



ST. MARY'S  
UNIVERSITY

St. Mary's Law Journal

---

Volume 1 | Number 2

Article 1

---

12-1-1969

## Expert Medical Testimony in Texas.

Zollie Steakley

Follow this and additional works at: <https://commons.stmarytx.edu/thestmaryslawjournal>



Part of the [Torts Commons](#)

---

### Recommended Citation

Zollie Steakley, *Expert Medical Testimony in Texas.*, 1 ST. MARY'S L.J. (1969).

Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol1/iss2/1>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact [egoode@stmarytx.edu](mailto:egoode@stmarytx.edu), [sfowler@stmarytx.edu](mailto:sfowler@stmarytx.edu).

# ST. MARY'S LAW JOURNAL

VOLUME 1

Winter 1969

NUMBER 2

## EXPERT MEDICAL TESTIMONY IN TEXAS

ZOLLIE STEAKLEY\*

The determination of questions of fact is ordinarily a function of the jury in our legal system. The problems are less difficult in the factual realm where common knowledge and lay judgment are adequate. Beyond this realm of lay knowledge there are certain difficult areas in which the jury may be assisted by, or must have, expert testimony in determining fact questions. The field of medicine is such an area.<sup>1</sup> This article will review some of the decisions of the Supreme Court of Texas which have considered this problem. Neither criticism nor prophecy is undertaken.

Expert testimony is probably employed more often in solving legal problems concerning the human body than in any other area.<sup>2</sup> Given the esoteric nature of medical questions arising in many fields of litigation, it is not surprising that the courts have allowed the admission of expert medical testimony for the benefit of jurors. Opinions of medical experts may be admitted to show physical condition, the cause, the effect and the probable future consequences of an injury or disease, and the cause of death.<sup>3</sup> Expert medical testimony is usually admitted to assist the jury in reaching a correct decision and is not binding upon the trier of fact.<sup>4</sup> But it has been said that if the trier of fact totally lacks the knowledge and experience to deal with a subject, the expert testimony becomes conclusive. In the words of the supreme court:

The opinion testimony of experts, although persuasive, under

\* Associate Justice of the Supreme Court of Texas, 1961—. The author acknowledges with appreciation the valuable assistance of William Honey, Briefing Attorney for the Supreme Court, 1968-69.

<sup>1</sup> See 2 McCORMICK & RAY, TEXAS LAW OF EVIDENCE § 1427, at 273 n.42 (2d ed. 1956).

<sup>2</sup> See *Id.* § 1427, at 268.

<sup>3</sup> See *Zurich Gen. Accident & Liab. Ins. Co. v. Kerr*, 54 S.W.2d 349 (Tex. Civ. App. — Amarillo 1932, writ ref'd); 2 McCORMICK & RAY, TEXAS LAW OF EVIDENCE § 1427, at 268-69 (2d ed. 1956).

<sup>4</sup> See *Hood v. Texas Indemn. Ins. Co.*, 146 Tex. 522, 524, 209 S.W.2d 345, 346 (1948).

most circumstances is not conclusive. It is peculiarly within the province of the jury to weigh opinion evidence, taking into consideration the intelligence, learning, and experience of the witness and the degree of attention which he gave the matter. The judgments and inferences of experts or skilled witnesses, even when uncontroverted, are not necessarily conclusive on the jury or the trier of facts, unless the subject is one for experts or skilled witnesses alone where the jury or the court cannot properly be assumed to have, or be able to form, correct opinions of their own based upon the evidence as a whole and aided by their own experience and knowledge of the subject of inquiry.<sup>5</sup>

That the jury should rely on the medical expert when it has no other rational basis for deciding factual issues is obviously sound. Thus the courts have had no choice but to require expert testimony in cases presenting factual questions shrouded by the mysteries of medical science. Were it otherwise, the jury would be allowed to decide fact questions upon the basis of surmise and conjecture rather than upon the basis of medical expertise.<sup>6</sup> So it is that the judiciary is confronted with the problem of defining the areas where expert testimony is required and, having done so, of then determining the standards this testimony must meet.

#### FUTURE CONSEQUENCES OF PRESENT INJURIES

The Texas Supreme Court developed at an early date the requirement that the evidence demonstrate the future consequences of an injury in terms of reasonable probability. The rule was stated in *Gulf, C. & S. F. Ry. Co. v. Harriett*,<sup>7</sup> a case involving personal injuries sustained by a railroad employee in a train collision. In ruling upon the correctness of a charge imposing upon the plaintiff the burden of demonstrating that the future consequences of a present injury would be reasonably *certain* to occur, the court wrote:

So much of the instruction as lays down the proposition that, in order to recover for future consequences they must be "reasonably certain" to ensue, is incorrect. Certainty means the absence of doubt, and the proposition means that the jury should be satisfied

<sup>5</sup> *Coxson v. Atlanta Life Ins. Co.*, 142 Tex. 544, 548-49, 179 S.W.2d 943, 945 (1944). See also *Broussard v. Moon*, 431 S.W.2d 534 (Tex. Sup. 1968).

