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# Tell It Like It Is Doctor!

## A Discussion of Reasonable Medical Probability in Kentucky

By JOE C. SAVAGE\*

For several months following an automobile accident, your client complains of headaches, dizziness, vertigo, some nausea and occasional difficulty in properly focusing his eyes. He tells you that although the collision resulted in only minor property damage to the vehicles involved, his head struck the windshield, and that this was the cause of his symptoms. He has not seen a physician. How are you going to prove that the blow to your client's head is the direct and proximate cause of his complaints? Do you need medical testimony? If so, how sure of his opinion must your medical witness be (1) before he is allowed to give it and (2) before you have met your burden of proof on this issue of causation?

You are defending against a plaintiff who alleges to have suffered a ruptured intervertebral disk in the cervical area at the C-6, C-7 interspace, causing severe neck pain and radiating left arm pain, as a result of being rear-ended by your client's insured. You know the plaintiff is forty-five years old and suspect that this neck and arm pain was caused not by the accident but by degenerative arthritis, which is common to persons of this age and which can easily produce these same symptoms. What kind of evidence must plaintiff's counsel offer to establish a direct causal relationship between the accident and the ruptured disc?

As attorney for the widow and four children of a forty-two year old carpenter who suffered a fatal heart attack at work, you

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would like to obtain maximum death benefits under workmen's compensation. How do you prove that the heart attack was work connected?

A woman claims to have swallowed pieces of glass while drinking a coke, and now complains of all types of bizarre symptoms. How do you prepare to defend such a claim?

A twenty-three year old boy is knocked from his motorcycle, suffering minor fractures and the usual bumps and bruises. Three months later, diabetes mellitus is diagnosed. Can you prove a causal relationship?

Turning for a moment from the problem of causation, what about the problem of future damages? Suppose, at trial, you prove that your client, a twenty year old boy, suffered a closed head injury. Your neurosurgeon is prepared to testify that statistics show that this boy has a five per cent chance of suffering from epilepsy at some time in the future. Can you get such testimony in? Assuming that this is all the testimony on future medical problems, can you get an instruction on future pain and suffering and loss of earning capacity?

Suppose your client, at the time of trial, continues to suffer low back pain, and his treating doctor is prepared to testify that such pain will likely continue, and that the best way to relieve it would be to perform disc surgery and fuse the vertebrae. Is such testimony too speculative? Can you get instructions on medical and doctor bills, future pain and suffering, and loss of earning capacity?

A doctor testifies that he cannot be absolutely sure of anything in medicine, but that its "possible" that plaintiff will never be able to go back to work. Too speculative?

How can the attorney chart his way through such a rough and uncertain wilderness? What are the rules?

#### WHAT AFTER ALL, MUST THE PLAINTIFF PROVE?

In any personal injury negligence action, the plaintiff, to win, must establish by the preponderance of the evidence:

1. A duty on the part of the defendant,
2. A breach of that duty,

3. A direct and proximate causal relationship between breach and injury suffered, and
4. Injury or damage.

Concerning duty, the plaintiff must produce evidence which will establish a duty on the part of the defendant to act as the reasonably prudent person in same or similar circumstances. Concerning breach, the plaintiff must produce evidence which will establish that the defendant did not conform to this reasonable man standard. For the purposes of this paper, we may assume that both duty and breach have been established.

Concerning causation, the plaintiff must produce evidence which will establish that the injuries for which the plaintiff asks to be compensated were caused, directly and proximately, by the defendant's breach of duty. What type of evidence must this be, and how persuasive must it be to warrant an instruction on defendant's basic liability?

Concerning injury or damage, the plaintiff, at the time of trial, must produce evidence which will establish any one or more of six possible elements of damage:

1. Past medical expenses,<sup>1</sup>
2. Past earnings lost,<sup>2</sup>
3. Past pain and suffering,<sup>3</sup>
4. Future medical expenses,<sup>4</sup>
5. Future loss of earning capacity, and<sup>5</sup>
6. Future pain and suffering.<sup>6</sup>

Presenting evidence to prove the first three should cause little difficulty. But what type of evidence must be presented and how persuasive must it be to warrant an instruction on the latter three?

