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## TORT LAW

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### Determining Proximate Cause In Delayed Treatment Cases

Most medical malpractice cases involve the failure to diagnose or treat a preexisting medical condition. In such cases, the plaintiff must not only prove that the defendant was negligent, but also that the delay in treatment was a proximate cause of increased harm.

Winning the battle of proximate causation is often the most difficult aspect of a malpractice case. For an extreme example, even where a defendant commits egregious malpractice, it is difficult to prove that a one-week delay in the diagnosis of cancer caused the patient additional harm. Attorneys handling such cases can find guidance in a series of New Jersey Supreme Court decisions, beginning with *Fosgate v. Corona*, 66 N.J. 268 (1974) and culminating in the recent decision in *Fischer v. Canario*, (A-56/91-95, January 30, 1996).

The *Fischer* decision may be the final word on proximate causation in medical malpractice cases. To the extent that plaintiff demonstrates that the delay in treatment increased the risk of harm, and the "harm was in fact sustained" the case goes to the jury. To the extent a defendant argues that the plaintiff would have suffered the harm in the absence of negligence, the defendant bears the burden of proof. To the extent that this burden of proof is satisfied, the defendant pays only the fair share of damages caused by the negligent conduct.

#### Tracing the Line

*Fosgate* is the seminal medical malpractice case involving the issue of proximate causation. Mrs. Fosgate alleged that her physician negligently failed to diagnosis her pulmonary tuberculosis during 120 office visits over six years. Her medical bills were \$13,000. When finally diagnosed, Mrs. Fosgate was required to be confined for one year in the Essex County Sanitorium. The

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jury awarded \$10,000, and plaintiff appealed, arguing that the low award was the result of a jury charge which "erroneously required the jury to apportion Mary's damages." *Fosgate*, supra, 66 N.J. at 272.

The Appellate Division affirmed, but the Supreme Court reversed and in so doing shifted the burden of proof regarding apportionment of damages to the defendant, stating:

Where the malpractice involves treatment of a pre-existing disease, the assessment of damages poses a problem because of the practical difficulty in separating that part of the harm caused by the malpractice from the preexisting disease and its normal consequences. Because of this, courts are now taking the view that in a situation where the malpractice or other tortious act aggravates a preexisting disease or condition, the innocent plaintiff should not be required to establish what expenses, pain, suffering, disability or impairment are attributable solely to the malpractice or tortious act, but that the burden of proof should be shifted to the culpable defendant who should be held responsible for all damages unless he can demonstrate that the damages for which he is responsible are capable of some reasonable apportionment." [Emphasis added]

*Fosgate*, supra, 66 N.J. at 272-273.

This case established that once plaintiff proved a negligent delay in treatment, defendant had the burden of proving the harm would have occurred even with proper care. Furthermore, where the extent of aggravation was unquantifiable, the defendant was responsible for all damages suffered by plaintiff.

#### The Evers Refinement

The Court refined the issue of proximate causation in *Evers v. Dollinger*, 95 N.J. 399 (1984). Plaintiff had noticed a "very tiny

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lump" in her breast in March of 1977 and was examined by the defendant and told to "stop worrying and go home and relax." By October of 1977 the lump had quadrupled in size and plaintiff sought a second and, still concerned, a third opinion.

The third doctor ordered a mammogram which revealed a 1.5 centimeter mass. The tumor was excised and was determined to be an infiltrating ductal carcinoma. At the time of the trial in May of 1981, the plaintiff had not experienced any recurrence of her cancer (although the cancer did recur during the pendency of the appeal). One of plaintiff's two experts proffered the opinion that 25 percent of all patients with infiltrating ductal carcinoma have a recurrence even when they are "accurately and promptly diagnosed and treated," but that the seven-month delay increased plaintiff's chance of recurrence. Evers, *supra*, 95 N.J. at 405.

Plaintiff's other expert was prepared to testify that while the chance of a recurrence was increased due to the delay, "the extent to which the patient was endangered cannot be assessed". Evers, *supra*, 95 N.J. at 406. The trial court refused to permit either expert to testify due to the inability of the experts to quantify the increased risk. The trial court then granted defendant's motion for an involuntary dismissal. The Appellate Division affirmed in an unreported decision.

