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CRITIQUE OF THE FELLOWS-KIMBROUGH RULE

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SCIENTISTS from varied fields are often called upon to enlighten lay jurors with respect to the particular branch of science involved. The Illinois Supreme Court has had frequent occasion to consider the competency of the testimony of expert witnesses. The court generally held that chemists,[1] engineers,[2] and fingerprint experts[3] might give direct evidence regarding their findings or opinions in relation to an issue of causal connection. However, in 1918, the scope of expert testimony was limited. In that year, the case of *Fellows-Kimbrough v. Chicago City Ry.*[4] announced the rule:

> [W]hether or not a given condition or malady of a person *may or could* result from and be caused by the facts stated in the hypothetical question, [was a proper question for an expert witness] but [expert witnesses] should not be asked whether or not such facts *did* cause and bring about such condition or malady.[5]

What prompted the court to announce a rule of such obviously limited scope? It is a matter of conjecture whether the limitation directly resulted from judicial recognition of the growth of a coterie of doctors who, recognizing a lucrative field, practiced medicine as was stated by the astute advocate, Max Stener, "with their rights hands in the air." Yet, that such condition in the courts had its effect upon judicial thinking is evidenced by the decision in *Opp v. Prior.*[6] There it was said:

> Expert testimony on matters not within common knowledge and experience is necessary to enable juries to determine questions of fact submitted to them, and there are experts of great knowledge and high personal standing whose opinions delivered without bias are a substantial aid to the attainment of jus-

[1] Koshinski v. Illinois Steel Co., 231 Ill. 198, 83 N.E. 149 (1904).

[2] McCabe v. Swift & Co., 143 Ill. App. 404 (1908).

[3] Mahlstedt v. Ideal Lighting Co., 271 Ill. 154, 110 N.E. 795 (1915).

[4] 272 Ill. 71, 111 N.E. 499 (1916).

[5] Ibid., at 77 (emphasis supplied).

[6] 294 Ill. 538, 128 N.E. 580 (1920).

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tice. That class of evidence, however, is generally discredited . . . with good reason, because the expert is often the hired partisan and his opinion is a response to a pecuniary stimulus.[7]

This contention has been borne out sufficiently in that today it is common knowledge that the use of medical experts has in recent years reached a point where a specialized and small group of doctors do little more than furnish evidence for those who employ them. This condition of affairs was recognized in the recent case of *Kemeny v. Skorch*[8] where the court through Mr. Justice Schwartz criticized the present use of partisan medical witnesses, saying:

He is part of the trial apparatus of a personal injury case. As such, every possible step should be taken to channel his contributions in a direction that will serve the ends of justice. One such step is to make his reports as nonpartisan, objective and scientific as are the other notable activities of his profession.[9]

The physician occupies an exalted position in society when his efforts are directed to the healing of sickness and injury. The integrity of his diagnoses made during his active practice is not often disputed. In the treatment of a patient the doctor will determine within the limits of medical certainty, the cause of the malady or, if uncertain, will so state and propose further diagnostic procedures. Inasmuch as

[7] Ibid., at 545, 583, where the court stated further: "The opinion has the sanction of an oath but lacks the substantial safeguard of truth applied to testimony concerning facts observed by a witness which is afforded by the criminal law since the opinion is the result of reasoning, and no one can be prosecuted for defective mental processes. The field of medicine is not an exact science, and the expert being immune from penalties for perjury, his opinion is too often the natural and expected result of his employment. The objections to that character of evidence can only be overcome or obviated by control by the court of the witness and the examination and such supervision as will at least fairly present the facts upon which an opinion is called for. If the facts are disputed the party examining the witness may include in the hypothesis only those facts which the evidence on his side tends to prove, and it will be for the jury to say whether the facts stated have been proved or not and accept or reject the opinion accordingly. If the evidence as to the particular matter inquired about is not disputed it is obvious that the hypothetical question must contain all the facts or the opinion will not only be worthless but be likely to mislead the jury. If counsel selects from the undisputed facts those which are most favorable to his party and obtains an opinion thereon, the jury may forget the partial nature of the premises and adopt the opinion of the witness on the partial statement."

