CAUSATION: CONTINUING TO MODIFY THE STANDARDS AND ANALYTICAL PROCESS

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I. Introduction

William Dorsaneo wrote in *Judges, Juries and the Reviewing Courts,* 53 SMU L. REV. 1497, 1527 (Fall 2000):

> As Dean Green was fond of arguing and lamenting, the causation issue can present a golden opportunity for a reviewing court to substitute its judgment for the judgment of the jury. Unfortunately, in *Union Pump Company v. Allbritton,* the Texas Supreme Court has taken full advantage of this opportunity by modifying both the causation standards used in tort cases and the analytical process through which the fact finders causation finding is reviewed.

Since the Texas Supreme Court handed down its opinion in *Allbritton* in 1995,they and the Courts of Appeal have continued to use the causation issue to overturn verdicts in favor of plaintiffs and uphold summary judgments in favor of defendants. This article will not be a dissertation on the law of causation. The purpose of this paper is to highlight ten areas in the last couple of years where the Texas Supreme Court and Courts of Appeal have continued to be active in modifying causation standards and the analytical process through which the fact finders causation findings are reviewed.

II. Ten Trends and Changes in Standards and Analysis

A. When May Objections to the Reliability of Expert Opinion be Made for the First Time on Appeal?

In *City of San Antonio v. Pollock,* 52 Tex Sup Ct J 665 May 1, 2009, a majority of the court holds that if the basis offered for the expert opinion provides no support for the opinion, an objection to the reliability of the opinion may be made for the first time on appeal.

Bare, baseless opinions will not support judgment, even if there is no objection to their admission in evidence. In *Coastal Transportation Co. v. Crown Central Petroleum Corp,* 136 S.W.3d 227 (Tex. 2004), the Texas Supreme Court holds that:

> Although expert opinion testimony often provides valuable evidence in a case, "it is the basis of the witness's opinion, and not the witness's qualifications or his bare opinions alone, that can settle an issue as a matter of law; a claim will not stand or fall on the mere *ipse dixit* of a credentialed witness." *Burrow v. Arce* 997 S.W.2d 229, 235 (Tex. 1999). Opinion testimony that is conclusory or speculative is not relevant evidence, because it does not tend to make the existence of a material fact "more probable or less probable." *See TEX R EVID 401.* This Court has labeled such testimony as "incompetent evidence," and has often held that such conclusory testimony cannot support a judgment. *Cas Underwriter's v. Rhone,* 134 Tex. 50, 132 S.W.2d 97, 99 (1939) holding that a witness's statements were "but bare conclusions and therefore incompetent"; see also *Wadewitz v. Montgomery* 951 S.W.2d 464, 466 (Tex. 1997) ("[A]n expert witness's conclusory statement...will neither establish good faith at the summary judgment stage nor raise a fact issue to defeat summary judgment."). Furthermore, this Court has held that such conclusory statements cannot support a judgment *even when no objection was made to the statements at trial. Dallas Ry. & Terminal Co. v. Gossett,* 156 Tex. 252, 294 S.W.2d 377, 380 (1956) (It is well settled that the naked and

> unsupported opinion where conclusion of the witness does not constitute evidence of probative force and will not support a jury finding even when admitted without objection."); *Rhone* 132 S.W.2d at 99 (holding that "bare conclusions" did not "amount to any evidence at all," and that "the fact that they were admitted without objection added nothing to their probative force"); see also *Merrill Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 712 (Tex. 1997). ("When the expert brings to court little more than his credentials and a subjective opinion, this is not evidence that would support a judgment...if for some reason such testimony were admitted in a trial without objection, would a reviewing court be obliged to accept it as some evidence? The answer is no."

When a scientific opinion is not conclusory, but the basis offered for it is unreliable, a party who objects may complain that the evidence is legally insufficient to support the judgment. *Merrill Dow Pharms., Inc. v. Havner* 953 S.W.2d 706, 711-713 (Tex. 1997). An objection is required to give the proponent a fair opportunity to cure any deficit and thus prevent trial by ambush. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 409 (Tex. 1998). When a reliability challenge is made, the court must evaluate the underlying methodology, technique, or foundational data used by the expert and an objection must be timely made so that the trial court has the opportunity to conduct this analysis. *Coastal Transportation Co. v. Crown Central Petroleum Corp,* 136 S.W.3d 227 (Tex. 2004).

