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Court Returns to Time-Honored Topic Of Proximate Cause in Med-Mal

What happens when the conduct of both the physician and the patient aggravates a preexisting condition?

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During the past year, the New Jersey Supreme Court issued relatively few decisions addressing torts and personal injury issues. Those few decisions, however, returned to such time-honored topics as proximate cause in medical malpractice cases, the extent of the duty owed under the Tort Claims Act and the definition of pecuniary damages under the Wrongful Death Act. Additional tort cases were argued this spring, with decisions expected soon.

It is, of course, difficult to discern a pattern from just a handful of opinions, particularly from a court burdened by judicial vacancies and occupied by temporarily assigned justices. That said, certain messages came across. For example, jury charges should relate to the facts and legal theories presented in a particular case, and not simply restate the model charge. In addition, protections afforded under the Tort Claims Act, especially relating to the

duties owed to third parties by public employees, are difficult to overcome. Finally,

either the physician *or* the patient aggravates that existing condition. Charging a

tion was said to have been made worse by both her own conduct and the conduct of her physician. Ultimately, the Supreme Court set forth a road map for addressing proximate causation in such



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efforts to judicially expand the Wrongful Death Act will be viewed with a critical eye.

Medical Malpractice: Preexisting Condition Jury Charge

Frequently, a patient presents to a physician with an existing condition. Occasionally, the conduct of

jury in cases like these can be challenging. Sometimes, however, the conduct of *both* the physician *and* the patient aggravates the patient's pre-existing condition. Crafting a jury charge in those cases can be overwhelming.

Such was the situation facing the Supreme Court in *Komlodi v. Picciano*, 217 N.J. 387 (2014), where the plaintiff's preexisting condi-

cases. Along the way, the court reminded trial judges that jury charges must be tailored to the facts of a particular case, especially in complicated matters where the parties have offered competing and alternative theories of liability.

In *Komlodi*, a physician prescribed a Duragesic patch for back pain to a patient known to abuse drugs and

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alcohol. The Duragesic patch, which is applied to the skin, releases the powerful pain medication Fentanyl over the course of 72 hours. The medication released by the patch is the equivalent of 80 Percocets, and is only intended to be used in cases of severe pain, where other forms of medication are ineffective. The physician contended that the patient's alcohol and drug abuse played a role in the prescription of this particular medication, as the patch was seen as the safest route to pain relief for a known drug abuser. However, instead of using the patch as directed, the patient orally ingested it, which resulted in severe and permanent brain damage due to a Fentanyl overdose.

The woman's mother, her daughter's guardian, sued the physician, alleging that the physician failed to protect a known drug and alcohol abuser from self-injurious behavior. The plaintiff claimed that the defendant's prescription of the Duragesic patch failed to account for the risk that the plaintiff would abuse the narcotics she had been prescribed. The physician countered that she chose the best option from among several bad options, and if she had done nothing, the plaintiff likely would have continued using drugs that she had procured on her own to relieve her pain. The result, according to the defense, would have been the same with or without the prescription of the Duragesic patch.

At the conclusion of the case, the trial judge charged the jury regarding causation with the "preexisting disease or condition" charge pursuant to *Scafidi v. Seiler*, 119 N.J. 93 (1990). When a patient is treated for a preexisting condition and a physician's negligence is alleged to have worsened that condition, the jury must decide whether the negligent treatment increased the risk of harm posed by the preexisting condition and, if so, whether the increased risk was a substantial factor in causing the ultimate harm. If the plaintiff satisfies her burden as to these first two elements, then the burden shifts to the defendant to prove which damages are attributable to the preexisting condition, as opposed to the physician's negligence. The harm caused by the aggravation of the pre-existing condition due to the physician's negligence is the value of

the lost chance of recovery. Model Jury Charge 5.50E, commonly referred to as the *Scafidi* charge, is meant to incorporate these issues.

Additionally, in order to account for the role that the plaintiff played in her own injury, the trial court charged the jury on superseding/intervening causation and avoidable consequences. The court did not, however, charge the jury on comparative negligence, stating that the superseding/intervening and avoidable consequences charges properly accounted for the plaintiff's potential role in her own injury.

