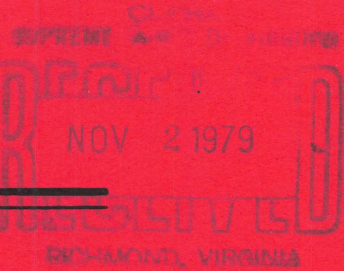


221VA1143



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IN THE

# Supreme Court of Virginia

AT RICHMOND

---

RECORD NO. 791025

---

MICHAEL B. HEMMING

Appellant

v.

JOHN C. HUTCHINSON

Appellee

---

JOINT APPENDIX

---

James E. Haluska, Esq.  
Attorney at Law  
4103 Chain Bridge Road  
Suite 110  
Fairfax, Virginia 22030

Counsel for Appellant

James Kearney, Esq.  
Attorney at Law  
2701 N. Pershing Drive  
Arlington, Virginia 22201

Counsel for Appellee

---



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FILED  
IN CIRCUIT COURT  
CLERK OF THE

JUL 10 1978

JAMES E. HENNING  
CLERK, FAIRFAX COUNTY, VA.  
FAIRFAX COUNTY  
DEPOSIT. ...

MOTION FOR JUDGMENT

COMES NOW the plaintiff, John C. Hutchinson, by counsel, and moves this Honorable Court to enter judgment against the defendant, Michael B. Hemming, for personal injuries occasioned against the plaintiff by acts of the defendant, and in support whereof states as follows:

1. That on or about June 15, 1977, the plaintiff, John C. Hutchinson, was operating his motor vehicle westbound on Route 693, a/k/a Westmoreland Street, near the intersection of Hopewood Drive, in Fairfax County, Virginia.

2. That at all times mentioned herein, the plaintiff, John C. Hutchinson, was operating his motor vehicle in a lawful and prudent manner.

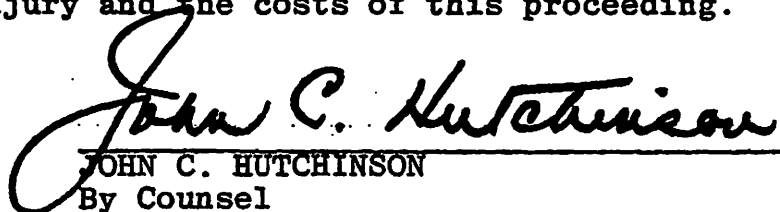
3. That at the same time and place, the defendant, Michael B. Hemming, was operating his motor vehicle eastbound on Route 693.

4. That the defendant, Michael B. Hemming, in a careless and negligent manner, with total disregard of the safety of others, drove his vehicle across the double yellow line into the oncoming traffic and struck the plaintiff's vehicle.

5. That as a result of the negligence of the defendant, Michael B. Hemming, the plaintiff, John C. Hutchinson, suffered

and will suffer both temporary and permanent personal injuries, incurred and will incur medical expenses and lost income, endured and will endure great pain and suffering, and continues to be afflicted by pain arising out of the aforesaid negligent actions of the defendant, Michael B. Hemming.

WHEREFORE, plaintiff, by counsel, moves this Honorable Court for judgment against the defendant in the amount of SIXTY THOUSAND and NO/100 DOLLARS (\$60,000.00), together with interest from date of injury and the costs of this proceeding.

  
JOHN C. HUTCHINSON  
By Counsel

MILLER, MILLER AND CYRON  
2701 North Pershing Drive  
Arlington, Virginia 22201

BY: 

JAMES B. MILLER

MIC( EL. B. HEMMING  
6545 Tucker Ave.  
McLean, Va. 22101

PROOF OF SERVICE

Virginia:

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

JOHN C. HUTCHINSON

vs.

MICHAEL B. HEMMING

LAW NO. 42955  
JUL 14 PM 3 20  
RECEIVED  
FAIRFAX COUNTY, VA.  
NPF  
COPIES

Returns shall be made hereon, showing service of Notice issued 7/12/ 78, 19\_\_\_\_,  
with copy of Motion for Judgment filed 7/10/ 78, 19\_\_\_\_, attached:

Executed on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in the County  
of Fairfax, Virginia, by delivering a true copy of the above mentioned papers attached to each other,  
to \_\_\_\_\_ in person.

Executed on the 17 day of July, 1978, in the County of Fairfax,  
Virginia, by calling at the usual place of abode 6545 Tucker Ave.  
of Michael B. Hemming and not finding him there, or any other  
person upon whom service could be made, I left a true copy of the above-mentioned papers, attached to  
each other, POSTED at the front door of his usual place of abode.

1142 AM

Not finding \_\_\_\_\_ at h\_\_\_\_\_ usual place of abode  
\_\_\_\_\_ the above mentioned papers, attached to each other,  
were executed on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in the County of  
Fairfax, Virginia by delivering a true copy of same to \_\_\_\_\_  
whom I found at the usual place of abode, a member of h\_\_\_\_\_ family above the age of sixteen years, and  
by informing h\_\_\_\_\_ of its purport.

Executed in Fairfax County, Virginia, this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_  
by the within named \_\_\_\_\_ not being found in my bailiwick.

JAMES D. SWINSON, SHERIFF

003

By Charles W. Baerger  
Deputy Sheriff

AUG 1 1978

ANSWER AND GROUNDS OF DEFENSE

COMES NOW the defendant, Michael B. Hemming, by counsel, and for Answer and Grounds of Defense to the Motion for Judgment filed herein by the plaintiff, states as follows:

1. The defendant is without information sufficient to formulate a belief as to the allegations contained in paragraphs 1, 2 and 3 of the Motion for Judgment and therefore denies same.
2. The defendant denies each and every allegation contained in paragraphs 4 and 5 of the Motion for Judgment.
3. The defendant states that the injuries and damages, if any, allegedly sustained by the plaintiff were the direct and proximate result of his sole or contributory negligence and,
4. The defendant will rely upon all defenses available from the evidence at the time of any trial of this case including sudden emergency.

WHEREFORE the defendant, Michael B. Hemming, having fully answered plaintiff's Motion for Judgment, prays that same be dismissed with costs expended.

MICHAEL B. HEMMING  
By Counsel

CARR, JORDAN, COYNE & SAVITS  
4084 University Drive  
Fairfax, Virginia 22030

By

  
JAMES E. HALUSKA  
Counsel for Defendant

We, the Jury, on the issue joined in the case of  
John C. Hutchinson, Plaintiff, vs. Michael B. Hemming,  
Defendant, find in favor of the Plaintiff and fix damages  
at Fifteen Thousand Dollars.

---

Mrs. Berneice Paulson  
FOREMAN  
March 23, 1979.

E I L E D

APR 4 1979

JAMES E. HOFFNAGLE  
Clerk of the Circuit Court  
of Fairfax County, Va.

MOTION TO SET ASIDE THE VERDICT  
AND GRANT A NEW TRIAL OR REMITTITUR

The defendant, Michael B. Hemming, moves the Court to set aside the verdict of the jury in this matter and grant a new trial, and, in the alternative, order a remittitur, upon terms of so much of the damages assessed by the jury as the Court shall deem proper; or such other relief as the Court shall deem proper.

As grounds for the requested relief, the defendant, Michael B. Hemming, states as follows:

1. That the Court erred in denying the defendant's motion in limine in which the defendant requested the Court to bar the introduction of any and all evidence concerning the defendant's consumption of alcoholic beverages prior to the accident that is the subject of this law suit.
2. That the plaintiff's counsel made improper remarks in his address to the jury regarding the defendant's consumption of alcoholic beverages which so overstepped the bounds of legitimate argument, and amounted to giving testimony in summation argument for the clear purpose of arousing the prejudice of the jury and constituted error.
3. That the verdict of the jury on the issue of damages to be awarded plaintiff was based upon a misconception or misunderstanding of the facts and the law of the case, and was



so out of proportion to the injuries suffered as to demonstrate clearly that it was not the product of a fair and impartial decision.

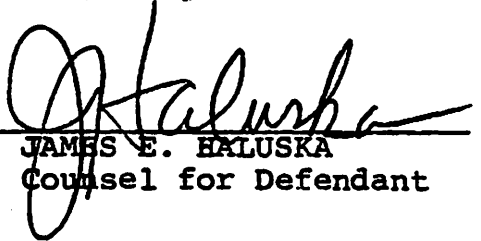
4. That the amount of damages, standing alone, was so excessive as to shock the conscience of the Court and to require the Court to correct the injustice.

WHEREFORE the defendant, Michael B. Hemming, prays that the Court set aside the verdict of the jury and grant such items of the alternative relief requested as it shall deem just and proper.

MICHAEL B. HEMMING  
By Counsel

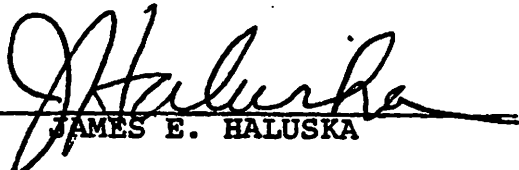
CARR, JORDAN, COYNE & SAVITS  
4084 University Drive  
Fairfax, Virginia 22030

By

  
JAMES E. HALUSKA  
Counsel for Defendant

CERTIFICATE

I HEREBY CERTIFY that a true copy of the foregoing was hand delivered this 3rd day of April, 1979 to James Kearney, Esquire, 2701 N. Pershing Drive, Arlington, Virginia 22201.

  
JAMES E. HALUSKA

O R D E R

THE 22ND DAY OF MARCH, 1979, came the Plaintiff and his attorney, James Kearney, Esquire, and the Defendant and his attorney, James E. Haluska, Esquire;

THEREUPON, from the veniremen in attendance on this date came a panel of thirteen (13) who were sworn on their voir dire and found free from exception, from which panel each side struck three (3);

THEREUPON, came a jury of seven (7) composed of the following named persons, to-wit:

Johanna Nissley  
Stephen A. Toth  
Hank Weiner  
Cora Russell  
Georgene Paulowski  
Lucille E. Moorefield  
Michael J. Mucha

who were sworn as the law directs as a jury for the trial of this case;

WHEREUPON all witnesses present were sworn as the law directs and on Motion of counsel for the Plaintiff, were excluded from the courtroom until they took the witness stand to testify;

THEREAFTER the witnesses who were not previously present were likewise sworn as they respectively took the witness stand to testify;

WHEREUPON opening statements were made by the attorney for the Plaintiff and the attorney for the Defendant and the Plaintiff, by his counsel proceeded with the introduction of his evidence to the conclusion thereof and rested his case;

WHEREUPON, the Defendant, by his counsel proceeded with the introduction of his evidence until the Court excused the jury for the luncheon recess after the members thereof were admonished by the Court not to discuss this case among themselves nor to permit anyone to discuss it with them or in their presence and not to come to any decision until they were directed to do so by the Court;

WHEREUPON, after the luncheon recess the jury returned to the jury box and the Defendant, by his counsel, continued with the introduction of his evidence to the conclusion thereof and the Court directed the jury to retire to its room;

WHEREUPON the matter of instructions was argued;

THEREUPON, the jury returned to the jury box and was instructed by the Court and after hearing closing arguments by the attorney for the Plaintiff and counsel for the Defendant, the jury retired to its room to consider its verdict and after a time the Court inquired of the jury as to whether they were close to a decision and being informed that they were not, the Court recalled the jury to the courtroom and after admonishing them not to discuss the case with their families or among themselves and not to visit the scene of the accident adjourned for the night;

THEREUPON, the jury returned the 23rd day of March, 1979, and again retired to its room to consider its verdict and after a time returned into Court and presented the following verdict, to-wit:

We, the jury, on the issue joined in the case of John C. Hutchinson, the Plaintiff, and Michael B. Hemming, the Defendant, find in favor of the Plaintiff and fix damages at Fifteen thousand Dollars (\$15,000.00).

WHEREUPON, on Motion of the Counsel for the Defendant,  
the jury was polled and each did answer affirmatively as to  
the foregoing being their verdict;

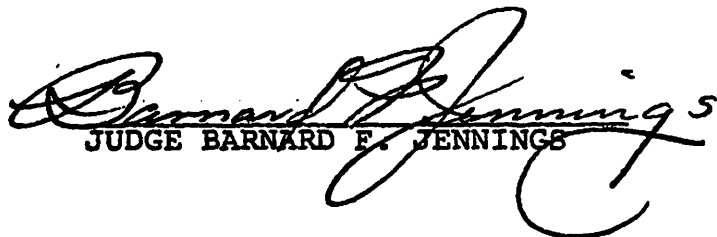
THEREUPON the jury was discharged as to this case;

WHEREUPON the Defendant, by counsel, informed the Court  
that no motions were to be made at that time;

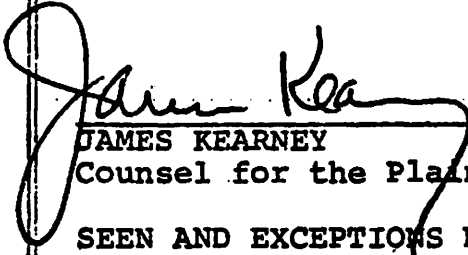
THEREUPON, the Court adjourned;

IT IS THEREFORE THE JUDGMENT OF THE COURT, pursuant to  
the verdict of the jury as ascertained, that the judgment be  
entered in favor of the Plaintiff and that the Plaintiff  
recover of and from the Defendant the sum of Fifteen thousand  
Dollars (\$15,000.00) together with interest from the date of  
the verdict and the costs of this proceeding.


ENTERED this 13<sup>th</sup> day of April, 1979.

  
JUDGE BARNARD F. JENNINGS

I ASK FOR THIS:

  
JAMES KEARNEY  
Counsel for the Plaintiff

SEEN AND EXCEPTIONS NOTED:

  
JAMES E. HALUSKA  
Counsel for the Defendant

FILED

COUNTY  
APR 18 1979

JAMES E. ROOPE  
Clerk of the Circuit Court  
of Fairfax County, Va.

NOTICE OF APPEAL

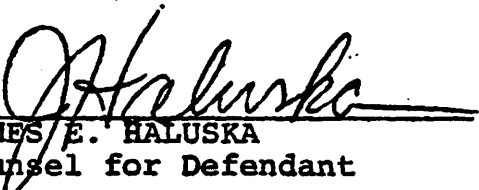
COMES NOW the Defendant, Michael B. Hemming, by his counsel, and pursuant to Rule 5:6 of the Rules of the Supreme Court of Virginia, files this, his Notice of Appeal, to the Supreme Court of Virginia from a final judgment Order entered herein by the Circuit Court for the County of Fairfax on the 13th day of April, 1979.

A transcript and other incidents of the case will be filed hereafter and made a part of the record.

MICHAEL B. HEMMING  
By Counsel

CARR, JORDAN, COYNE & SAVITS  
4084 University Drive  
Fairfax, Virginia 22030

By

  
JAMES E. HALUSKA  
Counsel for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed, postage pre-paid, this 17th day of April, 1979 to James Kearney, Esquire, 2701 North Pershing Drive, Arlington, Virginia 22201.

  
JAMES E. HALUSKA



ASSIGNMENT OF ERROR

The trial court erred when it denied the defendant's motion in limine which sought to prevent the introduction into evidence of the consumption by the defendant of alcoholic beverage.

SMN

## PARTIAL TRANSCRIPT

1

1 VIRGINIA:

2 IN THE CIRCUIT COURT OF FAIRFAX COUNTY

3  
4 JOHN C. HUTCHINSON,

5 Plaintiff,

6 -VS-

7 MICHAEL B. HEMMING,

8 Defendant.

LAW NO. 42955

FILED

JUN 1 1979

JAMES E. HOOFNAGLE

Clerk of the Circuit Court  
of Fairfax County, Va.

SUPERIOR COURT OF VIRGINIA

JUN 19 1979

10 Fairfax, Virginia

11 Thursday, March 22, 1979

12 The hearing commenced at 10:00 o'clock, a.m.

13 BEFORE:

14 The Honorable Barnard F. Jennings, Judge.

15 APPEARANCES:16 For the Plaintiff:

17 JAMES KEARNEY, ESQ.

18 Of: Miller, Miller &amp; Cyron

2701 North Pershing Drive

Arlington, Virginia 22201

19 For the Defendant:

20 JAMES E. HALUSKA, ESQ.

21 Of: Carr, Jordan, Coyne &amp; Savits

Suite 108

22 4084 University Drive

Fairfax, Virginia 22030

1 MR. MUCHA: Well, it comes and goes, yes.

2 THE COURT: Mr. Haluska?

3 MR. HALUSKA: I have no questions, Your Honor.

4 (Thereupon, there were had proceedings which  
5 were reported and not transcribed by the  
6 court reporter.)

7 THE COURT: Mr. Haluska, you indicated you have  
8 a matter you want to take up. Do you want an opening  
9 statement?

10 MR. HALUSKA: I think it has to be brought up now.

11 THE COURT: Okay.

12 (Thereupon, the following proceedings were  
13 had at the bench:)

14 MR. HALUSKA: I have a couple of brief motions  
15 in limine I'd like to pose at this time. I'd like to keep  
16 the matter out of the opening statement. There is evidence  
17 in the case that my client consumed two or three beers  
18 approximately 12 hours prior to the accident occurring, namely  
19 the evening before this accident occurred, about 8:00 in the  
20 morning, the following day.

21 I want to keep that out absolutely from the case.

22 THE COURT: Go ahead.

23 MR. HALUSKA: At the time of this accident, he was

1 taking medication, an antibiotic called Tetracycline, for a  
2 gastric disorder or dysentery that he suffered during a trip  
3 abroad.

4 I want that kept out also unless the plaintiff  
5 is going to put forth medical testimony to connect it up to  
6 the defense in the case, which is namely at the time of the  
7 accident, my client had an epileptic attack.

8 Also, the other motion in limine that I would  
9 have is photographs. I have photographs that were submitted  
10 to the carrier by the plaintiff, which I believe that he has  
11 copies of. I believe that they are prejudicial.

12 They show the freshly-sewn scar on the plaintiff.  
13 The scar is currently visible. I am sure the doctors can  
14 testify to it. I'd like to keep that out.

15 THE COURT: What is your position?

16 MR. KEARNEY: My position is that --

17 THE COURT: (Interposing) Do you intend to offer  
18 evidence of that?

19 MR. KEARNEY: I would like to on the fact of  
20 drinking. My position in the case is this: I --

21 THE COURT: (Interposing) Stick to these two  
22 things, please.

23 MR. KEARNEY: I would like to mention he was

1 drinking prior --

2 MR. HALUSKA: (Interposing) Keep your voice down.

3 THE COURT: Don't talk so loud.

4 MR. KEARNEY: I have a note from his doctor that  
5 he advised him not to drink and take the medicine at the  
6 same time.

7 THE COURT: And the photographs, your position on  
8 that?

9 MR. KEARNEY: He sustained a huge scalp laceration.  
10 There are two scars on his head. He has one that goes across --

11 THE COURT: (Interposing) Let me see the photo-  
12 graph. All right, what do you want to say about this?

13 MR. KEARNEY: He's got a scar that comes down here.  
14 This is the major scar. I think the jury can see what  
15 happened as a result of this accident.

16 THE COURT: Mr. Haluska?

17 MR. HALUSKA: Your Honor, on his note, I have a  
18 letter from the doctor, Dr. Jones, who gave him the Tetra-  
19 cycline. In the letter, he states that he did tell him how  
20 to use it, but the reason for that was that it would deacti-  
21 vate the effect of the antibiotic, not that it would have  
22 anything to do with this convulsive disorder.

23 There is medical testimony, we can establish the  
link between the alchohol and/or the Tetracycline having no



1 effect on this gentleman's activity or behavior that morning.  
2 And the alchohol would be incredibly prejudicial, so would  
3 the Tetracycline.

4 THE COURT: I am inclined to agree with you. As  
5 far as the photographs are concerned, I think the proper  
6 foundation is laid. As to admissibility with respect to the  
7 drinking, I think the evidence as to drinking would be  
8 admissible.

9 Insofar as that is concerned, I would sustain the  
10 objection at this point.

11 MR. HALUSKA: Are you going to allow the drinking  
12 to come in?

13 THE COURT: Yes, sir.

14 MR. HALUSKA: Can the record reflect my exception  
15 to that?

16 MR. KEARNEY: I can talk about the beer, but I  
17 can't talk about the Tetracycline?

18 THE COURT: That is correct, unless you have medi-  
19 cal evidence.

20 MR. HALUSKA: Your Honor, that foundation that  
21 needs to be laid would have to be some evidence that it  
22 affected his conduct at the time.

23 THE COURT: The objection to that is overruled.

(Thereupon, the discussion at the bench was concluded, and the following proceedings were had:)

(Thereupon, there were had proceedings which were reported and not transcribed by the court reporter.)

THE COURT: Go ahead with your opening statements.

MR. KEARNEY: Thank you. I'd like to introduce myself one more time. I am Jim Kearney, attorney for the plaintiff in this case, Jack Hutchinson.

This is my opportunity to tell you what evidence we are going to put on and what we hope to prove in the case and so that you have some familiarity with what has happened so that when you listen to the witnesses, you can judge what they are saying and weigh whether their testimony is accurate or inaccurate, which you will have the opportunity to do.