Before *Pollock,* the line was clearly drawn. If the expert's opinion on causation was not supported by any basis, no objection at the trial level was required to challenge the sufficiency of the evidence. If there was some basis for the expert's opinion, but the underlying methodology, technique or foundational data used by the expert was challenged, the objection had to be made so that the trial court can analyze the methodology. This clear line has been blurred into extinction in *Pollock.*

The Pollock's sued the City of San Antonio after their daughter was diagnosed with leukemia. They alleged that benzene from a nearby landfill caused Sarah's leukemia. The Pollock's offered the expert testimony of Dan Kraft, an engineer and Dr. Patel, a pediatric oncologist. Kraft used a generally accepted EPA landfill air model, testimony regarding odors in the Pollock home, the city's gas monitoring records, a physical site inspection and two decades of historical geological records and maps to reach his conclusion that benzene levels in the Pollack home during the time that Tracy Pollock was pregnant with Sarah in 1993 would have been equal to or greater than that of a sample taken from a nearby well in 1998. Sarah's treating medical oncologist, Dr. Patel, concluded that Sarah's *in utero* exposure to benzene during the first

trimester caused Sarah's leukemia. Dr. Patel relied on: (1) his review of the literature, (2) matched pattern abnormalities in Sarah's chromosomes and the chromosomal abnormalities in lab induced carcinogenisis caused by benzene exposure, (3) his academic background in human genetics and (4) Kraft's opinion that Sarah's mother was chronically exposed to at least 160 ppb of benzene while Sarah was *in utero.* Dr. Patel also excluded other plausible factors for Sarah's leukemia, including family history and benzene exposure from other sources. *The City of San Antonio* did not object to the testimony of either Kraft or Patel at trial.

The City of San Antonio objected for the first time on appeal that none of the facts or analysis supported Kraft's conclusion that the Pollock's were exposed to benzene at a level of 160 ppb in the air in their home and on their property. Kraft had used data from a monitoring well to reach his conclusion, but there was also evidence that the benzene that might have migrated onto the Pollock's property would have "unquestionably dissipated in the ambient air" and that if the methane and benzene were at the levels claimed by Kraft, the Pollock's would have suffocated from the methane. The City of San Antonio also complained for the first time on appeal that the epidemiological studies upon which Dr. Patel based his conclusion did not actually support his opinion. None of these objections or concerns were brought to the trial court's attention and both Mr. Kraft and Dr. Patel testified without objection.

The Texas Supreme Court holds in *City of San Antonio v. Pollock* that if the basis offered for the expert opinion provides no support for the opinion, the opinion is merely a conclusory statement and cannot be considered probative evidence, *regardless of whether there is no objection.* The almost $20 million judgment in favor of the Pollock's was reversed and the Supreme Court rendered judgment that the Pollock's take nothing on their claims.

In his dissenting opinion in which Justice O'Neill joined, Justice Medina noted that the majority had assumed the role of gatekeeper *ex post facto,* allowing the City to complain about analytical gaps for the first time on appeal. Justice Medina pointed out that although an analytical gap may have existed, the analytical gap may have been explained if the City had made an appropriate objection at trial. When the testimony of an expert is objected to on the basis of reliability, the trial court must exercise its discretion in determining whether the analysis used by the expert is reliable. The trial court, however, cannot abuse

discretion it is never asked to exercise. Justice Medina called the Court's decision not only wrong, but unfair and may encourage gamesmanship in the future. "Why have a pre-trial *Robinson* hearing or make a reliability objection during trial and run the risk that the proffering party may fix the problem, when the expert's opinion can be picked apart for analytical gaps on appeal?"

B. Contributory Negligence Defenses Based on Conjecture, Speculation or Mere Possibility Does Not Warrant Submission of Contributory Negligence.

In *Columbia Medical Center Las Colinas v. Hogue* 271 S.W.3d 238 (Tex. 2008), the Court holds that it was not error for the trial court to refuse to submit a contributory negligence question when the evidence of contributory negligence was based on conjecture, speculation or mere possibility.