[8] 22 Ill. App.2d 160, 159 N.E.2d 489 (1959).

[9] Ibid., at 171, 493. While the courts regularly recognized the unreliability of such testimony, a diligent search discloses very few reversals of exorbitant verdicts produced by the very evidence condemned. An inference to be drawn from the opinion is that a segment of the medical profession should be selected as "nonpartisan" experts subject to the call of the court or any litigant. Such a procedure is now in the experimental stage in New York. Whether this procedure will meet the complaints directed at the present practice is problematical.

the trial of a cause has for its object the discovery of the truth with as much certainty as possible,[10] it is difficult to understand why the doctor as a witness should not be confined to the same certainty in his evidence, or required to state that he is without an opinion regarding the cause of the pathological conditions involved. Moreover, it is believed that a rule of evidence requiring positive testimony would have a salutary effect upon the medical witness and in some cases make him pause before expressing an untenable or inaccurate opinion.

But such is not the case in Illinois. The medical witness is limited strictly to *could or might* types of answers to hypothetical questions rather than direct straightforward opinion testimony to be taken into account by the jury as other opinion evidence.

In *Fellows-Kimbrough v. Chicago City Ry.*,[11] a personal injury action commenced as a result of a streetcar accident, the court was asked to rule on the competency and admissibility of opinion testimony of medical experts. The railway company contended that the collision was slight and resulted in no injuries, while the plaintiff contended that the impact was great, resulting in broken bones, nervousness and most important, a tumor and traumatic neurasthenia in the area of the breast. At the first trial, judgment was entered for plaintiff but was reversed on other grounds. In the second trial the defendant questioned a medical expert regarding his testimony at the first trial where he had stated that the plaintiff had cancer. The questioning in the second trial brought out the fact that the doctor had been mistaken as to the cancer. The doctor further stated that the lump may lie dormant and cause cancer years later. This was excepted to because of its speculative nature, but the objection was overruled. On appeal, the court clearly labeled this testimony speculative and incompetent. The plaintiff then asked another medical expert witness:

Q. Doctor, referring to the suppositious or hypothetical patient and taking into account the elements of the hypothesis, have you an opinion as a medical man, and based upon reasonable certainty, as to what was the cause of the neurasthenia and the tumor in the hypothetical patient?

A. Yes, sir.

Q. What is your opinion as to the connection between this disease and the tumor or growth in the breast?

A. That the tumor resulted from the bruise—the injury to the breast. The neurasthenia resulted from the shock of the accident, and was kept alive by the breast condition.[12]

[10] Een v. Consolidated Freightways, 120 F. Supp. 289 (D. N.D., 1954).

[11] 272 Ill. 71, 111 N.E. 499 (1915). [12] Ibid., at 76, 502.

The trial court overruled defendant's objections to this testimony but the supreme court reversed, holding this to be error and inadmissible as testimony invading the province of the jury. Further, the court explained that the question of causal connection between the accident and the final malady was an ultimate fact upon which no witness might express a direct opinion. It is contended that the rule announced in the *Kimbrough* case calls for testimony which is speculative and conjectural. Thus, the courts and trial bar of Illinois found themselves on the horns of a dilemma. Quite certainly, it is sound law that on ultimate facts, witnesses may not be permitted to invade the province of the jury either by direct lay testimony or by expert opinion. On the other hand, a well established and universally accepted rule of evidence precludes speculative and conjectural proof.

