

Expert Testimony on Medical Causation: When “POSSIBLY CAUSED” is Good Enough

By: Robert Arnwine

I felt good following my first doctor deposition. It was a premises liability case in which the plaintiff had suffered a minor fall at our restaurant. He was claiming the fall resulted in a herniated disc in his lumbar spine. During the deposition, opposing counsel questioned the plaintiff’s treating physician extensively about the injury. The doctor explained that MRI imagery clearly showed the herniated disc was compressing nerves in the plaintiff’s lower back, causing him severe discomfort that would likely be permanent. The doctor explained that the plaintiff had reported his pain began after the fall at our restaurant, and such falls can cause herniated discs. The doctor made a good witness, and opposing counsel left the deposition feeling just as optimistic as I did.

When I returned to the office, I confidently reported to the partner that the deposition went well. The doctor, I explained, never testified that the plaintiff’s fall at our restaurant *probably caused* the herniated disc. I wanted to report the good news to the client right away. The partner sagely suggested I wait to review the deposition transcript before issuing a report to the client. In the interim, he suggested I review the relevant case law on medical causation to make sure I understood exactly what testimony the plaintiff needed to elicit from the doctor in order to prove his case.

In following the partner’s advice, I learned I held too narrow a view of the type of expert testimony that will suffice to establish medical causation. There is no question a plaintiff will meet her burden by eliciting testimony a negligent act *likely caused* or *probably caused* an injury. But, as discussed below, there is case law from the Alabama Supreme Court indicating a

plaintiff can also meet her burden where the expert only testifies the negligent act *possibly caused* her injuries, so long as there is either 1) no evidence of some other cause that could possibly explain plaintiff's injury, or 2) the plaintiff's expert can explain why these other possible causes were less likely to have contributed to the injury.

When is the plaintiff required to produce expert testimony?

As a threshold matter, it is worth noting a plaintiff may have to present expert testimony even if her case is not a medical malpractice claim. The general rule is a plaintiff must present expert testimony to establish causation where “the nature and origin of [injuries or diseases] is obviously beyond the understanding of the average person.” *Wade v. Plantation Pipe Line Co.*, 2:05-CV-697-WKW, 2007 WL 1668815, *3 n.2 (M.D. Ala. June 8, 2007) (not reported) (quoting *Ex parte Trinity Indus., Inc.*, 680 So. 2d 262, 268 (Ala. 1996)). As all of us are aware, this rule applies in the majority of medical malpractice cases. *See Sorrell v. King*, 946 So. 2d 854, 864 (Ala. 2006) (citations omitted) (recognizing exception to rule where proximate cause not beyond the ken of the layman). But the rule also applies equally to any negligence case so long as the cause of the alleged damages cannot be understood by the average juror. *Wade*, 2007 WL 1668815, *3 n.2 (citing instances in which rule has been applied in products liability and workers' compensation cases); *see Marcus v. Lindsey*, 592 So. 2d 1045, 1046 (Ala. 1992) (“A plaintiff can testify to what his injuries are, so long as his testimony is based on facts and does not present medical conclusions or opinions that require expert testimony.”).

Unless the cause of the alleged injury is obvious, *e.g.*, *Breaux v. Thurston*, 888 So. 2d 1208, 1217 (Ala. 2003) (retained foreign instrumentality found in plaintiff's body following surgery), the injury occurred immediately following the negligent act, *e.g.*, *Wade*, 2007 WL 1668815, *3 (falling ill upon exposure to diesel fumes), or the injury is a condition we can all

understand based on common experience, *e.g.*, *Marcus*, 592 So. 2d (headaches arising after plaintiff's head struck and busted windshield in car accident), the plaintiff must likely obtain testimony from a qualified medical expert in order to establish her prima facie negligence case.

