Mississippi College Law Review

Volume 6
Issue 1 *Vol. 6 Iss. 1*

Article 5

1986

Evidence - Causation Testimony Standards in Personal Injury and Medical Malpractice Cases - Substance over Form: The Mississippi Supreme Court Overcomes Semantic Problems in Causation Testimony - Pittman v. Hodges

Michael Parker

EVIDENCE—CAUSATION TESTIMONY STANDARDS IN PERSONAL INJURY AND MEDICAL MALPRACTICE CASES—Substance Over Form: The Mississippi Supreme Court Overcomes Semantic Problems in Causation Testimony—*Pittman v. Hodges*, 462 So. 2d 330 (Miss. 1984).

FACTS OF THE CASE

On December 4, 1980, Joseph R. Hodges[1] brought a malpractice suit against Dr. Harrison V. Pittman, a Yazoo City dentist. Hodges' claim arose out of allegedly negligent treatment he had earlier received from Dr. Pittman. The treatment involved the removal of two "wisdom" teeth from Hodges' lower jaw. Shortly after the operation, Hodges complained of a numbness in his chin and lower lip which continued for several months. Hodges filed suit against Dr. Pittman claiming that the numbness was permanent in nature and due to the negligent treatment he had received from Dr. Pittman. After hearing testimony from both sides, the jury returned a verdict in favor of Hodges and assessed damages at $20,000.

On appeal, Dr. Pittman claimed that there was no competent evidence to submit to the jury that his negligence, if any, was the proximate cause of Hodges' injury.[2] The Mississippi Supreme Court rejected this argument and affirmed the jury verdict. The court held that the testimony of Hodges' expert witness was expressed in terms of reasonable medical probability even though the expert had stated that, in his opinion, there were three possible causes of Hodges' nerve damage.[3]

BACKGROUND

The requirement that expert testimony regarding causation be expressed in terms of probabilities in order to get the case before

---

1. Before the case came to trial, Hodges and his wife were divorced. Later, Hodges committed suicide. The case was revived in the name of Lindsey Hodges, his minor daughter. Tragically, Lindsey Hodges also died and the suit was again revived, this time in the name of Linda Hodges, the mother and sole heir of Lindsey Hodges. *See* Brief of Appellant at 1, Pittman v. Hodges, 462 So. 2d 330 (Miss. 1984).

2. Pittman raised two other issues as well. First, he claimed that the action was barred by the two-year statute of limitations under MISS. CODE ANN. § 15-1-36 (Supp. 1984). 462 So. 2d at 331-33. The court ruled that the statute began to run when Hodges would have discovered, by the exercise of reasonable diligence, that his numbness was present and that the action was brought within two years of this reasonable time. *Id.* at 333. Second, Pittman claimed that the jury was not properly instructed regarding damages. *Id.* at 335-36. The court dismissed this contention as well since Hodges failed to object to the instruction at trial. *Id.* at 336.

3. Dr. E.G. Mainous, plaintiff's expert witness, testified as follows:

> There could be three possible causes of numbness. One, the – the nerve could have been damaged during the surgical procedure. Two, the nerve could be damaged from exerting extreme pressure on a material that does not change its intensity when it's in the presence of a solution. And three, the presence of infection secondary to a foreign body that doesn't resorb. Record at 143, *Pittman*.

Pittman, 462 So. 2d at 333.

the jury is not a special standard that is confined to medical cases.[4] It is a basic legal principle that the plaintiff must prove causation in negligence cases.[5] A plaintiff must submit evidence that provides a reasonable basis for a jury determination that it was more probable than not that the defendant's negligence was the cause of the resulting harm or injury.[6] A mere possibility of causation is not enough. When the issue is left to surmise or conjecture, a jury question has not been presented.[7]

