FUTURE DAMAGES IN PERSONAL INJURY ACTIONS—THE STANDARD OF PROOF

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The issue examined by this article can be stated as: What degree of certainty must be expressed, usually by a doctor, about the future consequences of an injury before that testimony may be submitted to the trier of fact? Can the testimony be couched in terms of possibilities? Will the words *may*, *might* or *likely* suffice? Or do we demand that the doctor speak only in the language of probabilities? Must he reach the far end of the verbal spectrum, being allowed to testify only if his prognosis reaches the standard of *certainty*?

An examination of several illustrative cases will demonstrate that the fortuity of jurisdictions may determine whether the plaintiff will be compensated for potential future consequences of his injuries. For example, in 1852 a lady named Curtis was a passenger on a New York railroad. As the train passed a village, appropriately called Waterloo, it ran off the track, injuring Mrs. Curtis. The jury was instructed that it could award future damages only, " 'when it is rendered reasonably certain from the evidence that such damages will inevitably and necessarily result from the original injury.' "[1] The words *inevitably* and *necessarily* are strong and demand a fairly high degree of requisite proof.

More fortunate in the law, but not in injuries, was Mr. Wright, who, on a night of heavy fog and intense darkness in 1882, was setting brakes atop railroad cars while passing Putnamville, Indiana. The train went under a low bridge. Mr. Wright's complaint alleged (in what must be considered an understatement of the matter) that the bridge was brought in contact with the back of his head with such force as to fracture his skull. The testimony of his doctor did not have to rise to a certainty and predict damages that would inevitably and necessarily result. Rather, the court said that the doctor could give his opinion as to the probable results.[2]

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1 Curtis v. Rochester Etc. R.R. Co., 18 N.Y. 534, 75 Am. Dec. 258 (1859).

2 Louisville Etc. Ry. Co. v. Wright, 115 Ind. 378, 7 Am. St. Rep. 432 (1888).

Consider next the medical testimony in *Dornberg v. St. Paul City Railway Co.*,[3] that while no one could tell whether a fusion would be necessary in the future, it was the doctor's "opinion that the additional injury definitely increased the possibility that a fusion might be necessary in the future."[4] The court held that this lack of certainty went to the weight of the opinion, but would not deprive the jury of the right to consider the element of future injuries.

The passage of time has not led to a more liberal rule in all jurisdictions. Witness the 1963 holding in *Bostian v. Jewell*[5] that opinion testimony of future consequences is admissible only as to injuries which are reasonably certain to occur, or which are medically probable.

Before examining the true boundaries of the rule in question, several points should be established. First, in the personal injury lawsuit the ultimate objective is compensation for the plaintiff's injuries(assuming, of course, that liability has been established).[6] The legal policy is that of repairing plaintiff's injury or of making him whole as nearly as may be done by an award of money.[7] Implicit in the process of compensating the plaintiff is a determination of what the future consequences of an injury will be.

The obvious reason that the judicial process must allow compensation for future consequences is that the plaintiff has but one day in court; if he will suffer in years to come, compensation must be decreed today. A New York court stated it well:

> Successive actions cannot be brought by the plaintiff for the recovery of damages, as they accrue from time to time, resulting from the injury complained of, as would be the case for a continuous wrong or a continued trespass. The action is for a single wrong, the injury resulting from a single act, and the plaintiff was entitled to recover not only the damages which had been actually sustained up to the time of the trial, but also compensation for future damages; that is, compensation for all the damages resulting from the injury, whether present or prospective. . . . To exclude damages of that character, in actions for injuries to the person, would necessarily, in many cases, deprive the injured party of the greater part of the compensation to which he is entitled.[8]

This brings us back to the central theme: *What standard of proof must the plaintiff meet to prove the potential consequences of his injury?* The hurdle may face him both as to the testimony which is admitted and in the language of the damage instruction. What do

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[3] 253 Minn. 52, 91 N.W.2d 178 (1958).
[4] *Id.*, 91 N.W.2d at 183.
[5] 254 Iowa 1289, 121 N.W.2d 141 (1963).
[6] Bennett v. Oregon-Wash. R. & Nav. Co., 83 Wash. 64, 145 P. 62 (1914).
[7] 2 HARPER AND JAMES, THE LAW OF TORTS, § 25.1, at 1301 (1956).
[8] Filer v. New York Central Railroad Co. 49 N.Y. 42, 44-45 (1872).

the cases say? Essentially, there are two branches to the rule.[9] The most harsh or restrictive requirement is to be found in those jurisdictions which insist upon the prognosis being cast in terms of reasonable certainty; anything less, even an opinion of reasonable probability, will be excluded. The more liberal cases are varied in their demands.

When we turn to the Washington authorities, we find that more than thirty cases have considered the rule in question.[10] While a sequential consideration of cases is hardly a desirable form of analysis, it appears to be a highly necessary task—first, because of the inconsistencies which will become obvious and second, to set the proper background for establishing the Washington rule today.