<sup>6</sup> Under our law it is just as pernicious to submit a case to a jury and permit the jury to speculate with the rights of citizens when no question for the jury is involved, as to deny to a citizen his trial by jury when he has the right. *J. C. Penney Co., Inc. v. Robison*, 193 N.E. 401, 404 (Ohio 1934).

<sup>7</sup> 80 Tex. 73, 15 S.W. 556 (1891).

of their occurrence beyond a reasonable doubt. We think the evidence should show that there is a reasonable probability of the occurrence of future ill effects of the injury, and that it need show no more in order to justify the jury in considering future consequences in estimating the damages.<sup>8</sup>

This rule was reaffirmed in another early supreme court case, *Galveston H. & S. A. Ry. Co. v. Powers*.<sup>9</sup> The plaintiff in *Powers* was a railroad employee seeking to recover damages from the railroad company for injuries suffered by him in a fall from a bridge. The question facing the court was whether a medical expert could testify about the possibility that epilepsy would result from the injury. After quoting from *Harriett* the court reasoned:

Neither expert witnesses nor the jurors may be turned loose in the domain of conjecture as to what may by possibility ensue from a given statement of facts. The witness must be confined to those which are reasonably probable, and the verdict must be based upon evidence that shows with reasonable probability that the injury will produce a given effect.<sup>10</sup>

A more recent case clarified the nature of expert testimony required for jury consideration of the future consequences of an injury. In *Port Terminal Railroad Association v. Ross*,<sup>11</sup> a personal injury suit under the Federal Employers' Liability Act, the supreme court was called upon to decide whether there was any evidence of the future course of the plaintiff's neurosis which had resulted from his physical injury. The court concluded that some evidence existed to support a jury finding that the plaintiff would not recover from his mental illness, and gave this explanation:

There are doubtless many imponderables which may affect the future course of a mental illness of this character, and it may be impossible to predict its duration with reasonable certainty. The evidence in this case clearly does not meet the requirements of the reasonable certainty rule which prevails in some jurisdictions, but such rule is not recognized in Texas.<sup>12</sup>

#### CAUSATION

One of the most perplexing problems confronting the Texas courts is that of determining the necessity for, and the adequacy of, expert

<sup>8</sup> *Id.* at 82-83, 15 S.W. at 558-59.

<sup>9</sup> 101 Tex. 161, 105 S.W. 491 (1907).

<sup>10</sup> *Id.* at 164-65, 105 S.W. at 493.

<sup>11</sup> 155 Tex. 447, 289 S.W.2d 220 (1956).

<sup>12</sup> *Id.* at 460, 289 S.W.2d at 228.

medical testimony on questions of causation. The variety of factual situations in which expert medical testimony may be required increases the burden upon the courts and renders impossible the decision of these causation questions by a precise formula. Further compounding the difficulties of the courts is the well-known reluctance of competent physicians, trained as they are in scientific thought, to state in clear and positive terms that certain factors caused a certain condition or disease. Recognition must also be given to the divergence of legal and medical approaches to causation. The physician trained in the scientific approach seeks the precise source of disease, giving little attention to contributing factors. The lawyer weighs factors contributing to the creation of a condition in an effort to determine legal responsibility and liability for that condition. Given these different approaches, it is not surprising that problems result when medical expertise is required for the solution of questions of legal responsibility.<sup>13</sup>

In an effort to shed some light on the recent development of the law in this field, analysis and comparison of four Texas Supreme Court decisions will be attempted in the following pages. The first of these decisions is a workmen's compensation case, *Insurance Company of North America v. Myers*.<sup>14</sup> The plaintiffs in *Myers* sought death benefits on the theory that the deceased sustained a traumatic injury aggravating a pre-existing malignant brain tumor, and that the aggravation was a producing cause of her death. Mrs. Myers had suffered a neck injury in the course of her employment when she momentarily grabbed a 140 pound bundle of clothes that unexpectedly fell toward her. Her medical history prior to the occurrence of the injury established the existence of a tumor. Subsequent to the injury, surgery was performed to remove the tumor, but Mrs. Myers' condition steadily deteriorated. She died from the malignancy within a year after the time of the injury. The plaintiffs sought to establish that violent movement in the head and neck area had injured Mrs. Myers and aggravated the pre-existing condition. The expert testimony of four physicians was presented on the trial of the case. Three of the experts testified that her cervical sprain injury would not, in reasonable medical probability, excite or aggravate the malignant brain tumor that caused her death. The substance of the testimony of the fourth expert witness was that the injury *could have* aggravated the tumor and become an existing or concurring

---

<sup>13</sup> See B. Small, *Gaffing at a Thing Called Cause: Medico-Legal Conflicts in the Concept of Causation*, 31 TEXAS L. REV. 630 (1953).

<sup>14</sup> 411 S.W.2d 710 (Tex. Sup. 1966).

cause of her death. In deciding the question of whether there was any evidence for submission to the jury, the court ruled that expert testimony would be required to establish that an injury had activated a pre-existing tumor and accelerated the deadly effects of a malignancy.<sup>15</sup> The court also stated the type of expert testimony required for submission to the jury:

Causal connection in such a fact situation must rest in reasonable probabilities; otherwise the inference that such actually did occur can be no more than speculation and conjecture. . . . 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 term or phrase.<sup>16</sup>

The holding of the court was that the *could have* testimony of one of the medical witnesses was not of sufficient probative force to support the inference of fact that the injury was a concurring, contributing or producing cause of her death from cancer.<sup>17</sup> It was said that the state

<sup>15</sup> *Id.* at 713.