That, in fact, is your job. That's what you have taken the oath to do. So what I say is not evidence and what Mr. Haluska says is not evidence. It's just what we hope to prove in the case.

I am going to go over the facts of the case, the facts of what occurred. And they are really kind of simple. I don't think there is much disagreement between myself and

1 Mr. Haluska about what happened in this case.

2 Mr. Hutchinson was -- this happened on June 15,  
3 1977, happened in the morning around 7:50. He had gotten  
4 up earlier and he had juice for breakfast or something and  
5 had gone to get in his car and he was on his way to work.

6 He works in Herndon and he lives in McLean. He  
7 will tell you about that. And he was about three blocks from  
8 where he lived and he had come to a stop sign. And the name  
9 of the street that he was on is Hopewood Drive in McLean.

10 And he was going to turn right onto Westmoreland  
11 Drive. He came up to that intersection. There was a stop  
12 sign there and a car in front of him. That car was being  
13 driven by Charles Teschner, a neighbor.

14 That car pulled up to the stop sign, stopped, made  
15 a right turn and began to go down Westmoreland Drive. Jack  
16 was in his car. He pulled up to the stop sign, stopped, looked  
17 to his left and didn't see any traffic coming to the left and  
18 he made the right turn.

19 They got approximately -- the police officer is  
20 going to testify to this because he investigated it and he  
21 measured everything out and he will tell you exactly what the  
22 distances are, but I think he will say that's about 50 feet  
23 down Westmoreland Drive, from that intersection, a collision

1 occurred.

2           What happened was Mr. Hemming, who is the defendant  
3 in the case, was coming in the opposite direction. He was  
4 driving his motor vehicle and he went across the line, the  
5 center line of the road, which is painted on the road.

6           And he struck Mr. Teschner's vehicle in the left  
7 rear of his vehicle and then that vehicle was kind of knocked  
8 out of the way, the Teschner vehicle. And he struck Jack's  
9 vehicle in the side. And as a result of that, Jack was thrown  
10 up against the side of his car, hit the window, and his scalp  
11 was severely lacerated.

12                   (Thereupon, there were had proceedings which  
13 were reported and not transcribed by the  
14 court reporter.)

15           MR. KEARNEY: The real issue in this case, though,  
16 isn't about the facts of the accident and it isn't about  
17 whether Jack's head was split open. That is going to be  
18 testified to and I don't think Mr. Hemming is going to  
19 disagree with that.

20           The real issue in this case is the defendant, was  
21 he negligent and is he responsible for this. And we can't  
22 argue the law at this point. I won't argue the law at this  
23 point.

1 But what I ask you to do is pay close attention  
2 to all the testimony and to weigh all the testimony because  
3 this case is going to turn, I think, on the credibility of  
4 the defendant in this case. I mean, if you believe him, then  
5 you will find for him. ,

6 But I don't think you will believe him and I am  
7 going to try to show why you shouldn't believe him. And so I  
8 ask that you listen carefully to all the questions that I  
9 ask him and listen carefully to all the questions Mr.  
10 Haluska asks him.

11 And when the evidence is all in, we will have an  
12 opportunity to stand up, Mr. Haluska and I, and we will come  
13 before you and we will say why we think that our client, why  
14 I think Jack Hutchinson should be awarded a judgment in this  
15 case. And he will say why he thinks his client should.

16 That again is not evidence. That's just argument.  
17 That is what lawyers do. You are the judges of the fact.  
18 You are the most important people in this courtroom right now  
19 because what you say in the end is what will rule the case.  
20 So I ask you to pay full time and attention and I ask that you  
21 honor that commitment that you just made to make sure the  
22 facts and the law are carried out in this case.

23 MR. HALUSKA: Ladies and gentlemen, again, my name



1 is Jim Haluska. I represent Mike Hemming, who is sitting  
2 next to me. Michael is 28 years old and he is currently  
3 employed with the Smithsonian Institute in Washington, D.C.

4 At the time of this accident, he lived with his  
5 mother in McLean, Virginia. And I will explain to you in a  
6 moment a sequence of events that we believe the evidence will  
7 show happened early in the morning hours of June 15, 1977.

8 But before I do that, these liability cases are  
9 split into two parts. The first is liability and that is  
10 the plaintiff has the burden to show you, the evidence must  
11 convince you that my client, Michael, was negligent.

12 And secondly, there is a damage element in the  
13 case. He must prove to you that each and every element,  
14 each and every item of the damages that he claims, flowed from  
15 this accident.

16 Now basically, as Mr. Kearney has said, we do not  
17 contest the fact that this automobile that Michael was  
18 driving came across the line and side-swiped or came into  
19 contact with Mr. Hutchinson's vehicle. That is not the issue.

20 We do, on the damages portion of the case, we do  
21 not agree with all aspects.

22 (Thereupon, there were had proceedings which  
23 were reported and not transcribed by the  
court reporter.)

**Ronald E. Johnson & Associates**

STENOTYPE REPORTERS

P.O. BOX 485 • FAIRFAX, VIRGINIA 22030 022

PHONE: (703) 273-9367

1 MR. HALUSKA: Now, as to what happened on the  
2 morning of June 15th, Michael accompanied his mother, who  
3 worked at the Department of Transportation building, next to  
4 the CIA building in Langley, Virginia.

5 He got up at approximately 7:15 that morning and  
6 it was his desire to use his mother's car that day. So he  
7 accompanied her on her trip to the Department of Transpor-  
8 tation building, with her driving the car.

9 He then took over the wheel after she got out and  
10 went to work and was proceeding back to the house in McLean.  
11 He was on Old Chain Bridge Road and he made a left-hand turn  
12 on Westmoreland.

13 After he made that left-hand turn, gentlemen and  
14 ladies, he blacked out. He has no conscious recollection  
15 today as to what occurred after he made that left-hand turn.  
16 Now, approximately a mile or so down the road is where this  
17 accident occurred.

18 Michael came to approximately an hour after the  
19 accident occurred. He was in a deep state of confusion,  
20 disorientation. He basically didn't know how he got to the  
21 scene of the accident and didn't know, certainly, how the  
22 accident occurred.

23 Furthermore, he really didn't know what happened

1 to him. He didn't know whether he fell asleep or whether he  
2 had some sort of problem with his brain. And the reason he  
3 didn't know what it was, ladies and gentlemen, is that because  
4 on this morning, this was the very first time that anything  
5 had ever happened to him, like this.

6 He then had another episode of losing consciousness.  
7 This happened in July, approximately July 26th. He blacked  
8 out again. And there was a boarder living in the house in  
9 the basement who heard screams and yells and heard pots and  
10 pans clanging.

11 Michael, when he regained consciousness, was in  
12 the house still. Somehow his trousers were off and he noticed  
13 there were pots and pans laying around the house. Again,  
14 he didn't know how it happened. He didn't know what was the  
15 cause.

16 He has no recollection of it occurring. By this  
17 time, he decided that something was really wrong with his  
18 brain or his nervous system, so he contacted a Dr. Jones in  
19 McLean, Virginia.

20 Dr. Jones immediately referred him to a neurosurgeon,  
21 who you are going to hear testify here today. His name is  
22 Dr. Sydney Green. He practices medicine in the District of  
23 Columbia. He's been a neurosurgeon for approximately 30

1 years.

2 The doctor made at least a first-hand diagnosis  
3 that there was something wrong with Michael's nervous system.  
4 He then referred him to have tests taken at Arlington  
5 Hospital, which was done.

6 This is approximately July 29th, the same year  
7 this accident happened. While he was at the hospital, he  
8 was undergoing tests for a number of things, checking out  
9 blood and things that doctors normally do to rule out things  
10 other than epilepsy as the physical problem.

11 While there, ladies and gentlemen, he had another  
12 seizure. He went out to get some fresh air during the course  
13 of his stay there, had a seizure, and when he came to the third  
14 time, he was in the emergency room of the same hospital,  
15 being treated for these convulsions.

16 He was then diagnosed by Dr. Green on August  
17 second as having suffered from a condition called grand mal  
18 epilepsy. There are different forms of epilepsy that you  
19 are going to hear about today.

20 Grand mal is the most serious. It is the most  
21 severe. It is a disorder of the brain which causes electrical  
22 discharges to course over the brain. A person loses conscious-  
23 ness. He doesn't have any idea what's happening.

1           Then he suddenly loses control of his body and  
2 goes into convulsions and then comes to, normally a short  
3 time afterwards, and is in a state of confusion because of  
4 this overwhelming assault of his own brain on itself.

5           Now, the doctor prescribed Phenobarbital and  
6 Dilantin, which Michael is taking even today, which he must  
7 take in order to avoid seizures. Since the last seizure in  
8 Arlington Hospital, he's had no others.

9           He's been faithfully taking the medicine which  
10 has prevented these seizures from occurring to him. Mr.  
11 Kearney is right about the issue. That's the defense. Again,  
12 the evidence will show that Michael was not negligent.

13           He wasn't coming along the road and something  
14 happened to him so that he just consciously drove across the  
15 line and struck Mr. Hutchinson's vehicle. It will be that  
16 he was having his first grand mal epileptic seizure at the  
17 time this accident occurred and the he never had it before.

18           We ask you again to listen to all the evidence.  
19 The plaintiff in this suit bears the burden to convince you  
20 not only that my client was negligent, but also all those  
21 damages that he's going to claim here before you today.

22           We ask you to join with us in challenging him to  
23 meet that burden.



1 (Thereupon, there were had proceedings which  
2 were reported and not transcribed by the  
3 court reporter.)

4 THE COURT: You are free to go, doctor, and thank  
5 you. Call your next witness.

6 MR. KEARNEY: I'd like to call Officer Degroot.

7 Thereupon

8 ROBERT A. DEGROOT

9 was called as a witness, and after having been duly sworn,  
10 was examined and testified as follows:

11 DIRECT EXAMINATION

12 BY MR. KEARNEY:

13 Q Good morning. State your full name for the  
14 record.

15 A Robert A. Degroot.

16 Q What's your occupation?

17 A Police officer for Fairfax County police department.

18 Q How long have you been a police officer for Fairfax  
19 County?

20 A A little over four years.

21 Q What training do you have to become a police  
22 officer?

23 A At the time, I went through 16 weeks of training  
through the police academy.

1 Q And in that course that you took, did they teach  
2 you how to conduct an auto vehicle accident investigation?

3 A Yes, sir.

4 Q Directing your attention to June 15, 1977, were  
5 you on duty at that time?

6 A Yes, sir, I was.

7 Q What shift were you working?

8 A Eight to four.

9 Q Day work?

10 A Yes.

11 Q When you say eight to four, does that mean you  
12 started at 8:00 o'clock?

13 A We hit the road about 7:30, or 7:40.

14 Q On that day, at approximately between 7:30 and  
15 8:00, did you receive a call --

16 A Yes, sir, I did.

17 Q -- concerning an accident?

18 A Yes, sir.

19 Q Would you please tell the jury what that call was  
20 about? Did you respond to the scene?

21 A It came over the radio as an accident with injury  
22 at the intersection -- excuse me, on Westmoreland, next to --

23 Q (Interposing) Excuse me, officer. Would you like

1 to use the drawing?

2 A If I could.

3 Q I might say the police officer came in and drew  
4 the drawing while we had that recess. Would you like me to  
5 move it over?

6 THE COURT: Can the jury see it where it it? I  
7 think it's all right.

8 THE WITNESS: This is Westmoreland Road, east and  
9 west. The curve is down here. (Indicating)

10 THE COURT: You will have to try to face the jury  
11 as you talk.

12 MR. HALUSKA: Would it be helpful if we moved the  
13 blackboard?

14 THE COURT: They can see it.

15 THE WITNESS: The curve of the road sits down here.  
16 This is Westmoreland going each and west. I believe this is  
17 Westmoreland Square Town Houses. It's back up there. That  
18 is the intersection with Hopewood Drive. The call was an  
19 accident with injury at this location with three vehicles  
20 involved. (Indicating)

21 BY MR. KEARNEY:

22 Q Could you identify those vehicles and who the  
23 operators of those vehicles were, if you know?

1           A     Yes, sir. In vehicle number one, which was the  
2 striking vehicle, was driven by Mr. Hemming.

3           Q     Can you identify Mr. Hemming here in the court-  
4 room?

5           A     To the best of my recollection, it's Mr. Hemmings  
6 right there. (Indicating)

7           Q     Thank you.

8           A     Vehicle number two, which is the first vehicle  
9 struck by vehicle number one, driven by Mr. Teschner. And  
10 vehicle number three, which was the second vehicle struck,  
11 was Mr. Hutchinson. (Indicating)

12          Q     Did you interview all the parties involved?

13          A     Yes, sir.

14          Q     Did you interview eyewitnesses?

15          A     Yes, sir.

16          Q     Would you relate to the jury what they said occurred  
17 in that accident?

18          A     Vehicle number two and three were coming down  
19 here, apparently in a line of vehicles. Vehicle number one  
20 was going eastbound on Westmoreland and started to cross over  
21 the double yellow lines. Vehicle number two, which was the  
22 front vehicle, saw vehicle number one start to cross over and  
23 it started over toward the side.

1           This is like a safety zone here. The street  
2 comes down like this at an angle. The curb goes straight.  
3 This is the safety zone through here with a median, grass  
4 median and sidewalk and grass up to the town houses.

5           Vehicle number two saw vehicle number one start  
6 to come over. He tried to get over. The first impact took  
7 place approximately here between vehicle number one striking  
8 the left rear of vehicle number two.

9           And then vehicle number three also saw vehicle  
10 two was coming over and saw vehicle number one coming up.  
11 He tried to get over and vehicle number one bounced off  
12 vehicle number two, striking, I believe, the complete left  
13 side of vehicle number three, causing it to spin.

14           The point of impact was approximately here.  
15 Vehicle number one glanced off three and went in like an  
16 arc and came to rest at the edge of some pine trees at the  
17 back of the town houses. (Indicating)

18           Q     Mr. Hutchinson was operating vehicle number  
19 three, is that correct?

20           A     Yes, sir.

21           Q     When you arrived on the scene, what was his  
22 condition?

23           A     He had, I believe it was, a head injury. He had

1 struck the window and glass was broken. He had a cut across  
2 the middle of the head approximately. It apparently took  
3 32 stitches, I believe.

4 Q Did you take statements? Did you take a statement  
5 from Mr. Hutchinson?

6 A I believe I questioned him.

7 Q What did that statement consist of?

8 A Briefly what I told you happened.

9 Q Did you take a statement from Mr. Hemming?

10 A Yes, I did.

11 Q What did he say?

12 A When I arrived, Mr. Hemming was still in his car.

13 Q I'm sorry, officer, do you want to --

14 THE COURT: (Interposing) Come on back up here.

15 THE WITNESS: Mr. Hemming was still in his car.

16 He appeared to be in a dazed condition, was still in the  
17 driver's seat.

18 BY MR. KEARNEY:

19 Q Where was the damage on Mr. Hemming's vehicle?

20 A It was the complete front, left, complete front,  
21 which is the grille, bumper, up around there and left front  
22 fender.

23 Q When you arrived on the scene, did Mr. Hemming

1 have his shoulder harness on, do you recall?

2 A I don't recall.

3 Q Did an ambulance arrive on the scene?

4 A Yes, sir, it did.

5 Q Did Mr. Hemming go in that ambulance?

6 A No, sir, he didn't.

7 Q What did Mr. Hemming do after this accident?

8 A After the accident, I believe, if I recall, I  
9 believe the rescue took a look at Mr. Hemming and then he  
10 went and had a seat in the back of my vehicle after the  
11 accident.

12 Q When he got to the back of the vehicle, did you  
13 talk to him?

14 A Yes, sir, I did.

15 Q Would you relate that conversation to the jury?

16 A From what I recall, he stated at first, he said  
17 something to the effect of why did I go by his house, pick  
18 him up and bring him up to the accident scene and, you know,  
19 he wasn't involved. He didn't know what was going on.

20 Q He appeared dazed and disoriented?

21 A Yes, sir.

22 Q Did you charge anyone in this accident?

23 A Yes, sir, I did.

1 Q Who did you charge?

2 A Mr. Hemming.

3 Q What did you charge him with?

4 A Failure to keep to the right of the highway.

5 Q Did that matter come to court?

6 A Yes, sir, it did. It never went to trial. A  
7 ticket was posted on it.

8 Q When you say the ticket was posted --

9 A (Interposing) He paid. There is two ways in  
10 which you could take care of a traffic summons, you can  
11 either appear in court and the matter can be disposed of that  
12 way or you can post on the ticket, which means pre-pay the  
13 ticket I believe 72 hours prior to the court date.

14 And if you do that, you do not have to appear in  
15 court on the court date.

16 Q How long after the accident, which was 6/15, was  
17 the court date?

18 A July 14th.

19 Q The court date was July 14th?

20 A Yes, sir.

21 Q And he didn't appear in court to contest the  
22 matter?

23 A No, sir, he posted a ticket.



1 MR. KEARNEY: I have no further questions of  
2 Officer Degroot.

3 CROSS EXAMINATION

4 BY MR. HALUSKA:

5 Q Officer, you mentioned that Michael Hemming  
6 appeared dazed. Could you elaborate on that, if you can?

7 A It appeared he didn't, you know, know where he  
8 was at the time of the accident, like when he was taken out  
9 of his vehicle and checked by rescue and then he came back to  
10 have a seat in my vehicle, first he wanted to know why I had  
11 brought him up to the accident scene and was eventually  
12 charging him in the accident, when he didn't know how he got  
13 there.

14 Then he recalled that he had been taking his mother  
15 to work and had gone home and gone back to bed, I believe.  
16 Like I said, he didn't realize how he had gotten up there.

17 Q So his words to you were that he thought he had  
18 taken his mother to work, gone home and gone to sleep and  
19 he wondered why you woke him up and brought him to the scene?

20 A Right.

21 Q Did he ask you why you specifically brought him  
22 to the scene?

23 A Yes, I believe so.

1 Q Was he making sense to you?

2 A Not right after the accident, right when I first  
3 got on the scene. But as time went on, like when I took him  
4 back home and we had his vehicle towed back to his house  
5 and everything, he appeared to be, you know, fully aware of  
6 what was going on, what had happened.

7 Q At the time when you first saw him, did he appear  
8 to be in a confused state of mind?

9 A Very dazed, yes.

10 Q Did he seem to be disoriented?

11 A Yes, sir.

12 Q Did you take him home, yourself?

13 A Yes, sir, I did.

14 Q How did you come to drive him home?

15 A His vehicle was, you know, had that much damage  
16 where it couldn't be driven. So I took him home to his house.  
17 We followed a tow truck over and I dropped him off at his  
18 house with his vehicle.

19 Q You mentioned that the rescue checked him over.  
20 Why did they do that, if you know?

21 A To make sure there wasn't any injuries.

22 Q Did you talk to any of the rescue people, yourself?

23 A I was with them at the scene. I am trying to  
recall whether they helped me get him out of the car, whether

1 I had gotten him out of the car and then they checked him,  
2 in which order. I don't recall.

3 Q Did they indicate to you it was all right to  
4 take him home?

5 A Yes, sir. ,

6 Q And did they, to your knowledge, check his head at  
7 the time you saw them checking him out?

8 A I can't say, I don't know.

9 Q I assume that driving him home and seeing him at  
10 the scene, you saw his head, yourself, is that correct?

11 A Yes, sir.

12 Q Did there appear to be any lumps or contusions or  
13 bruises or any kind of injury to the head?

14 A Not that I recall, sir.

15 Q Did he complain to you at any time, while you  
16 drove him home or at the scene, that his head was hurting  
17 and he was having some kind of pain?

18 A He was talking more about the accident, being  
19 charged in the accident and so on.

20 Q Did he ever contact you after that court date and  
21 after he forfeited collateral about the ticket?

22 A Approximately a month or two after the court date,  
23 he called me. Maybe it was a little longer, I am not quite

1 sure of the length of time. He called me and stated that he  
2 had been to the doctor and this doctor had found that he had  
3 epilepsy.

4 Q What was he trying to do? Was he trying to get  
5 the ticket taken off his driving record?

6 A He wanted to know how they could go about bringing  
7 the case back up. I told him he'd have to go talk to a judge,  
8 the fact of if it could be brought up again.

9 MR. HALUSKA: Thank you.

10 REDIRECT EXAMINATION

11 BY MR. KEARNEY:

12 Q To your knowledge, did he ever bring the case back  
13 up?

14 A No, sir, he didn't.

15 Q If he brought it back up, you would have to go and  
16 testify, wouldn't you?

17 A Yes, sir.

18 Q Did he ask about his condition that you observed?  
19 You said he later became fully aware, I believe is the word  
20 you used. How long after the accident or after you arrived  
21 on the scene would you say he did become fully aware?

22 A I believe approximately -- my total time on the  
23 accident, it was approximately an hour. I can't be sure at

1 this time. It may have been a little longer.

2 Q You say that he was dazed and disoriented, is that  
3 a fair characterization of your testimony?

4 A Yes, sir.

5 Q In your experience as a police officer investigating  
6 auto vehicle accidents, when people are involved in accidents --  
7 how much damage was done to his car?