Turning for a moment from a personal injury negligence action, what must a plaintiff establish to justify an award in workmen's compensation. He must prove:

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<sup>1</sup> AM. JUR. 2d *Damages* § 102 (1965).

<sup>2</sup> *Id.* § 90.

<sup>3</sup> *Id.* § 105.

<sup>4</sup> *Id.* § 102.

<sup>5</sup> *Id.* § 92.

<sup>6</sup> *Id.* § 106.

1. The employer and employee were under the act,
2. Injury, and
3. The injury arose out of and in the course of his employment.

As in a personal injury case, then, a workmen's compensation plaintiff must establish causation by showing that his injury was work connected. He also must present evidence on future injury if he is to obtain an award for permanent disability.

Through this article, then, we are talking about two distinct problems:

- (1) Proof of causation from the breach of duty (personal injury case) or the work duties (compensation case) to the injury, and
- (2) The injury now having been established, proof of its future consequence and duration.

#### THE MEDICAL EXPERT

As will be discussed later, the proof of causation and the proof of future injury usually involve testimony offered in court, or in a deposition, by a medical doctor. Too often this testimony is vague, uncertain and confusing.

One doctor says this or that "could" happen. Another says it "would." Another says "maybe," or "possible." Still a third says it's "likely."

"I would expect to see" such a result. "I can't be sure, but this can happen." "This may happen, if . . ." "These symptoms are consistent with" a particular type of trauma.

One doctor's "could" is another's "would." Two doctors have the same opinion, yet one expresses it in terms of "possibility," the other "probability."

What is the nature of medical testimony that it should be so difficult to express? Must we forever be wary of this quagmire of semantics?

We have all heard it said that "medicine is not an exact science." Some assert that it is not a science at all, but only an art. What label is used is unimportant; the understanding and

appreciation the lawyer has of the basic nature of medical knowledge is all important.

The touchstone of medical knowledge is the *opinion* of the doctor. Everything else is subservient. Medical history, physical examinations, X-rays, laboratory procedures, special diagnostic tests—all are merely steps taken along the way by the doctor so that he can finally reach a medical opinion.<sup>7</sup>

Of course, opinions are not absolute facts. This means that no doctor can testify with absolute certainty, and that there are few, if any, areas of medicine free of conflicting opinions. The human body being the complex mechanism that it is, medical knowledge is and will probably continue to be unsettled. Lawyers will forever be exposed to the “educated medical guess.”

So when a doctor testifies, all he can bring to court is what he has—his opinion. The attorney should not demand more from his medical witness than he can give. Neither should the court.

#### CAUSATION—“ETIOLOGY”

What evidence must the plaintiff introduce to sustain his burden of proof on the issue of whether the defendant’s breach of duty was the direct and proximate cause of plaintiff’s injury? Or, if in workmen’s compensation, whether the injury was work connected?

The study of the causes of injury or disease in medicine is known as “etiology.” What the attorney is really trying to prove, then, is the etiology of his client’s injury. Thus, in the hypothetical fact situations posed at the beginning, did the trauma suffered by the plaintiff in an automobile accident cause headaches, nausea and dizziness? Did the stress of work cause a heart attack? Can trauma cause diabetes?

Etiology of injury is a medical issue, and usually must be proven by a medical witness. This is true because only a physician has the knowledge and expertise to make inferences and draw conclusions, hence give an opinion, from medical facts.

But, you say, it takes no medical genius to know that the plaintiff’s lacerations of the face were caused by his going

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<sup>7</sup> M. HOWTS, *LAWYER’S GUIDE TO MEDICAL PROOF* (1966).

through the windshield. And, of course, you are correct. Where the cause of injury is obvious to the layman, medical testimony on causation is not required.