<sup>16</sup> *Id.*

<sup>17</sup> The settled rule in most jurisdictions seems to be that medical testimony as to the possibility of a causal relationship between an event and death or impaired physical or mental condition is insufficient to establish such relation. It has been held in some jurisdictions, however, that expert possibility testimony and nonexpert evidence supporting causal relationship may, in certain situations, provide a basis for a jury finding on causation. See Annot., 135 A.L.R. 516 (1941). The following cases illustrate the handling of the problem of the sufficiency of expert testimony in other jurisdictions: ARIZONA—Medical testimony as to mere possibility of causal connection is not sufficient, but medical evidence of possibility of causal relationship together with other evidence or circumstances indicating such relationship is sufficient. See *Breidler v. Industrial Comm.*, 383 P.2d 177, 179-80 (Ariz. 1963); *Ideal Food Products Co. v. Rupe*, 261 P.2d 992, 994 (Ariz. 1953). CALIFORNIA—Possibility testimony is enough if the trier of fact could reasonably find the expert believed there probably was a causal relationship. See *Travelers Ins. Co. v. Industrial Accident Comm.*, 203 P.2d 747, 748 (Cal. 1949). COLORADO—Expert testimony of a possibility of causal relationship is insufficient. See *O'Connor v. Boulder Colorado Sanitarium Ass'n*, 111 P.2d 633, 634-35 (Colo. 1941). CONNECTICUT—Possibility testimony is not sufficient. See *Boland v. Vanderbilt*, 102 A.2d 362, 365 (Conn. 1953); *Green v. Stone*, 176 A. 123, 125 (Conn. 1934). DELAWARE—Medical testimony of possibility alone is insufficient, but possibility testimony with other evidence may be enough. See *General Motors Corp. v. Freeman*, 164 A.2d 686, 688-89 (Del. 1960). HAWAII—Possibility testimony may be enough, and is a circumstance to be taken into consideration by the trier of facts. See *Dzurick v. Tamura*, 359 P.2d 164 (Hawaii 1960). IDAHO—Probability testimony apparently is required. See *Brooke v. Nolan*, 87 P.2d 470, 471 (Idaho 1939). ILLINOIS—Mere possibility testimony is not sufficient. See *Lewis v. Industrial Comm.*, 231 N.E.2d 593, 596 (Ill. 1967). IOWA—If the causal connection question is not within the knowledge and experience of the jury, possibility testimony alone is insufficient, but if the question is within the knowledge and experience of the jury, possibility testimony coupled with other nonexpert evidence may be sufficient. See *Bradshaw v. Iowa Methodist Hosp.*, 101 N.W.2d 167, 170-72 (Iowa 1960). KENTUCKY—Possibility testimony with additional circumstances is sufficient. See *Provident Life & Accident Ins. Co. v. Diehlman*, 82 S.W.2d 350, 353 (Ky. Civ. App. 1935). MARYLAND—Possibility testimony is not sufficient. See *Ager v. Baltimore Transit Co.*, 132 A.2d 469, 473 (Md. Civ. App. 1957). An expert witness must base his opinion on probability and not on mere possibility. See *Kujawa v. Baltimore Transit Co.*, 167 A.2d 96, 99 (Md. Civ. App. 1961). MASSACHUSETTS—Probability

of the record was such that "causal connection is left to surmise or conjecture with the fact finder having to make an arbitrary choice between unproved conclusions."<sup>18</sup>

The next supreme court decision touching upon the requirement of expert medical testimony on causation questions came in *Otis Elevator Company v. Wood*.<sup>19</sup> *Wood* involved a personal injury action to recover for injuries sustained in a department store escalator accident. Mrs. Wood suffered injuries when her body came into contact with an escalator handrail that pulled her into an opening between the escalator and a second-floor balcony railing. The plaintiffs sought to establish by expert medical testimony that the escalator accident did, in reasonable medical probability, cause Mrs. Wood to suffer a heart attack. A hospital report established that definite injury to her heart had occurred at some uncertain time. The following question in hypothetical form was propounded to a testifying physician by the plaintiffs:

