# The Standard for Expert Testimony Is *Not* Reasonable Degree of Certainty

By BRIEN A. ROCHE

Any lawyer who tries cases involving expert witnesses at some point has been confronted with the objection from opposing counsel that the expert's testimony does not meet the correct legal standard: "reasonable degree of certainty."

The word "certainty" within the phrase is a significant hurdle for many experts. They hear the word and they say, "No, I'm not certain of . . . " The qualifying words in the phrase "reasonable degree . . . " are frequently lost in the smoke created by the injection of "certainty" into the equation.

The article consists of an examination of the Virginia case law on what the standard is for expert testimony and sets forth several reasons why the standard must be "reasonable probability" and not "reasonable certainty."

## The Standard Established by the Virginia Supreme Court Is Reasonable Probability

A review of the Virginia case law shows that in fact "reasonable degree of certainty" is not the standard for expert testimony. "Reasonable probability" is the legal standard for expert opinions in Virginia as indicated in *Spruill v. Commonwealth*, 221 Va. 475, 271 S.E.2d 419 (1980).

In *Spruill*, a criminal case, the defendant was convicted by a jury of rape and abduction. He appealed, arguing that the court below erred in refusing to allow his psychiatrist to testify as to his mental condition. In the circuit court, the defendant's psychiatrist had been queried about the defendant's sanity on the day of the crime. The psychiatrist answered, "Well, I couldn't say." Asked if it was a "possibility" that the defendant was insane, the doctor answered, "It's a possibility, yes." The circuit court found such testimony to be inadmissible.

The Supreme Court clarified the standard for expert testimony in its opinion affirming the lower court:

> A medical opinion based on a "possibility" is irrelevant, purely speculative and, hence, inadmissible. In order for such testimony to become relevant, it must be brought out of the realm of speculation and into the realm of reasonable probability; the law in this area deals in "probabilities" and not "possibilities." (221 Va. at 479, 271 S.E.2d at 421.)

The Virginia Supreme Court applied the *Spruill* standard three years later in *LeVasseur v. Commonwealth*, 225 Va. 564, 304 S.E.2d 644 (1983). The issue to be decided there was again the admissibility of medical expert testimony regarding the mental state of the defendant, this time accused of murder.

The *LeVasseur* court stated the following:

> In *Spruill v. Commonwealth*, 221 Va. 475, 479, 271 S.E.2d 419, 421 (1980) considering medical testimony as to mental state which dealt only with "possibility," we said: "In order for such testimony to become relevant, it must be brought out of the realm of speculation and into the realm of reasonable probability; the law in this area deals in 'probabilities' and not in 'possibilities'." The proffered evidence suffered from the same infirmity as that we rejected in *Spruill*, and the trial court correctly excluded it (225 Va. 587, 304 S.E.2d at 656.)

In evaluating later testimony, the *LeVasseur* court commented on the probativeness of testimony:

> This was probative upon the issue of premeditation by reason of its certainty. It met the test of *Spruill* because it did not leave the jurors adrift to speculate in an area of expertise beyond their knowledge. (225 Va. 587, 304 S.E.2d 656.)

*LeVasseur*, in the language quoted directly above, seems to equate prob-

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ability with certainty, as indeed other courts have done as indicated below.

As recently as 1985, the Virginia Supreme Court had the occasion again to address the standard for expert testimony in *Cantrell v. Commonwealth*, 229 Va. 387, 329 S.E.2d 22 (1985). The issue there was the expert testimony of a forensic pathologist as it related to causation, i.e., the effects of blows to the head and face. The court ruled that the testimony was relevant and relied on and applied the *Spruill-LeVasseur* standard.