Perhaps a concise guide to the maze we are about to enter is expedient. We will discover that the numerical majority of cases approves a standard based upon probabilities. Slightly fewer opinions insist upon reasonable certainty. Indeed, we shall come upon one decision which holds that two standards mean the same thing. Other judicially approved words include *may*, *likely*, *will* and *reasonably expected*.[11]

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[9] Brinstool v. Michigan, 157 Mich. 172; 121 N.W. 728, (1909). *Accord*, Gardner v. Boyer's Estate, 282 Mich. 552, 276 N.W. 552 (1938).

The cases which demand a standard of reasonable certainty are legion. *See* Annot. 81 A.L.R. 423 (1932). A mere *probability* of future damage has often been rejected. *E.g.*, Johnson v. Taylor, 169 Neb. 280, 99 N.W.2d 254 (1959), Plank v. R. J. Brown Petroleum Co., 332 Mo. 1150, 61 S.W.2d 328, 334 (1933). *Accord*, Weiner v. St. Louis Public Service Co., 87 S.W.2d 191 (Mo. 1933); Lebrecht v. United Rys. Co. of St. Louis, 237 S.W. 112 (Mo. 1921); Settell v. Horgan, 362 S.W.2d 769 (Mo. Ct. App. 1962). Probability can only be adequate under this rationale when the ". . . probability of such consequences [amounts] to a reasonable certainty. . . ." Brinstool v. Michigan, *supra*, 180, 121 N.W. at 731.

Other cases generally classified as more liberal, require proof that the future consequences are *reasonably probable*. *E.g.* Henne v. Balick, 51 Del. 369, 146 A.2d 394 (1958), Baltimore Transit Co. v. State, 109 Md. 131, 61 A.2d 442 (1950). Some explicitly repudiate the *reasonably certain* standard. *E.g.*, Port Terminal Railroad Ass'n v. Ross 155 Tex. 447, 289 S.W.2d 220 (1956).

[10] Maybe there are more, but if so, they have escaped the author and with good reason. We can only assume that those persons who, over the years, have categorized cases in the Washington Digest System took delight in patterns of extreme inconsistency. Ten of the cases are digested under Damages, Key No. 216(7); four under Damages, Key No. 26; one important case is the only entry appearing in Evidence, Key No. 532; another is the only case cited under Evidence, Key No. 554.

[11] The Washington Supreme Court Committee on Jury Instructions in its pattern jury instructions recommends use of the words "reasonably certain" in describing the standard for measuring future pain and suffering which the plaintiff might endure. 6 WASH. PRACT. JURY INSTR. CIVIL §§ 30.05, 30.06, 30.07 and 30.09 (1967). However, the comment to § 30.05 notes that "reasonably certain," as applied to future damages, "*seems* to be equated with the term 'reasonably probable' and is approved as appropriate instruction language in Burgin v. Universal Credit Co., 2 Wn. 2d 364, 98 P.2d 291 (1940)." (Emphasis added.) This recommended instruction and the others grouped with it, in view of the qualifying language in the comment, indicate that there is not an absolute standard in Washington for measuring the probability of future damages.

In what appears to be the first case considering the measure of future damages[12] the court was faced with an instruction that the jury could allow such sum as would compensate plaintiff for pain and suffering which he had endured and would be *likely* to endure. While adopting the rule of reasonable certainty, the court found no error in the instruction on the basis that it was sufficiently restrictive since it limited compensation to the ordinary and natural results of the injury and impairment of health which would occur. This result is contrary to some jurisdictions which, guided by the reasonable certainty rule, often have held the word *likely* to be erroneous.[13]

Next before the court was the propriety of this question:

> Assuming that testimony (referring to the testimony of plaintiff) to be true, Doctor, what, in your opinion would be the future results, or what does that tend to show?

No error, said Chief Justice Hoyt, with the following comment:

> The objection to this testimony was founded upon the claim that it was allowing a mere possibility to be made an element of damage. But every expert opinion as to the future, founded upon present conditions, is, and must necessarily be, uncertain; but the fact that it is so uncertain does not prevent the opinion of an expert being given as to the probable results.[14]

Gallamore v. Olympia,[15] represents the most analytical Washington treatment of the issue. The trial court had instructed the jury that it might take into consideration the *probable* amount of pain, the *probable* loss of time and the *probable* amount of expense the plaintiff would suffer in the future. Appellant argued that this left the jury free to award damages for consequences which were contingent, speculative or merely possible, rather than reasonably certain. Holding that this instruction was proper, the court said:

> In civil actions it is a general rule, to which there are but few exceptions, that the jury may find according to the preponderance of the evidence. We know of no reason why an exception should be made in this instance, and we do not think the courts applying the term "reasonably certain" to supposed future conditions meant any more than this, but that each of them would have approved an instruction to the effect that the jury might return damages for future pain and suffering if they found, by a preponderance of the evidence, that such pain and suffering would ensue.

