

## Reasonable Medical Certainty

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Reasonable medical certainty. What is that? I am afraid to report that after having attempted to study the subject for many, many hours, I have discovered that the status of reasonable medical certainty is quite uncertain. In fact, I can make the statement that I am certain that reasonable medical certainty is an uncertain legal concept. From the cases I have reviewed, it appears that the law may even attempt to avoid the use of these words. What is reasonable medical certainty? Is it—more likely than not? Is it—that level of certainty upon which a physician relies when making an important medical decision such as whether or not to perform an appendectomy, whether or not to prescribe an antibiotic before obtaining a throat culture, whether or not to place the patient on antidepressant or antipsychotic medication, or is it certainty within some percentage range such as 51 to 75 percent or 90 percent? How certain can one be that a heart attack which occurs after being exposed to an armed robbery was caused by the stress of the robbery, and therefore was the legal cause of the heart attack or that, in another case, the stresses of the job were the cause of the depression in the patient? What is reasonable medical certainty in such a situation? I am uncertain. What about testimony that something could, might be, possibly was, seems connected to, may be related, could have, might have, etc. Is such testimony within reasonable medical certainty? For this article, I will consider reasonable medical probability or similar semantic efforts the same as reasonable medical certainty.

You might ask, why am I so uncertain, why is this so confusing? It is confusing because we are dealing with an evanescent concept, "reasonable," and attempting to define it across professions. The law is trying to tell us how they would like us to answer a legal question in legal language utilizing our medical knowledge and medical mind. Lawyers know what reasonable medical certainty means, but they cannot define it. Doctors testify to it daily, but they do not know what it means. Each jurisdiction appears to have its own interpretation of these magic words, so that an expert witness is advised to be sure that he/she understands the rules of evidence in the jurisdiction in which he/she is testifying and then hopes that he/she can

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In reviewing this subject, I am indebted to Marco<sup>1</sup> for his excellent review chapter, "The Certainty of Expert Opinion." He presents a complete picture of the confusion and he attempts to shed some light on the uncertainty. Some of my colleagues state that reasonable medical certainty means the same as beyond a reasonable doubt, while I have heard others say that reasonable medical certainty is at the level of the preponderance of the evidence. I suspect that there must be others, although I have not heard from them, who believe that reasonable medical certainty means clear and convincing evidence. I have just mentioned the three levels of burden of proof generally utilized by the law. Beyond a reasonable doubt, the highest burden, is used in criminal law where the potential loss of freedom could be severe. Some quantify this at 90 percent. This is the proof that is required by a reasonable man to decide guilt beyond a reasonable doubt or the type of doubt that is overcome before making an important decision. At the other extreme is the preponderance of the evidence, quantified at 51 percent by some. Evidence sufficient to tip the scales of justice, more likely so than not so. This burden is usually used in civil cases where there is no loss of freedom, only loss of money. The in-between standard, quantified at 75 percent by some, is clear and convincing evidence which is generally used where there may be a relative loss of freedom as in commitment, guardianship, etc. Obviously, these are vague and ambiguous standards subject to both inconsistent understanding and interpretation. It should be obvious that the greater the burden of proof, the greater the required certainty of evidence to meet that burden. "Yet despite the fact that these terms are by their very nature uncertain and incapable of, for example, scientific quantification, judges and the legal profession overwhelmingly favor retaining this vague and non-quantified system . . . ."<sup>2</sup>

In the 1971 case of the *Commonwealth of Pennsylvania v. Embry*, Cyril Wecht himself was the only medical witness.<sup>3</sup> A 71-year-old woman was robbed of her purse by three youths and subsequently died. The Court said "Cyril H. Wecht, MD, who performed the autopsy, testified for the prosecution that the sole cause of death was a myocardial infarction, commonly termed a "heart attack." Despite the existence of a past history of cardiac related problems, Wecht further opined, "with a reasonable degree of medical certainty" that the myocardial infarction was caused by physical and emotional stress occasioned by the purse snatching and ensuing struggle. Upon cross-examination by the defense attorney, as well as questioning by the trial judge, Wecht expressly admitted that while he was positively certain