The Supreme Court reversed and instructed that on remand:

[P]laintiff should be permitted to demonstrate, within a reasonable degree of medical probability, that the seven months delay resulting from defendant's failure to have made an accurate diagnosis and to have rendered proper treatment increased the risk of recurrence or of distant spread of plaintiff's cancer, and that such increased risk was a substantial factor in producing the condition from which plaintiff currently suffers."

[Emphasis supplied]

Evers, *supra*, 95 N.J. at 417.

The Court did not define the key phrase, "a substantial factor in producing the condition." However, the Court noted that where the defendant's negligence increased the risk of harm and the "harm was in fact sustained, it becomes a question for the jury as to whether or not that increased risk was a substantial factor in producing the harm." Evers, *supra*, 95 N.J. at 415, citing *Hamil v. Bashline*, 481 Pa. 256 (1978).

The Evers Court also cited *Hick v. United States*, 368 F. 2d 626, 632 (4th Cir. 1966), for the holding that "If there was any substantial possibility of survival and the defendant has destroyed it, he is answerable." Evers, *supra*, 95 N.J. at 417. Nevertheless, the Evers Court specifically declined to decide what damages are to be awarded where the plaintiff has been deprived of a quantifiable chance of survival. Evers, *supra*, 95 N.J. at 412 fn. 7. However, the Court noted that certain commen-

tators had suggested that the plaintiff be awarded compensation equal to the total amount of damages multiplied by the lost chance of survival. See, e.g., King, "Causation, Valuation & Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences," 90 Yale L. J. (1981). The Court adopted this approach six years later in *Scafidi v. Seiler* 119 N.J. 93 (1990) and *Olah v. Slobodian*, 119 N.J. 119 (1990).

In *Scafidi*, *supra*, plaintiffs alleged that the defendant's failure to treat Mrs. Scafidi's premature labor caused the premature birth and death of their child. Mrs. Scafidi had called the defendant when she was in her seventh month of pregnancy complaining of abdominal cramps and bleeding. The defendant did not examine the plaintiff but prescribed some medication and told her to call back if the cramps intensified. The next day, Mrs. Scafidi was examined by another physician who found that her cervix was partially dilated.

Although Mrs. Scafidi was hospitalized and an attempt was made to arrest premature labor, she delivered a 28-week gestated infant who weighed 2 pounds, 6 ounces. The infant died two days later from respiratory failure.

Plaintiffs' expert testified that the defendant's failure to examine and hospitalize Mrs. Scafidi and institute tocolytic constituted malpractice which was "directly related to the premature birth." *Scafidi*, *supra*, 119 N.J. at 98. Plaintiffs' expert also testified that proper treatment was 75 percent effective in stopping premature labor. The defendant's expert testified that the defendant complied with the standard of care and that the outcome would have been the same even if plaintiff had been immediately examined and treated as plaintiff's expert suggested.

The jury determined that the defendant was negligent but found that the defendant's negligence was not a proximate cause of the infant's premature birth and death. In affirming the Appellate Division's reversal and remanding for a new trial, the Supreme Court noted that it had recently held in *Ostrowski v. Azzara*, 111 N.J. 429 (1988) that a defendant is only liable for the amount of aggravation caused by the negligence. Thus, to the extent that the injury might have occurred solely as a result of the preexistent condition, without negligence, defendant is not liable to plaintiff. *Scafidi*, *supra*, 119 N.J. at 112-113, citing *Ostrowski*, *supra*, 111 N.J. 439, and *Fosgate*, *supra*, 66 N.J. 272.

## Defendant's Burden

However, "to the extent defendant seeks to apportion damages," the defendant must prove that the infant's death was "attributable solely to the preexistent condition, irrespective of defendant's negligence." *Scafidi*, *supra*, 119 N.J. at 113-114. The Court concluded that the jury should be instructed to determine the chance that the infant would have died in the absence of negligence and the trial court should "mold the verdict to limit the defendant's liability to the value of the lost chance" for survival. *Scafidi*,

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supra, 119 N.J. at 114.

