

# Chicago Daily Law Bulletin

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## A degree of medical uncertainty

How many of you have been in this situation? It is either the evidence deposition or direct testimony of a plaintiff's treating orthopedic surgeon.

On direct examination, the doctor testifies that it is more probably true than not that your client is going to have continuous and permanent pain due to the fractures he sustained in the trucking accident. As a plaintiff's lawyer, I am pleased with this testimony.

However, on cross-examination, the defense attorney takes a crack at turning the tables a bit. After some poking and prodding, the orthopedic surgeon gives in and basically aborts his prior testimony as to the lasting nature of the plaintiff's pain and suffering and acknowledges it is not medically possible to objectively state that the plaintiff's injury would present lifelong pain. In fact, the doctor now testifies, "I can't tell you what is going to happen tomorrow, let alone 30 years from now." You sit there momentarily stunned, and ask yourself, "Is this a death knell or merely a flesh wound?"

The buzz prompted by my June 2010 article, entitled "Rethinking to a Reasonable Degree of Medical Certainty," compels me to discuss the topic, to a varying degree, once again. I received numerous e-mails and phone calls requesting me to repost the article, lend out briefs and to otherwise discuss the relevant case law.

In Illinois, a plaintiff claiming personal injury must prove that it is more probably true than not true that the defendant's negligence was a proximate cause of his injuries. Treating physicians and expert witnesses may testify about causation as well as the nature, extent and duration of an injury. While they may not base their opinions on conjecture or speculation, these skilled witnesses may discuss what "might or could" have caused an injury and whether those injuries are permanent, despite any objection that the testimony is inconclusive. *Mesick v. Johnson*, 141 Ill. App. 3d 195 (1st Dist. 1986). In fact, an expert's testimony of "probable" causation does not render the testimony inadmissible; it may merely present a jury question. *Marston v. Walgreen Co.*, 389 Ill. App. 3d 337, 347 (1st Dist. 2009).



### Balancing Life and the Law

By [Jeffrey J. Kroll](#)

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I have seen my share of passionate motions in limine, arguing that inconsistencies in the health-care provider's testimony during cross-examination rendered the direct examination and accompanying opinions inadmissible. That just is not always the case. In fact, any inconsistencies created on cross-examination will often go to the weight the jury should give the testimony and not its admissibility. Illinois courts stand firm on this issue. See, e.g., *Mesick*; see also, *Marston*.

In *Mesick*, the plaintiff's treating physician specifically opined that, based on a reasonable degree of medical certainty, "the accident might or could have been the cause of the nasal injuries." Yet, on cross-examination, the same witness testified that it was "not medically possible to objectively determine whether a specific event or trauma caused a deviated septum." The trial court struck the wavering physician's testimony.

The appellate court reversed the lower court and permitted the doctor's testimony, acknowledging that although a physician may not base his opinion on speculation or conjecture, it is well settled that a physician may testify to what "might or could" have caused an injury. Ah, the infamous "might or could" language. Death knell? No. It is often up to the trier of fact to determine what facts and inferences to draw from "might or could" testimony.

It is also acceptable for a medical witness to testify that there is more than one possible cause of an alleged injury, without specifically identifying the exact cause. For example, in *Marston*, supra, a Walgreens pharmacist erroneously filled the plaintiff's prescription, causing the plaintiff to suffer grave injuries and, ultimately, a premature death. Although Walgreens admitted negligence, it argued that the plaintiff's ingestion of the wrong medication did not cause his kidney failure, stroke or his eventual death. 389 Ill. App. 3d at 346.

The plaintiff offered medical experts who testified to three possible mechanisms by which Walgreens negligence could have led to the plaintiff's death. While Walgreens argued that offering these alternative theories was improper and speculative, the trial court disagreed. The court maintained: When presented with more than one possible cause of an injury, it is for the jury to determine whether the evidence presented is sufficient to establish causation. 389 Ill. App. 3d at 346-7.

One of the reasons why this area of the law could be confusing to practicing attorneys is due to that previously discussed ambiguous, indefinite phrase "a reasonable degree of medical certainty." When a qualified witness testifies to "a reasonable degree of certainty" within a certain field, it has come to mean that others in the same field would agree with the witness' opinion and that it is more likely than not that the plaintiff's injuries resulted from the accident. Jeffrey J. Kroll, "Rethinking to a Reasonable Degree of Medical Certainty," June, 2010.

"More likely than not" is not and has never meant 100 percent certainty. As a result,

there is almost certainly a degree of uncertainty in nearly every medical opinion. Some degree of uncertainty is OK. Comfort in dealing with a certain degree of uncertainties is often the source of "the disconnect" between the legal and medical communities. (Which is more comfortable with uncertainties? I'm not certain.)

How can plaintiff attorneys avoid a scenario where a skilled defense attorney goads their medical witnesses to backtrack when testifying about certainty during cross-examination? It is as simple as adequately preparing health-care providers before any deposition.

Good defense attorneys are practiced at leading doctors to doubt a long-term prognosis. Clever attorneys will plant the seed in the testifying doctor's mind: Isn't it too early to really know if the plaintiff's condition will be permanent? Isn't possible that the plaintiff's condition will improve?

Testifying health-care providers must be reminded that their opinions must only rise to the level of "more likely than not" — not anything more — and certainly not to a level of absolute certainty. Of course, if a doctor can confidently testify to absolute certainty, by all means, the doctor should.

When making arguments, the defense often attempts to skew the burden of proof with the standard of certitude of medical testimony. The burden of proof in personal-injury cases is more probably true than not true. Personal-injury plaintiffs are not, and never have been, required to prove their cases to any degree beyond that standard. There is also, and never has been, a standard requiring the absolute certitude of medical testimony.

After all, we all know that there are absolutely no certainties in life. We should not force the medical community to conform their testimony and opinions to an unnatural level of certainty when testifying in court. Let the jury decide what they do and don't believe. They are the fact-finders and with proper direction will analyze the facts and determine what inferences to draw from the testimony presented. It's their job. As a trial lawyer, make it your task to present the evidence, close your case and then relax a bit while the jury deliberates.

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