Comparative negligence applies when the plaintiff's own negligence occurs before or concurrent with the defendant's conduct. In such cases, the jury considers whether the plaintiff was also negligent and, if so, compares the extent of the plaintiff's negligence with the defendant's negligence. If the jury finds that the plaintiff's negligence exceeds 50 percent, then the plaintiff is barred from recovery. Superseding/intervening acts are unforeseeable acts that break the "chain of causation" linking the defendant's wrongful conduct and the plaintiff's injury. *Cowan v. Doering*, 111 N.J. 451, 465 (1988). The doctrine of avoidable consequences applies when the plaintiff's own negligence occurs *after* the defendant's conduct. It is not a defense to liability, but may mitigate damages. The Supreme Court previously cautioned that comparative negligence does not apply when either the doctrine of avoidable consequences or preexisting condition applies. *Ostrowski v. Azzara*, 111 N.J. 429, 441 (1988). An important distinction between the doctrine of preexisting condition and the doctrines of comparative fault, avoidable consequences and superseding/intervening cause is that preexisting condition does not involve the patient's fault.

The jury in *Komlodi* returned a defense verdict, finding that, while the physician deviated from accepted standards of medical care, and that deviation increased the risk of harm from the plaintiff's preexisting condition, the increased risk was not a "substantial factor" in causing the plaintiff's injury. The plaintiff appealed.

In a split decision, the Appellate

Division reversed, holding that both the *Scafidi* preexisting condition charge and the superseding/intervening cause charge were inappropriate. Specifically, the court observed that the defendant was not entitled to a *Scafidi* charge because she did not identify a pre-existing condition and its normal consequences. In addition, the court found that the superseding/intervening cause charge should not have been given along with the foreseeability charge, because, if the plaintiff's act was foreseeable to the physician, then it could not have been a superseding or intervening cause. At this point, the defense appealed.

The Supreme Court affirmed, modified the Appellate Division's ruling, and remanded for a new trial. In doing so, the court first ruled that the *Scafidi* charge was inappropriate under the circumstances. In the typical *Scafidi*-type case, the progression of the preexisting condition will occur regardless of the plaintiff's conduct. The defense is obligated to identify the preexisting condition and offer proof that the condition contributed to the plaintiff's outcome. The defense did not do that here. In addition, by following the defense argument that the plaintiff's own conduct increased the risk of harm, the trial court blurred the distinction between the preexisting condition charge and the charges relating to superseding/intervening cause and avoidable consequences, because the preexisting charge does not account for the plaintiff's own conduct. Finally, the trial court failed to reference the specific facts of the case in its *Scafidi* charge, contrary to the instructions that accompany Model Jury Charge (Civil) 5.50E. 217 N.J. at 413-17.

The court next decided that the superseding/intervening cause charge was appropriate. The jury would have to determine whether the patient's improper ingestion of the Duragesic patch, given her long history of illicit drug use, was foreseeable to the defendant. If so, then the physician may be liable for prescribing the patch to a patient with such a history. If not, then the physician may avoid responsibility for the plaintiff's harm. However, the court noted, the trial court failed to "mold its instructions to the facts of this case." 217 N.J. at 420. The court continued: "Juries must know how the

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legal instructions are to be applied to the complex factual scenarios before them, and the instructions must be clear and understandable.” In this case, the court held, “[t]he jury charge failed to give the jury the guidance it needed to sort through the complex issues....” 217 N.J. at 420.

Finally, the Supreme Court agreed that the trial court appropriately charged the jury as to the doctrine of avoidable consequences. However, that charge, too, failed to account for the “special circumstances of this case,” specifically, “how plaintiff acted in light of her drug and alcohol addiction,” and “whether, and to what degree, the plaintiff had the capacity to act responsibly to care for herself in light of her health or mental condition.” 217 N.J. at 420-21. The court then recommended a lengthy charge that set forth the parties’ contentions, the relevant facts and the appropriate legal standard.