8 A My estimate was approximately \$1,400.

9 Q So that is a considerable amount of damage done  
10 to the vehicle.

11 A Yes, sir.

12 Q It couldn't be driven, as a matter of fact, could  
13 it? It had to be towed away?

14 A Yes, sir.

15 Q Is it at all unusual, in your experience as a  
16 police officer, to find that people after an accident are  
17 dazed when they have been in an automobile accident with that  
18 much damage?

19 A Some people that I have seen are like in a mild  
20 state of shock, the trauma of the accident, itself.

21 Q Is that the kind of daze that he was in? I know  
22 it's difficult to characterize it, but it is not at all  
23 unusual to find somebody who is in shock or in a daze after

1 an accident, is it?

2 A Depending on the seriousness of the accident.  
3 You get on the scene of a serious accident, you know, it is  
4 quite an impact or great force. Most of the people are  
5 dazed.

6 Q Let me ask you this: you said he walked. Did he  
7 walk to the rescue vehicle or walk from the rescue vehicle  
8 to your vehicle?

9 A He walked.

10 Q Did he have any problems walking there?

11 A Not that I recall.

12 Q Was he foaming at the mouth that you recall?

13 A Not that I recall.

14 Q Had he urinated, do you recall?

15 A Not that I recall.

16 Q Did he have jerky movements of any kind that you  
17 recall?

18 A Not that I recall.

19 Q In fact, he was just dazed after the accident,  
20 isn't that correct?

21 A Yes, sir, dazed and disoriented.

22 MR. KEARNEY: Nothing further.

23 THE COURT: Can the officer be excused?

1 MR. HALUSKA: May I ask one more, Your Honor?

2 THE COURT: Yes.

3 RECROSS EXAMINATION

4 BY MR. HALUSKA:

5 Q Do you remember what time in the morning it was  
6 when you actually arrived first on the scene of the accident?

7 A This says approximately five of 8:00 in the morning,  
8 8:00 o'clock, somewhere in that neighborhood.

9 Q When did you first begin hearing Michael Hemming  
10 speak to you or anybody?

11 A I guess maybe 20 after 8:00.

12 Q Twenty after 8:00?

13 A Somewhere in that neighborhood.

14 Q From your investigation, were you able to obtain  
15 a fix as to when the accident occurred?

16 A Approximately 7:50.

17 Q So 7:50 would be ten of 8:00?

18 A Yes, sir.

19 MR. HALUSKA: Thank you.

20 THE COURT: May he be excused?

21 MR. HALUSKA: We would like to have him remain.

22 THE COURT: It will probably be this afternoon  
23 ~~before you need him. If you have something you can do this~~

1 Q Did that include dysentery or something like  
2 dysentery?

3 A I wouldn't use that term, but something close.

4 MR. HALUSKA: That's all I have, Your Honor.

5 THE COURT: All right, you can step down. Who is  
6 your next witness?

7 MR. HALUSKA: I will recall Officer Degroot.

8 Thereupon

9 ROBERT A. DEGROOT

10 was recalled as a witness, and having been previously duly  
11 sworn, testified further as follows:

12 DIRECT EXAMINATION

13 BY MR. HALUSKA:

14 Q Officer, directing your attention back now to the  
15 date of this accident, on the accident scene, how close were  
16 you physically to the defendant, Michael Hemming, at the  
17 accident scene?

18 A I'd say I approximately came in contact with him,  
19 may have touched him, may have opened a door for him, six  
20 inches.

21 Q Anywhere from, say, six inches to about a foot away?

22 A Yes, sir.

23 Q Did you have occasion to observe his eyes during



1 the course of that contact with him?

2 A If I did, I couldn't recall.

3 Q Did you happen to notice whether or not he had  
4 bloodshot eyes?

5 A No, sir.

6 Q Did you happen to notice his breath while you  
7 were in contact with him?

8 A I may have, yes. It's been quite some time.

9 Q Was there any indication whatsoever of alcoholic  
10 beverages on his breath?

11 A Not that I recall.

12 Q Isn't it true that in the course of your business  
13 as a police officer, you have given tickets to many, many  
14 people for driving under the influence of alcohol?

15 A Yes, sir.

16 Q And you may give those tickets based on your  
17 observation at the scene of an accident, can you not?

18 A Yes, sir.

19 Q In other words, if you smell alcohol or see  
20 bloodshot eyes or any combination of these, you would issue  
21 a ticket, would you not?

22 MR. KEARNEY: Objection, Your Honor.

23 THE COURT: If you want to establish whether this

1 man should have been arrested, I think he asked that specific  
2 question.

3 BY MR. HALUSKA:

4 Q Let me ask you this, then: was there any indi-  
5 cation to you, from your observance of Michael Hemming on the  
6 morning of this accident, that he had been drinking alcoholic  
7 beverages?

8 A No. Probably if I thought he had, he probably  
9 would have been arrested, placed under arrest for driving  
10 while intoxicated.

11 Q You charged him with failure to keep to the right?

12 A Failure to keep to the right.

13 Q You did not ticket him for driving under the  
14 influence of alcohol?

15 A No, sir.

16 MR. HALUSKA: Thank you, sir.

17 MR. KEARNEY: I have no questions.

18 THE COURT: You may be excused now. Thank you.

19 MR. HALUSKA: We call Dr. Mulvaney.

20 Thereupon

21 RICHARD JOSEPH MULVANEY, M.D.

22 was called as a witness, and after having been duly sworn,  
23 was examined and testified as follows:

1 MR. KEARNEY: Thank you.

2 RECROSS EXAMINATION

3 BY MR. HALUSKA:

4 Q Just one or two questions. This person, my client,  
5 Michael, when you saw him he was seated in the car, was he  
6 not?

7 A Yes, he was.

8 Q Was his seat belt on, to your recollection?

9 A I can't recollect.

10 MR. HALUSKA: That's all I have. Thank you.

11 THE COURT: May the witness be excused?

12 MR. KEARNEY: Yes, sir.

13 THE COURT: You are free to go.

14 Thereupon

15 JOHN C. HUTCHINSON

16 was called as a witness, and after having been duly sworn,  
17 was examined and testified as follows:

18 DIRECT EXAMINATION

19 BY MR. KEARNEY:

20 Q Would you please state your full name for the  
21 record?

22 A John C. Hutchinson.

23 Q Where do you reside?

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045

1           A     6800 Fleetwood Road in McLean, Virginia.

2           Q     Mr. Hutchinson, you have heard all the testimony  
3 here. Would you direct your attention to June 15, 1977.

4 Were you involved in a traffic accident on that day?

5           A     I was.

6           Q     Would you tell the jury what happened that morning,  
7 from the time you got up until the time of the accident?

8           A     I got up that morning, as I normally did, and  
9 had a little juice for breakfast, as I do in the mornings,  
10 got in my car. I traveled approximately three blocks to the  
11 intersection of Westmoreland Drive, I guess it is.

12                   And when I got there, my neighbor was right in  
13 front of me. I was following him and he made a stop at the  
14 stop sign there. He pulled out, made a right turn. I pulled  
15 up and stopped. I pulled out and made a right turn, traveled  
16 approximately, I would say, 30, 40, 50 feet.

17                   And my neighbor's car had put on his brakes and I  
18 was, oh, five or ten feet behind him. And the next thing  
19 I know, I see this car glance -- when I saw it coming, it  
20 caught the back of his car.

21                   And then I braced myself. There wasn't any place  
22 to go. There was curbs to the right and he crashed into me.  
23 At that time, when I braced myself, I went up into the top

1 of the car and into the glass and felt like somebody hit me  
2 with an axe.

3 Q Where were you on Westmoreland Drive, I am refer-  
4 ring in relationship to the center line, at the time the  
5 vehicle collided with you?

6 A As I recall, we made the turn. I came down the  
7 right side of the road, as I normally do, and probably pretty  
8 far over to -- there is an area, sort of has crosswalks,  
9 sort of a safety area there, go almost over into that because  
10 my neighbor had pulled over into there.

11 And I was following him to see what was going on.  
12 And this thing comes crashing into me.

13 Q Did you try to avoid--try to get out of the way?

14 A As best I could, but my neighbor was right in  
15 front of me so there was no place for me to go, really, when  
16 I saw it coming.

17 Q The vehicle that struck your vehicle, where was  
18 it in relationship to the center line of the road or the  
19 painted lines in the middle of the road at the time it struck  
20 your vehicle?

21 A Repeat that again.

22 Q The vehicle that was driven by Mr. Hemming, where  
23 was it when it struck your vehicle? Where was it in

1 relationship to the painted lines on the road?

2 A It was considerably this side of the double line.

3 Q You say, "this side." Are you referring to --

4 A (Interposing) My side of the road.

5 Q Okay. After you were in the accident and felt  
6 like you were struck with an axe, would you describe what  
7 happened next, what you recall as happening next?

8 A The next thing I remember, I was holding my head  
9 and people said, "Take it easy," and tried to get me to lay  
10 down. I had this terrific pain and I was bleeding, blood  
11 running every place.

12 And they made me lie down on the curbing there  
13 or the grass. And someone covered me up is the next thing  
14 I remember.

15 Q Can you recall what thoughts were going through  
16 your mind at that point?

17 A I wondered if my brains were falling out or whether  
18 I was really hurt.

19 Q Was there a considerable amount of blood?

20 A It was running out, down all over me. I was  
21 trying to hold my hand on it to keep it from running out.  
22 It scared me, I will tell you. You get scared.

23 Q It scared you in the sense you didn't know how

1 badly hurt you were?

2 A That's correct.

3 Q Let me go back one second to the accident. Did  
4 you see the car that struck you? You have already testified  
5 you saw the car that struck you. Did you see the driver of  
6 the car that struck you?

7 A I remember seeing it coming. And it happened so  
8 fast that it was just almost impossible.

9 Q After this accident occurred, did you find out who  
10 was driving that vehicle, I mean at the scene of the accident?

11 A No, sir.

12 Q What happened next?

13 A The next thing I recall was some people trying  
14 to put pressure bandages on my head, ambulance people. And  
15 then they loaded me in the ambulance and took me to Fairfax  
16 Hospital. I got there and they took me in the emergency room.  
17 That's where they went to work on me.

18 (Thereupon, there was had testimony which was  
19 reported and not transcribed by the court  
20 reporter.)

21 BY MR. KEARNEY:

22 Q Did you receive a telephone call while you were in  
23 the hospital from the defendant?

1           A     No, sir.

2           Q     In fact, you couldn't have received a telephone  
3 call two or three days after this accident from the defendant  
4 in the hospital, could you?

5           A     No, sir.

6                     (Thereupon, there was had testimony which was  
7 reported and not transcribed by the court  
8 reporter.)

9           BY MR. KEARNEY:

10          Q     I'd ask if you can identify this, which I have now  
11 smudged ink all over, plaintiff's exhibit number 12? I  
12 don't think that's the right number. I ask if you can identify  
13 that. (Handing document to witness)

14          A     (Examining document) A picture of me and my head.

15          Q     When was that picture taken?

16          A     A day or two after the accident, maybe two or three  
17 days after the accident.

18          Q     Does that picture accurately reflect the injuries  
19 sustained by you in this accident?

20          A     The head injuries, yes.

21          Q     I move that into evidence.

22                 MR. HALUSKA: I object to it.

23                 THE COURT: Do you have any questions on it?



1 MR. HALUSKA: No, sir.

2 THE COURT: Are your objections on the same basis  
3 that you objected earlier?

4 MR. HALUSKA: Yes, sir.

5 THE COURT: It will be received. The sheriff  
6 advises me that one of the jurors has indicated that she  
7 recognizes the defendant -- the plaintiff as being a person  
8 she might have brought a car from. Would that make any  
9 difference insofar as your verdict is concerned?

10 JUROR: No, sir.

11 THE COURT: All right. You may continue.

12 BY MR. KEARNEY:

13 Q Would you identify this, which is marked as  
14 plaintiff's number 11? (Handing document to witness)

15 A (Examining document) That's another picture of  
16 myself.

17 Q Taken at the same time?

18 A Approximately the same time.

19 Q Does that reasonably represent the injury which  
20 you sustained on your head at the time of this accident?

21 A Yes, sir.

22 THE COURT: Let's get it marked. Are you offering  
23 this into evidence?

1 MR. KEARNEY: Yes, sir.

2 THE COURT: You have no objection, other than  
3 the objection earlier?

4 MR. HALUSKA: That's correct.

5 THE COURT: It will be received as plaintiff's  
6 exhibit 11.

7 (Thereupon, there was had testimony which was  
8 reported and not transcribed by the court  
9 reporter.)

10 MR. KEARNEY: I have no further questions.

11 CROSS EXAMINATION

12 BY MR. HALUSKA:

13 Q Sir, you sell new cars or new and used cars?

14 A New and used, combination.

15 (Thereupon, there was had testimony which was  
16 reported and not transcribed by the court  
17 reporter.)

18 MR. HALUSKA: That's all I have.

19 REDIRECT EXAMINATION

20 BY MR. KEARNEY:

21 Q What was the main injury you were concerned about?

22 A My head.

23 Q But your shoulder did bother you, you testified to

1 that. Can you account for why that would be?

2 A The only thing I can say, I didn't have it before  
3 the accident. I don't know that it's related to the accident.  
4 I did have pain.

5 Q Let me ask you to identify this picture, which  
6 is plaintiff's exhibit number eight. (Handing document to  
7 witness)

8 A (Examining document) This is my automobile.

9 Q What does that photograph show?

10 A It was a big impact to the left side of my car.

11 Q When was that picture taken?

12 A A couple of weeks after the accident, I guess.

13 Q Does the damage that's reflected in that photograph  
14 accurately reflect the damage that was done to your vehicle?

15 A What you can see of it.

16 Q How much damage is done to what we call the  
17 driver's door, the front, left door?

18 A Totaled out.

19 Q You were sitting in the driver's seat, is that  
20 correct?

21 A That's correct.

22 Q We move this into evidence, Your Honor.

23 MR. HALUSKA: I have no objection to that.

1 THE COURT: It will be received as the next  
2 plaintiff's exhibit.

3 MR. KEARNEY: I have no further questions.

4 MR. HALUSKA: I have no questions.

5 THE COURT: All right, sir, step down. We will  
6 recess for about five to ten minutes.

7 (Thereupon, a short recess was taken, after  
8 which the following proceedings were had:)

9 Thereupon

10 THOMAS O. CRANDALL

11 was called as a witness, and after having been duly sworn,  
12 was examined and testified as follows:

13 DIRECT EXAMINATION

14 BY MR. KEARNEY:

15 Q Good morning, Colonel Crandall. Would you state  
16 your full name?

17 A Thomas O. Crandall.

18 Q What is your occupation?

19 A At the present time, I am an officer with the FAA.

20 Q You are retired from the air force?

21 A Retired air force colonel.

22 Q Where do you reside?

23 A 6800 Fleetwood Road, McLean, Virginia.

1 (Thereupon, there was had testimony which was  
2 reported and not transcribed by the court  
3 reporter.)

4 MR. HALUSKA: That's all I have.

5 MR. KEARNEY: Your Honor, the plaintiff rests.

6 THE COURT: All right, sir.

7 MR. HALUSKA: We have no motions. We call Michael  
8 Hemming as our first witness.

9 Thereupon

10 MICHAEL B. HEMMING

11 was called as a witness, and after having been duly sworn,  
12 was examined and testified as follows:

13 DIRECT EXAMINATION

14 BY MR. HALUSKA:

15 Q For the record, Michael, would you please tell  
16 the jury your full name and address?

17 A Michael Bruce Hemming, 2103 Greenwatch Way, Reston,  
18 Virginia.

19 Q And how old are you today?

20 A Twenty-eight.

21 Q And where are you now employed?

22 A The Smithsonian Institution.

23 Q Is that a part of the United States government?

1 A Yes, sir.

2 Q What is your occupation there?

3 A Clerk typist is my title.

4 Q I am going to direct your attention to the  
5 morning of this accident, that has been testified to here  
6 today at the trial, namely June 15, 1977. Could you give  
7 the jury your testimony as to what happened when you got up  
8 and what happened in the course of the day, please?

9 A I woke up at 7:15 of that morning to accompany  
10 my mother to her job, which is the Department of Transpor-  
11 tation over by the CIA in Langley or McLean, Virginia. And  
12 she drove me over there.

13 And thereafter I took her car with the intent of  
14 going home.

15 Q I don't mean to interrupt you. Was there a  
16 reason for you going with her to where she worked?

17 A Yes, I wanted to borrow her car for the day. Okay,  
18 when I left the Department of Transportation, I went on Chain  
19 Bridge Road and I stopped at the 7-11 to pick up a Coke. And  
20 then I proceeded down Chain Bridge Road and made the left  
21 turn onto Westmoreland.

22 And that's the last thing I remembered before I  
23 woke up or kind of semi-regained consciousness in the police

1 cruiser, maybe an hour, an hour and a half later.

2 Q Do you recall where this police cruiser was  
3 generally?

4 A Basically it is where the officer described it,  
5 in front of the Longfellow Junior High School.

6 Q Can the jury hear?

7 JUROR: No.

8 THE WITNESS: Excuse me.

9 BY MR. HALUSKA:

10 Q Would you raise your voice a little and tell the  
11 jury exactly or roughly where the car was, where you found  
12 yourself in the police cruiser relative to the street location?

13 A Near the intersection of Westmoreland Street and  
14 Kirby Road, more towards the Falls Church side, maybe one or  
15 two hundred yards beyond Kirby Road. And when I kind of  
16 regained consciousness, I was across the street from Long-  
17 fellow Junior High School, in the back of the car with the  
18 police officers and Mr. Teschner from what I can remember,  
19 I think.

20 Q Is that drawing that was done by Officer Degroot  
21 basically accurate?

22 A Of what?

23 Q Of where the cars were and where you were.

1           A     I never saw Mr. Hutchinson's car. That had  
2 already been taken away. And I vaguely saw -- I didn't see  
3 Mr. Hutchinson's car. I vaguely remember Mr. Teschner's  
4 car and I kind of remembered my car being up on the lawn.  
5 That's about it.

6           Q     Now, between that time of turning left onto  
7 Westmoreland and the time you say you regained consciousness  
8 in the police cruiser, do you have any knowledge now or at  
9 any time of what happened to you between that time and the  
10 time you regained consciousness?

11          A     Excuse me, could you repeat it?

12          Q     Did you know what happened in that time when you  
13 blacked out, from the point where you turned left and the  
14 point where you regained consciousness at least the day the  
15 accident happened?

16          A     No, sir.

17          Q     Could you describe to the jury what your mental  
18 well-being was at the time you regained consciousness?

19          A     Well, I wouldn't even really say it was conscious-  
20 ness. I was what you call awake, semi-awake and I was very  
21 disoriented. I hardly knew where I was. Like I said earlier,  
22 the last thing I remember was the turn.

23                 And I was just kind of -- I wouldn't say in shock,  
but disbelief and people saying that I had caused this



1 accident, et cetera. They made some attempt to explain it  
2 to me, but I was basically in a state of disorientation  
3 about everything at that time.

4 Q Did you, to your knowledge, suffer any kind of  
5 head injury in the accident?

6 A To the best of my knowledge, no.

7 Q Please speak up a little. Let me rephrase the  
8 question. Did your head hurt you immediately after the  
9 accident?

10 A I will say this: being now many months, years I  
11 guess after this accident, part of epilepsy are very severe  
12 headaches, but they are not like up here. They are more  
13 towards the back, like the back of your head feels like it's  
14 going to fall off.

15 At that time, I felt there was a pressure in the  
16 back of my skull at the base of my spine. (Indicating)

17 Q Let me continue with that. Did you have any  
18 bumps on your head or face or the back of your head after the  
19 accident?

20 A No, sir.

21 Q I am going to direct your attention now to on or  
22 about July 26th. This would be a little bit more than a  
23 month after this accident. Did anything unusual happen to

1 you on that day?

2 A Excuse me?

3 Q July 26th.

4 A Well, July 26th, in the morning, I went jogging  
5 in the morning and I came back and I sat down in front of  
6 the television with my shorts on and tennis shoes. And  
7 approximately an hour later, I woke up with just my underwear  
8 on, kind of in a different spot. And I saw all these pots  
9 and pans scattered all over the place. And I was kind of in  
10 a fog again.

11 I said, "Oh my God, it happened again."

12 Q Did you know where those pots and pans were prior  
13 to this incident?

14 A Yes, they usually are put away in the proper place  
15 inside of a cabinet.

16 Q What was your mental state of mind during this  
17 incident?

18 A Excuse me?

19 Q Did you know what was going on during this time  
20 period?

21 A This was similar to the first blackout, per se. It  
22 was just like asleep. I lost consciousness and I am completely  
23 unaware of what happened.

1 Q Did you at any time come to find out what happened  
2 during that incident?

3 A Later on that day, a friend of mine did call me.

4 MR. KEARNEY: Objection. I think we are leading  
5 into, by telling him anything, hearsay. He's already testi-  
6 fied he doesn't know what happened.

