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By ABBOTT S. BROWN & WILLIAM L. GOLD

Litigating Comparative Fault and Avoidable Consequences Issues

The concepts of comparative negligence and avoidable consequences in medical malpractice cases have been described as "interwoven" by the Supreme Court in *Ostrowski v. Azzara*, 111 N.J. 429, 436 (1988) and more recently by the Appellate Division in *Bryant v. Calantone*, 286 N.J. Super. 362, 367 (App. Div. 1996). These doctrines have been unraveled and closely examined in a trilogy of Supreme Court cases and two recent Appellate Division cases. Attorneys handling malpractice and toxic tort cases must be familiar with these concepts, and defense attorneys must be especially alert for the opportunities these cases provide to reduce awards to plaintiffs.

The modern evolution of the doctrine of comparative negligence in medical malpractice litigation began in *Ostrowski v. Azzara*, 111 N.J. 429 (1988). Ms. Ostrowski, a "heavy smoker and insulin dependent diabetic" for 20 years, consulted the defendant, a podiatrist, about her ingrown toenails. After the defendant removed plaintiff's left big toenail, plaintiff's toe became gangrenous. Plaintiff was forced to undergo three bypass surgeries in an attempt to save the leg. These efforts failed, and plaintiff ultimately underwent a below-the-knee amputation.

During the trial, defendant presented evidence that the plaintiff had "smoked cigarettes and failed to maintain her weight, diet, and blood sugar at proper levels." *Ostrowski*, supra, 111 N.J. at 435. Defendant argued that plaintiff's pre-malpractice conduct increased the severity of her vascular disease, and made it more likely that the bypass operations would fail. The jury concluded that the plaintiff was 51 percent at fault and the defendant was 49 percent at fault.

The Supreme Court reversed the verdict, holding that the "pre-treatment health habits of a patient" may never be considered as evidence of comparative fault. The Court explained, "This conclusion bespeaks the doctrine of the particularly susceptible victim

or recognition that whatever the wisdom or folly of our life-styles, society, through its laws, had not yet imposed a normative life-style on its members; and, finally, it may reflect in part an aspect of that policy judgement that health professionals have a special responsibility with respect to diseased patients." *Ostrowski*, supra, 111 N.J. at 444. However, the Court did allow plaintiff's damages to be reduced by the doctrine of avoidable consequences which applies "when the injured party's carelessness occurs after the defendant's legal wrong has been committed." *Ostrowski*, supra 111 N.J. at 438-444. (Emphasis in original).

Once treatment has been rendered, "the law can justly expect the patient to cooperate with the health care provider in their mutual interests. Thus, it is not unfair to expect the patient to help avoid the consequences of the condition for which the physician is treating her. ... Hence, we approve in this context of post-treatment conduct submission to the jury of the question whether the just mitigation or apportionment of damages may be expressed in terms of the patient's fault." *Ostrowski*, supra, 111 N.J. at 445-446. (Emphasis added). The Court concluded that "the patient's fault will not be a bar to recovery except to the extent that her fault caused the damages," *Ostrowski*, supra, 111 N.J. at 446. Finally, and significantly, the Court imposed the burden of proving what damages were avoidable on the health care provider. *Ostrowski*, supra, 111 N.J. at 446-447.

More Fault Analysis

The issue of comparative fault was further analyzed in the context of an attempted suicide in *Cowan v. Doering*, 111 N.J. 451 (1988), which was decided on the same day as *Ostrowski*. Plaintiff Cowan alleged that the defendant physicians negligently prescribed sleeping pills and failed to prevent her from attempting to commit suicide. The trial court refused to charge the jury on comparative negligence because the alleged negligent conduct of plaintiff was the very conduct for which the defendants were treating plaintiff. The Supreme Court agreed, concluding that since the defendants' duty to exercise reasonable care included a duty to pre-

The authors, partners in Brown & Gold in South Orange, are both certified civil trial attorneys. Brown specializes in malpractice and product liability litigation. Gold specializes in malpractice and toxic tort litigation.

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vent plaintiff from engaging in self-damaging conduct, such conduct could not be the basis of a claim of comparative negligence. *Cowan*, supra, 111 N.J. at 459-460.

The comparative fault of a person with a diminished capacity for self-care was at issue in *Tobia v. Cooper Hospital University Medical Center*, 136 N.J. 335 (1994). In *Tobia*, supra, the Court was concerned with the relationship between the doctrine of comparative fault and patients who are unable to protect themselves from injury because of "age, substance abuse, or mental derangement." *Tobia*, supra, 136 N.J. at 338.