In your opinion could the experience that this sixty-one year old

---

testimony is sufficient but possibility testimony is not. See *Berardi v. Menicks*, 164 N.E.2d 544, 547 (Mass. 1960). MISSISSIPPI—Expert medical testimony must be in terms of probabilities. See *Teche Lines v. Bounds*, 179 So. 747, 748 (Miss. 1939). MISSOURI—Possibility testimony is not enough, but assurance of scientific possibility plus other facts may be of assistance to the jury. See *Lands v. Boyster*, 417 S.W.2d 942, 946 (Mo. 1967). Ficken v. Hopkins, 389 S.W.2d 193, 202 (Mo. 1965). NEBRASKA—Expert testimony in terms of reasonable medical certainty appears to be required. See *Whittington v. Nebraska Natural Gas Co.*, 128 N.W.2d 795, 808 (Neb. 1964). NEW HAMPSHIRE—Possibility testimony is insufficient. See *Leavitt v. Bacon*, 200 A. 399, 405 (N.H. 1938). NEW YORK—The expert must testify with some reasonable degree of medical certainty. See *Miller v. National Cabinet Co.*, 168 N.E.2d 811, 813-18 (N.Y. Civ. App. 1960). NORTH DAKOTA—A medical expert may express his opinion to a medical certainty or medical probabilities, but not as to mere possibilities. See *Vaux v. Hamilton*, 103 N.W.2d 291, 295 (N.D. 1960). OHIO—The medical testimony must establish a probability, not a mere possibility of causal connection. See *Drakulich v. Industrial Commission*, 27 N.E.2d 932, 935 (Ohio 1940). OKLAHOMA—Possibility testimony alone is not sufficient, although it may have some probative value. See *Cohenour v. Smart*, 240 P.2d 91, 93-94 (Okla. 1952). OREGON—Medical testimony of possibility alone does not establish causation. See *Henderson v. Union Pac. R.R. Co.*, 219 P.2d 170, 177 (Ore. 1950). PENNSYLVANIA—The expert witness must testify that the result in question came from the cause alleged. See *Nestor v. George*, 46 A.2d 469, 472 (Pa. 1946). RHODE ISLAND—The expert must identify the causal connection as being probable rather than possible. See *Woods v. Safeway System, Inc.*, 233 A.2d 347, 349 (R.I. 1966). SOUTH CAROLINA—In workmen's compensation cases the expert opinion must be that disability or death "most probably" resulted from the accidental injury. See *Cross v. Concrete Materials*, 114 S.W.2d 829, 829-30 (S.C. 1960). But possibility testimony with other facts and circumstances may be sufficient. See *Grice v. Dickerson, Inc.*, 127 S.E.2d 722, 725 (S.C. 1962). VERMONT—Mere possibility testimony is insufficient, but possibility testimony with other evidence may be sufficient. See *Burton v. Holden & Martin Lumber Co.*, 20 A.2d 99, 100-102 (Vt. 1941). WASHINGTON—Medical testimony of a possibility of causal relation is not sufficient to establish causation. See *Seattle-Tacoma Shipbuilding Co. v. Department of Labor & Industries*, 173 P.2d 786, 791 (Wash. 1946). WEST VIRGINIA—Possibility testimony with other evidence may be sufficient. See *Pygman v. Helton*, 134 S.E.2d 717, 721-23 (W.Va. 1964). WYOMING—Possibility testimony alone is insufficient, but possibility testimony plus other facts may establish causation. See *White v. Maverick Production Co.*, 182 P.2d 818, 823-24 (Wyo. 1947).

<sup>18</sup> *Insurance Company of North America v. Meyers*, 411 S.W.2d 710, 714 (Tex. Sup. 1966).

<sup>19</sup> 436 S.W.2d 324 (Tex. Sup. 1968).

lady with diabetes and hypertension and the pain and the bruising of her body and the exertion of running to that escalator at her age and her physical condition and being hurled through it in the manner I've described, in your opinion, *could* that have caused the scarring of her heart with the myocardial infarct . . . [?] (emphasis added.)<sup>20</sup>

The defendant objected to the question on the ground that it was phrased in terms of possibility instead of probability. The trial court suggested that questions be asked in terms of both probability and possibility, and overruled the objection to the *could have* question. The answer of the physician in response to the question was that the accident could have been a possible cause of the heart attack. He was not interrogated in terms of probability as previously suggested by the court. The defendant sought reversal of the trial court judgment for plaintiffs on the ground that the trial court erred in admitting the physician's *could have* testimony. In deciding the question of admissibility, the supreme court reviewed the *Myers* holding and reiterated that "reasonable probability is determined by a 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 term or phrase.'" <sup>21</sup> The court held that interrogation in *could have* terms was not error where the substance of the view of the expert was that causal connection existed in reasonable medical probability.<sup>22</sup> The expressed rationale of the decision is that a plaintiff should not be required to have questions and responses phrased in exact terms of *reasonable medical probability* because the context of the answer of a witness may very well indicate that he used *could have* in the sense of *probably did*.

Within four months of the *Wood* decision the supreme court delivered its opinions in *Parker v. Employers Mutual Liability Insurance Company of Wisconsin*<sup>23</sup> and *Insurance Company of North America v. Kneten*.<sup>24</sup> The plaintiff in *Parker* alleged that exposure to radioactive substances in the course of his employment induced a cancerous growth resulting in his total and permanent disability. It was shown that Parker developed a growth in the left side of his neck diagnosed upon surgical removal as a metastatic cancer of the cervical lymph node. There was some evidence that the cancer might have originated in

---

<sup>20</sup> *Id.* at 331.

<sup>21</sup> *Id.*

<sup>22</sup> *Otis Elevator Company v. Wood*, 436 S.W.2d 324, 332 (Tex. Sup. 1968).

