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Semantics of Traumatic Causation

Richard M. Markus*

SOMETIME BEFORE THE TRIAL of every personal injury case, each lawyer involved must make sure that the physicians whom he will call to testify understand the *legal* meaning of certain *medical* words. Counsel have not sufficiently prepared their case from a medical viewpoint, when they have ascertained the trauma sustained and its medical consequences. The lawyer must also educate the doctor about legal technicalities which will control the significance of the doctor's testimony. Among the most important formal requirements on the physician's testimony are those which relate to the language of causation. This article will discuss the views of various jurisdictions, the conflict between those views and accepted principles of semantics and medicine, and possible solutions to eliminate apparent incongruities in this area of the law.

Can counsel ask whether the incident involved was "the direct cause" of the condition which was later found by the physician? Can the physician testify that there is a "possible" causal relationship between the incident and the plaintiff's present condition? When is it proper to use such words as "could," "might," "likely," "probably," "may have," or other words or phrases which describe the certainty and uncertainty of causal relationship? An examination of the decisions from the courts of different jurisdictions shows that there is no single or universal answer to those questions. Acceptable language in one jurisdiction is an anathema in the next jurisdiction. Necessary phrases for one court are strictly prohibited in the next. These conflicts result in large part from the difference in rationale applied by the various tribunals. For the most part, three basic analytical categories encompass the reasoning of the various courts and the consequent language approved by them: (1) Does the testimony invade the jury's province on questions of ultimate fact? (2) Does the testimony express sufficient certainty to have probative value? (3) Does the testimony aid the jury in its deliberations?

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The first viewpoint emphasizes the effect of a physician's expert testimony as tending to decide the ultimate question presented to the jury. For example, a long line of Illinois decisions held that the expert should never be allowed to testify that the circumstances involved "did cause" the plaintiff's difficulties, or that such circumstances are "the cause" of the present condition.¹ Similar rulings have come from Iowa,² Michigan,³ Missouri,⁴ and New York.⁵ Some of these states have periodically recanted and adopted different positions under the theories described later.⁶ One Tennessee decision even held that testimony was improper where the expert witness stated that the incident involved "probably did" cause the disputed consequences.⁷ Those who follow this viewpoint assert that the jury should not be coerced by a learned expert to a specific conclusion on the ultimate issue. In the language of a leading Illinois decision, the basis for this doctrine is as follows:⁸

Whether or not the collision or accident caused traumatic neurasthenia in the defendant in error [the plaintiff], or caused the tumor in her breast, are ultimate facts upon which the jury must make their findings. It is no more proper for physicians to settle those questions for the jury by their direct answers than it would be for a motorman of another street car company to settle the question of negligence by testifying in broad terms that the plaintiff in error [the defendant] was guilty of negligence. . . .

¹ *Illinois C. R. R. v. Smith*, 208 Ill. 608, 70 N. E. 628 (1904); *Fellows-Kimbrough v. Chicago City RR*, 272 Ill. 71, 111 N. E. 499 (1916); *People v. Gleitsmann*, 361 Ill. 165, 197 N. E. 557 (1935).

² *Crouch v. National L. S. RR*, 241 Iowa 425, 217 N. W. 557 (1928); *Lukin v. Marbel*, 219 Iowa 773, 259 N. W. 782 (1935); *Strever v. Woodward*, 160 Iowa 332, 141 N. W. 931 (1913); *Sever v. Minneapolis & St. L. RR*, 156 Iowa 664, 137 N. W. 937 (1912) (opinion as to the "probable" cause of an injury also held improper for the same reason).

³ *DeGroot v. Winter*, 261 Mich. 660, 247 N. W. 69 (1933); *Layton v. Cregan and M. Co.*, 265 Mich. 574, 252 N. W. 337 (1933).

