by the 23rd or 24th, she was in a  
18 fairly advanced coma from multiple complications that were  
19 going on at this time.

20 Q Do you know approximately how long she remained  
21 in that state?

22 A By the 27th, the 28th, she started gradually coming  
23 out of the coma. But she remained extremely critically

1 ill over several weeks beyond that.

2 Q What were some of the primary causes for this  
3 comatose state?

4 A Probably the primary event of her comatose state  
5 was something which occurred around the 21st or the 22nd  
6 which was an episode in which she had a blood stream infection  
7 in which she had a high fever and a drop of blood pressure,  
8 and went into a shock like state and was growing bacteria  
9 out of her blood stream.

10 Q Is that sepsis?

11 A That is sepsis.

12 Q What causes sepsis.

13 Q On the basis of the organism that was growing in  
14 her blood, with a great deal of likelihood, we felt that  
15 it was coming from an infection in the pelvis or the area  
16 of surgery.

17 Q The infection in the pelvis, did you have an  
18 opinion as to where that was coming from what was causing  
19 that?

20 A We felt it was tied up with the surgery, with the  
21 fistula which we now knew was flowing from the pelvis.

22 Q You say it was tied up with the surgery and the  
23 fistula; is that correct?

1 A Um-hum.

2 Q When in your opinion, Doctor, did the fistula  
3 actually occur?

4 A I really can say only that it was clearly present  
5 on the 22nd and that it could have been -- it could have  
6 occurred any time prior to that with a small amount of  
7 drainage.

8 Q All right. Do you have an opinion based upon  
9 reasonable medical certainty as to what caused that fistula  
10 and when it occurred?

11 A I feel that the ureter was damaged at the time  
12 of surgery and that --

13 MR. SLENKER: (Interposing) I object to this  
14 and ask that it be stricken, if Your Honor please. There's  
15 been no showing that is within his area of specialty. No  
16 foundation was laid for it.

17 MR. POVICH: I beg your pardon.

18 MR. SLENKER: He said there wasn't any evidence  
19 of it until the 22nd. Now he is going back to cause. He  
20 said he couldn't tell how long it had been there.

21 MR. POVICH: I am asking him whether he had an  
22 opinion based on reasonable medical certainty as to when  
23 this injury was caused. He is a nephrologist. I can't

1 think of anybody else who is more qualified to answer the  
2 question.

3 MR. SLENKER: His prior answer was he could not  
4 say. The only evidence was on the 22nd when it became  
5 apparent there was something which had ruptured. But he  
6 said he couldn't tell when it occurred or how.

7 THE COURT: The Court will overrule the objection.  
8 This is a question for the jury to decide. Proceed.

9 MR. POVICH: Sure. Let me ask the question.

10 BY MR. POVICH:

11 Q Do you have an opinion based on reasonable medical  
12 certainty as to when the injury occurred which resulted in  
13 the fistula of the 22nd?

14 A The injury occurred at surgery. I cannot state  
15 when the fistula actually was created.

16 Q Can you tell us the type of injuries which may  
17 have caused that subsequent fistula to have occurred on the  
18 22nd?

19 A I think the two most likely types of injury are  
20 a direct trauma to the ureter in the form of it being  
21 cut and along with it a ligature being partially placed on  
22 the ureter, meaning partially tied off.

23 Q Was there some kidney function after --

1 A (Interposing) Surgery?

2 Q (Continuing) -- surgery?

3 A Yes.

4 Q All right. What does that fact do with respect  
5 to ascertaining the type injury that occurred?

6 A All that means to me is that there was not a total  
7 obstruction of the ureter so that some urine was able to  
8 flow out.

9 Q Are you saying that at some subsequent point there  
10 was a flow out or a fistula?

11 A Correct.

12 Q When in your opinion did you believe that occurred?

13 A I would think that it occurred somewhere around  
14 the 19th, 20th or 21st.

15 Q What do you base your opinion on?

16 A On when it occurred?

17 Q Yes, backdating it. The fistula occurred on the  
18 22nd and then in your opinion this occurred as a result of  
19 the surgery.

20 A I think with the situation of a probable partial  
21 obstruction, that once the diversion was created, that it  
22 would have very rapidly found an entrance from the body.  
23 I don't think it should have been present more than a day or

1 two simply because the pathway around the obstruction would  
2 have been great enough to divert enough urine that you would  
3 see it fairly quickly.

4 Q At my request, have you gone back and reviewed  
5 the records in order to ascertain whether or not there is  
6 some clinical or laboratory justification involved for this?

7 A For --

8 Q (Interposing) For your opinion?

9 A I think there are several pertinent features of  
10 the laboratory data. The first is on the degree of  
11 accumulation of waste products in the blood tests of the 19th  
12 which allow one to backdate it, assuming normal kidney  
13 function to begin with.

14 You can backdate and figure out how many days of  
15 relative kidney failure would have to occur before you could  
16 see this much accumulation in the blood.

17 And when one did that, it was consistent with  
18 renal failure occurring on the 15th with a twenty-four hour  
19 leeway.

20 The second thing is that at the time the urologist  
21 put the catheter up, a -- and the catheter was now relieving  
22 any kind of back pressure from sitting in the kidney itself,  
23 urine output rapidly increased. And over the next twenty-four

1 hours, there was a very major improvement in kidney function.  
2 And that continued over the next several days, so that the  
3 kidney failure was released over seventy-two hours once  
4 there was a catheter up in the kidney.

5 Q What difficulty were you having with the management  
6 of her case from the 22nd on, that period of time?

7 A Again, it was very complicated, and there were  
8 a lot of different things going on. The major one at that  
9 point was sepsis. And sepsis was a difficult kind of  
10 bacteria to treat.

11 Q Excuse me. I don't mean to interrupt you. Is  
12 the sepsis urologically oriented?

13 A It's pelvic oriented in this type of infection.

14 Q The infection arises from what?

15 A Something in the pelvis which means it could come  
16 out of the uterus if there was one there, out of an ovary or  
17 anything in that area.

18 Q In your opinion, was the matter that was escaping  
19 from the ureter what was causing this infection?

20 A My feeling was escaping urine was what got  
21 infected.

22 Q And was causing the sepsis?

23 A Um-hum.

1 Q Which is a bacteriological blood disease?

2 A Right.

3 Q What was the sepsis causing, what kind of  
4 complication?

5 A It caused her to go into shock and then into  
6 coma. Coma itself is a high mortality kind of condition and  
7 requires very intensive care. The particular kind of  
8 infection requires some very complicated antibiotics which  
9 the use of which was made more difficult by the fact they  
10 were in kidney failure and required a great deal of  
11 manipulation. And in the background was she had a pulmonary  
12 embolism and was on blood thinner medication for the  
13 pulmonary embolism.

14 On top of that, although it was never a very major  
15 problem, she had some degree of bleeding from the intestinal  
16 tract, probably from the stomach.

17 Q What did you do insofar as her treatment was  
18 concerned during the latter part of August?

19 A She needed adjustments of fluids as kidney  
20 function resumed. She needed manipulation of antibiotics,  
21 manipulation of the blood thinners, and general comatose  
22 type of care.

23 Q Were there any other events, more dramatic events



1 during that period of time that changed her course of  
2 recovery?

3 A No.

4 Q When was the first time that you began to see  
5 some change positively or negatively?

6 A I would say that on about the 28th to 30th, she was  
7 clearly coming out of her semicomatose state and was clearly  
8 starting to improve.

9 Q By this time, was the pulmonary embolism the  
10 problem?

11 A Again, around the 30th, and I would have to look  
12 at the chart for the exact day, Dr. Fusco, who was the chest  
13 specialist, called in to care for the pulmonary embolism  
14 took himself off the case because it had become an unimportant  
15 problem.

16 Q Not an important problem?

17 A Um-hum.

18 Q So, essentially you are dealing with the  
19 urological problem now?

20 A Right.

21 Q Is it still sepsis oriented?

22 A She had several recurrent periods of fever where  
23 infection was important.

1 Q If I understand correctly, it appears that she is  
2 leaking urine in her pelvic area and it is abscessing; is  
3 that correct?

4 A That is correct.

5 Q What do you do in a situation like that or what do  
6 you have to do?

7 A You have to attempt to get the urine out of that  
8 area which means divert it. And it's impossible to operate  
9 in an infected area like that, so that it requires trying  
10 to divert the urine from the kidney to the outside.

11 And there was a great deal of urological effort  
12 to keep catheters up through the bladder into the kidney that  
13 eventually proved unsuccessful. And eventually a tube had  
14 to be put directly into the kidney which required another  
15 operation to know for certain that we could bypass that  
16 infected area and allow the antibiotics and nature to heal  
17 up the infection.

18 Q Is that a nephrostomy?

19 A That's a nephrostomy.

20 Q Would you explain what that is?

21 A That is a major operation in which the patient is  
22 explored, and a basically large tube is put into -- directly  
23 into the pelvis of the kidney and let out through the

1 patient's side, so that any urine that forms in the kidney  
2 goes into this large tube instead of dripping down the  
3 ureter.

4 Q When approximately was that?

5 A I'd really have to look that up. I would be  
6 guessing to say somewhere around the middle of September to  
7 the end of September, but the exact date is available.

8 Q What was her course, say, from the end of August  
9 up until that time with the nephrostomy? How sick was she  
10 there?

11 A She was -- at that point, I would call her  
12 seriously ill but not in a life threatening way at that time.

13 Q Was there anything special that had to be done  
14 for her other than the nephrostomy tube?

15 A Well, again, she needed antibiotics intermittently  
16 over this time because of recurrent infections.

17 Q Was the management of the antibiotics a matter of  
18 some concern?

19 A It was very difficult because these infections  
20 were difficult and again required difficult antibiotics to  
21 use.

22 For instance, she had been at one point on  
23 Chloramphenicol. That's a drug which causes the platelet

1 count to drop. Platelets are entities in the blood which  
2 helps clot it. This is a known side effect of the drug, and  
3 it's a reason not to use the drug if at all possible. So, at  
4 the point that happened, that drug had to be stopped.

5 Q Describe as best you can what happened after the  
6 nephrostomy tube was concerned.

7 A At that point, I was becoming less involved in  
8 the case. And other than the patient gradually improved,  
9 I don't know.

10 Q Who became more involved? Dr. Berger?

11 A Dr. Berger.

12 Q He was the urologist?

13 A Yes.

14 Q All right. During this period of time that you  
15 are involved in her case, and I assume at some point  
16 perhaps early in the case, did you have a chance to review  
17 the operative procedure and note what had been done in this  
18 case?

19 A Yes.

20 Q Was there any indication in the record that any  
21 preoperative IVPs had been done?

22 A No.

23 Q Was there any indication that any preoperative

1 catheters had been done?

2 A No.

3 Q Was there any indication that any means had been  
4 done during the course of the operation to identify the  
5 ureter other than the attempt to feel it?

6 A No.

7 Q Was there any indication that any dissection of  
8 the ureter in order to visualize it had been done?

9 A No.

10 Q Was there any indication that the urologist had  
11 been called at any point in the operation, preoperatively  
12 to assist in the identification?

13 A No.

14 Q Are these all means of identifying the ureter?

15 A Yes.

16 Q Doctor, do you ever get involved in situations  
17 in which you have a question of whether a particular kidney  
18 is operating or not of any individual preoperatively?

19 A I don't do surgery, so not preoperatively. But I  
20 frequently have that problem.

21 Q Is the nonfunctioning of one kidney a serious  
22 complication preoperatively for a patient?

23 A It's serious if something happens to the other

1 kidney.

2 Q All right. From your review of the operative  
3 note, did it indicate to you where in this woman's, I guess,  
4 pelvic area this operation was centered vis-a-vis the  
5 ureter?

6 A It was very close to the ureter.

7 Q You mean in the vaginal cuff area?

8 A It was within inches of the ureter.

9 Q In the ovaries?

10 A Yes.

11 Q Would you say as a nephrologist, Doctor, that  
12 under circumstances of one functioning kidney, that it would  
13 have been important to identify the ureter by some means  
14 during the course of this operation for this type of an  
15 operation.

16 MR. SLENKER: I object to the question, Your Honor,  
17 since it's leading.

18 THE COURT: Sustained.

19 BY MR. POVICH:

20 Q Doctor, how important is it, if at all, to  
21 identify the ureter for the person with one kidney going  
22 into this type of an operation?

23 A It would be extremely helpful.

1 Q Would be what?

2 A Extremely helpful.

3 Q Why?

4 A It would make one increase whatever is necessary  
5 to make absolutely certain to make sure that the other one,  
6 the one that's there, is not injured.

7 Q Let me ask you, Doctor, would it have been helpful  
8 postoperatively in treating a urological problem of a  
9 leaking urine if there was one if the catheter had been  
10 placed preoperatively in the ureter?

11 A Are you -- are you saying that a catheter is there  
12 and it still occurs?

13 Q No. I'm saying that if you have a catheter in  
14 there, does that assist you in determining whether or not  
15 there has been postoperative urological injury?

16 A It would make it much less likely.

17 Q It would make the injury less likely?

18 A Um-hum.

19 Q With the type of illness that this woman experienced  
20 postoperatively in this case, and I would like to limit it  
21 for present purposes solely to the urological complications  
22 which followed -- I don't want to get into pulmonary  
23 embolism. But try to confine it if you could to the

1 urological -- what kind of difficulty would you expect this  
2 woman to experience postoperatively after she leaves the  
3 hospital?

4 A Once the inspection is totally cleared up and  
5 once the fistula is totally closed, I think what happens then  
6 would be very variable. It is possible that the --

7 MR. SLENKER: (Interposing) Objection, if Your  
8 Honor please, to the possibility. That is not evidence  
9 that is receivable.

10 THE COURT: Sustained. State it with medical  
11 probability.

12 BY MR. POVICH:

13 Q Medical probability, not mere possibility. But  
14 knowing her condition, what would you expect to be the  
15 difficulties she would have after the operation?

16 A Just in respect to what?

17 Q As a result of the stormy period of hospitalization,  
18 trying to exclude pulmonary embolism or the intracranial  
19 bleeding.

20 Q On the basis of the very long, stormy, complicated  
21 course that she had, it would not surprise me if she had a  
22 very long period after that where she would not be able to  
23 have the kind of strength, general strength and ability that



1 she had prior to the hospitalization.

2 Q Would you expect, Doctor, that she would have some  
3 difficulty in balance or dizziness or something such as that?

4 A It would be possible.

5 MR. SLENKER: Objection and ask it be stricken,  
6 if Your Honor please.

7 THE COURT: Sustained.

8 BY MR. POVICH:

9 Q Is it something you would expect she might well  
10 have opposed to possible?

11 MR. SLENKER: I object to the leading nature of the  
12 question, Your Honor.

13 THE COURT: Overruled. Exception noted.

14 MR. SLENKER: May I have an exception, please?

15 A Could you rephrase it?

16 BY MR. POVICH:

17 Q Would you expect that she would have some feeling  
18 of dizziness or lack of balance or something like that?

19 A She could.

20 Q Would there be any difficulty that you would  
21 expect mentally in the sense of retention?

22 A She could have such a problem.

23 MR. SLENKER: I object and ask that that be stricken,

1 if Your Honor please. Mere possibility, could she.

2 THE COURT: You say she could. Is that within a  
3 medical degree of certainty, fifty-one percent of probability?

4 THE WITNESS: I can't put it in those terms. What  
5 I am saying is if she had it, it would not surprise me. It  
6 would be consistent with what had happened before.

7 THE COURT: Would you say it's likely or probable?

8 THE WITNESS: I can't say it's likely. I am saying  
9 it could happen.

10 THE COURT: I sustain the objection.

11 MR. SLENKER: Thank you, Your Honor.

12 BY MR. POVICH:

13 Q Are you saying, Doctor, that if she experienced  
14 this, that it would not surprise you?

15 A Correct.

16 MR. SLENKER: I still ask that it be stricken,  
17 Your Honor. It has not changed its stature since the last  
18 question.

19 THE COURT: Go ahead.

20 BY MR. POVICH:

21 Q Rather than my taking this bit by bit, what type  
22 of experience generally would you expect her to have as a  
23 matter of reasonable medical probability given her course

1 of hospitalization and --

2 A (Interposing) I have trouble using the word  
3 probability. What I'm saying is I have cared for numerous  
4 patients who have had long, stormy, complicated courses.  
5 And some of these patients have the kind of symptoms that you  
6 are describing, and some of them do not.

7 Q Were you able to converse with her during the  
8 course of her hospitalization?

9 A There were periods during her hospitalization where  
10 I conversed with her.

11 Q What was her condition insofar as her mental  
12 condition, anxiety, if any?

13 A During those periods where she couldn't converse  
14 she had no anxiety. She was in a coma.

15 Q Yes, I know.

16 Afterwards.

17 A Afterwards at certain -- at many instances, she had  
18 a great deal of anxiety and a great deal of discomfort.

19 Q Can you tell us that she expressed any depression  
20 or symptoms such as that to you?

21 A She had severe depression at times, yes.

22 Q Severe depression at times?

23 A Um-hum.

1 Q Did you feel that these complaints were justified  
2 given her circumstances?

3 A These kinds --

4 MR. SLENKER: (Interposing) Objection, Your Honor.  
5 What materiality would that have? Whether they are justified  
6 or whether they are not? If he is being offered as an expert  
7 in the field of nephrology, then he ought to be able to  
8 frame a question that a doctor can answer with reasonable  
9 medical certainty without getting into an area of speculation  
10 and conjecture, which is where we have been for the last five  
11 minutes.

12 THE COURT: Overruled.

13 BY MR. POVICH:

14 Q I simply want you to relate to me what you were  
15 able to observe, Doctor, insofar as her general discomfort.

16 A I observed her in hospitalization periods of  
17 depression, anxiety periods of extreme discomfort. I felt  
18 these were quite consistent with the hospital course that  
19 she had had.

20 Q Doctor, can you relate percentagewise the portion  
21 of the period of hospitalization which is attributed in your  
22 opinion based upon reasonable medical certainty to the  
23 urological injury which you have placed as occurring at or

1 about the time of surgery?

2 A I think there are two answers. Without the  
3 pulmonary embolism, I think the entire course beyond the  
4 usual stay for surgery would be attributed. I think with  
5 the pulmonary embolism, that that would keep her in the  
6 hospital for eight or ten extra days beyond about the 18th or  
7 16th of August. In other words, even with the pulmonary  
8 embolism, by the 28th or 26th of August, she would have  
9 been discharged.

10 Q You say what day of August?

11 A Anything after August 28, approximately, I think,  
12 would be attributable to the urological problems.

13 Q Given the fact that she had urological injury in  
14 your opinion at the time of the surgery, wouldn't she have  
15 had to have been hospitalized during that time anyway for  
16 the urological problems?

17 A Yes.

18 Q Is it fair to say then that the period of  
19 hospitalization insofar as number of days is concerned would  
20 have been essentially the same but there were pulmonary  
21 services rendered to her in addition to the urological  
22 services?

23 A That is correct.

1 Q So, if we talk in terms of numbers of days,  
2 essentially those would have been the same?

3 A Correct.

4 Q What portion of your fees for which you charged,  
5 Doctor, would you relate to her urological problems?

6 A A hundred percent.

7 Q A hundred percent.

8 May I ask you what your bill was for care and  
9 treatment?

10 A Approximately or exactly? \$1145.

11 Q Now, this amount covered the services that you  
12 rendered to her which you attribute to her urological  
13 problems?

14 A Right.

15 Q Just one last question. You said that you thought  
16 the catheter would assist in preventing the injury if installed  
17 preoperatively?

18 A Yes.

19 Q Why?

20 A It would have allowed more ready identification  
21 of the ureter during surgery. And with definite identification  
22 of the ureter, one would think that injury would be extremely  
23 unlikely for the injury to occur if a catheter was in the

1 ureter and it could be readily palpated.

2 MR. POVICH: Thank you. I have no further  
3 questions.

4 THE COURT: Mr. Slenker.

5 MR. SLENKER: Thank you, Your Honor.

6 CROSS EXAMINATION

7 BY MR. SLENKER:

8 Q Dr. Strauch, you can still have injury to the  
9 ureter notwithstanding the presence of the catheter, can you  
10 not?

11 A Excuse me?

12 Q You can still have injury of the type you say  
13 this lady had even with a catheter in place?

14 A Yes, sir.

15 Q Now, you mentioned earlier in your testimony  
16 that a catheter can be injured and you mentioned in two  
17 ways, I believe.

18 A I believe the ureter can be injured.

19 Q Ureter, excuse me, can be injured only in two  
20 ways?

21 A No. I said two likely ways in this case.

22 Q Two likely ways in this case?

23 A Um-hum.

1 BY MR. SLENKER:

2 Q Do you know whether or not OB-GYNs in doing the  
3 type of surgical procedure that was involved here do IVPs  
4 beforehand?

5 A No.

6 Q You don't know whether they do or they don't?

7 A Correct.

8 Q Are you familiar with whether or not the standard  
9 other than at Fairfax Hospital calls for catheters to be  
10 in place of IVPs to be done?

11 A I'm not so familiar.

12 Q You do not know that?

13 A Correct.

14 Q Now, when you say that it is your opinion that  
15 there was injury to the ureter on the 15th of August at the  
16 time of the surgery, are you saying that this man over here,  
17 Dr. Pugsley, caused this?

18 A Yes.

19 Q By what he did or by the procedure that was done  
20 on that day?

21 A By what he officially did.

22 Q In what regard?

23 A Could you explain to me what you mean? How does



1 a procedure cause something to happen?

2 Q How do you know precisely what it was that  
3 happened to the ureter during that procedure?

4 A I can't know precisely. I can only know with  
5 a very high probability.

6 Q Well then, how do you know if you don't know what  
7 happened to it? How can you testify as to what caused it  
8 or who caused it if anybody?

9 A I can only testify with high probability.

10 Q So, you could be wrong?

11 A I could be wrong. I think it's very unlikely.

12 Q Sir?

13 A I think it's very unlikely.

14 Q Oh, you do?

15 A Um-hum.

16 Q Are you saying that he didn't do the procedure  
17 right?

18 A The gynecological part of the procedure, I can't  
19 comment on in terms of the organs being removed. I assumed  
20 from the pathology reports they were removed.

21 Q Are you familiar with the fact that injuries of  
22 this type can occur even under the best of circumstances?

23 A I am not familiar that they occur under the best of

1 circumstances.

2 Q You are not?

3 A That's correct.

4 Q I see.

5 Do you have any knowledge as to where the rupture  
6 occurred in the ureter?

7 A It is clearly outlined on the X-rays.

8 Q Where was it?

9 A Several centimeters above the bladder.

10 Q How far from the ovary?

11 A Several centimeters.

12 Q Several centimeters away from it?

13 A Um-hum.

14 Q That's the left ovary?

15 A Um-hum.

16 Q Now, did you actually do the first study that  
17 you mentioned that involved the dye?

18 A I'm sorry?

19 Q Did you actually do the study that was first done  
20 when you entered the case with regard to the kidney function?

21 A No.

22 Q Who did?

23 A That's done in the nuclear medicine department of

## FURTHER REDIRECT EXAMINATION

BY MR. POVICH:

Q Just one question. You say it was shrunken. How would you compare it sizewise, the right kidney, to the left?

A I'd say approximately one-third.

Q Would that be the condition in your opinion which would have existed the instant before the operation or at the time of the operation?

A You mean --

Q (Interposing) The shrunken kidney?

A How long was it shrunken?

Q I am saying was that the condition of a dried up right kidney approximately one-third the size of the other one?

A At the time of surgery? It would have been the situation at the time of surgery.

MR. POVICH: Thank you?

THE COURT: Any further questions?

Do you want the Doctor excused or subject to recall?

MR. POVICH: He may be excused.

THE COURT: You may be excused.

(Witness excused.)

1 BY MR. POVICH:

2 Q Doctor, I want to take you through your course  
3 of treatment with Phyllis Privette. Would you please tell  
4 me when you first became involved with her care and treatment?

5 A I was asked to see Mrs. Privette in consultation  
6 on the 22nd of August, 1974, at Fairfax Hospital. Mrs.  
7 Privette was in the intensive care unit at that time.

8 Q Were you able to examine her at that time and  
9 review her chart?

10 A I was.

11 Q What was her condition?

12 A I would say at that point in time Mrs. Privette  
13 was in very critical condition, perhaps moribund.

14 Q What does that mean?

15 A Well, that's ultracritical. I would say perhaps  
16 close to death at that point in time.

17 Q Can you tell us something about her condition?

18 A Pardon me?

19 Q Can you tell us something about her condition?

20 A At that point in time, she had what we call a  
21 sepsis. It means overwhelming infection in the body, systemic  
22 infection.

23 At that point in time, her blood pressure was low.

1 She was comatose, responding partially to painful stimuli.

2 That would be all as best as memory serves me.

3 Q Doctor, did you embark upon a course of treatment  
4 or did you undertake any diagnostic tests in order to  
5 ascertain what should be done?

6 A Let me correct myself first. You asked me when  
7 I first saw her. Actually, the date I gave you was the  
8 cystoscopy. I saw her approximately forty-eight hours prior  
9 to that. I saw her forty-eight hours prior to that. And  
10 the date of the 22nd was the time of cystoscopy.

11 Q Who asked you to enter this case on a consulting  
12 basis?

13 A That's a little vague in my mind. But I believe I  
14 got a call from Dr. Strauch who had talked to Dr. Pugsley.

15 Q Tell us what you did insofar as your diagnosis  
16 and treatment of her, you yourself.

17 A When I first saw Mrs. Privette, I felt that anything  
18 we did might be the straw to break the camel's back so to  
19 speak, and might result in her death. Also at that time --  
20 so I was not anxious to do anything at that point in time  
21 unless it were absolutely necessary. Also at that point in  
22 time, Mrs. Privette's renal output began to improve. There  
23 was some thought that perhaps she was getting better.

1           Therefore, other than seeing her in consultation  
2 on the initial visit, I did nothing further at that point in  
3 time.

4           Q     When did you decide that something should be done  
5 and why did you do it?

6           A     Approximately forty-eight hours after seeing Mrs.  
7 Privette, she had indeed gotten even worse, if that were  
8 possible. And her -- she began to have urinary flow out the  
9 vaginal canal. And it was at that point that I decided the  
10 cystoscopy was absolutely necessary.

11          Q     What is the cystoscopy?

12          A     Cystoscopy is the method whereby we can insert what  
13 we call a cystoscope which is essentially a telescope into  
14 the bladder for purposes of visualizing the bladder. And  
15 through the instrument, we can also inject dye up into the  
16 kidneys to define the ureters which are the tubes from the  
17 kidneys if that be necessary.

18          Q     Was that performed?

19          A     Yes, it was.

20          Q     How are the results indicated in the cystoscopy?  
21 Is it a fluoroscope? Is it a printout?

22          A     As far as the bladder is concerned, it's a visual  
23 situation you can see. Insofar as anything above the bladder,

1 we are able to document it by X-ray.

2 Q In this instance, were you able to document some  
3 abnormality with her urinary function?

4 A Yes. We were able to document a break, if you  
5 will, a perforation of the ureter of the left kidney which  
6 is the tube leading from the kidney to the bladder, and  
7 also an obstruction of her right ureter.

8 Q Is this something that you have an X-ray on?

9 A There is one here, yes.

10 Q Could you show us on the X-ray? This break, is  
11 this what is known as a fistula?

12 THE COURT: The X-ray box is here, Doctor.

13 A Yes, this is a perforation in the ureter. And it  
14 is known as a fistula where it exits to the outside. I  
15 think the X-ray is on top there.

16 THE COURT: Counsel may position themselves so they  
17 can see. If members of the jury are unable to see, please  
18 tell us.

19 Are you folks able to see?

20 Doctor, why don't you step down, and we will move  
21 the view box right there so it will be easier for counsel and  
22 the jury to see.

23

1 BY MR. POVICH:

2 Q Doctor, let me see if I can get us oriented. First  
3 of all as to time, what was the date of this cystoscopy?  
4 Is it on the film?

5 A It should be. Yes, it's the 22nd of August, 1974.

6 Q Is this the film that you referred to previously?

7 A Yes, it is. It's one of them.

8 Q Now, it appears to be what? Is that the pelvic  
9 bone there and the spine that we see?

10 A Yes, it is.

11 Q Okay. Could you tell me how is the patient lying?  
12 On her stomach or her back?

13 A The patient is lying on her back with her legs  
14 in what we call stirrups being assisted and held up in the  
15 air.

16 Q Her left kidney would be on the side closest to you;  
17 is that correct?

18 A That is correct.

19 Q Would you tell us what you did and what the X-ray  
20 shows?

21 A At the bottom of the X-ray you see what looks like  
22 a pencil. That's essentially the cystoscope.

23 And at that point in time, after looking around the



1 bladder, a special catheter was placed in the opening in  
2 the bladder where the ureter, the tube comes down. It was  
3 left at that point being approximately where I'm pointing  
4 (indicating), and dye was injected up the ureter.

5 Q What happened?

6 A Well, normally the dye should go up the ureter  
7 and outline the ureter and up into the kidney.

8 Q Where would that be? What course would that follow?

9 A Normally, it would come all the way up the tube  
10 you see here and continue all the way up (indicating). And  
11 approximately in this region it would fill out certain  
12 portions of the kidney. In this case, it did not. It  
13 exited out of the ureter at this point (indicating).

14 Q Are you indicating is that the area of the fistula?

15 A Yes, it is.

16 Q Is there any other organ in that immediate area?

17 A Would you like to clarify that a little more?

18 Q Where are the ovaries?

19 A The ovaries would be located at that level and just  
20 in front of the ureter (indicating).

21 Q Is it fair to say then that the fistula occurred  
22 in the ureter at or about the location of the left ovary?

23 A Yes, anatomically I think that would be a fair

1 statement.

2 Q Now, is this line here the ureter (indicating)?

3 A Yes. That's the ureter portion of it at any rate.

4 Q Normally a person would have two kidneys and two  
5 ureters; is that correct?

6 A Normally, yes.

7 Q What did that film indicate to you with respect  
8 to the ureter on the right side?

9 A This film indicated nothing. We have another film  
10 that would indicate where the ureter on the right side had  
11 been approximately in the stomach.

12 Q Where would it have been approximately?

13 A It would have been over here. And the segment  
14 would be even shorter than what you see on this side.

15 Q Fine, Doctor. I am finished with that.

16 What did you do after having reached the conclusion?  
17 What conclusion did you reach then after having performed  
18 the cystoscopy?

19 A I'm sorry.

20 Q What conclusion did you reach with respect to after  
21 you did the cystoscopy?

22 A Several conclusions: one, that the urine coming  
23 out of the vagina was exiting from the left ureter through a

1 perforation in the ureter; and two, that the nonvisualization  
2 of the right kidney which we had seen on both the scan and  
3 the IVP was due to some obstructive problems that had occurred  
4 in the right ureter.

5 Q Was that obstruction of some time in the past?

6 A At that point if you are asking me it would have  
7 been difficult to tell, although subsequently facts were  
8 made known to us at a later surgery which would have verified  
9 indeed it was, although taking into account the fact there  
10 was total nonfunction on the right. With that finding, it  
11 had certainly not happened -- it had not happened in the  
12 immediate past. It had been in the more distant past.

13 Q So, it was a difficulty which had taken place at  
14 some considerable time in the past?

15 A Probably, yes.

16 Q Okay.

17 Now, Doctor, what did you do? I'm sorry. I  
18 interrupted you. You said there were several conclusions  
19 which you reached.

20 A Those were the ones having reference to the left  
21 side and the other having reference to the right side.

22 Q Fine. What did you do about that condition?

23 A It's known that if luck is with you, that if you

1 pass a catheter up, if you get a catheter up past the  
2 fistula side and can divert the urine away, that with luck  
3 the fistula may close. So, at that time I think passed a  
4 catheter successfully up into the left kidney and left it  
5 there.

6 Q Do you have a film showing that?

7 A There should be one there in the jacket.

8 Q Would that show then what would otherwise be the  
9 normal course of the ureter?

10 A Yes, it would.

11 Q Would you show us the location of the ureter after  
12 you put the catheter up?

13 A This was the site that we had previously demonstrated.  
14 And this is the contrast material or the dye running down into  
15 the vaginal canal (indicating). This is the catheter that we  
16 put up through this cystoscopy running up into the kidney.  
17 There is dye injected at this point so that you can see the  
18 inner structure of the kidney.

19 Q Doctor, what was your course of treatment of Mrs.  
20 Privette following the cystoscopy?

21 A The course really consisted of leaving the catheter  
22 up for a period of time. I do have some notes here as to  
23 dates. That was put up on the 22nd of August. Would you

1 like the entire course, Mr. Povich?

2 Q Not in great detail, but if you could, hit the  
3 more prominent dates.

4 A On the 31st of August, I didn't like the positioning  
5 of the catheter. So, I repositioned it under fluoroscopy,  
6 doing it while you can watch on a screen.

7 I removed the catheter on the 10th of September  
8 because leaving it up for long, long periods of time is not  
9 without its problems.

10 On the 18th of September, I tried a larger  
11 catheter than the one you see there and put it up. I  
12 didn't like its position by the 20th and inserted another  
13 one of the same size. This was left up for a period of time.

14 All of these catheters did help somewhat in that  
15 there was less urine through the fistula. However, they  
16 were not successful in getting the closure of the fistula.

17 On the 24th of September, due to other circum-  
18 stances as well, I operated on the left kidney and put a tube  
19 directly into the kidney to try and get maximal diversion  
20 of the urine away from the lower ureter.

21 At that time, I also explored the abdomen and  
22 drained a large abscess which was a pocket of pus, out of  
23 the lower abdomen. With the tube in, eventually the fistula

1 did close.

2 Q You mentioned that there was a pocket of an  
3 abscess, a pocket in which urine was collecting and abscessing?

4 A It was a pocket filled with essentially pus and  
5 a mixture of urine which didn't totally escape through the  
6 fistula.

7 Q Where was that?

8 A That would have filled this entire area (indicating).

9 Q How were you able to drain that?

10 A We had to make an incision over the abdomen and  
11 put multiple rubber tubes in to drain out the pus.

12 Q Notwithstanding the catheter, did Mrs. Privette  
13 experience any continuing leaking?

14 A I'm sorry. Would you repeat that?

15 Q You had the catheter up essentially in order to  
16 collect the urine, I assume, from the kidney and allow it  
17 to pass down and exit normally?

18 A Correct.

19 Q Notwithstanding that, was there some other  
20 accumulation of urine in the body that continued sometime  
21 after the 22nd?

22 A Yes. The catheter diverted some of the urine.  
23 A great majority of what was left came out of the vaginal

1 tract. And some collected properly in the pelvis and did  
2 manage to get out.

3 Q How were you able to drain that out or get rid  
4 of that?

5 A It probably came out on its own accord, but it was  
6 always being replaced by more urine. In other words, I think  
7 it eventually found its way out, each bit of it. But I don't  
8 suspect there is a free constant flow. Eventually, it was  
9 all drained out by the time of the operation I just described,  
10 the abdominal operation.

11 Q Is there anything in the record that indicated  
12 you took some rather unusual steps in order to collect the  
13 urine and drain it during the course of this period of  
14 hospitalization?

15 A Yes. It's very difficult. It was quite vital to  
16 keep track of the output. And with urine flowing freely  
17 out of the vaginal canal other than weighing the absorbing  
18 paper which would take it up, which is not the most accurate  
19 method, it's very difficult to collect it. So we did try  
20 an operation whereby a diaphragm was inserted into the  
21 vaginal canal. Is this what you have reference to, Mr.  
22 Povich?

23 Q Yes.

1           A     And a catheter was placed through a hole in the  
2     diaphragm. So, in essence, the diaphragm was turned into  
3     a doughnut, if you will, where the catheter passed through  
4     the hole. And this worked fairly accurately for a while  
5     as a drain to catch the urine.

6           Q     You mentioned the insertion of a tube into her  
7     kidney. Is this a nephrostomy?

8           A     Yes, it is.

9           Q     When approximately did that take place?

10          A     That was on the 24th of September.

11          Q     What was her condition at that time?

12          A     Her condition had improved up to a point just  
13     prior to forty-eight hours before doing the surgery. In the  
14     forty-eight hours prior to doing this operation, it had  
15     again began to deteriorate.

16          Q     When you say deteriorate, what was happening to it?

17          A     She was -- she was getting less responsive to  
18     conversations. Her fever was becoming uncontrollable. She  
19     looked worse. This is a clinical impression that one can  
20     derive after seeing many patients over a period of years.  
21     She was not doing as well as she had for several weeks.

22          Q     After you inserted the tube, the nephrostomy tube,  
23     what happened with respect to her condition then?



1           A     Coincidental with that, of course, was draining  
2     the abscess. So you have to phrase them together. And after  
3     doing both of those procedures, her condition began to improve  
4     markedly.

5           Q     You drained the abscess. Is this with the tubes in  
6     the abdomen?

7           A     Yes, rubber drains.

8           Q     How do you put drains in the abdomen?

9           A     Well, you have to make an incision. And at the  
10    time of making the incision, you drain out as much as you  
11    can with suction. And after that, you leave drains, and  
12    by giving the material an easy access to the outside, it will  
13    drain of its own accord.

14          Q     Do you recall how many drains you had in her  
15    abdomen?

16          A     I do not.

17          Q     Multiple?

18          A     I would say yes.

19          Q     Can you quickly outline how she did up until the  
20    time of her discharge? I believe it was on October 27; is  
21    that right?

22          A     I don't have that immediately here, but I think it  
23    was some time around then. Well, Mrs. Privette began to

1 improve markedly. By the time of her discharge, she had  
2 no further urinary drainage from the vaginal canal. And it  
3 was our hope that the fistula had closed.

4 An IVP at that point indeed showed a ureter coming  
5 all the way down to the bladder. And she was doing well  
6 enough that our impression was that the fistula had closed.

7 Q When she was discharged, what was expected insofar  
8 as her future course of treatment was concerned?

9 A Well, watchful waiting would have been the word  
10 at that moment. And our plan was to leave the nephrostomy  
11 tube in for at least another month and then to obtain X-rays  
12 by inserting dye through the tube; in other words, inserting  
13 dye through the tube into the kidney and letting it run down  
14 the ureter which should give us positive proof that the  
15 fistula had healed itself. Once knowing that, the tube could  
16 be removed. So that was the plan at that point in time.

17 Q How would the tube be removed? How could that be  
18 done?

19 A The tube can be pulled out, and for several hours  
20 through the day urine will drain out of the side. Within  
21 a relatively short period of time, the body will close this  
22 off.

23 Q This is the tube out the side of the body where the

1 kidneys are?

2 A Yes.

3 Q Did she have to be readmitted to the hospital for  
4 that?

5 A Yes. Ordinarily, yes.

6 Q Was that expected?

7 A Yes, that we would readmit Mrs. Privette, do the  
8 X-ray that I mentioned, and then pull the tube if the X-ray  
9 implied that.

10 Q So, she was really discharged then on October 27,  
11 on or about that time with the idea being that she would go  
12 home for about a month and then hopefully the matter would  
13 resolve to your satisfaction to the point that you could  
14 readmit her to the hospital for the purposes of removing the  
15 tube?

16 A Correct, yes.

17 Q All right. Now, did you do that?

18 A Yes, we did.

19 Q She was readmitted on what date? Does December 1  
20 ring a bell?

21 A Yes, approximately. Yes.

22 Q How long did you expect that hospitalization to  
23 last at the time you brought her in?

1           A     I expected it to be a very short hospitalization  
2 all things going well, just a matter of days. I did plan  
3 to repeat her cystoscopy during that stay as I wanted another  
4 look at the right ureter.

5           Mrs. Privette unfortunately spiked a high fever  
6 following the putting in of the instrument and manipulation,  
7 which is something that can happen on occasion. This  
8 warranted her stay for a considerably longer time. I don't  
9 remember exactly how long.

10          Q     The recystoscopy, if I can call it that, is that  
11 what you were doing?

12          A     Yes.

13          Q     The second cyctoscopy, what did that do to her  
14 system?

15          A     She -- Mrs. Privette, being quite febrile, she  
16 developed a high fever and became very sick from this. In  
17 other words, it flared up infection.

18          Q     The infection that had been present earlier --

19          A     (Interposing) I don't know.

20          Q     I see.

21                But she became infected?

22          A     She did.

23          Q     How long did she end up in the hospital on that

1 occasion?

2 A Let me see. I don't think I have that there.  
3 Certainly a week.

4 Q October 17?

5 A December.

6 Q I'm sorry. December 17.

7 I show you Plaintiff's 2 for identification which  
8 appears to be a bill and the admission date is December 1,  
9 '74. Does it indicate to you what the discharge date is?

10 A Yes, the 17th of December which would have been  
11 sixteen days approximately.

12 Q All right. Doctor, with respect to the period  
13 of hospitalization from on or about the 20th of August when  
14 you first saw her, is that right --

15 A (Interposing) Yes, right.

16 Q (Continuing) -- which would have been about five  
17 days postoperatively until October 17 when she was discharged  
18 on the first admission, will you tell us how much of her  
19 hospital bill would have been associated with the urologic  
20 injury during that period of time in which you were following  
21 her care?

22 A If I can include the December admission in that --

23 Q (Interposing) Yes.

1           A    (Continuing) -- that would be approximately  
2   \$1620.

3           Q    That's your bill?

4           A    That's correct.

5           Q    How much of that is related to the urologic problem?

6           A    All of it.

7           Q    Could you tell me insofar as the hospital care is  
8   concerned, from the time that you entered the case and  
9   began the cystoscopy, say, in the 22nd, whether or not that  
10   was associated as well with her urological problem?

