

Evidence--Expert Testimony--Quantity and Quality Required to Establish Casual Relation

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did not give any indication as to whether the decision will be applied to non-tax cases where the decision of a lower state court is involved.²¹ Conceivably the principles enunciated in *Bosch* could be applied to non-tax federal cases as well as tax cases.

Patrick David Deem

**Evidence—Expert Testimony—Quantity and Quality
Required to Establish Causal Relation**

P's decedent was injured in an automobile accident when he was thrown violently against his seat belt placing sudden, severe pressure on his abdominal and pelvic organs, and allegedly resulting in the aggravation and acceleration of a pre-existing cancer of the left testicle. The cancer subsequently spread through decedent's body, and he died some nine months later. There was a jury verdict for *P* in her action charging *D* with negligence. *Held*, affirmed. Expert medical testimony, standing alone, stating there is a *possibility* of a casual relationship between a given accident and subsequent death is not sufficient. However, when such expert testimony is combined with uncontradicted non-expert evidence as to the decedent's general good health prior to the accident, including evidence that he had had no prior difficulties with his testicles, prostate, urinary tract, or kidneys, the evidence is sufficient to establish a causal relationship. *National Dairy Products Corporation v. Durham*, 154 S.E.2d 752 (Ga. App. 1967).

Courts vary considerably on what quantity and quality of expert testimony are necessary to establish a causal relationship. Although most courts accept probability as sufficient, some jurisdictions take the more lenient Georgia view and permit evidence of possible connection along with other evidence to satisfy the requirement.

The dissent in the principal case stressed the need of *probability*. Contending that the causal connection upheld by the majority was too speculative and conjectural to support a recovery, the dissent reasoned that use of the words "if," "possibility" and "might" by

²¹ See *Torres v. Gardner*, 270 F. Supp. 1 (D.P.R. 1967) where in vacating the final decision of the Secretary of Health, Education and Welfare, the court held that the determination by the Superior Court of Puerto Rico that children were the sole and universal heirs of the wage earner was *res judicata* on the administrative agency.

the expert witnesses gave the jury no factual basis on which to establish a causal relationship between the injury and the death. The dissent concluded that until the medical profession can elevate its knowledge of cancer to the realm of *probability*, recovery in such cases must be denied.¹ Many courts require this probability but no one standard of what constitutes probability has ever been established. Thus the courts have held the following to satisfy the requirements of probability: a doctor's uncontradicted opinion that he *thought* plaintiff's accident hastened her death by lowering her resistance to the degree that an eight-year-old inoperable malignancy spread rapidly through her body;² a doctor's testimony that plaintiff's waitress work "probably" aggravated a pre-existing condition, even though the same result might "possibly" have occurred at a later date, had she never been so employed;³ an expert's use of the word possible when it is reasonably apparent he intends probability;⁴ an expert's statement that in his opinion the result did arise from the alleged cause, anything less, including "probably did," not being sufficient;⁵ an expert's opinion that the result in question may "probably follow," or is "likely, liable or apt to follow" the injury.⁶

The proposition is generally accepted that expert testimony, standing alone, stating there is a possibility of causal relationship is not sufficient to establish such a causal relationship.⁷ Some courts however take the position that such evidence of possibility when coupled with other evidence is sufficient to take the question of causation to the jury. Generally, the other evidence considered acceptable is a convincing factual sequence of events. Thus appellate courts have upheld plaintiff verdicts based on expert testimony of a possibility *and* proof of the following: evidence of an infant's prior good health, his parents' close watch over his activities, and his freedom from any other accident;⁸ evidence of good

¹ National Dairy Products Corp. v. Durham, 154 S.E.2d 752 (Ga. App. 1967) (dissenting opinion).

² Abel v. Yoken, 104 N.H. 119, 179 A.2d 456, 458 (1962).

³ Walter v. Hagianis, 97 N.H. 314, 316-317, 87 A.2d 154, 156-157 (1952).

⁴ Miller v. Nat'l Cabinet Co., 8 N.Y.2d 277, 282, 168 N.E.2d 811, 813, 204 N.Y.S.2d 129, 133 (1960).

⁵ Menarde v. Philadelphia Transp. Co., 376 Pa. 497, 501, 103 A.2d 681, 684 (1954).

⁶ Wigton Motor Co. v. Phillips, 163 Okla. 160, 164, 21 P.2d 751, 754 (1933).

⁷ 3 AM. JUR. *Proof of Facts* § 127 (1959).