⁴ *Taylor v. Grand Ave. RR*, 185 Mo. 239, 84 S. W. 873 (1905); *Glasgow v. Metropolitan St. RR*, 191 Mo. 347, 89 S. W. 915 (1905); *Smart v. Kansas City*, 208 Mo. 162, 105 S. W. 709 (1907); *Maloney v. United Railways Co.*, 237 S. W. 509 (Mo. 1922).

⁵ *Marx v. Ontario B. H. & A. Co.*, 211 N. Y. 33, 105 N. E. 97 (1914).

⁶ E.g., *Sanitary Dist. v. Ind'l. Comm'n.*, 343 Ill. 236, 175 N. E. 372 (1931); *O'Leary v. Scullin Steel Co.*, 303 Mo. 363, 260 S. W. 55 (1924); *McMartin v. Fidelity and Casualty Co.*, 239 App. Div. 296, 267 N. Y. S. 473 (1933).

⁷ *Cumberland T. & T. Co. v. Peacher Mill Co.*, 129 Tenn. 374, 164 S. W. 745 (1914) (witness was expert on electricity testifying on cause of fire). This decision was apparently overruled in *National L. & A. Ins. Co. v. Follett*, 168 Tenn. 647, 80 S. W. 2d 92 (1935).

⁸ *Fellows-Kimbrough v. Chicago RR*, 272 Ill. 71, 111 N. E. 499 (1916).

Similar statements can be found in most decisions which outlaw testimony which seemingly expresses certainty as to the causal connection between the accident and the injuries.

It follows that courts which apply this rule necessarily approve language which purportedly expresses much less certainty. Since almost all jurisdictions agree that a physician has expert knowledge which can assist a jury in its deliberations, the courts denying definitive positive testimony about the causal relationship will ordinarily approve testimony that the condition "might" have resulted from the accident.⁹ In those jurisdictions counsel and the physician are freely encouraged to discuss possibilities. These courts reason that a physician may testify that there is a possible connection between the claimed consequences and the incident, and that the jury may combine that scientific possibility with the non-scientific circumstances developed in evidence to conclude that there was in fact a direct and proximate causal relationship. Thus, an early Iowa case stated: ¹⁰

In a case of this kind, it may become highly important that an expert shall enlighten the jury upon subjects of a technical or scientific character. The expert may be permitted, under certain circumstances, to express an opinion as to whether, in his judgment, a certain condition arising in a scientific or technical field, may have been brought about from certain causes, but never may the expert be permitted to invade the province of the jury and express any opinion as to the ultimate facts to be determined by the jury.

In summary, therefore, courts following this viewpoint prohibit too great an assertion of certainty in testimony about causal connection, while embracing somewhat more ethereal expert opinions about "maybes" and "mights."

At the opposite end of the spectrum are the courts which seem less concerned about an invasion of the jury's province,¹¹

⁹ See cases cited above at notes 1-5.

¹⁰ *Sachra v. Town of Manilla*, 120 Iowa 562, 95 N. W. 198 (1903).

¹¹ See, for example, the court's syllabus in *Shepherd v. Midland Mut. L. Ins. Co.*, 152 Ohio St. 6, 87 N. E. 2d 156 (1949): "Where an ultimate fact to be determined by the jury is one depending upon the interpretation of certain scientific facts which are beyond the experience, knowledge, or comprehension of the jury, a witness qualified to speak as to the subject matter involved may express an opinion as to the probability or actuality of a fact pertinent to an issue in the case, and the admission of such opinion in evidence does not constitute an invasion or usurpation of the province or function of the jury, even though such opinion is on the ultimate facts which the jury must determine."

but are determined to require expressions with a high degree of certainty before the testimony has probative value. Here, a physician's conclusion that the plaintiff's condition "might" have resulted from the accident would be stricken.¹² A doctor in this court would not be permitted to testify that it was "possible" for the trauma to cause these results.¹³ These jurisdictions insist that the degree of certainty be expressed as "probable" or in some instances even more strongly. A South Carolina court¹⁴ insisted that the only acceptable form of testimony which expressed sufficient certainty is a conclusion that the accident "most probably" caused the plaintiff's difficulties. Evidently courts following this line of thought construe the words "possible," "might," or "may have been," to mean an unlikely relationship that is remotely conceivable. Whether the word "could" expresses sufficient certainty is a disputed matter among courts applying this rationale.¹⁵

