

## **PROVING "POSSIBLE" FUTURE CONSEQUENCES OF PERSONAL INJURIES**

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A motorcyclist, struck head on by a drunk driver who crosses the centerline, sustains multiple injuries and retains you. The client's orthopedist tells you that he successfully repaired the cyclist's fractured femur with a rod and screws, and that future surgical removal of this hardware is a "real possibility." The client's second doctor, a trauma surgeon, tells you that the cyclist's spleen was severely lacerated in the accident and was surgically removed, thereby exposing your client to a life-long, 5% risk of "post-splenectomy sepsis," a massive infection which kills 50% of its victims. How can you introduce into evidence these possible future consequences of the motorcyclist's present injuries?

If you look at the cases on proving future consequences of injuries you will find discussion of percentages as well as concepts like possibility, speculation, and reasonable certainty. See e.g., Anderson vs. Golden (3d Dist. 1996), 279 Ill.App.3d 398, 664 N.E.2d 1137 (even if risk of future consequences is less than 50%, evidence of risk admissible); Jeffers vs. Weinger (3d Dist. 1985), 132 Ill.App.3d 877, 477 N.E.2d 1270, 1275-6 (evidence of 1% possibility is not speculation); Rainey vs. City of Salem (5th Dist. 1991), 209 Ill.App.3d 898, 568 N.E.2d 463, 469 (medical testimony in terms of "possibility" satisfies reasonable certainty requirement); Terracina vs. Castelli (1st Dist. 1980), 80 Ill.App.3d 475, 400 N.E.2d 27, 31 (medical testimony to a "possibility" fails to satisfy reasonable certainty). The cases are, at best, difficult to harmonize based on these routinely used concepts. However, some "How To" guidance emerges from examination of the evidentiary foundations which the reviewing courts have found adequate to support proof of future risks from current injuries.

One treatise describes a foundation as a "preliminary" fact which must be proven as a precondition to the admission into evidence of another fact. M. Graham, et al., Illinois Evidentiary Foundations (1991), p. 1-2. An evidentiary foundation can thus be likened to a building's foundation: The composition of each foundation determines what can be successfully erected upon it.

The cases suggest that three types of foundational evidence are likely to permit proof of uncertain future consequences of present injury. Those foundational items are facts about: (1) the state of medical knowledge, (2) the state of the plaintiff's mind, and (3) the state of the plaintiff's body. We will examine these in turn.

Foundational use of the state of medical knowledge to prove possible future consequences of injury is illustrated

in Boose vs Digate (3d Dist. 1969), 107 Ill.App.3d 418, 246 N.E.2d 50. In that case, despite Defendant's argument that the medical evidence was mere speculation, the Appellate Court held that the jury could properly consider a physician's testimony that a Plaintiff's injured eye had a 50% chance of being removed in the next 10 years. The Court so held even though the plaintiff's physician admitted on cross-examination that there was some element of speculation and guess in his answer about whether the plaintiff's eye would in fact be removed. The Appellate Court distinguished between the physician's testimony about the consensus of medical opinion about eye injuries like that suffered by the plaintiff, and whether the physician could point to a particular aspect of the plaintiff's current physical condition to conclude whether or not the eye might be removed. 246 N.E.2d at 53. The Appellate Court reasoned that the physician's "speculation" was limited to the physician's inability to pinpoint anything in the plaintiff's present physical condition which would suggest, one way or another, whether the eye should be removed. The Court found no speculation in the physician's testimony about the state of medical knowledge, that is, "the general consensus of recognized medical thought and opinion concerning the probabilities of conditions in the future based on present conditions." Id. Because the doctor testified to the general consensus of recognized medical thought, "reasonable certainty" was established, "speculation" was overcome, and the testimony of a 50% chance of eye loss was permitted.

While questions must be tailored for each case, questions eliciting the state of medical knowledge might sound like the following when addressed to a duly qualified physician. "Doctor, do you have an opinion, based on a reasonable degree of medical certainty, whether medical science generally recognizes that a person with Plaintiff's injury is subject to certain risks because of that injury?" "Doctor, do specialists in your field generally recognize any future risks posed by an injury like Plaintiff's?" "Doctor, what does medical science know about the future risks Plaintiff faces because of his injury?" Questions such as these can elicit established medical knowledge and elucidate the future faced by the plaintiff.