The Court of Appeals has long recognized these doctrines. The most recent example is *Tatham v. Palmer*.<sup>8</sup> In that case, the plaintiff, an eighteen year old boy, suffered headaches after striking his head against the windshield. Without medical testimony, the Court held that the plaintiff's burden of proof on causation had been met.<sup>9</sup> The Court pointed out that circumstantial evidence may be sufficient in some cases to prove causation. "[I]t is within the realm of common knowledge that a severe blow to the head will cause headaches . . ."<sup>10</sup> The test is, then, what is within the realm of common knowledge.

But what is within such realm has been more obvious to the Court than it has to me on several occasions. The Court once held, for example, in *Cumberland Railroad Company v. Baird*,<sup>11</sup> that a woman's testimony that she suffered a miscarriage after falling off a horse when it stumbled at a defective railroad crossing was sufficient, without medical testimony, to establish causation. At least two obstetrics and gynecology specialists have told me that it is extremely unlikely that such trauma would produce such a result.

Of course, taking a plaintiff's case to court without medical testimony would be foolish, and, as a practical matter, seldom occurs. The real question, then, is not whether medical testimony is needed, but rather, whether the medical testimony given is sufficient to prove causation? Or, to state it from a different frame of reference, how certain must the doctor be of his opinion in order for the plaintiff to establish causation?

There is one old Kentucky case which infers that the doctor need only testify that the injury "could" have been caused by the trauma. In *Louisville and Nashville Railroad Company v. Braymer*,<sup>12</sup> the issue was whether Braymer's abdominal tumor was caused by his striking his stomach on the seat in front when the train lurched unexpectedly. Plaintiff's medical testimony was

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<sup>8</sup> 439 S.W.2d 938 (Ky. 1969).

<sup>9</sup> See also *Jarboe v. Hasting*, 397 S.W.2d 775 (Ky. 1965); *Johnson v. Vaughn*, 370 S.W.2d 591 (Ky. 1963).

<sup>10</sup> 439 S.W.2d at 939.

<sup>11</sup> 156 Ky. 225, 160 S.W. 919 (1913).

<sup>12</sup> 18 Ky. L. Rptr. 1098, 39 S.W. 24 (1897).

"It could have." The Court held this was sufficient medical proof.

Plaintiff's counsel can take little comfort from this antique, however. Kentucky law for many years thereafter ignored this decision and held that the doctor must testify on causation with "reasonable probability." As with other concepts of negligence, such as duty and breach, causation must be proven by the preponderance of evidence. It must, then, be probable.

*Southern Mining Company v. Cornelius*,<sup>13</sup> for example, held that plaintiff's medical testimony, to the effect that the plaintiff's hearing loss "could" have been caused by defendant's explosion, was too speculative and would not meet plaintiff's burden on causation.<sup>14</sup>

*Jarboe v. Harting*<sup>15</sup> presents a classic discussion of causation. In *Jarboe*, a malpractice case, plaintiff's medical testimony that the operation "could" have caused her miscarriage was held not sufficient. It is interesting to further note that the court also held in *Jarboe* that causation could not be established without medical evidence because the cause of this miscarriage was not "so apparent that laymen with a general knowledge would have no difficulty in recognizing it."<sup>16</sup> Evidently, the miscarriage in *Jarboe* wasn't as obvious as the miscarriage in *Baird*.

*Bartley v. Childers*<sup>17</sup> is the last case I can find on this issue. A wrongful death case, *Bartley* holds that medical testimony that death "most likely" was caused by asphyxiation by drowning satisfies the probability rule. The Court suggested that all that is required is that the testimony be strong enough to warrant "an inference of causation," as opposed to speculation, surmise or guesswork. After noting that the line between what is speculative proof and what is circumstantial or inferential proof is sometimes dim and uncertain, the Court quoted from *Highway Transport Company v. Daniel Baker Company*<sup>18</sup> that the plaintiff's burden is to "introduce sufficient proof to tilt the balance from possibility to probability."<sup>19</sup>

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<sup>13</sup> 284 Ky. 515, 145 S.W.2d 93 (1940).

<sup>14</sup> KY. DIGEST *Damages*, Key 185 (1952), contains a list of cases on the issue of sufficiency of evidence on causation in personal injury cases.

