

Medical Malpractice

Understanding Proximate Causation

Revised Model Jury Charges seek to clarify vague notion

By Abbott S. Brown

The concept of proximate causation in medical malpractice cases has been described by our Supreme Court as “an inscrutably vague notion, susceptible to endless philosophical argument, as well as practical manipulation.” *Scafidi v. Seiler*, 119 N.J. 93, 101 (1990), quoting Robinson, “Multiple Causation in Tort Law; Reflections on the DES Cases,” 68 Va. L. Rev. 713 (1982). However, defining this “vague notion” is of critical importance in medical malpractice cases, since most involve the failure to diagnose or treat a pre-existing condition, such as a cancer. In such cases, the plaintiff must demonstrate not only that the physician was negligent, but also that the delay in treatment was a proximate cause of increased harm to the patient.

In *Ostrowski v. Azzara*, 111 N.J. 429 (1988), the Supreme Court instructed that the concept of proximate causation in malpractice cases must be “an instru-

ment of overall fairness and sound public policy” and that the jury should be instructed to understand the doctrine based on “logic, common sense, justice, policy and precedent.” Over a course of 30 years and numerous cases, the Supreme Court has provided much guidance to the bench and bar regarding how the jury should be instructed on this crucial issue. The proximate causation jury charge in medical malpractice cases found its genesis in *Fosgate v. Corona*, 66 N.J. 268 (1974), evolved in *Evers v. Dollinger*, 95 N.J. 399 (1984) and *Scafidi v. Seiler*, 119 N.J. 93 (1990), and most recently was clarified in *Reynolds v. Gonzales*, 172 N.J. 266 (2002) and *Verdicchio v. Ricca*, 179 N.J. 1 (2004). In *Fosgate*, *Evers* and *Scafidi*, the Supreme Court adopted the “increased risk-substantial factor” test to be used in medical malpractice cases involving a pre-existing condition, such as cancer. The *Scafidi* Court concisely explained how this test was to be applied:

Because this modified standard of proximate causation is limited to that class of cases in which a defendant’s negligence combines with a preexisting condi-

tion to cause harm — as distinguished from cases in which the deviation alone is the cause of harm — the jury is first asked to verify, as a matter of reasonable medical probability, that the deviation is within the class, i.e., that it increased the risk of harm from the preexistent condition.... Assuming that the jury determines that the deviation increased the risk of harm from the preexistent condition, we 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.

When creating the “increased risk-substantial factor” test, the Supreme Court imposed upon the plaintiff the burden of proof that the negligence “increased the risk of harm from the pre-existent condition.”

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However, the Court has clearly, consistently, and unequivocally imposed upon the defendant the burden apportioning damages between the pre-existing condition and the defendant's negligence. In *Fosgate*, the Supreme Court instructed that "[W]here the malpractice or other tortious act aggravates a pre-existing 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 and what those damages are." This opinion has been consistently ratified. For example, the *Scafidi* Court held that the defendant has the burden of apportioning damages and, if the defendant cannot apportion the damages, then the defendant is responsible for all damages. And in *Lanzet v. Greenberg*, 126 N.J. 168, 189 (1991), the Court held that "the defendant is required to distinguish the pre-existing condition from the eventual harm caused."

Despite the shifting of the burden of proof in such cases, the "increased risk-substantial factor" test, as it became known, remains inherently ambiguous. Judges and juries were often confused when attempting to determine how to quantify a "substantial factor." For example, is 3 percent a substantial factor? In *Velazquez v. Jiminez*, 336 N.J. Super. 10 (App. Div. 2000), *aff'd*, 172 N.J. 240 (2002), the plaintiff's child sustained brain injuries at birth. Dr. Jiminez, the attending physician, sought assistance during the delivery and Dr. Ranzini responded and helped deliver the infant. The plaintiff filed suit against both physicians and the case against Dr. Jiminez settled. The jury allocated 3 percent of the fault to Dr. Ranzini, and awarded \$2.5 million. The trial court held that as a matter of law Dr. Ranzini's conduct was not a substantial factor in causing the harm to plaintiff's child and entered a judgment notwithstanding the verdict in favor of Dr.

Ranzini. The Appellate Division reversed, holding that 3 percent was a substantial factor as a matter of law. The Supreme Court affirmed. Nevertheless, most juries, if left without a definition of the inherently ambiguous phrase "substantial factor" will most likely conclude that 3 percent is not a substantial factor.