11          A    I'll have to think about that, Mr. Povich. I  
12   would say that the vast majority of it was.

13          Q    Had her other problem in the form of a pulmonary  
14   embolism begun to resolve itself?

15          A    Yes, it had.

16          Q    Fairly early in her hospitalization?

17          A    Yes, it had.

18          Q    I show you, Doctor, an entry in the record or  
19   physician's progress notes of Dr. Fusco. Is Dr. Fusco at  
20   that time as of August 23 concerned essentially with the  
21   pulmonary problem?

22          A    Yes, I believe he was.

23          Q    All right. Would you look at that entry on the

1 23rd of August and indicate at that point whether Dr. Fusco  
2 felt the primary problem at that point was the pulmonary  
3 problem or whether or not he felt Dr. Strauch should take  
4 over because of the urological problem?

5 MR. SLENKER: If Your Honor please, I make objection  
6 to the note in view of the fact it comes from an exhibit  
7 that is in evidence which will speak for itself.

8 THE COURT: Sustained. You can ask him to read  
9 the note if you want to.

10 BY MR. POVICH:

11 Q Sure, Doctor. Read the note.

12 A Fortunately I can read his writing. "Lungs clear.  
13 No pneumothorax. Will double clamp chest tube and if lungs  
14 still expand, chest tube may be removed." He then gives some  
15 technical aspects as to how much Mrs. Privette is getting.  
16 "I feel respiratory problem very stable and needs only to be  
17 monitored with daily blood casts and chest X-ray over weekend.  
18 Therefore, since primary problems are general urinary  
19 infection and central nervous system, I believe Dr. Strauch  
20 should assume primary care."

21 Q What is the date of that?

22 A 23rd of August.

23 Q My last question, Doctor, what kind of difficulties

1 would you expect that Mrs. Privette would experience following  
2 her discharge, the second discharge on December 17 insofar  
3 as her physical condition was concerned and her well-being.

4 A Well, at that point in time, I would expect both  
5 some physical and mental difficulties. I would expect --

6 Q (Interposing) You say physical and mental?

7 A Yes. After that long a hospitalization and being  
8 that ill, I would expect it would take her some time to  
9 regain her strength.

10 I would also expect that she would have depression  
11 and some emotional problems as most patients I've seen do  
12 as going through that trying period.

13 Q Would you expect her to have some difficulty, any  
14 weakness?

15 A Yes. I would expect some weakness for that  
16 period of time.

17 Q Have you had occasion to recently check her  
18 urological system?

19 A In the fall, yes. We had, I believe, an IVP and  
20 some kidney function tests.

21 THE COURT: Fall of '76, Doctor?

22 THE WITNESS: Yes.

23



1 BY MR. POVICH:

2 Q Is the kidney function and her urinary function  
3 normal at this time as of the last time you saw her?

4 A No, I couldn't say that it is. Her IVP or the  
5 kidney X-ray anatomically looks good. The chemical tests,  
6 what we call a creatinine clearance, is not normal.

7 Q Do you think that she is somewhat more vulnerable  
8 to future difficulty than another individual as a result of  
9 this period of hospitalization?

10 A Well, let me answer that two ways. As regards the  
11 injury to the ureter or as regards the ureteral problem,  
12 the further out we get, the less chance there is for a  
13 problem. But there is always a problem with scarring which  
14 may last for some years, possibility of scarring around the  
15 tube.

16 As regards the function, the kidney function is  
17 quite all right for doing everyday activity. But there is  
18 perhaps less margin of reserve.

19 Q What if her situation should put her in future need  
20 of an operation in and about that area, would you --

21 MR. SLENKER: (Interposing) I object to this, if  
22 Your Honor please. It is totally in the area of speculation  
23 for him to say should she need another operation when there

1 hasn't been anybody that has even suggested that.

2 THE COURT: Sustained. Ask her with reasonable  
3 medical certainty what is the need for a future operation.

4 MR. POVICH: I will leave it at that. Thank you.

5 THE COURT: Mr. Slenker.

6 MR. SLENKER: Thank you, Your Honor.

7 CROSS EXAMINATION

8 BY MR. SLENKER:

9 Q Dr. Berger, with regard to the weakness that you  
10 spoke of after her discharge, do you have an idea as to how  
11 long that might last within reasonable medical probability?

12 A That's a very difficult question, Mr. Slenker.  
13 Most patients that I see have not had that degree of  
14 hospitalization fortunately. If I would take the average  
15 operation, I would say three months. I would say -- to give  
16 you a ball park figure, I would think that by one year  
17 following the surgery barring other problems, that physical  
18 strength should be returned. There may be other factors that  
19 enter into it.

20 Q All right.

21 Now, it is true, is it not, that if something  
22 happens to one of the kidneys in a person, the other kidney  
23 will take over the function of it?

1 BY MR. SLENKER:

2 Q In what instances?

3 A They are done to get the lay of the land so to  
4 speak. That is, they are sometimes done prior to surgery  
5 if one will be operating in that area. They are also done  
6 in evaluating high blood pressure.

7 Q I see.

8 Do you see any indication in this record or a  
9 reason why one should have been done on Mrs. Privette from the  
10 14th of August until the 19th?

11 A The -- may I consult something here? Yes, I do.

12 Q What would that be?

13 A Providing -- I qualify that, only to the point in  
14 providing her condition is stable enough to warrant it. Mrs.  
15 Privette's BUN, which is a measure of kidney function, began  
16 to go up on the 17th and 18th. And at that point, one might  
17 have thought she should have an IVP.

18 Q How about prior to the surgery from the 14th up to  
19 the time of surgery on the 15th? Do you see anything in the  
20 record to indicate the necessity for an IVP?

21 A I think there would have to be a determination,  
22 Mr. Slenker, that the obstetrician or the gynecologist would  
23 have to make since he is the one who is going to be doing that

1 Q (Interposing) All right. But within reasonable  
2 medical probability, this is your opinion, is it not, with  
3 reference to this point?

4 A Yes. It could form an abscess within twenty-four  
5 hours.

6 Q All right. That's my next question. If we assume  
7 that urine is escaping, let's say from the 15th of August,  
8 into the area outside the peritoneal and it's laying there,  
9 you would expect an abscess to form what, within twenty-four  
10 hours or within forty-eight hours or within what period of  
11 time?

12 A No. Again, I can't give you a definite answer.  
13 I would not be surprised if one were to form within twenty-  
14 four hours. I would not be surprised if it were to take  
15 five or six days.

16 Q All right, sir.

17 When you did your procedure on the 22nd of August,  
18 did you find any localized abscess?

19 A No.

20 Q So, she goes a full seven days without the formation  
21 of abscess, does she not?

22 A There was no -- we did not think that there was  
23 an abscess at that point. So, to answer your question, it

1 would appear that she had no abscess then.

2 Q All right, sir. As a part of your retrograde that  
3 you did on that day, you also did a cystoscopy, didn't you,  
4 before you did the retrograde?

5 A Yes, correct.

6 Q In the cystoscopy, you take your instrument and  
7 look into the bladder?

8 A Yes.

9 Q Now, the area that we are talking about here is  
10 below the bladder, is it not?

11 A Which area is that, sir?

12 Q Where you say that the opening in the ureter is?

13 A No. We haven't reached the bladder at that point.

14 Q It has not reached the bladder at that point?

15 A That's correct. The bladder would be below that.  
16 In other words, we are talking about the same spot. This  
17 area where the dye is exiting is before the ureter reaches  
18 the bladder.

19 Q All right.

20 Is it true, therefore, that whatever was escaping  
21 from that fistula by way of urine came from the kidney itself  
22 before it got to the bladder?

23 A Yes, that's correct.

1 Q All right.

2 That urine that reaches the bladder from the  
3 kidney and does not go out through the fistula is the  
4 patient's normally produced urine, is it not?

5 A It is.

6 Q Once again, Doctor, excuse me. It's my deficiency.  
7 Is this above or below the bladder where you see the dye  
8 there?

9 A It, of course, depends upon the direction you are  
10 coming from. If you are talking about from the kidney to  
11 the bladder, it's before you get to the bladder. If you  
12 are going via the bladder, then it's above the bladder and  
13 on the way to the kidney.

14 Q All right. Fine.

15 When you did your cystoscopy and looked in the  
16 bladder, what did you see?

17 A When we looked into the bladder, it was very  
18 difficult to get good visualization because there was a lot  
19 of debris floating around, what one sees with infection.

20 We were able to ascertain that there were no tumors  
21 or other problems in the bladder. And we were able to  
22 visualize reasonably easily the opening on the left where the  
23 left ureter entered into the bladder and later on with more

1 difficulty the area on the right where the right ureter  
2 was.

3 Q There was evidence, I take it, of infection in  
4 the bladder and in the urine that was in the bladder on the  
5 22nd, was there not?

6 A Yes, there was.

7 Q Does that not mean, Doctor, that the infection that  
8 was there came from the left kidney down the ureter and did  
9 not go out but went on down into the bladder carrying that  
10 infection into the bladder?

11 A Not necessarily, no. It may have come from the  
12 area around the opening of the ureter and come back into the  
13 ureter and down into the bladder. One could not say for  
14 sure.

15 I would say statistically chances are that it  
16 probably came from up in the kidney. But it could also have  
17 come from the pelvis. In other words, what comes out of a  
18 hole can always go into a hole. So, it may have gone back  
19 into the opening and down into the bladder.

20 Q You are saying if there is an opening there, the  
21 material can come out and material can go in?

22 A Yes. It just depends on how much pressure is there  
23 as to which direction it's going to go in.

1 Q Up to the 22nd when you did your test here, there  
2 was no test done by anybody that would show that portion of  
3 the ureter on IVP or indeed on retrograde?

4 A This is the first definitive test.

5 Q The IVP did not show that location of this ureter,  
6 did it?

7 A It did not.

8 Q Now, you mentioned in your direct testimony and  
9 indeed in response to my questions about injury to a ureter,  
10 those can come about in many ways, can they not, Doctor?

11 A Yes, they can.

12 Q How many can we think of right away?

13 A You know, as many as you want depending on the  
14 incident.

15 Q Within your area of urologic specialty, how many  
16 do you consider realistic and viable causes?

17 A Oh, I would think that we could talk in terms of  
18 ten, six to ten, maybe more depending on the degree of the  
19 injury and what we're talking about. And anything abnormal in  
20 the ureter can cause an injury to it or from the inside.

21 Q All right.

22 Now, can we get any evidence from the length of  
23 time that it took the fistula to close with reference to any



1 Q As a matter of fact, from your experience as a  
2 urologist, Dr. Berger, are most of the ureteral problems  
3 which you encounter diagnosed postoperatively?

4 A Yes, most of them are diagnosed postoperatively.

5 Q Aren't indeed about ninety-eight percent of them  
6 so diagnosed?

7 A I think that would be a reasonable ball park figure.

8 Q Now, if one can make the diagnosis of this type of  
9 complication early on the prospects of taking care of it are  
10 great, are they not?

11 A That's correct.

12 Q In this case, you were aware of her course following  
13 the surgery, were you not?

14 A Yes, I was.

15 Q She did very well, did she not, until about the  
16 17th of August?

17 A I believe that was the time of the pulmonary  
18 embolism.

19 Q Right.

20 A Yes.

21 Q Up until the 17th of August, is there anything  
22 at all that should lead one to even suspect the onset of  
23 any urinary or ureter complication?

1 A No.

2 Q Nothing at all?

3 A To the best of my memory, no.

4 Q All right.

5 Would you say or could you tell us, did the  
6 onset of the pulmonary embolism cloud the issue and encumber  
7 possible diagnosis of this complication?

8 A Yes. May I check my notes for a minute?

9 Q Certainly, Doctor.

10 A Now, could you repeat the question for me, please?

11 MR. SLENKER: Would you read the question, please?

12 (Question read.)

13 THE WITNESS: I would think very probably it might  
14 have. I wasn't in on the case at that point in time. But  
15 I would think that it might have.

16 BY MR. SLENKER:

17 Q Within reasonable medical probability, do you have  
18 an opinion on that?

19 A Yes, I believe it did with a reasonable probability.

20 Q That would be your opinion.

21 A I would think so, yes.

22 MR. SLENKER: All right. Thank you very much,

23 Dr. Berger. That's all I have.

1 THE COURT: Mr. Scanlon.

2 MR. SCANLON: I have no questions, Your Honor.

3 THE COURT: Redirect?

4 REDIRECT EXAMINATION

5 BY MR. POVICH:

6 Q Doctor, describe, identify, or define what this  
7 condition is right here. Do you want to define that as  
8 fistula, or would you like to define it some other way?

9 A Per se, that is not a fistula. I think I would  
10 just define it as urine contrast material in this case  
11 escaping from the ureter.

12 Q In your opinion, Doctor, when and how did that  
13 occur?

14 Let me ask you this way. What caused it from your  
15 review of this case and the chart? What in your opinion is  
16 the cause for that condition to have arisen and when did the  
17 cause arise?

18 A I can't cite the exact type of injury, Mr. Povich,  
19 because it was some type of injury to the ureter. And I  
20 would have to believe that it was at the time of surgery.

21 Q Now, Mr. Slenker has asked you about the fact that  
22 there may have been some urinary output, is that correct,  
23 shortly after surgery?

1 A I don't remember that specific question.

2 Q He was asking you about urine passing from the  
3 kidney into the bladder.

4 A All right.

5 Q Do you remember that? Have you had an opportunity  
6 to review urinary output with respect to this matter from  
7 the time of surgery to the time, say of the 22nd and  
8 thereafter?

9 A Yes.

10 Q Has that assisted you in coming to the conclusion  
11 which you just came to?

12 A Which conclusion specifically, Mr. Povich?

13 Q As to when the injury was caused and how it was  
14 caused.

15 A Yes, to an extent.

16 Q Would you explain that to us?

17 A All right. Mrs. Privette's recorded outputs of  
18 urine remarkably decreased from the day of surgery relative  
19 to the amount of fluid she was receiving. This can be a  
20 normal occurrence for several days, but this trend did  
21 continue.

22 Also the -- the BUN was recorded as elevated on the  
23 17th. I would guess the 17th. And with no known urinary

1 problem prior, medical probability would dictate that the  
2 only intervening event being surgical procedure, that we are  
3 talking about the day of surgery.

4 MR. POVICH: I have no further questions, Your  
5 Honor.

6 THE COURT: Recross.

7 MR. SLENKER: Yes.

8 RE CROSS EXAMINATION

9 BY MR. SLENKER:

10 Q When you say that it was at the surgery, are you  
11 meaning to infer that this problem was caused by Louis Pugsley?

12 A What I'm saying is that looking at everything, that  
13 whichever injury occurred to the ureter occurred at the time  
14 of the surgical procedure during the surgery.

15 Q All right.

16 I take it you are not saying that he did it, are  
17 you?

18 A It was done. Dr. Pugsley was the surgeon. When  
19 you say he did it, I don't quite understand what you mean.  
20 Knife in hand or retractor, it's hard to say.

21 Q Any way. Can we say? Any way.

22 A Again, I think I would stand on my prior answer  
23 that it was done at the time of surgery.

1 Q Can the same injuries occur under the best of  
2 surgical procedures and techniques?

3 A Yes, they can, certainly can.

4 Q All right. Is there anything in the record here  
5 that would indicate to you or would form the basis for your  
6 opinion within reasonable medical certainty as to whether  
7 or not this was an injury actually accomplished mechanically  
8 by Dr. Pugsley or whether it's something that comes from the  
9 natural and inherent insult of the procedure itself?

10 A That's hard to make a stipulation, but I would say  
11 no.

12 Q You cannot tell, can you?

13 A No, you cannot.

14 MR. SLENKER: Thank you, Doctor.

15 THE COURT: Anything further?

16 FURTHER REDIRECT EXAMINATION

17 BY MR. POVICH:

18 Q Insofar as reasonable probability is concerned,  
19 if it happened at the time of surgery insofar as what the  
20 surgeon did, his operative procedure, would it happen  
21 otherwise as a result of some spontaneous condition? Are  
22 those the alternatives?

23 A Would you rephrase that once more, please?

Q It either happened at the time of surgery as a result of what the surgeon did, his procedure which he followed, or it happened not as a result of that but as a result of some other spontaneous injury, did it not?

A Right. We are not talking about a spontaneous injury.

Q In this case, what in your opinion caused that injury? Surgical procedure?

A Surgical procedure, yes.

**THE COURT:** Do you have any further questions?

MR. SLENKER: I have none.

THE COURT: Do you want him excused or subject to recall?

MR. POVICH: He may be excused..

**THE COURT:** Do you object to his being excused?

MR. SLENKER: No.

(Witness excused.)

THE COURT: All right. We will take about a fifteen-minute recess at this time with the same admonition I gave you at the start of trial.

(Whereupon, a short recess was taken.)

MR. POVICH: Your Honor, at this time I would like to read to the jury an entry in Volume 2 which would be

1 checked."

2 Q Did you check your blood pressure or have it checked?

3 A I had a physician do it.

4 Q What was your blood pressure?

5 A It averaged 140 over 90.

6 Q Were you taking anything for it?

7 A I had been taking a diuretic approximately twice a  
8 week.

9 Q Were you taking it before the time that Dr. Pugsley  
10 did the vaginal examination?

11 A Yes, I was.

12 Q Was he aware of that?

13 A Yes, he was.

14 Q Now, Mrs. Privette, directing your attention now  
15 to the time of your admission in August of 1974, I believe  
16 that you have described the arrangements which you made with  
17 Dr. Hall and the scheduling of that operation you said at  
18 that time when Dr. Hall would be available.

19 A Yes.

20 Q Would you tell us what happened on the morning of  
21 August 15 insofar as your being taken to the operating room?

22 A Well, I was taken from the floor that I was on  
23 and taken down to the operating room floor. And I was taken



1 into the stand-by room.

2 Q Is that called a holding area?

3 A It's called a holding area where the patient is  
4 kept until they are ready to put them in the operating room.  
5 This also is the room where the anesthetist comes in and  
6 starts your IV.

7 While -- I was taken in there. And Dr. Pugsley  
8 came in while I was there, and the anesthetist came in while  
9 I was there.

10 Q Is the anesthetist --

11 A (Interposing) The anesthetist was a female. She  
12 came in, started my IV, and I asked her if Dr. Hall were  
13 there. And she said she did not know, but that she would  
14 check.

15 Dr. Pugsley came in. And he had his scrub suit  
16 on, and he said, "Good morning." And I asked him if Dr.  
17 Hall were there, and he didn't know. While the anesthetist  
18 was there, she started the IV, and that was all.

19 Q Had you earlier had a discussion with Dr. Pugsley  
20 about Dr. Hall being present?

21 A Oh, yes.

22 Q What was that discussion?

23 A Well, I had one with him -- I had one with him in

1 his office in June. I had one in his office with him in  
2 one week before surgery when I spoke to him about the  
3 venereal warts.

4 Q What was that conversation with respect to Dr. Hall  
5 being present?

6 A On which occasion?

7 Q The second.

8 A Well, it had been set up with Dr. Hall's office.  
9 It had been set up with Dr. Pugsley's office that I was to  
10 have Dr. Hall present.

11 Q Did you tell him, Dr. Pugsley, that he was to be  
12 present?

13 A Oh, yes.

14 Q He was aware of that?

15 A He was aware of that.

16 You want the exact words that were said?

17 Q If you can recall.

18 A Well, I explained to Dr. Pugsley that it was not  
19 that I didn't have confidence in him because if I didn't,  
20 I wouldn't be there; but that I realized that he was a  
21 gynecologist, and that the bleeding that I was having was  
22 for some unknown reason. And I would feel more comfortable  
23 to have a surgeon there.

1           And I told him that I planned to do this before  
2 I talked to Dr. Hall. I told him that I wanted to do it  
3 when I had my visit with him in June at the first time that  
4 we started to make arrangements to have surgery. Then when  
5 I saw him in August one week before surgery, I assured him  
6 that the arrangements had been made. I also spoke with his  
7 office on the telephone in between times, and they knew that  
8 everything was set.

9           Q     Now, you say you had a conversation with Dr.  
10 Pugsley in the holding area outside the operating room --

11          A     (Interposing) Right.

12          Q     (Continuing) -- on the morning of the 15th, the  
13 morning you were operated on?

14          A     Yes, I did.

15          Q     You asked if Dr. Hall was present?

16          A     I did.

17          Q     What did Dr. Pugsley say?

18          A     Dr. Pugsley didn't know where he was, but that he  
19 would look.

20          Q     What was your conversation with the nurse? Did  
21 she indicate what if anything she would do?

22          A     Well, she was going to look, too.

23          Q     Then what is the next thing that occurred insofar

1 as you were concerned?

2 A Well, the next thing that happened of any  
3 significance was that the anesthetist and someone took me  
4 into the operating room.

5 Q When you got into the operating room, what occurred  
6 that you recall?

7 A Well, there were -- there were three women and one  
8 man. Dr. Pugsley was not in the room at that moment. And  
9 I exchanged good mornings. And the young man that was  
10 standing there -- may I go back a moment, please, for  
11 something that I forgot?

12 Q Sure.

13 A When Dr. Pugsley -- when I had seen Dr. Pugsley  
14 in June -- on August 7, a week before surgery, I had reminded --  
15 I had told him I had some venereal warts, and I wanted them  
16 removed. And he said, "Don't forget to remind me," because  
17 you have to turn the patient over, I'm told, in surgery  
18 to take care of this.

19 So, in the holding room, I also -- it was just  
20 engraved upon my mind, don't forget the venereal warts.  
21 So, I reminded him in the holding room about the venereal  
22 warts, also.

23 Then when we -- I got into the operating room, and

1 the young man was standing there. He told me that he was  
2 going to assist Dr. Pugsley in this surgery. And I said to  
3 him also, "Don't forget these venereal warts."

4 And then I was put over on the table from the  
5 litter. I was put over on the table and, you know, strapped  
6 down like you would be, and the blood pressure cuff put  
7 around my arm, and the IV was set up to go in.

8 And there was a discussion going on behind me,  
9 a voice of a woman that I cannot identify, and Dr. Pugsley.  
10 And the discussion was to the effect that I don't know where  
11 he is. He's not here. And then Dr. Pugsley walked around.  
12 The anesthetist was behind me and in this area (indicating),  
13 and Dr. Pugsley walked around to this area (indicating), and  
14 told me that Dr. Hall was not available, that he was in one  
15 of the other suites doing surgery.

16 And I said, "I do not want to be put to sleep until  
17 he gets here." And at that moment I felt the sodium pentathal  
18 hit my vein, and I remember nothing else.

19 Q What is the first time you do recall anything  
20 occurring thereafter?

21 A The second day of September.

22 Q How do you know it was that date?

23 A Because I remember opening my eyes, and my daughter

1 was standing over me. And I said, "What day is it?" And  
2 she said, "It's the second day of September."

3 Well, the second -- the second day of September  
4 she was supposed to have entered college. And I knew she  
5 was supposed to be there. And so I guess I was rather irate.  
6 And I said, "You are supposed to be in college. Why aren't  
7 you there?" And she said, "Mother, you are in very critical  
8 condition, and I'm here with you."

9 Q Now, Mrs. Privette, I don't want to take a great  
10 deal of time going through the course of your hospitalization  
11 until the time that you left on the 27th of October on that  
12 first admission. But I would like you to tell just briefly,  
13 succinctly, some of the experiences that you recall having,  
14 and not a great deal of them, just some of them that stand  
15 out more or less in your mind.

16 A Starting when, Mr. Povich?

17 Q From the time that you began to remember until the  
18 time you were discharged. But I don't want to take a lot of  
19 time with it. I would just like several instances that you  
20 recall that you felt particularly --

21 A (Interposing) Well, the bouts in the hospital,  
22 I am very fuzzy about. I remember things, and I don't  
23 remember things. It was just that way.

1           When I got home to the hospital -- from the  
2 hospital the first time, there was no one there except my  
3 two children and I. And they did the best they could because  
4 my -- my memory was not too good, and my disposition was  
5 even worse.

6           Q     Before you tell us what happened during that  
7 period of time, would you tell us some of the instances that  
8 you recall during the period that you can recall while you  
9 were in the hospital before you were discharged?

10          A     I had horrible nightmares. I -- I can remember  
11 the time when I felt as if I were up in a -- the upstairs  
12 looking down upon my own body, seeing all the tubes that  
13 were leading in and out of it, and seeing how wasted away  
14 that I looked.

15               And I knew that I had an obligation, that I had  
16 two children and they were my -- my support. They were mine.  
17 And I had the -- well, anyway, it was a very tough decision.  
18 It was as if though I could either say okay, God, I'm ready  
19 to go to heaven or I could say, all right, this is your job.  
20 You've got to go back and get in that body and you've got  
21 to survive. And because I lived my children, I decided that  
22 was the best way. That one incident.

23               The nightmares that went on were a struggle. I

1 could relate some of them to you, but they were always --  
2 I was struggling to get somewhere or I was struggling to  
3 get something done.

4 Q Did you have any physical difficulty that you were  
5 acutely aware of?

6 A Oh, I was so sore. I was so sore. And because --

7 Q (Interposing) Where were you sore?

8 A Well, my nose and my -- all the -- the membranes  
9 that -- mucus membranes from the massive doses of antibiotics  
10 that I had had. It did good things, but it also did bad  
11 things. And, oh, my whole mouth and nose were just encrusted  
12 with ulcers, and I was unable to eat. And with nasal oxygen  
13 going in my nose on top of this horrible thing -- ulcerated  
14 nose, it was most painful.

15 Also, because there was urine that was coming out  
16 of the vaginal area that was unable to stop, the catheter  
17 being in was unable to stop, my whole area, both vaginal  
18 area and anal area and the cheeks were just constantly raw  
19 because it was impossible to keep me dry.

20 Is this the type things you need?

21 Q Well, perhaps another instance or so would be fine.

22 A I know that I was put on an air mattress because  
23 just the pressure of lying on a bed was painful. My -- I lost



1 all my hair.

2 Q Mrs. Privette, you say you left the hospital and  
3 you were home for what, approximately a month?

4 A I left, I think, the 27th day of October, and I  
5 returned the 1st day of December.

6 Q At that time, what was your condition? Was there  
7 anything unusual about your appearance when you left the  
8 hospital?

9 A I had a tube that's called a nephrostomy tube that  
10 was inserted in my left side. It looks very much like a  
11 catheter except that it was larger and has a fluted end on it.  
12 There was a hole in my side, and this was stuck in the side  
13 and taped.

14 And in the daytime, I wore a bag on my leg so that  
15 I could manipulate. And at night it was put on a longer cord  
16 and usually hung on the back of the chair so that the flow  
17 would go into that. And I had to keep this on at all times.

18 Q Generally how did you feel during that one month  
19 before you went back to the hospital?

20 A I -- well, I was unable to walk for more than twenty  
21 steps when I came home. And the bedrooms in my house are  
22 upstairs. So, I tried fixing a room downstairs but the  
23 bathroom is also upstairs. So, I learned how to crawl up the

1 stairs.

2 Q Did you have difficulty going to the bathroom?

3 A Well, because of this urine seeping out all the  
4 time, my rectum had also become very inflamed. And from  
5 constantly being wet, I had had constriction of it. So that  
6 before I left the hospital, Dr. Berger had dilated it for  
7 me. And then I had to constantly keep it dilated. And to  
8 have a stool required and still requires digital manipulation.

9 Q When you went back into the hospital in December  
10 on the 1st of December, how long had you expected to be in  
11 there?

12 A I'm sorry, Mr. Povich. I can't hear you.

13 Q When you went back into the hospital the first  
14 of December for the purpose of having the nephrostomy tube --

15 A (Interposing) Right.

16 Q (Continuing) --how long did you expect to be there?

17 A I was told I would be there three days.

18 Q And that was prolonged; is that correct?

19 A Yes.

20 Q You were finally discharged on December 17; is  
21 that right?

22 A That's right.

23 Q Where did you go? Did you return home?

1 A I returned home.

2 Q How were you able to get along after that?

3 A Well, it was better than it was after the first  
4 time I came home. I had gained strength. Mentally I was  
5 confused. I found that I could not relate one thought with  
6 another in a chain of events. I was very forgetful even to  
7 the point of my children telling me something and as youngsters  
8 will be, when I act as if though I had never heard this  
9 before, they became upset with me as though I told you; I  
10 told you before. And this was frustrating to me.

11 Q Did there come a time in which you tried to go back  
12 to work?

13 A Yes, I did.

14 Q When was that?

15 A The first time I tried returning to work was in  
16 December of '75.

17 Q Where did you try to return to work to?

18 A I beg your pardon. I tried before that.

19 Q Yes.

20 A I -- I had been formerly employed in a doctor's  
21 office.

22 Q Who was that doctor?

23 A Dr. William Carver Amos, Jr. I had been employed

1 by him when I went in the hospital. And he had told me that  
2 when I --

3 MR. SLENKER: (Interposing) I object to the  
4 hearsay.

5 THE COURT: Sustained.

6 THE WITNESS: I was employed by him. And when I  
7 was capable, I was going to go back to work for him. So, I  
8 went to his office.

9 BY MR. POVICH:

10 Q How long had you been employed by him previously?

11 A Two years and two months.

12 Q Did you anticipate returning to his employment as  
13 soon as you recovered from your operation at the time you  
14 went in for the operation?

15 A Well, I went to surgery during our vacation so I  
16 would be able to go back to work as soon as vacation was over  
17 with.

18 Q Do you recall how much money you had made with him  
19 for the year prior to your hospitalization approximately?

20 A I would say approximately \$8,000, 8,000 --

21 Q (Interposing) Between seven and 8,000?

22 A Approximately.

23 Q When you went to Dr. Amos, you say that was

1 approximately when in order to resume?

2 A It was in the fall of '75.

3 Q Of '75.

4 Did you visit with Dr. Amos?

5 A Well, I made an oppointment to come by and see  
6 him to be employed again to talk to him about it.

7 Q After your discussion, did you reach any conclusion  
8 as to whether or not you would be rehired?

9 A He was very emphatic about it. He said I was not  
10 capable.

11 Q All right. You can't say what he said.

12 A I was not able to do it.

13 Q You say that was in the fall of 1975?

14 A That was in the fall of '75.

15 Q Thereafter, did you seek sometime during 1975 to  
16 obtain employment?

17 A I made application to Homemakers Upjohn. And I  
18 did do some private duty with a newborn baby in December of  
19 1975.

20 Q How much work did that require?

21 A Well, the mother had a back injury. And she was  
22 unable to take the child from the bassinet and the lifting  
23 part of the baby, the newborn baby in the position that you

1 have to be in. It was all that she couldn't do.

2 Q Did you do that for her?

3 A Yes. I was able to do that and to feed the baby  
4 on occasion, and the position that you have to be in to change  
5 a diaper in a bassinet. The mother could not bend. So, I  
6 did this.

7 Q How long did that job last?

8 A Well, it was only part time. And I -- as best I  
9 recall, it was over a period of three weeks. But only on  
10 one or two times during the week.

11 Q Do you recall how much you were paid for that at  
12 the time?

13 A It was in excess of \$100. Maybe \$130.

14 THE COURT: Was it the entire period?

15 THE WITNESS: No, sir. I only worked part time.

16 THE COURT: Is that what you mean, the entire  
17 period \$130?

18 THE WITNESS: Yes, sir.

19 MR. POVICH: Can we have this marked, Your Honor?

20 THE COURT: Plaintiff's Exhibit 4.

21 MR. POVICH: We have had this marked for  
22 identification.

23 THE COURT: 5 and 6.

1 MR. POVICH: W-2 forms for 1974.

2 (The wage and tax statements  
3 previously referred to were  
4 marked Plaintiff's Exhibit  
5 No. 4 for identification.)

6 (The 1976 W-2 forms  
7 previously referred to were  
8 marked Plaintiff's Exhibits  
9 No. 3 and 4  
10 for identification.)

11 MR. SLENER: May we approach the bench, Your Honor?

12 THE COURT: Yes, sir.

13 (The following proceedings were had at the  
14 bench by Court and counsel out of the hearing of  
15 the jury.)

16 MR. SLENER: *On* Of these three documents, we would  
17 object to their admissibility. I think they are not within  
18 the parameters of recoverable damages in a case like this.  
19 This represents the amount she actually received. I think  
20 the recoverable damages are said to be the amount that is  
21 allegedly lost and tied in.

22 MR. POVICH: Your Honor, she lost the full salary  
23 from her work less what she made.

1 THE COURT: Are you offering this in mitigation?

2 MR. POVICH: Yes.

3 MR. SLENKER: There's been no evidence of what  
4 amount she would have earned if anything.

5 MR. POVICH: She would have earned what her job  
6 was at the time when she was going to go back --

7 THE COURT: (Interposing) You are claiming she  
8 would have earned 8,000 had she been working the whole time?

9 MR. POVICH: Yes.

10 MR. SLENKER: Whatever.

11 THE COURT: She just said she earned seven or  
12 eight thousand dollars.

13 MR. SLENKER: The year before.

14 THE COURT: Yes.

15 MR. SLENKER: That establishes what she earned in  
16 that year. In light of her testimony with her conference  
17 with Dr. Amos, how does it flow by any logical, legitimate  
18 manner that she would have earned that same amount of money  
19 more or less in subsequent years?

20 But the point is that these are offered for no  
21 recognizable purpose as I see it. The measure of damage is  
22 the amount of loss, not the amount of what she got. He  
23 says it's in mitigation. I'm saying in mitigation of what.



1 There isn't any evidence of what she would have earned.

2 MR. POVICH: I have asked her what her annual  
3 salary was, Your Honor. I can't prove the negative unless I  
4 can establish her salary which was the year preceding, which  
5 was the job she expected to return to. I'll have Dr. Amos  
6 on the stand.

7 THE COURT: You are going to call Dr. Amos as a  
8 witness?

9 MR. POVICH: Sure. But I think it's only fair we  
10 put in the fact she did make some money and that should  
11 be subtracted from what she expected to make.

12 MR. SLENKER: It might well be that there will be  
13 somebody that says she lost X number of dollars or that loss  
14 was a result of something which would be attributable to these  
15 defendants. But as the record now stands, that's not the  
16 case. The only evidence we have from his doctors is Dr.  
17 Berger that said he would have thought it would have been  
18 three months, I think, but at the outside it was one year,  
19 see.

20 MR. POVICH: That would take you through December  
21 just about.

22 MR. SLENKER: Where is the evidence that she had  
23 the capacity but for this injury to earn what amount when?

1 THE COURT: You have got Dr. Amos coming on this  
2 point. I'll just reserve on it until Dr. Amos comes.

3 MR. POVICH: Can I have it identified?

4 THE COURT: Yes, sir.

5 MR. POVICH: Can I have her identify them?

6 THE COURT: Certainly. You don't have any  
7 objection to her identifying them?

8 MR. SLENKER: As long as she doesn't testify to  
9 the amount.

10 THE COURT: There isn't any objection to leading  
11 on this.

12 MR. POVICH: Your Honor, if we feel there's been  
13 sufficient connection with Dr. Amos, we will move them in at  
14 that time.

15 THE COURT: Okay.

16 (Thereupon, the following proceedings w  
17 continued in the hearing of the jury.)

18 BY MR. POVICH:

19 Q Mrs. Privette, I show you what has been marked as  
20 Exhibits 4, 5, and 6, and ask, without your telling me what  
21 the amounts are, whether or not these represent W-2 forms,  
22 No. 4, for your salary or your earnings in 1975; is that  
23 correct?

1           Q     The two that I have shown you marked 5 and 6, they  
2 represent your earnings in 1976?

3           A     That is correct.

4           Q     Mrs. Privette, after this first experience in caring  
5 for the newborn, did you then seek employment during 1976  
6 as well with the same agency?

7           A     Well, when you go on this roster with Homemakers  
8 Upjohn, they -- they keep your name and your address and  
9 the hours that you are willing to work. It's like the  
10 register. And then they know what your qualifications are.  
11 They know the type of work and what your background is. So  
12 when they get a case of this type, they will call you. So  
13 when they got them, they called me.

14          Q     As a result of that, did there come on occasion  
15 times when you were able to work as a private duty nurse?

16          A     Yes, I did.

17          Q     How were you able to function? How did you do?

18          A     Well, I did not -- I had many limitations in that  
19 I could not lift. I also -- when I was on the floor, if --  
20 to stoop on the floor, to rise again, I either had to pull  
21 myself up by my hands or get on all fours, my hands and my  
22 feet to get up.

23          Also, if I had more than two things to do at one time,

1 it was very hard to concentrate or to differentiate. As you  
2 will see, I had a job there with a pediatrician, Dr. --  
3 Hanfling Pediatric Associates, and this was at a pediatrician's  
4 office. And when I was told to give an injection to one  
5 child and -- of we'll say measles, and to give a DPT to another  
6 child that was in the same room, unless I wrote it down and  
7 wrote the child's name down and wrote their age down so that  
8 I would not get the drugs mixed up, it was very confusing for  
9 me. And when you work in a pediatrician's office, you don't  
10 have time to do that type of thing.

11 Q How did that work out?

12 A Well, I tried very hard for a long time. And I  
13 kept trying to find ways that I could do it. And the doctors  
14 understood the situation, and they were very tolerant. But  
15 finally the time came after only a few weeks, and as I was  
16 only working two or three hours at a time there, after only  
17 a few days, or you can tell by the W-2 form that I did not  
18 work long. After only a few days -- or a few weeks, I beg  
19 your pardon, it was decided that it was more than I could  
20 cope with.

21 Q As of this time right now, do you feel that you  
22 are able at this point to do nursing and that you'll be able  
23 to do so in the future?

1           A     Well, I look forward to it. I plan to, and I  
2 certainly want to.

3           Q     Is there any reason you feel now is preventing  
4 you from doing that?

5           A     I beg your pardon?

6           Q     Is there any reason now that you feel you are  
7 having difficulty in doing that that you may be able to get  
8 resolved?

9           A     Well, I know I need help.

10          Q     What kind of help?

11          A     Well, it has been suggested to me that I need some  
12 psychological help, and I would like to have it. But --

13          Q     (Interposing) Have you seen a psychiatrist?

14          A     I have.

15          Q     What psychiatrist did you talk to?

16          A     Dr. Stowell. I saw him three times.

17          Q     Would you like to see him?

18          A     Yes, I would.

19          Q     Do you feel that if you could get the psychological  
20 help, that you could get yourself squared away and become  
21 employable as a nurse?

22          A     I want to.

23                THE COURT: No. 7.

(The drug bills were  
marked as Plaintiff's  
Exhibit No. 7 for  
identification.)

BY MR. POVICH:

Q I show you what's been marked as Plaintiff's  
Exhibit No. 7 and ask you if you can tell me what this is,  
what they are.

(Handing to witness.)

A These are the receipts for the medication that I  
have had prescribed for me since I left the hospital in  
October of 1974.

Q The total on that you've been told is how much?

MR. SLENKER: Your Honor, I make objection at this  
point unless there is some foundation laid as concerns the  
source of the medication, the prescription, and why. There  
hasn't been any identifying information from the doctors  
so far.

BY MR. POVICH:

Q Can you tell me who prescribed the medication for  
you and why it was prescribed?

A When I left the hospital, I was taking an  
antibiotic that was prescribed by Dr. Berger. I also take

1 a stool softener and a combination laxative which was  
2 prescribed by Dr. Berger. I am on Premarin which was  
3 prescribed by Dr. Pugsley.

4 THE COURT: Dr. who?

5 THE WITNESS: By Dr. Pugsley.

6 I also have prescriptions in there that are for --  
7 I think there may be one or two prescriptions that are for  
8 a sleeping medication. It's Dalmane.

9 BY MR. POVICH:

10 Q By the way, you drink a lot of water.

11 A I have to.

12 Q Why do you do that?

13 A Well, since I have only the one kidney remaining,  
14 I have been told I should drink approximately one gallon of  
15 fluid a day, so that I can put out three -- put out three  
16 quarts.

17 Q There is a prescription here from Dr. Brenner;  
18 is that right?

19 A Yes.

20 Q Do you know what that's for?

21 A No, I do not.

22 Q Okay.

23 That's \$5.09.

1 MR. SLENKER: Your Honor, may we approach the  
2 bench?

3 THE COURT: Yes, sir.

4 MR. POVICH: We will eliminate that, Mr. Slenker.

5 MR. SLENKER: May we approach the bench?

6 (The following proceedings were had at the  
7 bench by Court and counsel out of the hearing of the  
8 jury.)

9 THE COURT: Go ahead.

10 MR. SLENKER: I object to counsel using these  
11 prescriptions, Your Honor, and putting in the amounts saying,  
12 well, we are going to exclude those. That's not an  
13 appropriate way to get in the damages of any type.

14 Dr. Berger testified that when he put her in the  
15 hospital in December, that he anticipated a short stay. As  
16 I recall, it was three or four days. He testified that her  
17 stay there was extended. He didn't say that it was extended  
18 because of anything that these defendants did. He said it  
19 could have been or was possibly from instrumentation or  
20 the cystoscopy that was done at the time he looked at the  
21 right kidney as well as the left kidney.

22 Now, there isn't any issue here about a right  
23 kidney. But more importantly, Dr. Berger didn't testify that



1 he would have had her on medication after she left the  
2 hospital in any event. So, there isn't any foundation laid  
3 for consideration for her to testify with regard to these  
4 medications in any respect.

5 She may have bought them. I don't challenge that.  
6 But where is there any thing to tie it in to the defendants?

7 MR. POVICH: I think when a prescription has Dr.  
8 Berger's name on it and he is treating her for urology as  
9 a result of this operation, that the connection is obvious,  
10 Your Honor. She didn't write his name on here. It's on the  
11 prescription. Dr. Berger has treated her for nothing else.