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that death occurred due to the infarction, he was not convinced beyond a reasonable doubt that the struggle produced the stress which, in turn, could have caused the myocardial infarction. Instead, he was only able to reconstruct the chain of causation with a "reasonable degree of medical certainty." That the witness was not confused by this language is evidenced by his later testimony that in a proper case he could find causation beyond a reasonable doubt."<sup>4</sup> In this criminal case, all key issues must be proved beyond a reasonable doubt and therefore the conviction was reversed. Wecht's testimony was clearly admissible, however, his testimony was not sufficient to allow a conviction. The Court may have misunderstood since we wonder whether he could find a causation for a MI beyond a reasonable doubt in any case?

In medicine, we state that there is a possibility that the patient has a certain disease. We call it "rule out" with the idea that we will look further and try to nail it down later. Possibility under these circumstances can indicate an important or significant relationship or likelihood or an unimportant or insufficient likelihood. Under these circumstances, the word probability may then have a meaning to the physician of closer to near medical certainty. Many medical decisions are made within reasonable medical certainty when there is reasonable doubt. In medicine, concerns such as risk, harm, future impairments if wrong, etc., are some of the factors considered part of such decision making. Standards utilized for medical diagnostic and treatment purposes are not the same standards used by the law for testimonial purposes. While medically the word probable may mean near certainty, as we will see, it may mean a 51 percent likelihood for the law. The major factor to be considered is that much medical testimony is opinion evidence, not fact evidence, although a physician might testify factually that this bone is a radius or that a certain idea that a patient presents is a delusion. (I believe certain beliefs of patients can be factually considered to be delusions, i.e., "The Washington Monument is broadcasting to me.")

When discussing the need of the court to utilize the physician as an expert witness, Harold Liebenson, in "You, the Medical Witness" says "All we want you to do is to assist us and give us your opinion on the subject. Instead of the scientific certainty test used by doctors in medicine we make it an easier one. All we ask is that you give your opinion based upon a reasonable degree of medical and surgical certainty. Therefore, we are not asking you to be so stringent in your thinking, all we want you to do is help us so we can decide this case according to the law. What is this thing called "reasonable medical certainty"? It is a legal fiction. Its definition is not finite. Its interpretation by the courts has been varied. The key word is reasonable. A good meaning of this term which fits our situation for the

express his/her opinion at the required level of certainty. It is fairly certain that the attorney who has called you will assume that you understand exactly what these magic words mean, only to be surprised when on cross-examination your opinion does not reach the required degree of certainty.

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purposes of this explanation would be—a statement which would induce a person of ordinary prudence to believe it under the circumstances. Reasonable has also been defined as moderate or tolerable. One can readily see that this is far more liberal than the science of medicine would attach to this type of opinion.”<sup>5</sup>

Reasonable medical certainty problems are related to the admissibility and sufficiency of the expert testimony. Again, there are different rules in different jurisdictions. The standard of certainty required also varies depending on whether the issue is causation, present condition, or future problems. As expert witnesses we are allowed to render opinions, an exception from the common law rule which generally required witnesses to testify only from personal knowledge. We are allowed this privilege because we have special skill or knowledge with respect to the issue at hand that is superior to the knowledge of the average juror. However, after rendering an opinion, it is further necessary to convince the jury that the opinion is supported by the degree of certainty required. The legal concepts of admissibility and sufficiency also play a part in the law’s attempt to regulate evidence. I will not attempt to discuss these concepts since after struggling with them I was pleased to discover that the courts and attorneys are also quite confused.

In a 1965 Missouri case, the plaintiff’s attorney asked the doctor if the auto accident was “. . . the competent producing cause of this hernia which was found. . .” on the plaintiff three months after the accident.<sup>6</sup> The doctor answered, “It could be. I couldn’t say.” He was then asked if his opinion was based on reasonable medical certainty. He answered “The only way I can answer that . . . would be a percentage . . . I would say it would be about a 90% chance that it was caused by that (accident) and 10% it wasn’t.” On cross-examination, the doctor could not say the accident caused the hernia within a medical certainty. The court apparently wedded to reasonable medical certainty and not percentages reversed the case for a retrial and said “. . . the rule is that expert testimony that a condition might or could have resulted from an accident when standing above and without other facts, is not substantial evidence from which a jury can find cause and effect.”

