

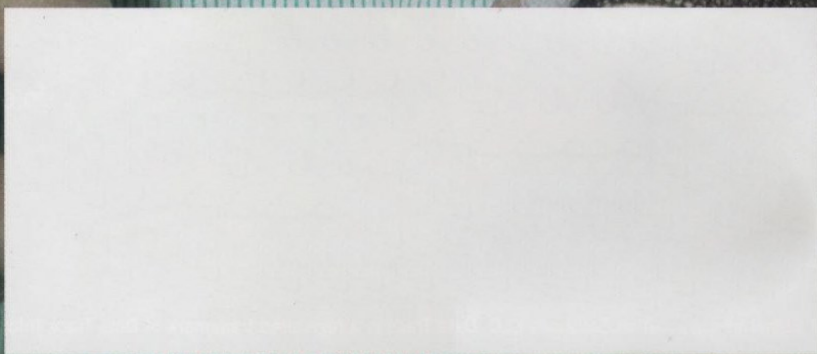
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PERSONAL INJURY LAW

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***Scafidi*—Where Do We Go From Here?**

by David M. Fried

The elements in a medical malpractice case do not materially differ from other personal injury cases, all of which require proof that the defendant breached a duty to the plaintiff, and that the breach of duty was a proximate cause of the plaintiff's injury or death. However, this normally straightforward analysis differs considerably, and becomes much more confusing, in a medical malpractice case where the plaintiff had a pre-existing condition that worsened because it was either not diagnosed, or was not treated properly.

To illustrate, imagine a patient who presents to a physician, unaware that she has cancer. As a result of medical negligence, the cancer remains undiagnosed and untreated. Much later, after the cancer has progressed, the correct diagnosis is made and treatment initiated. The proofs show that had the cancer been diagnosed and properly treated at the initial presentation, there was a 45% chance of cure. However, by the time the diagnosis was made and treatment initiated, the cure rate was only 15%, and the treat-

ment options were more invasive, painful and debilitating. The patient died during the pendency of litigation, due to complications related to this cancer. At trial, the question becomes whether the underlying condition alone (the cancer) caused the death, whether the medical negligence in failing to diagnose and provide adequate treatment was the sole proximate cause of death, or if some combination of the two was the proximate cause of the death. When the jury finds the third option is applicable, that a combination of these factors caused the death, the question becomes even murkier because it requires finding the proper method to evaluate each of the factors that contributed to the plaintiff's death, including the responsibility of the medical provider.

Courts have long grappled with these concepts. Our case law has attempted to find the proper balance between the import of the pre-existing condition, and the responsibility of the provider when the latter's negligence resulted in a worse outcome.

The Evolution of *Scafidi*

The initial analysis of this unusual subset of cases resulted in an attempt to both define the issues and fashion a reasonable remedy. That analysis has evolved and been refined through numerous decisions that have attempted to establish clear and reasonable rules. The first cases to grapple with this concept acknowledged that a different, lesser standard should be applied, resulting in the creation of a “substantial factor” test. Subsequently, the Supreme Court, in *Scafidi v. Seiler*, and later, *Verdicchio v. Ricca*, clarified the “substantial factor” standard as follows:

“The stricter ‘but for’ standard presupposes that a ‘defendant’s negligence began a chain of events leading to the plaintiff’s injury,’ while conversely, ‘the substantial factor test requires only that the physician’s deviation, in the context of the pre-existent condition, ‘was sufficiently significant in relation to the eventual harm.’”

At the time, *Scafidi* was heralded as a model to fairly address these issues and ameliorate the potentially harsh results plaintiffs faced due to this otherwise difficult, confusing causation analysis. There was widespread belief that *Scafidi* had clarified the decreased burden of the “substantial factor” test. Further, *Scafidi* provided a two-pronged approach to the evaluation of both the causation and damages elements of these claims that was intended to simplify this complicated issue for jurors: (1) Did the negligent treatment increase the risk of harm posed by a pre-existing condition; and (2) was the increased risk of harm a substantial factor in producing the ultimate result. For a jury to find that a plaintiff had met their burden of proof

on causation, the substantial factor test required finding that the negligence was “sufficiently significant in relation to the eventual harm.”

Scafidi then went on to address the proper measure of damages once the plaintiff met this burden of proof on the substantial factor causation test. There was recognition that since a tortfeasor should be charged only with the value of the interest she destroyed, the defendant was entitled to have the total damages apportioned between the pre-existing condition and that actor’s negligence. Significantly, the *Scafidi* damages analysis shifted the burden of proof to the defendant to prove that the damages were capable of apportionment, and how they should be apportioned to the underlying, pre-existing condition as contrasted to the lost chance caused by the negligence.

Difficulties Applying the *Scafidi* Analysis

Unfortunately, *Scafidi* did not provide the clear path that had been anticipated. Subsequent cases have attempted to more clearly define which party has the appropriate burden and the process for addressing it, but this issue has proved to be a sticky wicket for all. It has been difficult to adequately define the term “substantial factor” for juries, which blends and seems to confuse the concept of “increased risk” with the question of the extent to which a defendant’s negligence caused the result. A slightly modified version of this instruction was ultimately adopted as the Model Civil Jury Charge 5.36E.