7 MR. HALUSKA: We are talking about a state of mind.  
8 I think it's a proper question.

9 THE COURT: Objection sustained.

10 BY MR. HALUSKA:

11 Q Did you do anything about this moment of -- well,  
12 let's back up. Is it your testimony that you blacked out  
13 during that period?

14 A Yes, sir.

15 Q And do you remember in any way how long this time  
16 frame of blackout was?

17 A I can give you an approximation, approximately one  
18 hour.

19 Q Did you do anything about this blackout?

20 A Well, thereafter, the next day I went to see a Dr.  
21 Jones and he referred me to a neurosurgeon, Dr. Sydney Green,  
22 who I saw the following day.

23 Q Does Dr. Green practice in the District of Columbia?

1           A     Yes, sir.

2           Q     What was done to you by Dr. Jones and then, the  
3 next day, by Dr. Green, if you remember?

4           A     Dr. Jones gave me a basic medical checkup for any  
5 like obvious problems. And then he sent me to Dr. Green. And  
6 I tried to explain to him of the two incidents. And then we  
7 went through a series of medical tests at Arlington Hospital.

8           Q     Before you go into that, after the accident in  
9 June and the second period of blacking out, did you seek  
10 any medical attention between those two time periods?

11          A     Between the first blackout and the second blackout?

12          Q     Yes.

13          A     No, sir.

14          Q     Would you tell the jury why?

15          A     Well, I did not have any medical insurance.

16          Q     Any other reasons?

17          A     Well, I really didn't even know if there was  
18 anything wrong. It's not like a broken leg where it is  
19 obvious that you must go to a doctor. All of a sudden, you  
20 lose time, an hour or two. And going to a neurologist is  
21 very expensive.

22          Q     Did you have any idea after that first blackout  
23 what had happened to you?

1           A     I could have made a dozen guesses, fallen asleep --  
2                   MR. KEARNEY: (Interposing) Objection, Your  
3 Honor.

4                   THE COURT: If he knows. I would sustain the  
5 objection as to the guess.

6                   BY MR. HALUSKA:

7           Q     Tell the jury whether or not you knew after the  
8 first blackout at the time of this accident what had happened  
9 to you.

10          A     I don't think I am qualified to say that.

11          Q     Now, did you undergo, after seeing Dr. Green, a  
12 series of medical tests at, I believe you said, Arlington  
13 Hospital?

14          A     Yes, sir.

15          Q     Is that, in fact, what happened?

16          A     Excuse me?

17          Q     Is that, in fact, what happened?

18          A     I don't understand the question.

19          Q     Is it a fact that you went to Arlington Hospital  
20 for a series of tests?

21          A     I also took some tests at George Washington  
22 University Hospital.

23          Q     All of these were at the direction of Dr. Green,

1 were they not?

2 A Yes, sir.

3 Q Did anything unusual happen at Arlington Hospital?  
4 I will direct your attention now to on or about July 29th of  
5 the same year.

6 A Well, the first day that we were undergoing the  
7 test, I was having a blood test and it was a very long time,  
8 five or six hours, taking urine samples, blood tests,  
9 constantly from 8:00 in the morning to 1:00 o'clock in the  
10 afternoon.

11 And I went outside because I had these half hour  
12 breaks inbetween and I walked outside. And I had another  
13 blkout. And maybe an hour, an hour and a half later, I  
14 regained semi-consciousness in the emergency room.

15 Q Is that the same hospital, Arlington Hospital?

16 A Yes, sir.

17 Q After that time, did there come a time where your  
18 condition was diagnosed by anybody?

19 A Yes, sir. Approximately the first week, first day  
20 of August of that year, Dr. Green had told me --

21 MR. KEARNEY: (Interposing) Objection. I think  
22 that's all he can testify, if a diagnosis was made, but not  
23 as to the results of the diagnosis.

1 THE COURT: I would sustain the objection as to  
2 what the doctor told him. I assume Dr. Green will be here  
3 later on.

4 MR. HALUSKA: Yes, sir.

5 BY MR. HALUSKA:

6 Q For the condition that the doctor diagnosed, did  
7 you get from him any prescriptions for medicine to take for  
8 it?

9 A Okay, for this condition, I was told that I must  
10 take two pills, two different kinds of medication, Pheno-  
11 barbital and Dilantin, every eight hours of every day. And if  
12 I forgot to take this medication for one day, I would have  
13 a seizure. They were so strong they would cause a reaction.

14 Q Did you begin taking this medication?

15 A Excuse me?

16 Q Did you begin, in fact, taking this medication?

17 A Yes, sir.

18 Q And have you taken it continuously from that day  
19 until today?

20 A Yes, sir.

21 Q Since that time, when you first began taking this  
22 medication, Phenobarbital and Dilantin, have you had any  
23 other episodes similar to the three you described?

1 A No, sir.

2 Q Prior to June 15, 1977, the date this accident  
3 occurred, had you ever had an incident or episode similar to  
4 the one on that day or the two others you described after-  
5 wards?

6 A No, sir.

7 Q Did you ever in your life prior to that time have  
8 any fainting spells?

9 A No, sir.

10 Q In your life prior to that time, had you ever been  
11 unconscious, other than going to sleep at night?

12 A No, sir.

13 Q Prior to that time, had you ever had any head  
14 injuries of any kind?

15 A No, sir.

16 Q Prior to June 15, 1977, did you have any problems  
17 whatsoever that you would know of of your neurological --  
18 that is, your nervous system, your brain?

19 A No, sir.

20 MR. HALUSKA: That's all I have.

21 CROSS EXAMINATION

22 BY MR. KEARNEY:

23 Q Mr. Hemming, how long had you been in the United



1 States prior to June 15th?

2 A How long? Well, I was born in the United States.

3 Q How long had you been in the United States since  
4 coming back from wherever you had been before then?

5 A I had spent a year traveling around the world and  
6 I had just gotten back maybe a week before.

7 Q Had you contracted -- Your Honor, may we approach  
8 the bench?

9 THE COURT: All right.

10 (Thereupon, the following proceedings were  
11 had at the bench:)

12 MR. HALUSKA: He's already asked the question.

13 MR. KEARNEY: I want to ask him if he contracted  
14 any illnesses while he was in Europe.

15 THE COURT: What kind of illness?

16 MR. KEARNEY: Any illness, but I think he will  
17 say he contracted diarrhea from something. He went to  
18 hospitals over there. But this goes to the question of the  
19 Tetracycline.

20 MR. HALUSKA: On that basis --

21 THE COURT: (Interposing) Let him finish.

22 MR. KEARNEY: My position in this case is that the  
23 credibility of this witness is paramount and he has just

1 testified about how he can talk all about Phenobarbital and  
2 Dilantin and I will show other things that he recalls. But  
3 he says nobody ever told him not to take Tetracycline and  
4 drink at the same time.

5 And I have got a letter which says, from his  
6 doctor, which says that. And I want to be able to ask him  
7 whether that's true or not.

8 THE COURT: So as far as whether he had some  
9 disease outside the United States, I don't think that would  
10 be material to that as far as the statements. But you can  
11 ask him that question.

12 MR. KEARNEY: I didn't want to ask about the  
13 Tetracycline.

14 THE COURT: I said without proper support.

15 MR. HALUSKA: I still would like to mention one  
16 thing: in terms of that letter that he's talking about,  
17 I don't plan to call Dr. Jones, who is who he saw. Now if  
18 he is going to lay a foundation about establishing that  
19 letter through somebody else, that's fine. But I am not going  
20 to permit questions, unless he does that first.

21 He's going to try to get in the Tetracycline. And  
22 if he does, I will have to ask for a mistrial.

23 THE COURT: Well, what is the specific question

1 you want to ask? Insofar as the background is concerned, I  
2 will sustain the objection.

3 MR. KEARNEY: Whether he had a prescription for  
4 Tetracycline.

5 THE COURT: Then what?

6 MR. KEARNEY: Did they instruct him not to drink.  
7 And if he says no, I want to read him the letter and ask him  
8 if that isn't true.

9 THE COURT: I think that's proper.

10 MR. HALUSKA: Let me get the objection on the  
11 record. First of all, the dysentery and gastric problems  
12 he suffered while he was overseas --

13 THE COURT: (Interposing) I sustained your  
14 objection to that.

15 MR. HALUSKA: Insofar as the Tetracycline is  
16 concerned, he did not know, that I am aware of, and the  
17 letter established --

18 THE COURT: (Interposing) I think he can ask the  
19 question.

20 (Thereupon, the discussion at the bench was  
21 concluded, and the following proceedings were  
22 had:)

23 BY MR. KEARNEY:

1 Q Mr. Hemming, were you on a prescription for a  
2 drug called Tetracycline just prior to June 15, 1977?

3 A Yes, sir.

4 Q Were you told not to drink while you were taking  
5 the drug, Tetracycline?

6 A I do not recall it.

7 Q I have a letter here, signed by Dr. Jones. Do  
8 you know who Dr. Jones is?

9 A Yes, sir.

10 Q I want to read you this letter and ask you whether  
11 this letter is true or false.

12 MR. HALUSKA: How can he possibly know that?

13 THE COURT: I would sustain the objection as to  
14 that. The objection is sustained.

15 MR. HALUSKA: If he wants to ask the question --

16 THE COURT: (Interposing) Objection sustained.

17 BY MR. KEARNEY:

18 Q Did Dr. Jones ever instruct you not to drink while  
19 you were taking Tetracycline?

20 A I do not recall it.

21 Q But you do recall everything about the drugs,  
22 Dilantin and Phenobarbital, is that correct?

23 A Excuse me?

1           Q     You recall what you were told about Dilantin and  
2 Phenobarbital?

3           A     To take it every eight hours.

4           Q     Do you recall a discussion about that, is that  
5 correct, that you have to take it -- I mean, you testified  
6 that you recall all of that, is that correct?

7           A     Well, there is a difference between taking Tetra-  
8 cycline --

9           THE COURT: (Interposing) Just answer his question.  
10 Do you recall the doctor's instructions about taking these  
11 two drugs?

12           MR. KEARNEY: Dilantin and Phenobarbital.

13           THE WITNESS: Yes, sir.

14           BY MR. KEARNEY:

15           Q     You do remember that. The night before this  
16 accident, where were you?

17           A     A group of friends of mine from previous years  
18 had invited me over for dinner about a block away from my  
19 mom's house, where I was staying from this trip around the  
20 world. They invited me over for dinner and to take my  
21 pictures.

22           THE COURT: You had gone out to dinner. That answers  
23 the question.

1 BY MR. KEARNEY:

2 Q How many pictures did you bring along?

3 A About four to six hundred.

4 THE COURT: I think you can go directly to the  
5 point you want to bring up, rather than the details of the  
6 dinner.

7 BY MR. KEARNEY:

8 Q On that evening, had you taken the Tetracycline?

9 A I had taken it. It was supposed to be taken four  
10 times a day, as I can remember.

11 Q Did you take it on June 14th?

12 A Yes, sir.

13 Q Did you drink at the party that you went to on  
14 June 14th?

15 A During the meal, a very large crab meal, I drank  
16 two to three beers, as I can recall.

17 Q What time was the meal?

18 A As far as I can recall, approximately 7:00, p.m.

19 Q What time did it end?

20 A As I can recall, about 1:00, a.m.

21 Q What time did the dinner end?

22 A Well, there was so much food that people were  
23 coming and going. So it was like we ate for a while, looked

1 at pictures, ate for a while and looked at pictures conti-  
2 nuously until about 1:00, a.m.

3 Q Do you remember giving a deposition, a sworn  
4 deposition, in Mr. Haluska's office which was recorded by a  
5 court reporter?

6 A Yes, sir.

7 Q On March 15th?

8 A Yes, sir.

9 Q Do you recall I asked you a number of questions  
10 on that day?

11 A You asked many questions.

12 Q Were you under oath on that day?

13 A Yes, sir.

14 Q You had taken an oath to tell the truth? Did you  
15 also answer interrogatories that I had sent to you, written  
16 questions that I had sent to you?

17 A Yes, sir.

18 Q And did you answer those questions?

19 A Yes, sir.

20 Q Did you read those answers?

21 A Yes, sir.

22 Q Were they also under oath?

23 A Yes, sir.

1 Q Do you recall saying, in response to my question,  
2 do you recall saying that you had two to three 12-ounce  
3 beers consumed during a period of 7:00 to 8:00, p.m.?

4 A Yes, sir.

5 Q Now you are saying that that meal wasn't consumed  
6 from 7:00 to 8:00, p.m., but consumed at a later time?

7 A Well, as far as I was concerned, it was consumed.  
8 There was much left-over food and other people went back to  
9 eat during the breaks that we took for all the pictures.

10 Q When did you drink the beer?

11 A During the meal.

12 Q What time, as best you can recollect?

13 A Between 7:00 and 8:00, p.m.

14 Q Is it your testimony that you didn't have anything  
15 to drink after 8:00 o'clock?

16 A There is a slight possibility that I might have  
17 had a beer, one beer.

18 Q Do you remember stating on March 15th, in response  
19 to my question, "Is that the only alchohol you consumed that  
20 night," you answered, "As far as I can remember, yes."

21 Question: "After 8:00 o'clock, you didn't consume  
22 any other alchoholic beverages?"

23 Answer: "As far as I can recall, yes."



1                   Now you are saying there is a possibility you  
2 did have more beer?

3           A     There is a chance I might have had one more.

4           Q     Is there a chance you might have had two more?

5           A     No, sir.

6           Q     In fact, you had a considerable amount to drink  
7 that night, didn't you?

8           A     Pardon?

9           Q     In fact, you had a considerable amount to drink  
10 that night, didn't you?

11          A     No, sir.

12          Q     Other than the one more beer that you might have  
13 had from 8:00 to 1:00, a.m., you didn't drink anything, is  
14 that correct?

15          A     I did not drink any more after that, yes.

16          Q     Did you, in your answers to interrogatories -- I  
17 asked you if you had any conversations with Jack Hutchinson.  
18 Did you have any conversation with Jack Hutchinson?

19          A     Yes, sir.

20          Q     When did you have that conversation?

21          A     Approximately a few days after the accident. I  
22 had gotten this telephone number from Mrs. Crandall and  
23 called him up at the hospital to inquire about his condition.

1 Q Two or three days after the accident you called  
2 him at the hospital?

3 A Yes, sir.

4 Q That is your testimony?

5 A Yes, sir. ,

6 Q What did he tell you in that conversation while  
7 he was in the hospital?

8 A Well, we briefly tried to piece together the  
9 accident and I tried to explain to him that I had blacked out  
10 and was very unaware of what happened. I said, "I'm sorry  
11 it happened."

12 I mean, I was there. He was a victim, but I just  
13 blacked out.

14 Q Once again, reading from -- let me ask you this  
15 question: did anybody at the scene of the accident tell you  
16 that you appeared to be having an epileptic seizure?

17 A I was told that I had blacked out.

18 Q Who told you that?

19 A A witness at the accident.

20 Q Who was that?

21 A I can't recall.

22 Q Is that person going to come and testify for you  
23 today?

A Pardon?

1 Q Is that person going to come and testify for you  
2 today?

3 A That's up to my lawyer.

4 Q What did they say, the witness who told you that  
5 you were having an epileptic seizure?

6 A They told me I was unconscious. I was not  
7 answering questions.

8 Q When did they tell you this?

9 A They called me up after the accident to see if I  
10 was okay, maybe a day or two after the accident.

11 Q And they said that you were unconscious and you  
12 weren't answering questions, is that your testimony?

13 A Yes, sir.

14 Q And then they said you were having an epileptic  
15 seizure?

16 A Pardon?

17 Q And then they said they deduced from that that  
18 you were having an epileptic seizure?

19 A As far as I know, they weren't doctors, so I  
20 don't think you can draw that conclusion.

21 Q Do you recall stating under oath in the inter-  
22 rogatories, "Approximately two or three days after the  
23 accident, I telephoned the plaintiff at the hospital. I told

1 him that a witness at the scene of the accident said he heard  
2 a crash, was the first to arrive at the scene of the accident  
3 and said I looked like I was having an epileptic seizure"?

4 A Yes, sir.

5 Q Now you are saying that what he said was you were  
6 unconscious and dazed?

7 A Well, from what I have said, I was blacked out.  
8 Don't you black out?

9 Q Based on that testimony, then, several days after  
10 the accident you knew that somebody thought you had epilepsy,  
11 is that correct?

12 MR. HALUSKA: I object about "knowing". He's  
13 already testified that he didn't know.

14 THE COURT: I think the Court will sustain the  
15 objection. I think we have exhausted this.

16 BY MR. KEARNEY:

17 Q You were charged with failure to keep to the  
18 right in this matter, weren't you?

19 A Yes, sir.

20 Q You paid the fine and forfeited the collateral,  
21 isn't that correct?

22 THE COURT: If he can define that or if he just  
23 paid the fine in terms of the time or that's all he did in

1 response to it -- .

2 MR. KEARNEY: I will withdraw the question and  
3 reword it. You were charged with that, is that correct?

4 THE COURT: I think it's already been established  
5 through the officer.

6 BY MR. KEARNEY:

7 Q You didn't eat any breakfast that morning that  
8 you got up to take your mother to the Department of Trans-  
9 portation, did you?

10 A No, sir.

11 Q As a matter of fact, you got up and left the house  
12 in 15 minutes and 15 minutes later you were in the accident,  
13 is that correct?

14 A I can tell you when I got up. I can't tell you  
15 when the accident occurred.

16 Q From the point at which you turned left onto  
17 Westmoreland to the point of the accident, what is the  
18 distance?

19 A I would approximate a mile.

20 Q It could be a mile and a half?

21 A It could be.

22 Q As a matter of fact, you said in your deposition  
23 it was between a mile and a mile and a half, didn't you?

A Sir?

1 Q Did you state in your deposition that it was a  
2 mile to a mile and a half?

3 THE COURT: He said it could be.

4 BY MR. KEARNEY:

5 Q Did you refuse to go to the hospital?

6 A No, sir.

7 Q You didn't refuse to go to the hospital?

8 A Excuse me?

9 Q Did you refuse to go to the hospital from the  
10 scene of the accident?

11 A No, sir.

12 Q Did you tell somebody at the scene of the accident,  
13 "I am having a seizure. I won't go to the hospital"?

14 A No, sir.

15 Q You stated that you were thirsty on that morning  
16 and you stopped to get a Coke at the 7-11, is that correct?

17 A I stated I stopped at the 7-11 to get a Pepsi.

18 Q In fact, you were getting a Pepsi because you had  
19 a hangover, isn't that correct?

20 MR. HALUSKA: I object to that.

21 THE COURT: It's cross examination.

22 BY MR. KEARNEY:

23 Q You had that Coke to clean out the cotton mouth

1 because you had a hangover, isn't that correct?

2 A No, sir.

3 Q Did you tell Dr. Green that you refused to go to  
4 the hospital?

5 A I don't recall telling Dr. Green specifically  
6 that I told someone, someone who might have told me later,  
7 afterwards, a month later, two months later -- .

8 Q On June 30th, were you riding your bicycle or a  
9 bicycle?

10 A I ride my bicycle a lot. I can't recall.

11 Q Did you have an accident on that morning? Did  
12 you run into the back of a truck?

13 A It's a possibility. I did have an accident on  
14 my bicycle during the summer of '77.

15 Q Tell me about that accident. Did that happen  
16 after this accident?

17 A Pardon?

18 Q Did this happen after this accident?

19 A You mean June 15th?

20 Q Yes.

21 A Yes.

22 Q Tell me about that accident. What occurred?

23 THE COURT: What is the purpose of this?

1 MR. KEARNEY: I think that he was injured -- I  
2 think we should approach the bench.

3 MR. HALUSKA: We don't have to approach it.

4 THE COURT: If you think he was, ask him the  
5 specific question. You can't assume he was. What difference  
6 would it make?

7 MR. KEARNEY: If he was injured?

8 THE COURT: To this case.

9 MR. KEARNEY: Epilepsy can be caused by trauma.

10 MR. HALUSKA: If he has a doctor to say that, that's  
11 fine. I object.

12 BY MR. KEARNEY:

13 Q Were you injured in that accident?

14 A No, sir.

15 Q You were not?

16 A From what I can remember, sir, and what I know --

17 THE COURT: (Interposing) Just respond to his  
18 question. Were you injured?

19 THE WITNESS: No, sir.

20 BY MR. KEARNEY:

21 Q Did you tell Dr. Green that you felt slightly  
22 dazed after striking the back of a truck and falling off your  
23 bicycle?



1           A     It's a possibility, sir.

2           Q     Well, I don't understand now. You just said you  
3 weren't injured and now you say --

4           A     (Interposing) I don't recall everything I told  
5 Dr. Green. You can bring Dr. Green here and have him say  
6 what I told him.

7           Q     He will be here and I will ask him, but I am  
8 asking you now.

9           A     Sir, I don't recall.

10          Q     Can you tell me what doctors you have seen since  
11 1973 and the time of this accident?

12          A     The ones I know of?

13          Q     Yes.

14          A     The names?

15          Q     Names.

16          A     Okay, the doctors that I know the names of since  
17 '73?

18          Q     Right.

19          A     Dr. Jones and Dr. Green.

20          Q     And you don't recall the names of any other doctors  
21 during that period of time?

22          A     I don't recall any of the names.

23          Q     Did you see any other doctors during that period

1 of time?