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[12] Cameron v. Union Truck Line, 10 Wash. 507, 39 P. 128 (1895).

[13] Chicago, M. & St. P. Ry. Co. v. Newsome, 154 F. 665 (1907); Norris v. Detroit United R. Co., 193 Mich. 578, 160 N.W. 574 (1916).

[14] Mitchell v. Tacoma Ry. & Motor Co., 13 Wash. 560, 570, 43 P. 528, 530, 533 (1896). Five years later, the court showed that the Washington rule was still fairly consistent. In Taylor v. Ballard, 24 Wash. 191, 64 P. 143 (1901), the attending physician had testified in terms of probabilities. In a single sentence, without analysis, the opinion states that there was no error in admitting the testimony.

[15] 34 Wash. 379, 75 P. 978 (1904).

> However, the charge of the court is not without direct authority in its support. In 1 Sedgwick, Damages, p. 249 (8th ed.), the author, speaking of prospective losses, after stating the rule to be that such losses must be reasonably certain to ensue, uses this language; "This 'reasonable certainty' does not mean absolute certainty, but reasonable probability;" citing *Griswold v. New York Cent. etc. R. Co.*, 115 N.Y. 61, 21 N.E. 726, 12 Am. St. 775, and *Feeney v. Long Island R. Co.*, 116 N.Y. 375, 22 N.E. 402, 5 L.R.A. 544, where it was held not error to permit answers to questions put to an expert medical witness concerning the probability of the injured party suffering in the future from his injuries.[16]

The instruction in *Rowe v. Whatcom County R. & Light Co.*,[17] was unique in requiring the plaintiff to prove " 'to a reasonable certainty that he will in reasonable probability sustain damages.' "[18] The court approved that portion but said that the plaintiff had only to prove future damages by a preponderance and not by clear and convincing proof as had been instructed.

Trial courts could (and presumably did) then feel free to instruct in the language of "probability, likely or may." But the court in *Ongaro v. Twohy*[19] struck down an instruction as to losses which plaintiff *may* suffer in the future. The court admitted that somewhat similar instructions had been sustained in at least three earlier cases (*Kirkham*, *Gallamore* and *Cameron*),[20] but distinguished these on the ground that, while all recognized the correct rule of reasonable certainty, the particular language had not been erroneous in light of modifying words within the instruction. The opinion continues, "But in the case at bar the language used leaves it to the jury to award damages upon a mere possibility of future pain and suffering, which is clearly erroneous."[21]

Ongaro specifically disavowed recovery for those consequences which may result or which are merely probable or likely. That must

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[16] *Id.* at 386-87, 75 P. at 980. The court continued to commit itself to the liberal standard of reasonable probabilities. It approved an instruction, that the plaintiff could be compensated for pain and suffering he had endured and might endure, on the basis that the trial court had instructed the jury that under no circumstances was it to return an excessive verdict. Kirkham v. Wheeler-Osgood Co., 39 Wash. 415, 81 P. 869 (1905). The next two instructions before the court were couched in terms of injuries the plaintiff " 'may in the future with reasonable probability suffer' " (Webster v. Seattle, Renton Etc. Ry. Co., 42 Wash. 364, 85 P. 23 (1906)) and *probable* future losses. Cole v. Seattle, Renton Etc. Ry. Co., 42 Wash. 462, 85 P. 3 (1906). Both were given the stamp of approval.

[17] 44 Wash. 658, 87 P. 921 (1906).

[18] *Id.* at 663, 87 P. at 923.

[19] 49 Wash. 93, 94 P. 916 (1908).

[20] Kirkham v. Wheeler-Osgood Co., 39 Wash. 415, 81 P. 869 (1905). Gallamore v. Olympia, 34 Wash. 379, 75 P. 978 (1904). Cameron v. Union Truck Line, 10 Wash. 507, 39 P. 128 (1895).

[21] Ongaro v. Twohy, 49 Wash. 93, 97, 94 P. 916, 917 (1908).

have appeared satisfactory to the court as a future guideline, but two years later, *Harris v. Brown's Bay Logging Co.*,[22] found no error in an instruction which referred to *probable* future damages. The opinion states:

> But we did not mean by the holding in that case (Ongaro) that no other form of expression than the one there used could correctly convey to the jury the idea intended to be conveyed. . . . The language of the instruction complained of in the case at bar is as definite as the language used in the instruction in these cases (*Gallamore* and *Kirkham*), and we hold it free from error.[23]

Ongaro was relied upon later in *Anderson v. Hurley-Mason Co.*,[24] in the appellant's effort to strike down a judgment based upon an instruction which allowed damages for the effect that plaintiff's injuries would have upon future earning capacity, future pain which he would suffer, deprivation of ability to enjoy life as might be shown by the evidence and sums which he might thereafter spend for doctors. The court found no error, holding that the words used put a heavier burden upon the plaintiff than did either the *Ongaro* instruction or the *Harris* instruction.