<sup>15</sup> 397 S.W.2d 775 (Ky. 1965).

<sup>16</sup> *Id.* at 778.

<sup>17</sup> 433 S.W.2d 130 (Ky. 1968).

<sup>18</sup> 398 S.W.2d 501 (Ky. 1965).

<sup>19</sup> 433 S.W.2d at 132.

Workmen's compensation law has had the probability rule on causation for some time. The doctor testifying that the trauma at work "would" or "probably" caused the injury satisfied this rule. "Could" or "possibly," however, did not.

The heart attack cases in workmen's compensation have been particularly troublesome. With almost the same set of facts, cases have gone both for and against the plaintiff, depending upon the language of the testifying doctors. Thus in *Terry v. Associated Stone Company*,<sup>20</sup> and in *Grimes v. Goodlett and Adams*,<sup>21</sup> the doctors testified that the stress at work precipitated the attack, or that the causation was reasonably probable, so the plaintiffs won. In *Dupriest v. Tecon Corporation*<sup>22</sup> and *Kelly Contracting Company v. Robinson*,<sup>23</sup> the medical testimony on causation was only that such an attack was "possibly" a result of stress at work, so the plaintiffs lost.

Perhaps the highwater mark in the probability rule in causation cases came with *Inland Steel Company v. Johnson*,<sup>24</sup> a 1969 case. Also a workmen's compensation heart attack case, dictum suggests that even if the doctor uses the word "possible," his testimony should not, therefore, be discounted, but should be examined carefully from start to finish, within the total context of his testimony, to determine whether he really meant "probable." The Court cited McNiece, *Heart Disease and the Law* (Prentice-Hall, Inc. 1961) at page 136,

Physicians differ in the degree of caution or lack of caution with which they phrase their opinions, and one man's 'possibility' may be equivalent to another's 'probability.' It is submitted that, except where the use of the term 'possibility,' or other words of similar import, is indicative of an over-all viewpoint, the mere employment of such language should not be, as it is in some states, a basis for disregarding the particular physician's testimony. Substance should prevail over form, and the expert's testimony should be examined in its total meaning, rather than word by word.<sup>25</sup>

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<sup>20</sup> 334 S.W.2d 926 (Ky. 1960).

<sup>21</sup> 345 S.W.2d 47 (Ky. 1961).

<sup>22</sup> 396 S.W.2d 778 (Ky. 1965).

<sup>23</sup> 377 S.W.2d 562 (Ky. 1964).

<sup>24</sup> 439 S.W.2d 562 (Ky. 1969).

<sup>25</sup> *Id.* at 563, n. 2.

So "probability" is the test. Even "possibility" will not be held insufficient on its face, but will be examined to see if "probable" was really intended.

But there are still too many questions unanswered. What is probability? It has never been defined. Is it a chance? A better than even chance? More likely than not? 51-49? 75-25?

I submit that probability in the area of causation should mean "more likely than not." After all, the plaintiff's burden is only to establish his case by the preponderance of the evidence. Testimony that it is more likely than not that a particular breach of duty caused this injury would be a preponderance.

#### FUTURE DAMAGES—"PROGNOSIS"

Future damages, that is, future medical expenses, loss of earning capacity and future pain and suffering involve a prediction of the future medical course of the patient. This, in medical jargon, is "prognosis." What evidence must the plaintiff introduce to sustain his burden of proof if he is to get an instruction authorizing recovery for these future damages?

As with causation, prognosis is a medical issue and usually must be proven by a medical witness. Also, as in causation, however, where it is within the realm of common knowledge that a person will continue to incur these future damages, medical testimony is not required.

Thus, concerning future pain and suffering, where it is fairly obvious that a person will continue to suffer pain after the trial, medical testimony on future pain and suffering is not required.<sup>26</sup> Whether medical testimony is necessary depends to a large extent on the nature of the injury involved.