While the specific words "reasonable medical probability" need not be used, the testimony of the expert must demonstrate conduct that to a reasonable degree of medical certainty the injury or event would have occurred. *Otis Elevator Company v. Wood*, 436 S.W.2d 324 (Tex. 1968). "Perhaps" and "possibly" indicate conjecture, speculation or mere possibility rather than qualified opinions based on reasonable medical probability. *Merrill Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997) (stating that "can" and "could" do not indicate reasonable medical probability).

The widow and children of Robert Hogue, Jr. sued Columbia Medical Center of Las Colinas alleging that it was negligent and grossly negligent in failing to provide echocardiogram services on a STAT basis for its emergency medical services and in its failure to advise the physicians of the lack of STAT echo capability. When Mr. Hogue was admitted to the hospital, he failed to inform the physicians that he had previously been diagnosed with a heart murmur. *Columbia* contended that Mr. Hogue was negligent in failing to disclose his prior heart murmur and complained that the trial court erred in failing to submit contributory negligence. The Texas Supreme Court holds that since there was no evidence that the diagnosing doctors would have acted differently if Hogue had disclosed his heart murmur diagnosis, there was no evidence that Hogue's non-disclosure of the condition caused his injury and death. Testimony that the ER doctor "would have *perhaps* moved a cardiac source higher" on his differential diagnosis and he "would have searched *perhaps* more diligently for a cardiac source" of the illness was nothing more than conjecture, speculation or mere possibility.

C. In a Failure to Diagnose and Treat Case, a Medical Malpractice Patient May Have to Prove He Would Have Followed the Healthcare Provider's Advice.

In *Providence Health Center v. Dowell* 262 S.W.3d 324 (Tex. 2008), the majority reversed a judgment in favor of the family and rendered a take-nothing judgment holding that the defendant's negligence was "too attenuated from the suicide to have been a substantial factor in bringing it about."

The parents of 21 year-old Lance Dowell sued the hospital, an emergency room physician and nurse for negligently discharging Lance from the emergency room without a comprehensive assessment of his risk for suicide. Lance had been taken to the emergency room and treated for self-inflicted cuts on his left wrist. He was distraught over losing his girlfriend and had been threatening to kill himself. The emergency room physicians sutured the cut, the nurse had Lance sign a "no suicide contract," obtained his agreement to go to MHMR and to stay with his family until he went to MHMR. Lance stated that he did not want to be kept at the hospital, that he was not suicidal and did not want to be admitted to a psychiatric hospital. Thirty-three hours after discharge, Lance committed suicide.

At trial, the plaintiffs' experts testified that a comprehensive and competent risk assessment for suicide should have been performed and that had such an assessment been done, it would have been determined that Lance was at a high risk to commit suicide and therefore, should have been admitted to the hospital or a psychiatrist should have been called. The experts' further testified that there is a significant drop in suicide risk in ninety to ninety-five percent of patient's in Lance's situation when treated appropriately.

Justice Hecht, writing for the majority, found several things to defeat causality. Although the Dowell's expert testified that many patients will consent to treatment when sternly confronted with the dangers of refusal, there was evidence that Lance himself would not have consented to treatment and no evidence that *Providence* could have kept Lance from being discharged. Furthermore, the expert never actually testified that hospitalization, more likely than not, would have prevented the suicide. The expert opined that had he been hospitalized, Lance "would have improved" and been at a "lower risk" of suicide when he left. Finally, the majority holds that the discharge from the ER was simply "too remote from his death in terms of time and circumstances."

In dissent, Justice O'Neill, joined by Chief Justice

Jefferson and Justice Medina, charged that the Court had constructed "new legal hurdles that are insurmountable, particularly when, as here, the providers' alleged negligence results in death." The majority opinion holds that the verdict could not stand because the Dowell's failed to prove that, had Lance been properly diagnosed, he would have voluntarily submitted to hospitalization, or could have been involuntarily retained. In other words, the majority added "a causative element to a patient's burden when a healthcare provider negligently fails to diagnose or diagnoses improperly, *requiring the patient to demonstrate that he would have followed appropriate medical advice had it been given."*

D. "Factors" and "Facts" That Are Consistent With the Expert's Opinion Do Not, Standing Alone, Make the Opinion Reliable.