Without consideration of any other case, *McIllwaine v. Tacoma R. & Power Co.*,[25] found no error in an instruction which contained all the magic words: "may, reasonable certainty and reasonable probability." The court observed, "We think the jury, from these instructions, would get the right idea, that in making their award they were limited to results reasonably *probable*, and to those established by a fair preponderance of the evidence."[26] (Emphasis added.)

Bennett v. Oregon-Wash. R. & Nav. Co.,[27] stated in dictum that damages for probable future suffering was a proper statement of the law, but that reasonably certain was more proper. *Gifford v. Washington Water Power Co.*,[28] added little to the law in restating the reasonable certainty standard without discussing the earlier inconsistent cases, but the trial record illustrates the artificiality of the principle and demonstrates the obvious frustration of a witness being questioned within the limits of the rule.[29]

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[22] 57 Wash. 8, 106 P. 152 (1910).

[23] *Id.* at 14-15, 106 P. at 154-55.

[24] 67 Wash. 342, 121 P. 815 (1912).

[25] 72 Wash. 184, 129 P. 1093 (1913).

[26] *Id.* at 187, 129 P. at 1094.

[27] 83 Wash. 64, 145 P. 62 (1914).

[28] 85 Wash. 341, 148 P. 11 (1915).

[29] Q. What would that pressure produce there at the present time or some time in the future, in all reasonable probability? A. Well, there is a probability or possibility of its producing—bringing on epilepsy. The court: I didn't hear that. A. There is a possibility for its bringing on epilepsy in later life.

Thereafter, on cross-examination, the doctor upon this question testified: Q. I

In summarizing the status of the law to this point, we note that *Ongaro*[30] held that mere probability was not enough, *Bennett*[31] said that the jury should not speculate upon the likelihood or probability of future consequences and *Gifford*[32] held that the correct rule was based upon reasonable certainty. These three cases, in sequence, were quite definite and forceful in language. Nonetheless, in a short time, the court specifically and emphatically endorsed the admission of medical testimony as to future consequences which would result with reasonable probability.[33]

Directly faced with the proposition that the immediately preceding cases required reasonable certainty, the court flatly said that nothing in the earlier cases indicated that there was any material difference between reasonable probability and reasonable certainty. Therefore, no error was committed in receiving testimony of probabilities.[34]

Continuing then, we next come upon the testimony of a doctor who testified as to the reasonable probability of a future injury. The doctor said the trouble might never happen but it did occur in more than half of the cases. Without analysis, the court held, in *McCreedy v. Fournier*,[35] that this evidence was proper under the rule of *Holt* and *Gallamore*.[36]

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notice that you changed the word, when you were asked as to the possibility of troubles arising from depression of the skull at this point, you started in by saying "probably" and then changed it to "possibility" of epilepsy; that is correct isn't it? A. Well, I did not intentionally. Q. What? A. I didn't intentionally change it. Q. You meant to say possibility all the time, didn't you; you didn't mean to say probability? A. Well, there is a probability of it and a possibility of it. Q. There is a probability and a possibility? A. I suppose so. I think you could class it that way. Q. What is the difference between a probability of epilepsy and a possibility of epilepsy? A. Well, if you would say it was probable you would mean that there would be very little chance that it would not occur, I suppose; and if you say it was possible, it might occur and might not. That would be my definition of the difference. Q. You say if it was probable there would be very little chance that it would not occur? A. Yes, if you would say probably there would not be much chance but what it would occur. Q. That is what you mean in this case, is it? A. Well, I would not hardly make it that strong. I would say that you cannot tell whether it will or not. There is a chance that it will and a chance that it won't. Q. . . . And it is not your opinion, is it doctor, that there ever will be any injury to the brain? A. Well, there possibly may be. Q. Yes, but you, as a doctor, would not say to this jury that is your opinion that there ever will be an injury to the brain? A. Well, I could not say that in my opinion that there would not be, either. *Id.* at 343-44, 148 P. 12-13.

[30] Ongaro v. Twohy, 49 Wash. 93, 94 P. 916 (1908).

[31] Bennett v. Oregon-Wash. R. & Nav. Co., 83 Wash. 64, 145 P. 62 (1914).

[32] Gifford v. Washington Water Power Co., 85 Wash. 341, 148 P. 11 (1915).

[33] Harris v. Brown's Bay Logging Co., 57 Wash. 8, 106 P. 152 (1910).

[34] Holt v. School District No. 71, 102 Wash. 442, 173 P. 335, (1918).

[35] 113 Wash. 351, 194 P. 398 (1920).