As courts have often noted, it is usually difficult to determine whether a sufficient showing has been made to warrant submission of the causation issue to the jury.[8] Mississippi does, however, have a vast number of cases which address this issue.[9] Over fifty years ago, the Mississippi Supreme Court stated in *Berryhill v. Nichols*[10] that medical testimony to the effect that an injury could possibly have resulted from an alleged cause is not substantial evidence and thus, will not support a verdict.[11] In *Scott County Co-op v. Brown*,[12] the plaintiff's expert witness stated that the plaintiff's mental condition could have been caused by a previous accident. The court ruled that this testimony only showed a mere possibility of causation.[13] Similarly, in *Kramer Service, Inc. v. Wilkins*,[14] a personal injury action, the plaintiff contended that skin cancer had resulted from an injury that he had received two years earlier. One physician testified that there was one chance in one hundred that the cancer had resulted from the earlier injury, while another physician testified that no connection existed between the cancer and the injury. Recognizing that the combined testimony of the two physicians suggested that there was only a remote possibility that the cancer had resulted from the earlier injury, the court ruled that the jury should not have been allowed to consider the issue.[15]

Mutual Ben. Health and Accident Ass'n v. Johnson[16] also illustrates what constitutes insufficient medical testimony in Missis-

4. *See, e.g.*, John Morrell & Company v. Shultz, 208 So. 2d 906, 907 (Miss. 1968); Illinois Central Railroad Company v. Cathey, 70 Miss. 332, 338, 12 So. 253, 254 (1892).

5. *See* W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 41 at 269 (5th ed. 1984); 57 AM. JUR. 2D *Negligence* § 128 (1971).

6. W. PROSSER, § 41 at 269.

7. *Id.*

8. *See, e.g.*, Lenger v. Physician's General Hospital, 455 S.W.2d 703, 706 (Tex. 1970).

9. *See infra* notes 10-18 and accompanying text.

10. 171 Miss. 769, 158 So. 470 (1935).

11. *Id.* at 773-74, 158 So. at 471.

12. 187 So. 2d 321 (Miss. 1966).

13. *Id.* at 326.

14. 184 Miss. 483, 186 So. 625 (1939).

15. *Id.* at 496, 186 So. at 627.

16. 186 So. 297 (Miss. 1939).

sippi. In *Johnson*, a suit on an accident insurance policy, the insured had gone out to feed the hogs when he slipped on the icy ground. As he fell, one of the buckets he was carrying struck him on the cheek near the nose. Several days later the insured died of cavernous sinus thrombosis. The beneficiary, in an effort to recover under the policy, tried to establish a causal relation between the blow to the cheek and the infection in the nose that had led to the insured's death. However, the physicians who testified were able to state only that the blow could possibly have caused the infection. The court ruled that this testimony was insufficient to establish a jury question as it left the jury to conjecture as to the cause of the infection.[17] Numerous other Mississippi cases have repeated the principle that mere possibilities will not sustain a verdict.[18]

The required standard of sufficiency for expert testimony was made clear in *Garrett v. Wade*[19] when the court stated that medical testimony is not probative unless it is expressed in terms of probabilities and not possibilities.[20] Under the language of *Garrett*, a medical expert has to testify that the injury was probably caused by the defendant's conduct. *Garrett* does not require an expert to testify with absolute certainty. The court observed in *City of Jackson v. Locklar* [21] that whenever facts are in dispute or the evidence is such that fairminded men may draw different inferences, a measure of speculation and conjecture will be allowed.[22]

Mississippi's application of the probability standard in cases involving expert medical testimony is supported by a substantial majority of American jurisdictions.[23] Even Alabama, a state which recognizes the scintilla rule of evidence,[24] follows the probability

17. *Id.* at 298.

18. *See, e.g.*, Garrett v. Wade, 259 So. 2d 476 (Miss. 1972); John Morrell and Company v. Shultz, 208 So. 2d 906 (Miss. 1968); Teche Lines, Inc. v. Bounds, 182 Miss. 638, 179 So. 747 (1938).

19. 259 So. 2d 476 (Miss. 1972).

20. *Id.* at 479.

21. 431 So. 2d 475 (Miss. 1983).