⁸ Hamlin v. N.H. Bragg & Sons, 129 Me. 165, 167, 151 A. 197, 199 (1933).

health before the accident and continual doctor's care from then until death;⁹ evidence of a pre-existing cancer, an accidental violent blow to the body exactly where the cancer was located, and immediate symptoms of disability;¹⁰ evidence of good health, an injury, and subsequent death from cancer which caused one court to explain that the lay mind can reach no other conclusion than the accident either caused or aggravated cancer;¹¹ evidence of the plaintiff having curvature of the spine after the accident, but not before;¹² evidence of facts seeming to show that an accident caused the condition.¹³ Many of these *possibility-plus* cases considered it a strong point in plaintiff's favor if no causation other than the one he alleged was offered in evidence.¹⁴

As may be seen by the varied conclusions on what constitutes probability or satisfies *possibility-plus*, the courts have had great difficulty in defining their requirements. Perhaps the ultimate in this type of difficulty may be found in the expression of one court that proof of "possible" cause and effect, combined with a factual sequence of events, may be equivalent to "probable cause."¹⁵ Recognizing the difficulty in following either of these approaches, the New York court has made definite attempts to clarify and limit the quantity and quality of proof necessary to establish a causal relation. One opinion stated that in order to recover for the aggravation of a pre-existing cancer (as in the principal case), there must be a direct blow to the site of the cancer or a spreading of the disease into other areas of the body.¹⁶ A later opinion, after review-

⁹ *Smith v. Primrose Tapestry Co.*, 285 Pa. 145, 148, 131 A. 703, 704 (1926).

¹⁰ *Lucas v. Haas Coal Co.*, 118 Pa. Super. 182, 186, 179 A. 876, 878 (1935).

¹¹ *Winchester Milling Corp. v. Sencindiver*, 148 Va. 388, 395, 138 S.E. 479, 481 (1927).

¹² *Oklahoma Natural Gas Co. v. Kelly*, 194 Okla. 646, 648, 153 P.2d 1010, 1012 (1944).

¹³ *Bethlehem-Sparrows Point Shipyard Inc. v. Scherpenisse*, 187 Md. 375, 380, 50 A.2d 256, 259 (1946).

¹⁴ *Hamlin v. N.H. Bragg & Sons*, 129 Me. 165, 167, 151 A. 197, 199 (1933); *Oklahoma Natural Gas Co. v. Kelly*, 194 Okla. 646, 648, 153 P.2d 1010, 1012 (1944). In refusing to follow this type of reasoning the New York court argued that such a policy takes the burden from the plaintiff of proving causation, and places it on the other party to show that some other cause was responsible. As the court concluded, "The law does not intend that the less that is known about a disease the greater shall be the opportunity of recovery. . . ." *Miller v. Nat'l Cabinet Co.*, 8 N.Y.2d 277, 289, 168 N.E.2d 811, 818, 204 N.Y.S.2d 129, 138 (1960).

¹⁵ *Charlton Bros. Transp. Co. v. Garrettsen*, 188 Md. 85, 94, 51 A.2d 642, 646 (1947).

¹⁶ *Sikora v. Apex Beverage Corp.*, 282 App. Div. 193, 122 N.Y.S.2d 64, 67 (1953).

ing many decisions, concluded that recovery in these cases is only allowed when the trauma occurred at the exact location of the cancer and the symptoms of aggravation were immediate.¹⁷

Although the early West Virginia cases held that the probability requirement must be met, it seems now that this state follows the *possibility-plus* doctrine. In *Foose v. Hawley Corporation*,¹⁸ the West Virginia court, considering the problem of an alleged causal relation between an elevator accident and plaintiff's subsequent hernia, upheld a verdict for plaintiff. Plaintiff produced two medical witnesses. The first, who had personally examined him, stated that "it probably in all probability was the exciting cause." The second witness, in response to a hypothetical question, said, "I think it is quite possible . . . I think it is very probably the cause."¹⁹ Holding these opinions to be competent evidence, the court concluded that they served to establish "probable cause."²⁰ Comparing the expert testimony quoted in *Foose* to that offered in *Hayzlett v. Westvaco Chlorine Products Corporation*,²¹ where a physician testified that inhalation of gas "might" cause a heart attack, the court reasoned that "might" indicates only possibility, while the testimony in *Foose* related a probability. The court added that the testimony was admissible in evidence, but was not alone sufficient to establish a causal relationship²² which could be submitted to the jury, and therefore the directed verdict for the defendant was reinstated.²³ In *Rutherford v. Huntington Coca-Cola Bottling Co.*,²⁴ an instruction to the jury to disregard testimony of an expert witness as "too speculative" was made when the expert said, "I think it is possible, yes."²⁵ The court stated that such testimony was admissible, but, standing alone, was not sufficient to establish a causal relation.²⁶

¹⁷ *Miller v. Nat'l Cabinet Co.*, 8 N.Y.2d 277, 285, 168 N.E.2d 811, 815, 204 N.Y.S.2d 129, 135 (1960). A third decision, while admittedly not resolving the medical debate on whether trauma can *cause* cancer, held that two postulates must be met before a connection can be established: the cancer must form exactly at the site of the injury, and enough time must have elapsed for it to have reached a diagnostic size. Without setting an exact time limit, the court felt two months failed this test. *Dennison v. Wing*, 279 App. Div. 494, 110 N.Y.S.2d 811, 813 (1952).

¹⁸ 120 W. Va. 334, 198 S.E. 138 (1938).