[36] Holt v. School District No. 71, 102 Wash. 442, 173 P. 335 (1918); Gallamore v. Olympia, 34 Wash. 379, 75 P. 978 (1904).

Assuming that court and counsel had read all preceding cases, one can understand the apparent sense of frustration of the trial court in *Kane v. Nakamoto*[37] when it told the jury to take into consideration " ' . . . all the consequences of the injury, future as well as past. . . .' "[38] The supreme court held that the instruction would have been more accurate if it had used the words "reasonably certain," but that it was not as deficient as the word *may* in the *Ongaro* charge. Therefore, it fell within acceptable limits and contained no error.

An alert plaintiff's lawyer apparently seized upon this judicial wavering and obtained the following instruction in *Meehan v. Hesselgrave*,[39] " 'You will also take into consideration the physical pain, if any, suffered by the plaintiff, or which he may hereafter suffer as a result of the injury, if any, as shown by the evidence.' " (Note the word *may*.) The court held there was no error under the *Kane* doctrine.

The first open recognition of the obvious discrepancy in the cases came in *Johnson v. Dye*,[40] where the defendant urged upon the court the proposition that the *only* proper instruction was one based upon reasonable certainty and nothing less. By an 8-1 *en banc* decision the court specifically held that it had departed, by virtue of the *Kane* holding, from the rule of reasonable certainty, and found no error in the *may* standard. Affirming the trend was *Buell v. Park Auto Transportation Co.*,[41] which found no error in medical testimony—that the injuries would have a *tendency* to shorten the husband-plaintiff's life, and *might* shorten the wife's life. The opinion writer said that such testimony was of the ordinary type given by medical experts.

In light of the state of the law up to this point, plaintiff's counsel in *Crock v. Magnolia Milling Co.*,[42] must have thought that he was on firm ground when he asked the plaintiff's doctor whether there was a probability that a person affected as the plaintiff was might later develop epilepsy. Over the defendant's precisely phrased objection that it was incompetent, irrelevant and immaterial, too remote, entirely speculative and without foundation, the doctor said it was a probability. It must have been a surprised attorney who read the appellate opinion reversing the plaintiff's recovery, holding that the showing of a mere probability is too indefinite to be of value as

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[37] 113 Wash. 476, 194 P. 381 (1920).
[38] *Id.* at 480, 194 P. at 382.
[39] 121 Wash. 568, 571, 210 P. 2, 3 (1922).
[40] 131 Wash. 637, 230 P. 625 (1924).
[41] 132 Wash. 92, 231 P. 161 (1924).
[42] 147 Wash. 589, 226 P. 727 (1928).

evidence and liable to be misunderstood by the jury. The failure of the court to cite a single case in support of this pronouncement could have only added insult to bewilderment.

The only acceptable explanation for the next case, *Jacklin v. North Coast Transp. Co.*,[43] in view of the *Crock* decision, is that there were five different judges on the bench; for, it held no error in admitting the medical opinion that the plaintiff's condition would *probably* become worse and the chances were in favor of such worsening of condition. The court said, "The mere fact that, in giving his testimony, a doctor uses the word 'probably', does not necessarily mean that the testimony is based upon speculation and conjecture. . . . The testimony is not open to appellant's objection."[44] In accord are several subsequent cases.[45]

The court veered back toward the conservative rule in *Venske v. Johnson-Lieber Co.*,[46] which found error in an instruction allowing future medical expenses which *might* be incurred, saying that such damages must be proved with reasonable certainty. Later, no error was found in an instruction using the words, " '*will* in the future endure,' "[47] referring to pain and suffering. The standard of proof necessary was not commented upon.

The latest opinion directly in point is *Coffman v. McFadden*,[48] where the court held it to be error to admit testimony of a rare possibility, saying that such evidence did not meet the test of reasonable probability.

What then is the Washington rule? It is difficult to delineate an exact principle due to the failure of most Washington cases to reconcile apparent inconsistencies. No case since 1924 has recognized any discrepancy in the opinions; yet, the very recent cases have woven a patchwork from threads of possibility, probability and certainty. Nonetheless, it is a sound conclusion that the Washington court has not required future damages to be proved by reasonable certainty to the exclusion of anything short of that standard. While a number of cases speak of the rule of certainty, recall that in *Johnson v. Dye*[49] it was urged upon the court that the only proper instruction upon this element was one limited to reasonable certainty.

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[43] 165 Wash. 236, 5 P.2d 325 (1931).

[44] *Id.* at 240, 5 P.2d at 327.

[45] Jay v. Walla Walla College, 53 Wn. 2d 590, 335 P.2d 458 (1959); Orme v. Watkins, 44 Wn. 2d 325, 267 P.2d 681 (1954); Burgin v. Universal Credit Co., 2 Wn. 2d 364, 98 P.2d 291 (1940); Taylor v. Lubetich, 2 Wn. 2d 6, 97 P.2d 142 (1939); Lieske v. Natsuhara, 165 Wash. 270, 5 P.2d 307 (1931).