As men of science we are in an alien world when with the law. As men of law they are trying to force us aliens to speak their language. Science describes, organizes, and explains. The law additionally seeks to judge and control. The law must accommodate us as we try to assist it. We require a high level of evidence to “prove” cause and we carry these harsher demands into the courtroom, where we continue to think in terms of scientific proof rather than the probabilities the law would have us consider. Legal proof tends to be more practical, focusing on probable cause in order to determine

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legal responsibility. This philosophical and communication problem is at the seat of our difficulties with reasonable medical certainty. Marco<sup>7</sup> points out that "courts have accepted such terms as possible, probable, likely, could, might, could have, might have; some courts require probabilities, while others require "to a medical certainty," and some require positive and unequivocal terms, or absolute certainty." Yet another author says, "But there are still too many questions unanswered. What is probability? It has never been defined. Is it a chance? A better than even chance? More likely than not?"<sup>8</sup> He then says, "I submit that probability in the area of causation should mean "more likely than not." After all, the plaintiff's burden is only to establish his case by the preponderance of the evidence. Testimony that it is more likely than not that a particular breach of duty caused this injury would be a preponderance.

We now have "more likely than not" as a definition of reasonable medical certainty. To that I would here add my concept, "that level of certainty which a physician would use in making a similar clinical judgement." Marco<sup>9</sup> defines "reasonable medical certainty" as "... (it) refers to the degree of persuasion qualitatively sufficient to generate the belief that the hypothesis tendered is, in all human likelihood, the fact. It is circumstantial evidence shy of absolute certainty and mathematical probability." Did you hear the difference in our definitions? I speak to clinical judgments, what I as a physician need to do, and he speaks to the degree of persuasion, what an attorney hopes to accomplish. The New York courts, in attempting to deal with this problem, say that "... the words used by, or addressed to, the experts are not alone controlling.<sup>10</sup> . . . . The probative force of an opinion is not to be defeated by semantics if it is *reasonably* (that word again) apparent that the doctor intends to signify a probability supported by some *rational* (a new word) basis." In New York, absolute medical or scientific certainty is not required, only reasonable and probable correctness.

The major area in which we and the law have so much trouble communicating is causation. There is of course a vast difference between medical concepts of causation and legal concepts of causation. In medicine, we think of etiology and at times the etiology of a disease may be unknown or, at the very least, unproven to us. On the other hand, the law, having an injured person, must ascribe responsibility for that injury, *vis-à-vis* a causative factor. Therefore, the law may accept trauma as the cause of cancer, even though the cause of cancer is unknown to medicine. The law, however, must settle a dispute and, if in that single case the plaintiff has proven that the trauma was the legal cause of the cancer, the law is satisfied because we are speaking here of a legal cause and not a medical or scientific cause. In dealing with causation, the law wants to find, if possible, substantial evidence of the direct cause so the jury can decide. What qualifies as

substantial evidence is another one of those vague unquantifiable legal concepts. "... the substantiality of the evidence necessary to make a submissible case depends upon the fact situation and, there are three different types of factual situations."<sup>11</sup> The first is where there is common knowledge of the likely result of an act as the deceased's head was crushed by a car, or the plaintiff suffered stomach pains after swallowing broken glass. Expert testimony is not needed here. In the second situation, while the facts may tend to establish causation, they alone are insufficient to do it. Here the expert may only need to corroborate a possibility of causation for there to be substantial evidence. This is seen in a post hoc, ergo propter hoc type of case. The plaintiff was in good health before the alleged negligence and in bad health afterward. Reasonable medical certainty means one thing here. The third situation occurs where there is no obvious causal connection so that expert testimony is essential if the burden of proof is to be sustained. "In this third area, therefore, it is frequently said that substantial evidence must be based on reasonable certainty, and that "possibly" or even "probably" by itself is insufficient." As we discuss some cases we might keep these guidelines in mind to see how carefully they are observed by the courts.