22. *Id.* at 478; *see also* Jesco, Inc. v. Shannon, 451 So. 2d 694, 700 (Miss. 1984); Gulf Insurance Co. v. Provine, 321 So. 2d 311, 314 (Miss. 1975).

23. See, e.g., Pappa v. Bonner, 268 Ala. 185, 105 So. 2d 87 (1958); Seaton v. Rosenberg, 573 S.W.2d 333 (Ky. 1978); Walker v. Marcev, 427 So. 2d 678 (La. App. 1983); Johnesee v. Stop & Shop Companies, 174 N.J. Super. Ct. App. Div. 426, 416 A.2d 956 (1980); Matott v. Ward, 48 N.Y.2d 455, 399 N.E.2d 532, 423 N.Y.S.2d 645 (1979); Lenger v. Physician's General Hospital, 455 S.W.2d 703 (Tex. 1970); Spruill v. Commonwealth, 221 Va. 475, 271 S.E.2d 419 (1980); Hovermale v. Berkeley Springs Moose Lodge, 165 W. Va. 689, 271 S.E.2d 335 (1980); *see also* 7 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1976 (1979 & Supp. 1984).

24. Black defines a "scintilla of evidence" as follows:

> A spark of evidence. A metaphorical expression to describe a very insignificant or trifling item or particle of evidence; used in the statement of the common-law rule that if there is any evidence at all in a case, even a mere *scintilla*, tending to support a material issue, the case cannot be taken from the jury, but must be left to their decision.

BLACK'S LAW DICTIONARY 1207 (5th ed. 1979).

standard in malpractice cases.[25] It is difficult, however, to see how the probability standard and the scintilla rule can coexist.[26]

Although the vast majority of states do follow the probability standard,[27] some courts apply a more exacting rule. Pennsylvania courts have held that an expert must testify that the plaintiff's condition did result from the cause alleged.[28] According to the Pennsylvania Supreme Court, medical testimony that an injury or condition was probably caused by the defendant is not competent evidence to prove causation.[29]

An early Louisiana case, *Olsen v. Texas Co.*[30] also held that evidence as to probabilities is insufficient to establish liability. The Louisiana court ruled that the plaintiff must make his case certain, not just probable.[31] The Louisiana court has since relaxed this standard, stating that proof is sufficient when the fact or causation is more probable than not.[32]

At the opposite end of the spectrum are the courts which have upheld the use of expert testimony stated in terms of possibilities to establish causation if the testimony is buttressed by other evidence or circumstances which show that a causal relationship exists. In *Esmonde v. Lima Locomotive Works*,[33] an Ohio case, the medical expert testified that the plaintiff could have been injured in a certain manner. While the court recognized that this testimony is by itself insufficient to support a verdict, other evi-

---

25. Waddell v. Jordan, 293 Ala. 256, 302 So. 2d 74 (1974); Pappa v. Bonner, 268 Ala. 185, 105 So. 2d 87 (1958).

26. The scintilla rule allows the jury to consider the issue even if only a trifle or small particle of evidence has been presented. *See* BLACK'S LAW DICTIONARY, *supra* note 24, at 1207. The probability standard calls for more substantial evidence. Alabama courts do not seem concerned with this conceptual problem. *See, e.g.*, Pappa v. Bonner, 268 Ala. 185, 188, 105 So. 2d 87, 90 (1958):

> There must be some evidence to the effect that such negligence probably caused the injury . . . . However, this does not eliminate the effect of Alabama's "scintilla" rule. If there is a scintilla of evidence that the negligence complained of probably caused the injury[,] there is presented a question of fact for the jury's determination.

The Mississippi Supreme Court, like this writer, has had trouble with the coexistence of these seemingly mutually exclusive concepts. *See, e.g.*, Mutual Ben. Health & Accident Ass'n v. Johnson, 186 So. 297, 298 (Miss. 1939).

27. *See supra* note 23.

28. McMahon v. Young, 442 Pa. 484, 276 A.2d 534 (1971); Menarde v. Philadelphia Transp. Co., 376 Pa. 497, 103 A.2d 681 (1954).