Part of the confusion stems from *Scafidi*’s attempt to delineate “increased risk” and “lost chance.” All too often, the two steps, which were completely separate under *Scafidi*, become inter-

twined. Returning to our illustration, the risk of death from the underlying cancer, if properly diagnosed and treated, was 55%, but since there was no treatment, or improper treatment, the risk at diagnosis was 85%. Death then occurred making the risk of death a 100% certainty. Courts and juries have struggled with the question of whether the defendant’s negligence was a substantial factor resulting in death, and if so, how to apportion the damages between the chance of survival that was lost due to the defendant’s negligence from the risk that death would have occurred with proper diagnosis and treatment. This struggle seems to have resulted in what has appeared to be unusual and inconsistent verdicts.

Frequently, this struggle is often reflected in jury verdicts that are sometimes unexplainable where the jury is presented with an underlying condition that carries more than 50% risk of death, even with proper treatment, and they are asked to evaluate whether a defendant health care provider’s negligence increased the already considerable risk. In our example, we pose an underlying risk of 55% compared to a risk at the time of actual diagnosis of 85%, and where death had already occurred by trial. Jurors may agonize over whether the risk attributable to the negligent doctor is 100%, since the patient has died by the time of trial, or 85%, the likelihood of death at the time of diagnosis, or some other formula involving the likelihood of death when the patient first presented (55%).

While there may not be a universally accepted answer to that complicated fact pattern, it seems jurors become confused, when trying to consider and determine the allocation of whether the risk attributable to the delay was a sub-

stantial factor, and/or whether that risk was sufficiently increased to allow for an award of damages. Where jurors are confused by what appears to be intertwined concepts, their verdicts become unpredictable, a problem that is likely due to an inability to understand and apply this difficult concept, an outcome that betrays the clearly delineated process envisioned by *Scafidi*.

Burden Shifting- A Difficult Jury Issue.

There have been several attempts to resolve these issues with changes to the Model Jury Charge (most recently in 2010) in an attempt to simplify this process. That change eliminated the substantial factor part of the analysis, and made other changes which, unfortunately, had the effect of distorting the process instead of streamlining it. This change added further confusion, as was recognized in the *Flood* decision.

Certainly, there are several concepts at work in this type of analysis. In addition to the already difficult concept of determining the harm due to the underlying condition as compared to the harm from the delay or inadequate treatment, there is also a burden-shifting element that, until recently, had not been clearly explained. The *Flood* court addressed this by stating:

"[A] plaintiff's proximate cause burden remain[s] two-pronged, i.e., that the deviation increased the risk of harm and the increased risk was a substantial factor that led to the ultimate result. Once that burden is met, the defendant's ability to apportion damages to even a small percentage of responsibility does not negate the jury's proximate cause finding in the first instance. Such a finding only limits the damages for which the defendant is responsible."

It seems, therefore, that the jury must be clearly informed that the plaintiff's burden is to prove there was a deviation which substantially increased the risk of harm, but once plaintiff has met that burden, the defendant has the duty to prove what portion of that harm pre-existed the negligence.

Based on the evolution of cases in this area, most recently with *Flood*, it seems we are honing in on a clearer understanding of the concepts involved and the burdens to the parties. However, it is necessary to give clearer guidance, and instructions, to juries deciding these complex matters and to provide them with a road map, in the form of clear, understandable jury interrogatories that will allow them to apply the proper analysis to the already difficult factual, and medical issues presented at trial.

Without a clear explanation of this burden shift, juries may remain confused and mistakenly believe that the plaintiff, not the defendant, bears the burden of proving the allocation of damages. This misunderstanding can lead juries to conclude that the plaintiff has not introduced adequate proof of the proper apportionment of damages, when that duty belongs to the defendant, or to improperly find that plaintiff has not carried their burden of proof on the substantial factor question.

Furthermore, without a clear explanation of the distinction between the causation test and the apportionment of damages, juries can easily confuse causation and damages. Where the proofs regarding what constitutes an increased risk and those establishing negligence as a substantial factor become confused with the proofs on the possibility, and proper manner, of apportioning damages, jurors can find them-

selves detoured, leading to the re-analysis of the substantial factor test as a method of determining apportionment. Where this circular reasoning is applied, it leaves jurors with the mistaken belief that plaintiff is required to provide that analysis. The risk is that juries will conclude that in order for an increased risk to be a substantial factor in bringing about the patient's harm, the increase must rise to a particular number or percentage, an outcome explicitly disavowed under the *Scafidi* line of cases. As a result, verdicts may distort the application of the law and may not reflect the actual proofs presented at trial. The end result is exactly the outcome *Scafidi* attempted to avoid, an unwarranted, and harsh result for the injured plaintiff.