12 MR. SLENKER: I hate to disagree with counsel.  
13 But the fact of the matter is, Dr. Berger testified to other  
14 conditions, too. It's solely and exclusively for this.

15 THE COURT: Anything further?

16 MR. POVICH: I have the prescriptions. She can  
17 tell why she was receiving it.

18 THE COURT: Do you have any objection from Dr.  
19 Pugsley?

20 MR. SLENKER: Sure. How is that related? She was  
21 taking that beforehand. He knows that, and she knows that.

22 THE COURT: She said something about a stool  
23 softener that was prescribed by Dr. Berger.

1 MR. POVICH: Premarin. Whether that was prescribed  
2 by Dr. Pugsley, there is some question because he had taken  
3 her off it and put her back on before the operation.

4 THE COURT: Mr. Scanlon?

5 MR. SCANLON: I don't have anything to say.

6 THE COURT: Anything further on it?

7 I think I am going to have to sustain the objection  
8 because there is no foundation on it. I will note your  
9 exception.

10 MR. POVICH: Can I include the prescriptions from  
11 Dr. Berger? Do you object to the ones from him?

12 MR. SLENKER: After she left the hospital?

13 MR. POVICH: Yes.

14 MR. SLENKER: Sure.

15 THE COURT: Do you have ones where she was in the  
16 hospital?

17 MR. POVICH: No.

18 THE COURT: All right. I will let you mark those  
19 as an exhibit.

20 (Thereupon, the following proceedings  
21 continued in the hearing of the jury.)

22 MR. POVICH: I think we have marked, Your Honor,  
23 the bills from the hospital and from Fairfax Associates.

1 Are they in evidence?

2 THE COURT: No, sir.

3 (The Medical Consultants' bill  
4 previously referred to was  
5 marked Plaintiff's Exhibit  
6 No. 8 for identification.)

7 BY MR. POVICH:

8 Q Mrs. Privette, I show you what's been marked as  
9 Plaintiff's No. 2 for identification and ask whether or not  
10 this is your bill that you received from Fairfax Hospital  
11 for your admission in August which ended on the 27th of  
12 October as well as your subsequent admission on December 1  
13 which ended on the 17th of December.

14 (Handing to witness.)

15 A Yes.

16 M MR. POVICH: Your Honor, I'd like to move them  
17 in evidence, the hospital bill.

18 THE COURT: Any objection?

19 MR. SLENKER: Yes, sir. May we approach the bench?

20 (The following proceedings were had at the  
21 bench by Court and counsel out of the hearing of  
22 the jury.)

23 THE COURT: All right. Exhibits 2 and 8 are offered.

1 MR. POVICH: 8 is the bill separately for  
2 professional services.

3 THE COURT: So, you are just offering 2?

4 MR. POVICH: Yes.

5 MR. SLENKER: I would object to the admissibility  
6 of this bill, if Your Honor please. As the record now  
7 indicates, there isn't any way that this jury or Your Honor  
8 can tell which is related to what. There isn't any question  
9 but what the lady had a wealth of difficulties. Some are  
10 being claimed. Some are not being claimed.

11 The only testimony that would at all serve as maybe  
12 one-tenth of the foundation is the timing, the number of  
13 days in the hospital that are attributable or were  
14 attributable by one of the physicians to the urologic problem.

15 This bill contains all of her charges from the  
16 time she went in to the time of Pugsley's operation, before  
17 Pugsley's operation, what transpired thereafter, her being  
18 in intensive care which the testimony is she was put in  
19 intensive care because of the pulmonary embolism, not because  
20 of the urologic difficulty.

21 If we put the bill in front of the jury which is  
22 the charge of her entire hospital stay, it would be error  
23 in my judgment because there has been no foundation laid for

1 it. There's been no showing from anybody that has come in  
2 here to testify that these charges are directly, naturally  
3 and proximately related to anything the defendant did.

4 MR. POVICH: Your Honor, Dr. Strauch has testified  
5 that essentially all of the hospital charges are urologically  
6 associated particularly after the expiration of about ten  
7 days. Now, there has been testimony in this case that the  
8 injury resulted at the time of surgery. The fact that it was  
9 further complicated by some unconnected cause does not mean  
10 the patient cannot recover if she is in there for that purpose.  
11 There is nothing that has to be separated out at all. Not  
12 at all.

13 There is some separation I would think for Dr. Fusco  
14 or someone like that who is treating her solely for a  
15 pulmonary embolism situation. But we can do that relatively  
16 easily. I have his bill separate.

17 But as far as the hospital charges are concerned,  
18 they should come in under both the testimony of Dr. Strauch  
19 and Dr. Berger, especially on the charge of the assault and  
20 battery. There isn't any question about that one.

21 MR. SCANLON: If Your Honor please, speaking to that  
22 last point on the part of the defendants Silbersiepe and  
23 Fairfax Hospital and Marks on the assault and battery charge,

1 certainly they are offered as I understand it as to the  
2 charge. There hasn't been any evidence that there was any  
3 negligence on the part of Fairfax Hospital.

4 THE COURT: There is a claim of it.

5 MR. SCANLON: There is a claim. There hasn't been  
6 any evidence thus far, anything that leads to the defendants  
7 or particularly the hospital's negligence which resulted in  
8 money damages. So, I don't think there is any evidence as  
9 to anyone I represent on either charge, negligence or assault  
10 and battery, that would serve as a predicate to introducing  
11 the bills.

12 THE COURT: Mr. Povich.

13 MR. POVICH: I think, Your Honor, they should come  
14 in evidence. If Mr. Slenker wishes to argue from that they  
15 include charges which are not appropriate, fine. I may well  
16 agree with him. If he wishes to argue, he may point them  
17 out. But as far as the underlying justification, there is  
18 the justification based on the testimony of Dr. Strauch and  
19 Dr. Berger.

20 THE COURT: What about counsel for the hospital?  
21 Mr. Scanlon has argued they wouldn't be admissible for his  
22 defendants and didn't result from the assault and battery.

23 MR. POVICH: Your Honor, I think the evidence in

1 this case insofar as proximate cause is concerned, relates  
2 directly to that. Directly. We would never have been here  
3 had it not been for the assault and battery. If the operation  
4 hadn't gone forward, we would never have been in court. It's  
5 a natural and probable consequence of administering the  
6 operation and going through with it especially since they  
7 are claiming the so-called complications.

8 THE COURT: Anything further?

9 MR. SLENKER: The same argument made as to the  
10 hospital on the assault and battery, of course, would obtain  
11 to my client as well.

12 THE COURT: For the assault and battery portion.

13 MR. SLENKER: Yes. The same argument does apply  
14 to Dr. Pugsley on the state of the evidence at this time.  
15 The fundamental point that is involved here is the burden  
16 rests on the plaintiff to prove and is entitled to have  
17 admitted into evidence only those items of damage that are  
18 testified to and established as directly and proximately  
19 resulting from what? From negligent conduct of a defendant  
20 or of the defendant.

21 Admittedly these include more by counsel's own  
22 statement. And he says that I can argue these things or I  
23 can point out these things? It's not the defendant's burden

1 to do that. He hasn't brought himself within the frame work  
2 of the rule of evidence.

3 MR. SCANLON: I would join in Mr. Slenker's last  
4 point here. I don't think it's up to the defendants to  
5 disprove. It's up to the plaintiff to affirmatively prove  
6 every amount of damage that they claim. As Mr. Slenker says,  
7 admittedly they haven't done that in this case by their  
8 own testimony.

9 THE COURT: Okay.

10 MR. POVICH: This is the professional associates.  
11 This is the professional services rendered by the hospital.  
12 That's the hospital charges.

13 THE COURT: Have you seen these?

14 MR. POVICH: I am not introducing, for instance,  
15 Dr. Fusco's charges.

16 THE COURT: Is that in there?

17 MR. POVICH: No. No. No doctors' charges. No  
18 doctors' charges are in there.

19 THE COURT: Would the same arguments apply to this  
20 as they would to the other?

21 MR. SLENKER: Sure.

22 THE COURT: Okay. I am going to have to make one  
23 ruling on this so it will cover them both.



1 MR. SLENKER: The opening date you see is the 14th.  
2 This is all the anesthesiology. Then they have the X-rays  
3 and things like that, but that covers the same period of time  
4 we are talking about on the hospital.

5 THE COURT: Okay. Anything further?

6 The Court feels that there is a sufficient  
7 foundation laid on the basis of what the Doctors' said  
8 yesterday, particularly to the hospitalization. So, on the  
9 grounds alleged by the defendants, the Court would overrule  
10 your objection and note your exception as to 2 and 8. You  
11 can look at them and excise if need be.

12 MR. SLENKER: The whole bills are going in?

13 THE COURT: On the basis of the testimony yesterday,  
14 yes, sir.

15 MR. SLENKER: May I have an exception to Your  
16 Honor's ruling?

17 THE COURT: Yes, sir.

18 (Thereupon, the following proceedings  
19 continued in the hearing of the jury.)

20 BY MR. POVICH:

21 Q The total hospital charges, Mrs. Privette, as  
22 reflected by Exhibit 2 for the August admission are how much?

23 A \$20,072.02.

1 Q Next to that, the charges of the Fairfax Medical  
2 Consultants, which is the separate charge for professional  
3 services rendered at Fairfax Hospital but not by the doctors  
4 that have testified here, with respect to that, also August  
5 admission, is how much?

6 A Seven --

7 Q (Interposing) No, two.

8 A \$2,080.60.

9 Q All right. The charge with respect to the  
10 admission in December by the Fairfax Hospital is how much?

11 A \$2,514.06.

12 Q The charges of Fairfax Medical Consultants, again  
13 which does not include the charge by Dr. Berger, is how much?

14 A \$162.40.

15 MR. POVICH: Okay. It appears, Your Honor, that  
16 Exhibit 8, which has been identified, is a duplication of  
17 the last portion of Exhibit 2, and therefore I would like to  
18 have it stricken.

19 THE COURT: You withdraw 8?

20 MR. POVICH: Yes.

21 THE COURT: Eight is withdrawn.

22 MR. POVICH: Your Honor, I would like to end  
23 subject to one other matter. If you recall, there are some

1 there was another office visit scheduled or did you mean you  
2 were to go to the hospital for this procedure?

3 A I saw Dr. Pugsley in January. I saw him in  
4 February, and the surgery was done in March.

5 Q You saw Dr. Pugsley in January of what year?

6 A I beg your pardon. I guess I saw him in February.  
7 The surgery was done in March.

8 Q Where was that surgery done?

9 A At Fairfax Hospital.

10 Q When you went in for that, you were an outpatient,  
11 were you not?

12 A I was.

13 Q You signed a consent form on that occasion, did  
14 you not?

15 A Yes.

16 Q Even though as an outpatient; is that not true?

17 A I know this is standard operating procedure. And  
18 I do not specifically remember doing it, but I feel confident  
19 that I probably did.

20 Q You know from your experience as a registered nurse,  
21 don't you, Mrs. Privette, that any time you go in the hospital  
22 whether it's as an outpatient or as an in-house patient,  
23 particularly if you are going in there for a surgical

1 procedure that you have to sign surgical permits and medical  
2 treatment permits, don't you?

3 A I never dealt with that end of it.

4 Q I didn't ask you if you dealt with it. I just  
5 asked you if you knew as a matter of fact that any time you  
6 went in the hospital for a surgical treatment or for the  
7 extension of medical treatment that you had to sign a permit.

8 A Yes.

9 Q You knew that?

10 A Yes.

11 Q You did sign that at the time you went there in  
12 March, didn't you?

13 A Yes.

14 Q Did you read it before you signed it?

15 A Yes.

16 Q I'll ask you if it isn't a fact that the same type  
17 of permit was the one that you signed on the 14th of August,  
18 when you went in Fairfax Hospital on that occasion as an  
19 in-house patient.

20 A I'm sure I did.

21 Q It was the exact same permit, wasn't it?

22 A I'm sure it was.

23 Q At the time that you checked in for that procedure,

1 did you know what your blood pressure was and what it had  
2 been?

3 A You are speaking of the March procedure.

4 Q Yes, ma'am.

5 A I know what it was. I had not had it checked that  
6 day, so, no, I do not specifically know what it was.

7 Q In connection with your work at Dr. Amos's office,  
8 did you ever take your own blood pressure?

9 A No.

10 Q Did you have any of your fellow employees take it?

11 A Yes.

12 Q Prior to the time you went in the hospital?

13 A Yes.

14 Q What was it on that occasion?

15 A My blood pressure normally ran around 130 over 80  
16 to 140 over 90, according to the stressfulness of the day.

17 Q That was your normal range based on the stress of  
18 the day; right?

19 A Right.

20 Q Now, had you established that range by taking your  
21 blood pressure, or having it taken by a fellow employee over  
22 a long period of time?

23 A No. It wasn't -- I didn't make a practice of

1 have testified before, in July. When we found out in July  
2 that it could not be done, I tried to schedule it on that  
3 day. I tried to schedule it to have it done the 15th, but  
4 the operating books were not opened. So, I had to wait until  
5 later.

6 Q Mrs. Privette, are you telling us that you talked  
7 with the surgical department in the operating rooms at  
8 Fairfax Hospital to get you on the schedule for the operation  
9 at a certain time in July or in August?

10 A No, sir. I'm talking about Dr. Pugsley's  
11 receptionist.

12 Q Well, I'm asking you --

13 A (Interposing) The ones who scheduled it in July.

14 Q I am asking you isn't it a fact that Dr. Pugsley's  
15 office established a date upon which it could be done and  
16 then called you and notified you that it could be done on the  
17 15th, asking if you could go in the hospital on the 14th?  
18 Isn't that the way it happened?

19 A They did.

20 Q You didn't really have anything to do with the  
21 scheduling of it, did you?

22 A Except that I told him the exact date that I  
23 wanted it.

1 Q That date was what?

2 A I wanted surgery done on the 15th.

3 Q Now then, do you remember after that was scheduled  
4 that you saw Dr. Pugsley on the 7th of August in his office  
5 for a preop chat? Do you remember that?

6 A I remember I was in his office on the 7th, yes.

7 Q Do you remember anything else about it?

8 A Yes. I remember that we discussed that I was going  
9 to have some venereal warts removed. And I remember that  
10 same time that I discussed with him that I had gotten it  
11 arranged with Dr. Hall that he would be present, and I  
12 remember that we discussed the fact that while the abdomen  
13 was open, that the ovaries would be removed.

14 Q As a matter of fact, didn't you ask specifically  
15 and made a point to tell Dr. Pugsley that if the ovaries  
16 are there, to remove them, that you wanted them out?

17 A No. I don't remember that strong language.

18 Q Do you deny that you said that to him?

19 A I don't deny it, no. I don't think I used that  
20 strong a language, but I --

21 Q (Interposing) Do you remember reasserting once  
22 again that you thought that maybe the ovaries might be  
23 out? Do you remember telling him that?

1 or not.

2 Q Did you tell Dr. Pugsley on the occasion of  
3 August 7, 1974, that you would not need to have one because  
4 you would have it at Dr. Amos's office?

5 A I had had a physical in that I had had an EKG. in  
6 Dr. Amos's office in August or thereabouts.

7 Q All right.

8 A But I know past the age of forty, it's required  
9 at the hospital.

10 Q Now, did you know in 1970 that you only had one  
11 functioning kidney?

12 A No, sir.

13 Q Did you know in '71?

14 A No, sir.

15 Q Did you know in '72?

16 A No, sir.

17 Q Did you know in '73?

18 A No, sir.

19 Q When is the first time that anybody ever told you  
20 that you had only one functioning kidney?

21 A After I was in the process of recovery.

22 Q In the --

23 A (Interposing) In the Fairfax Hospital.



1 Did Dr. Amos at any time mention anything to you  
2 about you having only one kidney?

3 A No.

4 Q I believe you said Dr. Benedicto had not?

5 A No.

6 Q Incidentally, on every one of those hospitalizations  
7 that we covered, you signed essentially the same type of  
8 permit, did you not, for surgical treatment and medical  
9 treatment and gave your consent to it, did you not?

10 A If necessary.

11 Q Pardon?

12 A If necessary.

13 Q If necessary?

14 A If necessary, yes.

15 Q Well, you didn't change any of the wording or the  
16 language in them to put in as necessary, did you?

17 A They wouldn't have done it if it hadn't been  
18 necessary.

19 Q I see. So, you signed it when they presented it  
20 to you?

21 A I did.

22 THE COURT: Mr. Slenker, while we are here, we  
23 might as well take our afternoon recess for about fifteen

1 want to go back over it. I'm asking you if it isn't a fact  
2 that in the preop chat of August 7, '74, you and Dr. Pugsley  
3 both discussed about the vaginal cuff.

4 A I don't specifically remember anything being  
5 mentioned about the vaginal cuff because Dr. Pugsley did not  
6 know what he was going to do.

7 Q All right.

8 Now, with what we have developed this afternoon  
9 by way of your testimony, do you still stick by your testimony  
10 given on Wednesday before you you were taken off the stand  
11 for Dr. Murphy that there was no discussion between you and  
12 Dr. Pugsley about the procedure?

13 A Dr. Pugsley and I discussed that I was going to  
14 have the surgery. It was agreed that I was going to have  
15 the surgery.

16 Q You talked about that surgery and the procedure,  
17 did you not, ma'am?

18 MR. POVICH: Your Honor, it's ambiguous. "Surgery  
19 and the procedure," I think that's ambiguous, and I object  
20 to it.

21 THE COURT: Do you understand the question, Mrs.  
22 Privette?

23 THE WITNESS: Not entirely, Your Honor.

1 THE COURT: Okay. Mr. Slenker will rephrase it.

2 BY MR. SLENKER:

3 Q In light of what we've talked about this afternoon,  
4 is it still your testimony as given the other day before you  
5 left the stand that there was no discussion between you and  
6 Dr. Pugsley about the procedure?

7 A Define what you mean by "procedure."

8 Q The exploratory laparotomy.

9 A I knew I was going to have an exploratory laparotomy,  
10 yes.

11 Q You knew what that involved, did you not?

12 A I knew that it involved having a midline incision.

13 Q Now, you checked into the hospital on the 14th of  
14 August. Is this not the authorization that you signed?

15 (Handing to witness.)

16 A Yes, it is.

17 Q That's your signature there, isn't it?

18 A That is my signature.

19 Q That is captioned, is it not, Authorization for  
20 Medical and Surgical Procedures?

21 A Right.

22 Q Will you read that to the members of the jury?

23 A "I hereby authorize Dr. L. Pugsley and other

1 members of the staff of the Fairfax County office of his  
2 choice" --

3 Q (Interposing) "Medical staff of the Fairfax  
4 Hospital."

5 A "Of his choice to perform those diagnostic and  
6 therapeutic medical and surgical procedures own and" --

7 Q (Interposing) "Procedures on."

8 A "On and to authorize the necessary anesthetics  
9 to Phyllis W. Privette, which is his or" --

10 Q (Interposing) "And."

11 A "Which in his or her judgment may be deemed  
12 necessary. I further authorize the Fairfax Hospital to  
13 dispose of any removed tissue or amputated parts. I certify  
14 that the nature of the procedures contemplated have been  
15 explained to me by my physician, and I understand the  
16 purpose of this authorization form."

17 Q Now, when you certify that the nature of the  
18 procedures contemplated have been explained to you by your  
19 physician, you are certifying that Dr. Pugsley told you about  
20 them. Isn't that true, Mrs. Privette?

21 A As I said before --

22 Q (Interposing) Yes or no, please, ma'am. Is it  
23 true or is it not true?

1 MR. POVICH: Your Honor, I think she should answer  
2 yes or no and then explain her answer.

3 THE COURT: Okay.

4 A Yes. He told me that I was going to have an  
5 exploratory laparotomy for unknown bleeding of the vaginal  
6 area.

7 Q Now, can you tell the members of the jury when was  
8 the first time that you called Dr. Hall's office in 1974  
9 about the procedure?

10 A When is the first date that I called his office?

11 Q Yes, ma'am.

12 A I talked to Dr. Hall the first time. I talked to  
13 him in the fall of 1973.

14 Q Mrs. Privette, I'm concentrating on 1974.

15 A I do not know the exact date. But if your records  
16 show the exact date in which surgery was scheduled for me  
17 by Dr. Pugsley's office, I will tell you the first day that  
18 I talked to Dr. Hall's office.

19 Q On the 2nd of July, 1974, arrangements were made  
20 for your surgery to be accomplished on the 15th of August.

21 A Then it was there or about.

22 Q Was it before that or after it?

23 A It was after -- I talked to his receptionist and

1 told her that we were able to schedule surgery, that I  
2 wanted Dr. Hall present.

3 Q I understand that. My question is when. When did  
4 you make that call for the first time, if you know? If you  
5 don't recall, simply say so.

6 A I don't recall whether it was before or afterwards.

7 Q Before or after what, this July 2 date?

8 A Well, you must remember there was a first date  
9 that was set to be set up too, and I worked on that date.

10 Q All right. Did you talk to Dr. Hall personally?

11 A No, I did not. 

12 Q Isn't it true that you never talked to Dr. Hall  
13 personally at any time from the first time you called his  
14 office right on up until the 15th of August?

15 MR. POVICH: Are you saying for the first time  
16 she called his office in 1974?

17 MR. SLENKER: Right.

18 A In '74, I never talked to Dr. Hall on the phone.

19 BY MR. SLENKER:

20 Q You talked to people in his office but never to him  
21 directly; isn't that true?

22 A I talked to his nurse.

23 Q I see. Now, when you got in the hospital on the

1 14th of August, did you attempt to pick up your telephone and  
2 call Dr. Hall?

3 A I had no reason to.

4 Q Did you try --

5 A (Interposing) No.

6 Q (Continuing) -- to remind him?

7 A No.

8 Q Did you make any attempt at all during the time  
9 that you were in the hospital on the 14th to reach Dr. Hall  
10 by phone?

11 A No.

12 Q Did you ask any of the nurses to make contact with  
13 Dr. Hall?

14 A I did not ask them to make contact, but I told  
15 them. I also told the intern when he came in that did the  
16 physical on me that Dr. Hall would be present.

17 Q All right.

18 Now then, you saw Dr. Pugsley the next morning  
19 down in the holding area.

20 A In the holding area.

21 Q And he went to look for Dr. Hall?

22 A That's what he said.

23 Q He came back and reported to you that he was not

1 available, did he?

2 A No, sir, he did not. Not in the holding room, no.

3 Q I see. Are you quite certain, Mrs. Privette, that  
4 you conveyed this information about Dr. Hall to Dr. Pugsley  
5 prior to the morning of the 15th?

6 A Repeat that, please.

7 Q Are you quite certain of your testimony that you  
8 conveyed to Dr. Pugsley this business about Dr. Hall being  
9 present at the time of surgery prior to the morning of  
10 August 15, 1974?

11 A In fact.

12 Q You are certain of that?

13 A Positive.

14 Q You could not be in error about it?

15 A No.

16 Q There is no way?

17 A No way.

18 Q You remember that vividly?

19 A Yes.

20 Q Now, after you woke up from the surgery, you  
21 remember that, do you?

22 A No.

23 Q You don't remember being awake the evening of the



1           A     They asked me to slide over.

2           Q     Did you tell them you could?

3           A     I could and I did.

4           Q     You slid over by yourself?

5           A     Well, I might have had some pushing or pulling,  
6 but yes, I got over there on my own.

7           Q     On your own steam?

8           A     Right.

9           Q     Then when they got you up on the operating table,  
10 did they strap you down then, or did they put a strap over  
11 you, do you remember?

12          A     Well, they kept telling me don't cross my legs.  
13 And I don't recall if there was a belt to put around my  
14 waist or not, but I don't remember one being there.

15          Q     Okay.

16                 Then you heard a conversation that you told the  
17 jury about.

18          A     Well, not immediately.

19          Q     Okay.

20                 But in any event, Dr. Pugsley came into the room  
21 sometime. He wasn't in there when you first got in there,  
22 was he?

23          A     When I first was rolled in, I -- I don't think he

1 MR. POVICH: Your Honor, I offer him.

2 THE COURT: Any question as to his qualifications?

3 MR. SLENKER: No, sir.

4 MR. SCANLON: No, Your Honor.

5 THE COURT: All right.

6 BY MR. POVICH:

7 Q Doctor, did there come a time in which you saw  
8 Phyllis Privette as a patient?

9 A Yes. I had occasion to see Mrs. Privette in  
10 February of 1975.

11 Q Was that the first time?

12 A Yes, it was.

13 Q Can you give me the circumstances of that visit?

14 A I was called by her in order to do an evaluation.  
15 This specific date was February 5. The evaluation of the  
16 difficulty she was having with sleeplessness, depressive  
17 type symptoms, feeling a great deal of difficulty with the  
18 areas of confidence, and tying very closely into the area  
19 of getting into -- back into her work as a nurse, a registered  
20 nurse. And she had been through a period where there --  
21 well, I won't go into the history, but that's the reason  
22 she consulted me. And so the depression was probably the  
23 main reason that she consulted me. And it surrounded the

1 main issue that she presented which was her attempting to  
2 get back to work and so forth. And her objective was to  
3 overcome this depression in order to be able to get back  
4 into work basically.

5 Q Did she indicate to you what had interrupted her  
6 work?

7 A There were several factors. I'd say the main  
8 factor that had currently been pressing was the actual  
9 expressive symptomatology itself. And that is the inability  
10 to sleep, the lack of confidence, the varying types of  
11 symptoms which interfere with people's concentration and  
12 these kind of factors. And so she was feeling a tremendous  
13 amount of shame about this. There were many aspects of guilt  
14 about not being able to get back into the work. So these  
15 were the more direct things.

16 As the history unfolded, it became clear to me that  
17 she had been -- had undergone some surgery that I felt  
18 significantly both in terms of timewise and as well as the  
19 traumatic aspects did grossly interfere and had a direct  
20 correlation to her inability to have performed work since  
21 that time. This specifically was referring back to the  
22 August, '74, operation and subsequent complications of that  
23 operation.

1           Q     Doctor, did you take a history in order to  
2 evaluate her and to come to any conclusions with respect  
3 to what may have been the cause for her present depression  
4 during that time and her inability to work?

5           A     Yes, I did. The mental status examination, which  
6 is normally done as a part of the work-up, did reveal, I  
7 think without being too repetitive here, about her features  
8 in terms of insomnia, the difficulties with lack of  
9 confidence, shame and guilt, and I'd say a moderate to  
10 severe amount of depression.

11                She was not overtly suicidal or anything at the  
12 time. And there was no evidence of overt psychosis, meaning  
13 that she had not lost contact with reality and was able  
14 to coherently relate her position.

15                Now, in looking back and taking a complete history,  
16 which did include three sessions, all of which took place  
17 in February, I was able to come to a conclusion that the  
18 reasons for her depression did specifically relate in my  
19 opinion to the extreme trauma that was suffered as a result  
20 of unexpected complications from the operation in August of  
21 1974.

22                It was clear to me that prior to that time that  
23 she, for instance, had been able to work for Dr. Amos and had

1 various other periods where she had functioned reasonably  
2 well, and after that time had tried very hard to overcome  
3 this.

4 Now, in my examination, I also looked over with  
5 her aspects of why that should be a difficult area for her  
6 to return to. And what emerged was something that was not  
7 surprising to me, that nursing as we know is connected to the  
8 medical field rather closely; and that we are talking about  
9 returning to an area wherein again hospital work had been  
10 associated with the hospital, and various types of problems  
11 that she would see in her normal functions as a nurse which  
12 would necessarily revive very difficult memories for her.  
13 So, I felt that this was intimately tied into some of the  
14 difficulties she was experiencing at the time.

15 Q Did you discuss with her whether you felt that  
16 she should have the assistance or needed any assistance and  
17 towards what purpose?

18 A Yes. I told Mrs. Privette that I felt that  
19 diagnostically she had a depressive neurosis. Also, I felt  
20 that I wanted to rule out a phobic neurosis, phobia simply  
21 meaning a fear which ties in -- again, a fear such as of  
22 going to a hospital and having any further surgery --  
23 something like that.

1           So I felt that if I had pursued treatment which I  
2 did recommend at the time, that she be treated for this,  
3 so that she could be gainfully employed as a nurse which was  
4 her stated desire when she came in. So, on that basis, I  
5 did recommend further treatment and estimated the duration  
6 of treatment to be a minimum of six months on a weekly basis  
7 and possibly to be as long as one and a half to two years.

8           I had not and often did not come to a conclusion  
9 as to the frequency of treatment in terms of once or twice  
10 a week until sometime between the fifth and tenth session  
11 when I can have a better feel for the psychological makeup  
12 of the patient, how fast they will be able to advance in  
13 therapy, and what is in general their interest, but at the  
14 time did offer the suggestion once a week for a minimum of  
15 six months.

16           Q     Did you have an opinion at that time as to whether  
17 or not she could then return to her employment as a nurse in  
18 that profession without this type of therapy?

19           A     Yes. It was my firm belief that she at the time  
20 was simply unable to do that. And I certainly would not have  
21 recommended it because it would have been a setup for a  
22 failure; and in fact, this would have merely further depressed  
23 her. So had she brought that up, which I do not have any

1 recollection that we discussed her going back into nursing  
2 right then, I certainly would have discouraged it.

3 Q Did you discuss with her the expense of the future  
4 therapy?

5 A She knew my fee, which is in accordance with the  
6 usual and customary charges. It's forty-five per forty-five  
7 minute session or fifty dollars per fifty-minute session.  
8 The three sessions that she had were for fifty-dollar sessions  
9 for fifty minutes each, which is my customary evaluation,  
10 three-session evaluation of this kind of case.

11 And I did indicate to her that there would be a  
12 duration involved. Again, we are talking about in a six-  
13 month period normally twenty-five visits if you are not  
14 running into too many vacations or other kinds of problems  
15 weatherwise like we have this year.

16 Q What would you say, Doctor, is the range of the  
17 expense that you feel she would have if she followed your  
18 advice?

19 A I would say that again, sort of going through some  
20 math in my head, I would say the absolute minimum would be  
21 1500 and then somewhere up to \$5,000, depending on how she  
22 was treated and so forth.

23 In order to more accurately answer your question,

1 I would say that there are therapists -- my own background  
2 is psychoanalytically oriented, if one wants to look at it  
3 that way, aimed to why people have problems as opposed to  
4 another type of discipline which might be behavior therapy,  
5 which is again aiming for relief of symptoms than it is  
6 exploring the causes.

7 So, if she decided that she did want treatment,  
8 it might well have been that I would have recommended twice  
9 a week work if I felt she was most suited to that, and that  
10 her, again, means would permit and so forth. And this would  
11 have been very potentially a year's work twice a week.

12 So, again, that would have covered somewhere in  
13 that range as a bare minimum, 1500, and then I would say  
14 up to \$5,000, in that range. I guess that's a wide range.  
15 I wish I could be more specific.

16 Q Did she return to you after those three visits?

17 A No, she didn't. I did receive a phone call from  
18 her subsequently indicating that she did want treatment and  
19 so forth. But beyond that, I didn't hear from her. And I  
20 had to assume that there were circumstances beyond her control  
21 that she didn't. But it seemed that at the time, at the  
22 time of the phone call, she genuinely desired to improve her  
23 situation through what I had recommended.



1 Q Do you have a bill for your services?

2 A Yes, I certainly do.

3 Q How much was that?

4 A It was \$150.

5 Q For the three fifty-minute sessions?

6 A Yes, sir.

7 MR. POVICH: I have no further questions.

8 THE COURT: Mr. Slenker.

9 CROSS EXAMINATION

10 BY MR. SLENKER:

11 Q Doctor, when she first came to you, did you know  
12 anything about her medical history?

13 A No, I did not, sir.

14 Q So, you had no established profile or no criteria  
15 to judge the condition that you found in February of '75  
16 with her condition at any time prior thereto?

17 MR. POVICH: February, '75.

18 BY MR. SLENKER:

19 Q He said he saw her first in February of '75.  
20 Didn't you?

21 A Yes, sir.

22 Q So, you had no way of knowing what her condition  
23 was prior to February of 1975, did you?

1           A     I'm very sorry. Could I make a correction? It  
2 was 1976.

3           Q     You saw her first in February of --

4           A     (Interposing) Yes, February of 1976. I'm sorry.

5           Q     You saw her the 5th of February?

6           A     Yes, sir.

7           Q     '76?

8           A     That's right.

9           Q     What is the date of the second visit?

10          A     The date of the second visit is the 13th of  
11 February, 1976.

12          Q     And the third visit?

13          A     The 25th of February.

14          Q     Did she tell you at that time that she wanted you  
15 to come to this trial and testify?

16          A     No, sir.

17          Q     Did she mention anything about a pending case?

18          A     No, sir, she did not. I had no knowledge.

19          Q     She didn't mention that at all?

20          A     No. If -- the first time I heard of the case  
21 was when Mr. Povich called me. And I was -- he can recall --  
22 rather taken aback by the whole thing. And I was contacted  
23 two days ago.

1 Q In the last two days, you were contacted about  
2 coming to this trial?

3 A Yes.

4 Q All right.

5 Now, did she tell you in connection with her  
6 desire to return to work that she had been associated closely  
7 with hospitals in the past?

8 A I did not elaborate on that with her. So, I did  
9 know that she had worked for Dr. Amos, and I did know that  
10 she had been an RN. I did not go into her detailed employment  
11 history, no, sir.

12 Q Did you go into any kind of detailed family history?

13 A Yes, sir, I did cover some of that.

14 Q Beginning at what point? I don't know how you all  
15 operate, but do you start in the beginning and bring it up  
16 to date, or do you start at the time of the --

17 A (Interposing) Normally what I do is again in trying  
18 to do an evaluation, I try to get as many pertinent facts  
19 from the past as possible in general to go back into childhood  
20 and ask for the family constellation as much as possible,  
21 get the current family constellation, go over the marital  
22 history, go over again various high points that would have a  
23 bearing possibly on the symptoms that are presented.

1 Q Did you also take a social history?

2 A This would embody it. A social history in general  
3 does include the family history, yes, sir.

4 Q In the medical history, did you get the names or  
5 the numbers of physicians that she had seen over the last  
6 several years?

7 A I had occasion to get the name of the people that  
8 treated her at Fairfax Hospital. My recollection was that  
9 there was a Dr. Pugsley, and then again Dr. Myron Berger.  
10 Other than that, I did not have any other names of physicians.

11 Q Did she give you this information?

12 A Yes, sir, she did.

13 Q She mentioned only two names?

14 A Those are the only two. I can refresh -- if you  
15 wish, I will refresh my memory. But those are the only two  
16 that she did give me, yes, sir.

17 I'm sorry. There was one other physician. She  
18 did give me the name of -- and that was in connection with  
19 the headache syndrome she had, and that was Dr. J. Simsarian.  
20 So, she did indicate that for four months, she had had  
21 headaches and saw Dr. Simsarian where she had a brain scan,  
22 skull films, and EEG. which apparently were within normal  
23 limits.

1 Q When was that? What period of time?

2 A That really was subsequent to December of 1974.

3 So, I presume that it was in early 1975. I did not get the  
4 exact date on that.

5 Q You presume it was in that period of time?

6 A Yes, sir.

7 Q Why do you presume that rather than it might have  
8 been before then?

9 A Simply because the way the history was taken. I  
10 asked her to give somewhat of a chronological accounting.  
11 And she indicated the surgery, and then that was the sequence  
12 that was the reason I made that assumption.

13 Q Did you ask her anything prior to the surgery?

14 A About what?

15 Q About headaches.

16 A No, I did not inquire about headaches prior.

17 Q About seeing doctors?

18 A I didn't have that inquiry at that time, no.

19 Q Did you ask her anything about physical ailments,  
20 abdominal pains or anything like that, prior to 1974?

21 A That was not my focus, no, sir.

22 Q So, you started with the surgery in August?

23 MR. POVICH: Started what? I object.

1 BY MR. SLENKER:

2 Q Started your investigation of her medical history  
3 with the surgical procedure in August?

4 A That's correct. That's the basis on which I took  
5 the medical history at the time.

6 Q You started with that surgery in August of '74 and  
7 worked up to '76?

8 A Well, worked up to the present, right, to where she  
9 came in the office.

10 Q You asked her nothing about her medical history  
11 prior to August of '74?

12 A That's correct. I don't have any notes to that  
13 effect.

14 Q Did I understand you to say that you would have  
15 to have a number of visits with the patient before you could  
16 be in a position to outline what future therapy she might  
17 need, if any?

18 A You understood me to say that I would have to have  
19 further consultations to establish the frequency with which  
20 it would be advisable to see the patient.

21 Q These would be consultations with whom?

22 A With me. In other words --

23 Q (Interposing) Pardon?

1 A With myself.

2 Q With you?

3 A Um-huh. I had established that there was a need  
4 for treatment based on the depressive neurosis syndrome which  
5 I feel was interfering with her life and work in particular.  
6 The further session would have helped me establish what  
7 psychological capacity and other variables that would relate  
8 to my recommendation as to intensity.

9 Q How many of those consultations would you have to  
10 have in order to reach the point where you could make some  
11 judgment on these things?

12 A In general, as I indicated, that would take -- it's  
13 usually between five and ten sessions that we arrive at that.  
14 And we usually -- I would usually proceed with the patient  
15 on a weekly level until I felt that more intensive work would  
16 be in order.

17 Q Between five and ten sessions?

18 A Yes, sir.

19 Q You had but three with her?

20 A That's correct.

21 Q So, you were at the level where you could make any  
22 judgment as to how frequently she would need it?

23 A That's correct. I had already stated that she would

1 at least need once a week therapy. The only thing that I've  
2 indicated is that I could not determine twice a week  
3 frequency until I had seen her further.

4 Q That's the five to ten times?

5 A Yeah.

6 Q Had she as of 1976 in February when you saw her  
7 made any attempt to work according to your record?

8 A Yes, she had.

9 Q In nursing?

10 A I didn't write down the specifics. I do recall  
11 asking her had she made attempts. And my recollection is  
12 that she had made some attempts at work. And I don't have  
13 the details on the specific places where she did attempt  
14 employment, no, sir.

15 I do know that she mentioned this in the context  
16 of my having asked her and her having indicated this was a  
17 very disappointing experience because she couldn't maintain  
18 her work at these places.

19 Q Then you said you got a phone call from her. At  
20 any time, Doctor, did she mention to you at or about the  
21 time of the phone call that she was going to try to go back  
22 to work?

23 A No, she didn't. I didn't have any statement to that



1 effect. The phone call was simply a statement she wanted  
2 to come in and see me.

3 Q Now, you said there was no evidence of overt  
4 psychosis or anything like that. I believe your diagnosis  
5 on the basis of the three visits was depressive neurosis.

6 A Yes, sir.

7 Q Of course, that's a much less serious condition  
8 in your profession, is it not, than any psychosis?

9 A Yes, sir, it is.

10 Q Is it easier to diagnose and to treat?

11 A I would not say so. And I actually want to maybe,  
12 if you would allow -- it's your privilege -- but I would  
13 point out that neurotics very often suffer more than  
14 psychotics, to answer your question, and neurotics are very  
15 often more incapacitated than schizophrenics and psychotics.  
16 So that really the answer to the question is depressive  
17 neurosis, obsessional neurosis, phobia neurosis, other types  
18 of neurosis are often much more resistant to treatment;  
19 whereas psychosis is sometimes quite a lot easier to treat,  
20 in particular because psychosis can be treated with medication.  
21 Some of them are readily and in general I find that the  
22 psychosis I treat less frequently as well as they seem to  
23 improve quicker.

1           Q     There are more people who suffer from neurosis  
2 than from psychosis, are there not?

3           A     That is certainly correct.

4           Q     There are a lot more that suffer from depressive  
5 neurosis, are there not?

6           A     Absolutely correct.

7           Q     That is a very prevalent condition?

8           A     Very much so.

9           Q     It's not oriented or consistent with or oftentimes  
10 related in any respect to any kind of surgery or health care  
11 benefit, is it?

12          A     That is correct.

13          Q     It can come from mere pressures of jobs, can it not?

14          A     Certainly can.

15          Q     As well as pressure of no job; is that not true?

16          A     Um-hum.

17          Q     Does it not make it therefore harder for you as a  
18 psychiatrist to make a determination on what is the cause  
19 of any given patient's depressive neurosis?

20          A     It certainly is difficult. And that is my job  
21 in particular to ferret out the causes of the compressive  
22 neurosis. You are right.

23          Q     Did you spend enough time in the three visits that

1 you had with Mrs. Privette that you could make any kind of  
2 independent determination as to what her depressive neurosis  
3 was caused by?

4 A Yes. I felt that the major component of the  
5 depressive neurosis was her inability to obtain work in the  
6 area that she wanted to obtain it. I felt that that was  
7 directly correlated to the complications of surgery.

8 Q Did you come to that conclusion based on what  
9 she told you?

10 A Absolutely.

11 Q Is it not a fact that the statements that she gave  
12 you constitute about one hundred percent of the basis for  
13 your opinion that you have just given?