> The testimony was relevant because it tended to establish the probability or improbability of a fact in issue. (*Va. Real Estate Comm. v. Bias*, 226 Va. 264, 270, 308 S.E.2ld 123, 126 (1983).) Its weight was for the jury to determine. (Id.) It was not speculative, and did not, in itself, deal with possibilities rather than probabilities. Rather, it was offered to furnish the jury with empirical data available in the discipline of pathology, and thus to enable the jury to determine the degree of probability for itself. It did not, as the Commonwealth argued to the jury, impart matters of common knowledge. The jury was free to disregard it or to give it little weight, but was entitled to hear it. (229 Va. at 395 and 396, 329 S.E.2d at 28.)

A 1982 decision from the Fourth Circuit casts some doubt on what the standard is for expert testimony and indeed seems to state that there are two standards at issue: one as to the level of definiteness of the expert's opinion and the other as to the level of probativeness of the evidence itself. *Fitzgerald v. Manning* 697 F2d 341 (Fourth Circuit 1982), a diversity action decided two years after *Spruill* and three years before *Cantrell*, stated that:

> Moreover, in order to qualify on causation, the opinion testimony of the medical expert may not be stated in general terms, but must be stated in terms of a "reasonable degree of medical certainty." (*Crawford v. Quarterman*, 210 Va. 598, 172 S.E.2d 739, 744 (1970); *Lindsey v. The Clinic for Women*, 40 N.C.app. 456, 253 S.E.2d 304, 311 (1979).) Only if the opinion evidence on causation, as offered by the plaintiff, rises to the level of a "reasonable degree of medical certainty" that it was more likely that the defendant's negligence was the cause than any other cause, is there sufficient evidence on causation to permit jury submission of causation. (679 F.2d at 350.)

In reaching this conclusion, the court cites, as a basis for its standard, *Crawford v. Quarterman* 210 Va. 598, 172 S.E.2d 739 (1970).

A reading of *Crawford* reveals that the court therein never addressed the issue of what the standard was for medical expert testimony. The issue being addressed was the sufficiency of evidence adduced ". . . to prove deformity, humiliation or embarrassment" in the future. During an exchange between the court and counsel, considering a jury instruction, counsel stated:

> Mr. Stone: We object to the granting of Instruction P-1 as amended on the basis that in Subparagraph 2, there is no evidence as to any future effect on the health of the Plaintiff; in fact, the doctor testified that he could not say with reasonable certainty that there would be any future disability. In Subparagraph 4 there is no evidence of any disfigurement or deformity and there has been no testimony by the Plaintiff as to humiliation and embarrassment associated with any effects from the injury. (210 Va. at 605, 172 S.E.2d at 744.)

The court in *Crawford*, thus, was never presented with the question of what the standard was for expert testimony and never addressed the issue.

At least one other court in citing *Fitzgerald* has glossed over the "certainty" language and noted that "when dealing with an issue of medical causation, a considered medical judgment is necessary, expressed in terms of probability rather than possibility." (*Higgins v. Martin Marietta Corp.* 752 F.2d 492, 496 (10th Circ. 1985).)

Two years after *Fitzgerald*, in *Owens by Owens v. Bourns, Inc.*, 766 F.2d 145 (Ca-4 N.C. 1985), CERT DEN 106 S Ct. 608, 88 LED2d 586, the Fourth Circuit cited *Fitzgerald*:

> Even under diversity jurisdiction, the sufficiency of the evidence to create a jury question is a matter governed by federal law. *Fitzgerald v. Manning*, 679 F.2d 341, 346 (4 Cir. 1982). Medical opinion evidence must express "a 'reasonable degree of medical certainty' that it was more likely that the defendant's negligence was the cause than any other cause" for that evidence to be sufficient to go to the jury. (Id. at 350.) Additionally, medical opinion that is inconsistent with the entirety of an expert's testimony is not sufficient to raise a jury question. While we are mindful that we must view the evidence in the light most favorable to plaintiffs and give them the benefit of all reasonable inferences that a jury might have drawn, we do not believe that plaintiffs' evidence of causation was sufficient under the *Fitzgerald* standard to raise an issue for the jury. (766 F.2d 149 and 150.)