The reason for this requirement becomes apparent when one considers the fact a jury must accept the uncontroverted opinions of a medical expert. 1 CHARLES W. GAMBLE, ROBERT J. GOODWIN, MCELROY'S ALABAMA EVIDENCE, § 127.02(8) (6th ed. 2009) (uncontradicted testimony concerning a subject exclusively within the knowledge of experts); *see also Webster v. Offshore Food Serv., Inc.*, 434 F.2d 1191, 1193 (5th Cir. 1970) (“[T]he trier of fact would not be at liberty to disregard arbitrarily the unequivocal, uncontradicted and unimpeached testimony of an expert witness...where, as here, the testimony bears on technical questions of medical causation beyond the competence of lay determination.”). As succinctly stated by Justice Maddox:

“If the medical experts cannot testify that Mrs. Willard's death was *probably* caused by the negligence of Dr. Perry, then I cannot see how a jury of laypersons can reach this conclusion.”

Willard v. Perry, 611 So. 2d 358, 365 (Ala. 1992) (Maddox, J., dissenting).

It is also worth noting the expert testimony does not have to come from a doctor; subject to the limitations of the Medical Liability Act, anyone with the proper qualifications can offer testimony regarding medical causation. *Jordan v. Cont'l Airlines, Inc.*, 893 So. 2d 446, 451 (Ala. Civ. App. 2004) (“It is not the law that only a medical doctor may testify as to physical symptoms on the human being. If the witness is shown to have special qualification in that particular field and knowledge of the subject beyond that of the average laymen so as to give reliable testimony, he is not disqualified.”) (quoting *Bell v. Hart*, 516 So.2d 562, 567 (Ala.1987)).

The accepted standard of “probable cause”

A plaintiff’s case can never rest on speculation, regardless of whether expert testimony is required:

Proof which goes no further than to show an injury could have occurred in an alleged way does not warrant the conclusion that it did so occur, where from the same proof the injury can, *with equal probability*, be attributed to some other cause. Such a condition is equivalent to an absence of evidence as to the true cause....

Southworth v. Shea, 131 Ala. 419, 421, 30 So. 774, 775 (Ala. 1901) (emphasis added); *see, e.g., Shanklin v. New Pilgrim Towers, L.P.*, 58 So.3d 1251, 1256-58 (Ala. Civ. App. 2010) (plaintiff’s inability to identify the cause of her fall fatal to premises liability claim).

Construing this fundamental requirement in the context of cases requiring expert testimony, the Alabama Supreme Court has repeatedly stated such testimony must establish the defendant’s negligence “probably caused” the injury. *Lyons v. Vaughan Reg’l Med. Ctr., LLC*, 23 So. 3d 23, 27-28 (Ala. 2009) (citing numerous medical malpractice cases for this rule); *see Tidwell v. Upjohn Co.*, 626 So. 2d 1297, 1300-01 (Ala. 1993) (AEMLD case) (“On issues of medical causation a showing of probable cause, rather than possible cause, must be made.”). The Court has also characterized plaintiff’s burden on causation as requiring evidence of “selective application.” *See Cates v. Colbert Co.-Nw. Alabama Healthcare Auth.*, 641 So. 2d 239, 241 (Ala. 1994) (“It is also well settled that evidence indicating merely that the alleged negligence was one of several possible causes of the injury is not sufficient. We have stated that the evidence produced by the plaintiff must have “selective application” to one theory of causation.”).

Three occasions on which “possible cause” has sufficed

In the three cases that follow, the Alabama Supreme Court appears to have deviated from the accepted standard by upholding expert testimony that speaks only in terms of possible causation.

In *Bradford v. McGee By & Through McGee*, 534 So. 2d 1076, 1083 (Ala. 1988), the parents of a child with cerebral palsy alleged the physician failed to monitor a late-term fetus for hypoxia. The parents introduced expert testimony establishing the risk of hypoxia increases beyond the 42nd week of pregnancy. They also introduced the testimony of a second expert who concluded the cerebral palsy was “most probably” caused by hypoxia. The expert reached his opinions on the following grounds: 1) the most common cause of cerebral palsy is some sort of hypoxia; 2) there was no other obvious cause of the cerebral palsy, such as a familial trait, trauma, or congenital abnormality; 3) the labor records documented uteroplacental insufficiency, a condition of insufficient blood flow to the fetus through the placenta; 4) uteroplacental insufficiency is “associated with chronic hypoxia” and “can be a cause of chronic hypoxia.” On the basis of this testimony, the Alabama Supreme Court held the parents introduced sufficient evidence that the physician’s failure to monitor the child for hypoxia “probably caused” the child’s cerebral palsy. *Bradford*, at 1085. In reaching its holding, the Court specifically acknowledged the parents’ theory of liability was premised on a finding “the uteroplacental insufficiency led to chronic hypoxia.” *Id.*