Finally, the court held that "[i]n view of the significant change in the law represented by our holding concerning the measure of damages, the effect and application of that holding ... shall be prospective only." Scafidi, supra, 119 N.J. at 114. The Court did not state whether the "prospective application" of the Scafidi rule meant that it would only apply to causes of action which accrued after release of the decision, or to all trials which began after Scafidi was announced on May 24, 1990. This was most significant in cases involving infants, such as cerebral palsy cases, where the malpractice may have occurred before the release of the decision in Scafidi.

The Court answered this question in *Fischer v. Canario*. Mrs. Fischer was admitted to the Newark Beth Israel Medical Center after falling on October 11, 1984. The defendant, an orthopedic surgeon, examined an X-ray of the plaintiff's shoulder, concluded she had a fracture and admitted plaintiff to the hospital. As part of the admission procedure, a chest X-ray was taken and was interpreted by a radiologist as revealing a tumor. The next day, plaintiff was discharged and approximately a week later defendant signed the discharge summary.

The defendant did not review either the X-ray nor the radiological report, which was not attached to the hospital chart at the time the discharge summary was executed. In June of 1987, Mrs. Fischer was diagnosed as suffering from metastatic lung cancer. After undergoing radiation and chemotherapy, she died on February 16, 1988. In April of 1989, plaintiff's son filed suit as administrator ad prosequendum. At trial, plaintiff's son testified about his mother's extensive suffering from the cancer and chemotherapy. In particular, plaintiff testified that as his mother, who was a Holocaust survivor, lost her hair and began to relive her concentration camp experiences.

The parties stipulated that if the cancer had been diagnosed in October 1984 the plaintiff would have had a 50 percent chance of survival. The trial court refused to instruct the jury of the ultimate outcome of such a stipulation on their award. The jury found that the defendant had been negligent and awarded \$134,231 in damages. The trial court determined that Scafidi, supra, did not apply to causes of action which accrued before the decision in Scafidi and entered judgment for \$134,231, despite the stipulation on proximate cause. The Appellate Division affirmed, holding that Scafidi was only intended to apply to causes of action that accrued after the date of the Scafidi opinion. *Fischer v. Canario*, 277 N.J. Super. 302, 310 (App. Div. 1994).

In beginning their analysis, the justices recalled that in *Evers*, supra, they decided that where negligent medical treatment increases the risk of harm from a preexisting condition, the jury must determine whether the increased risk was a "substantial factor" in producing the ultimate result. The Court also noted that in Scafidi, supra, it decided that a jury must determine the

percentage chance that the plaintiff's ultimate harm may have occurred solely due to the preexisting condition and without any negligence and the trial court must mold the verdict to "limit defendant's liability to the value of the lost chance for recovery attributable to defendant's negligence." Fischer, slip op. at 7, citing Scafidi, supra, 119 N.J. at 114.

## Prospective Application?

However, in *Fischer*, the Court also noted that Scafidi, specifically held that the decision was prospective only. After extensively analyzing the history of the retroactive or prospective application of a new rule of law, the Court held that the preferable public policy required application of Scafidi retroactively to limit a plaintiff's damages to the value of the lost chance of recovery.

Scafidi merely clarified what was implicit in *Evers*, namely, that damage apportionment is an essential complement of *Evers*' increased risk theory. Failure to apply the Scafidi rule to the *Evers* increased risk rule would be fundamentally unfair. The Scafidi damage-apportionment rule was designed to correct the unjust result of saddling a defendant physician with the costs of injuries resulting from a preexisting condition. Principles of fundamental fairness dictate that a physician's liability in a medical malpractice action be limited to the value of lost chance for a recovery attributable to the physicians negligence. [citation omitted]

*Fischer*, slip op. at 18.

The Court concluded:

[W]e hold that the damage rule announced in Scafidi on May 24, 1990 should apply to cases tried after the date of that opinion. The purpose of the Scafidi rule is to limit a plaintiff's damages to the value of the lost chance of recovery. To allow full recovery for all of plaintiff's damages against the medical provider whose negligence caused plaintiff only a lost chance of recovery is fundamentally unfair. Scafidi's purpose was to restore a sense of fairness to lost-chance cases. A purely prospective application of Scafidi would clearly frustrate that purpose.

*Fischer*, supra slip op. at 21.

The Court also held that the trial court should give an ultimate outcome charge in conjunction with a Scafidi charge, citing *Roman v. Mitchell*, 82 N.J. 336 (1980). ■