No. 11-0960 – Bonnie Toothman and Gary Toothman, Plaintiffs Below, Petitioners, v. Kari Lynn Jones, Defendant Below, Respondent

Ketchum, Chief Justice, concurring:

Requiring a medical doctor to opine to a "reasonable degree of medical certainty" should be abolished. The question, "Doctor, do you have an opinion to a reasonable degree of medical certainty" contains antiquated legalistic jargon.[1]

Medical doctors, who are not professional or seasoned witnesses, always ask what the question means. Does it mean that the doctor's opinion must be absolutely certain, scientifically certain, reasonably probable, medically probable, greater than 50% possible, more likely than not, or somewhere in between? Worse yet, the lawyers I ask all give me a different definition, including "beyond a reasonable doubt."[2]

We should require the question to be asked in plain English. "Doctor, do you

[1] Jeff L. Lewin, *The Genesis and Evolution of Legal Uncertainty about "Reasonable Medical Certainty,"* 57 MD. L. Rev. 380 (1998). *See also*, Nelson Abbott & Landon Magnusson, *An Enigmatic Degree of Medical Certainty*, 21 Utah B. J. 20 (2008) ("[T]he phrases 'reasonable degree of medical certainty' and 'reasonable degree of probability' are simply not necessary in the court room, do more harm than good, and should consequently be eliminated from the legal lexicon.").

[2] The problem is illustrated by the various terms associated with "certainty" found in Burton's Legal Thesaurus (4th ed. 2007). The terms, among others, include a spectrum from *absence of doubt* and *absoluteness* to *confidentness*, *substantiality* and *sure presumption*.

have a medical opinion of which you are reasonably certain?" The doctor can then be cross-examined as to whether his opinion is based on a possibility, probability or an absolute certainty.

After the cross-examination, the trial judge will determine whether the doctor's opinion meets the required standard of proof. If the case goes to the jury, the jury can consider its weight after being instructed on the degree of proof required for different elements of the case, e.g., causation, permanent disability, and future medical expenses.

The most logical way to handle this legalistic jargon problem is to adopt a version of the solution proposed by Justice Neely in 1974 in his futuristic concurrence in *Jordan v. Bero*.[3] In the concurrence, Justice Neely indicated that a jury, upon proper instruction, could award damages based on the overall probability that the plaintiff will suffer a future disability, *i.e.*, a disability the medical doctor reasonably believes will occur. The doctor's testimony could set forth his or her medical experience and his or her "evaluation of statistical information from recorded cases of similar injuries." 158 W.Va. at 65, 210 S.E.2d at 641. In so stating, Justice Neely recognized that, although the probability of a future disability may be less than fifty percent in some cases, it is still possible to award appropriate damages without becoming speculative.

[3] *See,* concurring opinion of Justice Neely in *Jordan v. Bero*, 158 W.Va. 28, 210 S.E.2d 618 (1974).

In his concurring opinion, Justice Neely observed that the traditional rule requiring that future damages be proved to a reasonable degree of medical certainly is stated "in relatively vague language."[4] Consequently, the thrust of the concurrence expresses the need to clarify and simplify the complex information the jury is expected to absorb in a personal injury trial. I would add that the questions propounded to a medical doctor with regard to the traditional rule should also be clarified and simplified. Rather than robotically tracking the language of the rule, "Doctor, do you have an opinion to a reasonable degree of medical certainty," the required question should be, "Doctor, do you have a medical opinion of which you are reasonably certain?"[5]

On that basis, I concur.

[4] 158 W.Va. at 62, 210 S.E.2d at 640.

[5] In the context of the future consequences of an injury, the majority opinion in *Jordan v. Bero* uses both phrases, "reasonable certainty" and "reasonably certain."