14 A Absolutely, yeah. She was the only person I talked  
15 to.

16 Q So, you took what she had to say and reached your  
17 diagnosis?

18 A Absolutely.

19 MR. SLENKER: Thank you, Doctor. Thank you very much.

20 BY MR. SCANLON:

21 Q I wonder, Doctor, this record that you have in  
22 front of you, could I see that for just a moment?

23 A Certainly.

1 Q All right.

2 Let's see. Did you put her on any medication,  
3 Doctor?

4 A No, I didn't.

5 Q All right. You just had these conferences with her,  
6 three conferences fifty minutes each. Could you tell us,  
7 if you can -- here, I'll give it back to you, sir  
8 (handing to witness) --

9 A (Interposing) Thank you.

10 Q (Continuing) -- the dates of those conferences?

11 A Were they one week after another? Yes, 5, 13 and  
12 25, February of '76.

13 Q Those are the only notes that you have?

14 A Yes, sir.

15 Q Did she give you anything in writing?

16 A No, sir.

17 MR. SCANLON: I think that's all I have.

18 THE COURT: Any redirect examination?

19 REDIRECT EXAMINATION

20 BY MR. POVICH:

21 Q Just one question, Doctor. Did your analysis of  
22 her indicate that prior to the time of the operation she had  
23 been an effective employee, member of the work force, she had

1       been able to cope with whatever problems she did have, she  
2       had been coping fairly well as far as work was concerned,  
3       that she had been a good employee?

4           A     Yes. I had that distinct impression. She made  
5       reference to having worked for Dr. Amos and that this had  
6       been a satisfactory working relationship.

7           Q     If there was some confirmation of that, that would  
8       support you feel or reinforce your opinion about the effect  
9       of the operation on her subsequent difficulties?

10          A     Yes, it would.

11               MR. POVICH: I have no further questions.

12               MR. SLENKER: I just have a couple, Your Honor.

13                               RECROSS EXAMINATION

14               BY MR. SLENKER:

15           Q     You answered Mr. Scanlon's questions about whether  
16       she ever gave you anything in writing and you said she  
17       didn't; isn't that true?

18          A     Yes.

19           Q     Isn't that in her writing?

20                       (Handing to witness.)

21          A     I -- yes, it is. I had thought that you meant  
22       another thing. This is a form.

23           Q     Well, we can see that it's a form. It's only a part

1 A Springfield, Virginia.

2 Q How long have you practiced there?

3 A Twenty-one years.

4 Q What is your specialty?

5 A Internal medicine.

6 Q When did you first meet Mrs. Privette, the  
7 plaintiff in this case?

8 A In the summer of 1972.

9 Q How did you happen to meet her at that time?

10 A Well, she came for an interview for a job as a  
11 nurse to run my office because my other nurse was leaving  
12 to go to another state with her husband who had been  
13 transferred.

14 Q Did you hire her?

15 A Yes, sir.

16 Q How long was she an employee of yours?

17 A She worked for me until August, 1974, sir.

18 Q Could you tell the jury what her duties were as  
19 a nurse?

20 A Yes. She had complete charge of running my office  
21 as a nurse. She had the appointments. She assisted me with  
22 examinations. She did EKGs, and she helped me with  
23 correspondence relative to my patients and typing.

1 Q What sort of hours did Mrs. Privette work under  
2 your employment?

3 A Well, an average of eight to four. Sometimes nine  
4 to five because things vary a little bit in the practice of  
5 medicine.

6 Q How many days a week would she work?

7 A Well, that would be Monday through Friday except  
8 for Thursday. On Thursday, she would come in half a day once  
9 a month and do the bills. And then we worked a half a day  
10 ever other Saturday and sometimes three Saturdays in a month.  
11 So, Phyllis was responsible to be there those days, too.

12 Q Dr. Amos, when did Mrs. Privette leave your  
13 employ?

14 A August, 1974.

15 Q Do you know the reason, sir, that she left?

16 A She told me that she had a pelvic problem, and she  
17 needed an operation.

18 Q Prior to her leaving your employ, could you tell  
19 me what her rate of absenteeism was?

20 A Well, it was very small because I don't recall  
21 her missing any time that caused me any problem. My employees  
22 are allowed holidays and they are allowed five days a year  
23 sick leave without any problem. And we never had a problem.

1 So, I'd have to assume she didn't miss more than the five  
2 days.

3 Q Did you have any other employees in your office?

4 A My wife who is a graduate nurse worked part time.  
5 And her role is that she works as long as she is needed. And  
6 when things are under control, she goes home about two o'clock  
7 in the afternoon. Sometimes I employ a part-time secretary.  
8 At different times of the year, you have different work loads.

9 Q As between your wife and Mrs. Privette, Mrs.  
10 Privette carried the bulk of your work load?

11 A Yes. My wife acted more as an assistant when the  
12 work load was too heavy for the nurse and myself. And as  
13 soon as we could handle things, my wife likes to get back to  
14 being a wife.

15 Q Sir, what did you pay Mrs. Privette?

16 A Mrs. Privette, when she left me in August, '74,  
17 had been raised to \$8,000 a year. She came to work, I  
18 think, at around 7,000. And I suppose I'm a little tight  
19 and I don't pay much to people the first two years because  
20 as a business proposition, people cost you money the first  
21 year they work for you. The second year you break even on  
22 them, and the third year you begin to make money.

23 I would have raised her 600 to \$800 per year for



1 each year she worked after the third year up to a total of  
2 11,000 per year, which would be the maximum that I could  
3 afford in that position, sir.

4 Q So, after she continued in your employ, the maximum  
5 she would have made would have been 11,000 a year?

6 A Approximately. She might have pushed me to eleven  
7 five.

8 MR. DANIEL: Could we have this marked for an  
9 exhibit, please?

10 (The W-2 forms were marked  
11 Plaintiff's Exhibit No. 9  
12 for identification.)

13 BY MR. DANIEL:

14 Q Doctor, I show you what's been marked Plaintiff's  
15 Exhibit No. 9 for identification and ask you if you recognize  
16 that document.

17 (Handing to witness.)

18 A Yes, sir. This is a photocopy of Mrs. Privette's  
19 W-2 forms for the years she worked for me. Unfortunately,  
20 they would be confusing to someone who may not be an  
21 accountant or familiar with it, because, see, Phyllis came  
22 to work in '72 in the middle of the year and only worked a  
23 few months.

1 Q What did she make that year?

2 A Well, I really -- it looks like wages paid,  
3 \$3,930. That was for just part of the year. The year that  
4 she worked a full year was 1973 when she was paid \$7344.97.  
5 She got her raise to 8,000 in June of '74, but left in  
6 August. So, the W-2 form for 1974 only shows her pay from  
7 January 1 to August 12 of '74, and her raise to \$8,000 is  
8 not reflected very well because she only had the raise shown  
9 in her pay from June probably 15 to August 12.

10 MR. DANIEL: All right, sir. Thank you.

11 I move that this be admitted, Your Honor.

12 THE COURT: Any objection?

13 MR. SLENKER: No objection.

14 THE COURT: Mr. Scanlon, any objection?

15 MR. SCANLON: No objection.

16 THE COURT: It's admitted.

17 (The W-2 forms previously  
18 identified as Plaintiff's  
19 Exhibit No. 9 was received  
20 in evidence.)

21 BY MR. DANIEL:

22 Q Doctor, when did you become aware that Mrs. Privette  
23 was going to undergo surgery that summer?

1           A     I really can't remember. It's been that long  
2           ago. I certainly was aware of it in August when she asked  
3           to have a leave of absence of four to six weeks so that she  
4           could have her surgery. And we had arranged to let this  
5           take place when she was due to have her two weeks vacation  
6           so that she would only be out of the office effectively two  
7           and possibly four weeks maximum.

8           Q     Did you expect her to return to work?

9           A     I expected her to return to work in four to six  
10          weeks maximum.

11          Q     She did consult with you regarding the scheduling  
12          of her operation in conjunction with her vacation time?

13          A     Yes, sir.

14          Q     After Mrs. Privette's surgery, did she have occasion  
15          to come back and see you about further employment?

16          A     Phyllis returned to see me. And I can't remember  
17          the exact month, but it was probably about five months after  
18          surgery.

19                 At that time she told me that she really needed  
20          to return to work. But Phyllis was weak. She had an obvious  
21          tremor. She couldn't walk very steadily. And it was obvious  
22          to me that she wouldn't have the stamina to be able to perform  
23          a half a day's work in my office which is a very busy, intense

1 office. You have to work there for a week to understand  
2 that I suppose.

3 Q So, she was not reemployed by you at that time?

4 A No. You would have to be on your feet eight, nine  
5 hours a day, and handling multiple complex problems. You  
6 just could not be confused or weak or dizzy. You would have  
7 to be with it if you are going to take care of acutely ill  
8 people who have potential heart attacks and major medical  
9 problems.

10 MR. DANIEL: Thank you very much, Dr. Amos. No  
11 further questions.

12 THE COURT: Cross examination.

13 MR. SLENKER: Thank you, Your Honor.

14 CROSS EXAMINATION

15 BY MR. SLENKER:

16 Q Doctor, could you give us just a general idea as  
17 to when she came back to see you about her work?

18 A No more than what I've already stated, sir. It's  
19 been over two years ago. And when you work fifty some hours  
20 a week, and you have all the problems of multiple patients  
21 that you are trying to take care of, these things are not  
22 major issues in your life, so you don't remember them as far  
23 as dates are concerned. I couldn't say if it was three months

1 time to have this operation. It was my judgment to suggest  
2 that it was my belief that four to six weeks would be  
3 adequate.

4 Q Was the four to six weeks period your idea or was  
5 it hers?

6 A It was my idea of the four to six weeks. She  
7 asked me for time off to have the surgery and to recover.  
8 And naturally, being a physician, she asked me what I thought.  
9 And I said I thought that four to six weeks would be adequate.

10 Q You knew about the surgery that she was going to  
11 have?

12 A I knew that she was going to have abdominal surgery  
13 for a pelvic problem, sir.

14 Q Did she tell you this?

15 A She told me she had a pelvic problem. She needed  
16 an operation. And I felt that it would most likely have to  
17 be abdominal.

18 Q Did she go into any details at all, sir, with  
19 regard to ovaries or endometriosis or any of that?

20 A Not that I can recall. That's been two and a half  
21 years ago, sir.

22 Q I understand.

23 Then I take it that there was a time when you had

1 THE COURT: Prior inconsistent statement.

2 MR. SLENKER: Cut of the hearing of the defendant?

3 THE COURT: Any further argument on it?

4 MR. SLENKER: No indeed.

5 THE COURT: The Court will overrule the objection.

6 Note your exception.

7 MR. SLENKER: I do indeed.

8 MR. SCANLON: I object and note my exception.

9 BY MR. DANIEL:

10 Q Mrs. Holley, the question put to you was whether  
11 or not had you had a conversation with Mrs. Privette  
12 regarding the circumstance of her surgery and specifically  
13 whether or not a Dr. Hall was involved in these conversations.

14 A The answer is yes.

15 Q You said on more than one occasion?

16 A Yes.

17 Q What specifically did Mrs. Privette tell you with  
18 regard to Dr. Hall and the operation?

19 A That she wished him to be present when she had  
20 surgery.

21 Q Do you recall when was the last time you had such  
22 a conversation with Mrs. Privette?

23 A Shortly before she went into the hospital. I would

1 say the day before.

2 Q After Mrs. Privette went in the hospital for surgery,  
3 when was the next occasion you had to speak with her?

4 A She called me the evening after she had had surgery  
5 in the morning.

6 Q What time did you receive that telephone call?

7 A I think it was around five o'clock in the evening.

8 Q Could you relate to us that conversation?

9 A She was at that time still a little groggy. And  
10 she said that she had not had occasion to see her doctor  
11 after he had performed the surgery, so she did not know what  
12 they had found as far as the problem, whether the problem  
13 was solved or not.

14 But she said that her doctor -- her request for  
15 Dr. Hall to be present had not been honored, that he was not  
16 there. She said the last thing that she remembered was that  
17 he was not there, and they were going to put her to sleep,  
18 and she had tried to get off the table. She had cried and  
19 screamed and asked that he be there.

20 Q How long did this conversation last?

21 A Maybe five minutes.

22 Q Did you have occasion to go to the hospital and  
23 visit Mrs. Privette?

1 A Yes, I did. I was there every day.

2 Q During the course of your visits to the hospital,  
3 did you have occasion to see a Dr. Pugsley?

4 A Yes, I did.

5 Q When did you see Dr. Pugsley?

6 A As I recall, only on one occasion. And this was,  
7 if I remember correctly, one week after her surgery. I  
8 think this was the following Thursday.

9 Q Where did you see Dr. Pugsley?

10 A Outside the operating room at Fairfax Hospital.

11 Q How did you know that the man you met at that time  
12 was Dr. Pugsley?

13 A He identified himself.

14 Q Were you alone or with others?

15 A No, there were others. Her daughter, Susan, was  
16 there. And I believe her cousin and her cousin's husband  
17 and one other person, but I can't remember who that was.

18 Q Did you have a conversation, or was this a  
19 conversation from Dr. Pugsley at that time?

20 A Dr. Pugsley was going to bring us up to date on  
21 what had occurred because we had been so worried. We knew  
22 that she was very ill. And they had gone in for an  
23 exploratory to see what was causing all of her trouble.



1           He told us that they had inserted a tube into  
2           the right ureter and that did not go anywhere, that they  
3           discovered there was no kidney there, and that in the --  
4           on the left side, apparently the ureter had been nicked  
5           during surgery, that urine had escaped into her body, and  
6           this was one week after surgery.

7           Q     You use the word "nicked" and I ask you to be  
8           as precise as you can in recalling the details of that  
9           conversation.

10          A     To the best of my knowledge, that is the word  
11          he used.

12          Q     You say you visited Mrs. Privette every day  
13          during the course of her hospitalization?

14          A     Yes, for several weeks until she was getting  
15          better. Then I didn't go every day.

16          Q     Could you generally describe some of the highlights  
17          of your observations of Mrs. Privette and the condition that  
18          you saw her in at the hospital?

19          A     It was frightening, shocking. She was apparently  
20          almost dead. She just -- she had tubes in her nose, in her  
21          mouth, needles, machines that she was connected to. They  
22          were apparently showing whatever was going on in her body.  
23          And she was completely unconscious.

1 Q How about her hair?

2 A Her hair was all right at this point. Her hair  
3 started coming out later.

4 Q When was that?

5 A As well as I remember , it was when she had been  
6 moved up to I think the third floor of the hospital in the  
7 kidney ward. Then when she would get out of bed, there would  
8 be hair all over her pillow and over her bed. I would take  
9 it and rake it up.

10 Q Did you observe her fingernails, the care of her  
11 fingernails?

12 A While she was in intensive care, her fingernails  
13 grew very long, into the ends of her fingers. Then when she  
14 got home, they broke off and were all knotted, and I think  
15 probably some of them came out completely.

16 Q Did you observe that they were ever cut or  
17 manicured?

18 A Only when she was able to do it herself.

19 Q What about your observations of Mrs. Privette  
20 after she got home from the first surgery?

21 A She was very weak, very sick. She could maybe  
22 manage to get from the bed to a chair. There was a complete  
23 loss of memory at times. She would tell me things, and then

1 completely forget that she had told me.

2 Q Have you noted any change in her since the  
3 surgery?

4 A I think that she's undergone a complete personality  
5 change.

6 MR. SLENKER: Objection to this, if Your Honor  
7 please. She says, "I think." She is expressing an opinion  
8 now. There's been no foundation laid for any kind of  
9 justification for her to issue such an opinion. It can be  
10 a perceivable statement in any event.

11 THE COURT: Rephrase your question.

12 BY MR. DANIEL:

13 Q Insofar as you are able to compare her with your  
14 knowledge of her before and after the surgery, have there  
15 been changes in her that you have noted?

16 A Yes, I definitely see a change.

17 Q What would the changes be that you have noticed?

18 A Nervousness, forgetfulness, short of temper.

19 Q Have you observed whether or not she worked during  
20 this period?

21 A No, she was not able to work. She -- her weakness  
22 was very apparent.

23 MR. DANIEL: No further questions, Your Honor.

1 THE COURT: Cross examination.

2 CROSS EXAMINATION

3 BY MR. SLENKER:

4 Q Mrs. Holley, where are you employed?

5 A I am not employed.

6 Q So you were free during the course of the day to  
7 go see Mrs. Privette when she was in the hospital?

8 A Yes, I was.

9 Q Were you at the hospital on the 15th of August?

10 A If that was the day of the surgery, no, I wasn't.

11 Q Were you there on the 14th of August?

12 A No. She was at home. No, that was the day before  
13 surgery. No, I was not.

14 Q Did you take her to the hospital?

15 A No, I did not.

16 Q Do you know how she got to the hospital?

17 A No, I do not.

18 Q Now, you indicated that in conversations you had  
19 with Mrs. Privette, she told you that she wished to have Dr.  
20 Hall present in the surgery?

21 A Correct.

22 Q Now, did she say that to you more than once?

23 A Yes, she did.

1 Q Starting when?

2 A I really can't remember, but it was said more than  
3 once. Several times.

4 Q Do you remember the date upon which she first  
5 found out about the surgery?

6 A No, I don't.

7 Q So, you couldn't give a date at all?

8 A No. It had been contemplated for a while before  
9 she actually went in.

10 Q All right.

11 I take it that she never at any time told you that  
12 Dr. Hall was going to be at the surgery?

13 A Yes. She indicated that he was going to be there.

14 Q When did she indicate that to you?

15 A The day before she was to go in.

16 Q Did you interrogate her or ask her how she knew  
17 that to be true?

18 A She stated to me that he was going to be there.

19 Q Now, how about my question? Did she tell you how  
20 it was that she --

21 A (Interposing) No.

22 Q (Continuing) -- had found out or she knew that he  
23 was going to be there?

1 A No.

2 Q You didn't ask her about it?

3 A No. When she said --

4 Q (Interposing) Was that before or after she went  
5 to the hospital?

6 A She said before she went to the hospital that  
7 Dr. Hall was going to be present at surgery. She had  
8 specified specifically that she wanted him there. She did  
9 not want surgery without him.

10 Q She told you all that?

11 A Right.

12 Q All right. Now, you had a conversation with her  
13 on the afternoon of the 15th.

14 A Yes.

15 Q That I understand was about five o'clock.

16 A Yes.

17 Q Did she dial your number?

18 A Apparently so.

19 Q She knew your number?

20 A Of course.

21 Q You say she was still kind of groggy?

22 A Yes.

23 Q But she talked coherently, didn't she?

1           A     She talked and let me know that her request had  
2 not been honored. She was most upset about it, that surgery  
3 had been performed and her doctor had not been there.

4           Q     That took you about ten seconds to tell us that.  
5 What did you talk about the other four minutes and fifty  
6 seconds?

7           A     I didn't say that it was a definite five minutes.  
8 But I would say that we probably talked about her son and  
9 daughter who were next door, and I was trying to keep an eye  
10 on them for her, helping out with things.

11          Q     Did she carry on a rational conversation with you?

12          A     As well as I remember.

13          Q     When you said something to her, she gave you an  
14 appropriate response, didn't she?

15          A     As well as I remember, she did.

16          Q     All right.

17                Are you saying now you didn't talk to her for five  
18 minutes?

19          A     I would say that it was approximately five minutes,  
20 yes.

21          Q     She had a phone in her room right beside her bed,  
22 didn't she?

23          A     I would imagine so.

1 A 1940.

2 Q Upon receiving your degree, what did you do in  
3 terms of your education?

4 A I had an internship at Crawford Long Hospital in  
5 Atlanta, Georgia, for two years and a half. And then I  
6 went in the Army, United States Army for three years. And  
7 then I came back to Atlanta after the war and finished my  
8 residency making a total of four years internship and  
9 residency.

10 Q Did you come to this area at that time?

11 A In 1947, April of 1947.

12 Q You were admitted to practice in the State of  
13 Virginia at that time?

14 A Yes.

15 Q Have you been practicing here ever since?

16 A Since April 1, 1947.

17 Q In the specialty of obstetrics and gynecology?

18 A Yes, sir.

19 Q When were you first licensed to practice in the  
20 State?

21 A In June of 1940 -- July of 1940.

22 Q Are you licensed to practice in any other states?

23 A State of Georgia.



1 Q Since practicing in this area, in what hospitals  
2 have you had privileges?

3 A Alexandria Hospital, Circle Terrace Hospital,  
4 Arlington Hospital, Fairfax Hospital.

5 Q During the course of your practice, have you had  
6 occasion to serve as the head of any departments?

7 A Yes, sir. I was chairman of the Department of  
8 Obstetrics and Gynecology at the Alexandria Hospital for  
9 three years. I was chief of staff at the Alexandria Hospital  
10 for the normal one-year term. I have just finished twenty-  
11 one years as president of the Board of Directors of Circle  
12 Terrace Hospital. And I have served on any number of tissue  
13 committee -- tissue committees and chart review committees.

14 Q Are you a member of any professional society, sir?

15 A Yes, sir.

16 Q Would you tell us what those are?

17 A I am a fellow of the American College of Surgeons.  
18 I am a member of the Alexandria Medical Society, Medical  
19 Society of Virginia, American Medical Association, the  
20 Southern Medical Association, the Royal Society of Medicine  
21 in London, and the Northern Virginia Obstetrical Society.

22 Q The Northern Virginia Obstetrical Society consists  
23 of members in what area, sir?

1           A     From all of Northern Virginia, from the Alexandria,  
2           Arlington and Fairfax areas.

3           Q     Is that a voluntary organization?

4           A     Yes, it is essentially.

5           Q     Have you received any awards?

6           A     Which type do you mean?

7           Q     Service awards?

8           A     Service awards in the Army I was decorated. But  
9           I have received a service award from Circle Terrace Hospital  
10          for the twenty-one years as chief of the -- as president  
11          of the Board of Directors.

12          Q     Are you familiar with the facilities available  
13          at the various hospitals that you have described as having  
14          privileges at in this area of Northern Virginia?

15          A     I am familiar with the ones at Alexandria and at  
16          Circle Terrace Hospitals, not quite so much at the other two,  
17          at Arlington and Fairfax.

18          Q     Do you know, sir, if those hospitals have available  
19          IVPs and the use of catheters?

20          A     So far as I know, all.

21          Q     All the hospitals in this area have them?

22          A     All the hospitals do, yeah.

23          Q     Are those types of devices available to them?

1           A     Yes, sir.

2           Q     Insofar as you know from practicing in this  
3           locality, are all of the facilities basically similar at  
4           these various hospitals?

5           A     Essentially as far as I know, yes.

6           MR. DANIEL: Your Honor, I would offer Dr. Ferrell  
7           as an expert in the field of obstetrics and gynecology to  
8           qualify and testify as to the standard of care of like  
9           specialists in this community.

10          MR. COURT: Mr. Slenker, do you wish to question  
11          him?

12          MR. SLENKER: Not at this juncture, Your Honor.

13          MR. SCANLON: No, sir.

14          THE COURT: All right. Go ahead and proceed.

15          BY MR. DANIEL:

16          Q     Dr. Ferrell, prior to coming here today, have you  
17          had occasion to review certain medical records in the case  
18          of Mrs. Privette and her treatment by Dr. Pugsley?

19          A     Yes, I have.

20          Q     I'd like to show you, sir, what has been marked  
21          and admitted as Plaintiff's Exhibit No. 1-A, medical records  
22          pertaining to a hysterectomy performed by Dr. Martel in 1970.  
23          Would you glance through those, sir?

1 (Handing to witness.)

2 A All right.

3 Q Have you seen those records, sir?

4 A I have seen copies of most of this record. I have  
5 not seen all of them.

6 Q Have you seen the operative report of Dr. Martel  
7 that is contained in this?

8 A Yes.

9 Q Next, Doctor, I'd like to show you the records  
10 of Fairfax Hospital, Plaintiff's Exhibit No. 1-B, and ask  
11 if you have seen the Doctor's progress notes as contained  
12 in this record.

13 A Yes, sir, I have. I have read the Doctor's  
14 progress notes.

15 Q Have you read the operative report of Dr. Pugsley  
16 in connection with this surgery he performed upon Mrs.  
17 Privette?

18 A Yes, I have.

19 Q Also, I'd like to show you the records contained  
20 in Plaintiff's Exhibit No. 1-C, specifically referring you  
21 to the daily nurse's notes and medication records.

22 A No, I have not seen this. I have not seen the  
23 nurse's notes.

1 Q Okay, sir. Would you review the nurse's notes  
2 here briefly for the 15th and 16th?

3 A I beg your pardon. I have seen these. I have  
4 seen the 15th and 16th nurse's notes.

5 Q All right, sir.

6 MR. SLENKER: Is that August 15?

7 MR. DANIEL: August 15.

8 MR. SLENKER: Thank you.

9 BY MR. DANIEL:

10 Q Now, Dr. Ferrell, I'd like you to assume the facts  
11 as contained in the medical records which you have reviewed  
12 which I've shown you, and in addition, I would like you to  
13 assume the following: that in the fall of 1973, following  
14 the hysterectomy and the procedure performed by Dr. Martel  
15 in 1970, Mrs. Privette complained of vaginal bleeding at  
16 which time she went to an OB-GYN, a Dr. Brenner, who did  
17 an examination, who could not determine the cause of bleeding.  
18 She was subsequently seen by Dr. Hall who did an examination  
19 and did not diagnose the cause. And then on February 7,  
20 1974, she was seen by Dr. Pugsley. Her chief complaint at  
21 that time was erratic bleeding from the vaginal cuff.

22 Dr. Pugsley obtained a history from Mrs. Privette,  
23 and she had told him at that time that she was forty-one

1 Q In light of that finding, what should have been  
2 done?

3 A Do you -- are you meaning now what should have  
4 been done prior to surgery?

5 Q Yes, assuming that --

6 A (Interposing) Assuming that the defect had been  
7 discovered.

8 Q Yes, sir.

9 A She should have had a urological consultation.  
10 In my opinion, she should have been seen by a neurologist --  
11 a urologist with the possibility of inserting catheters  
12 perhaps preoperatively or certainly with the idea of  
13 protecting the one remaining kidney and ureter during the  
14 operation.

15 Q Would the insertion of the catheter preoperatively  
16 have resulted in the protection of the ureter?

17 A It would certainly have lessened the likelihood of  
18 damage to it, yes.

19 Q Preoperatively, what other steps do you feel the  
20 standard would have required the Doctor to have taken?

21 A That in essence is all I would think.

22 Q Reviewing the charts based upon the facts you've  
23 been provided, do you find that Dr. Pugsley met the standard

1 MR. SLENKER: If he asks the question, fine, what  
2 he has just represented to the Court. I think it's probably  
3 not objectionable.

4 THE COURT: I will allow you to go into that part  
5 of it. I will preserve your points so your exceptions are  
6 noted to the Court's ruling.

7 MR. POVICH: If exceptions are necessary.

8 THE COURT: They are really not any more, but we  
9 do it out of habit. Like a lot of things, you get in the  
10 habit of doing it. But I will note it for you so your  
11 record is preserved. Okay.

12 (Thereupon, the following proceedings continued  
13 in the hearing of the jury.)

14 BY MR. DANIEL:

15 Q Dr. Ferrell, you testified that you examined the  
16 medical records pertaining to the patient immediately after  
17 surgery, and that you reviewed the urinary output and input  
18 records in that time frame, say, thirty-six hours, have you  
19 not, sir?

20 A Yes.

21 Q What do those records reflect?

22 A Well, the most noticeable thing that I noticed was  
23 that the urine continued to be bloody on into the first

1 BY MR. DANIEL:

2 Q Excuse me. What would the standard of care require  
3 that a physician in this area do insofar as is relating or  
4 not relating that information to this patient in the context  
5 of the surgery that was to be performed?

6 A Well, the patient should be notified or should be  
7 made knowledgeable of the fact that she only had one kidney.

8 Q Why should she be informed of that?

9 A Because the hazard of the operation becomes greater  
10 if there is only one functioning kidney.

11 Q Based upon your review of Mrs. Privette's history  
12 prior to surgery in this case, were there any alternatives  
13 to an average physician in the situation to the abdominal  
14 surgery?

15 MR. SLENKER: If Your Honor please, I object again  
16 on the basis this is not claimed in this law suit, not a  
17 single word in this law suit about alternatives, and yet here  
18 we are interrogating this doctor in connection with that  
19 theory.

20 THE COURT: Okay.

21 MR. POVICH: Judge, not being advised of the risks,  
22 Your Honor, is clearly a part of this law suit.

23 THE COURT: All right, overrule your objection.



1 removed, and the bleeding continued even after that.

2 Q When you referred to the excision, are you  
3 referring to the excision by Dr. Pugsley in March?

4 A That is correct, yes.

5 Then following this excision, the bleeding  
6 continued. And this itself is a most unusual situation  
7 and should call for a second opinion.

8 Q Do you have an opinion, sir, as to what caused the  
9 injury to the ureter in this case and when?

10 A Well, certainly it would have to have occurred  
11 during the surgery. There are several things that could  
12 have happened. The ureter could have been pinched with a  
13 clamp. It could have had a suture put into it. It could have  
14 been nicked with the sutures, or the circulation to it could  
15 have been impaired in some way. Those are the main things.

16 MR. DANIEL: Thank you, sir. No further questions.

17 THE COURT: Mr. Slenker.

18 CROSS EXAMINATION

19 BY MR. SLENKER:

20 Q Dr. Ferrell, with reference to the second opinion,  
21 the second opinion on what, sir?

22 A On the procedure to follow, the course of action.

23 Q You are aware, I take it, are you not, that she had

1 A Unless it's an obstruction.

2 Q It will show obstruction?

3 A That's right.

4 Q But it doesn't prevent any kind of surgical  
5 injury to the ureter, does it?

6 A The IVP itself does not, no.

7 Q It does not. So, the difficulty of the  
8 complication that was experienced here could have happened  
9 and probably might have happened with or without the IVP;  
10 is that not true?

11 A You are asking for my opinion.

12 Q Yes, sir.

13 A Yes, it could have. But the preliminary work-up,  
14 as I said before, would have lessened the likelihood of  
15 injury or damage.

16 Q I understand that it might lessen the likelihoos  
17 of it. But the injury and the complications still occur  
18 even with the IVPs, don't they?

19 A Oh, yes.

20 Q Within reasonable medical probability, it did here,  
21 did it not?

22 MR. DANIEL: Objection. Your Honor.

23 MR. SLENKER: That is a perfectly legitimate  
question.

1 THE COURT: What is the basis of the objection?

2 MR. DANIEL: That there was no IVP.

3 MR. SLENKER: I am entitled to find out from him  
4 the effect of that.

5 THE COURT: Overrule the objection. Note your  
6 exception.

7 BY MR. SLENKER:

8 Q The type of surgical complication that occurred in  
9 this case could just as reasonably have happened within  
10 medical probability whether an IVP was done or whether it  
11 was not; isn't that a fact?

12 A That's true.

13 Q All right.

14 So, the effect of not doing an IVP is really of  
15 no moment, isn't it, Doctor?

16 A I think it is, yes.

17 Q Because of what, the likelihood or the  
18 prospect of a decreased risk of some type?

19 A I think a patient who is going to have major  
20 surgery deserves every possible thing that she can have to  
21 prevent the likelihood of damage or injury of any kind.

22 Q I understand that. I understand that. Every time  
23 that you operate and every time one of your OB-GYN colleagues

1 A No.

2 Q Could it be caused by the adhesions?

3 A I shouldn't think so, no.

4 Q Don't think so?

5 AQ No.

6 Q All right. Can you differentiate at all between  
7 the compromise of the blood supply as the cause of it?

8 A I don't quite understand what you mean. What can  
9 I distinguish?

10 Q Do you know whether the fistula that occurred  
11 was caused by a compromise of the blood supply or something  
12 else?

13 A No. You can't say except that -- no, I don't see  
14 that you could say that. No.

15 Q Now, you don't make a diagnosis of a fistula in  
16 the ureter until you see some evidence of it, do you?

17 A Not a fistula, no.

18 Q Now, in this case, is not the first evidence of  
19 the presence of a fistula on the 22nd of August?

20 A The first evidence of the fistula, yes, but not  
21 injury to the ureter.

22 Q Do you have any evidence at all in this record  
23 about injury to the ureter?

1           A     I wouldn't -- from the bloody urine for thirty-  
2 six hours plus the diminished urine flow to me would  
3 indicate ureteral damage

4           Q     All right. Is the standard when you have those  
5 two items that you immediately reoperate on the patient or  
6 do you pursue a course of watchful waiting within the  
7 standard of medical care?

8           A     You don't do either one. You investigate to try  
9 to find out what is the problem.

10          Q     Now then, in this case you had a pulmonary  
11 embolism on the 17th?

12          A     Yes.

13          Q     Now, that would mask, would it not, some of the  
14 urologic symptoms so far or it might possibly to the extent  
15 that they were not diagnosable, is that not true?

16          A     Well, yes. But that came well way after the  
17 symptoms were apparent or the signs were apparent.

18          Q     Is bloody urine an unusual phenomenon following  
19 pelvic surgery?

20          A     It is for this woman, yes, unless some part of  
21 the urinary tract has been damaged.

22          Q     Is decrease in urine output normally a phenomenon  
23 that follows pelvic surgery?

1 A I have no idea. I don't know.

2 Q How about the 17th?

3 A I just don't remember the date at all.

4 Q Now, would those blood values and the tests,  
5 laboratory tests that you are talking about, be at all  
6 influenced by reference to the pulmonary embolism?

7 A I presume so, yes. I would say so, yes.

8 Q That would cause a breakdown of the blood, would  
9 it not? That would be distinguishable in laboratory tests?

10 A Oh, yes. Yes.

11 Q Now, if 1200 CCs of fluid were taken out of the  
12 chest, would that be significant to you, sir?

13 A Yes, that's significant.

14 Q In what regard?

15 A That was what, three days after --

16 Q (Interposing) In what regard was it significant?

17 A It's part of the total fluid output.

18 Q That fluid would normally be what might be expected  
19 to pass through the kidneys, would it not, and constitute  
20 a part of the urine flow?

21 A This is true. But, sir, you are getting away from  
22 what I stated. You are leading me away from what I --  
23 my original statement. I said that the bright red reading

1 and the diminished output in the first twenty-four or thirty-  
2 six hours would have made me suspicious. Beyond that  
3 point when the embolism occurred, then your hands are tied.  
4 You just don't have -- there is not anything more you can  
5 do other than what was done.

6 But my feeling was that the diminished output and  
7 the bloody urine should have been investigated before the  
8 embolism even occurred. And this is the point I'm trying  
9 to make here. I've got no -- no argument with the -- what  
10 occurred after that at all. This is the only criticism I  
11 have of the postoperative --

12 Q (Interposing) All right, sir. Now, I'd like  
13 to concentrate with you, if I might, Dr. Ferrell, on the  
14 catheters. The catheter is on the inside of the ureter,  
15 is it not?

16 A Yes, it is.

17 Q It does not prevent injury, does it?

18 A No.

19 Q It does not prevent compromise of blood supply  
20 to the ureter, does it?

21 A No.

22 Q It does not prevent as a matter of fact the  
23 onslaught of disease to the ureter from the outside or from

1 the pelvic area, does it?

2 A No.

3 Q As a matter of fact, Dr. Ferrell, is it not  
4 true that a surgical injury to a ureter can happen just as  
5 easily with the catheter in place as with a catheter not  
6 in place?

7 A I think you've asked me this once or twice before.  
8 And each time I have said it does not prevent it, but it  
9 certainly makes it less likely that you are going to damage.  
10 it if you can feel it and tell exactly where that catheter  
11 is.

12 Q All right, sir.

13 Now, isn't it true that if as an OB-GYN surgeon  
14 you have gotten into the ureter in the excision of some  
15 organ that you will see some evidence of it at the operating  
16 table?

17 A Not necessarily, no.

18 Q What are the probabilities? Would you expect or  
19 do you expect within your profession to see them at that time  
20 or do you not?

21 A Usually you do not.

22 Q Usually you do not.

23 A That's right, at the time of the operation.



1 Q Why is that the case, Doctor?

2 A Because the location of the ureter is such that  
3 in working in the pelvis, you work oftentimes very close  
4 to the ureter. Unless you have some ways of the  
5 identification of the ureter, good identification, it's very  
6 easy to nick it or put a stitch through part of it or all of  
7 it, and you don't know it at the time.

8 Q Now, let's examine the hypothesis of the stitch.  
9 If you put a stitch through it, will it cause immediate  
10 leakage of urine?

11 A Not necessarily.

12 Q When would you expect the leakage of urine to be  
13 manifested if that were the situation?

14 A I don't know that I can absolutely correctly  
15 answer that question. As I said, I am not a urologist.  
16 And I would expect it would depend entirely on how much of  
17 the ureter was nicked, whether it went through -- all the  
18 way through the ureter or went simply into the wall of the  
19 ureter making a weak place in which maybe a rupture would  
20 occur later, or you might get leakages as quickly as right  
21 away.

22 Q If you do get leakage right away, cannot the  
23 surgeon see it?

1 A Oh, no. No. It builds up.

2 Q Can it be accumulating there over a period of time?

3 A It's unlikely it would to that extent without  
4 symptoms.

5 Q In determining what is the degree of output of  
6 fluid, is it not true that you have to take what is being  
7 taken formally, what is being taken by catheter, and you  
8 also have to add the 1200 CCs from the chest?

9 A Well, may I ask you to show me where the 1200 CCs  
10 is? The first evidence of fluid from the chest that I  
11 noticed was on the 19th. And at that time she got rid of  
12 5506 CCS.

13 Q 5500?

14 A And six CCS. That's right. That was on the 19th.

15 Q Where is the 5500 coming from?

16 A From the chest. From the chest tube.

17 Q Rather than 1200?

18 A Well, this is four days after surgery.

19 Q All right.

20 A There is no mention that I noticed. The first  
21 twenty-four hours she had 3245 CCs intake and 700 CCs output.  
22 On the second twenty-four hours, there are 2230 CCs input  
23 and 430 CCs output which is an average of 17.9 CCs per hour.

1 Q Yes.

2 A On the 17th, the note on the chart says output  
3 very low, 22CCs in three hours on one occasion. And the  
4 intake was 4800 CCS. And she had an output by catheter  
5 of 404 CCs.

6 Q Where on the chart do you find those values, Doctor?

7 A There is a page in there with all of the amounts  
8 listed.

9 Q That's the in and out chart?

10 A Yes, sir.

11 Q All right.

12 Do you know Dr. James Close?

13 A Yes, sir.

14 Q What is his specialty?

15 A He is an obstetrician, gynecologist.

16 Q You are aware of the time that he saw Mrs. Privette  
17 on the 17th?

18 A Yes.

19 Q He wrote a progress note, did he not?

20 A Yes.

21 Q On the 17th of August at 2:00 p.m.?

22 A He was concerned about -- as I recall from that  
23 progress note, he was concerned about the urinary output.

1 And then it improved just very slightly?

2 Q Now, you referred to what, 20 and 30 CCs?

3 A Well, the first twenty-four hours -- the total  
4 intake in the first twenty-four hours, 3245 CCs. Output,  
5 700, which is an average of 29.1 CCs per hour.

6 Q Now, that's for a twenty-four hour shift?

7 A Twenty-four hour shift, yes, sir.

8 Q All right.

9 Now, let me show you his note here. He saw her  
10 at two o'clock on the 17th. Then he says the last two hours,  
11 the output was 65 CCs.

12 A That's what the note says, yes. That's still  
13 below what you would expect or what she should be putting  
14 out. She should be putting out a minimum of 40 CCs an hour.

15 Q Then he goes further and reports, does he not, what  
16 was put out in the most recent half hour?

17 A She's put out another 50 CCs in the next half hour,  
18 yes.

19 Q That helped him to conclude that she possibly was  
20 getting better so far as the output was concerned?

21 A At that particular time, yes.

22 Q All right.

23 Now, with the decrease, with the bloody urine,

1 is it your testimony that a test should then have been run  
2 investigating the cause for it?

3 A I think so, yes.

4 Q When you say test, are you speaking of IVP?

5 A That or ureteral -- or cystoscopy, yes. IVP, of  
6 course, first.

7 Q IVP first and then cystoscopy.

8 A This again would be the realm of the urologist.  
9 With a problem like this, I would call the urologist right  
10 quickly and say do what you think needs to be done. I  
11 wouldn't attempt to do it myself at all.

12 Q Would you make those judgments yourself?

13 A I would make the judgments to call the urologist.

14 Q And then leave it up to him?

15 A Leave it up to him, yes.

16 Q Isn't that indeed what was done here?

17 A No. Dr. Close was called. He was not a urologist.

18 Q Aren't you aware of the fact that Dr. Berger was  
19 asked to consult on the case, Dr. Strauch was asked to  
20 consult on the case?

21 A Later.

22 Q I believe on the 19th?

23 A Yes. I am talking about the day following surgery.

1           A     Well, this -- this, of course, would have been  
2 again in the realm of the urologist. But there are  
3 treatments. Oftentimes -- I say oftentimes, but one treatment  
4 is you put a ureteral catheter up and leave it. If there  
5 is found an injury in the uretha, or certainly with a  
6 cystoscope, if the blood had been coming from the bladder,  
7 this would have been apparent. If not, if you see the blood  
8 coming from the ureteral orifice in the catheter, then you  
9 know the blood is coming from the ureter in which case a  
10 ureteral catheter could be inserted and left in place.  
11 Oftentimes if there is an injury or stitch through there,  
12 sometimes these will heal by themselves.

13           Q     If corrective action is taken immediately?

14           A     Quickly, yes.

15           Q     Did you find any evidence in this case that that  
16 was done?

17           A     I didn't understand.

18           Q     Did you find any evidence in this case that that  
19 was done?

20           A     No.

21           Q     Mr. Slenker asked you about evidence of the  
22 fistula and what evidence you found of the fistula and/or  
23 damage to the ureter. What was the evidence that you found

1 in the record that indicates damage to the ureter, possible  
2 damage to the ureter, and when does it present itself?