Further, in the *Kimbrough* opinion the court seems to be inconsistent. The court, relying on *Chicago v. Didier*[13] and *Schlauder v. Southern Traction Company*[14] stated that where there is no dispute as to the cause of the accident, and the fact was that some injury resulted, direct evidence of a causal connection would be permitted. It is difficult to reconcile this subsidiary holding with the main decision. In a case of disputed liability, if direct evidence of causal connection is improper (even through the use of hypothetical questions), why should the same character of evidence be permitted in a case in which only the issue of the extent of injury is involved?

Since the *Kimbrough* case allows only expert testimony of what *might or could* be the cause, it requires no extensive mental gymnastics to point out that a doctor's hypothetical opinion that a given state of facts *might or could* have resulted in the alleged disability is pure and unadulterated speculation. In many cases where the cause of the injury is not in issue, the condition of the plaintiff is established by opinion evidence and yet, other occurrences or condition of ill-being, apparent or subsequently proved in the record, *might or could* have resulted in the disability for which suit is brought. The mere statement of this proposition is sufficient to indicate the speculative character of the evidence.

A review of the prior decisions of the Illinois courts establishes that the decision in the *Fellows-Kimbrough* case is of ambiguous parentage. Prior to 1904 the courts of Illinois held that a treating physician could

[13] 227 Ill. 571, 81 N.E. 698 (1907).

[14] 253 Ill. 159, 97 N.E. 233 (1911).

testify that the condition of his patient was directly due to the original injury.[15] It was not until 1904 that the evidentiary rule regarding causal connection was attacked and then the issue arose as the result of expert opinion evidence of alleged causation. In *Illinois Central R.R. Co. v. Smith*,[16] it was held for the first time, that where the evidence was in dispute as to the cause of the plaintiff's injury it was improper for a medical expert witness to state that the injury *was* caused by a particular condition. Thereafter, a number of exceptions were engrafted upon this general rule in cases involving a dispute as to the nature and extent of the injuries allegedly suffered by a plaintiff. In *Chicago Union Traction Co. v. Roberts*[17] medical experts testified hypothetically on each side. Plaintiff's witness testified that plaintiff's condition was undoubtedly due to the injuries he received. On review the court said: "It is entirely immaterial whether the witness testified that the injury was the cause of the condition, or that the injury was sufficient to cause the condition or might have caused it."[18] The court also commented that "the question" did not concern the cause of the plaintiff's injuries. It was in regard to the relation between the hypothetically assumed injury and his condition as observed by the witness. Thus, the court appears to have said that a hypothetical question concerning the cause of a claimed injury is not an excuse for a medical expert to invade the jury's province, but rather concerns itself with the question of what nexus, if any, exists as to the injury claimed and the condition observed. The importance of this case is that despite the court's language *in arguendo* and without regard to the claimed invasion of the province of the jury by the question, the judgment in favor of the plaintiff was affirmed. To like effect is the decision of *Fuhry v. Chicago City Ry. Co.*[19] There it was held that it was immaterial whether a medical expert testified that the alleged condition of plaintiff was due to the injury that she had received or that he testified that the injury *might or could* cause the condition. In deciding the case the court said:

[15] Netcher v. Bernstein, 110 Ill. App. 484 (1903); Decatur v. Fisher, 63 Ill. 241 (1872). Quite obviously, up to this point, the use of the expert for hypothetical purposes had not come into use.

[16] 208 Ill. 608, 70 N.E. 628 (1904).

[17] 229 Ill. 481, 82 N.E. 401 (1907).

[18] Ibid., at 484, 402.

[19] 239 Ill. 548, 88 N.E. 221 (1909).

In any event the testimony was merely the opinion of the witness based upon the facts he had testified to. It was still for the jury to determine the truth in regard to those assumed facts, as well as any others which might tend to confirm or modify their reliance upon the opinion given.[20]

It seemed that Illinois had completely departed from the ruling in *Illinois Central R.R. Co. v. Smith*,[21] but in 1913 in *Lyons v. Chicago City Ry. Co.*[22] and *People v. Shultz*,[23] exclusions of medical expert testimony on causation lead one to question whether the *Roberts* case and its liberal holding had been forgotten. At this point the *Kimbrough* rule appeared.