29. *McMahon*, 442 Pa. at 486, 276 A.2d at 535. The Pennsylvania court offered the following rationale for its strict standard:

> Perhaps in the world of medicine nothing is absolutely certain. Nevertheless, doctors must make decisions in their own profession every day based on their own expert opinions. Physicians must understand that it is the intent of our law that if the plaintiff's medical expert cannot form an opinion with sufficient certainty so as to make a medical judgment, there is nothing on the record with which a jury can make a decision with sufficient certainty so as to make a legal judgment.

Id.

30. 161 So. 219 (La. App. 1935).

31. *Id.* at 220.

32. *See, e.g.*, Jordan v. Travelers Ins. Co., 257 La. 995, 1008, 245 So. 2d 151, 155 (1971).

33. 51 Ohio App. 454, 1 N.E.2d 633 (1935).

dence, taken together with the medical testimony, warranted submission of the issue to the jury.[34]

In addition to these preceding standards, some courts require only that an expert testify with a "reasonable degree of medical certainty"; however, this standard has been construed in a variety of ways. Pennsylvania courts use this standard and construe it to mean something close to virtual certainty.[35] Mississippi uses this standard only as a means of determining whether the probability standard has been met.[36] Wisconsin considers "medical certainty" and "medical probability" to be synonymous.[37]

As the preceding discussion has illustrated, all courts agree that the plaintiff must prove causation.[38] It is the standard to be used to determine whether causation has been adequately proven that sends the courts in different directions. Even though most jurisdictions follow the probability standard,[39] they often disagree upon what constitutes a probability or what test is to be used to determine whether the probability standard has been met.[40]

Pittman v. Hodges

The plaintiff's expert witness in *Pittman* testified that there were three possible causes of the nerve damage.[41] The defendant, in reaction to this testimony, asked for a peremptory instruction contending that this testimony amounted to a mere possibility of causation and, therefore, was incompetent to prove proximate cause.[42] The circuit court denied this request.[43]

Citing *Garrett v. Wade*[44] as authority, Dr. Pittman claimed on appeal that the lower court erred in denying the requested instruction.[45] Upon affirming the circuit court's ruling on this issue, the court stated that the meaning of an expert's answer that there could be three possible causes of the numbness should be considered in light of his testimony on each of these causes. The court looked

34. For more cases illustrating this view, see generally Annot., 135 A.L.R. 516, 532 (1941).

35. *See, e.g.*, Hamil v. Bashline, 481 Pa. 256, 392 A.2d 1280 (1978).

36. *See, e.g.*, Pittman v. Hodges, 462 So. 2d 330, 335 (Miss. 1984) ("Taken as a whole, Dr. Mainous's testimony . . . expressed an opinion based upon a reasonable degree of medical certainty in terms of medical probability that the numbness of Hodges was caused by the actions of Dr. Pittman . . . .").

37. *See* Pucci v. Rausch, 51 Wis. 2d 513, 187 N.W.2d 138 (1971).

38. *See supra* notes 4-7 and accompanying text.

39. *See supra* note 23.

40. *See generally*, Markus, *Semantics of Traumatic Causation*, 12 CLEV.-MAR. L. REV. 233 (1963); Annot. 135 A.L.R. 516 (1941).

41. *See supra* note 3.

42. Record at 261, *Pittman*.

43. *Id.*

44. 259 So. 2d 476 (Miss. 1972).

45. Brief for Appellant at 10-11, Pittman v. Hodges, 462 So. 2d 330 (Miss. 1984).

to see whether the expert considered the numbness a possible result of one of the three causes or a probable result of Dr. Pittman's treatment as a whole with three alternative explanations for the numbness experienced by Hodges.[46]

After discussing the medical testimony regarding each possible cause at some length,[47] the court opted for the latter view. The court concluded that the expert had expressed an opinion in terms of medical probability that Dr. Pittman had breached the standard of care and that this breach was the proximate cause of the plaintiff's injury.[48] The court apparently adopted the position that the three alternative possibilities were only explanations for the numbness.