<sup>23</sup> 440 S.W.2d 43 (Tex. Sup. 1969); (See 1 ST. MARY'S LAW JOURNAL at 105).

<sup>24</sup> 440 S.W.2d 52 (Tex. Sup. 1969).



some part of the body other than the neck. The only positive evidence of the amount of radiation he had received came from film badges indicating that he had been exposed to 36 millirems, a relatively small amount.<sup>25</sup>

The expert testimony evidence in *Parker* was that the cause of cancer is unknown, but that it is possible that prolonged exposure to radiation would cause cancer. There was *no* testimony that the exposure to radiation probably did cause the plaintiff's cancer. The court held that there was no basis in the expert testimony nor in the evidence as a whole for a jury decision on causal connection between the malignant tumor and the exposure to radiation.<sup>26</sup> The court emphasized the nature of the expert testimony, the lack of evidence on the total amount of radiation to which the plaintiff had been exposed, the absence of any strong sequence of events evidence, and the possibility that the cancer had been induced by causes other than artificial radiation. It is clear that the court viewed the *Parker* case as one requiring the establishment of causation by expert medical testimony based upon reasonable probability. The opinion contains some explanation of the standards for establishing causation by expert medical testimony and by circumstantial evidence. Reasonable medical probability was said to exist "when in the absence of other reasonable causal explanations it becomes more likely than not that the injury was a result of its action."<sup>27</sup> Having determined that the expert testimony was not adequate for submission to a jury, the court distinguished the *Parker* factual situation from those cases in which reasonable medical probability can be based on the evidence as a whole. The opinion indicated that in traumatic cancer cases, a sequence of events may be strong enough to establish a probable causal connection, especially where a cancer follows a traumatic injury produced by a single mechanical force. Under the facts of the *Parker* case, however, the court could not find any sequence of events or factual circumstances of probability adequate for the jury in the absence of expert testimony in terms of reasonable medical probability.

*Kneten*<sup>28</sup> was also a workmen's compensation suit presenting questions of causal connection and expert medical testimony. Kneten suffered a heart attack while using an electric drill in the course of his

---

<sup>25</sup> *Parker v. Employers Mutual Liability Insurance Company of Wisconsin*, 440 S.W.2d 43, 45 (Tex. Sup. 1969).

<sup>26</sup> *Id.* at 48-49.

<sup>27</sup> *Id.* at 47.

<sup>28</sup> *Insurance Company of North America v. Kneten*, 440 S.W.2d 52 (Tex. Sup. 1969).

work activity. There was testimony that he was predisposed to a heart attack at the time. Kneten was working in a hot, unventilated room and was standing on a ladder, when in the drilling process a bare wire in the cord of the electric drill struck his wrist. He felt an electric shock go through his body and in five or ten minutes he began to feel bad. Kneten then went to his doctor's office and from there to the hospital where he was hospitalized for forty-five days. It was determined that he had suffered a serious heart attack. The question confronting the court was whether the occurrence on the ladder was a contributing factor to the physical damage suffered by Kneten. The expert testimony established that the occurrence on the ladder could have precipitated the heart attack. The court found that the evidence as a whole provided a basis for a rational determination of causal connection by the jury:

In the present case the fact finder had direct evidence of the occurrence on the job when the employee, while wet with sweat in the heat and effort of his work, was shocked throughout his body with an electrical current. The fact finder was told of the prompt onset of symptoms with the employee feeling bad within a few minutes and his distress progressing until he was in a critical state in the hospital within a few hours. The doctor testified that this distress was due to a heart attack and that the heart is still impaired. Further, the doctor testified that what happened on the job could precipitate a heart attack. With those facts given, it was not conjecture on the part of the jury to conclude that the occurrence on the job was probably a cause of the attack and resulting disability.

Since the question is what precipitated *this attack at this time*, it requires no expert to decide the probabilities when the trier of fact is given evidence of prompt onset of the attack following an occurrence competent to affect adversely a defective heart. As in all of those cases where a back injury promptly follows a lifting strain, or a ruptured blood vessel or heart attack promptly follows exertion, though there is not definite proof of the mechanical process by which the physical structure of the body is damaged, under the circumstances it is reasonable to believe that what the employee did on the job precipitated physical failure.<sup>29</sup>

If *Myers, Wood, Parker* and *Kneten* are considered together, it is evident that in certain areas expert medical testimony in terms of reasonable medical probability is required for submission to the jury of issues on causation. *Parker* and *Myers* are illustrative of this type

---

<sup>29</sup> *Id.* at 53-54.

of case. *Myers* presented questions of the aggravation of a pre-existing cancer, and the answers to these questions were clearly not in the realm of general knowledge. In *Parker* the causation question turned upon the effects of radiation upon human cells, another question beyond the layman's knowledge and experience. There are questions other than cancer causation and aggravation requiring expert medical testimony for their resolution; however, since cancer is one of the leading causes of death in the United States, the solution of causation questions in these cases will continue to be a vexatious problem for the courts.