Wigmore in his treatise on Evidence[24] points out that the basis for the *Kimbrough* ruling may have been a misquotation of *Chicago v. Didier*.[25] In quoting the *Didier* case, the court in *Kimbrough* allowed positive expert testimony only when there is no dispute as to the cause; but the correct statement, and one of significant distinction, allowed testimony of a positive nature "where there is no dispute as to the *manner* of the injury."[26]

Illinois followed the rule in *Kimbrough* until 1922,[27] when a modification appeared. In allowing the testimony whether a hernia was caused by an injury to the abdomen, the court said the answer "did not in any way specify whether the hernia was caused by this accident or by some other injury."[28] This is hairsplitting. Nevertheless, this interpretation of the *Kimbrough* ruling was followed down to 1931.[29] In that year, *Sanitary District v. Industrial Commission*[30] brought the

[20] Ibid., at 552, 223.

[21] 208 Ill. 608, 70 N.E. 628 (1904), which sanctioned the use of "might have or could have" type expert opinion.

[22] 258 Ill. 75, 101 N.E. 211 (1913).

[23] 260 Ill. 35, 102 N.E. 1045 (1913).

[24] 7 Wigmore on Evidence, § 1976 (3rd ed., 1940).

[25] 227 Ill. 571, 81 N.E. 698 (1907).

[26] Ibid., at 575, 700.

[27] Davis v. Michigan Cent. R. Co., 294 Ill. 355, 128 N.E. 539 (1920); International Coal & Mining Co. v. Industrial Comm., 293 Ill. 524, 127 N.E. 703 (1920); Hanrahan v. Chicago, 289 Ill. 400, 124 N.E. 547 (1919); Heineke v. Chicago R. Co., 279 Ill. 210, 116 N.E. 761 (1917).

[28] Walsh v. Chicago R. Co., 303 Ill. 339, 344, 135 N.E. 709, 712 (1922).

[29] People v. Rongetti, 338 Ill. 56, 170 N.E. 14 (1929); People v. Zwienczak, 338 Ill. 237, 170 N.E. 303 (1930); People v. Winn, 324 Ill. 428, 155 N.E. 337 (1927); People v. Carrico, 310 Ill. 543, 142 N.E. 164 (1923).

[30] 343 Ill. 236, 175 N.E. 372 (1931).

rationale behind the *Kimbrough* ruling to its most stratospheric heights. The court said that testimony by a medical expert that there *might or could* be a causal connection was *insufficient* and that "liability cannot rest upon imagination, speculation or conjecture, but must be based upon facts. . . ."[31] Wigmore in commenting on this case states:

> [A]fter 30 years of allowing "what *might* have caused" (Illinois C.R. Co. v. Smith, 208 Ill. 608) this is declared inadequate, and for 15 years past "what *did* cause" has been forbidden (Fellows-Kimbrough v. Chicago R. Co., 272 Ill. 71); thus all testimony to causation is choked off; the judicial vagaries on this topic leave the practitioner in a parlous state. . . .[32]

Fortunately, this state of affairs did not remain in effect for long. In 1937, the *Kimbrough* rule was again adhered to in *People v. Arendarczyk*.[33] The rule has remained intact up to the present time.[34]

To refocus the problem, the *Kimbrough* rule is that a medical expert, whether giving direct testimony or answering a hypothetical question, may give an expert opinion on causal connection between the malady or condition and the injury which allegedly caused it only if his opinion is stated that the malady *might or could* have resulted from the injury. He may not state that the injury *did* cause the condition. The rationale for the rule is that to allow the witness to testify that the accident *did* cause the injury would be to decide an ultimate fact in issue and thereby invade the province of the jury whose function is to decide all factual issues.