This inherent ambiguity is no doubt what led to the two "no-causes" on the substantial factor question in *Reynolds*. In fact, the two verdicts in *Reynolds* compelled the Supreme Court to confront the inherent ambiguity of the term "substantial factor." The *Reynolds* Court observed that multiple learned commentators had criticized the "increased risk-substantial factor" test. *Reynolds* cited Richard L. Rosenzweig, *Substantial Factor: Plaintiff's Everest*, 146 Pittsburgh Legal J. 35 (1998), who suggested that the term "substantial" was "Everest-like in its implications" and "incomprehensible to jurors." The *Reynolds* Court also cited *Prosser & Keeton on the Law of Torts*, Section 41 at 43 (Supp. 1988) and Schmauder, *An Analysis of New Jersey's Increased Risk Doctrine*, 25 Rutgers L.J. 893 (1994) for the same conclusion. As a result, the *Reynolds* Court undertook to clarify how the "increased risk-substantial factor" test should be used, and instructed the Civil Model Jury Charge Committee to revise Model Jury Charge 5.36E.

The facts of *Reynolds* are illustrative. Plaintiff sustained serious injuries in a dirt-bike accident, and sustained severe nerve damage as the result of the untreated compartment syndrome, a painful condition that occurs when there is swelling inside an enclosed compartment in the body. Generally, if compartment syndrome is suspected, the proper course of action is to check intra-compartmental pressure and perform an incision in the affected compartment to relieve the pressure. The plaintiff's expert testified that the plaintiff's disabilities were the result of the defendant's failure to diagnose and treat the compartment syndrome, and not the original accident. The plaintiff's expert supported this opinion by relying on medical records that demonstrated

normal nerve function in the days following the accident and before the onset of the compartment syndrome. In contrast, the defendant claimed that the plaintiff's injuries were the result of the injuries sustained in the initial accident and that plaintiff did not have a compartment syndrome while under the defendant's care. The case was tried twice and both juries concluded not only that the defendant deviated from the standard of care by failing to test for compartment syndrome, but also that the deviation increased the risk of harm. However, both juries concluded that the increased risk was not a "substantial factor" in causing the plaintiff's residual injuries. After the first trial, the court granted the plaintiff's motion for a new trial, stating that the jury's finding that the initial accident caused the plaintiff's injuries was "clearly and obviously a mistake." However, at the conclusion of the second trial, the court denied a motion for a new trial, and the Appellate Division affirmed.

In reversing and remanding for a third trial, the Supreme Court first observed that since the juries determined the defendant had deviated from the standard of care, the juries must have also concluded that the plaintiff had suffered a compartment syndrome. The Court then noted that the juries' determination that the failure to treat the compartment syndrome was not a substantial factor in the plaintiff's disability was simply inconsistent with the juries' prior conclusions regarding deviation and increased risk. The Court concluded that this result was due to the ambiguity in the then-existing jury charge regarding proximate causation and the "substantial factor causation" test. The *Reynolds* Court therefore remanded the case with new instructions for the jury regarding proximate causation. The Court also referred the matter to the Civil Model Jury Charge Committee, ordering a modification of the then-existing version of *Model Jury Charge (Civil) 5.36E, Medical Negligence, Pre-existing Condition — Increased Risk/Loss of Chance — Proximate Cause*. The Court ordered that "Pending such modification, the trial court on remand should explain

to the jury that a defendant's deviation need not be the only cause, nor a primary cause, for the deviation to be a substantial factor in producing the ultimate result. However, defendant's negligent conduct cannot be a remote or inconsequential contributing factor. It must play a role that is both relevant and significant in bringing about the ultimate injury." The Court then added in key language:

The relative weight of an increased risk that is found to constitute a substantial factor can be reflected by the jury in the apportionment of damages between the increased risk and the pre-existing condition.

The Civil Model Jury Charge Committee promptly revised *Model Jury Charge (Civil) 5.36E* and the jury questionnaire to reflect the Court's holding in *Reynolds*. The relative weight of an increased risk that is found to constitute a substantial factor is determined by the jury when it apportions damages between the increased risk and the pre-existing condition in model jury interrogatory number 4. See <http://www.judiciary.state.nj.us/civil/charges/536e.htm>.