3 A What I have referred to on several occasions, the  
4 bloody urine within the first day and a half, and the  
5 diminished urinary output.

6 Q He also asked you if you found any fault with  
7 Dr. Pugsley's surgical technique in performing the operation.  
8 I believe you testified that you did not. Assuming that  
9 Mrs. Privette had been worked up preoperatively as you  
10 indicated she should have been, and an IVP had been performed,  
11 would that have indicated the use of a catheter during the  
12 course of the surgery?

13 A It would have to me, yes. But I would have had  
14 urological help on this again.

15 MR. SLENKER: I object, if Your Honor please, to  
16 what would have been or what would have been done by him  
17 specifically.

18 THE COURT: Sustained.

19 BY MR. DANIEL:

20 Q I will rephrase the question. Would the standard  
21 have indicated use of the consultation by urologist and the  
22 use of the catheter during the surgery?

23 A In my opinion, the standard would have indicated

1 that, yes.

2 Q So, the fact that Dr. Pugsley did not do that  
3 indicates to you that he did not follow the standard; is that  
4 correct, sir?

5 A In my opinion, yes.

6 Q Mr. Slenker also asked you about the benefits or  
7 the lack of benefits really of the catheter in performing  
8 the procedure. What benefits are there to using the  
9 catheter in this situation?

10 A Well, I thought we had made that clear. But it  
11 makes the ureter more identifiable or more easily  
12 identifiable at the time of surgery.

13 Q Were there factors in this history and in this  
14 operation which would indicate that that would have been  
15 good to have, have it more readily identifiable?

16 A It would seem so, yes.

17 Q What were those factors?

18 A I think the greatest factor is the fact that the  
19 ureter was damaged.

20 MR. DANIEL: Thank you.

21 THE COURT: Anything further, gentlemen?

22 MR. SLENKER: Yes, there is, if Your Honor please.  
23



1 (Handing to witness.)

2 A Yes, sir.

3 Q It's a two-page note about the surgery, isn't it?

4 A That's correct. Yes, but --

5 Q (Interposing) Dictated on the day of surgery,  
6 wasn't it, Doctor?

7 A Yes, sir. But this has nothing to do with the  
8 patient's condition later in the day. The patient is  
9 operated on in the morning. She should be seen that evening.

10 Q Now, are you saying that that's what caused a  
11 ureter difficulty?

12 A No, sir, I am not saying that. No, sir.

13 But you asked me about the standard of good  
14 medical care, and that would come under the standard of good  
15 medical care.

16 Q You are saying nobody saw her that afternoon?

17 A No, sir. I am not saying that at all.

18 Q Who did see her that afternoon?

19 A The resident saw her that afternoon.

20 Q What resident?

21 A What was his name? Cooper, I believe.

22 Q Dr. Cooper?

23 A I believe so.

1 Q What is wrong with that?

2 A Nothing.

3 Q Isn't that within the standard?

4 A I wouldn't think so, no. I think the surgeon who  
5 operates on her should see the patient again the same day.

6 Q I see.

7 Now, here is the 1200 CCs, Doctor (indicating).

8 A That's on the 17th.

9 Q Right. By whom?

10 A Dr. Bowen, is it?

11 Q Dr. Bowen. That's on the consultation sheet,  
12 is it not, that was addressed to Dr. Bowen?

13 A Yes, sir.

14 Q For management of what?

15 A Of this patient postoperatively who is complaining  
16 of chest pain.

17 This is when the embolism obviously occurred.

18 Q Now, the embolism, while it develops rapidly,  
19 does it give any prognostication that it's about to occur?

20 A No, not that I know of.

21 Q Does the fluid accumulate in the chest before  
22 the embolism hits or after?

23 A After as far as I know.

1           Q     So, when they aspired 1200 CCs on the 17th,  
2 the embolism had already been experienced, has it not?

3           A     I would think so.

4           Q     Were it not for the embolism, were it not for the  
5 1200 CCs that accompanied that event, that 1200 CCs probably  
6 would have been excreted, wout it not, through the bladder  
7 and the Foley catheter?

8           A     If the urinary operators were working sufficiently  
9 well to put it out, it would have, yes.

10          Q     Dr. Ferrell, you say decreased urinary output.  
11 How do we know what fluids are being diverted because of  
12 other physical conditions, to wit, pulmonary embolism into  
13 other areas of the body where they are being retained and  
14 where they are accumulating to the extent they never get to  
15 the kidney? How do we tell why that process occurs or how  
16 it occurs, or indeed when it occurs?

17          A     Well, you are getting me into a branch that I'm  
18 not extremely conversant in. I'm not a chest doctor either.  
19 But I do know that in the event of inflammatory disease in  
20 the chest or embolism, that fluid can accumulate very  
21 rapidly, and in acute heart failure of the chest, it can  
22 fill up with fluid in a matter of just a very few seconds.

23          Q     That's fluid that otherwise would go out through  
the kidneys?

1 Q Directing your attention, is it Mrs. Marks, to  
2 August of 1974, did there come an occasion in which you  
3 assisted in the care and treatment of Phyllis Privette at  
4 Fairfax Hospital?

5 A Yes.

6 Q Were you employed at that time?

7 A Yes.

8 Q By whom?

9 A The Fairfax Hospital.

10 Q On that occasion, when Phyllis Privette was  
11 operated on, did you administer the anesthesia to her?

12 A (Yes.)

13 Q Did you do so as an employee of the hospital?

14 A Yes.

15 Q At the time that you administered the anesthesia,  
16 was there an anesthesiologist or a physician under whose  
17 supervision that was administered?

18 A Yes.

19 Q What was his name?

20 A Dr. Silbersiepe.

21 Q Was he actually present at the time the anesthesia  
22 was administered?

23 A I don't recall.

1 Q You don't recall his being there, or you don't  
2 recall whether he was or was not?

3 A I don't recall him being in the immediate area  
4 of the operating room.

5 Q Were you in the immediate area of the operating  
6 room?

7 A Yes.

8 Q You were the individual who did administer the  
9 anesthesia?

10 A Yes.

11 Q Does the anesthesia have a feel in the vein? What  
12 kind of anesthesia was administered to Mrs. Privette?

13 A Do you want the agents?

14 Q Yes.

15 A Halothane, nitrous oxide, oxygen.

16 Q Thank you.

17 Would you spell that?

18 A Halothane, h-a-l-o-t-h-a-n-e, nitrous oxide,  
19 n-i-t-r-o-u-s o-x-i-d-e, and oxygen.

20 Q How is that administered?

21 A Through a semiclosed circle filter system of the  
22 anesthesia machine.

23 Q How does the agent get into the body?

1 A It goes through the machine. and she was intubated.

2 Q What does that mean?

3 A That means she had an endotracheal tube in her  
4 trachea.

5 Q In her what?

6 A Trachea.

7 Q Where is that?

8 A Through the larynx. That's the voice box and  
9 into the trachea.

10 Q Where is the trachea?

11 A At the -- in the back of the mouth. And it's --  
12 if you are looking through the mouth, it's at the back of  
13 the mouth.

14 Q Is there a mask that's used?

15 A Initially.

16 Q Initially there is a mask?

17 A Yes, until she is intubated.

18 Q What does intubated mean?

19 A It means that I put a tube into her trachea through  
20 the larvnx.

21 Q So, you first put a mask over her face?

22 A Yes.

23 Q Now, before this occurs, what is done? Do you do

1 anything else to her, or do you do anything to her prior to  
2 the time you put the mask over her face?

3 A (Yes.)

4 Q What do you do?

5 A I take the blood pressure and check her pulse.

6 Q Do you give her any injection?

7 A (Yes.)

8 Q When do you give her that injection?

9 A After I've checked her vital signs, which is your  
10 blood pressure and pulse.

11 Q At that time, do you give it with a syrinze?

12 A (Yes.)

13 Q At that time, does she have any intravenous fluid  
14 running through her?

15 A (Yes.)

16 Q What is that fluid?

17 A What is the fluid?

18 Q (Yes.)

19 A It's an electrolyte solution with dextrose which  
20 is sugar.

21 Q When does that start?

22 A In the holding area.

23 Q At any time is that changed?

1 A More fluids are put up if needed.

2 Q Does the consistency of it or the composition of  
3 it change?

4 A No, sir.

5 Q In the operating room itself, what do you do insofar  
6 as anesthetizing, or what did you do insofar as anesthetizing  
7 Mrs. Privette in the operating room?

8 A I don't know what you mean by that.

9 Q Was she anesthetized before she was brought to the  
10 operating room?

11 A She had preop medication given.

12 Q She was. What was the preop medication?

13 A She had Demerol, Valium and Atropine.

14 Q Demerol?

15 A Valium and Atropine.

16 Q Who administered that?

17 A A nurse on the floor that she was on.

18 Q That was before she was brought down?

19 A Yes.

20 Q What other medication was she given?

21 A That was all.

22 Q Did you give her any medication?

23 A In the operating room.



1 Q What did you give her?

2 A Sodium pentothol.

3 Q How is that given?

4 A Intravenous.

5 Q That's what I wanted to know. When was that  
6 given?

7 A After I checked her vital signs.

8 Q In the operating room?

9 A (Yes. sir.)

10 Q What is the purpose of that?

11 A To produce sleep.

12 Q To produce sleep. In other words, is this done  
13 before or after the mask is put over her face?

14 A (Before.)

15 Q So, would it be fair to say that the last thing  
16 Mrs. Privette most likely would have recalled would have  
17 been receiving the injection which was designed to put her  
18 to sleep?

19 MR. SCANLON: I'll object to that, Your Honor.  
20 I don't think that's proper for this witness to speculate  
21 as to what would have been the last thing she would recall.

22 THE COURT: Overrule your objection. Note your  
23 exception. If she knows.

1           A     You are asking me -- would you state that again,  
2 please?

3                     BY MR. POVICH:

4           Q     Yes. I want to know the last thing that the  
5 patient, Mrs. Privette, most likely would recall. Would  
6 that be the injection of the solution in her vein to put her  
7 to sleep?

8           A     I can't answer that with a yes or no.

9           Q     All right. But the solution is designed to put  
10 her to sleep?

11          A     (Yes.)

12          Q     It is injected in her vein before you put the mask  
13 over her face?

14          A     (Yes.)

15          Q     At the time you put the mask over her face. is  
16 she usually asleep?

17          A     (Yes.)

18          Q     All right.

19                     I am asking you then is it fair to say that the  
20 last thing that she would recall before she went to sleep  
21 would be the injection?

22                     MR. SCANLON: I still object.

23                     THE COURT: Overruled. She can answer if she knows

1 the answer.

2 A I cannot answer that with a yes or no because she  
3 was premedicated.

4 BY MR. POVICH:

5 Q But you did give her an injection in the operating  
6 room which put her to sleep; is that correct?

7 A (Yes.)

8 Q And that thereafter you administered the anesthesia  
9 agent with a mask, is that correct, through a mask and then  
10 a tube?

11 A Yes.

12 Q I just want to make sure I've got the sequence  
13 correct. Does the agent which you used to put her asleep,  
14 you said was it sodium pentothal?

15 A (Yes.)

16 Q Does that create any sensation, burning sensation  
17 in the vein or may it at the time it's injected?

18 A Some patients feel it does. Some don't.

19 Q Were you the individual that injected intravenously  
20 the sodium pentothal in Mrs. Privette's vein?

21 A (Yes.)

22 Q That was in the operating room; is that correct?

23 A (Yes.)

1 Q You did so as an employee of the hospital?

2 A (Yes.)

3 Q You did so under the supervision of Dr. Heinz  
4 Otto Silbersiepe who you don't recall being present at the  
5 time?

6 A That is correct.

7 Q Where were you at the table at the time that you  
8 injected --

9 A (Interposing) At the head of the table.

10 Q Is that where Mrs. Privette's head was, behind  
11 it?

12 A Where I was?

13 Q Yes.

14 A Yes.

15 MR. POVICH: I have no further questions.

16 CROSS EXAMINATION

17 BY MR. SLENKER:

18 Q Mrs. Marks, did you play any part in taking Mrs.  
19 Privette from the holding area to the operating room?

20 A Yes.

21 Q Were you assisted by anybody in that regard?

22 A Yes.

23 Q Who would that be?

1 A The circulating nurse. I don't remember her name.

2 Q I see. Had you had conversation with Mrs. Privette  
3 in the holding area?

4 A Yes.

5 Q Do you remember what that was?

6 A Yes.

7 Q What was it?

8 A Well, I go through a series of questions that I  
9 ask her. Would you like those?

10 Q Yes.

11 A I ask her the medication she's on, her allergies,  
12 her previous surgeries, whether -- when she had last had  
13 something to eat or drink, if she had any dentures, partial  
14 plates or caps, if she had any history of rheumatic fever,  
15 heart disease, asthma, bronchitis.

16 Q Did she answer those questions?

17 A Yes.

18 Q Did she make any statements with regard to Dr.  
19 Hall?

20 A (Yes.)

21 Q What were they?

22 A She told me that she had spoken to him yesterday.  
23 And he told her that -- that he would be there with her

1 prior to going into surgery.

2 Q She told you she had spoken with him yesterday  
3 the 14th?

4 A (Yes. )

5 Q All right. Was he there, in fact?

6 A No, he wasn't.

7 Q Did you try to find him?

8 A Yes.

9 Q Were you successful?

10 A (No. )

11 Q Did you ascertain where he was?

12 A I didn't.

13 Q You did not?

14 A That's right.

15 Q All right.

16 Did somebody else --

17 A (Interposing) (Yes.)

18 Q (Continuing) -- to your knowledge? Who was that?

19 A (Mrs. McClure. )

20 Q Who is Mrs. McClure?

21 A She's the charge nurse in the OB-gyne suite where  
22 the surgery was performed.

23 Q During the time that you transported Mrs. Privette

1 from the holding area down to the specific operating room.  
2 will you tell the members of the jury if she ever objected to  
3 anything?

4 A I don't recall her saying to me.

5 Q Would you indeed have taken her from the holding  
6 area to the operating room had there been any objection by  
7 her?

8 MR. POVICH: Objection.

9 THE COURT: Sustained as to the form of the question.

10 BY MR. SLENKER:

11 Q Did you hear any objection from her at any time  
12 during the time you were her presence about this operation  
13 or the surgery?

14 A Mrs. Privette told me in the holding area that  
15 she had talked to Dr. Hall the day before, and she wanted to  
16 see him prior to going into surgery.

17 Q That she wanted to see him?

18 A (Um-hum.)

19 Q Now, when you went to get her to take her to the  
20 operating room, did she object to anything?

21 A When I took her into the operating room, there was  
22 no objection.

23 Q How about in the holding area? Did she object to

1 anything?

2 MR. POVICH: She's answered that.

3 THE COURT: Go ahead.

4 A Mrs. Privette told me that she had gone to see  
5 Dr. Hall. I asked Mrs. McClure about this. Mrs. -- and  
6 Mrs. McClure is the one that relayed the message to Mrs.  
7 Privette. But there was no objection made to me from the  
8 time that I wheeled her out of the holding area into the  
9 operating room.

10 Q How about in the operating room itself?

11 A There was no objection.

12 Q You heard Mrs. Privette testify with reference to  
13 what she said in the operating room in her appearance on the  
14 stand in this case.

15 A (Yes.)

16 Q Is that true?

17 A Mrs. Privette testified that we asked her to wait  
18 to move from the carriage onto the operating room table.  
19 This is true.

20 Q Anything else that she said true?

21 A She said that I took her blood pressure and that  
22 I put her to sleep. That is true.

23 Q Prior to your giving her the shot, putting her to



1 sleep, you heard what she had to say in her testimony with  
2 reference to her testimony and what she said on that  
3 occasion?

4 A Well, from what I recall what Mrs. Privette said,  
5 that is correct.

6 Q Did she object to going to sleep?

7 A No, she didn't.

8 Q Did she say she didn't want to be put to sleep  
9 until Dr. Hall got there? Did she say that to you at any  
10 time?

11 A In the holding area.

12 Q How about in the operating room?

13 A ( No. sir. )

14 Q Now, does the patient know or do you tell the  
15 patient that you are about to give them a shot?

16 A I don't give them a shot directly into them. I  
17 put it into the IV tubing.

18 Q The IV tubing?

19 A Yes.

20 Q Did you do that with Mrs. Privette?

21 A ( Yes. )

22 Q Did you at any time hear Mrs. Privette say she  
23 didn't want to go to sleep?

1 A I did not hear her say that at any time.

2 Q Did you not hear her say that she did not want the  
3 operation?

4 A No, sir.

5 MR. SLENKER: Thank you, Mrs. Marks. That's all  
6 I have.

7 THE COURT: Mr. Scanlon.

8 MR. SCANLON: I don't think I have any questions.

9 REDIRECT EXAMINATION

10 BY MR. POVICH:

11 Q Mrs. Marks, remember I asked you beforehand about  
12 the IV fluid,

13 A Yes.

14 Q I asked you if anything was added to it and you  
15 told me no.

16 A It was not added to it until into the operating  
17 room. It was not added in the holding area.

18 Q So, if Mrs. Privette said that she felt something  
19 in her arm from the IV, if what she was feeling was the  
20 sodium pentothal, that's how she would have gotten it, isn't  
21 it?

22 A That's correct.

23 Q I mean you didn't walk over to her and put a

1 syringe in her arm?

2 A That's right.

3 Q So, she would be correct about that; is that not  
4 true?

5 A If she said she felt it, she felt it.

6 Q But she said she felt it in the same tube that  
7 was the IV fluid.

8 A That would be correct.

9 Q You did add then the agent, the sodium pentothal  
10 then to the IV tube in the operating room?

11 A In the operating room.

12 Q Mrs. Privette did tell you in the holding area that  
13 she did not want to be put to sleep until Dr. Hall was there?

14 A That is correct.

15 Q When you put her to sleep, Dr. Hall was not there,  
16 was he?

17 A That's right.

18 Q Did you put her to sleep because Dr. Pugsley had  
19 told you to take her from the holding area to the operating  
20 room?

21 A Dr. Pugsley had had a conversation with me. yes.

22 Q Please answer my question.

23 MR. SCANLON: No, Your Honor. I think she should be

1 permitted to answer the question.

2 MR. POVICH: He can ask any question he wants,  
3 Your Honor. I would like to have that question answered  
4 first and then she may give any explanation.

5 THE COURT: Reask your question.

6 BY MR. POVICH:

7 Q The question is did you take her from the holding  
8 area to the operating room because Dr. Pugsley told you to?

9 A ( Yes, sir.)

10 Q All right. Now, would you like to add to that?

11 A When Mrs. Privette told me she wanted to speak to  
12 Dr. Hall. I relayed my message to Mrs. McClure. Mrs.  
13 McClure then called Dr. Hall. Then Mrs. McClure from the  
14 message that Dr. Hall had given --

15 Q (Interposing) Don't tell us what Mrs. McClure  
16 said. I don't mind your saying what happened, but there is  
17 a rule about hearsay.

18 A I know. It's difficult for me to explain.

19 Q You can't say what Dr. Pugsley said, or at least  
20 I haven't asked you. I am simply asking whether or not you  
21 took her down to the operating room because Dr. Pugsley said  
22 to do so.

23 A ( Yes, sir.)

1 MR. POVICH: I have no further questions.

2 MR. SCANLON: I do, Your Honor.

3 RECROSS EXAMINATION

4 BY MR. SCANLON:

5 Q Going back to this conversation in the holding  
6 area, Dr. Pugsley came into the holding area, did he not,  
7 at some point in time --

8 A (Interposing) Yes.

9 Q (Continuing) -- before she was taken down. He  
10 talked with --

11 MR. POVICH: (Interposing) Objection, Your Honor.  
12 I think Mr. Scanlon can ask the question without having to  
13 suggest what the answer is by yes or no.

14 THE COURT: Sustained.

15 MR. SCANLON: I didn't finish the question. Okay.  
16 I'm sorry.

17 BY MR. SCANLON:

18 Q He did talk with --

19 MR. POVICH: (Interposing) Objection, Your Honor.

20 BY MR. SCANLON:

21 Q Did Dr. Pugsley talk with Mrs. Privette?

22 A ( Yes, he did. )

23 Q Where were you when Dr. Pugsley talked with Mrs.

1 Privette?

2 A In the holding area.

3 Q How far away were you from Dr. Pugsley and Mrs.  
4 Privette?

5 A I just don't remember.

6 Q Did you hear what Mrs. Privette said to Dr.  
7 Pugslev?

8 A No, I did not.

9 Q Can you say how long they talked?

10 A I would just -- I'd have to guess. About five  
11 minutes.

12 Q At the end of that five-minute conversation, did  
13 Mrs. Privette appear to you in any way to be agitated or  
14 excited?

15 A No, she did not.

16 Q Did you have to come up to where Mrs. Privette  
17 was laying on the litter?

18 A (Yes.)

19 Q Then what did you do? Did you look at her at all?

20 A I don't remember.

21 Q Did she say anything to you at all?

22 A I don't believe she did.

23 Q You pushed her down to the operating room?

1 A That's right.

2 Q With the assistance of --

3 A (Interposing) The circulating nurse.

4 Q Is that the certified operating room technician?

5 A No. She's a registered nurse in the operating  
6 room.

7 Q Then you pushed her into the operating room?

8 A That's right.

9 Q You went over and got her on to the operating room  
10 table?

11 A She moved over on the operating room table.

12 Q She moved over on her own. Did she say anything  
13 about Dr. Hall at that time?

14 A (No, sir.)

15 MR. POVICH: I still think he ought to ask her  
16 what she said.

17 THE COURT: Sustained. What if anything.

18 BY MR. SCANLON:

19 Q What if anything did Mrs. Privette say about Dr.  
20 Hall in the operating room?

21 A Mrs. Privette did not say anything about Dr. Hall  
22 in the operating room.

23 Q Never said a thing.

1 MR. SCANLON: I object.

2 THE COURT: Overruled.

3 A I don't remember the last thing Mrs. Privette told  
4 me.

5 BY MR. POVICH:

6 Q But the last thing she told you with respect to  
7 whether or not she wanted to be put to sleep was that she  
8 didn't want to be until Dr. Hall was there?

9 A Mrs. Privette told me that at one time. But I  
10 cannot testify that that was the last thing she told me.

11 Q Do you recall what else she said with respect to  
12 whether or not she wanted to be put to sleep if Dr. Hall was  
13 there or not?

14 A The only thing I can recall Mrs. Privette saying  
15 was that she did not want to be put to sleep until she spoke  
16 with Dr. Hall.

17 Q Thank you.

18 You never saw her speak with Dr. Hall?

19 A That's correct.

20 MR. POVICH: Thank you.

21 THE COURT: Anything further?

22 MR. POVICH: No, Your Honor.

23 THE COURT: Any further questions?



AFTERNOON SESSION (1:30 p.m.)

(The following proceedings continued out of  
the hearing of the jury.)

THE COURT: Okay. Are there any motions that the  
plaintiff has as to nonsuit or not?

MR. POVICH: Yes, Your Honor.

We are going to nonsuit as to the defendant  
Hospital on the first count as to negligence for the acts  
of the Defendant Pugsley.

THE COURT: Okay. Anything further?

MR. POVICH: Not at this time, Your Honor.

THE COURT: Okay.

MR. POVICH: We do not rest at this time.

THE COURT: Okay. Do you have more evidence that  
you want to put on?

MR. POVICH: Yes.

We will rest, Your Honor.

THE COURT: Okay. Plaintiff rests at this point.

MR. POVICH: I'm sorry. There are two matters.  
I would like to move into evidence all exhibits which were  
not previously ruled on by the Court. I believe we have  
1, 2, 3. I would like to move the admission of 3, which is  
the X-rays.

1 THE COURT: Any objection to the X-rays? Okay.  
2 That will be in evidence without objection.

3 MR. SLENKER: Are you moving all the X-rays, or  
4 just the two that were utilized by Dr. Berger?

5 MR. POVICH: For present purposes, just the two  
6 that are --

7 THE COURT: (Interposing) Testified to by Dr.  
8 Berger.

9 MR. POVICH: No. I would like to have them all  
10 in and available.

11 THE COURT: All X-rays. No objection. Okay.

12 (The X-rays previously  
13 identified as Plaintiff's  
14 Exhibit No. 3 was  
15 received in evidence.)

16 MR. POVICH: 4, 5, and 6 are the wage statements.

17 I would like to move those in in light of the  
18 testimony of Dr. Amos, her employer.

19 MR. SLENKER: Just because those indicate the  
20 earnings she did receive in those respective years, I don't  
21 perceive that falls within the ambit of receivable evidence.  
22 It's immaterial and irrelevant to any of the issues here.

23 MR. POVICH: It's in mitigation of damages, Your

1 Honor.

2 MR. SLENKER: Well, mitigation of damages, if the  
3 burden is on him to prove damages that proximately and  
4 directly flow from something. They don't show that at all.

5 MR. POVICH: We want to show how much she was able  
6 to earn as opposed to what she would earn.

7 THE COURT: Okay. Let me ask Mr. Slenker a  
8 question as to her damages she's got for a year afterward,  
9 right, '75?

10 MR. SLENKER: Yes.

11 THE COURT: She worked there for six months or  
12 a year.

13 MR. SLENKER: Yes, but they didn't say during this  
14 period of time she could not work.

15 MR. POVICH: That was the inference.

16 MR. SLENKER: I don't think that is a legitimate  
17 inference that flows from it. Not at all. We talked to  
18 Dr. Berger in terms of weakness only. His testimony as I  
19 recall it was he would expect perhaps for maybe three months,  
20 maybe at the outside a year, but that's weakness. There  
21 hasn't been one physician that said this lady could not  
22 work during calendar year 1975 because of what happened to  
23 her. Not one witness has testified to that.

1 THE COURT: Dr. Amos indicated he had a job for  
2 her. He gave her four to six weeks, I believe, until the  
3 situation straightened out. He expected her to come back and  
4 discuss it. She said she would and didn't because of the  
5 illness.

6 MR. SLENKER: But he didn't identify when it was  
7 that she came back and when the discussion took place.

8 MR. POVICH: He said it was about five months.

9 MR. SLENKER: We don't know whether it's in '75  
10 or '76 or when it is. So, I say it's not tied up to anything.  
11 To submit that to the jury is saying that you are entitled  
12 to take into consideration her lost wages predicated on what  
13 she earned during the time she worked for Dr. Amos in all of  
14 '75 and all of '76, and under the posture of the evidence  
15 here, I think would be improper.

16 THE COURT: All right, sir. Mr. Scanlon.

17 MR. SCANLON: I would join him.

18 THE COURT: Anything further, Mr. Slenker?

19 MR. SLENKER: No.

20 THE COURT: Mr. Povich.

21 MR. POVICH: Your Honor, I think the combined  
22 testimony of Dr. Strauch, Dr. Berger who talked of her  
23 weakness, Dr. Stowell who was the psychiatrist who said she

1 would have difficulty returning to her employment, testified  
2 to the particular difficulty this woman had and the  
3 particular need for future psychiatric care before she could  
4 become reemployed as a nurse, I think is sufficient under  
5 those circumstances.

6 THE COURT: Go ahead.

7 MR. POVICH: I would just say Dr. Amos as well.  
8 His testimony in that regard, although he was not precise  
9 as to when he did see her, it was obvious she came back with  
10 the hope of gaining employment. He made not only a delay  
11 judgment but a medical judgment about her condition at that  
12 time, that she could not resume reemployment. I think that  
13 was about five months after the surgery.

14 Your Honor, Mr. Daniel indicated that his notes  
15 indicate that Dr. Berger had testified that it was expected  
16 during the course of hospitalization her injuries, difficulties  
17 would last at least a year.

18 THE COURT: That's what I understood.

19 MR. DANIEL: It was a question on cross examination  
20 by Mr. Slenker, in fact. He said that most of his patients  
21 had not had the degree of hospitalization that Mrs. Privette  
22 had, and that he would expect one year before physical --

23 THE COURT: (Interposing) Did Dr. Stowell testify

1 to this?

2 MR. POVICH: Dr. Stowell testified essentially  
3 to future; that he felt that she needed future psychiatric  
4 care in order for her to return to her profession.

5 THE COURT: Okay. Can you find that in Dr.  
6 Stowell's testimony?

7 MR. POVICH: I think certainly, Your Honor, 5  
8 should go in.

9 THE COURT: All right. Any further argument on  
10 that?

11 MR. SLENKER: No, sir.

12 THE COURT: No. 4 is '75, and reserve on 5 and 6  
13 with '76. I will note the defendants' exception. No. 7 is  
14 the prescriptions. I will adhere to my previous ruling and  
15 note any exception.

16 (The wage and tax statements  
17 previously identified as  
18 Plaintiff's Exhibit No. 4  
19 were received in evidence.)

20 MR. POVICH: No. 3.

21 MR. SLENKER: That's been withdrawn.

22 MR. POVICH: No. 9, the W-2's, I move the  
23 admission of those, Your Honor. They were the estimates

1 A I don't think so, no.

2 Q All right.

3 Now, if one during the course of a surgical  
4 procedure cuts a ureter --

5 A (Interposing) Yes.

6 Q (Continuing) -- will that be apparent at once?

7 A It should be apparent at once.

8 Q How will it manifest itself?

9 A Usually by the clear liquid, the urine which  
10 appears in the peritoneal cavity.

11 Q If there is no urine that appears in the peritoneal  
12 cavity once the surgery is finished, can we assume from that  
13 within reasonable medical probability that it was not so cut?

14 A I think we can, yes. There is a possibility that  
15 it could accumulate extraperitoneal or outside the peritoneum.  
16 But if it was cut, you would assume the peritoneum was also  
17 cut and therefore the urine would extrude.

18 Q If in doing the surgery there is a disruption of  
19 the tissue and it occurs at a place where the surgeon cannot  
20 see it, how does he know about it, or how can he know about  
21 it?

22 A Failure to put out urine after the procedure.

23 MR. POVICH: I'm sorry, what?

1 THE WITNESS: A failure to put out urine, a  
2 failure to put out urine through the urethra or the bladder  
3 after the procedure.

4 MR. POVICH: After the procedure?

5 THE WITNESS: That's right.

6 BY MR. SLENKER:

7 Q Doctor, I show you here what is the operative  
8 report by Dr. Pugsley following the procedure of the 15th.  
9 I'm sure there is a copy of it in there, but I can't put  
10 my hands on it right now, but I can on this one. Right down  
11 here concentrating on that (indicating), I believe that  
12 indicates that he inspected the surgical site, does it not,  
13 sir?

14 A Surgical sites were inspected and interspaces noted  
15 to be adequate.

16 Q When he does that, and that's a routine procedure,  
17 is it not, in surgical procedures of this type?

18 A Yes, to be certain there is no excessive bleeding.

19 Q Do you look to see if there is any bleeding first  
20 of all?

21 A That's right.

22 Q Do you look to see if there are any other structures  
23 that are emitting anything?



1 which is a pregnancy type change in this endometrial tissue.

2 I assume by now you have been through this point where you  
3 know what endometriosis is.

4 Q Yes, we have heard about it.

5 A It produces a change in the characteristics, see,  
6 through two things. And if you can keep this for a period  
7 of time, say nine months or a year or perhaps two years even,  
8 this tissue will sometimes burn itself out. It's sort of  
9 like putting weed killer on weeds. It just become so active  
10 that it burns the -- takes the life out of this tissue. And  
11 the endometriosis will sometimes be brought under control.  
12 This is the medical treatment for it.

13 Q All right.

14 How many causes are there, Dr. Treichler, of  
15 injury to ureters in doing pelvic surgery in the area of  
16 your specialty? Are there many, one, two, what?

17 A I don't quite understand the question. When you  
18 say causes, the causes are trauma, and of course, trauma  
19 can be many kinds. You can put a clamp on the ureter. You  
20 can squeeze it this way. If you take the clamp off soon  
21 enough, the ureter will recover itself. You can cut it. You  
22 can sew it, crush it as I said. It can even be pulled at  
23 the side with the retractor that holds the incision open. It's

1 a long retractor that can push against the ureter and trauma-  
2 tize it conceivably.

3 Q Any others?

4 A I'm sure there are others. I can't think of them  
5 right now.

6 Q How about the compromise of blood supply?

7 A Well, yes. You can tie off the blood supply.

8 Q How far is the --

9 A (Interposing) This is not usual though unless you  
10 are doing an operation where you are taking the ureter up and  
11 actually dissecting it free of its moorings because you can  
12 pretty well dissect it out.

13 Q I see.

14 Do injuries occur in this type of procedure whether  
15 you have catheters in the ureters or whether you do not?

16 A Well, it could, yes. It's possible.

17 Q These injuries --

18 MR. POVICH: (Interposing) Again, the question  
19 is not "possible." I think it's still probable.

20 THE COURT: Sustained.

21 BY MR. SLENKER:

22 Q It has to be within reasonable medical probability,  
23 Dr. Treichler. Can you answer that same question within

1 reasonable medical probability?

2 A I think it would be less likely to damage it with  
3 the catheter in the ureter.

4 Q Less likely?

5 A That's right.

6 Q If it is less likely then, how is it or why is it  
7 that most of the OB-GYNs, and I take it yourself included,  
8 do not use them during surgical procedures of this type?

9 A Again, this is an invasive procedure. And these  
10 procedures are not without their problems. I certainly  
11 wouldn't want anybody putting a ureter catheter up my ureter  
12 unless I had mighty good reason for it because you can  
13 introduce infection, and you can actually traumatize the  
14 ureter by putting a catheter up. This requires cystoscopy  
15 and other operative procedures, anesthesia, to insert the  
16 catheter. It prolongs the procedure.

17 And in this particular case where the lady had  
18 a pulmonary embolism within forty-eight hours of her  
19 procedure, if this additional operation -- if this additional  
20 operative time, anesthesia and so forth had been administered,  
21 I would imagine we'd now be saying that she had a pulmonary  
22 embolism because it prolonged operating time.

23 Q Is it a known fact within reasonable medical

1           Q     It can become a serious complication for the  
2 surgeon operating in the area of the abdomen, can it not?

3           A     Yes.

4           Q     Would it prevent perhaps some clear identification  
5 of the organs in the area or particularly perhaps the ureter  
6 if the surgeon gets in there and find that that area is  
7 complication by the process of endometriosis?

8           A     You are saying that it could make it more difficult  
9 for him?

10          Q     Yes.

11          A     Yes.

12          Q     Did you review the records in this case to learn  
13 whether or not there was any indication prior to the time  
14 that Dr. Pugsley operated on Mrs. Privette in August of  
15 1974, that there was an indication that she had had the  
16 endometriosis?

17          A     Well, he records the diagnosis at that time of the  
18 hysterectomy.

19          Q     That's in 1970, isn't it, four years earlier  
20 approximately?

21          A     Approximately.

22          Q     In 1970, at the time the hysterectomy was performed,  
23 her ovaries were left in, were they not?

1 A Well, they said about 40 milliliters per hour.

2 Q Can we talk in terms of CCs.?

3 A Well, we are possibly -- renal failure implies --

4 Q (Interposing) I know, Doctor. Doesn't this  
5 indicate if you drop below 40 CCs. an hour, it is indicative  
6 of renal failure?

7 A That is what they say in the book. But they  
8 also have a lot more in that paragraph.

9 Q I'm sure. Would you like to read it?

10 A "Obstruction of the lower urinary tract is a  
11 common postoperative experience." I think you are talking  
12 in terms of renal failure subsequent to obstructive behavior?

13 Q Yes. Let me ask you this, Doctor. If you saw  
14 your patient and it went down to 10 CCs. an hour after you  
15 performed an operation on her in her abdomen and you knew  
16 you were in the area of the ureters, would you ask for  
17 somebody to check urinary function at that point?

18 A Well, I would be very concerned, yes.

19 Q How would you go about checking?

20 A I'd do an IV pyelogram.

21 Q IVP?

22 A IVP.

23 Q You knew you would do one. That would be the first

1 step?

2 A Well, in this case, yes, I would do one.

3 Q Doctor, if you added the fact that the urine was  
4 bloody during this period of time, would it also give you  
5 some cause for concern as to whether or not you had in some  
6 way traumatized the ureter during the course of the operation?

7 A It could mean that. Usually it would mean more  
8 trauma to the bladder than the ureter.

9 The bladder is more apt to bleed. The ureter is  
10 such a small structure. As a matter of fact, essentially  
11 in a sense, it would be a reassuring thing because this would  
12 mean that the ureter was producing, that something was  
13 flowing through it to a sufficient degree to bring down blood  
14 into the bladder.

15 Q Something was flowing through it, but it wasn't  
16 very much, was it?

17 A No, but something was flowing through it.

18 MR. POVICH: Can we take a break at this point?

19 THE COURT: We will take a ten-minute recess.

20 Same admonition I gave you at the start of the trial.

21 (Whereupon, a short recess was taken.)

22 THE COURT: Are you ready to proceed, sir?

23 MR. POVICH: Yes, Your Honor.

1 THE COURT: Okay.

2 BY MR. POVICH:

3 Q Doctor, when do you believe that the injury to this  
4 woman's ureter occurred?

5 A When do I believe it occurred? Well, sometime  
6 during surgery.

7 Q It was injured by the surgeon at some point during  
8 the surgery?

9 A I didn't say it was an injury. Whatever happened  
10 occurred sometime during the surgery.

11 Q You say not the injury. Was it some form of  
12 trauma?

13 A Well, I don't even know that there was some form  
14 of trauma. As I said, this woman had good urinary output  
15 for the first twelve hours after the procedure. So, whatever  
16 happened to the ureter, did not damage at the point the  
17 integrity of the ureter. The ureter was still transmitting  
18 good. So, I don't know --

19 Q (Interposing) In your opinion, what caused the  
20 injury to the ureter during the course of the surgery?

21 A Do I have an opinion?

22 Q Yes.

23 A What I am doing is running through my mind trying to

1 figure out what things would occur that would allow the  
2 ureter to still transmit urine and ultimately undergo the  
3 process. And conceivably, there could be a suture nearby it  
4 which could make some traction on it which over a period of  
5 several days might produce some necrosis in maybe a portion  
6 of the wall. As you have mentioned already, conceivably,  
7 or Mr. Slenker possibly, a blood supply.

8 Q But you said you thought that was unusual.

9 A I did say -- you said what could --

10 Q (Interposing) No. Again, I want to stay away from  
11 "could." What in your opinion based upon reasonable medical  
12 certainty caused the injury to the ureter during the course  
13 of the surgery? How was it injured? You said it was  
14 unusual that it would be from the compromising of the blood  
15 supply.

16 A It could be the manipulation in the immediate  
17 vicinity of the injury in attempting to diagnose the ovary.  
18 The ovary is attached to the pelvic ligament, which the  
19 peritoneal lining, very often the ureter runs under this.  
20 In elevating the ovary to take it out, as I say, perhaps  
21 probably the suture of the pelvic ligament of the ovary  
22 was removed. It was in the area --

23 Q (Interposing) A suture?



1 A It could have been one in the area.

2 Q Doctor, it was anticipated, was it not, that you  
3 might very well expect in this operation endometriosis at  
4 the time you went in?

5 A I think it's an accepted fact that she had  
6 endometriosis.

7 Q When he got into the pelvic area, that's what he  
8 learned, did he not, that she had endometriosis?

9 A I don't know if he was too surprised.

10 Q In fact, the left ovary was bound down by  
11 endometriosis; is that correct?

12 A I believe that is described that way.

13 Q Is it your opinion that in accordance with good  
14 medical practice that the only thing he should be doing at  
15 that point in order to protect the ureter was to be, quote  
16 very careful, unquote?

17 A Yes. I think this is acceptable medical practice  
18 to be very careful.

19 Q You are not of the opinion that it was an accepted  
20 medical practice indeed the standard of care, to use  
21 preoperative catheters where you would expect some  
22 inflammatory adhesions such as those from endometriosis?

23 A I've said that I would not in this case insert

1 A Yes.

2 Q Now, that's over a twenty-four hour period, is  
3 it not?

4 A Yes.

5 Q Any question about that?

6 A Well, it's the output, yes.

7 Q Over twenty-four hours she is putting out 430?

8 A Yes, that's about half of what you would expect.

9 Q What you would expect is about fifteen?

10 A You would expect about a thousand CCs. The  
11 standard is between a thousand and 1500 CCs.

12 Q So, she is certainly below what the handbook talked  
13 about in terms of indication of --

14 A (Interposing) Of ideal output, yes.

15 Q Ideal? It said anything below 40 CCs. indicated  
16 renal failure. She clearly is below 40, is she not, on the  
17 16th?

18 A Yes.

19 Q Is there anything else you want to say about that?

20 A Well, again, coming back to the fact that with  
21 urinary output, the -- you are talking about obstructive  
22 disease. I mean you start looking for other medical problems.  
23 She did have a medical problem coming up reducing her output

1 MR. POVICH: I object, Your Honor. This is all  
2 leading. It's all yes or no, yes or no, yes or no.

3 THE COURT: Rephrase the question, Mr. Slenker.

4 BY MR. SLENKER:

5 Q Are you able to give an opinion within reasonable  
6 medical probability as to what in fact occurred to the  
7 ureter, Doctor?

8 A Well, as I said, I think that probably there must  
9 have been a suture in the neighborhood of the ureter which  
10 possibly later produced some necrosis in the wall. Again,  
11 the patient was putting out urine through this ureter. She  
12 was -- the continuity of the ureter was maintained until  
13 about the second day, if in fact that is what caused her  
14 urine output to go down that much. Her urine output in the  
15 first hour after the procedure was not down enough to cause  
16 a lot of harm. It was on the second day that the urine --

17 Q (Interposing) Do you have an opinion or can you  
18 tell the Court and the jury what effect the pulmonary  
19 embolism in this case had?