ANALYSIS

Since it is clear that the Mississippi court has rejected testimony by medical experts phrased in terms of possibilities,[49] the question arises as to what specific wording an expert witness must use in order to meet the probability standard. Are there "magic words" an expert must say in order for his testimony to pass evidentiary muster? Or does the court weigh all of the expert's testimony and make an independent determination as to whether the testimony amounts to a probability or a mere possibility?

In *Segar v. Garan, Inc.*,[50] a workmen's compensation case, the Mississippi court confronted these questions and stated that "[t]he distinction between probability and possibility should not follow too slavishly the witnesses' choice of words," [51] and that

> [t]he compensation process is not a game of 'say the magic word,' in which the rights of injured workers should depend on whether a witness happens to choose a form of words prescribed by a court or legislature. What counts is the real substance of what the witness intended to convey . . . .[52]

Although the court did not rely on *Segar* in *Pittman v. Hodges*, it was this principle of "substance over form" that confronted the court.

Hodges' expert witness testified as to possible causes; he never stated that any particular one of the alternative causes probably caused the numbness.[53] However, he did say that each of these alleged causes constituted a deviation from the standard of care.[54]

---

46. *Pittman*, 462 So. 2d at 334.
47. *Id.* at 334-35.
48. *Id.* at 335.
49. *See supra* notes 10-18 and accompanying text.
50. 388 So. 2d 165 (Miss. 1980).
51. *Id.* 3 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION, § 80.32 at 15-435 (1976).
52. *Id.* 3 A. LARSON, § 80.32(d) at 15-460-61 (1976).
53. *See supra* note 3.
54. Record at 141-54, *Pittman*.

The court examined all of this testimony and ruled that taken as a whole it amounted to an opinion based upon reasonable medical probabilities.[55] Thus, just as in *Segar*, the substance of the expert's testimony prevailed over the form of the words he used. Had the court focused exclusively on the expert's use of the phrase "possible causes" a different result would have been reached.[56]

Examining the substance of an expert's testimony rather than the particular words he uses is a sound approach because it keeps a negligent defendant from escaping liability due to the fact that he has breached the standard of care in so many ways that an expert is unable to pinpoint with certainty which breach actually caused the injury.[57] Use of the "substance" standard helps to close semantic loopholes.

As words often mean different things to different people,[58] examining testimony by its substance keeps the court from having to decide what an expert means when he uses words or phrases that could mean either "possible" or "probable". For example, if a physician testifies that it is his opinion that the plaintiff's condition "very possibly" was caused by the defendant's act, would this mean that he thinks the defendant possibly caused or probably caused the injury? It all turns on how one interprets the phrase "very possibly." To some it may mean "possible" and to others it may mean "probable."[59]

Another semantic problem occurs because physicians and at-

---

55. *Pittman*, 462 So. 2d at 335.

56. *See supra* notes 10-18 and accompanying text.

57. That the Mississippi court recognized this is evidenced by the following quote from *Pittman*, 462 So. 2d at 335: "There is no merit to the slightly ironic argument that more than one breach of the standard of care casts doubt upon Dr. Pittman's liability and entitles him to an exemption from the scrutiny of the jury."

58. As Justice Holmes observed in Towne v. Eisner, 245 U.S. 418, 425 (1918): "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Chief Justice Marshall made a similar observation in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 414 (1819): "Such is the character of human language, that no word conveys to the mind, in all situations, one single definitive idea . . . ."

Justice Frankfurter approached the problem from a practical standpoint:

> [E]xactness in the use of words is the basis of all serious thinking. You will get nowhere without it. Words are clumsy tools, and it is very easy to cut one's fingers with them, and they need the closest attention in handling; but they are the only tools we have, and imagination itself cannot work without them. You must master the use of them, or you will wander forever guessing at the mercy of mere impulse and unrecognized assumptions and arbitrary associations, carried away with every wind of doctrine.