*Kneten*, on the other hand, illustrates a type of case where the nature of the physical damage and the sequence of events supplies a proper basis for a reasonable jury inference on causation, notwithstanding the expert medical witness may be said to have testified only in terms of possibility. It was emphasized in the opinion that the medical testimony was not inconsistent with the strong circumstantial evidence supporting the plaintiff's causation theory.<sup>30</sup>

#### MEDICAL PROFESSIONAL LIABILITY CASES

Medical professional liability cases present another area in which expert medical testimony is necessary. It has been said that what constitutes negligence or malpractice is a mixed question of law and fact, and the trier of fact can determine what a reasonable and prudent doctor would have done under the same or similar circumstances only after being advised concerning the medical standards of practice and treatment in the particular case.<sup>31</sup> The initial expression by the supreme court governing this type of suit is found in *Bowles v. Bourdon*.<sup>32</sup> The case involved the treatment by a physician of the fractured arm of a small boy. The plaintiffs sought to establish that the doctor had been negligent in binding the arm too tightly thereby causing a contracture or impairment of the child's hand. Two physicians offered testimony on the condition of the child's hand and on the cause of the condition. One physician testified that the child had a Volkman's contracture of the left forearm with only limited movement in his fingers. On the question of causation of the contracture, the doctors testified that the defendant physician's treatment of the fracture was not a probable but only a possible cause of the contracture, and that the treatment was only one of "several things that could have caused the injuries com-

<sup>30</sup> *Insurance Company of North America v. Kneten*, 440 S.W.2d 52 (Tex. Sup. 1969).

<sup>31</sup> *Snow v. Bond*, 438 S.W.2d 549 (Tex. Sup. 1969).

<sup>32</sup> 148 Tex. 1, 219 S.W.2d 779 (1949).

plained of."<sup>33</sup> The court held that there was no competent evidence of any negligence of the defendant doctor proximately causing the child's contracture and that an instructed verdict for the defendant was warranted.

In the course of the opinion, the court made the following statement:

It is definitely settled with us that a patient has no cause of action against his doctor for malpractice, either in diagnosis or recognized treatment, unless he proves by a doctor of the same school of practice as the defendant: (1) that the diagnosis or treatment complained of was such as to constitute negligence and (2) that it was a proximate cause of the patient's injuries.<sup>34</sup>

The rationale of the Texas Supreme Court for requiring expert medical testimony is well articulated in a quotation set out in the opinion:

When a case concerns the highly specialized art of treating (disease), with respect to which a layman can have no knowledge at all, the court and jury must be dependent on expert evidence. There can be no other guide, and, where want of skill or attention is not thus shown by expert evidence applied to the facts, there is no evidence of it proper to be submitted to the jury. Again, when the burden of proof is on the plaintiff to show that the injury was negligently caused by defendant, it is not enough to show the injury, together with the expert opinion that it might have occurred from negligence and many other causes. Such evidence has no tendency to show that negligence did cause the injury.<sup>35</sup>

It is obvious that the court in *Bowles* intended to require expert testimony on the issues of negligence and proximate cause. The language of the court is clear on this point:

We do not find in the testimony we have recounted or elsewhere in the statement of facts any competent evidence that the negli-

<sup>33</sup> *Id.* at 9-10, 219 S.W.2d at 785.

<sup>34</sup> *Bowles v. Bourdon*, 148 Tex. 1, 5, 219 S.W.2d 779, 782 (1949). The general rule in other jurisdictions is that a jury cannot make a finding of negligence in a medical malpractice case in the absence of expert medical testimony in support of the finding. *See* Annot., 141 A.L.R. 5 (1942). The Texas rule as stated in *Bowles* has been qualified to the extent that the expert medical testimony need not be given by a doctor of the same school of practice of the defendant "where the particular subject of inquiry is common to and equally recognized and developed in all fields of practice and where the subject of inquiry relates to the manner of use of electrical or mechanical appliances in common use in all fields of practice." *See* *Porter v. Puryear*, 153 Tex. 82, 87-88, 262 S.W.2d 933, 935-36 (1953).

<sup>35</sup> *Bowles v. Bourdon*, 148 Tex. 1, 5, 219 S.W.2d 779, 782 (1949). The underlying rationale had been previously expressed in slightly different form:

The courts and juries are not supposed to be conversant with what is peculiar with the science and practice of the profession of medicine and surgery. Such has been the law in all civilized nations since in his *Politics*, Aristotle wrote: "As the physician ought to be judged by the physician, so ought men to be judged by their peers." *Kaster v. Woodson*, 123 S.W.2d 981, 983 (Tex. Civ. App.—Waco 1939, writ ref'd).

gence, if any, of respondent either in binding the boy's arm or in its subsequent treatment was a proximate cause of the contracture suffered by the patient. All it shows is that what respondent did was not a probable but only a possible cause of the contracture; that it was only one of several things that *could* have caused the injuries complained of. . . . And if the plaintiff would rest upon inferences rather than upon direct evidence, he meets the same rule. "The proof must establish causal connection beyond the point of conjecture. It must show more than a possibility. Verdicts must rest upon reasonable certainty of proof. Where the proof discloses that a given result may have occurred by reason of more than one proximate cause, and the jury can do no more than guess or speculate as to which was, in fact, the efficient cause, the submission of such choice to the jury has been consistently condemned by this court and by other courts."<sup>36</sup>