20 A Well, of course, this is a real crisis situation.  
21 And this made the difference between life and death in this  
22 patient. This was a pure crisis. It takes precedence over  
23 everything.

1 Q I believe his specialty is OB-GYN?

2 A Right.

3 Q Why did you refer Mrs. Privette to Dr. Pugsley?

4 A Because I thought that he was capable of managing  
5 this type of problem, and I regard him as a competent  
6 gynecologist.


7 Q Between that time when you saw her in early '74  
8 and in August of '74, did you have any direct contact with  
9 Mrr. Privette?

10 A Between the office visit and --

11 Q (Interposing) The surgery.

12 A I don't recall any contact with her.

13 Q Did you commit yourself to be present at the time  
14 of her surgery, Dr. Hall?

15 A No, I did not commit myself to be present at the  
16 surgery, but would be available if necessary during the  
17 surgery. 

18 Q Did you ever tell Mrs. Privette that you would see  
19 her in the operating holding area or in the operating room?

20 A No.

21 Q As a matter of fact, did you have any commitment  
22 at all with Mrs. Privette other than what you have just  
23 delineated for us?

1 A No. In regard to doctor-patient relationship,  
2 I would consider that we had no contractual relationship  
3 whatsoever unless it was necessary that I be present.

4 Q Did you have any conversations with Dr. Pugsley  
5 about this business of being present in the holding area or  
6 in the operating room?

7 A I don't recall that we really ever discussed it  
8 because I turned the patient over to him. And he probably  
9 told me that he was going to operate on her, and I was aware  
10 of it. And as I say, I was available on a p.r.n. or as  
11 necessary basis.

12 Q Where is your office, Dr. Hall?

13 A In Fairfax Hospital.

14 Q Right in the building?

15 A Right.

16 Q About how far away is it from the operating room  
17 or the operating room area?

18 A A block.

19 Q A block?

20 A Um-hum.

21 Q Were you in the hospital on that morning?

22 A Yes, sir.

23 Q Do you recall what you were doing?

1 A Yes. I recall that I had an eight-fifteen case  
2 which was not a long procedure, and probably I was out of  
3 there by nine o'clock.

4 Q I see.

5 On the 14th of August, did you have any conversations  
6 with Mrs. Privette?

7 A What is the 14th?

8 Q The 14th is the day that she checked into the  
9 hospital.

10 A Oh, the day she was admitted --

11 Q (Interposing) For the surgery.

12 A No.

13 Q Now, your office is in the hospital. Is it also  
14 tied to the hospital switchboard?

15 A Yeah.

16 Q The hospital switchboard is tied to the phones that  
17 are in the rooms at the hospital, are they not?

18 A Yeah.

19 Q The patient could pick up the phone in their room  
20 and dial your office directly, could they not?

21 A I think they can, yeah.

22 MR. SLENKER: I see.

23 Thank you. Your witness.

## CROSS EXAMINATION

BY MR. POVICH:

Q Doctor, you said that you referred her to Dr. Pugsley.

A Um-hum.

Q Let me ask you if you don't recall this. When you declined to treat Mrs. Privette for a gynecological problem, did she suggest that one of the doctors that she had been advised of who would handle GYN was Dr. Pugsley, and didn't you say, "Well, he would be all right. He would be all right. You could go to him"?

A I don't recall that she said that. I think I was the one that made the referral.

Q Are you certain about that, or did you just give her --

A (Interposing) Well, as close as I could be certain after two and a half years. I certainly don't remember daily office details when you see a number of patients.

Q When you saw her in 1974 or at the end of '73, did you do an examination of her?

A Yes, as I remember.

Q Was her problem at that point something of bleeding

1 in the vaginal area?

2 A Right.

3 Q Did you make a diagnosis as to what was the reason  
4 for that?

5 A I made a presumptive diagnosis since I believed  
6 there was historically an operative procedure done for as  
7 I can recall, endometriosis. And I had a presumptive  
8 diagnosis at that time that this might be residual  
9 endometrial disease in the vaginal cuff, but did not wish  
10 to treat it.

11 Q Did you confer with Dr. Pugsley with respect to your  
12 examination and your diagnosis?

13 A I don't recall whether I did or not. Usually when  
14 we refer these patients to another physician, why the  
15 physician elicits his own history and does his own physical  
16 exam. And I don't recall that we ever really discussed the  
17 patient any more.

18 Q You don't recall then whether or not Dr. Pugsley  
19 consulted with you as to what this woman's problem was?

20 A Well, I'm sure that he probably told me that he  
21 was -- had Mrs. Privette scheduled and he was going to operate  
22 on her, which is the customary thing that usually doctors  
23 do when they refer patients when they see a patient. But I



1 don't remember any detailed discussion regarding the surgery.

2 Q Now, Doctor, Mr. Slenker has limited his questions  
3 to you in regard to your conversations with Mrs. Privette  
4 so far; is that correct?

5 A Um-hum.

6 Q Now, Mrs. Privette did have several conversations,  
7 did she not, with your secretary, Claudia Bain?

8 A This might be, you know. I do not know in the  
9 course of an eight or ten-hour day any conversations any  
10 nurse, secretary, has. That telephone rings quite often.

11 Q Wasn't Mrs. Privette very anxious to make sure that  
12 the operation which Dr. Pugsley performed was performed at  
13 a time when you would be there?

14 MR. SLENKER: I object to the question, if Your  
15 Honor please. I don't know how he would have any way of  
16 knowing what Mrs. Privette's position was.

17 THE COURT: Sustained unless he knows. Go ahead.

18 A Available but not present, only if necessary.  
19 That commitment was made, but not to be in the operating  
20 room to watch another surgeon operate. If necessary --

21 BY MR. POVICH:

22 Q (Interposing) Why notto watch another surgeon  
23 operate, Doctor?

1           A     It's not customary that we go in and watch another  
2 surgeon. What would we be doing observing another surgeon  
3 operate?

4           Q     Consulting.

5           A     Well, they would consult if there was a problem.  
6 But if there is apparently no problem, what use would I be  
7 standing behind someone while he's doing surgery? We get  
8 frequently called into the operating room for consultations.  
9 But that's when there is an apparent problem, which they ask  
10 us to come in and give an opinion or help them resolve.

11          Q     Dr. Pugsley, when he performed this operation as  
12 far as you know, didn't know what the problem was going to  
13 be, did he?

14          A     I don't know if Dr. Pugsley knew what the problem  
15 was going to be. It's like many operative procedures. None  
16 of us are entirely 100 percent positive once the abdomen is  
17 opened what we are going to find.


18          Q     Isn't it a practice when the patient specifically  
19 ask that a doctor consult with another doctor before anything  
20 is taken out or put back in or is done with her, especially  
21 since you don't know what you are going to find beforehand?

22               MR. SLENKER: I object to the question, if Your  
23 Honor please. There is no testimony from him that this lady

1 asked him that at all.

2 THE COURT: Overrule the objection. Note your  
3 exceptions.

4 A I don't think that there was a question of what  
5 he was going to do on the part of the patient. If there was  
6 a question as to involvement of intestinal tract, which is  
7 usually the reason we are involved in these cases and get  
8 called in, then I would certainly feel that, you know, I  
9 would or should have been called. But I don't think at the  
10 time of the surgery that there was any apparent bowel  
11 involvement which would be one reason for me not to be  
12 involved.

13 Q Doctor, I didn't ask you whether there was a  
14 reason for you to be involved. I'm asking you whether or  
15 not prior to the surgery is it not a practice for a doctor  
16 to have present at the time of surgery someone with whom  
17 he can consult, especially if he's going to operate on a  
18 person for a problem and he doesn't know what he's going to  
19 find inside? 

20 A No, that is not customary at all. What is generally  
21 customary is when I operate, I'm operating with a resident  
22 and student team. I do not have another attending present  
23 unless I know that I am going to be involved in a system

1 where I normally do not handle the tissue. Then the man  
2 will begin the operation with me. But normally with a  
3 surgical resident and student team, and not an attending  
4 surgeon except myself.

5 Q Didn't Mrs. Privette make arrangements with  
6 Claudia Bain, contact Claudia Bain to make sure that the  
7 operation date, August 15, was a date in which you could  
8 be there?

9 A She may have asked Mrs. Bain whether or not I could  
10 be there. But the question of being there is the critical  
11 point which was not ever made. The point was that I would  
12 be available if necessary. I was not committed to be there,  
13 only if necessary.

14 Q What was the reason you were not committed to you  
15 there, Doctor? Was it because she had not made any  
16 contractual arrangements to pay you?

17 A No, just merely because I -- I just don't use my  
18 time up standing around and watching another surgeon operate.

19 Q Do you know what happened to this woman during the  
20 course of the operation?

21 A I have heard what happened over the course of  
22 hospitalization. I don't know all the details because I  
23 wasn't really involved.

1 Q Was Mrs. Privette a little anxious about going  
2 into this operation? Is that why she asked that you consult?

3 A She was as probably anxious as most patients are  
4 who are going to undergo surgery. They are all anxious.

5 Q Did she bring up with you the fact that she wanted  
6 you there?

7 MR. SLENKER: Objection, if Your Honor please, he  
8 said he never talked to her.

9 THE COURT: I will let him answer. Overrule the  
10 objection.

11 A She may have asked at the time in the office visit.  
12 But I didn't commit myself to be there. I told her I would  
13 be available if needed.

14 BY MR. POVICH:

15 Q You say she may have asked. Do you have a  
16 recollection now of that?

17 A I don't have an accurate recollection.

18 Q Then how were you able to tell her you would be  
19 available if needed?

20 A Because I do recall that she wanted me there. And  
21 I told her I would be available if needed.

22 Q In fact, isn't it a fact, Doctor, that Claudia  
23 Bain made a notation on your calendar for August 15?

1 A Right.

2 Q That Mrs. Privette was going in?

3 A Well, that notation would be there to prevent  
4 that I would be committed to doing something else at the  
5 same time.

6 Q What happened?

7 A If I told the patient that I would be available  
8 if necessary, I shouldn't be involved in something else at  
9 the same time. Therefore, we left the space open where if  
10 I was needed in the operating room, I would be available.

11 Q Were you occupied at the same time, Doctor?

12 A I don't remember two and a half years ago exactly  
13 what I was doing while she was undergoing surgery. I might  
14 have been making ward rounds.

15 Q You don't know where you were?

16 A Well, I wasn't operating at the time because I  
17 know I had a case earlier.

18 Q You were not in some other operating suite?

19 A I was operating at eight-fifteen, and I know I was  
20 out of there.

21 Q What time was Mrs. Privette operated?

22 A I don't recall what time she was operated.

23 Q How do you know you weren't occupied some place

1 else?

2 A I know she was scheduled to be at nine. That's  
3 all I can recall.

4 Q On your calendar, you had it down at nine?

5 A Yeah. We knew she would go to surgery around nine,  
6 and I would be available if I was needed.

7 Q You say the reason you weren't there was not because  
8 she made no contractual arrangements to pay you for being  
9 there, but because you just don't do these things?

10 A I didn't see any reason to be there. I don't --  
11 my profession is not to stand behind another surgeon and  
12 watch him operate. If I am needed for my technical ability  
13 or something, I will be there. But that's dependent on that  
14 surgeon calling me. We don't normally stand around in an  
15 operating room watching each other operate.

16 Q Would you consider that this was a normal operation,  
17 Doctor, that she was undergoing?

18 A Well, what do you mean by the word normal?

19 Q Other than unusual. Was it a normal operation or  
20 was it an unusual operation?

21 A I would doubt that it was really unusual.

22 Q You've seen operations such as this before?

23 A I've seen some similiar operations. I don't know

1 what was found in this particular operation.

2 Q You wouldn't call it then an unusual type of an  
3 operation?

4 A Not likely to be unusual, no.

5 Q Did you, by the way, bring the calendar with you?

6 A No.

7 Q You didn't?

8 A No.

9 Q You do have the calendar though, do you, at your  
10 office?

11 A Yeah.

12 Q Have you shown it to me?

13 A Yeah. You were in the office questioning me about  
14 that very point of availability. And I made quite clear to  
15 you then that it was only if necessary. And I showed you the  
16 calendar that we were there and we would be available if  
17 necessary. I remember pulling that and showing it to you.

18 Q Doctor, what was the reason that you told me you  
19 did not appear at the operation? Was it because she had made  
20 no contractual relationship with you and you were not to  
21 be paid for it and that's why you didn't appear?

22 A No. That has nothing to do with it at all. I was  
23 not asked by the attending surgeon to be there. If he had



1 called me, I would have been there.

2 MR. POVICH: All right. Thank you. No further  
3 questions.

4 REDIRECT EXAMINATION

5 BY MR. SLENKER:

6 Q Dr. Hall, did you ever say to Mrs. Privette that  
7 the OB-GYN man would not allow you to do OB-GYN surgery  
8 because that was their bread and butter?

9 A I don't recall ever saying that.

10 MR. SLENKER: Thank you.

11 That's all, Your Honor.

12 RECROSS EXAMINATION

13 BY MR. POVICH:

14 Q Doctor, just one last thing; I'm sorry. Did anyone  
15 try to contact you that morning?

16 A You mean the day of the surgery?

17 Q Yes.

18 A No.

19 Q No one did?

20 A No.

21 Q Mrs. McClure or Dr. Pugsley as far as you know did  
22 not try to contact you?

23 A No.

1           A     It would not have any therapeutic value in  
2 relation to the surgical problems, but it would -- acts as  
3 hormone replacement which can cut down on any menopausal  
4 type symptoms.

5           Q     All right, sir.

6                     What was the prescription that you gave her for  
7 the Premarin?

8           A     The strength of the Premarin was 0.625 milligrams,  
9 to take two tablets, one a day and one tablet the next.

10          Q     How about the HydroDIURIL?

11          A     HydroDIURIL is not in my armamentarium. I do not  
12 use that particular drug.

13          Q     Now, up to this point, Dr. Pugsley, was there  
14 anything at all by way of information given to you by Mrs.  
15 Privette or any of the physical examinations, the laboratory  
16 work, which in any respect would give you any indication  
17 that she had other than two functioning kidneys?

18          A     No, sir, it did not.

19          Q     As a matter of fact, up to this point, had Mrs.  
20 Privette ever made any complaint to you at all that would be  
21 even related to any urologic difficulty?

22          A     No, she did not.

23          Q     Did you find anything by way of the examinations

1 or in the surgery that would give you any hint at all that  
2 she had one or two kidneys?

3 A No, we did not.

4 Q By the way, the steps that were taken by you from  
5 the time in February when she first saw you up through the  
6 18th of April, 1974, are those usual and routine steps that  
7 are taken in your field of specialty?

8 A Yes.

9 Q Are they within the standard of medical care  
10 prevailing at that time?

11 A Yes.

12 Q All right. So, you are still not able to diagnose  
13 the cause of her chief complaint of bleeding.

14 A That's correct.

15 Q What next then can you do in an effort to find  
16 the cause of it?

17 A Well, if you can't see the lesion by approaching  
18 the area from below, then you have to approach it from  
19 above, which would be the intraabdominal approach.

20 Q Did you discuss that with her?

21 A Yes, I did.

22 Q Now, after the visit of April 18, when did you  
23 next have occasion to see her?

1 mind.

2 Q Up to this point and through the visit of June  
3 13, '74, had Mrs. Privette mentioned anything to you about  
4 Dr. Hall?

5 A At some point and not on the first visit, Mrs.  
6 Privette indicated to me that she wanted to say hello to  
7 Dr. Hall while she was in the hospital.

8 Q Did she say anything to you about Dr. Hall being  
9 with you at the time of any surgery?

10 A No, she did not.

11 Q As a matter of fact, at the time of the March  
12 confinement for the in and out procedure, did she mention  
13 anything about Dr. Hall?

14 A No, she did not.

15 Q All right.

16 Do you remember if during the visit of June 13,  
17 she mentioned Dr. Hall?

18 A No. I don't recall when the discussion was on her  
19 various visits as to the fact that she wanted to say hello  
20 to Dr. Hall the day she was in the hospital.

21 Q Was she then scheduled for the exploratory  
22 laparotomy?

23 A Yes, she was.

1 would indicate in the slightest the presence or absence  
2 of one or two kidneys?

3 A No, sir.

4 Q Was there anything in connection with her problems  
5 of any kind, Doctor, that would alert anybody to the fact  
6 that she had one or two kidneys?

7 A No.

8 Q All right, sir.

9 Then what took place?

10 A Then the next day she went to surgery.

11 Q All right.

12 The surgery was an exploratory laparotomy, was it  
13 not?

14 A Yes. First we had to cauterize the condylomata  
15 around the vulva.

16 Q All right. Before we get to the actual procedure  
17 itself, let me ask you to tell the members of the jury when  
18 it was that you first saw her on the 15th of August, the  
19 day of the procedure.

20 A In the morning prior to the surgery.

21 Q Where?

22 A In the holding area.

23 Q Is that in the vicinity of the surgical suite in

1 the room where the surgery is actually to be done?

2 A It's in the vicinity, yes, just down the hallway  
3 from where the surgery is actually done.

4 Q Did you talk with her?

5 A Yes.

6 Q Had she then received her preoperative medication?

7 A She may have or may not have. I don't recall the  
8 timing on that.

9 Q All right. You heard Mrs. Marks testify yesterday  
10 that she had had Demerol, Valium and Atropine.

11 A Yes.

12 Q Now, the first one would constitute preoperative  
13 medication, would it not?

14 A It could, yes.

15 Q The Demerol?

16 A Yes.

17 Q How about the Atropine?

18 A Atropine would, too. The function of the Atropine  
19 is to dry up the saliva so it makes the anesthesiologist's  
20 job easier.

21 Q Does it have any narcotic factor insofar as the  
22 patient is concerned?

23 A Yes.

1 Q Demerol does?

2 A Yes.

3 Q Does Valium?

4 A Yes.

5 Q All right. When you spoke with Mrs. Privette on  
6 the 15th of August prior to surgery, did she respond to your  
7 questions?

8 A Yes.

9 Q Was she lethargic at all?

10 A No.

11 Q Had you ordered the preoperative medication for  
12 her?

13 A No, I had not.

14 Q Who had done that?

15 A That is normally done by the anesthesiologist.

16 Q The usual, normal routine doses of preoperative  
17 medication, do they have the effect of putting one out or  
18 putting one out of control of their faculties at all?

19 A No.

20 Q Can you tell the members of the jury if on the  
21 morning that you saw her on August 15 she was in control  
22 of her faculties?

23 A Yes, she was.

1 Q She answered your questions, did she?

2 A Yes.

3 Q What was said in that discussion if you can recall  
4 it, Doctor?

5 A Well, we exchanged good mornings. And she asked  
6 me if I had seen Dr. Hall. And I said I had not. And she  
7 said, "Can you find him?" And I said, "Well, I don't know  
8 if he's here. I certainly will go and look and see if I  
9 can find him if he is here."

10 Q Had she up to that point, Dr. Pugsley, said  
11 anything to you at all about the surgery was not to be done  
12 unless Dr. Hall was there?

13 A No, she did not.

14 Q She had not at any time said that?

15 A That is correct.

16 Q Did she say that indeed to you that very morning?

17 A She did not.

18 Q She asked only if you were there?

19 A Correct.

20 Q And you responded to her that you didn't know  
21 whether he was or not?

22 A I told her I had not seen him by the time I had  
23 spoken to her, but I would go into the surgeon's dressing



1 area and looked to see if he was there.

2 Q Do you recall about what time this was?

3 A This would have been just immediately before the  
4 procedure. So, nine o'clock I suppose, 8:55.

5 Q She was then in what area?

6 A In the holding area just outside the actual  
7 operating rooms.

8 Q Are all patients taken to the holding area?

9 A Yes, they are.

10 Q Before they go into the operating suite or the  
11 operating room?

12 A Yes, they are.

13 Q How long did you stand and converse with Mrs.  
14 Privette?

15 A A very brief period of time.

16 Q All right. Was there anything else discussed?

17 A Not that I can recall, no.

18 Q All right. Now, up to this point, you have heard  
19 testimony otherwise in this case about IVP.

20 A Um-hum.

21 Q Will you tell the members of the jury if there  
22 was any indication at all so far as Mrs. Privette is concerned  
23 by her condition, laboratory tests, anything at all that would

1 or twelve operations going on simultaneously. So, there is  
2 lots of people around these areas.

3 Q How many operating rooms were there, as a matter  
4 of fact, at that time in 1974?

5 A You are speaking of the GYN suite where we were?

6 Q Yes.

7 A Five.

8 Q All right, sir.

9 Did you go to look for Dr. Hall?

10 A Yes, I did.

11 Q Did you find him?

12 A No, I did not.

13 Q Where did you look?

14 A In the surgeon's dressing room.

15 Q Were you aware of the fact that he had been there  
16 earlier?

17 A No. I had not seen him on that particular day.

18 Q Had you conferred at all or consulted with him or  
19 even spoken with him prior to August 15, '74, about the  
20 procedure?

21 A No, I had not.

22 Q Had Mrs. Privette ever said that you should consult  
23 with him or she wanted you to talk with him about it?

1 A No.

2 Q All right.

3 After you looked around for Dr. Hall and you  
4 did not find him, what did you do?

5 A Then I proceeded down the hallway to the scrub area.

6 Q Do you have to go through the operating room to  
7 get there?

8 A No. There is a central corridor, and the scrub  
9 sinks are just outside of each of the individual operating  
10 rooms.

11 Q Were you in the operating room at the time Mrs.  
12 Privette was taken into the operating room?

13 A I don't believe I was, no.

14 Q Normally who takes the patients from this holding  
15 area to the operating room?

16 A Usually two people. The one at the head is the  
17 anesthesiologist or the nurse anesthetist who is going to do  
18 the case. And the person at the foot is the circulating  
19 nurse.

20 Q All right.

21 Did there come a time when you saw Mrs. Privette  
22 actually in the operating room?

23 A Yes.

1 Q At what time was that, if you can identify it  
2 for us?

3 A You mean in relation to whether she was  
4 anesthetized or not or --

5 Q (Interposing) Yes, or was she just being brought  
6 in or just what did you observe?

7 A My recollection is she had already been anesthetized  
8 by the time I got there.

9 Q The next time you saw her?

10 A Um-hum.

11 Q Now, when you scrub for a procedure of this type,  
12 what is going on in the operating room?

13 A The nurses are preparing the solutions that need  
14 to be painted on the patient's abdomen or the vagina or  
15 whatever. The anesthesiologists are getting all their gear  
16 together, the various intubation tubes and so on. And  
17 normally by the time the surgeon gets into the operating  
18 room, the patient is already well anesthetized because the  
19 people doing the scrubbing and the so-called prep people  
20 have to wait on that until the patient is anesthetized.

21 Q Is part of the prep accomplished before total  
22 anesthetization and part of the prep accomplished afterwards?

23 A Usually not. Usually the patient has to get pretty

1 Q Did you identify the ureter?

2 A Not specifically, no, we did not.

3 Q How do you do that during a procedure?

4 A Well, prior to placing any clamps or doing any  
5 sutures, you palpate the area that you are going to apply  
6 your clamp or that you are going to put your sutures through.  
7 And the ovary -- the ureter has a very specific twing or  
8 twang it's described as. So, you palpate with your fingers  
9 prior to putting on any clamps.

10 Q Did you do that in this case?

11 A Yes.

12 Q Now, the twing or the twang that you spoke of,  
13 how does that work? What does it mean?

14 A Well, the ureter is about the diameter of a wooden  
15 lead pencil, slightly bigger than that. And it's compressible  
16 because sometimes it's distended if there is urine in it.  
17 And sometimes it's flat if there is no urine in it. And  
18 the muscular layers of the ureter are such that when you  
19 pinch it, it tends to have a peristaltic wave which will give  
20 a different sensation between your fingers than a blood  
21 vessel would.

22 Q When you say it's bigger than a pencil, you mean  
23 bigger than this structure here?

1 A Slightly larger than that, yes.

2 Q Is it a fairly hardy structure?

3 A Yes.

4 Q When you palpate it or press down on it, it will  
5 pop back?

6 A Yes. But it's -- it's more when you feel it, you  
7 can get the sensation of muscular movement. It's described  
8 in the literature as a specific snap or twang.

9 Q Now, I believe you mentioned that you saw the  
10 ovaries. You mentioned that there were cysts on one or both?

11 A Both ovaries had cysts.

12 Q Now, would those be the type of cysts that are  
13 palpable on a pelvic examination?

14 A No, they are not because they are -- the measurement  
15 we gave is three centimeters. So, we're talking about  
16 something that size.

17 Q How far up in the abdomen?

18 A Oh, probably from the external surface starting  
19 at the vagina twelve inches, fourteen inches.

20 Q Twelve or fourteen inches.

21 A Um-hum.

22 Q All right.

23 Then did you take out both ovaries?

1 A Yes, I did.

2 Q Now, were you careful in doing this operation,  
3 Doctor?

4 A You've got to be careful in every operation.

5 Q Does it make any difference the way in which this  
6 operation was done as to whether or not the patient had one  
7 or two kidneys?

8 A No, it would not.

9 Q All right. Now, in operations of this type, there  
10 are certain percentages of complications that arise from  
11 time to time under the very best of circumstances?

12 A Yes, sir.

13 Q Can you give us the percentages or the statistics  
14 on it, Dr. Pugsley?

15 A On ureteral injury?

16 Q Yes.

17 A The reports run between two -- between two and  
18 four percent, I would say.

19 Q Even under the best of circumstances?

20 MR. POVICH: Objection, Your Honor.

21 THE COURT: Sustained.

22 BY MR. SLENKER:

23 Q Did you take out anything else?

1 Q Do you know who they are and what their areas of  
2 specialty were?

3 A Yes, I do.

4 Q Will you give us their names and specialty?

5 A The first physician was Dr. Patrick Bowen, who is  
6 a cardiologist and pulmonary disease man. The second one  
7 was Dr. Frank Fusco who is a pulmonary disease man; Dr.  
8 Strauch, who is a medical renal doctor; Dr. Myron Berger,  
9 who is a urologist; Dr. Paulo Franco, who is a general  
10 surgeon; Dr. James Simsarian, who is a neurologist; Dr. Lee  
11 Blakely, who is a dermatologist; Dr. James Close, who is  
12 a GYN doctor; and Dr. Ira Young, who is another urologist.

13 Q At one point or another concerning the treatment  
14 of Mrs. Privette?

15 A Yes.

16 Q When you saw Mrs. Privette on the 17th, Doctor,  
17 did she accuse you of doing a procedure that she had asked  
18 you not to do?

19 A She did not.

20 Q Did she say anything about you doing the procedure?

21 A No, she did not.

22 Q In Dr. Cooper's progress notes, did they reflect  
23 that she at any time said anything to him about the procedure?



1 note that you made in the record of October 2?

2 A Um-hum.

3 Q You heard testimony I believe it was from Mrs.  
4 Holley on the 22nd, I believe it was, of August which she  
5 described as taking place outside the operating room.

6 A Um-hum.

7 Q I'll ask you, Dr. Pugsley, at that time did you  
8 have any idea what the nature, the reason or the cause of  
9 her complication was? Now, I'm not speaking of the pulmonary  
10 embolism. I am talking about the urologic problem. At that  
11 time did you have any idea as to what the complication was?

12 A Well, we knew that there was some leakage of urine  
13 from the ureter by the time that I was talking to these  
14 people. We did know that.

15 Q You knew that?

16 A Um-hum.

17 Q Did you know what had caused it?

18 A No, we did not.

19 Q Did you know when it had come about?

20 A We knew when it had manifested itself on the 22nd.  
21 But other than that, we did not know anything.

22 Q Does anybody really know what gave rise to the  
23 urologic complication that she experienced?

1 MR. POVICH: Objection. I don't know if anybody  
2 would know --

3 THE COURT: (Interposing) Sustained unless it's  
4 in the record.

5 BY MR. SLENKER:

6 Q Do you know of your own knowledge within reasonable  
7 medical probability what caused this urologic problem?

8 A No, I do not.

9 MR. SLENKER: Thank you, Dr. Pugsley.

10 Your witness, Mr. Povich.

11 CROSS EXAMINATION

12 BY MR. POVICH:

13 Q Dr. Pugsley, you first saw Mrs. Privette on  
14 February of 1974; is that correct?

15 A Yes, it is.

16 Q You took a history from her at that time, did you  
17 not?

18 A Yes, I did.

19 Q What is the purpose in taking a history?

20 A To find out the appropriate medical background of  
21 a patient.

22 Q You ask her questions and she gives you answers?

23 A That's right.

1           A     She probably had at least one functioning kidney  
2 because she was putting out urine.

3           Q     She had at least one functioning kidney?

4           A     Um-hum.

5           Q     I'm asking you do you have an opinion as to whether  
6 or not she had one nonfunctioning one.

7           A     I would have no opinion on that, no.

8           Q     You heard Dr. Berger testify in this case, did you  
9 not?

10          A     Um-hum.

11          Q     His opinion that the kidney had not been  
12 functioning for some period of time.

13          A     Um-hum.

14          Q     Would you disagree with that?

15          A     I would have no way of knowing at that time in  
16 February of '74. I had no way of knowing anything about her  
17 kidneys.

18          Q     You had no way of knowing?

19          A     Hum-um.

20          Q     That's not quite true, is it, Doctor? You could  
21 have found out. You did have a way of knowing. What you  
22 are saying is you did not know.

23          A     Um-hum.

          Q     But you did have a way, did you not?

1 A (Nodding).

2 Q She gave you the history that I believe you reported.  
3 Her chief complaint was bleeding from the vaginal area.

4 A Um-hum.

5 Q Now, you say vaginal cuff. Is that usually the  
6 way a person would indicate to you that they were having  
7 a problem from the vaginal cuff or would they simply tell  
8 you, Doctor, that they were bleeding from the vaginal area,  
9 and you would perhaps make an assumption at that point that  
10 it was in the vaginal cuff area?

11 A That would be depending upon whether you were  
12 talking to a person knowledgeable in medical things or a  
13 lay person.

14 Q You felt that this woman was sufficiently  
15 knowledgeable that she could diagnose it as vaginal cuff  
16 bleeding?

17 A I don't say she could diagnose it. She could use  
18 that term.

19 Q As far as you know, had she ever been told as to  
20 where the bleeding was coming from?

21 A I don't know. I don't believe so.

22 Q So, you would expect that she would be able to  
23 make the diagnosis that it was coming from the vaginal cuff,

1           A     At that point, I didn't feel that anything that  
2     had happened to her would have been significant.

3           Q     Did you ever think at any time that anything that  
4     happened to her would have been significant?

5           A     Not really, no.

6           Q     Isn't it a fact, Doctor, that up until the time  
7     you opened up her belly, you never looked at one prior  
8     hospital record concerning her prior admissions?

9           A     That's correct.

10          Q     In fact, you didn't even look at Dr. Martel's  
11     records, did you?

12          A     I contacted Dr. Martel by phone. I did not look  
13     at his records.

14          Q     You asked him whether or not she had the ovaries  
15     in, didn't you?

16          A     Um-hum.

17          Q     Did you ask him anything else?

18          A     No.

19          Q     So, the only thing that you found out about her,  
20     notwithstanding her prior hospital admissions over a period  
21     of time, was the fact whether she did or did not have  
22     ovaries out.

23          A     Well, plus taking the history from her.

1 Q Doctor, we learned later at the IVP, did we not,  
2 that the fistula was right where the ovaries had been which  
3 you removed?

4 A Yes.

5 Q There is no question in your mind about that?

6 A No.

7 Q Is there any question in your mind, Doctor, as to  
8 whether or not you caused that fistula to appear on the 22nd?

9 MR. SLENKER: Certainly there is a question, if  
10 Your Honor please, and I object to the question. That's  
11 why we are here.

12 THE COURT: Overrule the objection. He can answer.

13 MR. SLENKER: May I have an exception, please?

14 THE COURT: Yes, sir.

15 BY MR. POVICH:

16 Q Is there any question in your mind, Doctor?

17 A As to what now, please?

18 MR. POVICH: Would you read that back, please?

19 (Question read.)

20 A Yes, there is a question in my mind. I don't know  
21 how the fistula was caused.

22 BY MR. POVICH:

23 Q You have no idea?

1 A I do not.

2 Q You have heard first Dr. Strauch, then Dr. Berger,  
3 both of whom were attending physicians in this case who  
4 testified.

5 A Um-hum.

6 Q You have heard Dr. Ferrell testify. You still  
7 don't have any idea?

8 A I do not.

9 Q In fact, you have even heard Dr. Treichler testify,  
10 didn't you?

11 A As to what point as far as Dr. Treichler's testimony?

12 Q When first of all that occurred and how it occurred.

13 A As I recall, he mentioned a number of possibilities.

14 Q Didn't he feel that according to even his opinion  
15 based upon reasonable medical certainty or probability that  
16 he thought perhaps it was a stitch in the area that had  
17 caused it?

18 MR. SLENKER: I object to this, if Your Honor  
19 please, for him to ask what it was that he had heard and  
20 to evaluate it. Your Honor has heard it. So has the jury.  
21 Why ask him a question in connection with that?

22 MR. POVICH: Because we want to find out, Your  
23 Honor, whether or not this person agrees or disagrees with

1 what Doctors have said in this case. I think we are  
2 entitled to find out whether or not he is agreeing with that  
3 or not.

4 MR. SLENKER: Your Honor, I think it's for the  
5 jury to determine which ones they are going to believe or  
6 which ones they are going to disbelieve and so forth and  
7 not a witness.

8 THE COURT: I agree. It's all right. But he can  
9 ask whether he agrees with an opinion or disagrees with an  
10 opinion of another doctor.

11 MR. SLENKER: I save an exception, please, Your  
12 Honor.

13 THE COURT: Yes, sir.

14 BY MR. POVICH:

15 Q Do you recall Dr. Treichler's testimony in which  
16 he finally said, well, most likely it was a stitch in the  
17 area of the ureter?

18 A I don't recall his testimony in that degree of  
19 specificity. No, I do not.

20 Q But you would disagree with that?

21 A What I'm saying is I don't know how this injury  
22 occurred. Numerous people have testified as to the various  
23 possibilities, but I do not know how.



1 Q So you didn't see her on the 14th when he saw her?

2 A Correct.

3 Q Do you recall consulting with him about it?

4 A No, I did not.

5 Q You didn't consult with him about it?

6 A Did not.

7 Q Then the first time you saw this patient was on  
8 the operating room table; is that right?

9 A Yes.

10 Q By that time she had been anesthetized; is that  
11 correct?

12 A Yes.

13 Q Draped and ready to go. Did you conduct an  
14 abdominal examination at that time?

15 A Yes.

16 Q You did an abdominal examination?

17 A Sure.

18 Q Did you ascertain any mass?

19 A No, there was no mass.

20 Q You didn't feel any mass?

21 A Did not feel any mass.

22 Q Did you note on the record that there had been a  
23 previous indication of a mass in that area?

1 A Did I note on my record?

2 Q On the record of the hospital.

3 A No, I did not.

4 Q Did you see the prior hospital record?

5 A Yes.

6 Q When did you see --

7 MR. SLENKER: (Interposing) Excuse me, Mr. Povich.

8 Your Honor, is he talking about the record of the medical  
9 student of the physical examination? That's what you are  
10 referring to?

11 MR. POVICH: Yes.

12 BY MR. POVICH:

13 Q Did you see that record?

14 A Yes.

15 Q Did you see it before the examination?

16 A Yes.

17 Q Did you indicate on that record whether or not  
18 you were expecting to find any endometriosis in the course  
19 of this operation?

20 A Yes.

21 Q What did you indicate?

22 A That we would have some recurrence of endometriosis.

23 Q When did you first see that record of the

1 examination on the 14th that reflect a mass in the abdomen?

2 A I don't recall for sure. Most probably the morning  
3 of the surgery.

4 Q Did you discuss with the resident what he felt  
5 at that point?

6 MR. SLENKER: This wasn't a resident. This was a  
7 medical student.

8 BY MR. POVICH:

9 Q I'm sorry, medical student.

10 A Many medical students find all sorts of things.  
11 So, I think you have to be concerned a little bit about who  
12 is giving you this information.

13 Q Are you saying you weren't relying on it, Doctor?

14 A I am not saying I didn't rely on it. I am saying  
15 medical students frequently have a finding different from the  
16 resident or attending physician.

17 Q Doctor, did you conduct the same examination that  
18 he conducted?

19 A Not on that date, I did not, no.

20 Q So, he had conducted then an examination on the  
21 14th far more extensive than anything you did on the operating  
22 table; is that right?

23 A Yes.

1 Q Are you saying that that examination was not  
2 of any significance to you?

3 A Yes, basically that's what I'm saying.

4 Q Let me ask you this, Doctor. If it's not of any  
5 significance to you, why is it done?

6 A Because the hospital requires someone other than  
7 the attending physician to do it first of all. And second  
8 of all, the medical student has to gain some experience.

9 Q Why does the hospital require someone other than  
10 the physician to do it?

11 A I don't know.

12 MR. SLENKER: I object to the question, if Your  
13 Honor please. What materiality has that?

14 THE COURT: He's answered it. He said he didn't  
15 know. He answered it.

16 BY MR. POVICH:

17 Q I'd like to ask you about the first time that you  
18 saw Mrs. Privette in the holding area. Is it fair to say that  
19 at that point in the holding area on the 15th of August that  
20 you had not done an IVP?

21 A Had not done an IVP, that's correct.

22 Q That you had not had her referred to an internist  
23 or worked up medically or had either her circulatory or

1 urinary systems worked up at all?

2 A Correct.

3 Q You had had no consultation with any other  
4 gynecologist; is that correct?

5 A That is correct.

6 Q Including the gynecologist who had seen her  
7 albeit even briefly, for instance, Dr. Hall?

8 A Correct.

9 Q Dr. Brennan, you had not spoken with him?

10 A Had not.

11 Q You hadn't asked for any gynecological consultation;  
12 is that correct?

13 A That is correct.

14 Q You had not asked for any urological consultation;  
15 is that correct?

16 A That is correct.

17 Q Essentially then you were going in on what you  
18 yourself believed as to what the problem was and what you  
19 would encounter during the course of the operation?

20 A Correct.

21 Q Were you able to determine at that point, Doctor,  
22 the extent of the endometriosis that you were going to  
23 encounter?

1 A Once we were in the abdomen?

2 Q No, before.

3 A No, I did not.

4 Q Now, I'd like to direct your attention to the  
5 holding area. You said that when you first saw Mrs.  
6 Privette she was in that area; is that correct?

7 A Yes.

8 Q And that you had a conversation with her?

9 A Yes.

10 Q What is it that she told you, or what did she  
11 speak with you about? What did she say?

12 A Well, she wanted to know if Dr. Hall was there,  
13 and she did remind me about taking care of the condyloma.

14 Q She had spoken with you earlier about Dr. Hall being  
15 there, didn't she?

16 A Um-hum.

*yes or no! ⊗ ?*

17 Q Now, when you say she wanted to know if Dr. Hall  
18 was there --

19 A (Interposing) Um-hum.

20 Q (Continuing) -- did she indicate to you why she  
21 wanted to know if he was there?

22 A No, she did not.

23 Q She didn't indicate what the purpose would have been

1 for him being there?

2 A Well, not on that particular day she did not, no.

3 Q Not on that particular day?

4 A Right.

5 Q I recall your saying something about she wanted  
6 to say hi to him.

7 A Correct.

8 Q Was that on some other day?

9 A That was in our office, one of our office  
10 consultations.

11 Q Didn't you testify earlier that she said she  
12 wanted to say hello to Dr. Hall?

13 A Um-hum.

14 Q Didn't you testify that she said that to you when  
15 you first saw her in the holding area?

16 A Yes.

17 Q So she did say she wanted to say hi?

18 A Yeah.

19 Q You are certain about that?

20 A Yes.

21 Q The reason she wanted to see Dr. Hall was to say  
22 hi.

23 A That's correct.

1 Q That's your testimony, is it not?

2 A Yeah.

3 Q Isn't it unusual that a person would want to say  
4 hello to the Doctor before an operation?

5 A No.

6 Q That happens?

7 A Sure. Many patients go to multiple physicians  
8 and most of the time they like all of them. And it's not  
9 at all unusual for someone to say I would like to say hello  
10 to whatever their favorite physician might be.

11 Q Before they are operated on?

12 A Um-hum, if he's going to be there.

13 Q Had she ever mentioned this to you before?

14 A She mentioned it in one of the office visits, yes.

15 Q That she wanted to say hello to Dr. Hall the morning  
16 of the operation before she was operated on?

17 A Um-hum.

18 Q You heard the testimony of Kathleen Marks, the  
19 nurse anesthetist, didn't you, in the courtroom?

20 A Um-hum.

21 Q Did she indicate that Mrs. Privette said anything  
22 to her about having Dr. Hall present to say hi to him?

23 A I don't recall that that was mentioned, no.



1 Q That's not what she told Nurse Marks, was it?

2 A I don't recall all those details.

3 Q You don't recall the details?

4 A Hum-um.

5 Q You don't recall the details sufficient to the  
6 extent that Nurse Marks felt she should advise the chief  
7 nurse in the area that the patient had said that Dr. Hall  
8 was to be there?

9 MR. SLENKER: I object to the question, if Your  
10 Honor please. There is no way Dr. Pugsley would know what  
11 Mrs. Marks felt, thought or otherwise.