Since the jurors in these jurisdictions must find that the alleged consequences resulted from the incident in suit, by the greater weight of the evidence, the witness must affirmatively establish that his conclusion is likewise founded upon the greater

¹² *Bearman v. Prudential Ins. Co.*, 186 F. 2d 662 (10th Cir., 1951); *Lyons v. Chicago City RR*, 258 Ill. 75, 101 N. E. 211 (1913); *Saaf v. Duluth P. P. R. Ass'n.*, 240 Minn. 60, 59 S. W. 2d 883 (1953); *McLaughlin v. Curtis-Quillen Co.*, 223 App. Div. 208, 227 N. Y. S. 712 (1928); *Windham v. City of Florence*, 221 S. C. 350, 70 S. E. 2d 553 (1952).

¹³ *Baeza v. Remington Arms Co.*, 122 Colo. 510, 224 P. 2d 223 (1950); *Packer v. Fairmont Creamery Co.*, 158 Kans. 580, 149 P. 2d 629 (1944); *Aiken v. Ind'l Comm'n.*, 143 Ohio St. 113, 53 N. E. 2d 1018 (1944); *Stacey v. Carnegie-Illinois Steel Corp.*, 156 Ohio St. 205, 101 N. E. 2d 897 (1951); *Stampas v. Dept. of Labor*, 38 Wash. 2d 48, 227 P. 2d 739 (1951); *Meyer v. Fronimades*, 2 Wis. 2d 89, 86 N. W. 2d 25 (1957).

¹⁴ *Windham v. City of Florence*, 221 S. C. 350, 70 S. E. 2d 553 (1952); see also *Cross v. Concrete Materials*, 236 S. C. 440, 114 S. E. 2d 828 (1960).

¹⁵ The following decisions apparently find that "could" means "probable": *Yellow Cab Co. v. McCullers*, 98 Ga. App. 601, 106 S. E. 2d 535 (1958); *Cunningham v. Maxwell*, 6 App. Div. 2d 366, 176 N. Y. S. 2d 720 (1958). *Oklahoma Nat. Cas. Co. v. Kelly*, 194 Okla. 646, 153 P. 2d 1010 (1944). On the other hand, these cases apparently construe the word "could" to mean "possible" rather than "probable": *Brandt v. Mansfield Rapid Transit, Inc.*, 153 Ohio St. 429, 92 N. E. 2d 1 (1950); *Nestor v. George*, 354 Pa. 19, 46 A. 2d 469 (1946). Numerous others phrases have been accepted or rejected as the particular court thought it appropriate at that time. E.g., *Boze v. Ind'l Comm'n.*, 32 Ohio L. Abs. 238 (1940) ("quite possible" and "most logical" are equivalent to "probable"); *Boland v. Vanderbilt*, 140 Conn. 520, 102 A. 2d 362 (1953) ("likely connection" means "probable cause"); *Shatto v. Grabin*, 233 Iowa 46, 6 N. W. 2d 149 (1942) ("reasonable cause" held admissible); *Vaccaro v. Marra Bros., Inc.*, 130 F. Supp. 12 (E. D. Pa. 1955) ("definite possibility" held insufficient); *Benjamin v. Holyoke St. RR*, 160 Mass. 3, 45 N. E. 95 ("adequate cause" held sufficient).

weight of his mental faculties. From a mathematical viewpoint, these courts would seem to be concerned with facts whose probability exceeded 50%, and totally disinterested in facts whose probability was 50% or less. A review of the decisions in this area of the law suggests that this judicial viewpoint has gained increasing momentum and acceptance.