2 THE COURT: Just ask him the question.

3 MR. KEARNEY: I don't know who they are. I am  
4 trying to establish --

5 THE COURT: (Interposing) He said he doesn't know  
6 either.

7 BY MR. KEARNEY:

8 Q Is that your understanding? I am not sure that's  
9 what he did say. Did you see any other doctors between  
10 1973 and the time of this accident?

11 A Yes, sir.

12 Q But you can't recall who they are?

13 A Their names?

14 Q The names.

15 A No, sir.

16 Q You said on direct examination to Mr. Haluska's  
17 question that the reason you didn't go to the doctor was  
18 because -- well, you gave two reasons.

19 THE COURT: Mr. Kearney, the question you are  
20 about to ask him, I assume you are going to take somewhat  
21 longer on this witness?

22 MR. KEARNEY: I'm sorry, Your Honor?

23 THE COURT: I was thinking you were through with

1 that question, but I assume you are going to take some more  
2 time with this witness, is that right?

3 MR. KEARNEY: Yes, sir.

4 THE COURT: We might as well recess for lunch at  
5 this point. It's ten minutes after 1:00. If you would go  
6 on to lunch at this point, I would ask you to go as a group,  
7 if you would, and try to stay together and don't circulate  
8 around the courthouse.

9 Maybe you can't eat at the same table. Please  
10 do not discuss the case with each other, with anyone you  
11 come in contact with while the Court is recessed for lunch.  
12 And as soon as you eat your lunch, come directly to the jury  
13 room. Please don't stand in the hallways or courtrooms.

14 The reason I want to seclude you, as best we  
15 can, is someone might be talking about the case and if you  
16 overhear some conversation about it, there is a possibility  
17 that we might have to have a mistrial.

18 That is why I want to keep you separate and apart  
19 from other people as best we can. We will try to start as  
20 close to 2:00 o'clock as we can.

21 (Thereupon, the noon recess was taken, the  
22 hearing to reconvene at 2:00 o'clock, p.m.  
23

Thursday, March 22, 1979, 2:00 o'clock, p.m.

Thereupon

MICHAEL B. HEMMING

the witness who was on the stand at the noon recess, resumed the witness stand and testified further as follows:

CROSS EXAMINATION

BY MR. KEARNEY:

Q It is a little difficult to get back to what I was thinking about. Mr. Hemming, you have already testified after the accident, June 15th, you didn't seek medical help and you cited two reasons: the first one was money. But isn't it true that you had been to a doctor with regard to the Tetracycline, the drug that you were using just prior to that?

A Yes, sir.

Q The second reason you said was you didn't know if anything was wrong. Are you saying that you didn't know anything was wrong after June 15th?

A I did not know what was wrong.

Q But you have testified that you blacked out for an hour and you know that this accident occurred during that hour, but you didn't think that that was important enough to get medical help.

MR. HALUSKA: If he wants to argue with the witness, that's all right, but I want him to ask a question.

1 THE COURT: I think it is an argumentative  
2 question. I think he testified that he went to the doctor  
3 the next day or two days later.

4 MR. KEARNEY: No, sir.

5 BY MR. KEARNEY:

6 Q When was the first time you attempted to get  
7 medical attention after June 15th?

8 A After the second blackout.

9 Q After the second blackout was the time you first  
10 had medical attention, is that correct?

11 A The first time I went to see a doctor, yes.

12 Q The accident occurs June 15th. You allege you  
13 have a second blackout on July 23rd.

14 MR. HALUSKA: He didn't allege that. He stated it  
15 as a fact.

16 BY MR. KEARNEY:

17 Q Between June 15th and July 23rd, did you seek  
18 medical attention?

19 A Excuse me?

20 Q Between June 15, 1977, and July 23rd, did you seek  
21 medical attention?

22 A No, I did not see a doctor between those two  
23 periods.

1 Q And you didn't see a doctor because you didn't  
2 know if anything was wrong, is that correct?

3 A My knowledge of what happened and the cost if I  
4 was wrong and there was nothing wrong, it would have cost me  
5 a lot of money that I didn't have. Like I said, a broken leg,  
6 that's obvious, you must go to a doctor.

7 But when you fall asleep at night, do you go see  
8 a doctor?

9 Q That's what it is, isn't it? You fell asleep that  
10 morning.

11 A At 7:00 o'clock in the morning? No, sir.

12 Q After you got home after a party at 1:00 o'clock  
13 and had to get out of bed at 7:15 and rush out to the car and  
14 rush your mother to the Department of Transportation, on the  
15 way back, you fell asleep.

16 A No, sir.

17 Q Was it a slip of the tongue when you said you woke  
18 up after the accident?

19 MR. HALUSKA: He's arguing again. He's already  
20 given testimony that he was disoriented.

21 MR. KEARNEY: He gave testimony that he woke up.

22 MR. HALUSKA: The testimony is he regained  
23 consciousness.

1 THE COURT: I think it is the same thing. We are  
2 going over the same thing.

3 BY MR. KEARNEY:

4 Q Did anybody observe the attack you had on July  
5 23rd?

6 A Is that the second attack?

7 Q That's the second attack.

8 A To observe the attack, no, but someone heard it.

9 Q Someone heard pots and pans, isn't that what you  
10 testified to?

11 A They were heard screaming and hollering.

12 Q Did anybody observe the blackout that you had at  
13 the Arlington Hospital?

14 A I wasn't awake during the blackout. I don't know  
15 if someone observed it.

16 Q Who was the person who observed and heard the  
17 screaming and hollering?

18 A The second one?

19 Q Yes.

20 A That was a girl that was rooming in the basement  
21 of my mom's house, an apartment.

22 Q Is she going to come here to testify?

23 A That's up to my lawyer.

1 Q Is anyone going to come and testify that they  
2 observed the third attack?

3 A Pardon?

4 Q Is anyone going to come and testify that they  
5 observed a third attack?

6 A I am not my lawyer. You have to ask him.

7 MR. HALUSKA: If he'd like to call me as a  
8 witness, Your Honor -- .

9 BY MR. KEARNEY:

10 Q The Coke you got at the 7-11, did you drink it  
11 at the 7-11?

12 A This is after when?

13 Q The Coke that you got at the 7-11, after you  
14 dropped your mother off, did you drink that there?

15 A I took it with me.

16 Q You had it in the car with you?

17 A Yes.

18 Q Did you drop it?

19 A Drop it?

20 Q Yes.

21 A How do you drop it?

22 Q Did you ever drop it? Did you drop the Coke, the  
23 Pepsi, whatever it was? You had it in your hand.



1 THE COURT: Let him answer the question before you  
2 go on.

3 THE WITNESS: I do not recall dropping it.

4 BY MR. KEARNEY:

5 Q Isn't it a fact that you dropped it and you leaned  
6 over to pick it up and drove across the line?

7 A No, sir.

8 Q I just have two more questions. Are you saying  
9 that if you had epilepsy on 6/15/77, that you wouldn't have  
10 been driving?

11 MR. HALUSKA: That is not a proper question. It's  
12 been established -- there's no other evidence other than  
13 it's been June 15th. If he wants to argue, he can do that  
14 somewhere else.

15 THE COURT: Objection sustained.

16 MR. KEARNEY: I have no further questions.

17 REDIRECT EXAMINATION

18 BY MR. HALUSKA:

19 Q Michael, what were you taking the Tetracycline for?

20 A Stomach disorders from traveling around the world,  
21 eating. When you go to all these foreign countries --

22 THE COURT: (Interposing) You answered the question.

23 BY MR. HALUSKA:

1 Q Did that include dysentery or something like  
2 dysentery?

3 A I wouldn't use that term, but something close.

4 MR. HALUSKA: That's all I have, Your Honor.

5 THE COURT: All right, you can step down. Who is  
6 your next witness?

7 MR. HALUSKA: I will recall Officer Degroot.

8 Thereupon

9 ROBERT A. DEGROOT

10 was recalled as a witness, and having been previously duly  
11 sworn, testified further as follows:

12 DIRECT EXAMINATION

13 BY MR. HALUSKA:

14 Q Officer, directing your attention back now to the  
15 date of this accident, on the accident scene, how close were  
16 you physically to the defendant, Michael Hemming, at the  
17 accident scene?

18 A I'd say I approximately came in contact with him,  
19 may have touched him, may have opened a door for him, six  
20 inches.

21 Q Anywhere from, say, six inches to about a foot away?

22 A Yes, sir.

23 Q Did you have occasion to observe his eyes during

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## 1 DIRECT EXAMINATION

2 BY MR. HALUSKA:

3 Q For the record, doctor, would you tell the jury  
4 your full name?

5 A Richard Joseph Mulvaney.

6 Q Are you a doctor of medicine?

7 A Yes, I am.

8 Q Where do you currently practice medicine?

9 A Practice emergency medicine at the emergency  
10 department of Fairfax Hospital.11 Q Would you please tell the jury or give them a brief  
12 resume of your education and experience as a medical doctor?13 A Well, I went to Georgetown University medical  
14 school and graduated in 1948. Then I went through two years  
15 of training, one at Georgetown Hospital and one at what is  
16 now D.C. General Hospital.17 Then I went to Wyoming to practice for about seven  
18 months and went into the army for two years. When I got out  
19 of the army in 1953, I began the general practice of medicine  
20 in McLean, Virginia.21 And I kept that up for almost exactly 20 years,  
22 when in early '73, I retired from private practice and  
23 started working at the emergency department at Fairfax.

1 Q Did you do your internship, could you tell us --  
2 would you tell us which hospital you did your internship at?

3 A Interned one year at Georgetown and one year at  
4 Galinger (phonetic), now D.C. General.

5 Q Do you currently hold privileges at any hospitals  
6 other than Fairfax?

7 A Fairfax, Georgetown, Northern Virginia Doctors  
8 and Arlington.

9 Q Does the plaintiff counsel wish to voir dire?

10 MR. KEARNEY: No.

11 BY MR. HALUSKA:

12 Q I believe you may have mentioned this already.  
13 Did you practice the private practice of medicine at any time  
14 in your career?

15 A Yes, twenty years, between '53 and '73.

16 Q During that period of time, did you have occasion  
17 to treat Michael Hemming?

18 A Yes, his family and he were patients of mine in  
19 the time I was in practice, almost the entire time.

20 Q Would that be approximately 20 years?

21 A Yes.

22 Q Do you remember roughly how old he was when you  
23 began treating him?

1           A     He must have been about three, two or three or  
2 four, something like that.

3           Q     Was he also a neighbor in your neighborhood?

4           A     Yes, we lived on the same street and his and my  
5 children -- my children, and he played together.

6           Q     Were they about the same ages?

7           A     Yes.

8           Q     When was the last time you treated Michael?

9           A     I have an idea it was the early seventies, probably  
10 '71 or '72, shortly before I went out of practice.

11          Q     Do you have his medical records or are they  
12 available to you?

13          A     I'm sorry, I do not have them and I can explain  
14 why I don't. Do you want me to?

15          Q     Go ahead.

16          A     When I went out of practice, that is out of private  
17 practice, I had my practice taken over by another man who  
18 moved into the same suite of offices. And I allowed him, at  
19 the request of any person or patient who wanted it, to keep  
20 any records the patients wanted him to keep. Those that  
21 they didn't, requested they be sent to other doctors, which  
22 I did.

23                   And then I took those that were left and stored

1 them in my home. And every once in a while, I would have  
2 a request from the insurance company or somebody who would  
3 want my records on a certain patient, and I would go to these  
4 various sources.

5 Sometimes I was able to find them, sometimes I  
6 wasn't. Then the real problem came when, in December of '77,  
7 I moved my home and it necessitated another move of records.  
8 So it became difficult to locate anything.

9 And when I recently heard from you that I should  
10 talk about Michael, I looked for his records and assumed that  
11 they must be in one of those places that I could not find.  
12 I'm very sorry, I wish I could provide them.

13 Q Are you testifying basically from your memory,  
14 then, of this patient?

15 A Yes.

16 Q And over the course of years you have treated him?

17 A Yes.

18 Q Are you familiar, doctor, in the course of your  
19 education and experience, with the symptoms of a disease  
20 called epilepsy?

21 A Yes, very familiar.

22 Q Is there any particular reason why you may be more  
23 familiar than somebody else?

1           A     It so happens that I have two children who had --  
2           one had and one still has epilepsy, so I didn't necessarily  
3           make it a pet subject of mine, but I do know a considerable  
4           amount about it for that reason.

5                     They took treatment. I was aware of their  
6           seizures, their difficulties. And I talked at great length  
7           with neurologists about them. So I feel I know a fairly  
8           good amount about the disease.

9           Q     During the entire 20-odd years that you have treated  
10          Michael Hemming, did he at any time give any indications of  
11          the symptoms of epilepsy?

12          A     No, absolutely not.

13          Q     Did he ever have any indications of fainting  
14          spells at any time?

15          A     No.

16          Q     Did he ever have, to your knowledge, in your  
17          treatment of him, a head injury of any kind?

18          A     Not that I can recall, no.

19          Q     At any time, did he have an indication of blacking  
20          out?

21          A     Never.

22                     MR. HALUSKA: That's all I have. Thank you.

23                     CROSS EXAMINATION

1 BY MR. KEARNEY:

2 Q Dr. Mulvaney, I want to ask you a couple of  
3 questions about epilepsy. In light of the fact that your  
4 children have epilepsy, can you tell us what a seizure looks  
5 like? First, can you tell me what a petit mal seizure is?

6 A That's the kind my children have. That's a  
7 brief, usually five to ten-second period, of what I call  
8 memory lapse in which there is no falling and no gross  
9 evidence of malfunction, except to one who is quite aware of  
10 it.

11 And if I could describe, one of the mannerisms is  
12 a sudden staring off into space, like that, coming back right  
13 in the general run of conversation and not even realizing  
14 that you have been out of it, as it were.

15 Another manifestation is a lip smacking, like that,  
16 for again five to ten seconds and coming right back. (Indi-  
17 cating)

18 Q And then after the ten seconds are over, they are  
19 sort of back to just the way they were?

20 A Yes.

21 Q Michael Hemming has said that he has grand mal  
22 epilepsy. What is that?

23 A That is the one that most people are more familiar



1 with, having seen what's called a fit, a seizure, in which  
2 the person sometimes shouts out and then suddenly falls to  
3 the ground and shakes all over like he's having a shaking  
4 chill.

5           This might last for as long as 30 seconds, during  
6 which time the person involved does not breathe, so the face  
7 becomes blue. And they look like they are going to die  
8 because they are not getting any air in.

9           Their mouth becomes frothy and they sometimes  
10 clench their teeth together and bite their tongue. They  
11 frequently will become incontinent of urine. And that is  
12 followed by a period of post-seizure state in which the person  
13 is pretty much out of it.

14           That is, he is unaware of surroundings for anywhere  
15 from ten minutes to half an hour. When they wake, they are  
16 not always sure that they had any such disorder or such  
17 seizure.

18           The whole generalized fit or shaking business  
19 lasts anywhere from 20 seconds to about a minute.

20           Q     How long do they stay blue? Do they turn blue in  
21 that period in which they are not breathing?

22           A     Anywhere from 20 to 35, 40 seconds.

23           Q     Let me ask you this question: in a grand mal

1 attack, how does it occur? I know you have described the  
2 kind your children have as petit mal, which is a small  
3 attack, that's what it means?

4 A Yes, little.

5 Q A little attack. Grand mal is a big attack?

6 A Right.

7 Q In a grand mal attack, it is my understanding, and  
8 I don't pretend to be a doctor, I have read all I can on this,  
9 but my understanding of petit mal attack, and I am asking  
10 if this is correct, petit mal attack, you can continue to  
11 function although you don't remember. Would that be a fair  
12 characterization?

13 A Yes.

14 Q In a grand mal attack, in fact, a grand mal attack  
15 is a major seizure and, as I understand it, I will describe  
16 it as the upper part of the brain, is that fair to say?

17 A Yes.

18 Q And that part of the brain controls your ability  
19 to move and do things, is that fair?

20 A Yes.

21 Q Let me ask you this question: do you think a  
22 person having a grand mal attack could drive a car a mile to  
23 a mile and a half and, by the time they reach that mile and

1 a half, have suffered through the seizure and come out of  
2 it, not be blue and not be frothing at the mouth? Could  
3 they operate the car during that mile and a half?

4 A It is pretty unlikely, except for one thing: there  
5 is sometimes in some people what is called an aura or an  
6 awareness that it is going to occur. And then between then  
7 and when it does occur, that can be a short interval.

8 Q The aura is kind of an warning, isn't it?

9 A Yes.

10 Q That's the way it is described. The attack has  
11 begun, as I understand it, but for those people who have  
12 experienced it, they will know when they feel the aura that  
13 they, if they are epileptic, they are about to have a seizure,  
14 is that fair?

15 A That's the idea.

16 Q Do you have an aura in grand mal attack?

17 A I would say that doesn't always happen.

18 Q Do you have auras in grand mal attacks?

19 A As I say, sometimes.

20 Q Describe for me, as best you can, what an aura is  
21 like, what it is like to the patient, to the person.

22 A Well, it isn't always the same. It can take the  
23 form of a sudden flash of light, just a momentary realization

1 that something is not right, a snow-blindness type of thing.

2 It can take the manifestation of a sudden headache.  
3 It could be an inner awareness that something is just not  
4 right. I would have difficulty describing that because I  
5 have never had it.

6 Q I think I understand.

7 A But it is an awareness that something is not right.

8 Q Has it been your experience that patients who have  
9 this aura can remember the aura after it's over, I mean,  
10 they may black out for the period of time after the aura, but  
11 they remember the aura?

12 A Sometimes they are aware of the aura because they  
13 think of it as a means of knowing when they are going to have  
14 a seizure.

15 Q Let's talk about a grand mal. In a grand mal  
16 attack, we are talking about grand mal -- petit mal does not  
17 have an aura, ordinarily, does it?

18 A No.

19 Q Do all grand mal attacks have an aura?

20 A No.

21 Q So if you didn't have an aura, the first thing  
22 that would happen to the patient would be what?

23 A Well, by definition, the grand mal is a convulsive

1 seizure in which they fall to the ground and shake. So they  
2 would lose consciousness.

3 Q Let me give you a hypothetical question: a  
4 person is driving a car. They make a turn onto a road and  
5 they black out. There is no described aura, as you have  
6 described it, of any description. They black out and then,  
7 a mile and a half later, there is an automobile accident on  
8 a road that is described as hilly with some curves.

9 Would it be possible for a person having a grand  
10 mal attack to operate a car for that period of time?

11 A Well, as I say, anything is possible, but it is  
12 unlikely.

13 Q It is unlikely?

14 A Yes.

15 Q I have no further questions.

16 REDIRECT EXAMINATION

17 BY MR. HALUSKA:

18 Q I have one question. Doctor, again relating back  
19 to Mr. Kearney's hypothetical, is it also possible that when  
20 a person suffers such an attack, that their memory would be  
21 blacked out further back in time than the actual onset of the  
22 seizure?

23 A Yes.

1 MR. HALUSKA: Thank you.

2 THE COURT: Can the doctor be excused?

3 MR. HALUSKA: Yes, sir.

4 THE COURT: You are free to go.

5 Thereupon

6 SYDNEY GREEN, M.D.

7 was called as a witness, and after having been duly sworn,  
8 was examined and testified as follows:

9 DIRECT EXAMINATION

10 BY MR. HALUSKA:

11 Q Doctor, would you please state for the record and  
12 to the jury your name?

13 A My name is Dr. Sydney Green.

14 Q Doctor, where do you practice medicine?

15 A In Washington, D.C.

16 Q Do you have a specialty?

17 A Yes, neurosurgery and neurology.

18 Q Could you tell the jury where you hold your medical  
19 licenses?

20 A In D.C., Maryland.

21 Q You also hold them in New York City?

22 A I also have one in New York City.

23 Q Would you please tell the jury how long you have

1 been in the practice of medicine?

2 A Since 1939.

3 Q Could you give us a brief description of what a  
4 neurosurgeon does, what area of the human body he deals with?

5 A Neurosurgeon and neurologist deals with the diseases  
6 and injuries of the nervous tissue of the body, brain, spinal  
7 cord and nerves.

8 Q Would your area of expertise include surgery on  
9 the brain?

10 A Yes.

11 Q Would you please tell the jury what medical school  
12 you graduated from?

13 A From Guys Hospital medical school of the Univer-  
14 sity of London, England.

15 Q Did you have an internship after that graduation?

16 A Yes.

17 Q Where did that take place?

18 A In Guys Hospital and also other schools of the  
19 University of London.

20 Q Would you give the jury a brief description of  
21 where you practiced after you were at that hospital?

22 A Well, I was in the army during the war as a  
23 surgeon and then, when I came back, further training in

1 university hospitals in London, England. And I eventually  
2 came over to the United States in 1959.

3 Q Are you board certified?

4 A I have my English certifications.

5 Q What is the significance, if any, of board  
6 certifications?

7 A Board certification is the people here who have  
8 gone through a course of approved study and taken certain  
9 examinations.