In ordering a new trial, one may argue that the Supreme Court simply reiterated principles previously stated in cases such as *Scafidi*, *Ostrowski* and *Cowan*. In another respect, however, the court made clear its preference for jury charges that are specifically tailored to the facts of the case. The charges are not to be given in a vacuum, or provide a sterile recitation of the relevant legal principles. Instead, “the jury charge must explain the parties’ legal theories and the proofs in relation to the governing law.” 217 N.J. at 423. In similarly complex matters, therefore, the trial judge must “tailor the legal theories and facts to [relevant] law” when charging a jury. 217 N.J. at 417.

Tort Claims Act: Duty Owed by Public Employee to a Third Party

Usually, the scope of a school principal’s duty to protect others is clearly delineated. It is obvious, for example, that a principal has the duty to protect students in the school during school hours. How far that duty extends, however, is open to interpretation, especially when accounting for New Jersey’s Tort Claims Act, N.J.S.A. 59:1-1, et seq. In *Robinson v. Vivirito*, 217 N.J. 199 (2014), the New Jersey Supreme Court considered whether that duty extends to a third party who is injured on school property after school

hours.

In *Robinson*, the plaintiff was walking from her home to a nearby diner on a Saturday. In doing so, the plaintiff cut through the property of a neighboring school, which was closed at the time. The school principal was not on the school property at the time. As the plaintiff walked across the school property, an unleashed dog came upon the property, attacked and bit her. The dog’s owner lived next to the school.

About a week prior to this incident, the school principal received a letter advising him that this dog was unleashed and had attacked others on school property. While the principal did not contact the police or animal control in response to this letter, he had notified animal control concerning other instances of unleashed or unattended dogs on school property. On those prior occasions, animal control responded to the calls.

The plaintiff sued the school principal, the school board (alleging that the board was vicariously liable for the conduct of the principal) and the owner of the dog (claiming that the dog’s owner was strictly liable for its dangerous conduct). The plaintiff claimed first that the principal was responsible for the safety of others while they are on school property. The plaintiff also claimed that because the principal knew this dog had been unleashed on school property and attacked others previously, he was obligated to take steps to prevent against attacks by the dog as part of his supervisory responsibilities of the property. The plaintiff contended that if the school principal had taken corrective measures when he learned about the dangerous, unleashed dog on the school property, this incident would have been avoided. Thus, the plaintiff alleged that the principal breached his duty, even to a third party such as the plaintiff.

The principal moved for summary judgment, arguing that he owed no duty to the plaintiff, a trespasser on school property at a point in time when the school was closed and the principal was not even there. The trial court granted the principal’s motion, holding first that N.J.S.A. 59:4-2, which permits liability of a public entity for a dangerous condition on a public property, refers only to the physical

features or characteristics of the property, not to activities conducted on the property. Therefore, the Tort Claims Act did not provide the basis for a claim. Second, the trial court noted that the principal neither owned, controlled, nor harbored the dog that attacked the plaintiff, distinguishing this situation from *Benjamin v. Corcoran*, 268 N.J. Super. 517 (App. Div. 1993). In *Benjamin*, a dangerous dog bit a young girl on the grounds of a public facility. The dog was owned by the facility’s superintendent, who was also on notice of the dog’s dangerous characteristics. In *Benjamin*, therefore, the defendant was under a duty to prevent further injuries to anyone who lawfully entered the grounds of the public facility. Those same factors, however, were not present in the *Robinson* case.

The plaintiff appealed the grant of summary judgment. The Appellate Division reversed, finding that the principal had a duty “to address a known danger from the dog to people who come onto the property.” 217 N.J. at 205. The court drew no distinction between the principal’s obligation to address the presence of a stray dog on the school premises during the school day, and an obligation to protect those who come onto the property at other times. As a result, the Appellate Division concluded that a jury could find that the principal “had a duty to contact the police or the animal control officer to request that the dog be removed because of its dangerous propensity to escape and attack people on or near the school property, and that his failure to do so was a proximate cause of plaintiff’s injury.” 217 N.J. at 206.