Let us now look at some psychiatric testimony with reference to cause. In the Swiss Colony case, the court said, "There is extensive credible evidence in this case that the cause of Mrs. Schillinger's mental disability was the unusual work stress which she was subject to in 1971."<sup>12</sup> (Schillinger was the overworked purchasing agent for the rapidly growing Swiss Colony mail order company and among other problems had been unable to take two scheduled one-week vacations in 1971 because of the press of business.) "Dr. Kamstra . . . testified that this work stress was the "major contributing factor" to Schillinger's mental disability (schizophrenia). He further testified that if this unusual work stress was not present, Schillinger would not have experienced her mental breakdown." Since the appeal did not raise any issue involving the admissibility or sufficiency of the evidence, I have assumed that this testimony was given with reasonable medical certainty. It was shown that Schillinger did have marital problems in 1968 to 1969, because of her husband's problem with alcohol. But the court pointed out that "Dr. Kamstra discounted these prior difficulties as "a minor stressful situation" in 1971." Dr. Barnes, her treating psychologist, testified that "the work stress was the principal cause and major factor in her mental breakdown," far outstripping "all other factors." No doubt he testified within reasonable psychologic certainty. The court later said, "there is no question that there is credible evidence to support the findings . . ." Dr. Leigh Roberts had testified to the contrary that she was not subject to unusual stresses and that her psychosis was due to her marital difficulties.

In a recent California case, *Albertson's, Inc. v. Worker's Compensation Appeals Board and Judith Bradley*, there was extensive psychiatric testimony apparently not to a reasonable medical certainty but at a "might" level (perhaps we should call this "mighty testimony").<sup>13</sup> Judith Bradley worked for Albertson's as a cake decorator. She was laid off by error when her seniority was miscalculated but was called back in ten days later when the error was discovered. When she returned she believed her supervisor's attitude had become curt and that he talked of getting rid of her. One day she said she could not work more than her scheduled five hours because of a doctor's appointment and "he became angry and replied in the presence of a co-worker, "You better get your butt in high gear because there's nothing here to sell." Bradley was "so embarrassed that (she) wanted to die" and she rapidly began to experience difficulty breathing, shaking and nausea." Upon leaving for the doctor's she told the manager that her supervisor "had made (her) sick."<sup>14</sup> Dr. Albert P. French, in his report with reference to Bradley's symptoms, said "... (they) *might* simply be part of an ongoing progressive deterioration going back many years and (*might*) have little or nothing to do with work." Bradley's treating psychiatrist, Dr. Robert B. Cahan, on the other hand, acknowledged in his report that she "had a mild obsessive-compulsive personality" which (*might*) well have hypersensitized her to the stressful experience at work and even colored her perception of those experiences."<sup>15</sup> The admissibility of "might" testimony was apparently not challenged on appeal. Eric Marcus, in an article in *Medical Trial Technique Quarterly* entitled *Causation in Psychiatry: Realities and Speculations*, raises some mighty strong criticism of "might" testimony.<sup>16</sup> He says "... what does "might" signify? Does it mean probably, possibly, or is it pure speculation?" Is might synonymous with reasonable medical certainty? Incidentally, this case is an important one in that it established a concept related to the plaintiff's "subjective perception of job harassment" whether or not it existed in fact.

In a Kentucky court worker's compensation case, a medical expert testified that overexertion as a cause of the coronary was "entirely possible, and entirely conceivable."<sup>17</sup> Another doctor said the exertion was "probably" the cause. The Board interpreted this as insufficient "could have" testimony. In reversing the Appeals court said "beyond cavil it is a shame that claims of equal merit should stand or fall on just how the medical witnesses choose to portray their conclusion . . . ." The Court then quotes from *Heart Disease and the Law*, "Physicians differ in the degree of caution or lack of caution with which they phrase their opinions, and one man's possibility may be equivalent to another's probability."<sup>18</sup>

In the Bailey case, a wrongful death action, the Missouri court did not accept the expert's "feeling" of a causal connection.<sup>19</sup> Since the doctor only

had a “feeling” that the accident was the cause and refused to state that his belief was based on “reasonable medical certainty,” the Court held that the verdict must be disregarded and the judgment reversed.