[46] 47 Wn. 2d 511, 288 P.2d 249 (1955).

[47] Greenwood v. The Olympic, Inc., 51 Wn. 2d 18, 25, 315 P.2d 295, 299 (1957).

[48] 68 Wn. 2d 954, 416 P.2d 99 (1966).

[49] 131 Wash. 637, 230 P. 625 (1924).

The 8-1 *en banc* decision refused to agree with that proposition. Clearly an *en banc* opinion, never overruled or questioned in forty-five years stands as substantial authority today. Many of the later cases bolstered the premise that Washington has departed from the rule of reasonable certainty. Washington decisions contain much authority to sustain the admission of testimony, and an instruction, couched in terms of the reasonable probabilities of future consequences. Starting with *Gallamore*[50] in 1904 and continuing to *Coffman*[51] in 1966, there is a strong and consistent fabric of approval of the reasonably probable standard.

The course the Washington court will take from here is the more significant inquiry. It is suggested that the proof required for future damages should *not* be the subject of a special rule. The customary preponderance-of-the-evidence standard should be the single requirement. Highly respectable authority has suggested already that the standard of reasonable certainty should be discarded. Judge Lloyd L. Wiehl of the Superior Court Bench of Yakima County and Chairman of the Washington Supreme Court Committee on Jury Instructions, has written:

> It may be argued, however, that the "reasonable certainty" requirement, while not changing the traditional burden of proof in a civil case, is an added epithet thrown in to insure against speculation and conjecture. But this could be prevented by specifically admonishing the jury not to base a verdict for damages on speculation and conjecture, without changing the usual standard of proof. All of this confusion should therefore be eliminated by simply instructing the jury that future damages must be proved by the same burden of proof as all other damages, plus specifically admonishing against speculation and conjecture.[52]

Indeed, the Washington cases already contain sufficient justification for abandoning any separate, special standard of proof for future damages. The *Gallamore*[53] opinion said that generally the jury may find according to the preponderance of the evidence and that the court knew of no reason why an exception should be made for this point. The instruction approved in *Kane*[54] probably is the most understandable to the jury; it directed consideration of all the consequences of the injury, future as well as past. No special standard was necessary.

The most sensible approach is contained in Judge Hunter's opinion in *Clevenger v. Fonseca*.[55] The physician was allowed to

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[50] Gallamore v. Olympia, 34 Wash. 379, 75 P. 978 (1904).
[51] Coffman v. McFadden, 68 Wn. 2d 954, 416 P.2d 99 (1966).
[52] Wiehl, *Our Burden of Burdens*, 41 WASH. L. REV. 109, 115 (1966).
[53] Gallamore v. Olympia, 34 Wash. 379, 75 P. 978 (1904).
[54] Kane v. Nakamoto, 113 Wash. 476, 194 P. 381 (1920).
[55] 55 Wn. 2d 25, 345 P.2d 1098 (1959).

testify as to the possibility, as well as the probability of future injury, over the objection that it did not meet the rule of reasonable certainty. He stated that the plaintiff had suffered a contusion and that she might have a post-traumatic syndrome. Six judges were in agreement that this objection went to the weight and not the admissibility of the evidence.

A closer questioning of the entire principle is merited. If we were to remove entirely the restrictive rule with which we are dealing, the plaintiff's doctor could be asked a rather simple question along these lines, "Doctor, would you tell the jury your opinion of what future consequences may result from the injuries which you have described?" Amplification would involve the future economic, physical and mental impact of these injuries. The doctor's predictions might well range from a 1% possibility of a particular consequence to a 99% probability of another result. In short, the doctor would reveal his entire prognosis, unfettered by any rule of certainty or probability.

The problem with a rule which excludes possibilities or even probabilities of future consequences is that it necessarily withholds facts from the jury. It is a medical fact that the plaintiff has a 49% possibility of post-traumatic epilepsy if the doctor so testifies. It is no more a fact if the doctor evaluates the chances at 51%. Yet the 49% possibility may be excluded while the 51% probability would come in. The cases do not suggest that the one degree of evidence is more trustworthy or believable than the other. The rationale, rather, is bottomed upon the premise that damages must not be speculative.[56] Must it not be conceded that the doctor's opinion of a 49% possibility may well be *less* speculative than the layman's estimate of speed?[57] Does that expert's prediction carry less truth and reliability than the lay evaluation of intoxication?[58]

The aim of exclusionary rules of evidence is avoidance of testimony which is unreliable or which cannot be fairly combated by either party. Thus, the typical deadman's statute—in a sense of fair play—seals the lips of both witness and decedent since the departed obviously cannot refute the testimony of the living. The odd quirk of the principle which we are considering is that its ultimate achievement is the exclusion of a fact, a denial of truth if you will. Wigmore's analysis is accurate albeit somewhat less than charitable:

> It should be added that Courts sometimes misapply the Opinion rule to enforce the doctrine of Torts that a recovery for future *personal*

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56 Strohm v. N.Y., L.E. & W.R.R., 96 N.Y. 305 (1884).
57 *See* MEISENHOLDER 5 WASH. PRACTICE, EVIDENCE § 342, at 318 (1965).
58 *See* MEISENHOLDER 5 WASH. PRACTICE, EVIDENCE § 342, at 327 (1965).