The second foundation stone for proof of future consequences, proof about the state of the plaintiff's mind, is suggested by cases like Friedland vs. Allis Chalmers Co. (1st Dist. 1987), 159 Ill.App.3d 1, 511 N.E.2d 1199. In Friedland Plaintiff offered testimony that he was afraid to undergo future surgery, and that he had been advised of

the risk of future surgery. Over Defendant's objection that in closing argument references to Plaintiff's fears were simply attempts to invoke sympathy, the Appellate Court found that the remarks were reasonable and proper inferences from the testimony. Testimony about Plaintiff's state of mind thus supported Plaintiff's damage arguments. 511 N.E.2d at 1203. That proof of the state of Plaintiff's mind may be a foundation for proof of future consequences of injury is also suggested by the recent cases defining the "disability" element of damages as a "loss of a normal life." See Smith vs. City of Evanston (1st Dist. 1994), 260 Ill.App.3d 925, 631 N.E.2d 1269, 1277-78; see also Fetzer vs. Wood (2d Dist. 1989), 211 Ill.App.3d 70, 569 N.E.2d 1237, 1244-45 (loss of the enjoyment of life is a relevant consideration in determining pain and suffering).

Proving the plaintiff's state of mind can be done by asking the plaintiff not what his physicians have told him, but his understanding of the risks he now faces given his injury. Another method, less likely to draw an objection, uses the plaintiff's doctor to establish the state of Plaintiff's knowledge: Plaintiff's counsel should pose questions to the plaintiff's doctor, like those suggested above, to elicit the state of medical knowledge about risks, and then ask the doctor about whether and in what detail the doctor informed Plaintiff of the risks, and the plaintiff's reaction to this information. If the doctor testifies before the plaintiff does, and establishes the risks and the fact that Plaintiff has been informed of the risks, the plaintiff can also be asked about his reactions to the risk-information. Approaches such as these can establish the plaintiff's state of mind about the future consequences of present injury.

Recall here the medical facts in our motorcyclist's case: Surgical removal of the orthopedic hardware is possible and so is post-splenectomy infection. Both future risks could be introduced if the consensus of medical opinion recognizes them, and particularly if the motorcyclist's doctors have told the cyclist about these risks and the cyclist suffers under the knowledge of them.

However, even if the risk of possible future surgical removal of the hardware is admitted into evidence, are you entitled to have admitted as future medical expense the cost of "possible" future surgery? Yes, if you use the third foundational element, pertinent information about the state of the plaintiff's body. The case of Roman vs. City of Chicago (1st Dist. 1985), 134 Ill.App.3d 14, 479 N.E.2d 1064, suggests how to do it. In Roman, Defendant objected as "speculative" to the plaintiff's medical testimony that arthritis in Plaintiff's ankle would gradually worsen so that the plaintiff would eventually, perhaps in a decade, need surgery presently costing \$15,000.00. The Appellate Court allowed the testimony about the \$15,000.00 future surgery. The Appellate Court did not rely on testimony about either the state of medical

knowledge or Plaintiff's knowledge of surgical risks. Rather, in approving the future consequences testimony, the Court cited specific testimony by Plaintiff's medical expert about the state of Plaintiff's body: two fractures and a partial dislocation in the ankle, early arthritic changes in the ankle, cartilage damage, etc.. For the Appellate Court, these facts about the plaintiff's body supported the future consequence evidence, including \$15,000.00 for surgery perhaps a decade away. 479 N.E.2d 1066.

The foundational questioning of Plaintiff's physician to support evidence of the dollar cost of future medical care might begin with the questions suggested above about possible future risks. Then the physician can be asked, "Doctor, do you have an opinion, based on a reasonable degree of medical certainty, as to whether Plaintiff will need future medical care?" If so, the doctor should be asked what specific conditions in Plaintiff's body will require the future medical treatment, why, the nature of the anticipated treatment, what would likely happen to the plaintiff's body if the treatment were not rendered, and, ultimately, the treatment's cost. These kinds of questions tend to prove the "reasonable certainty" of future medical expense.

Plaintiffs' lawyers wishing to prove future consequences of present injuries should consider offering as foundational proof the state of medical knowledge about future consequence of injuries like the Plaintiff's injury, possibly coupled with evidence of the plaintiff's state of mind about risks the plaintiff faces in the future. Particularly when seeking recovery of future medical expenses, Plaintiffs may need foundational proof about the particular conditions in the plaintiff's body which indicate the likelihood of future medical treatment. Defendants' lawyers resisting evidence of possible future consequences of present injuries will be better able to claim "speculation" when these foundational elements are missing or unclear.