10 Q Do you hold any privileges in any hospitals in  
11 the Washington metropolitan area?

12 A Privileges in Washington Hospital Center, Holy  
13 Cross Center, Doctors Hospital, Greater Southeast Community  
14 Hospital, Doctors Hospital of D.C., Childrens Hospital of  
15 D.C., Howard University Hospital.

16 Q What does it mean when a doctor has privileges at  
17 a hospital?

18 A It means that he has the authority to take patients  
19 into the hospital and treat them.

20 Q And have you been published in your area of  
21 specialty?

22 A Yes, but not in recent years.

23 Q Did you have occasion to come into contact with a



1 patient -- excuse me. Have you any questions?

2 MR. KEARNEY: I have no questions.

3 BY MR. HALUSKA:

4 Q Did you have occasion to come into contact with a  
5 patient by the name of Michael Hemming?

6 A Yes.

7 Q Would you tell the jury when your first examination  
8 was?

9 A July 27, 1977.

10 Q At that time, did you obtain a history from him?

11 A I did.

12 Q What history was provided to you by him?

13 A I can refer to my written report here?

14 A Yes, sir.

15 Q This man had come back from abroad. He had been  
16 traveling around the world and had come back only about ten  
17 days or so before I had seen him. His last country visited  
18 had been England, where he had been checked at the hospital  
19 for tropical diseases for some intestinal upset he picked up  
20 in his travels.

21 And he had been given medicine for that. Then he  
22 comes to --

23 Q (Interposing) What medicine was that?

1           A     Tetracycline, it's an antibiotic, Tetracycline.  
2     Then, on July 15th, which I imagine must have been the time  
3     within about ten days when he came back from abroad, from  
4     whatever, he got quickly out of bed to drive his mother to  
5     work so that he could have his mother's car to use.

6                     He had no breakfast. On the way back from  
7     delivering his mother, he apparently blacked out with an  
8     accident involving two other cars. And one of the other  
9     drivers sustained a fractured skull. Do you want me to go  
10    on with how he related the story?

11           Q     Yes, sir.

12           A     He said the police did not appear to accept his  
13     story, though the first thing that he knew was of his being  
14     in the police car. He had no knowledge that he had been taken  
15     into that police car.

16                     An ambulance had been brought. He said that he had  
17     been asked if he wanted to take the ambulance and he had  
18     replied that he did not want to, although he was quite unaware  
19     of all this exchange afterwards, but he had been told that  
20     by other people, I understand.

21                     Later the police car took him home and he had an  
22     argument with the policeman outside his place where he lived.  
23     At the time, he felt some soreness of his neck, but had not

1 bitten his tongue and had not wet himself, as far as he knew.

2 He had been very concerned about all this and had  
3 contacted his mother and was additionally concerned because  
4 of the accident and the police involvement and their seeming  
5 suspicions.

6 He spent the next few days talking to all the  
7 people involved in the accident so that he could find out  
8 more of what had happened. Apparently also he had been in  
9 contact with some of those injured.

10 MR. KEARNEY: I have to object to this testimony  
11 at this point. I have a copy of his report. It is being  
12 read off the report. I don't know how much independent  
13 recollection there is.

14 THE COURT: You object to the use of his notes?

15 MR. KEARNEY: I don't object to him using his  
16 notes, but I am reading word for word what he is reading here.  
17 I don't think that's what -- these are the clinical notes  
18 written afterwards.

19 THE COURT: I am not sure, are you objecting to  
20 him using the notes? I am not sure what your objection is.

21 MR. KEARNEY: I object to him reading from his  
22 notes.

23 THE COURT: I would sustain the objection.

1 BY MR. HALUSKA:

2 Q If you did not have your notes before you, would  
3 you be able to independently recall offhand all the things  
4 that you were told by the patient?

5 A Yes, I have a, very good idea what happened to the  
6 patient. It is normal to refresh one's memory by notes  
7 written at the time of the interview.

8 Q If at any time you must, do so. Other than this first  
9 incident, were you aware of any other similar incidents that  
10 Michael suffered?

11 A Well, this examination he had had another thing  
12 that happened to him. Some weeks later he had been in a  
13 little minor or little accident on his bicycle hitting the  
14 back of a truck. It was a very minor thing, but the combi-  
15 nation of everything seemed to be worrying him.

16 At the time when he came to see me particularly,  
17 and then especially the day before he had seen me, that would  
18 be June 26th, a very bizarre kind of episode had taken place  
19 in his own home.

20 Q Was that July 26th?

21 A That would be the day before I saw him, July 26th.  
22 A very bizarre episode had taken place.

23 Q What was that?

1           A     Well, he had sort of come to himself in the  
2 morning, just wetting his underpants, and the whole place was  
3 in a mess, the kitchen, materials like pots and pans all over  
4 the place where they shouldn't have been and lying on the  
5 floor or on beds.

6                     And he didn't know what had happened to him, no  
7 idea. But he had learned later in some more detail because  
8 there had been a lodger who lived downstairs in the basement,  
9 a girl lodger, who goes to work early in the morning.

10                    And she heard the tremendous commotion.

11                   MR. KEARNEY: Objection.

12                   THE COURT: Objection sustained.

13                   BY MR. HALUSKA:

14           Q     Did he have a third episode after this one,  
15 involving a similar activity?

16           A     Yes. The next episode was when I had referred him  
17 for what we call a glucose tolerance test at the hospital  
18 near where he lives. It was Arlington Hospital or Fairfax  
19 Hospital.

20           Q     I believe it was Arlington.

21           A     And in that test, they go -- they are fasting and  
22 have blood sugar testing and then they have a sugar drink,  
23 take a blood test every half hour for about four hours. The

1 object of that was to see whether he had, by any chance, a  
2 low blood sugar level, which could precipitate some kind of  
3 fainting episode or seizure episode. But during the test, he  
4 had another attack.

5 Q Do you know what happened during that attack?

6 A Well, I spoke to the doctor afterwards, who had --

7 MR. KEARNEY: (Interposing) Objection.

8 MR. HALUSKA: He can testify about that if it  
9 relates to his treatment of the patient after that time,  
10 certainly.

11 THE COURT: I think as far as the medical history  
12 is concerned, with respect to diagnosis --

13 MR. KEARNEY: (Interposing) All right.

14 BY MR. HALUSKA:

15 Q Go ahead, doctor.

16 A This doctor had not seen the attack apparently, him  
17 having the attack. Apparently the patient had gone out  
18 between the half hours for a breath of fresh air and had  
19 passed out, was brought in the emergency room of the hospital  
20 and his blood sugar had not been low at the time.

21 Q What was the purpose of this glucose testing?

22 A I think I said that the idea was to see whether  
23 he had abnormally low blood sugar at any time, which could

1 precipitate reactions, same way as a diabetic who is on  
2 insulin might have an insulin reaction.

3 Q Was that particular cause ruled out as a result  
4 of that glucose testing?

5 A Yes.

6 Q Could you give the jury a brief idea of any other  
7 testing that he underwent at your behest?

8 A Yes. When I first saw him, he was sent to  
9 Fairfax Hospital for an EEG, which is the abbreviation for  
10 electroencephalogram.

11 Q Could you give a brief description of what that is?

12 A An electroencephalogram is pretty similar to an  
13 electrocardiogram where lids are put around the heart. In  
14 the electroencephalogram, it is around the head and records  
15 the electrical activity produced by the brain and shows many  
16 different things, abnormalities.

17 In this particular case, we wanted to see if it  
18 showed epileptic activity.

19 Q Brain waves are listed on a piece of paper as it  
20 came out of a machine?

21 A Yes, recorded on a moving piece of paper.

22 Q And it is your testimony, then, that what was  
23 shown on that EEG was consistent with a convulsive disorder?

1 MR. KEARNEY: Objection. There is no foundation  
2 for this. This is the key issue.

3 THE COURT: Go on.

4 BY MR. HALUSKA:

5 Q What did that, EEG show, if anything?

6 A Epileptic activity.

7 THE COURT: Objection overruled. Go ahead.

8 BY MR. HALUSKA:

9 Q Could you tell the jury again what that showed?

10 A An abnormal encephalogram consistent with a  
11 diagnosis of epilepsy.

12 Q And was it descriptive or did it show any particular  
13 type of epilepsy?

14 A No, it wasn't specific. Can I read out the actual  
15 report?

16 Q If you need to consult it, yes, sir, but you  
17 probably shouldn't read it to the jury.

18 A This was dated August 1, 1977.

19 THE COURT: Don't read it, doctor. But if you  
20 need it to refresh your recollection -- .

21 THE WITNESS: It showed paroxysmal, slow and sharp-  
22 waved discharges consistent with the diagnosis of a convulsive  
23 disorder. That means a seizure disorder.



1 BY MR. HALUSKA:

2 Q Did he have any other EEG's performed?

3 A Yes, a second one.

4 Q When was that done?

5 A A few months later. Well, anyway, it was an  
6 abnormal EEG consistent with a diagnosis of epilepsy,  
7 carried out on the 11th of October, 1977.

8 Q Was there any significance at all attached to the  
9 EEG over a period of time showing the same or similar results?

10 A If they were done by two different encephalographers,  
11 they both agreed on the diagnosis of epilepsy.

12 Q Was there any other tests or things done to  
13 Michael's person to determine what he was suffering from?

14 A Skull X-ray, chest X-ray, computerized brain scan  
15 done at George Washington University Hospital. And these were  
16 normal studies.

17 Q Did the skull X-rays indicate anything consistent  
18 with a traumatic injury to his head?

19 A No, nothing at all, just normal chest and skull  
20 X-rays.

21 Q Were there any other tests done?

22 A We had various blood tests carried out, serological  
23 tests and tests for liver function.

1 Q What did those tests show? I didn't mean to  
2 interrupt.

3 A Blood sugar, liver function and anything that  
4 would bear on the nature of the attack that he had had  
5 or attacks that he had had. And they were all negative  
6 studies.

7 Q What is the significance of those studies being  
8 negative?

9 A Support the diagnosis of idiopathic epileptic  
10 condition.

11 Q Would you please tell the jury what idiopathic  
12 means?

13 A Idiopathic epilepsy is a kind of epilepsy you get  
14 where there is no structural change that can be identified  
15 in a patient's brain on the basis of clinical examination  
16 of the patient, which would be normal, and the absence of  
17 any significant history in the past like brain injury or  
18 having been in a coma sometime in his life or encephalitis,  
19 any of those other kinds of illnesses and nothing else is  
20 found, no other cause.

21 Then you say this is idiopathic epilepsy, just  
22 part of this man's basic inherent metabolism.

23 Q Is that what was, in effect, found by you?

1           A     This was the case, yes.

2           Q     Is it your testimony that no other source for  
3 these blackouts or seizures were found?

4           A     None.

5           Q     As a result of the history you obtained from  
6 Michael, as well as your own examination of him and all the  
7 tests that you have described that you have done, did you  
8 reach an opinion as to what he was suffering from, if anything?

9           A     Yes, I considered that he was suffering from  
10 idiopathic epilepsy.

11          Q     What is the type, petit mal or grand mal?

12          A     Well, there is some question in my mind as to  
13 whether there was a grand mal seizure activity followed by a  
14 state of post-seizure confusion, which is very typical, or  
15 the possibility of a temporal lobe epilepsy, which is a little  
16 bit different from the so-called grand mal or major epilepsy.

17          Q     I don't want to belabor this. Could you briefly  
18 explain the different between those two types of seizures?

19          A     Well, grand mal epilepsy, there is a sudden onset  
20 of an attack where the patient falls unconscious, a major  
21 attack, and breathes very heavily, slobbers at the mouth.  
22 His tongue may fall back. He may have an epileptic cry. He  
23 tenses up all his limbs and starts to shake them, all four

1 limbs together, for minutes or so and then it is over.

2 And then he may be in a state of unconsciousness  
3 or unresponsiveness for ten minutes, half an hour or be in  
4 a state of confusion.

5 Temporal lobe, epilepsy, you don't have the major  
6 dramatic falling to the ground and shaking, but there is  
7 bizarre behavior on the part of the patient, that they may  
8 pluck at their clothes, abnormal behavior, slobber at the  
9 mouth and behave in a very strange, bizarre way.

10 Q Is it possible for a person to suffer from both  
11 types simultaneously?

12 A Yes, sir.

13 Q Would this temporal lobe be perhaps more consistent  
14 with that pots and pans episode?

15 A Yes, it sounds very much like that.

16 Q Does the episode of June 15, 1977, sound like  
17 one of the other two?

18 A June 15th?

19 Q The automobile accident that he was in.

20 A The first episode?

21 Q Yes, sir.

22 A He seemed to be in a confused state, not known  
23 what had happened in the first half hour or so after this

1 accident.

2 Q Is that consistent with any particular type of  
3 epilepsy?

4 A Yes, this was consistent with what we know about  
5 the patient later on.

6 Q Is it consistent with grand mal or --

7 A (Interposing) Well, it could have been a sort of  
8 minor grand mal attack followed by a state of confusion or  
9 sometimes called postictal confusion.

10 MR. KEARNEY: Objection to that. What could have  
11 been is --

12 THE WITNESS: (Interposing) Or a temporal lobe  
13 seizure.

14 THE COURT: When the lawyer objects, stop. I  
15 would sustain his objection.

16 BY MR. HALUSKA:

17 Q When a person suffers a grand mal attack, does it  
18 necessarily mean that he will foam at the mouth?

19 A No.

20 Q Does it necessarily mean that he will be incon-  
21 tinent, that he will either defecate on himself or urinate  
22 on himself?

23 A No, he may have an empty bladder, for example.

1           Q     Do you know or have an opinion as to whether or  
2 not -- excuse me, let me rephrase the question. What effect,  
3 if any, can Tetracycline have on this condition you described?

4           A     None.

5           Q     How about the effects, if any, of alcohol?

6           A     Well, it is well known that alcoholics can suffer  
7 from grand mal seizures. It is part of the delirium tremor  
8 or syndrome. It is very often when they stop taking  
9 alcohol when they start having seizures.

10           A     A person has to be an alcoholic, someone who is  
11 known to be an alcoholic or persistent, heavy drinker of  
12 alcohol over a long period of time before he gets to this  
13 stage of his alcoholism.

14           Q     Were there any indications on any of your tests  
15 done by you or others that indicated alcoholism?

16           A     No. The liver tests were normal, no evidence  
17 of alcoholism at all.

18           Q     Did you reach, based on the history that Michael  
19 gave you as well as your objective findings, an opinion as  
20 to the first attack on June 15, 1977?

21           A     Yes.

22           Q     That was what?

23           A     That he had an attack of epilepsy.

1 Q Based on his history and based on your examination  
2 and your testing, did you form an opinion as to whether or  
3 not this was the first time this happened?

4 A I did form an opinion. This was gone into and  
5 there were no episodes suggestive or similar to this in his  
6 life before.

7 Q So, in your opinion, it would be the first time?

8 A Yes.

9 Q Did you, in August of 1977, place Michael on any  
10 sort of medication as a result of your diagnosis?

11 A I believe his medication was started on August 2,  
12 1977.

13 Q What did you prescribe?

14 A The usual anticonvulsant, one is called Dilantin,  
15 taken three times a day, standard dosage, and also Pheno-  
16 barbital. It is three times a day and it's a standard dosage.

17 Q What is that designed to do?

18 A These are drugs which damp down the capacity of  
19 the electrical, chemical process of the brain to break through  
20 a barrier.

21 Q Is that what causes the epileptic seizure?

22 A The theory is there is an electrical, chemical  
23 abnormality in the cavity of the brain.

1           Q     Have you followed up on this patient since that  
2 time you prescribed this medicine?

3           A     Yes, I saw him about half a dozen visits alto-  
4 gether. He is seen 8/16/77; 9/9/77; 9/26/77; 10/4/77; 11/1/77  
5 and more recently on 3/16/79.

6           Q     And are there any things that are done to see  
7 whether or not the patient is taking the medication?

8           A     Yes, we do the blood levels of the Dilantin and  
9 Phenobarbital routinely so I think he's had about three or  
10 four of these done now. They have all been very satisfactory.

11          Q     What do you mean by, "satisfactory"?

12          A     There are normal levels for a man on Dilantin,  
13 a certain dosage, normal therapeutic levels and also for the  
14 Phenobarbital. He's always been within these normal thera-  
15 peutic levels of the drug, so that he's not omitted taking  
16 the drugs as far as we can tell.

17          Q     That basically means he is taking the medication  
18 as prescribed?

19          A     Yes. And the other thing is he's never had  
20 another attack.

21          Q     What would happen if he stopped taking the  
22 medication?

23          A     He probably would have another attack.



1 Q After that attack in the hospital in Arlington,  
2 is it your testimony that he's not had another one?

3 A He's not had any other attacks.

4 MR. HALUSKA: Thank you, doctor. That's all I  
5 have.

6 CROSS EXAMINATION

7 BY MR. KEARNEY:

8 Q Dr. Green, I have some questions. When you say  
9 he hasn't had another attack -- well, let's go back to the  
10 beginning. Have you ever talked to anyone or did you talk to  
11 anyone prior to 7/27/77, which was the first time you saw Mr.  
12 Hemming, about this accident or about this situation?

13 A No.

14 Q Is it fair to say, then, that all of the history  
15 that is in your clinical notes, dated August 2, 1977, was  
16 given to you by the patient, himself, and didn't come from  
17 somebody else?

18 A That's right.

19 Q He told you he didn't suffer from headaches, is that  
20 correct? You can refer to your notes.

21 A I can this time? What particular time are you  
22 thinking about?

23 Q When you were taking a history.

1           A     Okay, on June 15th. Was he the sort of man  
2 who had suffered from headaches in the past, is that what you  
3 are asking me?

4           Q     No. Your notes indicate that he did not suffer  
5 from headaches at the time?

6           A     Yes.

7           Q     Let me see where he said that, please, sir.

8           A     Whereabouts are you referring to now?

9           Q     That's at the bottom of the first paragraph of that  
10 note.

11           THE COURT: Give him time to search through.

12           THE WITNESS: The time of the accident, you are  
13 talking about the car accident?

14           MR. KEARNEY: Yes.

15           THE WITNESS: Neck stiffness, but did not suffer  
16 from headaches.

17           BY MR. KEARNEY:

18           Q     You have put in some things that I am curious  
19 about.

20           A     What did you say?

21           Q     What is the significance of the fact that he  
22 denied disturbance of hearing, smell, taste or vision?

23           A     It is a routine sort of question a neurologist,

1 neurosurgeon asks.

2 Q He did tell you on June 30, he was riding his  
3 bicycle and he had run into the back of a truck at a red  
4 light, is that correct?

5 A Yes.

6 Q He did tell you that?

7 A Yes.

8 Q Did he tell you that he felt slightly dazed after  
9 that incident also?

10 A Yes.

11 Q Doctor, any physician or surgeon is widely  
12 respected in society --

13 A (Interposing) Is what?

14 Q Is widely respected in society. And the point I  
15 am trying to make --

16 MR. HALUSKA: (Interposing) If he's got a  
17 question, I'd like to hear it.

18 THE COURT: I think he was trying to state it.

19 BY MR. KEARNEY:

20 Q The conclusions that you have reached about what  
21 happened on June 15, 1977, are based solely on the history  
22 that Michael Hemming gave you, is that correct?

23 A Yes.

1           Q     In other words, if Michael Hemming had an attack  
2 on June 1, 1977, and didn't tell you about it, then your  
3 conclusion as to whether that was his first attack would be  
4 incorrect?

5           A     That would be true, yes.

6           Q     I'd like to talk a little bit about epilepsy because  
7 I think it is important what we are talking about. Would you  
8 describe what a petit mal -- excuse me if I am not pronouncing  
9 it correctly, petit mal --

10          A     (Interposing) It means a small attack. And  
11 it is quite a different nature to the grand mal attacks. They  
12 are very transient, very, very transient. They maybe last  
13 half a second and maybe two seconds.

14          Q     And you can go right on?

15          A     You can go right on with what you are doing,  
16 no confusion afterwards or anything like that. Also very  
17 typically, they have a typical abnormality in the EEG, very  
18 diagnostic abnormality.

19          Q     From your tests that you have done and everything  
20 you know about Mr. Hemming, would you say he had petit mal  
21 epilepsy?

22          A     No.

23          Q     Would you tell us, then, what the grand mal attack

1 is, grand mal epilepsy?

2 A I think I have done that. You want me to repeat  
3 what I have said before? I already talked about that, didn't  
4 I?

5 Q I'd like you to explain it again to me in lay terms.  
6 What did it look like when you see somebody having a grand  
7 mal attack to the lay person?

8 A They will fall down or fall off a seat, if they  
9 are seated. If they are in bed, of course, they won't fall  
10 off the bed usually. They will have it in the bed. They are  
11 totally unresponsive. They tighten up, all the muscles  
12 tighten up, become flexed and stiffened for a short period of  
13 time.

14 And they may tend to be blue in the face. They  
15 tend to be holding their breath. And then the so-called tonic  
16 phase becomes a shaking phase. And the next phase is  
17 shaking, violent shaking. That depends on the severity of  
18 the attack.