The third judicial rule for semantics acknowledges the uncertainty of language. This view accepts testimony by an expert physician as to the likelihood of causal connection in almost any terms which the witness deems appropriate. Here the courts note that testimony which ascribes any degree of probability, whether greater or less than 50%, assists the jury in its deliberations. Recent Missouri decisions,¹⁶ some cases from Maryland,¹⁷ Indiana,¹⁸ Iowa,¹⁹ and scattered rulings from other states, seem to support this type of analysis.²⁰ Because of his special training and experience the physician has knowledge which can materially aid a jury in its evaluation of the testimony. If the physician chooses to employ phrases or words which fall below a judicially created semantic standard, he may nevertheless assist the jury in reaching a proper decision.

Some of these rulings suggest that the choice of language by the physician is not necessarily expressive of his true thoughts, and that the language can best be interpreted and understood by the jury which receives it from the witness in all of the surrounding environment of the testimony. A few would receive opinion testimony, even where the witness unequivocally acknowledges that his conclusion is rendered with less than 50% probability, because it nevertheless aids the trier of facts when combined with other fact and expert testimony. Courts following this line of approach do not abandon the requirement that

¹⁶ *Walker v. St. L. Pub. Serv. Co.*, 362 Mo. 648, 243 S. W. 2d 92 (1951); *Foley v. Coca-Cola Bottling Co.*, 215 S. W. 2d 314 (Mo. App. 1948); *Kenney v. J. A. Folger and Co.*, 192 S. W. 2d 73 (Mo. App. 1946); *Butsey Hahn v. McDowell*, 349 S. W. 2d 479 (Mo. App. 1961).

¹⁷ *Charlton Bros. Transp. Co. v. Garrettson*, 188 Md. 85, 51 A. 2d 642 (1947); *Bethlehem-Sparrows Point Shipyard v. Scherpenisse*, 187 Md. 375, 50 A. 2d 256 (1946); *Butsey Kujawa v. Baltimore Transit Co.*, 224 Md. 195, 167 A. 2d 96 (1961).

¹⁸ *Magazine v. Shull*, 116 Ind. App. 79, 60 N. E. 2d 611 (1945).

¹⁹ *Cody v. Toller Drug Co.*, 232 Iowa 475, 5 N. W. 2d 824 (1942).

²⁰ This is not the same situation as is presented where the words "probable" and "possible" are construed to mean the same thing. *Lucey Boiler & Mfg. Corp. v. Sich*, 188 Tenn. 700, 22 S. W. 2d 19 (1949).

the plaintiff must prove his case by a preponderance of the evidence to sustain his burden of proof. Instead, they simply find that the expert opinion testimony, in whatever terms it is expressed, should be considered with all the other testimony in deciding whether sufficient evidence of proximate causation was presented to allow a jury verdict on that question. There are, then, three viewpoints which in substance hold (a) too great a degree of certainty is objectionable, (b) too slight a degree of certainty is objectionable, and (c) any degree of certainty has some value.

This conflict in principles is further complicated in the federal courts by the application of Rule 43 (a) of the Federal Rules of Civil Procedure, which reads in part as follows:

All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States Court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.

This rule has been popularly summarized as saying that evidence is admissible if proper either in the federal courts generally or in the state courts where that district court is sitting. Since the rule applicable in any state court may change from time to time among the various views described above, and since there is no well-established pattern of rules in the federal courts, the federal courts are sometimes left to their own discretion in deciding whether or not expert medical testimony states the appropriate degree of certainty in conclusions as to causation. The district judge is ordinarily a man who previously practiced in the state where he now holds court, so he usually tends to follow the rules of that state.

At the same time, the search for a favorable forum might well induce plaintiff's counsel to select a particular state, or the federal courts in such state. Traditional principles of conflict of laws make the evidentiary rules of the forum state the rules which apply in the trial, since evidence is ordinarily considered procedural rather than substantive. It would not be surprising,

therefore, for a plaintiff's lawyer who anticipates difficulty in proving a causal relationship between the accident and the injuries to select carefully among available jurisdictions, and to include both state and federal courts in his search for one whose evidentiary rules permit testimony supporting his theory.