Thereafter, the defendant petitioned the Supreme Court for certification, and the court reversed. In doing so, the Supreme Court considered two issues: first, whether the plaintiff’s harm was foreseeable to the principal, and second, whether recognition of a duty comports with considerations of fairness and public policy. With regard to foreseeability, the court noted both that the principal was not in a position to exercise control over the dog and his inability “to monitor conduct on or near school grounds” after hours. These factors “foreclosed [the principal’s] ability to undertake any action to protect

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anyone who traversed school grounds and his ability to appreciate the foreseeability of any harm” to the plaintiff. 217 N.J. at 213.

In addition, the court found that public policy did not impose a duty here, because there was no relationship between the plaintiff and the school. The plaintiff was not a student, nor was she invited onto the property. She was, the court noted, “a trespasser.” While the risk of attack by a dangerous, unattended dog is significant, the legislature addressed that risk by imposing strict liability against dog owners for harm caused by their dogs. See N.J.S.A. 4:19-16. The legislature recognized that a dog’s owner is in the best position to minimize risk of harm. As a result, the court acknowledged that a duty of care should not be imposed on someone such as the school principal who had no control over the dog’s actions at the time of the attack.

Under the facts present in *Robinson*, therefore, the court refused to impose a duty of care on the principal. “Absent some ability to control the behavior and location of the dog,” the court concluded, “imposition of a duty of care does not foster the public interest. Rather, it renders the school defendants an insurer of the negligent behavior of others, which is contrary to the purpose of the [Tort Claims Act].” 217 N.J. at 215.

While the court’s conclusion is phrased narrowly (“we hold that the school principal had no duty of care to [the plaintiff] under the facts of this case”), one can easily envision how school authorities, and other public employees, may rely on this decision to limit their duty to protect third parties unaffiliated with the school, its activities or its property, during off hours. This may impact, for example, those who are injured using a school’s athletic facilities or while congregating on school property after hours.

Wrongful Death Act: Estate Tax Liability as a Pecuniary Injury

In a wrongful death case, the decedent’s survivors may bring a claim under the Wrongful Death Act. N.J.S.A. 2A:31-1 to 2A:31-6. The act allows the survivors to bring a negligence claim against the

party that caused the decedent’s death, just as the decedent could do had he or she survived. In such cases, however, the survivors’ recovery is limited to their pecuniary injuries, or economic losses caused by the decedent’s premature death. Such pecuniary injuries take various forms. For example, survivors may claim lost income because the decedent is no longer alive and able to work and contribute financially to the survivors. The survivors may also claim that the decedent is no longer able to provide services, society, companionship, guidance and advice to them. Such nonmonetary losses are frequently valued by economists retained in a litigation, and converted into a dollar figure.

The plaintiffs in *Beim v. Hulfish*, 216 N.J. 484 (2014), sought to expand the definition of pecuniary injuries. They claimed that losses to the estate in the form of estate taxes that were greater when the decedent died, due to the defendants’ negligence, than they would have been even a year later, constituted pecuniary damages. Whether the Wrongful Death Act “authorizes claims for damages in the form of estate taxes paid by the decedent’s estate,” the Supreme Court noted, was an issue of first impression. 216 N.J. at 489.

In 2008, John Kellogg, then 97 years old, was a passenger in a car driven by one defendant who collided with a car driven by another defendant. Kellogg was seriously injured and hospitalized. After he was discharged from the hospital to a rehabilitation center, he developed complications, was readmitted to the hospital, and died soon after.

After Kellogg died, the co-executors of his estate filed the appropriate estate tax returns. Under the law as it existed in 2008, the estate paid nearly \$1.2 million in federal estate taxes. Thereafter, the plaintiffs filed suit against the drivers on behalf of the decedent’s estate, seeking damages under the Wrongful Death Act.