In *Tidwell*, 626 So. 2d 1297, 1300-01, a widow brought suit against the Upjohn Company alleging it was negligent in failing to warn physicians that certain dosages of the prescription drug Halcion could cause patients with depression to commit suicide. The widow introduced the testimony of a psychiatrist, who testified only two factors could have caused the husband’s

suicide: depression and Halcion. The psychiatrist could only identify the Halcion as a possible contributing cause. The widow also introduced the testimony of a pharmacist, who testified the Halcion was a “significant contributing event to the suicide.” The pharmacist held this opinion to a reasonable degree of certainty. However, the pharmacist could not testify the suicide was more likely caused by the Halcion than the underlying depression:

I am not saying it's more likely caused by the Halcion than by the psychiatric condition itself. I'm saying that they are inextricably tied together and that by virtue of the temporal relationship the exacerbation of symptoms related to the use of Halcion and the dosage increase, in my opinion, the Halcion would have been a contributing factor in that exacerbation and deterioration.

Tidwell, at 1302. On appeal, the Alabama Supreme Court reversed the trial court’s grant of summary judgment upon holding this testimony constituted “substantial evidence of probable causation.” *Id.* at 1303.

In *Silva v. Hodge*, 583 So. 2d 231, 232 (Ala. 1991), Hodge was injured on the job by falling lumber, and she suffered injuries to her pelvic area and lower back. Five years after the accident, Hodge suffered a crippling stroke, which she claimed was caused by the on-the-job injury. To support this claim, she introduced the following testimony of her treating physician:

“We know a stroke and heart disease are degenerative disease of the artery. This usually comes when you're sixty-five or sixty [sic] years old. But in this patient, I believe because of her inactivity and because of gaining weight because she cannot move, the degenerative process was hastened. That's all the connection I can give you.”

On appeal, the workers’ compensation carrier argued this testimony was inadmissible because it was speculative. The Alabama Supreme Court held the testimony was not only admissible, it was “sufficient evidence that the accident at Sunbelt caused the stroke.” *Silva*, at 234. The Court reached its holding in spite of the fact “there exist other plausible causes of the stroke.” *Id.*

Selective Application

These cases cannot be reconciled with the accepted standard of probable cause. The expert in *Bradford* could only testify uteroplacental insufficiency is “associated with chronic hypoxia” and “can be a cause of chronic hypoxia.” *Bradford*, 534 So. 2d at 1084-85. The pharmacist in *Tidwell* expressly admitted he could not testify the Halcion was the more likely cause of the suicide (rather than the depression). *Tidwell*, 626 So. 2d at 1302. The treating physician in *Silva* simply testified the on-the-job accident caused the plaintiff’s stroke; he did qualify his opinion to state whether the accident was a possible cause or a probable cause. *Silva*, 583 So. 2d at 233-34. But notwithstanding this, the Court upheld the testimony in each case.

The inconsistency is troubling until one considers the Court’s alternative formulation of plaintiff’s burden on proving medical causation, “selective application:”

“Proof which goes no further than to show an injury could have occurred in an alleged way, does not warrant the conclusion that it did so occur, where from the same proof the injury can with equal probability be attributed to some other cause.’