With the above analysis of contrasting views in mind, we suggest that basic concepts of semantics might well aid a court in choosing a reasonable semantics rule. In general, semantics could be described as the study of the meaning of meaning. Most students of semantics begin by saying that language is a very limited means of communicating thought.²¹ Certainly, the words used by the witness may express something less than his entire mental processes on the subject involved. In some instances, the words even create an impression directly contrary to the intention of the person who is seeking to express himself. When a witness testifies that there is a "possible" causal relationship between the automobile collision and the plaintiff's condition of multiple sclerosis he ascribes no specific mathematical ratio between the probability of likelihood and unlikelihood.

Despite its limitations, language is the only means available as a practical matter for the witness to communicate his thoughts to the trier of facts. Fortunately, the testimony of live witnesses is more informative because the juror sees the expression on the witness' face, hears the emphasis given to the words, and senses something more than the bare language from surrounding circumstances of the courtroom.²² This is, of course, one of the main reasons why the trier of facts is given broad discretion in determining the truth, since he has received the testimony in its full context with all of its overtones and nuances. A review of the cold transcript seldom reveals the connotations intended or understood for the testimony.

²¹ See Lee, *Language Habits in Human Affairs*, ch. 2, 7 (1941); Chase, *Tyranny of Words*, ch. 1 (1938); Ogden, *Meaning of Meaning*, ch. 1 (1938); Korzybski, *Science and Sanity*, ch. 4, 5 (1950).

²² Other factors which can give greater meaning to the words of the witness are the tone and expression of the questioner, expressions on the face of the judge, and movements or activities of any person in the courtroom. The importance of direct observation of the witness is emphasized in *Continental Casualty Co. v. Stokes*, 249 F. 2d 152 (5th Cir., 1957). In that case the medical evidence was presented by document and deposition and defendant argued that the appellate court had special reason to review the factual determinations as to the nature and extent of injuries. The appellate court pointed out that the plaintiff had testified personally and that the credibility of his testimony was important to the evaluation of the medical testimony.

One semantic approach to this problem points to a process known as "abstraction."²³ When a witness observes certain occurrences, his senses abstract characteristics of that occurrence. From those multitudinous characteristics, his mental processes abstract something less than all of the observed factors in formulating an impression. When the witness expresses himself about the observed phenomenon, he further abstracts by selecting only a portion of his impressions about which he makes any attempt to communicate. The listener abstracts further, and his faculties absorb even fewer of the original characteristics. At some or all of these stages, additional characteristics may be consciously or unconsciously added which tend to make the subsequent stages even further from the original facts. The law recognizes this process as one of the justifications for exclusion of hearsay testimony, since the reported facts are less reliable as they pass to persons beyond the original observer.

Thus, oral description of simple observations is subject to incompleteness and inaccuracy. "I see a red apple" communicates only a small portion of the real facts and describes those facts in a greatly oversimplified (consequently inaccurate) fashion. Manifestly, expression of mental comparisons between objects is still less accurate. And inferential comparisons of intangibles, such as those required to discuss "cause and effect" relationships, are among the most nebulous mental evaluations. The verbalization of those evaluations is at best a poor expression of statistical averages when compared with the facts originally observed and the mental processes applied to those facts. This means that a physician is truly hard pressed to reach a conclusion about causality with any degree of accuracy as to its mathematical probability. His verbal statement of that mental analysis is still fuzzier.