Balanced against this invasion of the jury function is the problem of speculative testimony. There are eight jurisdictions which seem to follow evidentiary rules similar to the *Kimbrough* rule.[35] With some authorities vociferously denouncing the rule,[36] it is logical that the

[31] Ibid., at 242, 374.

[32] 7 Wigmore on Evidence, § 1976, n. (3rd ed., 1940).

[33] 367 Ill. 534, 12 N.E.2d 2 (1937); People v. Ardelean, 368 Ill. 274, 13 N.E.2d 976 (1938).

[34] Williams v. Walsh, 341 Ill. App. 543, 95 N.E.2d 743 (1951); People v. Shelton, 388 Ill. 56, 57 N.E.2d 473 (1944).

[35] Howland v. Cates, 43 So.2d 848 (Fla., 1949); Dedman v. Oregon Short Line R. Co., 57 Idaho 160, 63 P.2d 667 (1936); Fellows-Kimbrough v. Chicago City Ry., 272 Ill. 71, 111 N.E. 499 (1916); Beneks v. State, 208 Ind. 317, 196 N.E. 73 (1935); State v. Winstead, 204 La. 366, 15 So.2d 793 (1943); Newton v. Gretter, 60 N.D. 635, 236 N.W. 254 (1931); Friese v. Boston Consol. Gas Co., 324 Mass. 623, 88 N.E.2d 1 (1949); Cole v. Simpson, 299 Mich. 589, 1 N.W.2d 2 (1941).

[36] 7 Wigmore on Evidence, § 1976 (3rd ed., 1940).

majority of jurisdictions have more liberal rules concerning expert opinion on the question of causal connection in injuries. The Supreme Court of Missouri had occasion to consider the Missouri equivalent of the rule in *O'Leary v. Scullin Steel Co.*[37] The conclusion reached in that case was that the rule should no longer be followed. The court pointed out the specious reasoning that if the expert were to directly state what the cause of the condition was, he would be outside the area of his expertness and his testimony would be incompetent because he would no longer be acting as an expert. However, when an expert is allowed to state, by virtue of a hypothetical question, what *might or could* cause the condition, the jury is left with no evidence at all on which to base their verdict.

> The only evidence which, to the lay mind in the jury box, could be said to have any efficacy to point to one rather than the other as to the cause of the infection, is that of experts. In this situation our law steps in and . . . directly forbids the expert to say more than that the wound or the boil, or both, "*might or could*" cause the infection of the bone. The jury is then in this situation: It has before it no evidence on which it can form an independent opinion as to the cause; it has expert testimony that the injury to the thumb "*might or could*" cause the bone infection; it has before it other expert testimony that the boil "*might or could*" cause it; it has, in this case, other testimony that many other things "*might or could*" cause it; *it has no testimony that either the wound or boil, or anything else, did cause it.*[38]

The jury could then decide that the plaintiff who has the burden of preponderating has failed to do so since the jury has no testimony or other evidence to establish the causal relationship, but only that something *might or could* have caused the condition. A very astute observation made in *O'Leary* was that if the reason for the rule was to prevent the invasion of the jury function, "then every opinion in every case is incompetent for that reason or it is immaterial."[39] The Missouri court believed that a reasonable invasion of the jury's province, left to the trial court's discretion, would be necessary to adequately inform the triers of fact. The basic reason for the rejection of the *Kimbrough* rule in *O'Leary* was the desire to better inform the jurors. Thirty-one other jurisdictions have also rejected the rule for similar reasons.[40]

[37] 303 Mo. 363, 260 S.W. 55 (1924).

[38] Ibid., at 375, 376, 59.

[39] Ibid., at 376, 59.