Hence the edict of *Bowles* is that the plaintiff must present expert medical testimony from which the trier of fact can conclude that the doctor was negligent and that the doctor's negligence probably was the cause of the patient's injuries.<sup>37</sup> Circumstantial evidence may also be significant. An excellent illustration is found in *Porter v. Puryear*.<sup>38</sup> The plaintiff sued his physicians alleging negligent administration of a spinal anesthetic, which caused a rupture and a contusion of his spinal cord resulting in paralysis of his lower extremities. The court held that there was evidence to support the jury's finding on the proximate cause issue in favor of the plaintiff; in so doing the court reviewed not only the expert medical testimony but the supportive circumstantial evidence:

The facts detailed— injection of the needle in the upper back, presence of the spinal cord at the point of injection, blood in the spinal fluid, immediate pain, final paralysis from the point of injection downward— furnish strong circumstantial evidence that the needle entered and ruptured a blood vessel in the spinal cord setting off a hemorrhage which caused a transverse myelitis (destruction of the cord) and the ensuing paralysis. These circumstances are bolstered by the opinion testimony of the medical witnesses— necessary to the plaintiff's case— that that is what happened. In summation, the evidence detailed would constitute some support for a finding that the negligent injection of the spinal needle into the plaintiff's spinal cord or canal set in motion a natural

<sup>36</sup> *Bowles v. Bourdon*, 148 Tex. 1, 10, 219 S.W.2d 779, 785 (1949).

<sup>37</sup> This is not to say that expert testimony would be necessary to establish a doctor's negligence in the exceptional case that is within the common knowledge of the jury. See PROSSER, LAW OF TORTS, § 32, at 167 (3rd ed. 1964).

<sup>38</sup> 153 Tex. 82, 262 S.W.2d 933 (1953).

and unbroken chain of events—rupture of a blood vessel, hemorrhage, destruction of the spinal cord—that led directly to the plaintiff's paralysis, a reasonably foreseeable result. It therefore would constitute some support for the jury's finding that the injection of "a spinal needle into the plaintiff's spinal cord or canal at a level above the 1st lumbar vertebra" was a proximate cause of the plaintiff's injury.<sup>39</sup>

The *Porter* case indicates that circumstantial evidence tending to prove causation may be valuable to the plaintiff although it ordinarily must be accompanied by expert testimony. The probative value of circumstantial evidence apart from expert medical testimony will depend upon its comprehensibility to the court and jury in terms of lay knowledge and experience. It will be observed that the circumstantial evidence present in *Porter* helped establish a sequence or chain of events strongly supporting causal connection.

The usual case presents questions of the propriety of a physician's methods of diagnosis, surgery or treatment. Another type of action is that brought against a physician for failure to disclose the hazards of a procedure or operation to the patient. Here, also, the conduct of the physician must be tested against a medical standard of proper practice.<sup>40</sup> The Texas Supreme Court, following the rule in a number of other jurisdictions, has held that the medical standards for disclosing hazards and obtaining a patient's consent must be established by expert medical testimony.<sup>41</sup> The rationale of this requirement is that since the disclosure of risks incident to proposed treatment involves medical judgment, the jury cannot judge the physician's conduct without expert medical testimony of proper medical standards for disclosure. Such testimony is especially necessary in such cases since a disclosure of risks to a patient may actually violate good medical practice under some circumstances.<sup>42</sup>

A current question of considerable difficulty has been posed in cases

<sup>39</sup> *Id.* at 90, 262 S.W.2d at 937-38.

<sup>40</sup> See *Snow v. Bond*, 438 S.W.2d 549 (Tex. Sup. 1969).

<sup>41</sup> *Wilson v. Scott*, 412 S.W.2d 299 (Tex. Sup. 1967).

<sup>42</sup> *Id.* at 301. The court emphasized this point in the *Wilson* opinion:

The nature and extent of the disclosure depends upon the medical problem as well as the patient. In some medical procedures the dangers are great; in others they are minimal. See *Atkins v. Humes*, 110 So. 2d 663, 81 A.L.R.2d 590 (Fla. 1959). It has been suggested that some disclosures may so disturb the patient that they serve as hindrances to needed treatment. *Patrick v. Sedwick*, 391 P.2d 453 (Alaska 1964); *Di Filippo v. Preston*, 173 A.2d 333 (Del. 1961); *Natanson v. Kline*, *supra*; *Lund, The Doctor, The Patient, and The Truth*, 19 TENN. L. REV. 344 (1946); *Smith, Therapeutic Privilege to Withhold Specific Diagnosis from Patient Sick with Serious or Fatal Illness*, 19 TENN. L. REV. 349 (1946). Certain disclosures in some instances may even be bad medical practice. *Aiken v. Clary*, 396 S.W.2d 668, 674 (Mo. 1965).