> *injuries* must include only the certain or fairly *probable*, but not the merely *possible*, consequences; so that the judge instead of covering the subject by an instruction to the jury as to the measure of recovery, excludes from evidence a physician's opinion expressed in terms of possibility only. This attempt to control the course of expert testimony is of course unreasonable in itself. . . . This is only one of the many instances in which the subtle mental twistings produced by the Opinion rule have reduced this part of the law to a congeries of nonsense which is comparable to the incantations of medieval sorcerers and sullies the name of Reason in our law.[59]

Some of the recent cases in other jurisdictions have veered away from the rigidity of the magic words of reasonable certainty. For example, the Pennsylvania court allowed medical evidence that a plaintiff had a one-in-twenty chance of developing epileptic seizures at some time in the future. In a well-reasoned analysis the court said:

> There is nothing evidentially improper about this testimony. If we were to rule it out we would be holding that such possible future effects

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[59] 7 WIGMORE, EVIDENCE, § 1976 (3d ed. 1940).

The rule is not free of other respectable criticism:

> Attempts by the appellate courts to require that instructions about damages for pain and suffering conform to a standard of exactness appropriate only to a mathematical theorem are sometimes encountered. For example, the phraseology of instructions authorizing damages for future pain and suffering seems to assume importance in the minds of some appellate courts. Consequently, there is much discussion as to whether particular instructions properly limit damages to compensation for suffering reasonably certain to be sustained or erroneously permit recovery for suffering which is merely "possible." Surely too great exactitude about this subordinate feature of the instructions on damages should not be required. The chief reliance for reaching reasonable results in attempting to value suffering in terms of money must be the restraint and common sense of the jury and not the detailed verbal accuracy of the instruction. MCCORMICK, DAMAGES, § 88, at 318 (1st ed. 1935).

Do not the following contain significant kernels of truth:

> Left to exercise their common sense in their own way, the jury will generally determine correctly what is well proved and what lacks further support. Furnished with a superfluity of rules, their attention is distracted and the proffered help only obstructs. Moughon v. State, 57 Ga. 102, 106 (1876). It is already increasingly said among trial judges that charges are delivered to satisfy the Court of Appeals, not to instruct the jury. Knotts v. Valocchi, 2 Ohio App. 2d 188, 193, 207 N.E.2d 379, 385 (1963) (upon motion for rehearing).

Dismayed by all the semantic juggling, the Connecticut court wrote these words of wisdom:

> Certainty is freedom from doubt, and if a plaintiff is required to prove that future apprehended consequences are reasonably free from doubt, he has imposed upon him a burden far beyond the ordinary requirement of proof in a civil action and approximating closely to the proof beyond a reasonable doubt of the criminal action. . . . Reasonable certainty and reasonable probability bear no resemblance to each other, and judicial construction which brings them into opposite relations seems to us forced, perhaps, to save the appearance of a rule which violates a fundamental of the theory of evidence. . . . When a plaintiff has by a fair preponderance of the evidence satisfied the jury that future pain and suffering in consequence of his injury is reasonably, likely, or probable, or to be expected, he should be compensated for these as well as for those which are certain to occur. Johnson v. Connecticut Co., 85 Conn. 438, 83 A. 530, 531 (1912).

> are not entitled to any consideration as a matter of substantive law. See II Wigmore, Evidence Sec. 663(1), (3d ed 1940). That would be unfair since the action must be brought within the time limitations fixed by our law and all damages, past, present and future, must be determined in that one action. Admittedly the probability of this child's getting epileptic seizures is low and it should be weighed by the jury accordingly. However, rather than keep this medical knowledge from the jury we are of the opinion that the defendant's remedy lies in objecting to the excessiveness of the verdict in a proper case.[60]

Likewise California, in *Potter v. Empress Theatre Co.*,[61] allowed evidence that there was a good possibility that epilepsy might develop. Other authorities allow similar evidence without meeting the issue head-on. The doctor in *Hanlon v. Pomeroy*[62] testified that the prognosis was uncertain. Pressed for explanation, he expressed what must represent one of the more understandable and candid medical opinions, " 'You hope she will get well and you fear that she won't.' "[63] The court found no error since the language is such that the jurors should take it as a statement of a probability that the condition would continue.