[40] Detroit T. I. R. v. Banning, 173 F.2d 752 (C.A. 6th, 1949); Francis v. Southern Pac. Ry., 162 F.2d 813 (C.C.A. 10th, 1947); New York Life Ins. Co. v. Doerksen, 64 F.2d

Another vigorous vituperation against the *Kimbrough* rule is set out in the opinion of Judge Schnackenberg of the United States Court of Appeals for the Seventh Circuit in *Spears v. A. T. & Santa Fe R.R.*[41] The strongest possible language was used in criticizing the rule: "It is evident that the *Kimbrough* rule is unrealistic in its application and is based upon a strained theoretical premise."[42] It was pointed out that the greatest weakness of the rule is that it invites the jury to guess as to what is the cause. The opinion given, being speculative and inconclusive, makes the testimony valueless as an aid to the jury which is, after all, the sole reason for its admission.

Not only does the restraint imposed by the *Kimbrough* rule prevent "an invasion of the province of the jury"; it actually leaves the jury floundering in uncertainty and renders it likely to find, or reject a finding, of causal relationship upon grounds without basis in the evidence.[43]

The *Spears* case sets out the so-called "Federal Rule" that the opinion of experts as to causation as well as the reasons upon which the opinion is founded should be submitted to the jury and they will be

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240 (C.C.A. 10th, 1933); Denver & R. C. R. Co. v. Roller, 100 Fed. 738 (C.C.A. 9th, 1900); Birmingham E. & B. R. Co. v. Williams, 190 Ala. 53, 66 So. 653 (1914); Everett v. State, 213 Ark. 470, 210 S.W.2d 918 (1948); Bland v. R. Co. 65 Cal. 626, 4 Pac. 672 (1884); Colorado M. & I. Co. v. Rees, 21 Col. 435, 42 Pac. 42 (1895); Boland v. Vanderbilt, 140 Conn. 520, 102 A.2d 362 (1953); Beasley v. Burt, 201 Ga. 144, 39 S.E.2d 51 (1946); Grismore v. Consol. Prod., 232 Iowa 328, 5 N.W.2d 646 (1942); Packer v. Fairmont Creamery, 158 Kan. 580, 149 P.2d 629 (1944); H. & S. Theatres v. Hampton, 300 Ky. 677, 190 S.W.2d 39; Baltimore City R.R. v. Tanner, 90 Md. 315, 45 Atl. 188 (1900); Weller v. Northwest Airlines, 239 Minn. 298, 58 N.W.2d 739 (1953); O'Leary v. Scullin Steel Co., 303 Mo. 363, 260 S.W. 55 (1924); Kelley v. Daily Co., 56 Mont. 63, 181 Pac. 326 (1919); Horst v. Lewis, 71 Neb. 365, 103 N.W. 460 (1905); Lynch v. Sprague, 95 N.H. 485, 66 A.2d 697 (1949); Castner v. Sliker, 33 N.J. 95 (1868); Jones v. Citizens Bank, 58 N.M. 48, 265 P.2d 366 (1954); Marx v. Ontario B. H. & A. Co., 211 N.Y. 33, 105 N.E. 97 (1914); Ford v. Blythe Bros., 242 N.C. 347, 87 S.E.2d 879 (1955); Scarinzi v. Farkas, 80 Ohio App. 409, 75 N.E.2d 86 (1947); Cohenour v. Smart, 205 Okla. 668, 240 P.2d 91 (1951); Schweigal v. Solbeck, 191 Ore. 454, 230 P.2d 195 (1951); Menarde v. Phila. Trans. Co., 376 Pa. 497, 103 A.2d 681 (1954); Barker v. Narragansett Racing Assn., 65 R.I. 489, 17 A.2d 23 (1940); Windham v. Florence, 221 S.C. 350, 70 S.E.2d 553 (1952); National Life & A. Ins. Co. v. Follett, 168 Tenn. 647, 80 S.W.2d 92 (1935); Ynsfran v. Burkhart, 247 S.W.2d 907 (Tex., 1952); Hooper v. Gen. Motors, 260 P.2d 549 (Utah, 1953); Baldwin v. Gaines, 92 Vt. 61, 102 Atl. 338 (1917); Hayzlett v. Westvaco Chlorine Prod., 125 W.Va. 611, 25 S.E.2d 759 (1943); Lyon v. Grand Rapids, 121 Wis. 609, 99 N.W. 311 (1904).