In *Mack Trucks Inc. v. Tamez* 206 S.W.3d 572 (Tex. 2006), the Texas Supreme Court reversed the Court of Appeals and upheld the trial court's granting of summary judgment where the evidence of cause-in-fact was not sufficient to prove that a fuel system defect was more likely the cause of the fire than any other potential source.

In determining whether expert testimony is reliable, a court should examine "the principles, research and methodology underlying an expert's conclusions." *Pipeline Co. v. Zwahr*, 88 S.W.3d 623 (Tex. 2002). When the testimony involves scientific knowledge, the expert's conclusion must be "grounded in the methods and procedures of science." *E.I. du Pont de Nemours and Co. v. Robinson* 923 S.W.2d 549 (Tex. 1995). The Texas Supreme Court has identified several non-exclusive factors that trial courts should consider when determining the reliability of expert testimony involving scientific knowledge. These factors include (1) the extent to which the theory has been or can be tested; (2) the extent to which the technique relies upon the subjective interpretation of the expert; (3) whether the theory has been subjected to peer review and/or publication; (4) the techniques potential rate of error; (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and (6) the non-judicial uses that have been made of the theory or technique.

These factors, however, may not apply when testimony is not scientific, but, rather, involves technical or other specialized knowledge. *Gammill v. Jack Williams Chevrolet*, 972 S.W.2d 713, 726 (Tex. 1998). Even then, however, there must be some basis for the opinion to show its reliability. An expert's bare

opinion will not suffice. Additionally, there cannot be "too great an analytical gap between the data and the opinion offered." *Gammill*, 972 S.W.2d at 726.

The Texas Supreme Court upholds the trial court's finding that the expert witness's opinion on cause in fact was unreliable in *Mack Trucks, Inv. v. Tamez,* 206 S.W.3d 572 (Tex. 2006). Tamez was operating a Mack truck tractor hauling a trailer of crude oil. The tractor and trailer overturned. A fire erupted. Although Tamez was able to climb out of the tractor, he was badly burned and died as a result of his injuries.

The Tamez's alleged that the tractor was defectively designed in that the fuel system was unreasonably prone to fail and release diesel fuel and that the tractor had ignition sources such as hot manifolds and electric batteries in areas likely to contain released flammable fluids. Elwell, the expert for the Tamez family, relied on various "factors" and "facts" that were consistent with diesel fuel having been released during the rollover. In reaching his opinion, Elwell did not utilize any of the *Robinson* factors and did not exclude the crude oil as the ignition source.

The Supreme Court holds that Elwell's testimony did no more than set out "factors" and "facts" which were consistent with his opinions then conclude that the fire began with diesel fuel from the tractor. "The reliability inquiry as to expert testimony does not ask whether the expert's conclusions appear to be correct; it asks whether the methodology and analysis used to reach those conclusions is reliable." Citing *Kerr-McGee Corp. v. Helton* 133 S.W.3d 245 (Tex. 2004).

E. Failure to Prove General Causation Based on Reliable Expert Testimony is Fatal in a Chemical or Toxic Tort Case.

In toxic tort and chemical-exposure cases, plaintiffs must prove both general and specific causation. General causation asks whether a substance is *capable* of causing a particular injury in the general population; specific causation asks whether the substance *caused* a particular individual's injury. Proving one type of causation does not necessarily prove the other, and logic dictates that both are needed for a chemical-exposure plaintiff or toxic tort plaintiff to prevail. *Merrill Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997); *Coastal Tankships, U.S.A., Inc. v. Anderson,* 87 S.W.3d 591, 602 (Tex. App.-Houston [1st Dist.] 2002, pet. denied).

In *Brookshire Brothers, Inc. v. Smith*, 176 S.W.3d 30 (Tex. App.-Houston [1st Dist.] 2004, writ dism'd), Smith, an employee of Brookshire's, was required to clean the bakery and a restroom with several commercial cleaners without protective gear. The

following day, he was diagnosed with reactive airways dysfunction syndrome (RADS), an asthmatic condition that impairs breathing and oxygen flow.