‘As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. *There may be two or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any one of them, they remain conjectures only.*”

Howard v. Mitchell, 492 So. 2d 1018, 1020 (Ala. 1986) (quoting *McClinton v. McClinton*, 258 Ala. 542, 544-45, 63 So.2d 594, 597 (1952) (quoting *So. Railway. Co. v. Dickson*, 100 So. 665, 668-69 (Ala. 1924) (quoting *Southworth v. Shea*, 131 Ala. 419, 421, 30 So. 774, 775 (Ala. 1901))). In fact, the Court expressly applied the selective application formulation in its holdings in *Bradford*, 534 So. 2d at 1085, and *Silva*, 583 So. 2d at 233.

I am not aware of an opinion in which the Court further defines “selective application.” But we can certainly draw on *Bradford* and *Silva* to understand how the doctrine can be applied.

In *Bradford*, the expert specifically acknowledged other potential causes of the child's cerebral palsy, but he testified there was no evidence those causes were present. 534 So. 2d at 1084-85. Thus, the only cause that could have caused the hypoxia was the uteroplacental insufficiency. *Id.* In contrast, the treating physician *Silva* did not acknowledge any other potential causes. 583 So. 2d at 233. But, as I read the opinion, no other causes were raised in the physician's deposition other than theoretical "what ifs." *Id.* at 234 ("[W]hile USF & G correctly points out that there were other possible causes of this stroke, Dr. Santos's testimony points to a specific theory of causation...."). If this is the case, it would make sense that the expert's testimony was sufficient to satisfy the selective application requirement, because the expert is not being called upon to distinguish between multiple potential causes. *Compare with Lyons v. Vaughan Reg'l Med. Ctr., LLC*, 23 So. 3d 23, 29 (Ala. 2009) (summary judgment on plaintiff's medical malpractice claim appropriate due to expert's failure to distinguish between two possible causes, where expert testified "both traumas can possibly initiate the Reflex Sympathetic Dystrophy").

This leaves the opinion in *Tidwell*, in which the Court did not expressly rely on the selective application formulation to reach its holding. However, it would appear the formulation applies fairly easily. As did the expert in *Bradford*, the expert testimony (of the two experts) in *Tidwell* first narrows the range of potential causes. *Tidwell*, 626 So. 2d at 1302. And, again as in *Bradford*, the expert then places preference on one of the potential causes after having identified all of the potential causes. *Id.* The only difference between the two cases is the expert in *Bradford* excluded the other potential causes, whereas the expert in *Tidwell* identified one of the potential causes as the likely candidate. The result, however, is effectively the same.

Based on this analysis, even if the expert only speaks in terms of possibilities, a plaintiff may have obtained sufficient expert testimony where:

- I. There are no other causes of the injury discussed in the expert’s deposition; or
- II. There are other causes of the injury discussed in the expert’s deposition, but either:
 - a. the expert discounts the other causes, or
 - b. the expert emphasizes one of the causes over the others.

Two other opinions that do conform to the traditional standard of probable cause lend support to these conclusions.

Sorrell & Brown Mech. Contractors, Inc.

In *Sorrell v. King*, 946 So. 2d 854, 858 (Ala. 2006), the plaintiff alleged she suffered pain, bleeding, and depression following her doctor’s failure to remove a surgical device from her cervix. The doctor was granted summary judgment on grounds the plaintiff had failed to prove her allegations with the necessary expert testimony. The only material testimony presented on appeal was that of her doctor, who testified bleeding and pain would be symptoms of a foreign body left in a woman’s cervix. He testified those same problems “might be” symptomatic of the failure to remove the specific device left in plaintiff’s cervix. The Alabama Supreme Court held this testimony was not sufficient to meet plaintiff’s burden on causation:

Dr. King testified that the adapter *might* cause discharge, bleeding, pain, and fever, but he did not testify that injuries Sorrell alleged she suffered were probably caused or even likely caused by the presence of the adapter in her cervix. Dr. King's testimony demonstrates only a mere possibility that the adapter caused Sorrell's alleged injuries. We reject Sorrell's contention that Dr. King's testimony amounts to substantial evidence indicating that the presence of the adapter was the proximate cause of her injuries.