12 THE COURT: Sustained.

13 MR. POVICH: My question was, Your Honor, simply  
14 whether or not he had heard that testimony in this courtroom.

15 THE COURT: Well, let's have the question.

16 BY MR. POVICH:

17 Q It's still your testimony, Doctor, that what Mrs.  
18 Privette asked was to say hello to Dr. Hall.

19 A Correct.

20 Q And that this had been agreed upon earlier, you say?

21 A It wasn't necessarily to agree upon anything.  
22 She just said to me that she would like to say hello to Dr.  
23 Hall when she was in the hospital. And I said that's fine.

1 That was just a casual conversation.

2 Q That's all she ever indicated to you about Dr.  
3 Hall being present?

4 A Correct.

5 Q Did she say when she wanted to say hi to Dr. Hall?

6 A Not that I recall, no.

7 Q Was there any particular time during her hospital  
8 course she wanted to say hi to Dr. Hall?

9 A Not that I recall.

10 Q Was there anything that would prevent her from  
11 saying hello to Dr. Hall at any time during her hospital  
12 stay?

13 A Not that I know of.

14 Q But didn't you think it was a little unusual,  
15 Doctor, when she said I want to say hi to Dr. Hall to tell  
16 you that?

17 MR. SLENKER: I object, Your Honor. We have been  
18 all over this.

19 THE COURT: I think it has been asked and answered.

20 BY MR. POVICH:

21 Q Was there anyone present at the time you say Mrs.  
22 Privette said that she wanted to say hi to Dr. Hall before  
23 she was operated on?

1 A No.

2 Q Now, you did go after that conversation, did you  
3 not?

4 A Um-hum.

5 Q And you went to look for Dr. Hall?

6 A Correct.

7 Q Were you able to find him?

8 A I was not.

9 Q The next time you recall seeing her, she was  
10 in the operating room; is that right?

11 A That is correct.

12 Q At that time you believe she was under anesthesia?

13 A Correct.

14 Q The anesthesia to the best of your knowledge had  
15 been administered by Nurse Marks; is that correct?

16 A Correct.

17 Q Did you ever tell Nurse Marks to take this woman  
18 down to the operating room?

19 A I don't recall that.

20 Q You don't recall that?

21 A No. But as I mentioned earlier, if the anesthesia  
22 department sees the physician talking to the patient to  
23 provide the patient with the knowledge that the responsible

1 physician is there, then oftentimes there is no further  
2 communication. Once they see that happening, then they just  
3 take the patient to the operating room.

4 Q Would that be true in the case where the patient  
5 told the person in the anesthesia department that they  
6 didn't want to be operated on until Dr. Hall was there, not  
7 when Dr. Pugsley was there?

8 A Well, the person's name who was on the chart is  
9 the responsible physician. In this instance, my name was  
10 on the chart.

11 Q There has been testimony in this case which you  
12 have heard, have you not, that Nurse Marks indicated that  
13 Mrs. Privette said she didn't want to be operated on until  
14 Dr. Hall got there?

15 A I was not aware of that particular conversation.

16 Q But you heard the testimony here.

17 A Um-hum.

18 Q You don't recall telling Nurst Marks to take her  
19 down to the operating room?

20 A No. But I am stressing the point that oftentimes  
21 the instruction is not given verbally. If the nurse  
22 anesthetist or the anesthesiologist witnesses that the  
23 patient is conversing with the responsible physician, once

1 that discussion is over, then that is considered the green  
2 light to go ahead.

3 Q Notwithstanding that the patient may have told  
4 the nurse anesthetist not to do so until another doctor  
5 was there, is that what you are telling me?

6 A I'm just telling you what the usual routine is.  
7 Which nurse said what to what patient, I am not privy to  
8 that information.

9 MR. POVICH: Your Honor, before we get into the  
10 operation itself, I think it would be a good time to break.

11 THE COURT: Okay. We will take a break until  
12 ten minutes of two. Same admonition I gave you about a one-  
13 hour lunch break. Come back to this courtroom. Please do  
14 not discuss the case or allow anyone to discuss it in your  
15 presence.

16 (Whereupon, at 12:50 p.m., the hearing was  
17 recessed, to reconvene at 1:50 p.m.)  
18  
19  
20  
21  
22  
23

AFTERNOON SESSION (1:50 p.m.)

1  
2 THE COURT: I note some of you have inquired as to  
3 the length of time the case will take. I know this has been  
4 on your minds. You have asked the bailiff. I've just  
5 consulted with counsel. They hope to finish the evidence  
6 early tonight or early tomorrow morning and give this case  
7 to you sometime tomorrow. So that's the prognosis we have  
8 at this time. This is about the best I can tell you at this  
9 point.

10 You can go ahead and proceed.

11 Whereupon,

12 DR. LOUIS Q. PUGSLEY,  
13 resumed the stand, and having been previously duly sworn,  
14 was further examined and testified as follows:

15 CROSS EXAMINATION (resumed)

16 BY MR. POVICH:

17 Q Doctor, I'd like to get into the actual operation  
18 to be performed on Mrs. Privette on August 15, 1974. By the  
19 way, do you have any records there in front of you?

20 A Not relating to that particular admission.

21 Q Do you have your own records with respect to  
22 Mrs. Privette?

23 A Yes, I do.

1 Q Are they in that folder?

2 A Yes.

3 MR. POVICH: May I have that?

4 Perhaps it will save some time if I just let Mr.  
5 Daniel run through that quickly.

6 THE COURT: All right, sir.

7 BY MR. POVICH:

8 Q Doctor, tell us what you did after you draped her  
9 and you made the midline incision and you opened her up  
10 essentially. What was the first thing that you did?

11 A We examined the pelvic content.

12 Q All right. What do you do when you examine it?

13 A You look at them and palpate them.

14 Q Palpate them. What would be the pelvic contents?

15 A In this particular patient, it would be the two  
16 ovaries and any remaining fallopian tube.

17 Q Were you able to do that?

18 A Yes, we were.

19 Q What did you then do?

20 A Then we explored the upper abdomen.

21 Q That would include what area? What would be there?

22 A It would include the liver, the spleen, the gall  
23 bladder, the kidneys and the upper intestinal tract.

1 Q You say explored them. How do you explore them?

2 A By palpation. You feel them.

3 Q Is that important for you to do that?

4 A Yes, we feel that it is.

5 Q Why is it important?

6 A Well, sometimes you can discover the condition that  
7 the patient was not aware of that might be at a subsequent  
8 time taken care of.

9 Q When you say you palpate them, do you feel them?

10 A Yes.

11 Q Is that what you did in this case?

12 A Yes.

13 Q Can you tell the normality insofar as palpation  
14 is concerned by feeling them?

15 A Most of the time you can, yes.

16 Q If you have two organs, by comparing the feel of  
17 each, would that assist you in determining the normality of  
18 the particular organs in question?

19 A It can be helpful, yes.

20 Q All right. Now, Doctor, did you palpate the kidneys  
21 in this case?

22 A Yes, we did.

23 Q What did you determine them to be?



1           A     We did not find anything abnormal about palpation.

2           Q     You have heard, have you not, testimony in this  
3 case that one of the kidneys at that time Dr. Strauch  
4 described as being about one-third the size of the other  
5 one, not functioning and hydronephrotic; is that correct?

6           A     Yes.

7           MR. SLENKER: If Your Honor please, I believe his  
8 testimony was that that is his opinion. I don't know that  
9 he ever palpated it, saw it or otherwise.

10          THE COURT: All right, sir. Go ahead and proceed,  
11 Mr. Povich.

12          MR. POVICH: He did see it at the time of the  
13 operation, Your Honor, by Dr. Berger.

14          THE COURT: Go ahead.

15          BY MR. POVICH:

16          Q     When you went in there and you palpated the kidneys,  
17 Doctor, you didn't in your opinion find anything abnormal  
18 about it, did you?

19          A     That's correct.

20          Q     They felt as far as you were concerned very normal?

21          A     Um-hum.

22          Q     Do you have an opinion as to what the condition of  
23 the kidneys each was at that time, the right kidney in

1 particular?

2 A You mean at the time I was palpating them?

3 Q Yes.

4 A I had no reason to think they were anything other  
5 than normal. By palpation you can't tell function. You  
6 can tell feel.

7 Q Did they feel the same size, Doctor?

8 A Yes, they did.

9 Q But apparently they were not; is that correct?

10 A Well, see, when a kidney dies, there can be swelling  
11 around it. There can be infection around it. So, actually,  
12 distinguishing the kidney by feel, remembering that you are  
13 feeling an area probably twelve to fourteen, sixteen inches  
14 away from where your arm is, you can feel that.

15 Q Doctor, do you remember my taking your deposition  
16 on January 6, 1977, with respect to this case?

17 A Um-hum.

18 Q I asked you questions and you answered the questions  
19 under oath. There was a court reporter present.

20 A Yes..

21 Q At that time you indicated that you had palpated  
22 the kidneys, did you not?

23 A Um-hum.

1           A     We didn't expect to have difficulty in this  
2 particular instance.

3           Q     But I'm asking you hypothetically now. If you  
4 expected to have difficulty identifying the ureter from  
5 endometriosis on a second abdominal surgery, how would you  
6 go about identifying it?

7           MR. SLENKER: I object to the question, if Your  
8 Honor please, because it's in the area of speculation and  
9 conjecture and asks him to presume something that he did  
10 not have in his mind at the time.

11          MR. POVICH: There are facts in this case from which  
12 he can answer the question.

13          MR. SLENKER: I don't know of any such facts, Your  
14 Honor, that are in this record. He is bound only to adhere  
15 to the standard.

16          MR. POVICH: Your Honor, he doesn't have to answer  
17 the question solely based upon what he thought. He should  
18 be able to answer the question based upon what other doctors  
19 have found in this area, and that is what it suggests.

20          THE COURT: If it is within the standard, I think  
21 he can testify.

22          MR. POVICH: That has been testimony.

23          THE COURT: Yes, sir. Okay.

1 MR. SLENKER: There hasn't been any testimony on  
2 what they saw, if Your Honor please, and he cannot be  
3 judged based upon what somebody else had in their mind.

4 THE COURT: That's correct, but I think the question  
5 is proper. Overrule the objection.

6 MR. SLENKER: May I have an exception, please?

7 THE COURT: Yes, sir.

8 MR. POVICH: Would you read back the question?

9 "Question: But I'm asking you  
10 hypothetically now. If you expected to have  
11 difficulty identifying the ureter from  
12 endometriosis on a second abdominal surgery,  
13 how would you go about identifying it?"

14 A You could insert catheters into the ureter through  
15 the bladder.

16 BY MR. POVICH:

17 Q Would that be of assistance to you?

18 A It could be.

19 Q Doctor, do you have to be aware of the presence  
20 of the ureters in the performance of the operation which you  
21 performed?

22 A You have to be aware of what is beneath your clamp  
23 that you are applying.

1 Q That's a somewhat guarded answer, isn't it? I  
2 mean don't you have to know where the ureters are?

3 MR. SLENKER: I object to the argument of the  
4 question.

5 THE COURT: Sustained as to the characterization.

6 BY MR. POVICH:

7 Q Don't you have to know where the ureters are,  
8 Doctor, to avoid them?

9 A I mentioned that you palpate the area prior to the  
10 time you put the clamps on them.

11 Q Well, that's why you say you did it?

12 A Yes.

13 Q But I'm saying would you agree with me that you do  
14 have to know where they are?

15 A Not necessarily. As long as you palpate the area  
16 where you are putting your clamps, if you do not feel the  
17 ureter there, then you are in pretty good shape.

18 Q Then you have ascertained that they are not there?

19 A Yes.

20 Q You felt under the circumstances that that was  
21 sufficient?

22 A Yes.

23 Q Doctor, is there a method or a procedure by which

1 following the operation you could have ascertained whether  
2 or not you had caused any urinary injury or injury to the  
3 urinary system?

4 A Yes.

5 Q What procedure is that?

6 A The first procedure would be intravenous pyelogram.

7 Q Did you do one of those?

8 A No.

9 Q Now, Doctor, did you find following surgery or  
10 did you learn following surgery that your patient had  
11 suffered a marked decrease in urinary output?

12 A When I was seeing her, this was not yet apparent  
13 on the chart, but it subsequently became apparent, yes.

14 Q When you saw her, what do you mean when you were  
15 seeing her?

16 A When it was my turn to be making rounds.

17 Q That was on the 17th?

18 A Yes.

19 Q You say by the 17th, it was not apparent?

20 A Well, these values are collected over an eight-  
21 hour period. I'm usually there very early in the morning  
22 at the hospital, seven o'clock or six-thirty.

23 Q What time did you go in on the 17th, Doctor?

1           A     My normal time would be around seven o'clock.  
2     I don't specifically recall in this particular instance.

3           Q     You are saying that by the time you reached her  
4     on the 17th there was nothing in the hospital chart to  
5     indicate marked decrease in urinary output?

6           A     Well, these values are calculated on an eight-hour  
7     basis. Every nursing shift makes their own calculation.

8           Q     Fine. Why wouldn't you know what it was?

9           A     Because if I'm there at seven, it's not totally  
10    calculated up until eight o'clock. The shift runs from  
11    twelve until eight.

12          Q     Doctor, you were relying to some extent you said  
13    on Dr. Cooper, weren't you?

14          A     To some extent, um-hum.

15          Q     Well, I'd like you to look at the first time you  
16    saw this patient of yours following the operation. I'd like  
17    you to look at the progress notes and tell me when that was.

18          A     The first time I saw her?

19          Q     Yes.

20          A     August 17, 1974.

21          Q     All right. Is there an entry at the bottom of the  
22    page there where you indicated that you saw her?

23          A     Yes.

1 Q That's for the 17th; is that correct?

2 A Yes.

3 Q Now, immediately above that is there an entry?

4 A Yes.

5 Q By whom?

6 A By Dr. Wayne Cooper, the resident.

7 Q All right. That is at what time on the 17th?

8 A Seven-thirty.

9 Q What does it say with respect to urinary output,  
10 the last shift which would be an eight-hour shift?

11 A Output only 100 CCs.

12 Q In eight hours; is that right? It says last  
13 shift, does it not?

14 A Yes, it does.

15 Q How many CCs. an hour would that be approximately?

16 A Twelve.

17 Q Twelve CCs. an hour?

18 A Um-hum.

19 Q Is that correct?

20 A Yes.

21 Q That would be on the last shift?

22 A Um-hum.

23 Q Which would have ended when?



1           A     I'm not sure whether he's referring to the one  
2           that would be just about ending, which would be at eight  
3           o'clock, or the one that ended previously at midnight.

4           Q     But in any event, the entry was right in front  
5           of your entry, was it not?

6           A     Yes, it was.

7           Q     You read that, did you not, when you saw your  
8           patient on the 17th?

9           A     Yes.

10          Q     That's the first time you saw her?

11          A     That's right.

12          Q     Is that the first time you had any indication that  
13          she had difficulty in urinary output?

14          A     Yes.

15          Q     On the 17th.

16                 At that time, she was getting about 12 CCs. an  
17          hour. You would agree with me, would you not, or would you  
18          agree with the text which I showed Dr. Treichler yesterday  
19          that any urinary output less than 40 CCs. would indicate  
20          acute renal failure?

21          A     It would indicate there is something going on  
22          in the urinary tract. I would say that would be true.

23          Q     It would indicate something going on. You mean sort

1 of like something going around. You catch the flu; something  
2 going on. You can't indicate anything more specific than  
3 that?

4 A I don't believe you could, no.

5 Q Just something going on in the urinary tract?

6 A Um-hum.

7 Q Would it require attention?

8 A If it didn't respond. Now, she was -- the dose  
9 of intravenous fluid was increased in an attempt to see if  
10 we couldn't increase the output.

11 Q Doctor, did you take a look at the intake and  
12 output chart at the time?

13 A I don't recall whether I did or not.

14 Q That would give you very specific information,  
15 would it not, as to precisely what she was taking in and  
16 what she was putting out?

17 A Yes.

18 Q That isn't the only entry, Dr. Cooper's entry on  
19 that occasion, on the morning of the 17th, is it? On the  
20 same page in which you have made the entry on the bottom of  
21 the page, there is also one other entry by him, is there  
22 not, with respect to urinary output?

23 A Yes.

1 Q What does that say? What is that date for?

2 A 8-16, 1974, 12:15 p.m.

3 Q Okay. What does it say with respect to urinary  
4 output over the last shift?

5 A It looks like 80 CCs. It's difficult to read his  
6 writing. 80 CCs. output over the last shift.

7 Q So, over an eight-hour period, you are talking  
8 about less, ten CCs. per hour for this woman; is thatr right?

9 A Yes.

10 Q Do you think, Doctor, that ten to twelve CCs. an  
11 hour for the last sixteen hours might indicate something ~~more~~  
12 than the fact there was something going on in the urinary  
13 system?

14 A Well, as I said, I think this would point toward  
15 a defect in the urinary system.

16 Q A defect in it?

17 A Um-hum.

18 Q Would you describe that defect as the test does,  
19 acute renal failure?

20 A As Dr. Treichler mentioned yesterday, acute renal  
21 failure refers to the body of the kidney. And at this point  
22 we had no knowledge of whether this was something in the  
23 kidney, the ureter, the bladder or what it was.

1 Q At this point, you didn't do anything about it,  
2 either, did you?

3 A We increased the intravenous feedings.

4 Q You just gave her more fluid?

5 A Yes.

6 Q You didn't find out what was wrong?

7 A That is correct.

8 Q By the way, you said that you saw your patient  
9 after the operationa

10 A No, I didn't say that.

11 Q You did not see the patient after the operation?

12 A I did not see her after the immediate post-  
13 operative phase. We usually see the patient in the recovery  
14 room. But I did not go to her floor, to the floow.

15 Q Did you see her in the recovery room?

16 A Yes.

17 Q Did you conduct an examination of her?

18 A No.

19 Q Did someone conduct an examination of her?

20 A In the recovery room?

21 Q Yes.

22 A The normal procedure would be for the anesthesiologist  
23 to evaluate her as far as coming back into consciousness in

1 order to be able to go to her room.

2 Q We know she returned to consciousness.

3 A Right.

4 Q When was she examined?

5 A Probably not until the following morning, August  
6 16.

7 Q Who examined her then?

8 A Dr. Cooley, my partner.

9 Q Did he do a physical examination?

10 A He just did an abdominal examination.

11 Q Can you tell his examination by the extent of the  
12 entry there?

13 A I don't believe I can, no.

14 Q What does his entry show insofar as his examination  
15 was concerned?

16 A He looked at the incisional area and felt that  
17 the incision looked fine.

18 Q Anything else?

19 A He was going to remove the catheter. He stated  
20 that she told him she felt fairly well, had some upper  
21 abdominal and shoulder discomfort.

22 Q Anything else?

23 A No.

1 Q That's the extent of it?

2 A Yes.

3 Q The woman has been through an exploratory  
4 laparotomy the day before, the morning of the 15th, and --

5 MR. SLENKER: (Interposing) If Your Honor please,  
6 can we just have a question?

7 THE COURT: Yes. Go ahead.

8 BY MR. POVICH:

9 Q There has been no other examination from the  
10 time she came out of that operation except by the  
11 anesthesiologist, except for the examination which Dr. Cooley  
12 did the next day?

13 A Right.

14 Q Then there really was no further examination, was  
15 there, until you saw her on the 17th?

16 A Except by Dr. Cooper, the resident.

17 Q But he's telling you that her urinary output is  
18 down to ten CCs. an hour; is that right?

19 A Not in so many words, but that's the implication,  
20 yes.

21 Q Didn't you tell Mr. Slenker on direct examination  
22 that immediately in her postoperative course, Mrs. Privette  
23 was doing well until the time she had the pulmonary embolism?

1           A     Yes, I think I said that.

2           Q     Do you think that that's a fair statement given  
3 the facts in this record?

4           A     Well, I think you would have to amend that to  
5 include the fact that the urinary output was down. I think  
6 that's a valid statement.

7           Q     Was there any other indication, Doctor, of renal  
8 failure?

9           A     I don't believe so.

10          Q     What about Dr. Ferrell's suggestion he was concerned  
11 or would have been concerned about the presence of blood in  
12 the urine over this period of time?


13          A     Well, we -- we tend to see blood in the urine after  
14 many gynecologic procedures. The fact that it was there  
15 for the first twenty-four hours or the first thirty-six hours  
16 in my experience is not unusual.

17          Q     That was unusual in his experience though, was it  
18 not?

19          A     That was his testimony as I recall it.

20          Q     He thought it should have cleared up fairly  
21 quickly, and that if it hadn't cleared up, he would have  
22 been suspicious?

23          A     (Nodding.)

1 THE COURT: Dr. Pugsley, it's easier if you speak  
2 your answer if you would, please. 

3 THE WITNESS: Okay. Yes, sir.

4 BY MR. POVICH:

5 Q Doctor, when you saw her on the 17th for the first  
6 time, what was her condition insofar as you were able to  
7 observe and note?

8 A With the exception of the diminishing urinary output,  
9 I think that she was in the normal postoperative status for  
10 this type of surgery.

11 Q What did you note there? What action did you take  
12 at that point?

13 A She had some lower abdominal distention, and we  
14 gave her a suppository and rectal tubes to try to get rid  
15 of some of the gas.

16 Q You gave her a suppository and a rectal tube for  
17 gas?

18 A Yes.

19 Q Anything else?

20 A Not -- not to my note here.. I can check the order  
21 sheet if you like.

22 Q Didn't you increase her IV?

23 A I think Dr. Cooper had already done that.



1           Q     If you had already increased the IV, then it  
2 really wasn't working, was it?

3           A     Well, it appeared to when Dr. Close saw her a  
4 little bit later in the afternoon.

5           Q     You have talked about that Dr. Close came in and  
6 began to take over the management of the case. You listed  
7 several doctors then who also came in the case. You had  
8 Dr. Bowen, Dr. Fusco, Dr. Strauch, Dr. Berger.

9           A     Yes.

10          Q     Dr., I think it's Franco?

11          A     Paulo Franco, yes, general surgeon.

12          Q     Dr. Simsarian, Dr. Blakely, Dr. Close, Dr. Young.

13          A     Correct.

14          Q     You said that the first one, Dr. Bowen, was called  
15 in because of the chest problem?

16          A     Yes.

17          Q     He was called in, I think you said, by yourself;  
18 is that right?

19          A     Yes.

20          Q     Do you recall that?

21          A     Well, the note says here that Dr. Close actually  
22 called him, the doctor who was managing the case at that time.

23          Q     You didn't call him at that time, did you?

1           A     I think Dr. Close did.

2           Q     Does the note indicate how Dr. Close got around  
3 to calling in Dr. Bowen?

4           A     Because the patient had a chest pain, I believe.

5           Q     Where did he go when he learned that the patient  
6 had the chest pain in order to get help? Did he go to you?

7           A     No, he went to the chest man.

8           Q     Where did he get the chest man from?

9                     What does the note say, Doctor, about how he happened  
10 to get Dr. Bowen? Could you read that to us?

11          A     Could you possibly point out what you are speaking  
12 about because I don't recall that aspect of it?

13          Q     (Indicating.) 5:00 p.m. on the 17th. What does  
14 that say?

15          A     5:00 p.m., August 17, 1974. This is written by  
16 Dr. James Close. "Contacted Dr. Amos, who feels she should  
17 be under the care of a pulmonary disease specialist. Have  
18 called in now for Dr. Bowen."

19          Q     It was Dr. Amos that he called, wasn't it? That  
20 was her employer.

21          A     Well, but the reasoning behind that type of thing  
22 is you try to call the particular specialist that is the  
23 favorite doctor of the referring doctor. I'm sure that's why

1 Dr. Close was trying to get in touch with Dr. Amos so that  
2 he would call the correct chest specialist.

3 Q Was the referring doctor Dr. Amos?

4 A I think in Dr. Close's mind it probably was.

5 Q Or do you think, Doctor, when you gave me this  
6 answer -- I would like you to reconsider this -- to whether  
7 or not Dr. Close learned that Mrs. PPrivette worked for Dr.  
8 Amos, that he thought that Dr. Amos in your absence may be  
9 able to find a chest specialist that should see this woman  
10 right away?

11 A I don't think there was any question that she  
12 needed to be seen right away. But we wanted to be careful  
13 to get the correct physician because there are numerous  
14 chest physicians that could handle the situation and you  
15 don't want to call the incorrect individual.

16 Q So, Dr. Close in his judgment went to Dr. Amos  
17 to find out who his employee should be seen by for the chest  
18 problem; is that correct?

19 A I really don't know what went on in Dr. Close's  
20 mind. That may have been how he was thinking.

21 Q But in any event, it was Dr. Close who brought in  
22 Dr. Bowen after consultation with Dr. Amos?

23 A On that particular day, Dr. Close was handling the

1 practice. So, it would have been his responsibility to call  
2 whoever he wanted to call.

3 Q He didn't call you?

4 A No, he did not, not at that time.

5 Q He was the GYN?

6 A Correct.

7 Q Why is Dr. Close seeing her? Do you have some  
8 association with Dr. Close?

9 A Yes, we do. On weekends we sometimes alternate  
10 days, alternate coverage.

11 Q So, he is seeing your patient as sort of like a  
12 courtesy to you. Is that what you are saying?

13 A No. What I'm saying is on the weekend, he will  
14 take care of his practice and our practice on certain days.  
15 And the reverse is true. We take care of his patients on  
16 certain weekend days.

17 Q He more or less can save you a trip. Is that what  
18 you are saying?

19 A No. I'm just saying that we alternate coverage.

20 Q Doctor, do you recall that Mrs. Holley testified  
21 in this case that there came a time in which you had advised  
22 her and other friends of Mrs. Privette who were concerned  
23 about her condition approximately a week after the operation

1 as to what had happened. Do you recall that testimony of  
2 hers?

3 A I don't recall specifically talking to Mrs. Holley.  
4 I do recall talking to various people to be certain that  
5 they were aware of the severity of the illness that Mrs.  
6 Privette had. We felt that she was extremely ill.

7 Q Who did you speak with?

8 A On various occasions, I think I did speak with her  
9 daughter on a few occasions and the other folks I spoke to  
10 I could not identify.

11 Q Did you indicate to them why Mrs. Privette was in  
12 the condition she was in as Mrs. Holley testified?

13 A I don't recall all the discussions, no. I do not  
14 recall that.

15 Q Doctor, don't you think you would recall whether or  
16 not you had advised the friends and family of Mrs. Privette  
17 that during the course of the operation, you had nicked her  
18 left ureter and subsequently learned that the right ureter  
19 was a stump?

20 A I don't recall using that terminology, no.

21 Q You don't recall using that terminology?

22 A No, I do not.

23 Q Do you recall advising them that during the course

1 of the operation which you had performed that the ureter had  
2 been injured and was causing problems that Mrs. Privette  
3 was experiencing?

4 A Well, actually, one week postoperatively she was  
5 so ill from the pulmonary embolism that the main thrust of  
6 any discussion I had with anyone was advising them as to the  
7 severity of her illness.

8 Q I'm sure that you would want to do that, Doctor.  
9 I'm just saying in doing so, did you advise them as to how  
10 she became so ill and did that include injury to her ureter?

11 A Not that I can recall.

12 Q So, you don't recall then this conversation that  
13 Mrs. Holley testified to which she said occurred about a  
14 week later?

15 A No.

16 Q By the way, about a week later would have been  
17 about the 22nd; is that correct?

18 A (Nodding.)

19 Q On the 22nd, a cystoscopy had been performed and  
20 a retrograde had been done; is that correct?

21 A Yes.

22 Q And there had been a film, is that correct, showing  
23 where Dr. Berger felt the fistula had initiated from?

1 A Yes.

2 Q Did you see that?

3 A Yes.

4 Q So, you were aware then of that?

5 A Oh, yes.

6 Q So, it's not unlikely then that having been aware  
7 of it at the time you sought to explain what the problem  
8 was to Mrs. Privette's family and friends, that you would  
9 have indicated to them that that was the problem?

10 A Well, I think we indicated that there was a fistula  
11 or a leakage of urine. But the specifics of how this  
12 occurred, I do not recall discussing that.

13 Q Any reason why you don't recall it?

14 A I don't recall it.

15 Q You just don't recall.

16 A As I said, the main thrust of our discussion was  
17 to let them know that here was a woman who was exceedingly  
18 ill.

19 Q There came a time, did there not, Doctor, in which  
20 you indicated to Mrs. Privette and confirmed it with a note  
21 in the record, did you not, that you explained to her how  
22 she happened to have found herself in the condition she did;  
23 is that right?

1 A Yes.

2 Q You do recall that?

3 A Yes.

4 Q Is that the entry on October 2?

5 A Yes.

6 Q Did you indicate to her at that time that the  
7 injury, the damage to her urinary system, to her left ureter,  
8 was most probably caused at the time of surgery in removing  
9 the ovary?

10 A That's what I had in the note on that date, yes.

11 Q Is that what you believe?

12 A At that time, yes.

13 Q You now don't believe that any longer?

14 A I'm not sure I can say what caused the injury.

15 Q At that time, that's what you believe caused the  
16 injury?

17 A I think phraseology was most probably.

18 Q You no longer feel that most probably that was what  
19 caused it?

20 A I don't really know what caused it.

21 MR. POVICH: I have no further questions, Your  
22 Honor.

23 THE COURT: Mr. Scanlon, do you have any questions?



1 MR. SCANLON: No, Your Honor.

2 THE COURT: Mr. Slenker.

3 REDIRECT EXAMINATION

4 BY MR. SLENKER:

5 Q Dr. Pugsley, Mr. Povich asked you if there were  
6 ways in which you could have found out the kidney was in  
7 there or indeed if the patient has one functioning kidney  
8 or two functioning kidneys. I'll ask you, sir, if there  
9 was any need to know about kidneys with reference to the  
10 chief complaint made to you by Mrs. Privette in this case.

11 A No, there was not.

12 Q The kidneys would not be the cause of vaginal  
13 bleeding to the extent that she complained of, would they?

14 A They would not.

15 Q All right, sir. He asked you also about on the  
16 7th of February, 1974, if you ordered any laboratory tests  
17 on Mrs. Privette. Would you tell the members of the jury  
18 if laboratory tests of any kind would show where she was  
19 bleeding from, first of all, or would laboratory tests give  
20 you any indication as to the cause of the bleeding?

21 A They certainly wouldn't indicate where the bleeding  
22 was coming from. And I don't think they would help us as  
23 far as the cause either.

1 something in relation to a school situation.

2 Q Okay.

3 Mr. Slenker has read you something from Dr.  
4 Strauch's testimony as to the location of the ureter. You  
5 recall very clearly, do you not, when Dr. Berger testified  
6 and he put the IVP film up there exactly what he testified  
7 to as to the location of the fistula or the break in the  
8 ovary?

9 A Um-hum.

10 Q He specifically said, did he not, that the ovary  
11 was at or about or had been at or about the location of the  
12 fistula; is that correct?

13 A Yes.

14 Q That's what you saw on the 22nd, wasn't it, Doctor?

15 A In that particular X-ray?

16 Q Yes, or one very similar to it.

17 A Yes.

18 Q So, there wasn't any question in your mind on the  
19 22nd when you spoke to her family and friends where that  
20 fistula was, was there?

21 A Not as far as the X-ray was concerned.

22 Q Wasn't that the best indication of it, not what  
23 Dr. Strauch said some almost three years later, two and a

1 half years later. You knew perfectly well where it was,  
2 didn't you?

3 A Certainly.

4 MR. POVICH: Right where you had been.

5 I have no further questions.

6 FURTHER REDIRECT EXAMINATION

7 BY MR. SLENKER:

8 Q Didn't Dr. Strauch look at the same X-ray you looked  
9 at?

10 A Yes.

11 Q Did he look at the same X-ray Dr. Berger looked at?

12 A Yes.

13 Q You all could see the approximate location of it?

14 A Yes.

15 MR. SLENKER: That's all.

16 THE COURT: Dr. Pugsley, you may step down, sir,  
17 and join Mr. Slenker at counsel table.

18 Do you have any further witnesses you want to call?

19 MR. SLENKER: That's our case, Your Honor.

20 THE COURT: All right. Do you all want to stand  
21 up and stretch a moment?

22 Mr. Scanlon, do you want to proceed, sir?

23 MR. SCANLON: Yes, if Your Honor please. I'd like

1 A What if anything?

2 Q Right. Did she have an IV with her?

3 A Yes. She does have her IV running.

4 Q All right. Now, after she gets into the operating  
5 room, did she get over on the table by herself?

6 A Yes, she did.

7 Q Okay. Did she say anything while she was getting  
8 over on the table?

9 A No, she didn't.

10 Q All right. Now, after she gets over on the  
11 operating table, what do you do then?

12 A I explain to her that I'm going to take her blood  
13 pressure. And I check her pulse and respiration. And then  
14 this is when I start -- after I've checked these, then I  
15 start to tell her I am going to proceed with the anesthesia.

16 Q Do you give her any medication in the operating  
17 room?

18 A Yes, I do.

19 Q What did you give her?

20 A I -- first of all, after checking the vital signs,  
21 I give her Curare, which is a nonpolarizing muscle relaxant.

22 Q What does this do?

23 A This will make the eyelids grow very heavy. And

1 she may have blurred vision, and it prevents vesiculations  
2 which is caused by another muscle relaxant which I have to  
3 give her for her intubation.

4 Q How do you give that medication?

5 A I inject it into the IV.

6 Q How is it exactly that you inject it in the IV?  
7 What is the IV anyway?

8 A The intravenous. It's the fluid --

9 Q (Interposing) Is it a tube?

10 A It's five percent -- it's in a plastic base.

11 Q How do you give the medication and what do you  
12 put into it?

13 A Okay. I give the medication in the tubing from  
14 her IV tubing. And this tubing runs from the IV. It's  
15 a plastic bag. And it goes into a needle which the --  
16 it's a Teflon catheter which has been inserted into her arm.

17 Q Try to talk to the jury, please. Okay?  
18 You just insert the medication in the IV bag; is that right?

19 A Not into the IV bag. There is a little rubber  
20 stopper type thing which is about I would say eighteen inches--  
21 twelve to eighteen inches from where the tubing is connected  
22 to the Teflon catheter. Anyhow, this is a place where you  
23 inject your medication.

1 Q Now, after you give her that medication, do you  
2 know the dosage?

3 A Of -- I remember the dosage of Curare which is  
4 three milligrams.

5 Q All right.

6 After you give that medication, what do you do  
7 next?

8 A Well, prior -- then I tell her that I'm going to  
9 start to put her to sleep, and when she wakes up, that  
10 she'll be in the recovery room.

11 Q You tell her that?

12 A Yes.

13 Q After you tell her that, what do you do then?

14 A I proceed starting to put her to sleep.

15 Q How do you do that?

16 A I first inject the sodium pentothal.

17 Q You inject it where?

18 A Into that little rubber stopper type thing on  
19 the IV tubing.

20 Q All right. Now, I think Mr. Povich asked you if  
21 the sodium pentothal burns. Do you recall that question?

22 A Yes, I do.

23 Q Your response was what?

1           A     Well, some people claim that it burns. Other  
2           people say that it doesn't burn.

3           Q     Do you have any recollection that you can recount  
4           for this jury on whether or not Mrs. Privette indicated  
5           to you that she indeed had a burning sensation when the  
6           medication was inserted?

7           A     I think I answered this as to I don't recall  
8           what Mrs. Privette says. But if she says that she said  
9           that it burned, well, I believe her that it burned.

10          Q     Do you have any recollection that she did say it?

11          A     I don't recall that she said that on that day.

12          Q     Okay. Now --

13               MR. POVICH: (Interposing) Excuse me, Your Honor.  
14           I hate to interrupt, but I don't believe the evidence in  
15           this case was that she told the nurse that it burned. I  
16           think the evidence is that she felt a burn.

17               MR. SCANLON: I think it's the jury's recollection.

18               THE COURT: You can cover it on cross. Go ahead.

19               BY MR. SCANLON:

20          Q     Now, I would ask you, Mrs. Marks, in all of the  
21           procedures that you've done at Fairfax Hospital since 1973,  
22           including Mrs. Privette's procedure, have you ever had a  
23           patient scream and fight to get off of the table?

1 A I've never had an adult scream or fight to get off  
2 the table. I have had little kiddies do this.

3 Q All right. Now, with reference to Mrs. Privette,  
4 specifically, did she scream in the operating room?

5 A Mrs. Privette did not scream --

6 Q (Interposing) All right.

7 A (Continuing) -- in the operating room.

8 Q Did Mrs. Privette fight to get off of the operating  
9 room table?

10 A No, she did not.

11 Q I would ask you to assume that she did scream and  
12 that she fought to get off of the table. Now, assuming  
13 those facts, what would you do had that situation  
14 presented?

15 A I would then have taken her blood pressure cuff  
16 off, probably removed my precordial stethoscope. I forget to  
17 add that. I always listen to a patient's heartbeat with  
18 a precordial stethoscope. And that is one which -- it's  
19 a small stethoscope you put over the heart, and the end of  
20 it or the tubing -- I have an earpiece, so I'm constantly  
21 listening to the pulse rate.

22 I would have removed that, have told the circulating  
23 nurse to bring the carriage into the room, and would have



1 A Prior to me administering the anesthesia?

2 Q Yes.

3 A I don't recall that.

4 Q You don't recall whether he was or he wasn't?

5 A I don't recall whether he was or he wasn't.

6 Q You heard Dr. Pugsley testify today, did you not?

7 A Yes.

8 Q You heard that according to his testimony, he  
9 did not recall telling you to take Mrs. Privette to the  
10 operating room?

11 A I heard --

12 MR. SCANLON: (Interposing) I object to that,  
13 Your Honor. It's outside the scope of direct examination.

14 THE COURT: Overruled. Exception noted.

15 THE WITNESS: I heard Dr. Pugsley testify. I am  
16 testifying to what I saw and what I heard.

17 BY MR. POVICH:

18 Q What you saw and heard was that you recall him  
19 telling you to take Mrs. Privette to the operating room?

20 A That's correct.

21 Q In fact, that was the last instruction that you've  
22 heard with respect to her, wasn't it, from Dr. Pugsley before  
23 she was anesthetized?

1 A That's right.

2 Q The last instruction you heard from Mrs. Privette  
3 was that, "I don't want to be anesthetized." I don't want  
4 to be put to sleep until Dr. Hall is here."

5 A I don't recall saying that was the last thing that  
6 Mrs. Privette said. I said the last thing that I can  
7 remember her saying was that she had wanted to see Dr. Hall.

8 Q Before she was put to sleep?

9 A Yes.

10 MR. POVICH: I have no further questions.

11 THE COURT: Mr. Slenker.

12 BY MR. SLENKER:

13 Q At the time that you said Dr. Pugsley told you  
14 to take her to the room --

15 A (Interposing) Yes.

16 Q (Continuing) -- from that point on, do you have  
17 any recollection that Mrs. Privette objected in any respect  
18 to this operation?

19 A She did not object in any way, shape or form.  
20 Otherwise, I would not have wheeled her into the operating  
21 room.

22 Q All right. Do you go to the recovery room with  
23

1 the patient?

2 A Yes, I do.

3 Q Are you there when the patient wakes up?

4 A No, I'm not.

5 Q Who is?

6 A The recovery room nurse.

7 Q Do you see the patient after you turn the patient  
8 over to the recovery room nurse?

9 A Just when I take other patients into the recovery  
10 room. If she's still there, I may, you know, just stop and  
11 check on her.

12 Q Do you have a recollection as to whether or not  
13 that occurred with regard to Mrs. Privette?

14 A No, I don't remember.

15 Q Did you see Mrs. Privette later on at any time?

16 A No, I hadn't. No, I didn't.

17 Q I see.

18 In the days following the procedure, and particularly  
19 in the days following the 17th of October, I believe, when  
20 she was discharged from the hospital, did she ever call you  
21 up and ask you why you put her to sleep in light of what  
22 she supposedly said?

23 A No, she didn't.



1 THE COURT: Just give me one copy, whatever you  
2 want.

3 MR. POVICH: Can we give you this and substitute  
4 it because this is the authority?

5 THE COURT: Okay. I can cut this off.

6 MR. POVICH: If Your Honor wants to use the  
7 original to work with and then we will substitute these.

8 THE COURT: All right. It's fine with me.

9 Mr. Scanlon, thank you. Okay.

10 Number one?

11 MR. SCANLON: I would object to it on behalf of  
12 the hospital.

13 THE COURT: Okay.

14 MR. SCANLON: I don't think that it's in the  
15 circumstances that we are talking about here, Your Honor.  
16 I don't think that it is sufficiently definitive or all  
17 inclusive, and I object most strenuously to the word assault.  
18 I don't believe it is an assault, number one. And number  
19 two, I don't believe that it mentions anything about what  
20 the real issue in the case is, that is, whether or not the  
21 plaintiff had made a revocation of the previous authorization  
22 that she had given. So I think it's deficient.

23 THE COURT: Let me reserve on number one. Anything

1 further you all want to say on it?

2 MR. SCANLON: No, Your Honor.

3 THE COURT: No. 2.

4 MR. SLENKER: Yes. I would object to No. 2 on  
5 the same basis as Mr. Scanlon has objected to No. 1.  
6 Since No. 2 has reference to the surgeon who performs an  
7 operation, I think you are essentially telling them that  
8 if they adopt what Mrs. Privette says that the operation  
9 was without authorization from the patient, then that flies  
10 right in the face of the record and flies right in the  
11 face of her exhibits which are the hospital records in which  
12 the authorization specifically runs in favor of him to do  
13 the surgery and to extend medical treatment.