Concerning future loss of earning capacity, the same rule applies. In *Smith v. Hamm*,<sup>27</sup> the Court held that testimony of the loss of an important organ (spleen) was sufficient to warrant a finding of permanent injury and an award for damages therefor without medical testimony.

Concerning future medical expense, I could find no cases but would think that the same rule applies.

Again, as in the area of causation, to take to trial a personal injury case without medical testimony on future damages would

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<sup>26</sup> See *Williams v. Kirtley*, 263 S.W.2d 119 (Ky. 1953).

<sup>27</sup> 314 Ky. 339, 235 S.W.2d 437 (1950).

be foolish. So the practical question, again, is not whether medical testimony is necessary, but rather, whether the medical testimony is sufficient to prove these damages.

*Rogers v. Sullivan*<sup>28</sup> changed prior case law in this area of prognosis. The Court had previously held in *Ingram v. Galliher*,<sup>29</sup>

It is an established rule that to warrant recovery for permanent injuries, the future effect of the injuries sustained must be shown with reasonable certainty. The evidence must be positive and satisfactory, although it need not conclusively show the condition to be permanent. So, a mere conjecture or even probability of lasting disability does not warrant recovery for permanent impairment of earning power.<sup>30</sup>

As late as 1966, the Court in *Townsend v. Stamper*<sup>31</sup> held similarly as in *Ingram*.

*Rogers* overrules such nonsense. As Judge Palmore points out<sup>32</sup> in that opinion, all we are talking about is damages and in order to obtain an instruction authorizing recovery for damages, the fact of damages must be taken out of the area of speculation. This is the rule generally applicable to proof of compensatory damages; it is not peculiar to personal injury cases. Where damages are too speculative, they should not be allowed. Judge Palmore then relates probability to speculation, holding that testimony of "probable" future damages removes the fact of damage from the area of speculation and warrants an instruction.

*Rogers* has been followed once, in *Jones v. Skiles*.<sup>33</sup> The case will probably be cited for a long time. But *Rogers* is important from still another viewpoint. Possibility, probability and certainty have long confused lawyers in the phrasing of their questions to the medical witness. To remove such semantic stumbling blocks, Judge Palmore wrote,

It seems to us that it would be proper simply to ask the witness for his opinion as to the prospects of recovery, and let him explain as he wishes. [citations omitted.] The thing

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<sup>28</sup> 410 S.W.2d 624 (Ky. 1967).

<sup>29</sup> 309 S.W.2d 763 (Ky. 1958).

<sup>30</sup> *Id.* at 766-67.

<sup>31</sup> 398 S.W.2d 45 (Ky. 1966).

<sup>32</sup> 410 S.W.2d at 628.

<sup>33</sup> 434 S.W.2d 637 (Ky. 1968).

that counts is what he says; the question need only open the subject.<sup>34</sup>

This is important, then, because the doctor can testify as to prognosis any way he sees fit, even if he feels there is only a "possibility" of future damage. And the question which opens up this topic need not contain the phrase "based on reasonable medical probability," or anything else.

The rule seems to be, then, that in order to get an instruction on future damages, probability of such damage is required; to get testimony from the doctor, the question need not call for an opinion based on probability. All the doctor need to do is "tell it like it is."

What does "probable" mean in this area of future damage? The term has never been defined in this area either. Should it mean the same as in the area of causation? The Court in *Rogers* only intended that future damages not be speculative. It then adopted "probability" as the test of speculation, without defining probability.

If we define probability as "more likely than not," as I suggested we do in questions of causation, do we automatically conclude that anything short of this is too speculative? This may sound good in theory, but consider again the hypotheticals posed in the beginning. Is a five per cent certainty of epilepsy at some time in the future a probable future injury? Too speculative? Would you require a higher percentage?

Neurosurgeons will tell you that the percentage of patients developing epilepsy at some later time substantially increases with the severity of the head injury. With an open head injury, for example, the percentage climbs to fifty per cent or even higher. Is a forty-nine per cent or even a fifty per cent certainty of epilepsy a probable future injury?