The language of the revised charge was subsequently explicitly ratified in *Verdicchio*. In that case, the plaintiffs alleged that the defendant negligently failed to diagnose their son's cancer, resulting in their son's death. The plaintiffs' expert opined that the defendant deviated from the standard of care in not performing certain tests and not referring the plaintiffs' son to specialists. The plaintiffs' expert also testified that their son had an 85 percent chance of survival if the cancer had been detected before it had metastasized, and a 20 to 30 percent chance of survival if the cancer had already metastasized when the deviations occurred. The defendant presented an oncologist who testified that even if the diagnosis had been made when the plaintiffs' expert thought it should have been made, the "ultimate outcome" would have been no different."

The jury concluded that the defendant had been negligent, that the negligence had increased the risk of harm, and that the increased risk was a substantial factor in causing the death of the plaintiffs' son. The jury awarded \$6.5 million for the survival claim and \$1.5 million for the wrongful death claim. The jury allocated 45 percent of the damages to the underlying disease and 55 percent to the defendant's negligence. The trial court then granted a motion for a judgment not withstanding the verdict. The Appellate Division affirmed in an unpublished opinion.

In reversing, the Supreme Court in *Verdicchio* first reviewed *Evers*, *Scafidi*, and *Reynolds*, and traced the development of the "increased risk/substantial factor" test. After conducting this review, the *Verdicchio* Court reiterated:

The *Verdicchios* were required only to show that Dr. Ricca's failure to perform an examination that would have led to the discovery of the cancer increased the risk that Stephen would lose the opportunity for treatment at an earlier stage. They were not required to prove the results of examinations and tests that Dr. Ricca neglected to administer. Although the *Verdicchios*' expert was unable to render an opinion whether the cancer had metastasized by January 1994, his testimony was clear that, as a matter of medical probability, Dr. Ricca's delay increased the risk that Stephen would lose the opportunity for effective treatment of the cancer. In fact, we recognized in the failure to diagnose cancer case of *Evers* that the 'passage of time' with concomitant '[d]elay in treatment almost invariably results in a more serious prognosis.' (citations omitted).

The *Verdicchio* Court explicitly instructed that the plaintiffs were not obligated "to prove which of Stephen's damages were attributable to his pre-

existing disease and which could be linked to any increased risk" arising from the negligence of the defendant. This was the defendant's burden. The *Verdicchio* Court observed, "Indeed, a contrary conclusion would effectively shift to the plaintiff the burden of separating out the harm flowing from the malpractice from the consequences of the pre-existing disease in every case. That in turn would eviscerate the remedial aims of *Fosgate*."

The *Verdicchio* Court also recalled that in *Reynolds*, it had instructed the Model Civil Jury Charge Committee to revise *Model Jury Charge (Civil) 5.36E* to incorporate its holding on proximate causation. The *Verdicchio* Court reviewed the revised jury charge, *Model Jury Charge (Civil) 5.36E (2002)*, and observed that it has been modified to "reflect our holding in *Reynolds v. Gonzales*." The jury interrogatories incorporated into the Model Jury Charge obligate the plaintiff to first prove that the defendant deviated from accepted standards of medical care, and then prove that the defendant's deviation increased the risk of harm posed by the plaintiff's pre-existing condition. If the jury determines that the plaintiff has met this burden, then the burden shifts to the defendant to prove that some of the plaintiff's ultimate injury would have occurred even if the defendant's treatment was proper. If the defendant cannot satisfy this burden of apportioning the damages, then the defendant is responsible for all damages. If the defendant has met this burden of proof, then the jury is asked to state whether the increased risk was a substantial factor in causing the plaintiff's damages by stating, in percentages, what portion of the ultimate injury is a result of the pre-existing condition and what portion of the damages resulted from the defendant's deviation from the standard of care.

In conclusion, once the plaintiff demonstrates that there was an increased risk of harm, the burden of allocating that risk shifts to the defendants. If both parties meet their burden, the Supreme Court has instructed that "The relative weight of an increased risk that is found to constitute a substantial factor can be reflected by the jury in the apportionment of damages between the increased risk and the pre-existing condition." The revised *Model Jury Charge (Civil) 5.36E* and the jury interrogatories incorporated therein reflect this now-settled law. ■