In a 1969 Ohio case, *State v. Holt*, the court reversed because a nuclear chemist conducting a neutron activation analysis of the hairs of the rape defendant with a hair found at the scene of the crime and testified “the samples . . . are similar and are likely to be from the same source.”<sup>20</sup> The Court said “the term “likely” is a weaker one (than) reasonably certain or probability and carries appreciably less weight . . . .” The Court went on to say, “it has also been held that in law “likely” means something less than “probable,” and opined that the testimony had not reached the degree of certainty which the law required. In a subsequent Ohio case, a man murdered his wife and threw her body into the reservoir, but it was not discovered for several months, so that at the time of the autopsy the body was badly decomposed.<sup>21</sup> The pathologist was asked the following questions:

**Question:** Doctor, your bottom-line conclusion of death by drowning—you state to me that—that is—a probability?

**Answer:** That is a probability.

**Question:** But you say it cannot be a probability, that is, to a medical certainty?

**Answer:** Medical, sir. When I speak of medical certainties, I'd like to be up in the 99.99 percentage range. This is a bit below that.

**Question:** This—this does not reach a medical certainty in your opinion as a—as a trained doctor?

**Answer:** It is a little less than certain.”

The Court went on to say, “Consequently, it is clear that Dr. Jolly testified that there was a probability, not a possibility, that the cause of death was drowning.<sup>22</sup> The test as to the admissibility of the opinion of a doctor is as follows: “The witness must connect the two with reasonable medical certainty. Probability, and not possibility, is required.” It appears therefore that in this case, although the doctor was not sure within reasonable medical certainty, he was sure within the probability and that this was acceptable. The Court again accommodates to the witnesses’ words.

In a Pennsylvania case, the Court said that when (Dr. Ascher testified) “. . . that he felt that the collision was a significant cause of her phobic condition clearly expresses a professional judgment of reasonable certainty . . . that he characterized the collision as a “significant cause” rather than a “substantial factor” makes no difference.”<sup>23</sup> I can now say with further certainty that it appears uncertain what evidence a court will accept. So much for causation.

The issue of prognosis or future condition is a very thorny problem for the courts, since a part of the award is based on what will happen to the plaintiff in the future as a result of the injury. Medical testimony is very

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important at this point, since dire predictions of future complications and suffering could lead the jury to give a large award while minimizing future problems could unfairly diminish the award. For this reason, it has generally been said that the burden placed upon the expert with reference to his level of certainty is greater at this point than that required for causation or diagnosis. We should watch to see if this is done. In the Swiss Colony case, the Court pointed out "... (yet) Dr. Kamstra clearly and *unequivocally* testified that his findings of 25% permanent partial disability was based upon "the impairment of earning capacity."<sup>24</sup> He explained that he had made such a conclusion because when a schizophrenic like Schillinger improves so that she can return to society, she does so "with a reduced ability to function in society."

In another case, the Eighth Circuit upheld an orthopedist's opinion, "based upon a reasonable medical certainty, that there was a 10% probability that Trapp's ankle would need an arthrodesis within the next 5 to 10 years."<sup>25</sup> The court reasoned that this "risk" is a medical fact and may be relevant if for no other purpose than to establish a basis for compensable anxiety of an injured person." In discussing this, one reviewer says, "It should be observed that even jurisdictions purportedly following the more restrictive traditional rule have permitted introduction of "possibility" testimony when it has been phrased in terms of low statistical probability (10%) known to the physician with reasonable medical certainty."<sup>26</sup> To me, this seems to say that something is possible if it is within a statistical probability and therefore it is within reasonable medical certainty.