In the meantime, Congress amended the federal estate tax laws. Under the amended tax laws, had Kellogg lived until 2009, the estate would have owed less than half the amount of taxes it paid in 2008. If Kellogg lived until 2010 or thereafter, the estate would have owed no federal estate taxes. The plaintiffs argued that had it not been for the car accident, based on the life

expectancy tables, the decedent probably would have survived until 2009 or 2010, and if he had, the estate’s tax liability would have been much less or none at all. Therefore, the decedent’s premature death led to the estate sustaining significant economic losses. Specifically, the difference between the estate’s tax liability at the time of death, and the tax liability, if any, at various points in the future, the plaintiffs claimed, constituted pecuniary injuries to which they were entitled under the Wrongful Death Act.

The trial court rejected this claim and granted the defendants’ motion to dismiss and for summary judgment. The Appellate Division reversed, holding that the estate taxes constitute pecuniary injuries under the act. The Supreme Court granted the defendants’ petition for certification.

The court reviewed the language and policy underpinning the Wrongful Death Act. The act permits a cause of action provided the decedent would have had the basis for a claim had he survived. N.J.S.A. 2A:31-1. Put another way, “if the deceased could not have recovered [had he survived], his beneficiaries may not recover.” 216 N.J. at 499 (quoting *Graf v. Taggart*, 43 N.J. 303, 306 (1964)). The court also noted that the act limits the decedent’s heirs to recovering only the “pecuniary injuries resulting from such death.” N.J.S.A. 2A:31-5. Pecuniary damages include the economic contributions of which the heirs have been deprived by virtue of the decedent’s death. “An award of damages in a wrongful death action is...a replacement for that which decedent would likely have provided and no more. The amount of recovery is based upon the contributions, reduced to monetary terms, which the decedent might reasonably have been expected to make to his or her survivors.” 216 N.J. at 501 (quoting *Smith v. Whitaker*, 160 N.J. 221, 231-32 (1999)). The contributions that constitute pecuniary damages include future financial contributions the decedent was likely to make to his heirs, as well as the “lost ‘value’ of services such as companionship and care...and the loss of advice, guidance and counsel.” 216 N.J. at 502 (quoting *Johnson v. Dobrosky*, 187 N.J. 594, 609 (2006), citing *Green v. Bittner*, 85 N.J. 1 (1980)).

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Compared to these categories of economic losses, the court observed that plaintiffs' proposed estate tax damages are "starkly different." 216 N.J. at 505. There is no relationship to the federal estate taxes and "the financial support or the services that a decedent would have provided to his or her heirs had he or she survived." The court further noted that "plaintiffs' damages theory is premised not on the contributions that [the decedent's] heirs would have enjoyed during his continued lifetime, but on the tax benefits that they would have achieved as a result of his deferred death." 216 N.J. at 505. This, the court held, counters the legislature's intent and the ample case law upon which damages in wrongful death cases have been based.

While the Supreme Court has not shied away from an expanding the Wrongful Death Act (*see, e.g., Green v. Bittner*, 85 N.J. 1), the court's clear mandate in *Beim* is that such losses must be based on the contributions the decedent would have made while alive, and not the estate's tax liability associated with his premature death.

Pending Decisions

In addition to the opinions summarized above, the New Jersey Supreme Court has heard argument in a handful of other tort/personal injury cases. Decisions in those cases are expected soon. Some of the more significant matters include the following:

• *Complying with a federal regulation as setting the appropriate standard of care*

In *Wayne Davis v. Brickman Landscaping*, a wrongful death suit resulting from a fire in a hotel, the central issue before the court is whether a federal regulation can serve as the defendant's standard of care.

A cigarette ignited the fire in a hotel where the plaintiff and her two children were staying, trapping them in their suite. Tragically, both children died, and the plaintiff sustained serious injuries. The plaintiff sued numerous parties, including those that had inspected the sprinkler system, alleging that the defendants violated the industry standard of care by failing

to note in their inspections that there was no sprinkler system in the storage closet underneath the stairwell where the plaintiff's suite was located. While National Fire Protection Association (NFPA) regulations established standards for inspecting and maintaining sprinkler systems, those regulations did not explicitly require that there be a sprinkler in the storage closet. The plaintiff, however, presented testimony that the standard of care in the industry, in fact, required a sprinkler in the storage closet.