When plaintiff *Tobia* was admitted to the Cooper Hospital, she was 85 years old and "was in urgent need of medical care." *Tobia*, supra, 136 N.J. at 339. She was left unattended on an unlocked stretcher with its side rails down, and attempted to get off the stretcher and go to the bathroom. In so doing, she fell to the floor and fractured her hip. Plaintiff alleged that the defendants were negligent in breaching Cooper Hospital's emergency room policy and safety procedures, and that the defendants were further negligent for placing her in a wheelchair and causing a dislocation of the fracture. A jury found that *Tobia* was 100 percent at fault.

The Supreme Court reversed and held that comparative negligence is not a defense where the defendant had a duty to prevent plaintiff from engaging in self-damaging conduct. *Tobia*, supra, 136 N.J. at 341. The Court concluded that where plaintiff was not competent to care for herself because of age, substance abuse or mental derangement, "the jury should not consider a failure to care for herself as contributory negligence." *Tobia*, supra, 136 N.J. at 347.

Intermediate Rulings

In two important recent cases, the Appellate Division has further analyzed the concepts of comparative negligence and avoidable consequences in malpractice cases. In *D'Aries v. Schell*, 274 N.J. Super. 349 (App. Div. 1994), the plaintiff, like Mrs. Ostrowski, was a diabetic who sued a podiatrist alleging negligent treatment of an infection of his toe. At the last visit with the podiatrist on March 3, 1986, the toe was noted to be "markedly improved." However, the plaintiff remained concerned about the appearance of the toe and three days later went to another doctor who immediately diagnosed gangrene of the toe. The plaintiff was treated with intravenous antibiotics but ultimately underwent a below-the-knee amputation.

The defendant argued that the amputation was caused by the "natural progression of the diabetes, its complications and plaintiff's failure to follow recommended treatment instructions." *D'Aries*, supra, 274 N.J. Super. at 357. The trial court instructed the jury that if they found plaintiff had not complied with the defendant's instructions, they could find plaintiff negligent and his damages would be reduced. The jury found plaintiff 60 percent at fault and plaintiff appealed.

The Appellate Division reversed, finding the trial judge's instructions to the jury to be inadequate:

Simply telling the jury Schell contended plaintiff was "negligent in not complying with Dr. Schell's instructions during the period of time that he treated" plaintiff was grossly inadequate. While the instruction focused on the proper time period, it did not preclude the jury's consideration of pre-treatment and post-treatment evidence in arriving at its decision whether plaintiff was negligent and in determining the percentage of plaintiff's negligence. Much more was required in light of the extensive pre-treatment and post-treatment evidence introduced which presented a real potential for jury misunderstanding of the repeated reference to plaintiff's failings.

D'Aries, supra, 274 N.J. Super. at 360.

The court held that "extraordinary precautions must be taken to make sure jurors properly limit their consideration of the pre-treatment and post-treatment testimony." *D'Aries*, supra, 274 N.J. Super. at 361. Therefore, a limiting instruction, similar to an instruction given regarding subsequent remedial conduct as defined by N.J.R.E. 407, must be given concerning the use of the pre-treatment and post-treatment conduct of the plaintiff. *D'Aries*, supra, 274 N.J. Super. at 361.

Jury Instructions

Furthermore, on retrial, "[t]he jury should be asked to arrive at two percentages, one on the issue of liability and the other as a just apportionment of damages by expressing mitigation of damages as a percentage of fault which reduces plaintiff's damages." *D'Aries*, supra, 274 N.J. Super. at 362, citing *Ostrowski*, supra, 111 N.J. at 443 and *Scafidi v. Seiler*, 119 N.J. 93, 110-113 (1990). The *D'Aries* Court cited a footnote in *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541 (3rd Cir. 1990), rev'd in part on other grounds, 112 S. Ct. 2608 (1992), which suggests a formula for such an apportionment.

However, the formula proposed by *D'Aries* is flawed in that it does not distinguish the proximate causation question, required by *Scafidi*, from the avoidable consequences question, required by *Ostrowski*. Nevertheless, application of the correct formula will give defendants two chances to reduce a plaintiff's award, once for the *Scafidi* pre-existing chance that the harm would have occurred in the absence of negligence (the proximate cause determination), and once for the *Ostrowski* post-treatment failure to comply with reasonable self-care (the avoidable consequences determination). Defendants in these cases must be alert for the possibility of developing such proofs.

Most recently, in *Bryant v. Calantone*, 286 N.J. Super. 362 (App. Div. 1996), the court returned to these difficult concepts.

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Plaintiff Bryant alleged that his dentist committed malpractice by cleaning his teeth without providing prophylactic antibiotics to prevent bacterial endocarditis. Plaintiff had a history of a heart murmur and had been advised that he must have antibiotics before and after any dental procedure. The plaintiff advised the defendant dentist that plaintiff was required to take antibiotics before and after dental treatment. The defendant told plaintiff that antibiotics were not necessary since plaintiff was only going to have his teeth cleaned. The defendant did give plaintiff some pre-treatment antibiotics saying, "This is all you need," Bryant, *supra*, 286 N.J. Super. at 366, but plaintiff was not given a prescription for any post-treatment antibiotics. Thereafter, plaintiff developed bacterial endocarditis requiring several surgeries to replace heart valves.