*Owens*, like *Fitzgerald*, contains no reference to *Spruill*, *LeVasseur* or *Cantrell*, three cases that apply the standard of reasonable probability for medical expert testimony in Virginia. The reason for this is found in *Owens* where the court notes that the "sufficiency of the evidence to create a jury question is a matter governed by federal law"; i.e., the standard as to expert testimony is a procedural matter not governed by Virginia case law. That standard is different in Virginia state courts as seen in *Spruill*, *LeVasseur* and *Cantrell*, although an argument can certainly be made that the Virginia Supreme Court has never addressed the question of what is the standard of definiteness for expert opinions (reasonable probability or reasonable certainity) but rather has simply addressed the question of what is the level of probativeness of the evidence itself (probability as opposed to certainty).

## The Semantic Duel of Probability v. Certainty Overall Is Unproductive

Although precision in speech is a

prized commodity among lawyers, there are instances when that ideal is taken too far. The apparent distinction between reasonable degree of probability and reasonable degree of certainty may be such an instance.

There are no decisions of the Virginia Supreme Court that precisely address that distinction. However, the Supreme Court in the neighboring state of West Virginia in 1980 addressed the semantic duel that is sometimes engaged in in reference to this issue in *Hovermale v. Berkeley Springs Moose Lodge* (W. Va. 271 S.E.2d 335, 1980):

> The appellant also maintains that the trial court erred in instructing the jury that it could only find for the Plaintiff if it found the evidence established to a reasonable medical certainty that Hovermale would have survived had he promptly received prompt medical attention. A physician testified that there was a reasonable probability that Hovermale would have survived had he promptly received medical attention, but that nothing in medicine is certain. The physician's discomfort with the use of the word "certainty" (apparent during examination by the trial court) appears to be the result of semantics rather than substance.
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> The trial court's ruling that West Virginia requires medical testimony in terms of reasonable medical certainty may have resulted from a misunderstanding of our discussion in *Duling v. Bluefield Sanitarium*, 149 W. Va. 567, 142 S.E.2d 754 (1965). In *Duling* we approved as valid and nonspeculative the testimony of a physician who felt sure enough to testify in terms of medical certainty. That case, however, should not be read as requiring testimony in those terms.
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> In Syllabus Point 1, of *Pygman v. Helton*, 148 W. Va. 281, 134 S.E.2d 717 (1964), we made it clear that where a physician is testifying as to the causal relation between a given physical condition and the defendant's negligent act, he need only state the matter in terms of a reasonable probability.
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> "Medical testimony to be admissible and sufficient to warrant a finding by the jury of the proximate cause of any injury is not required to be based upon a reasonable certainty that the injury resulted from the negligence of the defendant. All that is required to render such testimony admissible and sufficient to carry it to the jury is that it should be of such character as would warrant a reasonable inference by the negligent act or conduct of the defendant."
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> *Pygman* specifically rejected the requirement that the physician tie the injury to the negligence by way of a reasonable degree of medical certainty and eschewed any rigid incantation or formula as it quoted at considerable length from *Bethleham-Sparrow Point Shipyard,. Inc., v. Scherpenisse*, 187 Md. 375, 50 A.2d 256 (1946). (271 S.E.2d 335, 339.)*

Other courts have likewise noted that the semantic distinction should not be controlling. *Toth v. Community Hospital*, 292 N.Y. S.2d 440, 446 (Court of Appeals of New York, 1968), noted that in regard to questions of causation in medicine, we can only deal in probabilities since it can never be known with certainty whether a different course of treatment would have avoided the adverse consequences. In *Miller v. National Cabinet Company*, 204 N.Y. S.2d 129, 132 (Court of Appeals of New York, 1960), the court noted that the probative force of an opinion is not to be defeated by semantics if it is reasonably apparent that the doctor intends to signify a probability supported by some rational basis. The Court of Appeals of Texas noted in *Ralph v. Mr. Paul's Shoes, Inc.*, 572 S.W.2d 812, 814 (1978), that the test of whether expert testimony expresses reasonable probability as opposed to pure conjecture is not based upon the semantics of the expert or his use of any particular term or phrase, but rather is

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*The *Hovermale* court goes on to cite *Pygman* noting that reasonable degree of medical certainty is the standard when the issue is future damages. The apparent rationale for that is that future damages are extremely speculative.

determined by looking at the entire substance of the expert's testimony.