14 THE COURT: How about reserve on No. 1 and No. 2?  
15 No. 3?

16 MR. SCANLON: Yes, sir, I would object to that,  
17 if Your Honor please. May I remain seated, Your Honor?

18 THE COURT: Yes, sir, go ahead.

19 MR. SCANLON: I specifically object to the word  
20 unlawful in this context. There isn't anything about  
21 unlawful touching in the circumstances of this case. As  
22 to the unauthorized manner, I would have the same objection  
23 that I have indicated to No. 1 and No. 2, that in the

1 circumstances of this case, it simply is not definitive,  
2 does not say enough considering all the facts and  
3 circumstances of this case. I think by brevity, I think  
4 it's prejudicial.

5 THE COURT: Where is No. 3?

6 MR. POVICH: Virginia Jury Instructions.

7 THE COURT: Anything further on it?

8 MR. SLENKER: That's the criminal instruction,  
9 if Your Honor please.

10 THE COURT: No, sir. That's 46.01, which is  
11 Civil. It is a civil case. Crosswhite v. Barne is the  
12 authority for it.

13 Any further argument on No. 3?

14 *Tot* MR. SCANLON: Well, it talks about an intentional  
15 port in this instance.

16 THE COURT: Yes. What do you feel --

17 MR. SCANLON: (Interposing) I don't think that's  
18 the fact in this case.

19 THE COURT: Okay. Anything further?

20 MR. SCANLON: No, sir.

21 THE COURT: The Court will grant 3. Exception  
22 noted.

23 4? Do you want to tell me where it's from first and

1 MR. SCANLON: I have not.

2 THE COURT: The Court will deny it and note  
3 plaintiff's exceptions for the reasons stated.

4 ??

5 MR. SCANLON: I do object on behalf of the  
6 defendants. Again, I object to the assault and the words,  
7 "Unlawful assault." I think it has to be rephrased in the  
8 context of this case possibly in combination with one and  
9 two, if it's correct. I object.

10 THE COURT: Is this 46.02 Doubles?

11 MR. DANIEL: Yes.

12 MR. SLENKER: You have already given number 3,  
13 46.01, which is a definition of the battery.

14 MR. POVICH: It was clearly contemplated, Your  
15 Honor. It says as defined in other instructions of the  
16 Court. It's clearly contemplated in 46.02 that there would  
17 be a reference to the definition of assault and battery.

18 THE COURT: Any further argument on number 7,  
19 counsel?

20 MR. SCANLON: I don't believe so.

21 THE COURT: The Court will grant it and exceptions  
22 of the defendants are noted for the reasons stated.

23 8?

1 MR. SLENKER: Yes. I object to 8 on the basis  
2 of its very language. I thought they were suing us because  
3 of what we did rather than for abandonment anywhere. How is  
4 abandonment any issue in the case?

5 THE COURT: I assume Mr. Scanlon --

6 MR. SCANLON: (Interposing) It would be  
7 prejudicial, but I don't think there is any evidence.

8 THE COURT: Where is 8 from?

9 MR. POVICH: 41.02.

10 THE COURT: Okay. Are you claiming abandonment  
11 in this case? Abandonment would be some sort of omission.  
12 Isn't this more in the nature of a commission?

13 MR. POVICH: Essentially, Your Honor, there is  
14 still a question of following this patient on the 15th and  
15 16th when Dr. Ferrell thought that he should have given her  
16 closer attention. I think maybe we can take the word  
17 abandon and make it more directly applicable to the case.

18 MR. SLENKER: Abandonment, if Your Honor please,  
19 certainly consists of more than conduct on one occasion.  
20 The evidence is uncontradicted that his partner saw the  
21 patient on the 16th. Cooper, who had assisted on the surgery,  
22 saw her on the 15th, saw her on the 16th, Dr. Pugsley saw  
23 her on the 17th. How is that abandonment? Dr. Pugsley's



1 testimony is that she was seen by him or his partner or  
2 by the resident that was in on the case from the beginning  
3 right on up until the time of the pulmonary embolism. There  
4 isn't any basis at all for any abandonment.

5 MR. POVICH: Failure to treat is abandonment,  
6 Your Honor. It's not limited to situations in which you  
7 walk away from the patient. It means the situation in  
8 having performed the surgery, there is not sufficient  
9 following of his patient especially during a critical period.

10 MR. SLENKER: Your Honor has already ruled on  
11 that. There isn't anything charged to the defendant with  
12 reference to this case following the surgery. We had that  
13 out the other day on an evidentiary matter.

14 MR. DANIEL: Your Honor, you took that up and  
15 said you felt it was within the motion for judgment but  
16 were not going to let me put that particular witness on to  
17 testify to it because I hadn't given you notice. But it  
18 clearly says within the parameters of the motion for judgment.  
19 There's been testimony in this case. So, we certainly should  
20 give the jury some guidance as to how to handle it.

21 THE COURT: What if I state it was the duty of  
22 the defendant surgeon to give continuous services to the  
23 plaintiff throughout his treatment? Do you have any objection,

1 Mr. Slenker?

2 MR. SLENKER: I certainly do. There isn't any  
3 evidence to support that.

4 THE COURT: Did he render continuing treatment  
5 throughout the case?

6 MR. SLENKER: Certainly did. His partner treated  
7 her. He treated her. Cooper treated her. That is his  
8 testimony. It's uncontradicted. Who said that is a violation  
9 of any standard?

10 THE COURT: Okay. I understand your point. Go  
11 ahead.

12 MR. DANIEL: In that connection, when we had the  
13 argument and the Court ruled in favor of Mr. Slenker the  
14 other day --

15 THE COURT: (Interposing) I never rule in favor  
16 of counsel. I rule in favor of their cause or their client.

17 MR. DANIEL: All right, sir. I stand corrected.

18 Mr. Slenker on cross examination of Dr. Ferrell  
19 then asked Dr. Ferrell what the standard was postoperatively.  
20 That in my view and judgment opened up the entire issue in  
21 this litigation.

22 THE COURT: The only question I have, and I'll just  
23 throw this out, Dr. Ferrell indicated he should have visited

1 her the day following the operation. There was a conflict  
2 on that. That's one of the conflicts we have got. Dr.  
3 Ferrell said he thought he should have visited her the  
4 evening following the operation. That's what I remember  
5 him saying.

6 MR. SLENKER: Fine. Is that the standard? Did  
7 he say that's the standard or did he say he should have?

8 MR. POVICH: He stated it's the standard.

9 MR. SLENKER: If so, what flowed from that?

10 THE COURT: You mean what damages?

11 MR. SLENKER: Yes, sir.

12 MR. POVICH: Failure to take corrective surgery,  
13 Your Honor, is what he said. He said you would have done  
14 an IVP and gone in there and done something about it on  
15 the 16th before the pulmonary embolism. But I think Your  
16 Honor is absolutely right. If you just start the sentence  
17 it was the duty of the defendant surgeon to continue the  
18 services as long as necessary, I think that's the law.

19 THE COURT: Any further argument on Number 8,  
20 gentlemen?

21 MR. SLENKER: I believe I have made my position  
22 clear.

23 THE COURT: I believe I understand counsel's

1 position. I am going to go ahead and grant 8 with the  
2 amendment noting the exception on the amendment on the part  
3 of counsel.

4 MR. SLENKER: I want the record to reflect, Your  
5 Honor, my objection of an interjection in this record of  
6 a theory of recovery that is not in the motion for judgment,  
7 not supported in any respect by the evidence, and that is  
8 abandonment. There isn't a word in the motion for judgment.

9 THE COURT: I have stricken the word abandonment,  
10 sir.

11 MR. SLENKER: I know. But that doesn't cure the  
12 instruction by taking the word abandonment out of it and  
13 substituting the language that Your Honor now proposes to  
14 put in there.

15 THE COURT: All right, sir.

16 MR. SLENKER: That still makes it an abandonment  
17 instruction. That is something that was never in this case.

18 THE COURT: Very well, sir.

19 Your exception is noted.

20 9?

21 MR. SLENKER: Instruction 9 effectively directs  
22 a verdict, if Your Honor please, particularly by the language  
23 in the last paragraph pulling out particular items of evidence

1 strike at the end of the case. I just don't believe that  
2 under the circumstances the defendants that I represent  
3 are liable to respond for the damages she sustained as  
4 a result of Dr. Pugsley's surgery or the surgery at all.  
5 I think there has to be something in an instruction of this  
6 type to that effect.

7 THE COURT: Anything further?

8 MR. SLENKER: No, sir.

9 THE COURT: Grant subparagraph one. Exception  
10 noted. Number two?

11 MR. SLENKER: I don't think there's been any  
12 evidence that, number one, applies to the injury itself;  
13 number two, applies to any effect of those injuries upon  
14 her health or otherwise. I don't perceive there is any  
15 evidence of that, Your Honor.

16 THE COURT: Doesn't the psychiatrist indicate that  
17 he did something as a result of the alleged injury by the  
18 defendants in this case? He undertook to treat her and  
19 that she would need some future treatment or something to  
20 that effect.

21 MR. SLENKER: I have to concede that he thought  
22 he came --

23 THE COURT: (Interposing) I mean it's a jury

1 question.

2 MR. SLENKER: He came to a preliminary judgment  
3 that she needed treatment once a week.

4 THE COURT: For six months to a year or something  
5 to that effect.

6 MR. SLENKER: Whatever. That's the only testimony.  
7 In other words, this leads on into the future as I see it,  
8 one and two, and I don't think there is any evidence on that.

9 THE COURT: All right, sir. Any further argument,  
10 gentlemen?

11 MR. SCANLON: If the Court please, I would have  
12 the same objection as I have indicated earlier with reference  
13 to number one. I would like to submit another instruction  
14 tomorrow on damages insofar as my defendants are concerned.

15 THE COURT: Okay. I'll grant two and exzeptions  
16 noted. Number three?

17 MR. SLENKER: I don't think there is any evidence  
18 of any physical pain to be suffered in the future.

19 THE COURT: Is there any evidence on future?

20 MR. POVICH: Future pain?

21 THE COURT: The only thing is going to the  
22 psychiatrist. I don't know that that's future pain per se.  
23 Future medication for this lady. Is there any evidence on

1 the part of physicians that there is any pain that she is  
2 now suffering or she has to go back or take anything? She  
3 has indicated she is taking some medication now, stool  
4 softeners and what have you.

5 MR. POVICH: Your Honor, I think that's a matter  
6 of how much evidence there is of it. I think there is  
7 some indication. She doesn't move as well. There is  
8 difficulty before her to move. She has limitation.

9 THE COURT: Has she testified she's got pain as  
10 a result or has any doctor testified?

11 MR. POVICH: Dr. Berger spoke about it, but he  
12 didn't indicate a present condition.

13 THE COURT: Okay. The Court will strike future,  
14 noting plaintiff's exceptions.

15 MR. POVICH: Except, Your Honor, I'm sorry. There  
16 was an abnormal urological condition which she testified to  
17 that she did have.

18 THE COURT: Was that painful though? Any indication  
19 he said it would be painful?

20 MR. DANIEL: I think the psychiatric testimony  
21 would authorize the future mental anguish.

22 THE COURT: Isn't mental anguish to go to the  
23 psychiatrist? That's what is bothering me in this case.

1 MR. DANIEL: I think the mental anguish is her  
2 inability to obtain employment and to cope with the  
3 situation in her past.

4 MR. POVICH: I think, Your Honor, to be absolutely  
5 scrupulous, with respect to the record, any physical anguish  
6 and pain suffered by her in the past and mental anguish  
7 would be reasonable to be suffered by her would be fine.  
8 Exclude the pain, but include the mental anguish because he  
9 said she is not in a position now to return to work according  
10 to the psychiatrist.

11 THE COURT: Okay. Mr. Slenker.

12 MR. SLENKER: I am not aware there is any evidence  
13 concerning mental anguish so far as the future is concerned.

14 The psychiatrist said that everything he was  
15 testifying to came from her. It's not him. He didn't say  
16 she did or she didn't.

17 MR. POVICH: He said he accepted that and he made  
18 a diagnosis that she was going to continue to have difficulty  
19 mentally until she could resolve it hopefully through therapy.

20 I think Your Honor is correct in saying that there  
21 is some question as to actual physical pain from this point  
22 forward. But I think that there is good evidence in the  
23 record that she's going to have some mental anguish.



1 THE COURT: Mr. Scanlon.

2 MR. SCANLON: I don't recall the testimony that  
3 way, Your Honor. That's all I can say.

4 THE COURT: I know there is evidence she is going  
5 to the psychiatrist. But I don't know whether it's mental  
6 anguish or not because it may be beneficial in the sense of  
7 being helpful. I guess that is what I am bothered with.

8 MR. POVICH: It's not the going to the psychiatrist.

9 THE COURT: You are saying her present condition.

10 MR. POVICH: Yes, is what necessitates her going  
11 to the psychiatrist.

12 THE COURT: Yes.

13 I think you would get this easily in D. C. Our  
14 Court of Appeals is very tough on what you can prove. If  
15 you don't have some sort of medical supporting data for it,  
16 they are very strict and send these cases back. So, I'm  
17 going to sustain the objection. I'll note your exception  
18 to the future part of this.

19 All right. Number four.

20 MR. POVICH: It says any physical pain and anguish  
21 suffered by her in the past period.

22 THE COURT: Semicolon. I understand there is no  
23 objection to that portion of it by defendants' counsel.

1 Four?

2 MR. SLENKER: I don't believe there is any  
3 evidence of humiliation or embarrassment associated with  
4 any disfigurement or deformity in this case, Your Honor.

5 MR. POVICH: Your Honor, she has lost her hair  
6 just for openers right up front. I think that that's a  
7 disfigurement that is humiliating and embarrassing, and about  
8 which she obviously had some concern.

9 THE COURT: What about any evidence of deformity?

10 MR. POVICH: Yes, the scars on her stomach, three  
11 on each side. The doctor said that.

12 MR. SCANLON: If Your Honor please, she didn't  
13 testify to anything like that.

14 THE PLAINTIFF: Would you like to see them?

15 THE COURT: Mrs. Privette, you are going to have  
16 to remain quiet while I take this up with counsel.

17 MR. SCANLON: It may be so, but it's not in evidence.

18 THE COURT: The only question I have is the  
19 procedure when they have the tube coming out of her kidney.  
20 I don't know.

21 MR. DANIEL: Nephrostomy. Now, whether that is  
22 a deformity or what, I'm not sure. You can assume that it is.  
23 Of course, it's not --

1 MR. SCANLON: (Interposing) She never testified  
2 that it caused her --

3 MR. POVICH: (Interposing) That was humiliating  
4 the idea of having to go around with a bag, if you recall.

5 THE COURT: I understand that portion. The  
6 question is whether it's a deformity. That's what I'm  
7 hung up on.

8 MR. POVICH: I don't mind striking deformity and  
9 keeping disfigurement.

10 THE COURT: Any further argument, gentlemen?

11 MR. SCANLON: I don't believe there is any testimony  
12 to support paragraph 4 by this witness as to any humiliation  
13 which she suffered. I think she has to say it. I don't  
14 believe she did.

15 THE COURT: All right. The Court will grant it  
16 as amended. I strike the word "or deformity," and your  
17 exception is noted.

18 5?

19 MR. SLENKER: Objection so far as the future is  
20 concerned. No evidence to support that.

21 THE COURT: Mr. Scanlon, do you joint in that?

22 MR. SCANLON: Yes.

23 THE COURT: Okay. Mr. Povich?

1 MR. DANIEL: Your Honor, there is a great deal  
2 of discomfort. I'm not so sure it's limited to physical  
3 pain type of discomfort.

4 THE COURT: I think what they are talking about  
5 is in the future. Isn't that the objection to the future,  
6 counsel?

7 MR. SLENKER: That's right.

8 THE COURT: You all can see there is evidence of  
9 past but not future. That's what I understand they are  
10 focusing on in their arguments.

11 MR. POVICH: I think if we include the mental  
12 part of it, Your Honor, there is certainly mental discomfort.

13 THE COURT: The question is whether going to a  
14 psychiatrist is discomfort or inconvenience or what have you  
15 going in the future because he indicates some future.

16 MR. POVICH: That may be discomforting, but it's  
17 the condition which he feels necessitates coming to him  
18 which I suggest is also discomforting especially since he  
19 talks in terms that she has depressed neurosis and is  
20 concerned and upset about it, what her situation is.

21 THE COURT: Any further argument about 5? The  
22 Court will grant it and exception of the defendants is  
23 noted.

1                   Okay. 6? Is there any evidence of nursing?

2                   MR. POVICH: No, Your Honor.

3                   THE COURT: Do you want to strike that word?

4                   MR. POVICH: There is nursing at the hospital,  
5 Your Honor.

6                   THE COURT: Okay, I'm sorry.

7                   MR. SLENKER: That's all in the hospital bill.

8                   MR. POVICH: You know, if someone would be smart  
9 enough to pick up the hospital bill and go through there  
10 and say it's hospital expense and not nurse's expense and  
11 cross it out, we have problems. I mean don't worry about  
12 a private duty nurse that doesn't exist.

13                   THE COURT: Okay.

14                   MR. SLENKER: There isn't any separate charge that's  
15 made for nursing services rendered to her at the hospital.

16                   THE COURT: Is there a separate charge for nursing  
17 at the hospital?

18                   MR. SCANLON: No.

19                   THE COURT: Why don't you look at them tonight?  
20 If you think that there is, I will put it back in.

21                   MR. POVICH: All right. Let's strike it.

22                   THE COURT: Any objection further to number 6?

23                   MR. SLENKER: There isn't anything as concerns the

1 future either.

2 THE COURT: Doctors.

3 MR. SLENKER: Well, there might be doctors,  
4 psychiatrists.

5 THE COURT: Yes. That's the only thing I think  
6 that gets it to that.

7 Okay. ??

8 MR. POVICH: It should be "Her:".

9 THE COURT: Okay.

10 MR. SLENKER: For what period of time, Your Honor,  
11 under the evidence?

12 THE COURT: Plaintiff's counsel will tell you.

13 MR. POVICH: Whatever the evidence warrants, Your  
14 Honor. Any loss of earnings in the past by reason of being  
15 unable to work at her calling. That's however much the  
16 jury finds she is unable to do. It says past. I'm not asking  
17 for future although I think I could. I think insofar as the  
18 past is concerned, it's that amount. The jury may find it  
19 one year, less than a year, may find it up to date,  
20 especially if they accepted the psychiatric point of view  
21 that her loss of earnings is due to the trauma of the  
22 hospitalization and her failure to get everything back in  
23 shape. Indeed, he even suggested that at one point, Your

1 Honor, he wouldn't want her to do it because she would fail  
2 and failing would be very destructive.

3 THE COURT: What is the objection, Mr. Slenker?  
4 There is no time on this?

5 MR. SLENKER: Yes, for what period of time.  
6 This is a procedure that's done in August of 1974. You are  
7 going to put it to the jury that they can allow her loss of  
8 earnings in August of 1974 right on up until today?

9 MR. POVICH: The preamble relates, Your Honor, to  
10 damages resulting from the conduct of the defendants.

11 MR. SLENKER: I understand that, Mr. Povich. I  
12 don't have any problem at all with that. I have a problem  
13 with the evidence, and I should think everybody else here  
14 ought to, of a medical nature that says this lady can't  
15 work and when it was she couldn't work.

16 THE COURT: There was evidence she couldn't work  
17 for a year.

18 MR. SLENKER: No. Dr. Berger didn't say she  
19 couldn't work for a year. He said he would expect maybe  
20 she would experience some weakness, but he didn't say she  
21 couldn't work. Nobody said she couldn't work in 1975.

22 THE COURT: Dr. Amos indicated she couldn't do  
23 the work when she came back, to do the lifting and what have

1 you.

2 MR. SLENKER: When though?

3 MR. POVICH: Five months. That was five months  
4 postoperatively.

5 MR. SLENKER: He never did identify when that was  
6 because he didn't know.

7 MR. POVICH: Originally he said five months.

8 MR. SLENKER: And for what period of time?

9 THE COURT: Is there any further argument on ??  
10 The Court will grant it. Exception noted.

11 All right. 8? Any objection to 8?

12 MR. SLENKER: Yes, once again on the same basis,  
13 Judge.

14 THE COURT: This is a different basis.

15 MR. SLENKER: There is no evidence. That's what  
16 I mean by the same basis.

17 THE COURT: Okay.

18 MR. SCANLON: I also join in that objection. I've  
19 joined in the others.

20 THE COURT: Has plaintiff produced any evidence  
21 of lessening of earning capacity?

22 MR. SLENKER: Not a bit.

23 MR. SCANLON: No, sir.



1 MR. POVICH: It's not lessening of earning  
2 capacity, Your Honor. The problem is what happens if she  
3 can't return to her profession and she does something else?

4 THE COURT: Has somebody said she can't return  
5 to her profession medically? I don't know that you need  
6 to get it medically.

7 MR. POVICH: The psychiatrist really says she has  
8 not been able to operate as a nurse and hopes that she will  
9 be able to in the future with treatment.

10 THE COURT: We have got one case in Virginia that  
11 doesn't fit, the Basham vs. Pate case, which is a broken  
12 wrist case.

13 MR. POVICH: I am not going to argue it anyway.  
14 If you will grant it with loss of earnings, I will take out  
15 lessening of earning capacity.

16 THE COURT: Okay. Any further argument?

17 MR. SCANLON: No, Your Honor.

18 THE COURT: Okay.

19 I'll sustain the objection to 8 and I'll note  
20 plaintiff's exception to the Court's ruling.

21 MR. POVICH: I'm sorry. Could I have some  
22 clarification? Are you going to say any loss of earnings  
23 she may reasonably expect to sustain in the future?

1 THE COURT: Is there any evidence really of loss  
2 of earnings in the future?

3 MR. POVICH: The psychiatrist said she could not  
4 return to her work as a nurse until she gets herself squared  
5 away and he expected that it would take some time, six months  
6 perhaps, and some therapy.

7 THE COURT: Do you all agree that's the testimony  
8 of the psychiatrist?

9 MR. SLENKER: No, sir.

10 THE COURT: Will you read that part of his  
11 testimony back, please?

12 "Question: Did you discuss with her  
13 whether you felt that she should have the  
14 assistance or needed any assistance and  
15 towards what purpose?

16 "Answer: Yes. I told Mrs. Privette  
17 that I felt that diagnostically she had a  
18 depressive neurosis. Also, I felt that I  
19 wanted to rule out a phobic neurosis,  
20 phobia simply meaning a fear which ties in --  
21 again, a fear such as of going to a hospital  
22 and having any further surgery -- something  
23 like that.

1           "So I felt that if I had pursued  
2 treatment which I did recommend at the time,  
3 that she be treated for this, so that she  
4 could be gainfully employed as a nurse which  
5 was her stated desire when she came in. So,  
6 on that basis, I did recommend further  
7 treatment and estimated the duration of  
8 treatment to be a minimum of six months on a  
9 weekly basis and possibly to be as long as  
10 one and a half to two years.

11           "I had not and often did not come to a  
12 conclusion as to the frequency of treatment  
13 in terms of once or twice a week until sometime  
14 between the fifth and tenth session which I  
15 can have a better feel for the psychological  
16 makeup of the patient, how fast they will be  
17 able to advance in therapy, and what is in  
18 general their interest, but at the time did  
19 offer the suggestion once a week for a minimum  
20 of six months.

21           "Question: Did you have an opinion at  
22 that time as to whether or not she could then  
23 return to her employment as a nurse in that

1 profession without this type of therapy?

2 "Answer: Yes. It was my firm belief  
3 that she at that time was simply unable to do  
4 that. And I certainly would not have  
5 recommended it because it would have been a  
6 setup for a failure; and in fact, this would  
7 have merely further depressed her. So had  
8 she brought that up, which I do not have any  
9 recollection that we discussed her going back  
10 into nursing right then, I certainly would have  
11 discouraged it.

12 "Question: Did you discuss with her  
13 the expense of the future therapy?

14 "Answer: She knew my fee, which is in  
15 accordance with the usual and customary  
16 charges. It's forty-five per forty-five  
17 minute session or fifty dollars for fifty-  
18 minute session. The three sessions that she  
19 had were for fifty-dollar sessions for fifty  
20 minutes each, which is my customary  
21 evaluation, three-session evaluation of this  
22 kind of case.

23 "And I did indicate to her that there

1 would be a duration involved. Again,  
2 we are talking about in a six-month  
3 period normally twenty-five visits if you  
4 are not running into too many vacations or  
5 other kinds of problems weatherwise like  
6 we have this year.

7 "Question: What would you say, Doctor,  
8 is the range of the expense that you feel  
9 she would have if she followed your advice?

10 "Answer: I would say that again, sort of  
11 going through some math in my head, I would  
12 say the absolute minimum would be 1500 and  
13 then somewhere up to \$5,000, depending on how  
14 she was treated and so forth.

15 "In order to more accurately answer  
16 your question, I would say that there are  
17 therapists -- my own background is  
18 psychoanalytically oriented, if one wants to  
19 look at it that way, aimed to why people have  
20 problems as opposed to another type of  
21 discipline which might be behavior therapy,  
22 which is again aiming for relief of symptoms  
23 than it is exploring the causes.

1 "So, if she decided that she did want  
2 treatment, it might well have been that I  
3 would have recommended twice a week work if  
4 I felt she was most suited to that, and that  
5 her, again, means would permit and so forth.  
6 And thiw would have been very potentially  
7 a year's work twice a week.

8 "So, again, that would have covered  
9 somewhere in that range as a bare minimum,  
10 1500, and then I would say up to \$5,000, in  
11 that range. I guess that's a wide range.  
12 I wish I could be more specific.

13 "Question: Did she return to you after  
14 those three visits?

15 "Answer: No, she didn't. I did receive  
16 a phone call from her subsequently indicating  
17 that she did want treatment and so forth. But  
18 beyond that, I didn't hear from her. And I  
19 had to assume that there were circumstances  
20 beyond her control that she didn't. But it  
21 seemed that at the time, at the time of the  
22 phone call, she genuinely desired to improve  
23 her situation through what I had recommended."

1 MR. SLENKER: See, the effect of his testimony  
2 is that she was addressing something we didn't bring up  
3 that he was discussing there in that phone conversation.

4 MR. POVICH: That's very helpful to me that we  
5 didn't bring it up. But his evaluation of whether or  
6 not she is now able to return to the practice of being a  
7 nurse without additional psychiatric help, he says she can't.  
8 That's why we included the future psychiatric expense.

9 THE COURT: All right. You feel that's future  
10 loss of earnings?

11 MR. POVICH: Well, until she can get back to work,  
12 Your Honor.

13 MR. SLENKER: That's an evaluation as of February,  
14 1976.

15 MR. POVICH: That's right.

16 MR. SLENKER: Not March of '77, Judge, not March  
17 of '78 or '9.

18 MR. POVICH: Your Honor, this is all argument as  
19 to why it shouldn't be awarded one way or the other. But  
20 I think the jury if they feel the evidence warrants it,  
21 should be able to find that.

22 THE COURT: Okay. Any further argument? I will  
23 leave in future loss of earnings. Exception noted.

1 Do you have any objection to what I call the amen  
2 paragraph?

3 MR. DANIEL: It should be "Her" instead of "Him."

4 THE COURT: Yes, sir.

5 MR. SLENKER: Your Honor, may we back up a minute?  
6 I missed the ruling that you made.

7 THE COURT: Which one, sir?

8 MR. SLENKER: Just after the reporter read the  
9 material that she read.

10 THE COURT: Okay. I granted loss of earnings  
11 as to future. And I struck lessening of earning capacity  
12 and noted the exception of the defendants.

13 Then counsel said that the amen paragraph it  
14 should be "Her" in the third line from the bottom, the  
15 paragraph that is unnumbered, the second paragraph sustained.  
16 "Him" should be "Her."

17 I asked if anybody has any objection to the  
18 last.

19 MR. SLENKER: Yes, I do. I think I will throw in  
20 not to exceed the sum sued for in the motion for judgment.

21 THE COURT: If you mention the ad damnum, we leave  
22 it in. If you don't, we take it out. That's usually the  
23 way.



1 MR. POVICH: Your Honor, could I make that  
2 decision in the morning?

3 THE COURT: Yes, sir. I will reserve on that. I  
4 will make a note and we will take it up in the morning.

5 Does everybody agree that's the way it ought to  
6 be handle or not?

7 MR. SCANLON: It's agreeable with me.

8 THE COURT: Mr. Slenker, is that agreeable with  
9 you, sir? If he attempts to mention it, we would leave it  
10 in.

11 MR. SLENKER: I would then ask for a curative  
12 instruction at the time he mentions it if he decides to.

13 THE COURT: Okay. 15?

14 MR. SLENKER: I would object to this, if Your  
15 Honor please, on the basis that there isn't any expert  
16 testimony to support it.

17 MR. POVICH: That's all Ferrell, Your Honor.

18 THE COURT: Sir?

19 MR. POVICH: This was all testified to by Dr.  
20 Ferrell, what he would advise his patient under the  
21 circumstances as existed here had the defendant followed the  
22 standard of care in the community. He testified that what  
23 he would have advised his patient was in conformity with the

1 THE COURT: He did testify that the preparations  
2 were not within the standard of care. Now, this goes to a  
3 different issue.

4 MR. SLENKER: IVP, catheters.

5 THE COURT: All that was in doing some work-ups.

6 MR. DANIEL: My recollection is I asked him  
7 specifically what the standard would require insofar as  
8 discussing this operation with his patient.

9 THE COURT: Let me pass on 15 then. We will take  
10 a break at some point and I'll give you a chance to get  
11 those.

12 16?

13 MR. SLENKER: This purports to cover the elements  
14 of damage we already covered in 14.

15 MR. DANIEL: It deals with assault.

16 MR. POVICH: Your Honor, perhaps we will withdraw  
17 this one.

18 THE COURT: Withdraw this one?

19 MR. POVICH: What is more appropriate is a false  
20 arrest case.

21 THE COURT: 16 is withdrawn. 17?

22 MR. SLENKER: Isn't this covered in other  
23 instructions, if Your Honor please, dealing with damages to

1 which the plaintiff might be entitled should there be a  
2 recovery?

3 MR. POVICH: Your Honor, it's important, I think, that  
4 note there, that all such consequences might not reasonably be  
5 expected to result, for instance, typically being the  
6 pulmonary embolism and vested tube. So, this is to show --

7 THE COURT: (Interposing) Where is this one from?

8 MR. POVICH: This is a standard instruction, 23.021.

9 THE COURT: Any further argument on 17, gentlemen?

10 MR. SCANLON: Yes, Your Honor. I do have an  
11 objection. I don't believe that these defendants are liable  
12 as this instruction would say. I don't just feel they are  
13 liable for the acts of Dr. Pugsley. That's the only evidence  
14 that all of the acts of Dr. Pugsley however committed were  
15 injurious but nothing with reference to the anesthesia.

16 I don't believe that these defendants, the defendants  
17 I represent, are liable for anything other than any  
18 consequences she suffered as a result of the anesthesia.  
19 Nothing else. There isn't any evidence to support she  
20 suffered any injury as a result of the anesthesia.

21 THE COURT: Mr. Slenker.

22 MR. SLENKER: Another thing, under the parameters  
23 of instruction 17, the jury would be entitled to award

1 damages for the pulmonary embolism.

2 MR. POVICH: That's right.

3 MR. SLENKER: The evidence here is that pulmonary  
4 embolism can happen when you are at rest.

5 THE COURT: Plaintiff's counsel indicated they  
6 weren't claiming pulmonary embolism.

7 MR. POVICH: On the assault and battery we are,  
8 but not on the negligence. We don't say his negligence  
9 caused the pulmonary embolism. But his negligence was a  
10 natural and probable consequence of the operation.

11 THE COURT: I don't follow. Let me hear from Mr.  
12 Slenker and then I will back up to you, Mr. Povich.

13 MR. SLENKER: This instruction here will allow  
14 them to grant damages for pulmonary embolism and any other  
15 condition that she had while in the hospital as to which  
16 there isn't one scintilla of evidence. Now, I don't care  
17 whether you are claiming pulmonary embolism under assault  
18 and battery or under negligence. You've still got to prove  
19 it, and the evidence here is pulmonary embolism can happen  
20 at rest. It can happen to you and I right now. That's the  
21 only evidence in the record.

22 MR. POVICH: The trouble is, she was at rest. She  
23 was lying in bed in a hospital and that is when you get the

1 pulmonary embolism.

2 THE COURT: How can that be the responsibility of  
3 the defendants? Nobody said they know what the cause of it  
4 is. I understood the first day there wasn't a claim for  
5 the pulmonary embolism I guess you say on the negligence  
6 portion of it.

7 MR. POVICH: Yes, sir. We don't think Dr. Pugsley  
8 caused it, but it was a result of the operation.

9 THE COURT: Is there anybody that said pulmonary  
10 embolism was a result of the operation?

11 MR. POVICH: I think, Your Honor, it's more  
12 probable following an operation than just walking around on  
13 the street. It occurs at rest when you are lying down.

14 MR. SLENKER: Mr. Povich didn't testify in this  
15 case.

16 THE COURT: Okay.

17 MR. POVICH: Your Honor, the only thing that  
18 should be excluded shall be the pulmonary embolism and  
19 intracranial bleeding because everything else certainly  
20 was a result of it.

21 MR. SCANLON: If Your Honor please, I would object  
22 on that basis. I don't see how you add jury instruction  
23 number 17 when you've already got jury instruction number 14.

1 I think you itemize it out, number 14. I think this is just  
2 a catch all which is terribly prejudicial to my clients.

3 MR. POVICH: Your Honor, this is a clear statement  
4 of the law. It's a natural and probable consequence.  
5 It's immaterial that all consequences might not reasonably  
6 have been expected to result.

7 What he's going to come in and argue is okay, we  
8 expected Dr. Pugsley to operate on her, and she would be out  
9 of there in a week. We can't be expected to pay if he  
10 operated and a fistula was there and resulted in her stay for  
11 two months.

12 But they can be. That was a natural and probable  
13 consequence of the operation which they were administering  
14 the anesthesia for. Does that mean the damages should be  
15 limited to the four days they originally anticipated the  
16 operation would last? This says no. It was immaterial  
17 that all such consequences might not reasonably have been  
18 expected to result. They did. As long as they did result,  
19 that's the state of the law.

20 MR. SLENKER: The fact that they resulted, if Your  
21 Honor please, they must result from something. If so,  
22 some doctor some place could identify the source of it, the  
23 reason for it, the etology of it. That was not done as to

1 the intracranial bleeding, as to the pulmonary embolism.

2 So, I am saying irrespective of what he says, where  
3 he is claiming it and what count, it is not in this law suit  
4 because there isn't any evidence to tie it in to anything.

5 MR. POVICH: If you want to add "result from the  
6 operation," fine. But to that extent, we do not include  
7 pulmonary embolism and intracranial bleeding. Then it would  
8 not be included.

9 THE COURT: What do you want to do? Amend it?

10 MR. POVICH: It is immaterial that all such  
11 consequences might not reasonably have been expected to  
12 result from the operation.

13 THE COURT: Strike the word "From the defendants'  
14 act."

15 MR. POVICH: I add "From the operation" at the very  
16 end.

17 THE COURT: Okay. I understand what you are  
18 saying.

19 MR. SLENKER: The amendment does not cure the  
20 instruction, if Your Honor please. It does not cure the  
21 point that we have heretofore been discussing, because when  
22 you talk about injurious consequences, you have got a lot  
23 to talk about so far as injurious consequences with reference

1 to this lady. But that's the very heart and thrust of their  
2 argument.

3 One of those is the pulmonary embolism as to which  
4 there is no evidence whatsoever to tie it into any of the  
5 defendants. One of those is intracranial bleeding as to which  
6 there is no evidence tying it into any of the defendants.  
7 You are just going to say injurious consequences.

8 As a matter of fact, I am going to ask Your Honor  
9 to tell the jury that there is no way that they could award  
10 damages for the pulmonary embolism or for the intracranial  
11 bleeding because that's what ought to be done. There isn't  
12 a scintilla of evidence tying those into anything that the  
13 defendants did.

14 THE COURT: Okay. Any further arguments, gentlemen?

15 MR. SCANLON: Yes, if Your Honor please. I want to  
16 make my position clear, I hope, that I do object to this  
17 instruction because I don't believe these defendants are  
18 liable for any damages flowing from the operation. They are  
19 liable only for what the plaintiff has sued for in the motion  
20 for judgment, which is damages from the anesthesia. I  
21 believe that's all they sued for.

22 THE COURT: I am going to deny 17. I will not  
23 the plaintiff's exception to the Court's ruling.



1           Okay. 18? Other than making it his, her and  
2 she, is there any objection?

3           Third line from the bottom, "She," fourth line  
4 from the bottom, "She," and the top line, Her."

5           MR. SLENKER: I have no objection to 18.

6           MR. SCANLON: I don't have any objection.

7           THE COURT: 18 is granted.

8           19?

9           MR. SCANLON: I'm sorry. Could we go back over  
10 18? I think for the record, I will still have to make the  
11 same objection I've been making before, that I don't  
12 believe my clients, I mean in order to be consistent --

13           THE COURT: (Interposing) You don't think it  
14 applied to your clients.

15           MR. SCANLON: That's correct.

16           THE COURT: The court will grant 18, and your  
17 exception is noted for the reasons stated.

18           19?

19           MR. SLENKER: We would object or I would object  
20 if Your Honor please, to instruction 19 as not being involved  
21 in the case, nor is it supported by the evidence by any of  
22 the witnesses, and as a matter of fact, finds no support  
23 whatever going all the way back through the pleadings and

P R O C E E D I N G S

(Out of the presence of the jury)

THE COURT: The jury verdict form. I assume we will want one in favor of all the defendants. The second one I was thinking of is a verdict against the plaintiff. The jurors would have to write in the defendants against whom they were finding in favor of the plaintiff against certain defendants and then finding in favor of certain defendants.

MR. POVICH: Can I make a suggestion?

THE COURT: Go ahead.

MR. POVICH: Could you say how do you find as to the plaintiff's claim as to the defendant and list the defendants? Then say or do you find against any of the following defendants and list them. Say yes or no, and then if so, put the amount.

Essentially we have two counts. In the first one you would have as to count one on negligence. You would say do you find against the defendant --

THE COURT: (Interposing) Do you want it separate?

MR. POVICH: Yes, sir. I think you have to separate them because of the situation we have here.

THE COURT: Mr. Slenker.

1 I have indicated that you have an hour each to  
2 argue the case. I will say at the outset counsel are  
3 responsible to see that the instructions in the proper form  
4 and the exhibits so that you are satisfied.

5 I will take the exhibits if you all want to refer  
6 to them and put them over here on this corner if any of  
7 you want to grab them at the time. I'll put the instructions  
8 next to it.

9 The jury strikes we have covered. I'll go back  
10 to instructions. I was holding on plaintiff's 1, 2, 15, 19,  
11 7, A-7, A-10, and C. Mr. Povich last night raised the question  
12 about C after you left, Mr. Slenker, and I told him I would  
13 hold it until this morning.

14 MR. SLENKER: I see.

15 THE COURT: All right. As to Plaintiff's 1 and 2,  
16 on the assault and battery. Mr. Povich?

17 MR. POVICH: Yes, sir. I think that it requires  
18 a definition and that this relates the definition to the  
19 case. I mean it's not a criminal assault. It's a case  
20 involving the unauthorized admission of anesthesia. I think  
21 that the jury should be told that that constitutes assault.

22 MR. SLENKER: Is it really an assault?

23 MR. POVICH: I mean assault and battery. Well, it

1 Do you want to come up on the verdict forms, and  
2 we'll see where we are on this?

3 Do you have any objection to this one? It's a  
4 negligence count.

5 Do you want the names in, a total in, or do you  
6 want to let them write in the names? Dr. Pugsley's name  
7 is on the original here. Really, it's joint and several,  
8 isn't it, so they should write in the names? Defendants  
9 blank and leave off Fairfax Hospital, Silbersiepe and Marks.

10 MR. POVICH: Yes.

11 THE COURT: Find in favor of the plaintiff against  
12 the defendants blank, long line, and assess damages blank.  
13 And we find in favor of defendants blank. Okay? Will that  
14 cover it?

15  MR. POVICH: I think you have to find in favor  
16 of all defendants.

17 THE COURT: That's this one, the second one.

18 MR. POVICH: Yes, sir. Otherwise, it's a repeat  
19 of this.

20 THE COURT: No, no. If they fill out this one, *See P 512 (Vol. 3)*  
21 that's only if they find in favor of the plaintiff against *Hy P.*  
22 certain defendants. In other words, in theory, if they find *Not Filled*  
23 against defendant A only, then they put defendant A's name in *Hy P.*

The Fairfax Hospital

3300 Gallows Road, Falls Church, Virginia 22045

Authorization for Medical and Surgical Procedures

I hereby authorize Dr. DR. L. PUGSLEY  
and/or other members of the Medical Staff of The Fairfax Hospital or his choice, to perform those diagnostic or therapeutic medical and surgical procedures on and to administer the necessary anesthetics to PHYLLIS PRIVETTE  
which in his or their judgement may be deemed necessary. I further authorize The Fairfax Hospital to dispose of any removed tissue or amputated parts.

I certify that the nature of the procedures contemplated have been explained to me by my physician and I understand the purpose of this authorization form.

8-12-71

(Date)

Phyllis W. Privette  
(Signature)

[Signature]  
(Witness)

[Signature]  
(Relationship)

\_\_\_\_\_  
(Witness)

one sheet from Plaintiff's Exhibit #1  
attest: Norman F. Slunker.