At trial, the defendant argued that the plaintiff was comparatively negligent, and claimed that he had given the plaintiff a prescription for post-treatment antibiotics which plaintiff did not fill. The jury specifically rejected this argument and found that the defendant had not given plaintiff a prescription for post-treatment antibiotics. Bryant, *supra*, 286 N.J. Super. at 362.

On appeal, defendant argued, for the first time, that plaintiff should have been considered comparatively negligent for failing to tell the dentist about the need for post-treatment antibiotics, given the specific advice provided to plaintiff by his cardiologist.

Interwoven Concepts

In reversing, the Appellate Division initially noted that malpractice actions present difficult issues because "comparative negligence, avoidable consequences and proximate cause are interwoven and dependent upon events that occur over time." Bryant, *supra*, 286 N.J. Super. at 367. The court specifically reiterated that pre-treatment habits are relevant to "the issue of proximate cause exclusively" and are "not to be considered as evidence of fault." Bryant, *supra*, 286 N.J. Super. at 368. In contrast, the doctrine of avoidable consequences applies to conduct that occurs after the malpractice and "affects only the question of diminution of damages; it has no impact on comparative fault (liability) issues." Bryant, *supra*, 286 N.J. Super. at 368 citing D'Aries, 274 N.J. Super. at 360.

Therefore, Bryant could not be charged with comparative fault for any conduct before the malpractice. Indeed, as a matter of public policy, the improper use of comparative negligence "would lead to a dilution of the defendant's duty of care." Bryant, *supra*, 286 N.J. Super. at 370, citing Cowan, *supra*, 111 N.J. at 467. Therefore, the court again warned trial judges that they must "avoid the indiscriminate application of the doctrine of comparative negligence (with its 50 percent qualifier for recovery) when the doctrine of avoidable consequences applies." Bryant, *supra*, 286 N.J. Super. at 370 citing Ostrowski, *supra*, 111 N.J. at 441. (Parenthesis in original).

However, even if comparative negligence did not apply,

plaintiff's post-malpractice conduct was relevant to the issue of damages.

The error in this case, however, is that the trial judge gave no instruction to the jury concerning plaintiff's actions after the dental treatment. Although the issue of avoidable consequences was not raised below, we are satisfied that the lack of a charge thereon constitutes plain error. ... Plaintiff clearly was aware of his medical condition and was advised that he needed to be given antibiotics both before and after dental treatments. ... After defendant's failure to provide post-procedure medication, plaintiff did not ask him about it, nor did he contact his cardiologist. A reasonable jury could conclude that a patient who is told he had to be medicated for one week both before and after his dental procedure, who is only medicated one hour prior thereto, could have mitigated his damages by inquiring of defendant or his cardiologist about the post dental procedure medication in an effort to insure that he received proper care. A reasonable jury could conclude based on the evidence, with an appropriate jury instruction, that plaintiff's conduct serves to decrease the amount of his damage award.

Bryant, *supra*, 286 N.J. Super. at 370-371.

The court clearly stretched to reach this result since plaintiff did in fact ask his dentist about the need for antibiotics and was given a pre-treatment antibiotic with the advice, "This is all you need." Bryant, *supra*, 286 N.J. Super. at 366. The court's imposition of a duty to question his dentist and inquire of the cardiologist puts patients in the position of having to question every doctor and trust none. Nevertheless, the concept that a patient's damages may be reduced by the doctrine of avoidable consequences is sound.

Finally, the Bryant court again cautioned that "the patient's fault will not be a bar to recovery except to the extent that his fault caused the damages." Bryant, *supra*, 286 N.J. Super. at 371, citing Ostrowski, *supra*, 111 N.J. at 446-447. Furthermore, the court reiterated Ostrowski's warning that the health care provider "bear the burden of proving that their mistreatment did not aggravate a pre-existing condition: that the health care professional bear the burden of proving the damages that were avoidable." Bryant, *supra*, 286 N.J. Super. at 371 quoting Ostrowski, *supra*, 111 N.J. at 447.

The Supreme Court will not get a chance to rule on either D'Aries, which was dismissed on remand, or Bryant, which has been settled. A review of the cases reveals that the issues of proximate cause, comparative fault and avoidable consequences are so "interwoven" as to often lose their individual identity. The common thread is that both plaintiff and defendant are only responsible for that measure of damage which, with reasonable care, could have been avoided. ■