After a verdict in favor of Smith, Brookshire's appealed, contending that there was legally insufficient evidence to prove general causation. The court of appeals reversed and rendered a take-nothing judgment.

Smith's pulmonary expert, Gary Friedman, M.D., testified that the chemical exposure proximately caused Smith to suffer from RADS. He based his opinion on Material Safety Data Sheets (MSDS), the commercial cleaners' warning labels, Smith's medical records and Smith's personal account of his exposure to the commercial cleaners on the evening in question. Friedman admitted that he was not an expert in chemistry and did not know which commercial cleaner or combination of cleaners caused Smith's RADS and did not know the amount of chemical concentration to which Smith had been exposed. More importantly, he did not refer to any scientific literature associating RADS with commercial cleaners. The court of appeals found Friedman's general causation testimony insufficient for the following reasons:

1. Although Dr. Friedman testified that Lime-A-Way decomposes into a toxin known to cause RADS, he did not substantiate that conclusion with any scientific evidence. The absence of any general-causation evidence, combined with the absence of reliable scientific literature, created a fatal evidentiary gap in Smith's claim.
2. Reliance on Dr. Friedman's extensive training and expertise as well as his own education is not sufficient. No matter how qualified an expert is, his opinion must still demonstrate scientific data that evidences reasonable medical probability before the opinion can be accorded evidentiary value.
3. Smith's medical records and his account of the exposure did not sufficiently demonstrate scientific reliability. The mere fact that Smith had been exposed to the chemicals the day before he was diagnosed with RADS did not prove general causation. In other words, it did not prove that the substance was capable of causing a particular injury in the general population.
4. While the Material Safety Data Sheet (MSDS) identified particular toxins in the commercial cleaners and Lime-A-Way's MSDS and warning label identified asthma or RADS as a potential injury that could result from high

levels of exposure, the MSDS and warning labels did not demonstrate, scientifically, that the particular toxins at issue generally caused RADS. Without evidence produced at trial that discussed the scientific foundation used in formulating the conclusions contained in either the MSDS or the warning labels, there was no evidence established by the MSDS or warning label of general causation.

5. Although Dr. Friedman referred to "other peer reviewed articles" during his testimony, he mentioned the articles only in passing and never referred to it for the proposition that the commercial cleaners at issue generally cause RADS.

F. An Injured Patient is not Required to Quantify the Degree of Additional Damages Caused by Negligence When There is a Pre-Existing Illness or Injury.

The causation element of a negligence claim comprises the two following components: the cause-in-fact, or "substantial factor" component and the foreseeability component.

The ultimate standard of proof on the causation issue "is whether, by a preponderance of the evidence, the negligent act or omission is shown to be a substantial factor in bringing about the harm and without which the harm would not have occurred." *Kramer v. Lewisville Memorial Hospital,* 858 S.W.2d 397, 400 (Tex. 1993) (stating that the test is whether it is "more likely than not" that the ultimate harm or condition resulted from the alleged negligence.) "Hence, where pre-existing illnesses or injuries have made a patients' chance of avoiding the ultimate harm improbable even before the allegedly negligent conduct occurs - *i.e.*, the patient would probably have died or suffered impairment anyway - the application of traditional causation principles will totally bar recovery, even if such negligence has deprived the patient of a chance of avoiding the harm." *Id.*

In *Chau v. Riddle, M.D.* 2008 WL4836500 (Tex. App.-Houston [1st Dist.]) - not reported in S.W.3d. Mrs. Chau delivered twins by emergency Cesarean section. At delivery, one baby was "floppy," and very pale. Dr. Riddle intubated the child but several minutes later, it was discovered that the intubation tube was lodged in the esophagus. Although the child clinically improved following re-intubation, the child suffered permanent brain damage due to a lack of oxygen. Dr. Riddle argued that there was no evidence to establish the *amount* of harm that the child suffered as a result of

his alleged negligence because the plaintiff's expert anesthesiologist, Dr. Ronald Katz, admitted that he could not quantify the amount of additional damage that the child may have suffered due to oxygen deprivation caused by Dr. Riddle's failure to properly intubate. Dr. Katz testified that there was "no way" for him or anyone else to determine the amount of brain damage suffered before and during the delivery versus the amount of brain damage caused by the allegedly improper intubation.