where the defendant doctor has moved for summary judgment with supporting expert medical testimony to the effect that he met proper medical standards of practice and treatment. Must the plaintiff thereupon come forward with expert medical evidence that the defendant doctor failed to meet proper medical standards, which failure proximately caused the plaintiff's injuries? The contention has been made that the plaintiff must counter the defendant's expert medical proof with expert medical proof, and thus show a fact issue, or suffer a summary judgment against him.<sup>43</sup> It is argued that since under *Bowles v. Bourdon*<sup>44</sup> the plaintiff cannot establish a case without expert medical testimony, the plaintiff must also offer expert medical proof. Support for this position may be found in *Allen v. Western Alliance Insurance Co.*,<sup>45</sup> in which the court stated:

In an action on a motion for summary judgment where the motion is supported by affidavits, depositions and other extrinsic evidence sufficient on their face to establish facts which, if proven at the trial, would entitle the movant to an instructed verdict, the opponent must show opposing evidentiary data which will raise an issue as to a material fact, or must justify his inability to do so and seek appropriate protection.<sup>46</sup>

If the *Allen* test is applied where the defendant's expert evidence supporting his motion for summary judgment negates the plaintiff's allegations, it would seem that the defendant would be entitled to a summary judgment under *Bowles* in the absence of countering expert medical evidence offered by the plaintiff. This conclusion is buttressed by the language in *Bowles* that a "patient has no cause of action against his doctor for malpractice" in the absence of expert medical proof.<sup>47</sup>

The opposing view is that a defendant doctor is not entitled to a summary judgment simply because he alone has produced expert medical proof and the plaintiff patient has not done so. The argument in support of this position is that *Bowles* was an instructed verdict case and its requirement of expert medical testimony is inapplicable to the summary judgment stage of medical liability cases. The proponents of this view also contend that the *Allen* instructed verdict test should not be applied to require the plaintiff patient to produce expert medical

---

<sup>43</sup> *Snow v. Bond*, 438 S.W.2d 549, 559 (Tex. Sup. 1969).

<sup>44</sup> 148 Tex. 1, 219 S.W.2d 779 (1949).

<sup>45</sup> 162 Tex. 572, 349 S.W.2d 590 (1961).

<sup>46</sup> *Id.* at 577-78, 349 S.W.2d at 594.

<sup>47</sup> *Bowles v. Bourdon*, 148 Tex. 1, 5, 219 S.W.2d 779, 782 (1949).

testimony. This view is supported by language in *Tigner v. First National Bank of Angleton*:<sup>48</sup>

The failure of one party in a hearing upon a motion for summary judgment to discharge the burden which would rest on him at a trial on the merits is no ground for a summary judgment in favor of the other party.<sup>49</sup>

Also persuasive to the existence of a fact issue at the summary judgment stage is the general rule that opinion testimony is not binding upon the trier of fact and does not establish any material fact as a matter of law.<sup>50</sup>

The Texas Supreme Court in three recent cases found it unnecessary to decide the question of whether the plaintiff in the circumstances under review must come forward with expert medical testimony.<sup>51</sup> The question remained unanswered because it was held that the summary judgment evidence offered by the defendants in the three cases failed to show conclusively that they had acted in accordance with proper medical standards of practice. Although the question was not reached in these cases, the court alluded to the problem in *Snow v. Bond*:

Defendants say that the intermediate court missed the real issue in the case, and that its holding will make the summary judgment practice wholly inapplicable to malpractice suits. They point out that under the rule of *Bowles v. Bourdon*, 148 Tex. 1, 219 S.W.2d 779, plaintiff cannot prevail on a conventional trial of this case without expert medical testimony from which the trier of fact may reasonably conclude that the delay in his recovery was proximately caused by negligence of defendants in either diagnosis or treatment. (Citations omitted.) Defendants argue from this premise that their showing of expert opinion evidence tending to negative negligence shifted to plaintiff the burden of going forward at the summary judgment stage. They insist that summary judgment was properly rendered in their favor since plaintiff did not counter with an affidavit or deposition containing expert opinion evidence showing a material and disputed issue of fact.

We do not reach the ultimate question presented by this argument. Assuming without deciding that the burden of going forward may be shifted to the plaintiff as defendants contend, it is our opinion that the depositions and affidavits in the present record do not have that effect.<sup>52</sup>

<sup>48</sup> 153 Tex. 69, 74, 264 S.W.2d 85, 87 (1954).

<sup>49</sup> *Id.* at 74, 264 S.W.2d at 87.

<sup>50</sup> *Broussard v. Moon*, 431 S.W.2d 534, 537 (Tex. Sup. 1968); *Board of Firemen's Relief & Retirement Fund Trustees of Houston v. Marks*, 150 Tex. 433, 440, 242 S.W.2d 181, 185 (1951); *Hood v. Texas Indemnity Insurance Co.*, 146 Tex. 522, 524, 209 S.W.2d 345, 346 (1948).

<sup>51</sup> *King v. Flamm*, 442 S.W.2d 679 (Tex. Sup. 1969); *Prestegord v. Glenn*, 441 S.W.2d 185 (Tex. Sup. 1969); *Snow v. Bond*, 438 S.W.2d 549 (Tex. Sup. 1969).

<sup>52</sup> *Snow v. Bond*, 438 S.W.2d 549, 550 (Tex. Sup. 1969).