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Combating the "anything is possible" expert

Speculative possibility does not become admissible testimony merely because it comes out of the mouth of a defense expert

Imagine the following scenario: Plaintiff's counsel or plaintiff's expert argues, "Defendant is negligent. Do I know if that negligence caused plaintiff's injuries? I'm not sure, it is certainly one of several interesting possibilities." In less than 3.47 seconds plaintiff would be bombarded by about 10 or 15 motions from defendant seeking to have his case thrown out and seeking to have all reference to the existence of his expert, let alone his opinions, erased from the face of the earth. Each motion would make the same argument – a party and its experts are not allowed to speculate, and, an expert must have an opinion to a reasonable degree of probability that the negligence caused the injury.

Now imagine a second scenario: Defense counsel or defendant's expert argues, "I don't think defendant caused plaintiff's injuries. I'm not really sure what caused plaintiff's injuries. It's possible that plaintiff is suffering from a pre-existing medical condition, or maybe plaintiff's injuries are being caused by some unknown disease that hasn't shown up on any of the medical records, or maybe plaintiff needs to adjust his medications, or maybe plaintiff has a psychological disorder, or maybe plaintiff needs to change his sleeping habits, or maybe plaintiff is allergic to cat hair, or maybe plaintiff grew up in a town that uses too much pesticide. I'm not really sure what is going on here, all of these are interesting possible explanations for what caused plaintiff's injuries."

While the first scenario is only a hypothetical scenario, the second scenario is playing out in cases all over the State on a daily basis. Defendants are constantly bombarding courts with motion after motion trying to end plaintiffs' cases and exclude plaintiffs' experts by claiming that plaintiffs are speculating about possible causes, and then in the exact same breath trying to drown juries with "possibility" defenses that are little more than sheer speculation.

Don't get me wrong, a defendant is entitled to argue that plaintiff or an expert has failed to meet the burden of proof on a claim or issue. However, as soon as a defendant or an expert says, "Our negligence did not cause this injury, this injury was really caused by X," the defendant is no longer simply defending him or herself. At that point the defendant is making an affirmative claim of alternative causation, an affirmative defense. At trial, a defendant raising an affirmative defense has the burden of proving it. (*Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 469, [110 Cal.Rptr.2d 627]; *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794-795 [85 Cal.Rptr.2d 844], *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 54 [118 Cal.Rptr. 184].) This means that a defendant and a defense expert are bound by the same authorities regarding speculative opinions and foundation for opinions as the plaintiff and the plaintiff's expert.

The law applies equally to both sides. Speculative nonsense and speculative possibility claims do not suddenly become admissible because they are being offered by the defendant or defense expert. If the expert or the party cannot state an opinion to a reasonable degree of probability they risk exclusion, no matter which side of the case the party is on. As the Court wrote in *Espinosa v. Little Co. of Mary Hospital* (1995) 31 Cal.App.4th 1304, 1315-1316 [37 Cal.Rptr.2d 541]

> That there is a distinction between a reasonable medical 'probability' and a medical 'possibility' needs little discussion. **There can be many possible 'causes,' indeed, an infinite number of circumstances which can produce an injury or disease. A possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action**. This is the outer limit of inference upon which an issue may be submitted to the jury.

(*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108; *Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493. (Emphasis added).)

This article is designed to address the issue of what happens when a defense expert starts trying to flood the courtroom with speculative "possibility" defenses. There are three ways to approach the issue: Find an expert or item of evidence to obliterate the possibility, attempt to exclude the opinion, or embrace the nonsense to make the defense expert look foolish on the witness stand. Chances are you will need to employ a mix of all three options.

Obviously the easiest way to combat a speculative possibility defense is to hire an expert who can discredit the claim or find that item of evidence that discredits the claim. The problem with defense expert speculation is that it often makes its initial appearance in the later stages of expert discovery, too close to trial to hire an expert or locate a piece of evidence.

Additionally, defensive possibility speculation is easy to conjure up and inexpensive. The plaintiff usually does not have an endless supply of time, experts or evidence to combat every single form of speculative possibility. Still, if you are able to learn early enough in discovery that for

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example, a defendant is going to "bet the house" on a claim that the injury was caused by some phantom infection that does not show up on any medical test, retaining an infectious disease expert to explain why the claim is nonsense is a very good idea.

Even with the best expert, you want to do everything you can to keep the defendant and the defense expert from dumping speculative possibility in front of the jury. Many Americans love a good conspiracy theory. Despite the fact that there is live video footage of two airplanes slamming into the World Trade Center Towers, there are thousands of Americans who refuse to give up the belief that the towers were brought down by a shadow team of demolition experts hired by the U.S. Government. These same people will take speculation they see on the Internet about prevailing wind patterns or the way glass from a 45th story window is "supposed to shatter," and argue that such speculation demonstrates that a shadow demolition team caused the towers to collapse. You might have the best expert in the world but if you have jurors who love a good conspiracy theory, there is always a risk that one or more of them will fall in love with speculative nonsense. As such, you should also consider bringing a motion to exclude the speculative possibility defenses from the jury.