F. FRANKFURTER, OF LAW AND MEN: PAPERS AND ADDRESSES OF FELIX FRANKFURTER 70-71 (1956) (quoting Allen, *Essay on Jeremy Bentham*, in THE SOCIAL AND POLITICAL IDEAS OF THE REVOLUTIONARY ERA, 181, 99 (Hearnshaw ed. 1931)).

59. *E.g.*, In Interest of Watson, 5 Kan. App. 2d 277, 281, 615 P.2d 801, 805 (1980), the court observed: "Here, in spite of the fact that the word 'possibility' was used, the fact that the witness stated that the possibility was 'very, very strong' indicates that she was thinking and speaking in terms of probability."

For examples of other "borderline" phrases that have posed problems see Wray v. Schwitzer Co., 615 S.W.2d 646 (Mo. App. 1981) (expert used terms "think," "guess," "rough opinion," and "impression."); Dickinson v. Mailliard, 175 N.W.2d 588 (Iowa 1970) (expert's opinion was couched in such terms as "I think" and "I believe").

torneys have differing interpretations of the word "cause."[60] To an attorney, it is a word of special legal significance as it is an essential element of proof in a negligence action.[61] To a physician, causation refers to developments inside a patient's body which produce medical problems.[62] The doctor's definition of "cause" is much more demanding and restrictive than the lawyer's definition.[63]

Thus, when a physician is asked whether a particular event probably caused the plaintiff's medical problem, he may be hesitant to speak with certainty because medicine is an inexact science in which anything is possible.[64] The physician may be reluctant to answer with the word "probable," yet it is that very word which the law requires.[65] When a court looks at the substance of medical testimony it alleviates much of this problem.[66]

Since the Mississippi court looked to the substance over the form of the testimony in *Pittman*, the question arises as to whether the court will use this same approach in the future. While the substantive approach seems to be the better reasoned one, it is inconsistent with earlier Mississippi cases. In *Garrett* the court was very concerned with the precise wording, not the substantive testimony, of the expert witness.[67] The same was true in *Scott County Co-op*, where although the court said that it had based its decision upon a "careful reading of all of [the doctor's] testimony,"[68] the court was again caught up in the exact words used by the expert.[69] *Pittman* should mark the end of the strict, term-oriented view.

Mississippi has not been alone in its preoccupation with precise wording; other courts have also required precise use of specific words. In *Pucci v. Rausch*,[70] the Wisconsin court outlined which

60. M. HOUTS, 1 LAWYER'S GUIDE TO MEDICAL PROOF (MB) § 102.15 (June, 1984).

61. *See supra* note 5 and accompanying text; *see also* HOUTS, *supra* note 59, at § 102.15(1).

62. HOUTS, *supra* note 60, at § 102.15(1).

63. *Id.* at § 102.15(2)-(3) ("The doctor thinks of proving medical causation in terms of *identifying a specific causative agent by trial and error, testing and retesting, experiment after experiment*, until there can be no practical doubt but that Item A produces Disease B . . . .").

64. *McMahon*, 442 Pa. at 486, 276 A.2d at 535. ("Perhaps in the world of medicine nothing is absolutely certain."); *see also* Pucci v. Rausch, 51 Wis. 2d 513, 187 N.W.2d 138 (1971) ("Dr. Peterson countered that 'Everything in medicine is speculative; there is nothing that is not speculative.' "). *Id.* at 518, 187 N.W.2d at 141.

65. This reluctance of physicians to testify with certainty is compounded by the fact that "the more distinguished a medical witness is, the more tentative and qualified are his statements on the witness stand." 3 A. LARSON, § 80.32 at 15-435-36 (1976).

66. In light of the semantic problems that occur when the expert is forced to use certain terms like "probable," the substantive approach provides needed flexibility.

67. *See supra* note 19 and accompanying text.

68. 187 So. 2d at 326.

69. *Id.* (The court was quick to point out that the expert had used the phrases "very likely" and "could have been" when he testified on the causation issue.).