A great deal of this confusion seems to stem from a lack of understanding of when and how the burden of proof shifts. The plaintiff's burden is to prove the negligence increased the risk of harm, and was a substantial factor in bringing about the end result, with proof that the increased risk was more than just a remote, or unlikely, factor. Once the plaintiff proves these elements, the burden then shifts to the defense. The difficulty is in the failure to recognize that the burden shifts to defendants at that point. Part of this difficulty occurs because the defense also has the traditional opportunity to attack plaintiff's proofs of increased risk and that the increased risk was more than just a remote or unlikely factor.

Where the jury finds that the negligence did increase the risk, and it was a substantial factor, there is a great deal of confusion regarding the burden of proving what portion of the damages were due to defendant's negligence,

and the proper allocation of damages. It seems that confusion, and inconsistent results stem from the failure to appreciate that it is the defendant's burden to prove how much, or how little, the risk was actually increased. Certainly, our system does not work properly if the plaintiff is penalized for the defendant's failure to adduce the requisite proofs of this allocation, simply because the jury does not understand it is the defendant who carries this burden. It seems there has been confusion in this area, both in when and how the burden shifts, and how to properly explain that shifting burden to the jury, and as a result, there are verdicts that do not truly represent the proofs or the findings of the jury.

Where Do We Go From Here?

Our challenge is always to provide juries with fair and understandable legal principles, to enable them to reasonably comb through the proofs, make their factual findings, and then have the opportunity to understandably apply the law to those facts. Therefore, it is necessary to create a model that clearly explains the burden of proof borne by the plaintiff, and if that burden is met, when and how that burden then shifts to the defense. It is also necessary to reduce, and hopefully eliminate, juror confusion when the burden, which has shifted to the defense, has not been met, so plaintiffs are neither overly compensated nor unfairly undercompensated.

In fact, in May, 2014, our Supreme Court addressed the question of how to address the related situation where a case presents questions regarding the concept of "avoidable consequences." What is instructive is that the Court specifically recognized that where a case involves competing and complex

issues with potential for shifting of the burden of proof, it is necessary to create specific clear jury instructions as well as interrogatories, tailored to assist the jury in understanding these matters.

Conclusion

In sum, as trial lawyers, in cases with the potential for a shifting of the burden of proof, we must do a better job delineating the responsibility of each party. We must also do a better job explaining that if the proofs are inadequate on an issue, it is important to understand which party had that burden, and to consider the failure to meet the burden in the proper context. We must also give instructions that are clear enough to avoid a jury becoming caught up in the type of circular reasoning that seems to have caused confusion in *Scafidi* type cases. This requires the thoughtful preparation of clear and specific jury instructions as well as specifically tailored jury interrogatories. If we can provide that clear road map in our cases, verdicts will be more predictable and jurors will be better equipped to perform their already difficult tasks. In the end, we all benefit.

Endnotes

- i. Scott v. Salem Cnty. Mem'l Hosp., 116 N.J. Super. 29 (App. Div. 1971).
- ii. Id. at 34 (citing Rappaport v. Nichols, 31 N.J. 188, 203 (1959)). Although this provided necessary guidance on the proper causation analysis and burden of proof, it did not address the proper way to apportion the damages that plaintiff was entitled to recover from the defendant.
- iii. Scafidi v. Seiler, 119 N.J. 93, 102 (1990).
- iv. Verdicchio v. Ricca, 179 N.J. 1, 24 (2004).
- v. Scafidi, supra, 119 N.J. at 102.
- vi. Id. at 112.
- vii. Fletcher v. St. Joseph Regional Medical Center, No. 10-1499, 2013 U.S. Dist. LEXIS 54870, at 32-34 (D.N.J. Apr. 15, 2013), recon. denied, 2013 U.S. Dist. LEXIS 86000 (D.N.J. June 19, 2013)

(holding that defendant was not entitled to have the plaintiff's damages apportioned between the pre-existing condition and the defendant's negligence because they had failed to carry their burden of proof and "did not introduce any evidence as to which portion of [plaintiff's] damages were attributable to her preexisting condition, breast cancer, and which were due to [defendant's] negligence.") ("[T]here was no evidence introduced at trial which would contradict or otherwise call into question [plaintiff's expert's] credible testimony that as a result of the delay in diagnosis, Plaintiff's survival rate over a ten-year period is now zero. Accordingly, Defendant does not meet its burden of demonstrating that it is entitled to a reduction in accordance with Scafidi.").

- viii. 172 N.J. 266, 280-90 (2002).
- ix. Ibid.
- x. Flood v. Aluri-Vallabhaneni, 431 N.J. Super. 365, 384-85 (App. Div. 2013).
- xi. Ibid.; Komlodi v. Picciano, _____ N.J. _____, _____ (May 20, 2014) (slip-op at 43-45) (most recently describing the proper causation, and damages, analysis to apply to a case where a patient has a preexisting condition that combines with a physician's negligence to increase the risk of harm to the patient.).
- xii. Flood, supra, 431 N.J. Super. at 382.
- xiii. Battenfeld v. Gregory, 247 N.J. Super. 538, 546 (App. Div. 1991) ("We are convinced that the concept of substantial factor is not subject to quantification. . . .").
- xiv. Komlodi, supra, _____ N.J. at _____ (May 20, 2014) (slip-op at 36, 48).

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