Sorrell, at 864-65. The Court went on to explain, in depth, the other potential causes the doctor discussed in his deposition:

The record also contains evidence suggesting that Sorrell's complaints of pain, bleeding, and depression did not relate to the adapter. Dr. King testified that the bleeding could have been associated with her menstrual cycle because of her history of taking Depo–Provera and that the Depo–Provera could “invoke

irregular bleeding, break-through bleeding from time to time....” Dr. King also testified that bleeding is a frequent complaint of patients who undergo laparoscopic procedures. In addition, Dr. King testified that her continued complaints of pelvic pain could have been related to the endometriosis. Although Sorrell alleged that she suffered from depression after the procedure, there is no evidence in the record showing that the presence of the adapter could have caused her depression. Sorrell’s medical records demonstrate that she had a history of depression and that she had taken multiple antidepressant medications before the surgical procedure.

Id. at 865.

In *Brown Mech. Contractors, Inc. v. Centennial Ins. Co.*, 431 So. 2d 932 (Ala. 1983), a contractor’s insurers sought recovery from two subcontractors for starting a fire at a construction project. The relevant issue on appeal was whether the insurers produced sufficient evidence to establish the subcontractors’ negligent welding of a cooling tower caused the fire. To meet their burden at trial, the insurers introduced the testimony of a fire marshal, who identified the possible causes of the fire. After giving reasons to reject the alternative causes, the fire marshal testified it was his “best judgment” the welding was the cause of the fire. On appeal, the subcontractors argued the evidence only established their conduct was one “several equally possible causes.” The Alabama Supreme Court held the testimony was sufficient to establish causation, in spite of the fire marshal’s characterization of the subcontractors’ negligence as one of several “possible causes” of the fire. *Brown Mech. Contractors, Inc.*, at 943-44. The Court based its holding on the fire marshal’s rejection of the alternative causes:

Goodner and Brown first argue that Reynolds testified only that the welding was a “possible” cause of the fire, not that it was the “probable” cause. It is true that in his investigation report and in much of his testimony Reynolds referred to welding as a “possible” cause of the fire. However, he gave reasons to doubt all of the alternative possible causes, and his testimony makes perfectly clear that he considered the welding the most likely cause of the fire. For example, to the question, “What did you find in the way of a source of fire or flame,” he answered unequivocally, “The only thing I could determine was welding.” The trial judge recognized the importance of this issue and specifically questioned Reynolds to distinguish between certain, probable and possible causes.

Id.

At first blush, these opinions appear inconsistent with one another. The Court in *Sorrell* held plaintiff cannot meet her burden with the physician's testimony alone because his testimony only "establishes that [her] pain and bleeding were *possibly* caused by the presence of the adapter in her cervix...." *Sorrell*, 946 So. 2d at 865. And, yet, in *Brown Mech. Contractors, Inc.*, the Court held the insurers met their burden even though the fire marshal identified the welding as a "'possible' cause of the fire." *Brown Mech. Contractors, Inc.*, 431 So. 2d at 943. But the opinions are consistent, given the distinction that the fire marshal in *Brown Mech. Contractors, Inc.* was able to explain why other potential causes of the injury were less likely to occur. In doing so, his testimony provides the necessary "selective application" because, in discounting the other potential causes, he is explaining why he thinks they were less likely to have caused the fire. The experts in *Bradford* and *Tidwell* applied the same logic, and, significantly, the Alabama Supreme Court equates the fire marshal's testimony to the probable cause standard. *See Brown Mech. Contractors, Inc.*, 431 So. 2d at 933-34 ("It is true that in his investigation report and in much of his testimony Reynolds referred to welding as a 'possible' cause of the fire. However, he gave reasons to doubt all of the alternative possible causes, and his testimony makes perfectly clear that he considered the welding the most likely cause of the fire.").

Conclusion

As discussed, an Alabama appellate court may relax the requirement for a medical expert to speak in terms of probabilities or likelihoods where 1) there are no other potential causes identified in an expert's deposition, or 2) the expert explains why other potential causes didn't cause the accident. Thus, it makes sense to raise other potential causes in any medical expert deposition regardless of whether the expert has testified to the probable cause of the injury.

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