Recognizing the damage stemming from a 3%-25% possibility of future epilepsy, substantial damages (for that and other injuries) were awarded in *McCall v. United States*.[64] The Iowa court has also upheld a judgment based in part upon proof of a 3%-25% chance of future epilepsy.[65] The Illinois court has held that a jury could infer that there was a reasonable medical certainty based upon the doctor's statement that there was a *good chance* of eventual seizures.[66] Some courts engage in semantical shadowboxing to escape the harshness of the reasonably certainty standard. *Figlar v. Gordon*[67] held that the *possibility* of future epilepsy would not justify an award of damages based upon the occurrence of epilepsy in the future, but the danger that it might ensue was a present fact and the jury could take into consideration anxiety resulting therefrom. The result is right, but certainly the reasoning is tortured. Ponder a while the curious distinction drawn in this language:

> It is not required that the doctor testify that he was reasonably certain that the plaintiff could be disabled in the future. All that is required to establish future disability is that from all the evidence, including the

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[60] Schwegel v. Goldberg, 209 Pa. Super. 280, 228 A.2d 405, 409 (1967). *Accord*, Boyli v. Penn R. Co., 403 Pa. 614, 170 A.2d 865 (1961).

[61] 91 Cal. App. 2d 4, 204 P.2d 120 (1949).

[62] 102 N.H. 407, 157 A.2d 646 (1960).

[63] *Id.*, 157 A.2d at 648.

[64] 206 F. Supp. 421 (E.D. Va. 1962).

[65] Murphy v. City of Waterloo, 255 Iowa 557, 123 N.W.2d 49 (1963).

[66] Melford v. Gaus and Brown Construction Co., 17 Ill. App. 2d 497, 151 N.E.2d 128 (1958).

[67] 133 Conn. 577, 53 A.2d 645 (1947).

> expert testimony, if there be any, it satisfactorily appears that such disability will occur with reasonable certainty.[68]

The trend of recent cases indicates either an outright rejection of the requirement of certainty or probability, as shown in *Schwegel*[69] or the use of an elastic interpretation of evidence so as to come within the rule as shown in *Figlar*.[70] It is suggested that the more recent cases discussed above and in the footnotes are the forerunners of the outright repudiation of this outmoded doctrine.[71] Unreal standards of proof have no place in today's law and plaudits will be due the court which leads the way in discarding this remnant of artificiality. The Washington court has adopted already a guiding principle which could be the spring-board to such result:

> Common-sense justice is, of course, the most desirable objective inherent in the application of any legal concept; and where the application of a legal concept clearly results in injustice, it is incumbent upon the courts to examine the concept and its applicability most carefully.[72]

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[68] Paolini v. City and County of San Francisco, 72 Cal. App. 2d 579, 164 P.2d 916, 922 (1946). An oft-cited case—and considered more liberal—is Bauman v. San Francisco, 44 Cal. App. 2d 144, 108 P.2d 989, 999-1000 (1940), which states:

> One other point should be passed upon. During the direct examination of Dr. Edmond J. Morrissey, the physician who operated upon respondent, he was asked to give his prognosis of the case. He stated that, "The prognosis in this case is good, providing the particular patient does not develop epileptic seizures." When asked if such a result was "probable," the trial judge ruled that the doctor could not answer unless he would state the epileptic seizures were "reasonably certain" to occur. The doctor stated that he could not state whether or not this patient was "reasonably certain" to have such seizures; that, "I would not say it was reasonably certain; I would say that it might occur and I would not be surprised if it occurred, but certainly I would not state it was reasonably certain." Thereupon all the doctor's testimony as to future damage was stricken from the record.
>
> The law does not require a doctor to state that future results are "reasonably certain" to occur before his testimony is admissible. Before the jury may allow a recovery for future consequences the evidence must show with reasonable certainty that such consequences will follow, and the jury should be so instructed. The testimony referred to above would not, standing alone, support an award for damages for future consequences. But that does not mean that such evidence was not admissible. The ultimate fact to be determined by the jury is whether it is reasonably certain that future evil consequences will flow from the injury. Any evidence reasonably tending in an appreciable degree to prove that fact is admissible. Its sufficiency to prove that fact is largely for the jury.

[69] Schwegel v. Goldberg, 209 Pa. Super. 280, 228 A.2d 405 (1967).

[70] Figlar v. Gordon, 113 Conn. 577, 53 A.2d 645 (1947).

[71] Although little literature on the subject is available several sources are excellent. Schreiber, Damage in Personal Injury and Wrongful Death Cases 319-56, Practising Law Institute, 1965; Stason, Estep and Pierce, Atoms and the Law 262-70, 465-94, Univ. of Michigan Legal Studies, 1959; Wiehl, *Our Burden of Burdens*, 41 WASH. L. REV. 109, 113-15 (1966).

[72] DeNike v. Mowery, 69 Wn. 2d 357, 418 P.2d 1017 (1966).