If you were the five per cent patient seeking redress in court, wouldn't you want the jury to hear this evidence? Wouldn't you want an instruction on future pain and suffering and on loss of earning capacity? Is it fair to require you to be in the fifty-one per cent or better range to obtain relief?

Prognosis in medicine is probably the least certain of all

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<sup>34</sup> 410 S.W.2d at 627-28.

areas. Will I need another operation? Will I ever be able to walk? Will I regain my sight? Will I return to manual labor? All these questions are, to some extent, speculative in nature. The answers are based upon past statistical experience applied to the present condition of the patient. Is it fair to the patient to adopt a "more likely than not" rule in this area?

*Rogers* already stands for the proposition that the doctor need only be asked for a prognosis, and then he can explain as he wishes. The opinion will, therefore, be before the jury. Why not then give the jury instructions on future damage and let them calculate the plaintiff's chances any way they see fit?

#### ANY CHANCE TO REOPEN AFTER JUDGMENT?

The fairest solution to this dilemma would be to allow a plaintiff to obtain a new trial on damages should his condition deteriorate. The defendant could do the same thing if the plaintiff got better. Of course, this is done in workmen's compensation quite regularly by a motion to reopen. Is there any authority which would permit such action in a civil case?

Civil Rule 60.02 provides:

On motion a court may upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (1) mistake, inadvertance, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (3) perjury or falsified evidence; (4) fraud affecting the proceedings, other than perjury or falsified evidence; (5) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time, and on grounds (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this Rule does not affect the finality of a judgment or suspend its operation.<sup>35</sup>

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<sup>35</sup> Ky. R. Civ. P. 60.02.

If a plaintiff develops epilepsy twenty years after a judgment is entered, might he be "relieved" of the judgment upon ground (6)? Sounds pretty far-fetched, doesn't it?

In *Anshutz v. Louisville Railway Company*,<sup>36</sup> the defendant was held to be relieved of a final judgment upon the grounds of newly discovered evidence. The plaintiff and two doctors had testified that because of the trauma suffered by the plaintiff, both fallopian tubes and the left and most of the right ovaries were removed, so that the plaintiff was forever barren, and that the trauma had caused a tumor to develop at the site. Several months after trial, long after the time for appeal had run, the tumor became a baby boy!

*Anshutz* was based on Civil Code, Section 344, the forerunner of CR 60.02. It is one of the few cases I could find setting aside a judgment.

The general rule, however, is that courts do not favor the granting of new trials for newly discovered evidence, particularly evidence tending to prove a change of physical condition of the plaintiff. In *Woods v. Kentucky Traction & Terminal Company*,<sup>37</sup> the plaintiff testified she was paralyzed from traumatic neurosis and recovered \$15,000. Naturally the defendant was chagrined when the plaintiff was seen walking shortly after judgment. Without actual proof of fraud, however, the court refused to set aside the judgment, and distinguished *Anshutz* by stating that the plaintiff's testimony in *Anshutz* was so incorrect as to constitute fraud and conspiracy on its face. See also *Teche Lines v. Boyette*,<sup>38</sup> which is a Sixth Circuit federal case similar to *Woods*.

#### CONCLUSION

While reasonable medical probability is the test in Kentucky, in both the area of causation and the area of future damage, no cases really define "probability." Evidently, the doctor can testify any way he likes, and his testimony will then be examined in its total context to see whether the probability test has been satisfied. If it has on causation, the plaintiff will get a liability instruction and the case will go to the jury. If it has on future

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<sup>36</sup> 152 Ky. 741, 154 S.W. 13 (1913).

<sup>37</sup> 252 Ky. 78, 65 S.W.2d 961 (1933).

<sup>38</sup> 111 F.2d 579 (6th Cir. 1940).

damages, the plaintiff will get instructions on future medical expenses, loss of earning capacity, and future pain and suffering.

If probability be defined as "more likely than not," this would be an acceptable standard in the area of causation but might work hardship in the area of future damage. A possible remedy for such hardship would be to allow the plaintiff to reopen, but Kentucky law at present really precludes this possibility.