THE IMPACT OF *GARDNER* ON THE LAW OF CAUSATION IN MEDICAL MALPRACTICE CASES

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The New Jersey Supreme Court has described the concept of causation in a medical malpractice case as "an inscrutably vague notion, susceptible to endless philosophical argument, as well as practical manipulation." *Scafidi v. Seiler,* 119 N.J. 93, 101 (1990). Causation in medical malpractice cases has been the subject of continual refinement by the Court, culminating in the recent important decision in *Gardner v. Pawliw,* 150 N.J. 359 (1997). *Gardner's* impact on medical malpractice litigation has been immediate, and is best understood when placed in the light of the Court's many prior discussions of this topic, such as *Fosgate v. Corona,* 66 N.J. 268 (1974); *Evers v. Dollinger,* 95 N.J. 399 (1984); and *Scafidi.* A brief review of these cases assists in understanding the most recent developments.

In *Fosgate,* the Court chose a case involving a delay in the diagnosis of tuberculosis to illustrate the problem presented by such cases: "Where the malpractice involves treatment of a preexisting 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." *Id.,* at 272. The *Fosgate* Court shifted the burden of proof in such cases 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 and what those damages are." *Id.,* at 273. In *Evers,* involving a delay in the diagnosis of breast cancer, the Court again eased the burden of proof for plaintiffs. Instead of being required to prove that the delay "probably" caused additional harm, the Court held that:

"[P]laintiff should be permitted to demonstrate, within a reasonable degree of medical probability, that the seven months delay resulting from the 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." *Id.*, at 417. This has come to be known as the "increased risk/substantial factor" test and has become the basis for the determination of proximate causation in malpractice cases involving a pre-existing condition.

The Supreme Court comprehensively analyzed the relationship between a pre-existing condition and causation in a malpractice case in *Scafidi v. Seiler,* 119 N.J. 93 (1990), where plaintiffs alleged that the defendant negligently managed Mrs. Scafidi's early labor, resulting in the premature birth and death of their child. The *Scafidi* Court explained the rationale for the 'increased risk/substantial factor' test:

> "[W]e use the 'substantial factor' test of causation because of the inapplicability of 'but for' causation to cases where the harm is produced by concurrent causes . . . The 'substantial factor' standard requires the jury to determine whether the deviation, in the context of the preexistent condition, was sufficiently significant in relation to the eventual harm to satisfy the requirement of proximate cause." *Id.*, at 109.

The Court did not precisely define what is "sufficiently significant in relation to the eventual harm to satisfy the requirement of proximate cause," leaving that determination to the jury. *Accord, Lanzet v. Greenberg,* 126 N.J. 168 (1991), holding that the substantial factor test merely requires the jury to decide whether the deviation "was sufficiently significant in relation to the eventual harm to satisfy the requirement of proximate cause." *Id.*, at 189. Thereafter, in *Anderson v. Picciotti,* 144 N.J. 195 (1996), the Court added that when the defendant argues that some of the

harm is due to the pre-existing condition and seeks apportionment of the damages, "the defendant must bear the burden of establishing the existence and identity of such a condition or disease." *Id.,* at 211. The defendant must also satisfy, within a reasonable degree of medical probability, "the burden of segregating recoverable damages from those solely incident to the preexisting disease." *Id.,* at 212, citing *Fosgate.*

The Supreme Court has taken the analysis one step further in *Gardner v. Pawliw,* 150 N.J. 359 (1997), where the plaintiff consulted with the defendant, an obstetrician, to manage her high risk pregnancy. Approximately one month prior to her expected date of delivery, the plaintiff noticed a decrease in fetal movement. Plaintiff was examined by the defendant and sent home with the reassurance "that the fetus was sleeping". Id., at 365. The plaintiff continued to experience decreased fetal movement and returned to the defendant's office one week later when it was discovered that the fetus had died. Plaintiffs asserted that the defendant should have ordered a Non-Stress Test [NST] and BioPhysical Profile [BPP] when plaintiff first presented with complaints of decreased fetal movement. However, at trial the plaintiff's expert equivocated when asked if the baby would have survived if the tests had been done:

> "I don't know. However, if one would have performed a study and if that study indicated that there was a smoldering in utero environment, one would have acted on that and most likely the baby would have been able to survive on the outside being given the fact that even though this is not a term baby, it is very close to term." *Id.*, at 368.