Despite the uncertainty in the physician's mind, and the even greater uncertainty in his oral expression of that state of mind, the courts apply standards of rigor which assume that the doctor has made a specific quantitative determination and has expressed it in precise fashion to reflect that thought. In other words, the courts ignore the fact that the word "possible" may in fact express greater certainty than the word "probable" in

²³ See, Korzybski, *Science and Sanity*, ch. 24-26 (1950); Johnson, *People in Quandries*, ch. 7 (1946).

some circumstances.²⁴ Likewise, the courts demand that the physician limit his testimony to causality involving more than 50% likelihood, when the physician is himself unable to separate likelihoods of 45% from likelihoods of 55%. This represents another semantic fallacy, sometimes called "two valued orientation."²⁵

The courts infer that a causal relationship is "probable" or "not probable." However, the infinite gradations between certainty that a causal relationship is present (100%) and certainty that it is absent (0%) make such a two valued orientation meaningless or even harmful. When courts refuse to admit testimony on the ground that it purportedly asserts less than 50% probability, they ascribe precision to the testimony which is greater than the witness can honestly supply. Indeed, in many situations a medical opinion might well be more honestly framed if the witness testified that there was more than one chance out of four of a causal relationship (25%) but less than three chances out of four (75%). The two valued orientation adopted by some courts requires the rejection of testimony on the theory that less than 50% certainty has no meaning at all. A fair analysis shows that an evaluation of likelihood near 50% but below that figure is truly important since the degree of error in any approximation is itself substantial.

A study of semantics from an historical viewpoint indicates the manner in which many societies ascribe fixed meaning to words, whether or not that meaning is intended by the speaker or understood by the listener. In some societies, certain words take on a magical quality so that their mere utterance presumably causes favorable or unfavorable reactions or consequences.²⁶ More enlightened societies should recognize that the words are merely attempts to express thought which in turn is an attempt to express observations and inferences. Some judicial decisions on traumatic causation suggest that courts are willing to ascribe quasi-magical qualities to particular words of certainty.

Thus, some courts hold the statement by a physician that the

²⁴ The word "possible" was held to express sufficient certainty when coupled with an additional statement that it was "80% possible." *Cole v. Simpson*, 299 Mich. 589, 1 N. W. 2d 2 (1941).

²⁵ See Lee, *Language Habits in Human Affairs*, 100-111 (1941). For a detailed discussion of two valued orientation as applied to cause and effect, see Korzybski, *Science and Sanity*, ch. 15 (1950).

²⁶ See Chase, *Tyranny of Words*, ch. 5 (1938); Ogden, *Meaning of Meaning*, ch. 2 (1938); Lee, *Language Habits in Human Affairs*, ch. 8 (1941).

injury was "probably" caused by the accident serves to open the door to jury consideration, no matter what he or anyone else might say. It is as if he spoke the words "open sesame" and the path to jury consideration was established. In those circumstances, the words have more effect than their meaning. On the other hand, some courts would say that testimony of a "possible" causal connection does not actuate the mechanism which permits jury deliberation, regardless of the additional testimony by that physician or other non-medical witnesses. This use of "magic words" results from legal inertia. It is far simpler for a reviewing court to look for the magical word or phrase, in deciding whether a case was presented for the jury, than to make a careful analysis of all the testimony, including the medical testimony.

If we consider this language problem from the physician's position, rather than that of the judge and lawyer, we see even greater complications. The doctor wishes to express himself accurately and fairly in accordance with his oath to tell the whole truth. Yet, when he is called to testify, he must adopt awkward or unnatural language to respond in a manner that has evidentiary value. Since the testifying physician has a natural identity or affinity for his patient or the person who requested his professional services, he may be consciously or unconsciously induced to use the requested language, even though it does not truly reflect his thought pattern. His training has prepared him to use language of causation for treatment purposes, not for testimony purposes, so his frame of reference is artificially altered.²⁷

In deciding whether to undertake a course of treatment, the physician must balance the risk and complexity of the treatment against the likelihood of its value in aiding the patient. The cause of the patient's ailment is important as a guide to appropriate treatment. Virtually every medical treatise emphasizes the value of a complete history to assist the physician in making a proper diagnosis and an appropriate plan of treatment. A treating