41 255 F.2d 780 (C.A. 7th, 1958).

42 Ibid., at 783.

43 Ibid., at 782.

allowed to decide the issue, keeping in mind that the testimony is opinion and not a decision of fact binding upon them.[44]

CONCLUSION

We have, therefore, considered the primary criticisms of the *Kimbrough* rule as illustrated by the *O'Leary* and *Spears* cases.[45] Both the federal and the majority of the state courts have indicated that to limit expert testimony to speculative "*could or might*" opinions is to do the jury more harm than good. There is an evident trend in connection with expert opinion testimony to allow greater latitude in the ever increasing search for the truth.[46] Wigmore believes that, eventually, the entire problem of the trial bar in connection with expert opinion testimony will disappear.[47] The *Fellows-Kimbrough* rule is not only antiquated and out of step with the majority; it is cumbersome, narrow and does not solve the basic problem confronting the trier of facts—the search for truth—but rather materially hinders that search. At the time of its inception, there may have been a justifiable basis for the rule, but it has been lost in the changing concept of fairness and the increasing latitude allowed in the presentation of evidence. The rule does not even satisfy the main reason given for its inception, i.e., prevention of the invasion of the province of the jury; for an expert opinion on causation, no matter how forcefully stated, is still an opinion and may be met by contradictory opinion. The quest for truth is more important than quibbling over fine distinctions in the admissibility of expert opinion testimony.

The logical conclusion is that the *Kimbrough* rule should be abandoned in Illinois. A logical replacement would be something akin to the "Federal Rule." The experts should be allowed to give their opinions on causation, when it is in issue, supported by the reasons which support their opinions. The jury should be instructed that the expert

[44] Judge Schnackenberg states: "[I]f the relevant facts are proved by evidence and called to the attention of the experts who are then permitted to state their opinions as to causation as well as the reasons therefor, the jury can intelligently decide between the conflicting opinions on causation in the light of the evidence of those facts. The jury's determination of which opinion is right is clearly within its function as the trier of the facts." Spears v. A. T. & Santa Fe R.R., 255 F.2d 780, 783 (C.A. 7th, 1958).

[45] It should be noted that Judge Schnackenberg's condemnation of the Kimbrough rule was dicta. The evidentiary issue was resolved on the ground that both parties, in adducing hypothetical medical testimony, used the same question.

[46] Een v. Consol. Freightways, 120 F. Supp. 289 (D. N.D., 1954).

[47] 7 Wigmore on Evidence, § 1929 (3rd ed., 1940).

opinions are just that—opinion and not fact. The jury would then weigh the expert opinions and the basis upon which they are founded along with all the other evidence in the case. This procedure would most adequately satisfy the necessity of searching for the truth; will not improperly or unreasonably invade the province of the jury; will not decide the ultimate fact; and will, most certainly, be an aid to the trial bar in doing away with much confusion and uncertainty. The hesitancy of the court to allow speculative testimony would be dispelled by the simple expedient of having the opinion supported by the expert's reasons for arriving at his opinion. It seems logical to conclude that requiring reasons to support an opinion would tend, at least partially, to dispell the fear of biased or doubtful testimony and place the medical witness on the same impartial level as other scientific expert witnesses.

Wigmore, in criticizing the *Kimbrough* rule, states:

> This is only one of the many instances in which the subtle mental twistings produced by the Opinion rule have reduced this part of the law to a congeries of non-sense which is comparable to the incantations of medieval sorcerers and sublies the name of Reason in our law.[48]

Reason can be restored very simply by laying the *Kimbrough* rule to rest.

[48] Ibid., at § 1976.