70. 51 Wis. 2d 513, 187 N.W.2d 138 (1971.)

specific words and phrases constituted a possibility and which ones constituted a probability. The court actually stated which words would and would not indicate the required degree of medical certainty.[71] This approach seems to put the law back into the stage of formalism which Cardozo proclaimed had already passed.[72] Another writer criticized the "magic word" approach when he stated, "The use or absence of particular key words should be no basis, standing alone, to authorize submission of the case to the jury or to refuse its consideration by the jury."[73] According to this same writer, courts use the "magic word" approach because, "[i]t is far simpler for a reviewing court to look for the magical word or phrase, in deciding whether a case was presented for the jury, than to make a careful analysis of all the testimony, including the medical testimony."[74]

Again, the use of expert medical testimony is not a word game that is won only when the expert says the magic word. Mississippi has come to realize this as evidenced by the *Pittman* and *Segar* decisions. Several other jurisdictions have also begun to put less emphasis on the exact words used by a medical expert and more emphasis on the substance of his testimony.[75] These decisions,[76] along with *Pittman* and *Segar*, have indeed kept the word from becoming "the sovereign talisman where every slip is fatal."[77]

Use of the "substance" standard of examining expert medical testimony as a whole does not displace the probability standard; it merely changes the way that a court determines whether the probability standard has been met.[78] The emphasis moves from formalism to substance.

---

71. The Wisconsin court stated:

> "Might" or "could" is not sufficient and does not reach the certitude required. The "might or could rule" is another form of possibility like "perhaps." However, an opinion expressed in terms of "I feel" or "I believe" has been held to be sufficient. The words "liable," "likely," and "probable" have also been accepted as words connoting reasonable probability as opposed to a possibility (citations omitted).

Id. at 519, 187 N.W.2d at 142.

72. Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 90-91, 118 N.E. 214, 214 (1917).

73. Markus, *supra* note 40, at 245.

74. *Id.* at 242.

75. *See* Norland v Washington General Hospital, 461 F.2d 694, 697 (8th Cir. 1972), where the court stated:

> The use of the terms 'probable' and 'possible' as a basis for testing of qualification or lack of qualification in respect to a medical opinion has frequently converted this aspect of trial into a mere semantic ritual or hassle." The court has "come to recognize that the competency of a doctor's testimony cannot soundly be permitted to turn on a mechanical rule of law as to which of the terms he has employed.

Id; see also Miller v. National Cabinet Co., 8 N.Y.2d 277, 282, 168 N.E.2d 811, 813, 204 N.Y.S.2d 129, 132-33 (1960) ("The probative force of an [expert] opinion is not to be defeated by semantics . . . ."); Insurance Co. of North America v. Meyers, 411 S.W.2d 710, 713 (Tex. 1966) ("Reasonable probability, in turn, is determinable by consideration of the substance of the testimony of the expert witness and does not turn on semantics or on the use by the witness of any particular phrase or term.").

76. *See Norland*, 461 F.2d 694 (8th Cir. 1972); *Miller*, 8 N.Y.2d 277, 168 N.E.2d 811, 204 N.Y.S.2d 129 (1960); *Meyers*, 411 S.W.2d 710 (Tex. 1966).

77. *Wood*, 222 N.Y. at 90-91, 118 N.E. at 214.

78. *See, e.g., Meyer*, 411 S.W.2d at 713; Markus, supra note 40, at 245. Of course the probability standard must be retained or else juries would resort to conjecture.

CONCLUSION

It has long been settled that expert testimony must be expressed in terms of probabilities, not possibilities, in order to be probative. In *Pittman v. Hodges* the expert had testified only as to possible causes. Instead of summarily dismissing the testimony for failure to use the right term, the Mississippi court recognized that the substance of the expert testimony amounted to a probability even though it was expressed in terms of possibilities and upheld the testimony as sufficient evidence of causation. In so ruling the court moved beyond formalism by keeping a plaintiff's right of recovery from depending on the precise words used by an expert witness.

Michael Parker