²⁷ In the preface to their book, *The Relation Between Injury and Disease* (1938), Drs. Reed and Emerson make this statement: "Physicians responsible for the care of injured persons in whose condition there is the element of liability are impressed by the unfairness of many of the settlements made, if the latter be judged on their scientific merits, although in view of the medical testimony presented often they may be quite just. For this reason many injured persons receive little or nothing for physical disabilities and impairments justly compensable, while others receive awards for diseases not in the least due to injury."

physician's decision that there is 30% to 40% likelihood of internal injuries resulting from trauma might well be sufficient for him to undertake extensive tests.²⁸ In some circumstances he might even feel obliged to undertake exploratory surgery even though the contemplated consequence of the trauma is only a "possibility" in the legal sense.

Is there any reasonable support for a legal rule that excludes a physician's testimony as to consequences from a trauma when his degree of certainty is sufficient to require dangerous operative procedures? In view of the uncertainty necessarily presented by limited knowledge available in medical sciences, the doctor must act upon "maybes" or "mights" in his daily practice. Why should he be prohibited from expressing those views in court?

Because the reason for decisions about causality differs in the medical context from that in the legal context, the words take on a meaning different to the physician from that for the lawyer. Many times a physician will state that there is a "possibility" of a certain medical condition or relationship, and intend to convey the meaning that there is reason to make further examination or treatment. Therefore, "possible" can mean an important and significant likelihood to many practicing physicians. Except for his rare participation in medical-legal matters, the average physician may have no occasion to use the word "probable" in describing the physical condition or the causal source of that condition. Therefore, the word "probable" may assume a meaning to the physician of near certainty rather than 51% likelihood.

Any lawyer who practices personal injury law receives innumerable medical reports in which the physician states that the condition "could well arise from the accident," or "certainly

²⁸ "In the course of the practice of medicine, every physician and consultant encounters problem patients who, after careful history and examination, appear to be suffering from persistent symptoms of both a general nature and from those referable to several specific systems of the body. The routine laboratory and x-ray diagnostic procedures may be either 'negative,' 'borderline,' or 'inconclusive.' He is then faced with the problem of: (1) biding his time, hoping that subsequent events in the clinical course may clarify the nature of the patient's condition; (2) diagnosing the symptom complex as psychosomatic, if significant elements of anxiety or depression are present; or (3) intensively pursuing other diagnostic approaches in the hope that a specific treatment or prognosis may be more readily ascertained. It has repeatedly impressed the author that these difficult diagnostic problems are definitely on the increase in this transitional age of medicine, characterized as it is by both the continuing effective control of acute illness and the undeniable emphasis upon disease affecting the middle and older age groups." Roberts, *Difficult Diagnosis*, 1-2 (1958).

might" come from the accident. The lawyer realizes that this doctor needs education as to the legal meaning of the words he is using. It is sometimes necessary to write for a supplementary report, with legal explanations by the lawyer, in order to obtain acceptable language which does in fact reflect the true feelings of the physician.

A sad state of affairs has arisen when the lawyer must educate his professional brother practicing medicine as to the meaning of simple English words. This procedure is demeaning to the physician, the lawyer, and both professions. Often, the lawyer must state that this is legal jargon and that the physician must accept the fact that lawyers use peculiar phrases in a peculiar manner. This is hardly a means of maintaining respect for the judicial processes. It is certainly not conducive to the maintenance of good relations between the two professions.

The problem is further accented when the physician chooses to relocate in another jurisdiction. Having been carefully educated in the few medical-legal matters in which he was called upon to participate, the doctor now learns that his education is entirely wrong. All that he has been told is now inapplicable or false, because the courts in this jurisdiction attach a completely different meaning to the same words that were defined for him by the lawyer in the first jurisdiction. If the attorney fails to educate or re-educate the physician, he runs the real risk that the doctor's true thoughts will be excluded from evidence, even though the witness genuinely believes that there is a real causal connection between the trauma and the alleged sequella.