The commentators and encyclopedias are in accord with the view that the semantic distinction is not controlling. *American Jurisprudence 2d* states "an expert witness should not be barred from expressing his opinion merely because he is not willing to state his conclusion with absolute certainty. But an expert's opinion, if not stated in terms of the certain, must at least be stated in terms of the probable, not merely of the possible." (31 Am.Jur.2d 548.)

In *American Law of Medical Malpractice* by Pegalis and Wachsman, the authors note at page 304 that the word "probable" means "reasonably certain" and that is a sufficient basis for an opinion.

## Consistency Dictates That the Standard Be Reasonable Degree of Probability

The Virginia Supreme Court has frequently adopted the approach that simplicity and consistency are virtues in the law. We see that in many instances:

1. In conflicts of law situations, the Supreme Court has opted to uniformly apply the *lex loci* analysis rather than engaging in the more flexible and more involved "interest analysis" approach.

2. The Virginia Supreme Court has adopted the rule that the *Ad Damnum* in a motion for judgment sets the upper limit of what amount may be recovered by a plaintiff. This blanket rule again avoids any factual analysis of whether the verdict is excessive and evidences the Supreme Court's option for simplicity and consistency.

Assuming that simplicity and consistency are actual objectives of the Virginia Supreme Court as indeed they should be, then it would seem reasonably probable, or perhaps even reasonably certain, that the court would reject the rationale of the *Fitzgerald* court and would continue applying the logic to all instances of expert testimony as the court did in *LeVasseur* and *Cantrell* — both decided *after Fitzgerald*.

That would coincide with the principle of simplicity and consistency mentioned above in several respects:

1. The threshold inquiry as to the probativeness of evidence is "does it tend to prove whether something is more probable than improbable." "Certainty" is not part of that inquiry either in dealing with opinion evidence or factual evidence.

2. The *Fitzgerald* rationale results in an inquiry that at the very least is confusing and may be internally inconsistent; i.e., the expert is asked whether he is reasonably certain that something is reasonably probable. One standard (certainty) is applied to the firmness of the opinion and another standard (probability) is applied to the probativeness of the evidence. That type of convoluted question is of no aid to a jury called upon to decide issues that it is surely unfamiliar with.

3. The standard of proof in a civil case is "the preponderance of the evidence"; i.e., greater weight of the evidence. To inject the criterion of certainty into a case where the overall standard of proof is something less than certainty would again significantly increase the likelihood of confusing the jury.

## There Are No Degrees of Certainty

*The Oxford English Dictionary* defines "certainty" to mean "that which is certain" or "the absence of doubt." The same dictionary defines "certain" as "determined, fixed, settled" or "establish as a truth or fact to be absolutely received, depended or relied upon; not to be doubted, disputed or called into question."

As such, it would seem that the term "certainty" is an absolute. Just as there are not degrees of uniqueness, so there are not degrees of certainty: either you are certain or you are not certain.

## The Scientific Community Is Not Accustomed to Dealing with "Certainty"

People trained in the sciences are like lawyers in at least two respects: 1) they seek precision in their trade (the lawyer is looking for precision in language and the scientist is looking for precision in calculations and measurements); and 2) they are not accustomed to dealing with certainties. Instead, they deal with possibilities or probabilities. Certainty is something antithetical to their analytical approach and education. To inject the concept of certainty into an opinion question directed at a medical scientist is inviting confusion and strains the intellectual honesty of such a witness who knows that in his line of work there is no such thing as "certainty," but rather there are possibilities and probabilities.