In bringing the motion to exclude the expert or his possibility defense you are not required to re-invent the wheel. Chances are you have already been bombarded by defense motions in the past on the same subject. The same authorities the defense loves to use against your experts will work for you. Your main challenge is convincing the judge that the authorities Defendants rely on so repeatedly, apply as much to them as they do to you.

The main point you have to highlight for the judge is that there is a vitally important difference between possibility and something that is a reasonable degree of probability. The judge needs to understand that whether the plaintiff or the defense is offering the opinion, it cannot go to the jury unless it is an opinion stated to a reasonable degree of probability. (*Espinosa v. Little Co. of Mary Hospital, supra,* 31 Cal.App.4th 1304.) This case provides a clear illustration of the line between mere possibility and reasonable degree of probability.

Espinosa dealt with a claim of medical malpractice that resulted in brain damage to a newborn child. During trial, plaintiff's expert conceded that there were three potential causes for the child's injury. The first was the ingestion of lithium by the mother during the early portion of the pregnancy, the second was malpractice by the defendant during the hours leading up to the delivery of the child, and the third was malpractice committed by the defendant during the delivery itself. While the defendants were potentially liable if the brain injury occurred during the hours leading up to the delivery or the delivery itself, they were not liable if the damage occurred as a result of the ingestion of lithium.

Plaintiff's experts were forced to concede that all three things: the lithium, the pre-delivery malpractice, and the delivery malpractice, contributed to the brain injury of the child. Plaintiff's experts could not even quantify which act caused which percentage of the injury. The trial court granted defendants' motion for non-suit on the grounds that the plaintiff's expert could not eliminate the possibility that the lithium was responsible for the injuries and could not state with certainty as to how much responsibility the lithium had for the injuries. The Court of Appeal reversed the trial court, noting that plaintiff's expert had produced enough evidence that plaintiff suffered independent injuries from the medical malpractice. In doing so, the court explained what plaintiff's expert had to do in order to overcome a complaint about competing possibilities of injury:

> Dr. Gabriel did not testify that it was possible that the subacute and acute phases caused brain damage. He testified that they did cause brain damage. He did not testify that it was possible that the subacute and acute phases were substantial factors in causing plaintiff's brain damage. He testified that they were substantial factors in causing the outcome.
>
> To reason, as did the trial court, that based on plaintiff's evidence, "[i]t is entirely possible ... that the brain damage to [plaintiff] had occurred prior to the hypoxic event ..." is simply not justified or supported by Dr. Gabriel's testimony. Dr. Gabriel identified specific brain damage on plaintiff's MRI study which was not caused during the first trimester, but rather, was caused by trauma, and testified that the events surrounding the labor and delivery were substantial factors in causing plaintiff's condition.

(*Id.* at 1318.)

> [I]n the absence of factual circumstances of probability understandable to a jury there must be some scientific testimony that can be interpreted as an inference of hypothetical probability before we can allow a jury to speculate upon the rights of citizens. [¶] .... [O]nce the theory of causation leaves the realm of lay knowledge for esoteric scientific theories, the scientific theory must be more than a possibility to the scientists who created it.

(*Jones v. Ortho Pharmaceutical Corp., supra,* 163 Cal.App.3d at p. 403, italics added.)

(*Id.* at 1320.)

> Here, testimony about the statistical risk or likelihood of brain damage was not necessary to a prima facie case. Causation was shown directly. Dr. Gabriel testified the brain damage was the result of discrete, known factors, not possibly the consequence of myriad variables. ...

(*Id.* at 1320.)

> [T]he testimony of plaintiff's expert witness, viewed in its most favorable light, was unequivocal. Dr. Gabriel concluded that defendants' negligent acts, while not the sole cause of plaintiff's brain damage, were clearly a substantial factor in causing them. Such testimony was not uncertain or speculative; and it was sufficient to present a prima facie case of causation."

(*Id.* at 1321.)

Defendants will claim it is permissible for them to speculate regarding possible alternative causes of injury because they have hired an expert to do the speculating.

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However, experts are not granted a license to speculate. As the court wrote in *Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1120 [8 Cal.Rptr.3d 363] an expert opinion that states, "in essence 'Trust me, I'm an expert, and it makes sense to me' has provided no grist for the jury's decisional mill. Instead, such a conclusion leaves to the jury only a weighing of the curricula vitae of the opposing experts. We are convinced the expert must provide some articulation of how the jury, if it possessed his or her training and knowledge and employed it to examine the known facts, would reach the same conclusion as the expert." (*Ibid.*)

If a defense expert has no reliable basis for their opinions, these opinions are worthless and inadmissible. Evidence Code section 801 limits expert opinions that rely on matters that provide a reasonable basis for the particular opinion offered, and that an expert opinion based on speculation or conjecture is inadmissible. (*In re Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 564. [10 Cal.Rptr.3d 34].) The value of opinion evidence rests not in the conclusion reached, but in the factors considered and the reasoning employed. Where an expert bases his conclusion upon possibilities and assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value. (*Id. at* 563.)