Solutions to the confusion presented in this area must attempt to accomplish two goals. First, conflict between legal rules and principles of medicine and semantics should be reduced. Second, efforts should be made to eliminate differences which flow from the fortuity of the forum. Consideration of the matters discussed earlier suggests strongly that the third rule of judicial semantics makes the best sense—testimony by the physician should be admitted in any language or choice of words. Let the physician express his true thoughts as ably as he can. Further elaboration upon his meaning can be obtained by additional direct examination or cross-examination. Such examination ordinarily follows expressions of opinion on causation even in courts which use the "magic words" approach. However, in such courts, the opposing counsel's goal is to cause the physician to use one

of the evil words and thereby subject his entire testimony to a motion to strike.

Judges should refrain from saying that testimony of "probabilities" is proper, while all other testimony is without value. Recognizing the wide range of likelihoods (0%-100%) and the physician's inability to speak with precision on this subject, the courts can adopt practices which conform to sound semantics and medical management. All of the physician's testimony should be treated as guidance by a trained expert for the assistance of the jury. The use or absence of particular key words should be no basis, standing alone, to authorize submission of the case to the jury or to refuse its consideration by the jury.

None of this analysis is intended to suggest that the standard or the burden of proof should be changed in any way. Instead, the requirements of proof should be found to have been satisfied or unsatisfied by a careful analysis of all of the evidence, including all of the medical testimony, without reference to a need for particular words. Courts which permit a broad range of medical language in describing causation ordinarily apply the same requirements that the plaintiff must establish his case by a preponderance of the evidence. In arriving at decisions whether or not sufficient evidence has been presented to merit a jury verdict on this issue, those courts recognize that non-medical circumstances are oftentimes as important or more important than the testimony of a physician.²⁹ While a mere time sequence of trauma and complaints does not establish their relationship, it is some evidence for consideration. Few people would deny a causal relationship between the amputation of a leg and a trauma shortly before which destroyed most of the tissue of that leg. Insistence that a doctor come to court and speak the obvious places formalities above justice. So long as medical knowledge is clouded with uncertainties, the judge and the juror should be allowed to apply their own good sense to the facts, after learning the information and guidance that can be supplied by trained physicians.

Accomplishment of uniformity among the jurisdictions is a

²⁹ In *Charlton Bros. Transp. Co. v. Garrettson*, 188 Md. 85, 51 A. 2d 642 (1947), the court said: "The law requires proof of probable, not merely possible, facts, including causal relations. Reasoning post hoc, propter hoc is a recognized logical fallacy, a non sequitur. But sequence of events, plus proof of possible causal relation, may amount to proof of probable causal relation in the absence of evidence of any other equally probable cause."

more difficult project. With at least 51 jurisdictions in the United States making separate and independent rulings, there are practical obstacles to the creation of a general national rule. However, there is one force which has traditionally aided in molding a uniform procedural jurisprudence. That force is the federal courts. The adoption of the Federal Rules and their use over the years has led to the development of counterparts in 17 states and the Commonwealth of Puerto Rico. There are movements in many other states to follow the lead of the federal courts in procedural matters. Traditionally the federal judiciary has been a strong force for liberality in procedure which removes the game-like character of litigation. Whether the adoption of a more practical approach to semantics in medical causation is a matter for statute, rules, or judicial decision, is beyond the scope of this article. But it appears that leadership can most effectively come from that source.

A fitting conclusion to this discussion is the statement of Humpty Dumpty in Lewis Carroll's memorable *Through the Looking Glass*:³⁰

"There's glory for you." "I don't know what you mean by 'glory,'" Alice said. Humpty Dumpty smiled contemptuously. "Of course you don't—till I tell you. I meant there's a nice knock-down argument for you." "But glory doesn't mean a nice knock-down argument," Alice objected. "When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I chose it to mean—neither more nor less." "The question is," said Alice, "whether you *can* make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master—that's all."

The lawyers and the courts must decide who is to be master—the word or the witness.

³⁰ Carroll, *Through The Looking Glass*, ch. 6, pp. 93, 94 (Random House 1946).