Plaintiff's expert conceded that he could not state within a reasonable degree of medical probability that either the NST or BPP would have disclosed the potential problem, because the tests were not done. *Id.*, at 369. However, on redirect, the expert testified that the

failure to do the tests increased the risk that the fetus' condition would not be recognized. *Id.*, at 369. In contrast, the defendant's expert testified that as a matter of "medical certainty" the tests would have been "perfectly normal" if performed when suggested by plaintiff's expert. *Id.*, at 370. The trial court dismissed the plaintiff's case, concluding "that plaintiffs had failed to show a causal connection between the failure to administer the tests and the death of the fetus." *Id.*, at 372. The trial court based its conclusion on the lack of evidence that performing tests when plaintiff first presented with decreased fetal movement would have probably demonstrated any abnormality. The trial court buttressed its opinion by noting that the only evidence as to the probable results of the tests was the testimony of the defendant's expert who stated "to a medical certainty" that the tests would have been normal. *Id.*, at 372-373. The Appellate Division affirmed, 285 N.J. Super. 113 (App. Div. 1995).

In reversing and remanding for a new trial, the Supreme Court first revisited *Evers;* *Scafidi*; and *Anderson*; recalling that it had previously "lessened the traditional burden of proof on a plaintiff asserting a medical-malpractice claim for establishing proximate cause in the case of a plaintiff suffering from a preexistent condition." *Gardner,* at 375. The Court reiterated its prior adoption of the 'increased risk/substantial factor' test, and reviewed the development of this concept from *Evers* and its adoption of the *Restatement of Torts*, §323(a) through *Scafidi.* The *Gardner* Court restated its commitment to the holding that once a plaintiff demonstrates that the defendant's negligence increased the risk of harm, the plaintiff has presented "a jury question whether the increased risk was a substantial factor in producing the ultimate result". *Gardner,* at 378 citing *Scafidi,* 119 N.J. at 108.

The *Gardner* Court observed that when the malpractice consists of a failure to perform

a diagnostic test, the "very failure to perform the test may eliminate a source of proof necessary to enable a medical expert to testify to a degree of reasonable medical probability concerning what might have occurred had the test been performed." *Id.*, at 380. In such a case, as a matter of public policy, the plaintiffs were entitled to have a jury determine causation. The Court explained:

> "When the prevailing standard of care indicates that a diagnostic test should be performed and that it is a deviation not to perform it, but it is unknown whether performing the test would have helped to diagnose or treat a preexisting condition, the first prong of *Scafidi* does not require that the plaintiff demonstrate a reasonable medical probability that the test would have resulted in avoiding the harm. Rather, the plaintiff must demonstrate to a reasonable degree of medical probability that the failure to give the test increased the risk of harm from the preexistent condition. **A plaintiff may demonstrate an increased risk of harm even if such tests are helpful in a small proportion of cases. We reach that conclusion to avoid the unacceptable result that would accrue if trial courts in such circumstances invariably denied plaintiffs the right to reach the jury, thereby permitting defendants to benefit from the negligent failure to test and the evidentiary uncertainties that the failure to test created."** *Id.*, at 387. [Emphasis supplied].

The Court then explained the plaintiff's burden of proof in such cases:

> "Plaintiffs' burden was not to show as a matter of reasonable medical probability that the tests would have revealed the placenta and umbilical cord abnormalities. Plaintiffs' burden was to show that [defendant's] failure to perform the NST and BPP tests increased the risk that the fetus would die *in utero* . . . [Plaintiff's expert] answered affirmatively when asked whether he could say to a reasonable degree of medical probability that because [defendant] failed to perform either an NST or BPP test there had been an increased risk that a condition that could cause the fetus's death would not be recognized. Accordingly, [plaintiff's expert's] testimony was sufficient for plaintiffs to satisfy their requisite threshold burden of proof that to a reasonable medical probability the failure to perform those two tests increased the risk of harm from the preexistent condition. Plaintiffs should have been permitted to submit for the jury's determination the questions of whether, based on the parties' expert testimony, the failure to give the NST or BPP tests had increased the risk that the fetus's condition would not be detected, treated

> or corrected and whether that increased risk had been a substantial factor in causing her death." *Gardner,* at 388-389.