An expert opinion that does not have an adequate factual basis does not constitute admissible evidence. (*Carmel Valley View, Ltd. v. Board of Supervisors* (1976) 58 Cal.App.3d 817, 822 [130 Cal.Rptr. 249].) The law is abundantly clear that an expert opinion rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion has no evidentiary value because an expert opinion is worth no more than the reasons and facts on which it is based. (*Bushling v. Fremont Medical Center,* 117 Cal.App.4th at p. 510.) Even if a witness qualifies as an expert, that witness because of his expert status, does not have carte blanche to express any opinion. "The value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed." (*Pacific Gas and Electric Company v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135 [236 Cal.Rptr. 630].)

If a defense expert is going to claim that plaintiff's injuries were caused by some other source, he needs to render that opinion to a reasonable degree of probability and back it up with an actual and reasonable basis. If not, you should bring a motion to exclude the expert and/or the expert's opinions.

Although defense experts are not permitted under the law to dump speculative possibility evidence and opinions on the jury, you are not always going to be able to succeed in keeping such speculative opinions from the jury. You need to be prepared with experts and facts to deal with the "possibility" defenses. There are ways to take advantage of the fact that the defendant or its experts are trying to dump speculation on to the jury. Because the opinions are little more than pure speculation, you can use the speculation to make the defense experts and the defendant look pretty bad in front of the jury.

For example, below is an edited deposition transcript of a defense expert. The case concerned the death of a special-education student who had limited ability to speak. The defense expert was upset at the level of the autopsy performed by the coroner and claimed that there were a number of possible causes of death that could not be ruled out. (Possible causes of death that might serve as a defense). The following exchanges took place during the deposition:

Q. Did they test Plaintiff's blood at all for anything?
A. They did for some of the common drugs of abuse but not anti-seizure medications and not some of the drugs that you have to find by looking for them, not by doing a screen.
Q. And what would – give me an example of some of those more uncommon drugs you're talking about.
A. Ecstasy, any of the new salts which are still referred to in tox as bath salts.
Q. I mean, come on. Ecstasy would be a reach; right?
A. Ecstasy what?
Q. Saying that Plaintiff might have taken Ecstasy, that's a reach; right?
A. I'm not saying it's a reach because I've seen some 60-year-old ladies taking cocaine and methamphetamine and basically they didn't do what they were supposed to do and they didn't rule out a whole lot of possibilities.
Q. So you're telling me it's realistic in this case to leave Ecstasy in as a realistic possibility that plaintiff somehow got a hold of Ecstasy and took it – shortly before he hopped in the shower?
A. I'd say the odds are over 50 percent that if plaintiff is going to a school that there's Ecstasy available at that school, yes.
Q. So you're saying plaintiff using Ecstasy is a reasonable possibility in this case?
A. It sure is.

Eventually, the expert moved on to another possible cause of death, a fatal blood clot.

Q. So are you saying to a reasonable degree of medical probability that it was a blood clot in his lung that did him in, or are you still sticking with seizure as the cause of death?
A. Well, we're talking about things that were not ruled out. This was not ruled out. It would have been a blood clot most likely originating in his legs and then traveling to his lungs and blocking the blood supply to his lungs. …
Q. I guess what I'm getting at, doctor, is that you've got no evidence whatsoever that plaintiff had a blood clot. This is just a hope that maybe – if they pulled out his lungs, maybe they'd be able to see some evidence of a blood clot. There's no – you've got no basis to suggest to a degree of medical probability that they were going to find something like that in his lungs; correct?
A. As I said several minutes ago, it was one of the many things that they didn't rule out that could be a possible cause of death.
Q. Did the coroner rule out ninjas assassinating plaintiff in the shower?
A. They didn't rule that out. …
Q. There's a difference between ruling something out, though, and stating to a reasonable degree of medical probability

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it occurred. Just because it wasn't ruled out does not mean you can sit here and say to a reasonable degree of medical probability that it occurred; correct?
A. I can say with medical probability that it possibly could have occurred and it's not been ruled out.
Q. So there's a reasonable degree of medical probability that it's possible; is that the opinion?
A. Without it being ruled out, yes.

To the defense expert's credit, he created a new standard of proof, "reasonable degree of medical probability of the existence of a possibility." This expert was so determined to advocate speculation on behalf of his client that he lost credibility. He can have the greatest resume in the world and his core opinions can be sound, but because he was not willing to give an inch on his determination to speculate, he was forced to take some ridiculous credibility-damaging positions. Whether the transcript winds up in a motion in limine or serves as a basis for cross examination in front of the jury, the position staked out by the expert threatens to damage his credibility and the credibility of his other opinions.

Speculative possibility does not become admissible merely because it comes out of the mouth of a defense expert. Absent adequate foundation and expertise to render a reasoned opinion to a reasonable degree of probability, the opinion, no matter which side is offering it, is simply not admissible. Anything is possible, but it has to cross the threshold of probable to be admissible.

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