¹⁹ *Id.* at 336, 198 S.E. at 139.

²⁰ *Id.* at 337, 198 S.E. at 139.

²¹ 125 W. Va. 611, 25 S.E.2d 759 (1943).

²² *Id.* at 617, 25 S.E.2d at 762 (dictum).

²³ *Id.* at 619, 25 S.E.2d at 762.

²⁴ 142 W. Va. 681, 97 S.E.2d 803 (1957).

²⁵ *Id.* at 683, 97 S.E.2d at 805.

²⁶ *Id.* at 692, 97 S.E.2d at 809 (dictum).

From the dicta in these earlier opinions, the court seemed to make the logical extension to *possibility-plus* beginning with *State v. Evans*.²⁷ There the *Foose* case was cited for the proposition that an expert could be asked whether a result was actually caused or "might" be caused by a given injury and that such a form of examination was not speculative.²⁸ Judge Haymond in his dissent called it error to let the jury pass on this evidence,²⁹ but the majority refused to set aside the verdict.

Perhaps the most important West Virginia case on this question is the very recent decision of *Pygman v. Helton*.³⁰ In attempting to establish a causal connection between his injury and a subsequent hernia, the plaintiff relied on three sources of evidence: his own testimony of freedom from pain prior to the accident, the testimony of the doctor who examined him before the injury and found no hernia, and the testimony of the surgeon who operated on him. The surgeon testified, "[I]t was possible. It could cause it. It is possible."³¹ On cross-examination, he admitted that one might get this type of hernia merely by bending over, and that many hernias result in the absence of accidents. He further stated that he could not tell with either "absolute" or even "reasonable" certainty that the accident caused the hernia. For this reason the trial court excluded the surgeon's testimony.³² In reversing this decision, the supreme court noted that reasonable certainty was required to establish future pain and suffering, but not for establishing proximate cause.³³ Although the expert here said "possible" and the expert in *Foose* said "probable" the court stated that "evidence relating to the cause of the hernia in the case at bar was as competent and sufficient to show the causal connection between the collision and the hernia as was the evidence offered to establish

²⁷ 136 W. Va. 1, 66 S.E.2d 545 (1951).

²⁸ *Id.* at 6, 66 S.E.2d at 548. This is exactly what *Foose* stated; however, the court there specifically said that the witnesses were testifying as to the *probable* effects of the accident, and the experts even used the word "probable" in their testimony. In contrast in *Evans*, not only was the hypothetical question based on a hotly disputed, unprovable fact, but the expert's answer was that it would be "unusual" to cause that result but it "could have done so." Thus the court has relied on a statement in a case standing for probability as authority for its upholding a jury verdict based on evidence of possibility.

²⁹ *Id.* at 23, 66 S.E.2d at 557.

³⁰ 148 W. Va. 281, 134 S.E.2d 717 (1964).

³¹ *Id.* at 285, 134 S.E.2d at 720.

³² *Id.*

³³ *Id.* at 286, 134 S.E.2d at 721.

the cause of a hernia" in *Foose*.³⁴ Finally the court said, "[T]he medical testimony of the surgeon does not stand alone but is supported by other evidence relating to the condition before the collision and the prior absence of a hernia."³⁵ Thus the West Virginia Supreme Court held that expert testimony stating there was a possibility of causation supported by other evidence could be sufficient to establish a causal relationship.

In considering the quantity and quality of expert medical testimony necessary to establish a causal relation, the courts have taken various paths. Probability is accepted by all and required by some, although there are different standards by which it is constituted. Testimony of mere possibility alone is not sufficient, but, when coupled with other evidence, it is sometimes enough to take the question of causation to the jury. This other evidence requirement is generally satisfied by a factual sequence of events in support of the possibility testimony of the expert. Earlier the West Virginia court seems to have required probability as a basis for establishing the causal relationship. The more recent decisions of *State v. Evans* and *Pygman v. Helton* seem to dictate that West Virginia is following the line of cases which permit causal relationship to be established by the expert's *possibility* testimony when supported by other evidence.

Linda L. Hupp

Insurance—Recovery of Excess Judgment from Insurance Company

X obtained a judgment against *P*, plaintiff, in excess of *P*'s liability policy limits. *P* sued *D*, his insurer, to recover the excess alleging that *D* had exercised "bad faith" in failing to settle the claim within the policy limits. The trial court allowed recovery of the excess. *Held*, reversed. In holding that the evidence did not support the verdict for *P*, the court stated that, as a matter of law, *D* was guilty of neither negligence nor bad faith in not settling with the injured party. *Speicher v. State Farm Mutual Automobile Insurance Company*, 151 S.E.2d 684 (W. Va. 1966).

³⁴ *Id.* at 287, 134 S.E.2d at 721.

³⁵ *Id.* at 288, 134 S.E.2d at 722. Here the court cited with approval *Hamlin v. N.H. Bragg & Sons*, 129 Me. 165, 151 A. 197 (1933), listing the factual sequence of that case, and thus endorsing the *possibility-plus* doctrine.