19 They breathe heavily and they may bite their  
20 tongue, clamp their jaw. They may bite their lip. And some-  
21 times they can be so violent, even fracture a limb, fracture  
22 a bone and very often they are incontinent, not always, but  
23 they may be incontinent.

1 Q What does that mean?

2 A Lost their water or their bowel movement.

3 Q I think you testified that doesn't happen all the  
4 time, is that correct?

5 A That doesn't happen all the time, and the attack  
6 subsides. They lie quietly then, but you can't wake them up  
7 usually for some time. They come around slowly and they seem  
8 to be confused for quite a while, have a headache.

9 Q Let me ask you this, then: is that kind of  
10 epilepsy preceded by what Dr. Mulvaney, he's been here, he  
11 testified what an aura is, is the grand mal preceded by an  
12 aura?

13 A Not always, but sometimes there is an aura, lasts  
14 a half a second or quarter of a second before the actual  
15 attack takes place.

16 Q Did you determine, did Michael Hemming have an  
17 aura from the history you took from him?

18 A Not that I know of, no.

19 Q And that wouldn't be unusual? I mean somebody  
20 could have a grand mal attack without an aura, is that  
21 correct?

22 A Yes.

23 Q Let me ask you this: you just talked about -- Mr.  
Hemming has said that you told him that he had a grand mal

1 attack. Are you saying he may have had a grand mal attack  
2 and he may have had something else?

3 A Well, I have been treating him on the general  
4 diagnosis that he has major epilepsy, either grand mal or  
5 possibly temporal lobe type of seizures. And the medication  
6 is essentially the same, Dilantin and Phenobarbital.

7 Q Temporal, is that psychomotor epilepsy?

8 A Psychomotor epilepsy, yes.

9 Q You mean there is a possibility in your professional  
10 opinion that he may have had psychomotor epilepsy?

11 A There is a chance of that because there are  
12 certain bizarre features in his behavior, particularly the  
13 episode in his own home, the banging of the pots and pans  
14 and finding himself in his underpants.

15 Q Let me go back to the June 15th episode. Based  
16 on your history, would you say that was a psychomotor epilepsy  
17 or grand mal?

18 A I wasn't present. All I have got is the story  
19 and what happened to him afterwards.

20 Q I understand. I am asking you to base it on that.  
21 Would you say that is psychomotor or grand mal?

22 A I am not able to say particularly with that  
23 particular episode. I would imagine that he had probably

1 a small grand mal attack.

2 Q Now the second one, which occurred on 7/26, would  
3 you call that --

4 A (Interposing) I don't know because either it was  
5 temporal lobe type of an attack or post-seizure confusion  
6 that I mentioned before.

7 Q How about the third one, could you characterize  
8 that?

9 A The third one I don't know. He was found outside  
10 apparently in an unconscious state and brought into the  
11 emergency room.

12 Q Would it be fair to say that you never -- strike  
13 that question. Did you tell Michael Hemming that he had a  
14 grand mal attack?

15 A Yes, that was my diagnosis.

16 Q Would you characterize it as being clearly a grand  
17 mal attack?

18 A I think it is clearly an epileptic attack.

19 Q I need to get this very close. Would you say that  
20 the attack on June 15th could have been psychomotor or could  
21 have been grand mal?

22 A Could have been either.

23 Q Would you say that the attack on July 26th, which



1 is the bizarre one about the no pants and the pots and pans --

2 A (Interposing) That could have been either.

3 Q It could have been either? Okay. And the one  
4 on 7/29, can you form an opinion about that one?

5 A That sounded more like an ordinary grand mal  
6 attack.

7 Q Then, doctor, I have a question: why did you send  
8 a letter to the Division of Motor Vehicles, dated February 17,  
9 1978, saying that this 27-year-old man had epileptic attacks  
10 on 6/15 and 7/26 and 7/29/77 and that these were clearly  
11 grand mal attacks with no warning?

12 A There is nothing wrong with that statement.

13 Q I thought you just said that the attacks may  
14 have been either.

15 MR. HALUSKA: He's asking him --

16 THE WITNESS: (Interposing) It makes no difference  
17 whatsoever to the Division of Motor Vehicles, absolutely none  
18 at all. All they want to know is whether he has epilepsy  
19 or not.

20 BY MR. KEARNEY:

21 Q This letter says it is clearly grand mal.

22 A I see no problem with that, no problem, no problem.

23 THE COURT: His question is did the letter say that?

1 BY MR. KEARNEY:

2 Q Can you identify this as your letter to the  
3 Division of Motor Vehicles? (Handing document to witness)

4 A (Examining document) Yes, yes.

5 Q Does that letter say that these were clearly grand  
6 mal attacks?

7 A Yes, but also goes on to say quite a bit about  
8 postictal confusion, which would touch upon these things.

9 Q I am not asking about that.

10 A That is what I am saying.

11 Q I'd like this marked as plaintiff's exhibit number  
12 nine and move it into evidence.

13 MR. HALUSKA: That's fine with me.

14 THE COURT: Proceed. It will be received.

15 BY MR. KEARNEY:

16 Q Let me ask you this, Dr. Green: in a grand mal  
17 attack, can a person operate a motor vehicle for a mile and  
18 a half, a mile to a mile and a half, when he's having a grand  
19 mal attack?

20 A A mile, while he is having the attack or the attack  
21 with its associated period of post-seizure confusion?

22 Q I am not talking about that. Let me ask you this  
23 hypothetical: a person is in fine condition. They don't

1 have any problems at all. They make a left-hand turn and  
2 they black out. They drive a mile and a half and they get  
3 into an automobile accident, a mile and a half down a curving,  
4 hilly road. Could a person have a grand mal attack and drive  
5 that vehicle?

6 A Well, how do you know that he had an attack at  
7 that particular part?

8 THE COURT: Just respond to the question he asked  
9 you.

10 MR. KEARNEY: Let me ask the question.

11 THE COURT: I don't think you need to. Did you  
12 understand the question?

13 THE WITNESS: Yes, but he presupposes something I  
14 don't know about.

15 THE COURT: If you can answer it, go ahead.

16 THE WITNESS: Could somebody negotiate a hilly road  
17 with curves and turns and not know anything about it after-  
18 wards, is that the question?

19 BY MR. KEARNEY:

20 Q That is not what I asked. I asked this hypothe-  
21 tical: a person has clearly a grand mal attack. They make  
22 a left-hand turn. They drive a mile and a half and they have  
23 an automobile accident, the attack having happened during that

1 period of time because after that, and this is the hypo-  
2 thetical, there is a statement about a confused, dazed  
3 attitude.

4 But the question is would the grand mal attack,  
5 could they have driven that mile and a half?

6 A I think you would have the accident at the  
7 beginning of the attack.

8 MR. KEARNEY: I have no further questions, Your  
9 Honor.

10 REDIRECT EXAMINATION

11 BY MR. HALUSKA:

12 Q Again, back to that hypothetical just posed to  
13 you by Mr. Kearney, is it not unusual, doctor, that a person's  
14 memory would be blacked out further backwards in time from  
15 the actual onset of the seizure?

16 A Not unusual.

17 MR. HALUSKA: Thank you, doctor.

18 THE COURT: Can the doctor be excused?

19 MR. HALUSKA: Yes, sir.

20 MR. KEARNEY: Yes.

21 THE COURT: You are free to go. Anything further?

22 MR. HALUSKA: One second, Your Honor. We rest.

23 MR. KEARNEY: I'd like to call a rebuttal witness.

1 THE COURT: Who?

2 MR. KEARNEY: I would like to call Linda Crandall,  
3 Your Honor.

4 Thereupon

5 MARILYN CRANDALL

6 was called as a witness, and after having been duly sworn,  
7 was examined and testified as follows:

8 DIRECT EXAMINATION

9 BY MR. KEARNEY:

10 Q Mrs. Crandall, would you state your full name for  
11 the Court?

12 A Marilyn Crandall.

13 Q Colonel Thomas Crandall has testified in this  
14 matter. What is your relationship with him?

15 A He is my husband.

16 Q And do you know Jack Hutchinson, the plaintiff in  
17 this case?

18 A Yes, I do.

19 Q How would you characterize your relationship with  
20 him?

21 A He's been a friend of ours for many years.

22 Q Directing your attention to June 15, 1977, what  
23 were you doing that morning?

1           A     Well, the phone rang. I had been fixing breakfast  
2 for my son and they said there had been an accident, so we  
3 went to the scene of the accident, which was just a matter  
4 of two or three blocks.

5           Q     When you arrived on the scene of the accident,  
6 what did you see?

7           A     When we first arrived, we saw Mr. Hutchinson's car  
8 and we were very upset, naturally.

9           Q     What did you think at that point?

10          A     That he had been killed.

11          Q     Did you see Jack then?

12          A     Not instantly, no.

13          Q     Would you tell the jury when you did see him?  
14 Just relate what happened.

15          A     Well, when we saw the car, there were people  
16 standing around Mr. Hutchinson and he was laying on the ground,  
17 but he was covered with a blanket. So we approached him and  
18 he was holding his head like this. And blood was -- well, it  
19 was very profuse. (Indicating)

20               THE COURT: I think you might go directly to the  
21 point you want to rebut.

22               BY MR. KEARNEY:

23          Q     I apologize, Your Honor. After that time, did you

1 walk over to the car that was being driven by Mr. Hemming,  
2 the defendant in this case?

3 A Yes, I did.

4 Q I would ask you to relate to the jury what you  
5 said and what he said. ,

6 A I approached Mr. Hemming and he was sitting in  
7 his car. And I said, "Young man, are you hurt?"

8 And he said, "I will be all right. I have had a  
9 seizure, but I will be all right."

10 And I said, "The ambulance is on the way. We will  
11 get you to a doctor."

12 And he said, "No," he did not want to go. So I  
13 left him, went back to Officer Degroot and I said, "That  
14 young man should also see a doctor."

15 And he said, "By law, I cannot make him."

16 MR. KEARNEY: Okay, I have no further questions.

17 CROSS EXAMINATION

18 BY MR. HALUSKA:

19 Q You mentioned, ma'am, that you are a close friend  
20 of Mr. Hutchinson.

21 A Yes, I am.

22 Q Is it not also true that he lives in your apartment  
23 house?

A He does live with us, yes.

1 Q He lives in your specific apartment, does he not?

2 A In my husband's and mine, yes.

3 Q How long has that been?

4 A Ten years.

5 Q Could you describe for me the accident scene when  
6 you got to it?

7 A As I stated, his car, I saw it first, Mr. Hutchin-  
8 son's car.

9 Q And what did you see when you first saw him?

10 A The side of the car was demolished and we wondered  
11 if anybody could have gotten -- how he could have gotten out  
12 of it.

13 Q Did you see him at that time?

14 A No, not instantly.

15 Q How soon after you first saw the car did you see  
16 him?

17 A A moment or two later.

18 Q Was that before you got over to Michael Hemming?

19 A Oh, yes.

20 Q And how did the plaintiff look to you when you first  
21 saw him?

22 A He was badly hurt.

23 Q Was he covered with blood?



1           A     Oh, yes.

2           Q     And I assume this upset you very much, did it not?

3           A     Well, it alarmed me. It did alarm me, yes.

4           Q     Would it be fair to say you became frantic over  
5 his condition?

6           A     Oh, no, no, because he said, "I am all right. I  
7 will be all right. I hurt."

8           Q     And how long after that did you go over to  
9 Michael's car?

10          A     I would judge two or three minutes. My son stood  
11 there. I said, "You stay with Jack."

12                     And I walked over to Mr. Hemming's car.

13          Q     You told us what he said. How did he appear to  
14 you, physically?

15          A     He was, well, he was obviously shocked, too, I am  
16 sure. He had a terrible blow.

17          Q     Did he seem coherent to you?

18          A     Yes.

19          Q     Perfectly conscious at the time?

20          A     Enough to say he did not want to go to the doctor.  
21 He said, "I have had a seizure. I will be all right. I do  
22 not want to go to the doctor."

23          Q     Did he seem confused to you at the time you talked

1 to him?

2 A Well, I didn't -- there wasn't a lot of conver-  
3 sation.

4 Q Well, answer my question. Did he seem confused  
5 to you at the time?

6 A I would say he knew what he was doing, enough to  
7 know he did not want to go to the doctor. He knew that.

8 Q Did you hear the accident occur?

9 A No, I did not.

10 Q I presume that very recently you have talked to  
11 Mr. Kearney about your testimony, have you not?

12 A Yes.

13 Q And he asked you when you talked to him whether or  
14 not Michael Hemming said anything about having any seizures?

15 A No, he did not.

16 Q Did he tell you our defense in this case was  
17 sudden illness?

18 A No, he said something about the side of the road,  
19 which side of the road, and I couldn't answer that because  
20 I was not at the scene.

21 Q He said nothing about sudden illness, did he?

22 A No, he did not.

23 MR. HALUSKA: Thank you.

1 evidence applicable to the issues presented.

2           The Court instructs the jury that a verdict must  
3 not be based in whole or in part upon surmise, conjecture or  
4 sympathy for either of the parties, but must be based upon  
5 the evidence and the instructions of the Court.

6           The Court instructs the jury that the jury are the  
7 sole judges of the weight of the evidence and of the credibi-  
8 lity of the witness and the jury has the right to discard or  
9 accept the testimony or any part thereof of any witness which  
10 the jury regards proper to discard or accept, when consi-  
11 dered in connection with the whole evidence in the case, but  
12 the jury has no right arbitrarily to disregard the credible  
13 testimony of a witness.

14           And in ascertaining the preponderance of the  
15 evidence and the credibility of witnesses, the jury may take  
16 into consideration the demeanor of the witness on the witness  
17 stand, his apparent candor or fairness, his bias, if any, his  
18 intelligence, his interest or lack of it for knowing the truth  
19 and for having observed the facts to which he testifies, any  
20 prior inconsistent statements by the witness if proven by the  
21 evidence, and from all these and taking into consideration  
22 all the facts and circumstances of the case, the jury are to  
23 determine the credibility of the witnesses and the

1 preponderance of the evidence.

2           If a witness makes a statement at this trial  
3 inconsistent, contradictory, conflicting or materially  
4 different from that made on other occasions or at a former  
5 trial, it does not render his testimony nugatory, but it is  
6 the duty of the jury to determine from all the circumstances  
7 the truth or falsity of the statements made in this trial and  
8 not elsewhere.

9           The Court instructs the jury that doctors have  
10 testified in this case as experts and their testimony consists  
11 of conclusions drawn by them from facts which they have  
12 assumed to be true and which are expressed in hypothetical  
13 questions.

14           The weight of such testimony is dependent entirely  
15 upon the truth of the facts stated to them in the hypothetical  
16 questions, and the Court warns the jury that before accepting  
17 the testimony of any of such experts, it is the duty of the  
18 jury to examine carefully all the facts stated to the experts  
19 in the hypothetical questions to determine whether such facts  
20 have been proven to be true.

21           In considering the weight to be given to the  
22 testimony of expert witnesses, you may consider the ability  
23 and character of the witnesses, their actions upon the witness

1 stand, the weight and process of the reasoning by which they  
2 support their opinion, their possible bias in favor of the  
3 side of which they testify, their relative opportunities for  
4 study or observation of the matters about which they testify,  
5 and any other matters which serve to illuminate their state-  
6 ments.

7           The Court instructs the jury that negligence is  
8 the failure to do what a reasonable and prudent person would  
9 ordinarily have done under the circumstances of the situation,  
10 or doing what such a person would not have done under the  
11 circumstances.

12           The Court instructs the jury that the term,  
13 preponderance of the evidence, does not necessarily mean the  
14 greater number of witnesses, but means the greater weight  
15 of all the evidence. It is that evidence which is most  
16 convincing and satisfactory to the minds of the jury. The  
17 testimony of one witness in whom the jury has confidence may  
18 constitute a preponderance.

19           The Court instructs the jury that reasonable care  
20 or ordinary care is a relative term, and varies with the  
21 nature and character of the situation to which it is applied.  
22 The amount or degree of diligence and caution which is  
23 necessary to constitute reasonable or ordinary care depends

1 upon the circumstances and the particular surroundings of  
2 each specific case. The test is that degree of care which  
3 an ordinarily prudent person would exercise under the same  
4 or similar circumstances to avoid injury to another.

5 The Court instructs the jury that the proximate  
6 cause of an event is a cause which in natural and continuous  
7 sequence, unbroken by any efficient intervening cause,  
8 produces the event, and without which the event would not  
9 have occurred.

10 The Court instructs the jury that it is not neces-  
11 sary that material facts be proven by direct evidence. They  
12 may be proven by circumstantial evidence, that is, the jury  
13 may draw all reasonable and legitimate inferences and deduc-  
14 tions from the evidence adduced before them.

15 The Court instructs the jury that the defendant  
16 was on the wrong side of the road at the time of the collision.  
17 This fact raises a prima facie presumption that he was  
18 negligent. This presumption does not shift the burden resting  
19 upon the plaintiff to prove by a preponderance of the evidence  
20 that the defendant was negligent because the burden of proof  
21 in a negligence case is always on the plaintiff and this burden  
22 never shifts.

23 When and if a plaintiff makes out a prima facie

1 case, it is the defendant's duty only to go forward with  
2 the evidence. Such defendant is required only to produce  
3 evidence in a reasonable explanation that the presence of his  
4 vehicle on the wrong side of the road was due to something  
5 other than negligence on his part.

6 And if upon all the evidence you believe that the  
7 defendant was not negligent, then you shall find your verdict  
8 in favor of the defendant.

9 If you believe from the evidence that the defendant  
10 just prior to the collision was suddenly stricken with an  
11 unforeseen illness, which he had no reason to anticipate and  
12 which caused him to lose control of his automobile, and that  
13 he was not otherwise negligent, then you shall return your  
14 verdict in favor of the defendant.

15 The burden on the Plaintiff to prove his damages  
16 by a preponderance of the evidence or with reasonable  
17 certainty does not require that he prove with mathematical  
18 precision the exact sum of his damage, but only that he  
19 furnish evidence of sufficient facts and circumstances to  
20 permit an intelligent and probable estimate thereof.

21 Damages are not presumed nor may they be based upon  
22 speculation, but must be proven, and the burden is upon the  
23 plaintiff to prove by a preponderance of the evidence or with

1 And from these, as proven by the evidence, your  
2 verdict should be for such sum as will fully and fairly  
3 compensate the Plaintiff for such damages sustained by him  
4 as a result of the collision.

5 The attorneys, have indicated to me that they would  
6 want a total of about 45 minutes or so to argue the case for  
7 you from their respective viewpoints. All right, Mr. Kearney.

8 MR. KEARNEY: Thank you, Your Honor. We will try  
9 and keep it down to under 45 minutes. You will have all  
10 those instructions that the judge just read to you. I have  
11 never been on a jury, but I have heard those read like that  
12 before and I can imagine having all that read to you at one  
13 time is very difficult.

14 I am going to touch on some of it. They are all  
15 equally important and you should look at them all, but I am  
16 going to touch on some of them and point out why I think  
17 they are important and what is to be considered in this case.

18 First of all, the instruction that the judge read  
19 to you that said, "The Court has instructed the jury that the  
20 defendant was on the wrong side of the road at the time of  
21 the collision and this fact raises a prima facie presumption  
22 that he was negligent."

23 I don't know how to exactly explain that, but what



1 that means, in essence, is that if they didn't do anything  
2 else, at that point we had proved our case.

3 We have the burden of proving the case. Once we  
4 have done that, then they have to go forward with evidence  
5 to reasonably explain why he was on the wrong side of the road.  
6 That is what all that testimony is about him blacking out,  
7 he had epilepsy and all that testimony was for.

8 He was saying that the reason he was on the wrong  
9 side of the road was because he had an epileptic attack. I  
10 think that opened a dispute and you have got to reasonably  
11 believe Mr. Hemming before you can find for him.

12 I just don't think the evidence is there to do  
13 that and I will say it again -- first I want to talk about  
14 one other thing. He came across the road, struck Mr.  
15 Hutchinson and, as a result of that, Mr. Hutchinson was  
16 injured, no dispute about that.

17 The Court has given you one instruction and I  
18 want to talk about it a little bit, how to determine damages.  
19 I am a recent law school graduate and I had a professor who  
20 said he had seen people come in and do incredible things.  
21 I have to convince you what he is entitled to cover and some  
22 things are easy.

23 (Thereupon, there were had proceedings which

1                   were recorded and not transcribed by the  
2                   court reporter.)

3                   MR. KEARNEY: We had some doctors testify this  
4                   afternoon, Dr. Green and Dr. Mulvaney. And Dr. Mulvaney was,  
5                   I thought, really candid. He got up and he said, and he knows  
6                   a lot about this because he's the one that had the kids who  
7                   have epilepsy, he said that he -- he described the petit mal  
8                   seizure as that which his children have, a short intermittent  
9                   thing and you can continue right on.

10                  Then he described the grand mal. You fall down,  
11                  you don't breathe, you turn blue, you are frothing, you bite  
12                  your tongue, you urinate on yourself. Those are some of the  
13                  things he described in grand mal.