Because Dr. Katz testified that the allegedly improper intubation "contributed to the baby's hypoxia and brain damage" and "there was definitely post-delivery hypoxia," there was evidence that the allegedly improper intubation caused *"some degree of additional damage."* The court of appeals found this testimony sufficient to defeat the defendants' no-evidence motion for summary judgment on the issue of damages.

G. When Should "Injury" Instead of "Occurrence" Be Used in the Liability Question? Maybe Never!

The comments to PJC 4.1 provide:

> **Use of "occurrence" or "injury."** The use of "occurrence" or "injury" in this question, as well as in PJC 4.3, could affect cases in which there is evidence of the plaintiff's negligence that is "injury-causing" or "injury-enhancing" but not "occurrence-causing": for example, carrying gasoline in an unprotected container, which exploded in the crash, greatly increasing the plaintiff's injuries (pre-accident negligence), or failing to follow doctor's orders during recovery, thereby aggravating the injury (post accident negligence). In such a case, the jury should not consider the negligence in answering PJC 4.1 and 4.3 if "occurrence" is used, while it should consider the negligence if "injury" is used.

Block v. Mora, _____ S.W.3d _____ (Tex. App.-Amarillo 2009) expressly disapproves this comment. Block was driving his pickup at 45 mph when Mora pulled out of a Wal-Mart parking lot in front of Block, causing a collision. Block had placed a spare tire atop four 5-gallon buckets in the bed of his truck and did not secure the tire. On impact, the spare tire flew forward, knocking out the pickup truck's rear window and striking Block in the back of the neck and shoulder. Over Block's objection, the trial court submitted the following jury question:

> Did the negligence, if any, of those named below proximately cause the injuries, if any, to David Block?
>
> Answer "Yes" or "No" for each of the following:
>
> A. Kimberly Mora _____
> B. David Block _____

The jury answered "No" as to Mora and "Yes" as to Block. The Amarillo Court of Appeals reversed the take-nothing judgment and remanded the case for trial.

Because comparative responsibility involves measuring the parties comparative fault in causing

plaintiff's injuries, it necessitates a preliminary finding that the plaintiff was in fact contributorily negligent. *Kroger Co. v. Keng*, 23 S.W.3d 347, 351(Tex. 2000). Mora's contention that Block was negligent in placing his spare tire atop the buckets in the bed of his pickup truck and that such negligence proximately caused his injuries when the spare tire struck him during the collision, was rejected because Mora failed to meet her burden of proving that Block was contributorily negligent. She failed to meet that burden by failing to establish that by placing the unsecured spare tire in the back of the truck, Block committed an intrinsically harmful act or breached a legal duty to Mora or to the public at large. citing *Elbaor v. Smith*, 845 S.W.2d 240, 245 (Tex. 1992).

Under Texas law, the concept of comparative negligence has "no application to a plaintiff's actions which antedate the defendant's negligence." citing *Kingsonwong v. Carnation Co.*, 509 S.W.2d 385, 387 (Tex. App.-Houston [14th Dist.] 1974) *aff'd*, 516 S.W.2d 116 (Tex. 1974) (holding that persons whose negligence did not contribute to an automobile accident should not have the damages awarded to them reduced or mitigated because of their failure to wear available seat belts.) The Amarillo Court of Appeals also cited *Kerby v. Abilene Christian College*, 503 S.W.2d 526, 527 (Tex. 1973) where the Supreme Court stated:

> [W]e draw a sharp distinction between negligence contributing to the accident and negligence contributing to the damages sustained. Contributory negligence must have the causal connection with the accident that but for the conduct, the accident would not have happened. *Negligence that merely increases or adds to the extent of the loss or injury occasioned by another one's negligence is not such contributory negligence as will defeat recovery.*

Disagreeing with Mora's assertion that the comments for PJC 4.1 can be interpreted to support a trial court's application of PJC 4.1, the Amarillo Court of Appeals held that the proportionate responsibility questions, such as PJC 4.1 and 4.3, are appropriate when the defendant has met his burden of proof on contributory negligence. That the plaintiff engaged in conduct prior to the accident that somehow increased or added to the extent or loss of his injury does not establish contributory negligence as to the occurrence, *i.e.,* but for his negligence, the accident would not have occurred. citing *Haney Electric Company v. Hurst*, 624 S.W.2d 602, 611 (Tex. App.-Dallas 1981, writ dism'd) (holding that plaintiffs placement of a gas can in the rear of her vehicle prior to a rear-end collision is not evidence of contributory negligence).