The trial court granted summary judgment to the defendants, finding that their compliance with the NFPA regulations was sufficient to show that they had not acted negligently. The plaintiff appealed, and the Appellate Division reversed, explaining that compliance with safety regulations alone is not dispositive on the issue of negligence, and the standard should be one of reasonable care, which is a fact question for a jury.

• *Adverse inference when a party fails to call a medical expert*

In *Washington v. Perez*, an auto accident case, the plaintiff alleged that the defendant had negligently operated his bus, causing the plaintiff's injuries. The plaintiff sued the bus driver as well as the bus company. The defense retained two medical experts whose reports were produced during discovery. However, the defense did not call either expert to testify at trial. Upon the plaintiff's request, the trial court instructed the jury that if they found that the medical experts were witnesses who naturally would be expected to testify at trial, the jury could draw an adverse inference that their testimony would have been unfavorable for the defense from the fact that they were not called to testify. The jury returned a verdict for the plaintiff, awarding damages for pain, suffering and economic losses.

The defendants appealed, claiming that the trial court improperly gave the adverse inference charge. The Appellate Division agreed, reversed the jury verdict and remanded for a new trial. In doing so, the Appellate Division outlined the four factors that courts have considered in deciding whether an adverse inference charge is appropriate. First, the uncalled

witness must be peculiarly within one party's control, such that the other party would not be able to call him or her if desired. Second, the witness must be available, both practically and physically. Third, the court must consider whether the testimony will elicit relevant and critical facts at issue. Fourth, the court must decide whether the testimony appears to be superior to other testimony on the fact at issue.

According to the Appellate Division, the instruction on the adverse inference was in error, because, while the witnesses were available physically and practically, and their testimony likely would have elicited relevant facts at issue, the other two factors were not present. Therefore, the Appellate Division held that the trial court should not have given the adverse inference charge. In giving the charge, the court noted that the defendant's case was palpably harmed because the instruction gave authority to the plaintiff's argument about the missing witnesses, and created unfair prejudice against the defendants.

• *Scope of remand for new trial*

In *Henebema v. South Jersey Transportation Authority and New Jersey State Police*, the issues before the Supreme Court include: (1) defining the act of a public entity as either ministerial or discretionary, thus impacting the standard of care; and (2) whether a retrial should involve both causation and damages, or just damages.

The underlying suit involved a series of auto accidents that occurred during poor weather conditions on the Atlantic City Expressway. As a result of the accidents, the plaintiff lost her leg. She sued the South Jersey Transportation Authority and the New Jersey State Police, alleging that emergency personnel were not properly dispatched to the scene of the accident, and that state resources were improperly allocated during this emergent situation.

At trial, the judge instructed the jury that the acts of the public entity defendants were ministerial in nature and, as a result, pursuant to the New Jersey Tort Claims Act, the standard of care to apply to their conduct was one of ordinary negligence. The jury found that the defendants were negligent and awarded the plaintiff

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over \$8 million in damages. The Appellate Division reversed, finding that it was for the jury, not the court, to determine whether the acts in question were “ministerial” or “discretionary,” in which case the standard of care under the Tort Claims Act would be “palpably unreasonable,” a much higher burden for the plaintiff to meet. The Appellate Division held that by taking the question away from the jury and instructing only as to ordinary negligence, the trial court committed reversible error. The Appellate Division remanded

on the issue of liability alone. Because the question of damages was separate from the issue of liability, the court found that a new trial on damages was not warranted.

The Supreme Court is considering whether, during the retrial, issues relating to proximate cause and comparative negligence must be re-litigated. At oral argument, defendant South Jersey Transit Authority argued that these issues are not separable from the question of the standard of care, and thus must be tried again. The plaintiff, however, stated that the

issue as to whether the standard of care should be ordinary negligence or palpably unreasonable conduct is separable from all other issues, and, as a result, only this one narrow question should be presented at retrial.

With opinions in these cases still to come in the Supreme Court’s final weeks of its term, the court’s work in the areas of tort and personal injury law remains unfinished. Without question, however, these decisions will impact trial strategy for both plaintiffs and defendants. ■