The significance of *Gardner* was immediately demonstrated in *Greene v. Memorial Hospital*, 299 N.J. Super. 372 (App. Div. 1997), remanded 151 N.J. 67 (1997), rev. 304 N.J. Super. 416 (App. Div. 1997). In *Green*, plaintiff's daughter died as a result of acute viral myocarditis. Significantly, *Green* did not involve the failure to perform diagnostic test, but rather plaintiff's expert testified that the emergency room nurses improperly triaged the patient, and that the emergency room physician negligently failed to examine the patient after being informed of a change in the vital signs. However, the initial opinion of the Appellate Division court noted that:

> "[Plaintiff's expert's] testimony respecting proximate cause was highly equivocal. The witness acknowledged his inability to state with a reasonable degree of medical certainty that the child would have survived had appropriate treatment been administered, or that [the defendant's] negligence constituted a substantial factor in the patient's death. While noting that appropriate measures might 'have afforded the child a . . . higher percentage of survival potential,' [plaintiff's expert] candidly observed that he could 'not say . . . that [such procedures] would have altered the outcome'." *Greene,* 299 N.J. Super. at 378-379.

The Appellate Division initially affirmed the directed verdict in favor of the defendant, noting that even under the "modified standard of proximate causation" utilized in cases where the malpractice aggravated a pre-existing condition, plaintiff must demonstrate "within a reasonable degree of medical probability that negligent treatment increased the risk of harm posed by a pre-existent condition." *Greene,* 299 N.J. Super. at 380.

> "Within this analytical framework, we conclude that plaintiff failed to produce evidence which would permit a jury to find, as a matter of reasonable medical probability, that [defendant's] negligence increased [plaintiff's daughter's] risk of harm from her pre-existing myocarditis. Plaintiff's expert witness was unable to say that [defendant's] negligence resulted in a lost chance of survival, or that it enhanced the risk caused by the pre-existing condition. Although the witness

suggested the possibility that appropriate measures might have afforded a 'slight margin' of 'survivability', he was steadfast in his refusal to say, within a reasonable degree of medical probability, that defendant's negligence enhanced the risk of harm presented by [plaintiff's daughter's] downward course. Moreover, despite repeated urging by plaintiff's counsel, [plaintiff's expert] did not express the opinion that the risk of harm caused by [defendant's] deviation constituted a substantial factor in producing the ultimate result. In sum, the trial court correctly dismissed plaintiff's claim for medical malpractice because she failed to satisfy either prong of the two-part standard of proximate causation." *Greene,* 299 N.J. Super. at 381.

The Supreme Court remanded for reconsideration in light of its decision in *Gardner*. *Greene v. Memorial Hospital*, 151 N.J. 67 (1997). The second appellate decision, by the same panel, tersely held that "a jury could reasonably find that defendant deviated from accepted standards by failing to examine [plaintiff's daughter] and placing her on a heart monitor after being apprised that the patient's vital signs had changed, and that the physician's malpractice 'increased the risk of harm from the preexistent condition'." *Greene*, 304 N.J. Super. at 420, citing *Gardner*, 150 N.J. at 387. The case was remanded for a new trial.

When viewed in its historical perspective, *Gardner* is another refinement of the Supreme Court's policy of limiting a physician's liability to "the value of the interest damaged." *Anderson,* at 207. *Gardner* will be important in any case involving the failure to diagnose a condition where the plaintiff alleges that the standard of care required the defendant to perform certain tests which were not done. In such cases, the plaintiff presents a jury issue by merely demonstrating that the failure to perform the tests increased the risk of harm to the patient, and wins the case by proving that the increased risk was a substantial factor in causing the harm.

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