H. Expert Testimony is not Always Required To Prove Medical Causation.

Submission of a causation issue is warranted

when, under the evidence (1) a layperson's general experience and common sense will enable the layperson to fairly determine the causal relationship between the event and the condition; (2) categorical scientific principles, usually proved by expert testimony, established that the result in question is always directly traceable back to the event in question; or (3) a probable causal relationship is shown by expert testimony. *Parker v. Employers Mut. Liab. Ins. Co. of Wis.,* 440 S.W.2d 43, 46 (Tex. 1969).

In *Guevara v. Ferrer,* 247 S.W.3d 662 (Tex. 2007) the Supreme Court discusses the exception to the general rule that expert testimony is needed to prove causation as to medical conditions noting the following:

> In personal injury cases, trial evidence generally includes evidence of the pre-occurrence condition of the injured person, circumstances surrounding the occurrence and the course of the injured persons physical condition and progress after the occurrence. The record before us contains lay testimony about the plaintiff's pre-accident physical condition, his activities and other events leading up to the accident, the accident, an investigating police officer's report, and post accident events including medical treatments. This type of evidence "establishing a sequence of events which provides a strong, logically traceable connection between the event and the condition" could suffice to support a causation finding between the automobile accident and basic conditions which (1) are within the common knowledge and experience of laypersons, (2) did not exist before the accident, (3) appeared after and close in time to the accident, and (4) are within the common knowledge and experience of laypersons, caused by automobile accidents.

The Court in *Guevara* explained that if the plaintiff had been pulled from a damaged automobile with overt injuries such as broken bones or lacerations, and undisputed evidence that reasonable jurors could not disbelieve showed the plaintiff did not have such injuries before the accident, then "the physical conditions and causal relationship between the accident and the conditions would ordinarily be within the general experience and common knowledge of laypersons."

The Court made clear, however, that temporal proximity alone does not meet the standards of scientific reliability and will not support an inference of medical causation. Non-expert evidence is sufficient to support a finding of causation in limited circumstances were both the occurrence and conditions complained of are such that the general experience and common sense of laypersons are sufficient to evaluate the conditions and whether they were probably caused by the occurrence.

The types of injuries that are within the common knowledge and experience of laypersons include broken bones, lacerations and bruises. Other examples include low back pain (*State Office of Risk*

Management v. Larkin's, 258 S.W.3d 686 (Tex. App.-Waco 2008, no pet.) and carpal tunnel syndrome (*Saenz v. Ins. Co. of P.A.*, 66 S.W.3d 444 (Tex. App.-Waco 2001, no pet.) (It is within reasonable medical probability that continuous and painful movement in the hands could lead to a hand-related injury such as carpal tunnel syndrome as well as symptoms of pain and suffering.)

In *Morgan v. Compugraphic Corp.*, 657 S.W.2d 729 (Tex. 1984) the Texas Supreme Court holds that lay testimony could establish a causal connection between a chemical leak and Morgan's injuries when Morgan, who had previously been in good health, began experiencing *symptoms* such as watery eyes, blurred vision, headaches and swelling of the breathing passages four days after a typesetting machine that sat two inches from her face was found to be leaking chemical fumes. Expert testimony, however, may be required to establish causation of a *medical condition* or *diagnosis*. See *Brookshire Bros., Inc. v. Smith,* 176 S.W.3d 30 (Tex. App.-Houston [1st Dist.] 2004, writ dism'd).