Since doctors cannot predict the future occurrence of seizures following brain injury if they have not already occurred nor deterioration in personality or intelligence or improvement of same with any high level of certainty, the courts have evolved various ways of allowing some testimony with the understanding that the jury will have to determine its substantive value. The Alaska Supreme Court said "the testimony on possibility is admissible on the basis that all cumulative testimony in the case tends to show with reasonable certainty the consequences that will follow a given injury."<sup>27</sup> On the other hand, other courts have placed restraints on the use of possibility testimony, holding it improper for the plaintiff to prove future special damages that he/she might anticipate on the basis of possibility. These courts require recovery on the basis of proof that the dire results are reasonably certain to occur. In *Rogers v. Sullivan*, the medical witness was asked, "Based on the fact that it has now been some sixteen months subsequent to the time he sustained this injury, and the presence of atrophy, what would you say his possibilities or probability with medical certainty would be for complete recovery on that right hip and right leg, considering his age?"<sup>28</sup> Answer—"I don't expect after this length of time that he can

recover fully from this injury that he sustained to his right hip and right leg.”

The Court said, “It is our view that in order for this jury to receive maximum enlightenment the medical witness must have considerable freedom in expressing a prognosis. It seems to us that it would be proper simply to ask the witness for his opinion as to the prospects of recovery, and let him explain as he wishes. The thing that counts is what he says; the question need only open the subject. Within this context the question now under review, though perhaps somewhat awkward, was not improper.”<sup>29</sup>

I started on this endeavor because I thought I could obtain some clarification of the concept of reasonable medical certainty and assist my colleagues in becoming more useful witnesses. After many hours I find myself frustrated in the search for a simple answer. There is no simple answer. Reasonable medical certainty is not what I thought it was. It is neither reasonable nor certain. It may be a probability, but then it is quite possible it is a possibility. Humpty Dumpty was correct when he told Alice, “When I use a word it means just what I choose it to mean—neither more nor less.”<sup>30</sup> This is certainly what the law has done with reasonable medical certainty.

In closing, I advise—ask how it is supposed to be told and then tell it as close to what they want within the limits of your honesty and integrity.

### Addendum

In the open discussion of this article, several colleagues raised important points. It became clear to me that part of my frustration with this issue was the result of my becoming bogged down in an obsessional attempt to understand reasonable medical certainty as a precise concept, when it clearly is not. Dr. Theodore Sidley pointed out that the goals of the judicial system are justice and therefore most courts will try to interpret testimony in a fair fashion and not apply rigid definitions.

Dr. Larry Strasburger pointed out that the law is struggling between policy issues and rigid concepts in its need to settle disputes. Therefore, it establishes a formula but cannot stick to it rigidly.

Dr. Robert Sadoff suggested that we should testify as to our clinical knowledge and understanding and that was the level of our certainty. Dr. Melvin Goldzband, however, thought that clinical impressions belonged in our report (clinical certainty) but this had to be presented to the court as reasonable medical certainty. Others reported that some courts required opinions within “reasonable medical certainty” while some did not require these magic words.

Dr. Martin Orne felt that the Appeals courts appeared to stick to the magic words without evaluating the supporting evidence that must have

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been furnished. (Perhaps it was not furnished, which accounts for part of the problem.)

Professor Ralph Slovenko pointed out that reasonable medical certainty has no direct relationship with the preponderance of the evidence since it is the jury who makes the final determination on all of the evidence (in civil cases) at that level of proof. The expert's opinion may or may not approach that level because the evidence to be considered by the jury is cumulative.

In conclusion, it is clear that reasonable medical certainty does not mean a clear or positive certainty. It means whatever the court, lawyers, or witness seem to want it to mean. One should express opinions with as clear a degree of certainty as is possible, with supporting evidence and not be confused by a scientific concept of certainty. Perhaps this fits my definition that reasonable medical certainty is that level of certainty upon which a physician relies when making a diagnosis and starting treatment, but I am not certain!!

### Acknowledgment

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24. Swiss Colony, *Supra* n.11, at 133
25. *Trapp v. 4-10 Investment Co.*, 424 F.2d 1261 (8th Cir. 1970)
26. Joseph GP: Less Than Certain Medical Testimony. 14 Trial 51,53 (1978)
27. *Saslow v. Rexford*, 395 P.2d 36,41 (Alaska 1964)
28. *Rogers v. Sullivan*, 410 S.W.2d 624,626 (Ky. 1966)
29. *Id* at 627
30. Carroll L: Alice Through the Looking Glass. Chap. 6. London, MacMillan, 1867