14                  I am not saying they were in all of them, but he  
15                  did say that those are the things that occur at these times.  
16                  I want you to ask yourselves where is the testimony that any  
17                  of that happened in this case?

18                  All of the evidence comes from Mr. Hemming. Mr.  
19                  Hemming tells us that he had a seizure on June 15th. There  
20                  were a bunch of people around that accident. None of them  
21                  testified to frothing mouth, falling down.

22                  Officer Degroot said he walked over to his car  
23                  without any problem. They testified he looked okay. Everybody

1 testified that he looked dazed. I submit to you if everybody  
2 on this jury can imagine what it would be like to hit another  
3 car and at the speed he must have been traveling to do the  
4 damage he did to Jack's car, remember he hit another car  
5 first and then he hit Jack's car and then he goes onto the  
6 side, anybody would be dazed from that.

7 That is not unusual. Now, in instruction four  
8 of the instruction which were given to you with regard to  
9 expert witnesses, this instruction is given because doctors  
10 are pretty persuasive people.

11 Dr. Green really had a demeanor about him. He  
12 was an impressive person. When I asked him to read this  
13 instruction, he said, "You can consider the ability and  
14 character of the witness and you can consider their action  
15 upon the witness stand."

16 I had that letter, which you have in evidence,  
17 which you will have a chance to read, that he wrote to the  
18 Division of Motor Vehicles, which says, "It is clearly a  
19 grand mal attack."

20 If you read the letter, it says, "All three are  
21 clearly grand mal attacks."

22 He described the grand mal attack and he knew that  
23 could have been what happened to Mr. Hemming on that day.

1 Then he kind of fumbled. It might have been something else.  
2 It might have been temporal lobe or some kind of other  
3 epilepsy.

4 That bites into his credibility, if he can't say  
5 one thing in a letter and then get up and tell you another  
6 thing.

7 There is one line I want to tell you about in  
8 this instruction. That is that when you are considering  
9 expert testimony, you can consider possible bias in favor of  
10 the side for which they testify.

11 That doctor was here to testify for Mr. Hemming  
12 and take that into consideration. And Dr. Mulvaney got up  
13 to testify that he was his doctor for 20 years, but he didn't  
14 testify that since 1973 he's seen him. That's the key.

15 Where are the doctors he saw? He can't remember  
16 the doctors he saw. That doesn't make sense. That is beyond  
17 me. I just don't understand that. You will recall that I  
18 asked Officer Degroot what did he see, did he see that he  
19 was walking normally, did he see whether he had a foaming  
20 mouth, had he wet his pants and did he have any jerking,  
21 shaking movements. No.

22 As a matter of fact, he said he was soon fully  
23 aware. Mr. Haluska said, "How long afterwards?" He said,

1 "Approximately an hour, he was fully aware."

2 I think he was fully aware because he was dazed  
3 and he was over his daze. Remember, he testified, Officer  
4 Degroot, that when there have been major accidents, often  
5 people are dazed. That is not unusual.

6 That would happen to any of us. Mr. Britton got  
7 up and testified and he couldn't recall everything that went  
8 on. He remembers being there, but he couldn't testify to  
9 what exactly he said, but he did say that he had seen an  
10 epileptic attack and he knew what that epileptic attack was.

11 It was back in high school, but the same kind of  
12 epilepsy attack that Dr. Green and Dr. Mulvaney talked about,  
13 that is a grand mal attack. You fall down, you shake, you  
14 froth at the mouth, you lose body function. It is just not  
15 what happened here.

16 There is no testimony that that is what happened  
17 here.

18 Now, I want to talk about Mr. Hemming and it is  
19 difficult to do this. I mean, he is sitting right here and  
20 he may now have epilepsy, I don't know. It is hard for me  
21 to say this, but I want you to consider what he knew on June  
22 15th, and some of the inconsistencies that are involved here.

23 Now, he said, first of all, he said that he had

1 been to a party the night before. They were showing slides.  
2 He testified that he drank some beer. He told me originally  
3 that he did that all before 8:00 o'clock, between 7:00 and  
4 8:00, when they had the meal.

5 Then he gets up there and he says he may have had  
6 another beer. I submit if he had two or three and then he  
7 may have had another one, he may have had several more and,  
8 in fact, he may have had many more.

9 That is for you to determine. Was he telling the  
10 truth or was he not telling the truth when he was sitting  
11 there?

12 MR. HALUSKA: I really don't want to interrupt,  
13 but if there is evidence in the record that there were more,  
14 he may say. But he cannot argue something that is clearly  
15 not in evidence.

16 THE COURT: I would sustain the objection. I  
17 think the jury would have to rely on the evidence introduced  
18 and not on speculation.

19 MR. KEARNEY: Okay. Mr. Hemming was given a ticket  
20 for this and he paid the fine. He forfeited collateral. Now  
21 he has a long explanation that he had epilepsy, but he didn't  
22 know it then, so he paid the fine.

23 He knew. He said that he talked to Jack Hutchinson

1 in the hospital two days later and that somebody told him he  
2 had an epileptic seizure.

3 He can't say that he didn't know there was an  
4 epileptic seizure. He did not, if he is telling the truth.  
5 Dr. Green got up on the stand. His own doctor said that all  
6 the information he got in front of him, all the information  
7 about Mr. Hemming he got from him.

8 What he says in his report is that he refused to  
9 go to the hospital. He gets up there and he said he didn't  
10 refuse to go to the hospital. That one is the one that  
11 really is the crux of this case.

12 I can't imagine anybody being in a traffic  
13 accident and then refusing to go to the hospital unless they  
14 knew they had epilepsy, because if he knew he had epilepsy,  
15 he knew once the seizure went away he would be okay.

16 And I submit to you that's the reason he refused  
17 to go to the hospital and that's the reason that this accident  
18 occurred. He knew he had epilepsy and he was out there  
19 driving, anyway.

20 There are some other things that don't make any  
21 sense and I want you to ask yourself about this because this  
22 goes to his credibility. He has testified that he had three  
23 seizures, June 15th, July 27th and July sometime after that,

1 I am not sure, three or four days after that.

2 He had three separate seizures. One he has at  
3 the Arlington Hospital. Is there anybody here to testify?  
4 Where are they? Did anybody see it? Nobody saw the first  
5 one, nobody saw the second one and nobody saw the third one.

6 And I can't think of a better way than that to  
7 prove you were having seizures, to have someone come in and  
8 say, "I saw him having a seizure."

9 There is no one here to say that. That is very,  
10 very unusual. I think finally that even Dr. Green and Dr.  
11 Mulvaney got down to the nub of it when they talked about  
12 whether he could make that left-hand turn, black out and  
13 drive a mile and a half.

14 If he had a grand mal attack, there is no way he  
15 could have driven that mile and a half. It just doesn't work  
16 that way. Now Dr. Green tried to change it and say maybe  
17 he had some other kind, temporal lobe epilepsy, in which  
18 case he might have been able to do that.

19 You can't believe him part way and then not believe  
20 him. That is a two-edged sword. Finally, he tried to  
21 exculpate himself, Mr. Hemming did, by saying he called Jack  
22 Hutchinson at the hospital three days after this accident.

23 He testifies that he knew he called up and he got



1 the number at home and called him in the hospital. And he  
2 said that he thought or that somebody told him he had an  
3 epileptic seizure.

4 Ladies and gentlemen, Jack Hutchinson was not in  
5 the hospital three days later. He simply wasn't there.  
6 That is another story he's making up in order to protect  
7 himself in this suit.

8 Ladies and gentlemen, he has the duty to go forward  
9 with evidence to reasonably explain what he did. It would  
10 be a reasonable explanation that he had an epileptic seizure,  
11 I grant that.

12 The problem is that this man is not credible. This  
13 man, I don't like to use the words, but he is not telling  
14 the truth and he hasn't told the truth. And there are just  
15 too many inconsistencies.

16 I think what happened was he went to the party,  
17 he drank beer, he got up and he went out and had an accident.  
18 And I don't know if he fell asleep, I don't know what  
19 happened.

20 But it is just too inconsistent to make what he  
21 says to be a reasonable statement. I think maybe that the  
22 slip of the tongue he made when he first started testifying  
23 with Mr. Haluska is true, that was that he woke up after the

1 accident.

2 Maybe he just fell asleep or, even worse than  
3 that, he knew because he had had previous seizures. Epilepsy  
4 is the kind of disease that has been stigmatized and he was  
5 afraid to have people know about that. And I am sorry about  
6 that.

7 MR. HALUSKA: Your Honor, again, I don't see that  
8 anywhere in the evidence. If he is going to argue it, it  
9 has to be in the evidence.

10 THE COURT: I think he can argue his recollection  
11 of the evidence. Go ahead.

12 MR. KEARNEY: I'm sorry about that. If Mr.  
13 Hemming has epilepsy, I am sorry about that and I wish he  
14 didn't, but the jury instructions that you will see say you  
15 can't find for either party based on sympathy.

16 And I am sorry that Mr. Hemming may have epilepsy,  
17 but he is negligent. He is responsible for the damages  
18 that happened to Jack Hutchinson. And I ask you to honor the  
19 oath that you took this morning and come back with a verdict  
20 in favor of my client for whatever you feel is the correct  
21 amount he deserves.

22 I want to thank you for your patience and I hope  
23 it's been a good experience.

1 MR. HALUSKA: Ladies and gentlemen, I am going  
2 to try to be short. This is my opportunity to deal with the  
3 facts that were presented to you today and all the testimony  
4 that you have heard.

5 I am going to, try to be fair with those facts,  
6 but I caution each and every one of you that I am an advocate.  
7 I am an attorney and I am for Michael Hemming. There is no  
8 question about that.

9 I will, however, try to deal fairly and honestly  
10 with the facts that have been presented to you here today,  
11 reminding you at the same time that you are the ultimate  
12 and really sole judges of the facts.

13 His Honor is the judge in this courtroom, but you  
14 are the judges of what you have heard here today. You must  
15 base your judgment, quite obviously, on the reasonable  
16 inferences that you might draw from the evidence that you  
17 have heard today and also the credibility or lack thereof  
18 of various witnesses and various propensities, et cetera, as  
19 Mr. Kearney has pointed out.

20 Again, the burden never shifts. I mentioned that  
21 in my opening argument or my opening statement to you, that  
22 it always remains on the plaintiff to prove each and every  
23 element of the case.

1           There are still two elements of the case. There  
2 is the issue of damages, there is the issue of liability.  
3 I'd like to touch very briefly on the issue of damages first.

4                       (Thereupon, there were had proceedings which  
5 were reported and not transcribed by the  
6 court reporter.)

7           MR. HALUSKA: Now, the next aspect is liability.  
8 And I believe this is really a liability case. Again, the  
9 burden is one the plaintiff to prove to you by a preponderance  
10 of the evidence that my client, Michael, was negligent.

11                   In our system of assigning blame, if you will,  
12 in litigation like this, is to assign it by means of fault  
13 and that is that somebody is negligent. They are at fault  
14 for the accident and they are, therefore, blameworthy.

15                   Now it is belaboring the obvious that in order to  
16 be at fault, in order to be responsible for an event, you  
17 must be conscious at the time it occurred. You must know it  
18 is going on so you can make a choice of being negligent or  
19 failing to act or you make a conscious act which is an  
20 improper act.

21                   Further, the law is that if you believe Michael  
22 Hemming, if you believe that this was his first seizure, we  
23 must show that prior to the collision, and certainly this

1 happened prior to the collision based on the evidence, he was  
2 suddenly stricken.

3 And there is no question he was suddenly stricken  
4 by an unforeseen illness, and that this illness caused him  
5 to have the accident.

6 It is our belief that there is no question of  
7 that sequence and that that burden or that requirement is met  
8 by us. Now, Mr. Kearney's challenge to you and challenge to  
9 us is the credibility of Michael Hemming. We fully,  
10 completely accept that challenge.

11 If he wants to hinge his case on Michael's relia-  
12 bility and his honesty, then we ask you to do exactly the  
13 same thing.

14 Now I can't, as an attorney, let's say that I know  
15 a certain man and I ask him a question, "Sir, when did you  
16 stop beating your wife," I have suggested something in that  
17 question.

18 I may know at the time I asked the question that  
19 the man has never laid a hand in anger on his wife, but if I  
20 ask it in the presence of other people, what might they think?  
21 They might think the man is beating his wife because I had  
22 asked him the question.

23 I would suggest to you that that is exactly what

1 the plaintiff's case is based on in this lawsuit when he asks  
2 you or suggests to you that this was not Michael's first  
3 epileptic seizure.

4 The case is based on innuendo and I am not going  
5 to chase down each and every innuendo, but I will tell you  
6 that he's got several for you to pick from. Is it possible  
7 that Michael fell asleep? That's one he's got.

8 Is it possible that he dropped a Coke can that  
9 he picked up at the 7-11 and lost control of the vehicle? Is  
10 it possible that he was drunk at the time and recovering from  
11 this and this is why he went across the line?

12 Or is it possible that he had a seizure before and  
13 he knew it and, therefore, was liable? There are four.  
14 Ladies and gentlemen, not one -- he hasn't proved a single  
15 one, but he's suggested four to you.

16 He has suggested again that the time of the seizure  
17 is important, that Michael did not manifest at the accident  
18 scene foaming at the mouth or incontinency or some other  
19 display of this.

20 But you have heard the testimony of Dr. Mulvaney  
21 and also Dr. Green that an epileptic seizure, even a grand  
22 mal seizure, as he's been diagnosed, takes place in a very  
23 short amount of time. And that, I suggest, is exactly what

1 happened here, that somewhere between that left turn and that  
2 accident scene, he had his seizure.

3 And he was basically recovered, at least from the  
4 convulsive aspects of it, by the time these people got to him.  
5 These people didn't get to him just like that. There was  
6 a time lapse between the time this accident occurred and the  
7 time he was first seen.

8 You have heard Officer Degroot. Officer Degroot  
9 was called by the plaintiff, at least initially, and then  
10 called back by me. The man obviously has the responsibility,  
11 among other things, that a policeman has to give tickets to  
12 other people that he finds driving under the influence of  
13 alchohol.

14 He stood next to Michael, maybe this close. He  
15 says six inches to a foot. He observed his eyes, he could  
16 smell his breath. And there was not one iota of evidence  
17 of alchohol consumption here whatsoever.

18 Again, what is it based on? It is innuendo. It  
19 is a suggestion by Mr. Kearney that perhaps this particular  
20 explanation is why he should win this case.

21 He also has suggested, ladies and gentlemen, stood  
22 here before you and he said, "Michael may have epilepsy."  
23 You know, that just may be the lowest point in his entire

1 trial.

2           You have heard Dr. Green testify to all manner  
3 of tests that were done to determine what conditions this man  
4 suffers from. He had his blood checked. He had his urine  
5 checked. He had his skull X-rayed to determine that there was  
6 no trauma to the head.

7           He had CAT scans. Not only that, he had other  
8 tests for epilepsy. He had two electroencephalograms which  
9 showed his brain waves to be abnormal and consistent with the  
10 convulsive disorder.

11           Does Mr. Kearney contend that he may have epilepsy?  
12 If he does, I hope he gets back up and says that to you and  
13 he rebuts when he comes to speak to you again.

14           Now, compare all of that. I'd like to mention one  
15 more thing parenthetically: Michael paid his fine. I don't  
16 know if you have done this for a parking ticket or some other  
17 form of traffic ticket, but notice the sequence of time, the  
18 sequence of time that Mr. Kearney is so free to over alter  
19 and play with in his argument to you.

20           That is this: that it happened before that second  
21 seizure, the pots and pans incident, and it happened before  
22 the diagnosis. Now the plaintiff has introduced a letter from  
23 Dr. Green to the Division of Motor Vehicles. What do you



1 think that letter was an explanation of?

2 Is it perhaps an attempt to get his ticket expunged?  
3 Why else would Dr. Green write the Division of Motor Vehicles?  
4 Look at the evidence he introduced in order to make a  
5 decision.

6 Now I believe that the testimony you have heard  
7 from us and the way we tried to present the case is honest  
8 and straightforward. I specifically mean Michael Hemming  
9 when I say those words, but I also mean Dr. Mulvaney, who  
10 treated the patient for 20 years, Dr. Green, who made his  
11 diagnosis and all his tests.

12 Again, even Officer Degroot, who was called at  
13 least initially by the plaintiff in this case, I mean him, too.  
14 Jim Kearney knows the law. He knows the law of sudden illness.  
15 He knows he must somehow convince you or somehow struggle  
16 to get you to believe that Michael did not have his first  
17 seizure on June 15, 1977.

18 Now he's going to get up before you in a few  
19 minutes because, as this sequence goes, the plaintiff gets  
20 to argue first. I get to make my argument to you and he  
21 gets to come up last.

22 When he does, ask him to explain to you why, number  
23 one, you should believe that Mr. Hutchinson's hip and shoulder

1 pain is chronic and excruciating at times and comes as a  
2 result of this accident, as he testified here on the stand,  
3 in his deposition.

4 When he is through doing that, you ask him to explain  
5 to you exactly why, on hard evidence, you should not believe  
6 Michael Hemming's account of what happened to him on June 15,  
7 1977.

8 We ask that you consider all of the evidence and  
9 when you retire to the jury room to deliberate the case,  
10 you return your verdict in favor of Michael Hemming.

11 MR. KEARNEY: I don't get to ask me any questions,  
12 but I will answer the questions that he posed because that's  
13 the reason he posed them. He testified that, and he wanted  
14 me to say how it happened, you got a picture of the car. You  
15 look at that car and see if you can figure it out, why the  
16 left shoulder and the hip might be injured.

17 Now Jack testified he thought he told Dr. O'Brien.  
18 Dr. O'Brien says that there is no notes in there. Jack says  
19 that he thought he told him, but he was concerned about his  
20 head.

21 That is the major injury we are talking about in  
22 here. But if there is any question about the shoulder and  
23 hip, you take a look at the car and see if you can determine

1 why his shoulder and hip might be bruised from that.

2 I forget what the other question was you were  
3 supposed to ask me, but I am not struggling. All I am  
4 asking you to do is look at the evidence, listen to the  
5 testimony and you decide whether Michael Hemming was  
6 telling the truth or whether the inconsistencies of his  
7 testimony and the inconsistencies of what he did and the  
8 testimony that came out doesn't make sense.

9 THE COURT: Mr. Kearney, if I could interrupt you,  
10 I am sorry to interrupt you. We will take a recess for a  
11 few minutes. If the jury will go to the jury room, I am  
12 awfully sorry to interrupt you.

13 (Thereupon, a short recess was taken, after  
14 which the following proceedings were had:)

15 (Thereupon, the jury returned to the courtroom,  
16 after which the following proceedings were had:)

17 THE COURT: I apologize for interrupting at a  
18 rather crucial time. You go ahead.

19 MR. KEARNEY: Thank you, Your Honor. Mr. Haluska  
20 has kind of laid down a challenge for me to pick one, what  
21 do I think really happened. And he talked a lot about burden  
22 of proof and that kind of thing.

23 We proved our case when we put our case on. We

1 put on the fact that he came across the road and hit. Now  
2 it is his duty to reasonably explain why he came across the  
3 road.

4 And as I said before, it depends on his credibility.  
5 Mr. Haluska had just advanced a very interesting theory and  
6 that is that by the time everybody saw him after the accident,  
7 he had recovered from the convulsive activity.

8 You don't recover from foaming mouth and bitten  
9 lips and bitten tongue and apparently all the things that  
10 happen to an epileptic. That is not the real issue.

11 The real issue is if he had convulsive activity  
12 during that mile and a half, this accident would never have  
13 occurred because he couldn't have driven the car any further.  
14 That just doesn't hold any water.

15 The fact was he was driving down the road and, as  
16 he testified, as Mrs. Crandall testified, he refused to go  
17 to the hospital. The reason he refused to go to the hospital,  
18 the only rational reason he would refuse was if he was an  
19 epileptic and knew he would recover.

20 Mr. Haluska has kind of put the attack on me.  
21 That is a common tactic used in trial because there is nobody  
22 else to attack but me. Jack Hutchinson didn't do anything  
23 wrong so if he can kind of make it look like, you know, I am

1 having a problem, then perhaps you will find for his client.

2 But it doesn't make any difference what we say.

3 What I say and Jim Haluska says doesn't make any difference  
4 at all. You have heard all the evidence. You have heard  
5 what I think about it. You have heard what Jim Haluska  
6 thinks about it.

7 It is in your hands now. And when you come back  
8 with a verdict, that is what we will accept. Thank you very  
9 much for your patience.

10 THE COURT: Ladies and gentlemen, when you first  
11 get to the jury room, if you would select one of your number  
12 to act as foreman or forewoman of the jury, we have prepared  
13 forms for you to fill out.

14 If you find in favor of the plaintiff, go one  
15 step further and decide his damages. Utilize that form,  
16 sign it and return it.

17 On the other hand, if you find in favor of the  
18 defendant, a form has been prepared for that contingency.  
19 The foreman would sign that and return that. It is almost  
20 5:00 o'clock. Suppose we do this: I will check with you  
21 about 5:45, see whether you are close to reaching a verdict.

22 If it looks like maybe not, we will let you go home.

23 We will check with you from 5:30 to 5:45 and see how you are