I. The Importance of Medical History in Establishing Medical Causation.

In *City of Loredo v. Juan Garza*, _____ S.W.3d _____ (Tex. App.-San Antonio 2009) 2009-TX-0514.544, evidence that the plaintiff did not complain of his back hurting for several weeks after the accident, and a doctor's testimony that there were other possible causes of Garza's back pain other than his on-the-job accident, was legally insufficient to establish such a strong, logically traceable connection between the accident and the herniated discs such that a layperson could evaluate whether the medical conditions were probably caused by the accident.

In *LMC Complete Automotive, Inc. v. Burke*, 229 S.W.3d 469 (Tex. App.-Houston [1st Dist.] _____) it was held that Dr. Mims was qualified to render the opinion that the accident probably caused Burke's herniated discs based on the history given by Burke that immediately after the accident, he had pain in his back and he had never experienced back pain before the accident. The fact that there were no MRIs or other studies taken immediately before and after the accident did not make the opinion unreliable or unscientific. In addition, the fact that Burke first went to a doctor for his back pain three months after the accident, but consistently reported to his doctors that he had been experiencing back pain for about nine months did not render the basis of the doctor's opinion unreliable because Burke's inability to recall the exact date on which he was injured did not make his eventual

statement to Dr. Mims regarding the source of injury inherently unreliable.

J. Circumstantial Evidence That Raises an Equal Inference of Two Possible Causes is Not Legally Sufficient

Merck and Co., Inc. v. Ernst, ___S.W.3d ____ (Tex. Civ. App.-Houston [14th Dist.] 2008) 2008-TX-V0602.078 (motion for reh'g pending). The test for legal sufficiency "must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review." *City of Keller v. Wilson,* 168 S.W.3d 802, 827 (Tex. 2005). Legal-sufficiency review in the proper light must credit favorable evidence of reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not. *I.d.* Although the reviewing court must consider evidence in the light most favorable to the judgment, and indulge every reasonable inference that would support it, if the evidence permits only one inference, neither jurors nor the reviewing court may disregard it. *I.d.* at 822. A legal-sufficiency challenge will be sustained when the record discloses one of the following situations:

(1) Complete absence of evidence establishing a vital fact;

(2) The court is barred by rules of law or of evidence from giving weight to the only evidence of a vital fact;

(3) The evidence offered to prove a vital fact is no more than a mere scintilla; or

(4) The evidence conclusively establishes the opposite of a vital fact. *I.d.* at 810.

In *Merck v. Ernst,* ____S.W.3d ____, (Tex. App.-Houston [14th Dist.] 2008) the issue was whether there was legally sufficient evidence from which a jury could find that a thrombus or clot in the coronary artery of Robert Ernst caused his death, a vital fact. No thrombus or clot was found at autopsy.

The experts for Ernst testified that when Ernst died, the clot *could* have dissolved or they *could* have moved to small capillaries causing arrhythmia. The medical examiner testified that more likely than not, a thrombus caused myocardial infarction even though she found no clot and there were no findings consistent with a thrombus such as death of heart muscle tissue or the presence of cardiac enzymes. She explained that the clot *could* have dissolved, been dislodged during CPR or too small to find at autopsy. She also explained that an individual must live 6-8 hours after suffering a myocardial infarction for there to be development of dead heart muscle and cardiac enzymes.

Admitting that there was no direct evidence of a

blood clot or myocardial infarction, Ernst contended that there was sufficient circumstantial evidence to support the jury's verdict. In rejecting this contention, the court of appeals noted testimony of Merck's experts that the possibility of a clot dissolving on its own was not a viable hypothesis because the natural process of fibrinolysis takes 24-48 hours and only continues while the patient is alive. The theory that vigorous CPR could have dislodged a blood clot or caused it to fragment into small pieces that could not be detected on autopsy was deemed speculative because the medical examiner's testimony described this theory as a "guess," her "estimate," and a "possibility." No published literature suggesting that CPR could dislodge or move clots was presented.

In claims supported by only meager circumstantial evidence, the evidence does not rise above a scintilla if jurors would have to guess whether a vital fact exists. citing *City of Keller,* 168 S.W.3d at 813. When the circumstances are equally consistent with either of two facts, neither fact may be inferred. *I.d*. When the circumstantial evidence of a vital fact is meager, the court must consider not just favorable, but all of the circumstantial evidence, and competing inferences as well. *I.d.* at 814.