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# Civil Practice Update

## *All the Law That's Fit to Print*

by Michael J. Epstein

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**How Does a Plaintiff in a Medical Malpractice Case Prove that a Doctor's Deviation Caused an Injury When the Plaintiff Has a Pre-existing Condition?** For those of you who said, I dunno, join the club. Since the Supremes decided Scafidi v. Seiler, 119 N.J. 93 (1990), the Supreme Court and the Appellate Division have repeatedly altered plaintiff's burden of proof on this issue of causation because it is difficult to understand, and the charge and jury interrogatories are misleading to jurors. In Scafidi, the Supremes made it clear that the burden of proof on causation was supposed to be lower in cases involving pre-existing conditions, but the recent line of cases makes it clear that the burden is now greater than one for the standard proximate cause. Although this topic is complex and hard to fit into this column, it is an important issue so we will try to summarize the issue. Essentially, in pre-existing condition cases, the plaintiff has to show that the defendant's deviation increased the risk of harm posed by the pre-existing condition and whether the increased risk was a substantial factor in producing the ultimate result. What does that mean? Recently, in

Flood v. Aluri-Vallabhaneni, A-4248-11T2, slip op. June 13, 2013, the Appellate Division explained that the jury interrogatories in the Model Charges are wrong because they do not accurately reflect the law. Basically, the panel found that after the deviation question, two questions need to be asked on the issue of proximate cause: did the deviation increase the risk of harm, and was the increased risk a substantial factor in the ultimate harm? The problem is that the Supremes seemed to have approved the current model of one question in a previous case. Now we are going to show the complications – substantial is not defined in the charge, but 3% has been deemed sufficient. In addition, the defense has the burden of proving an apportionment between the pre-existing condition and the increased risk. So, where are we other than blurry eyed and exhausted? The law is confusing because the injury in these cases is an increased risk, which by definition is inconsistent with substantial factor. A jury can easily find that plaintiff showed that the defendant's deviation increased the risk, but not find a substantial factor because of some artificial number in the jury's head about what substantial is – without

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an explanation in the charge, juries have no idea what substantial means. The question should simply be did the deviation increase the risk of harm, and then the burden should shift to the defendant to allocate the percentage. Alternatively, the question should be was the deviation a substantial factor in increasing the risk of the ultimate harm. That is easier to understand and far less confusing. Then the burden shifts to defendant to apportion. We firmly believe that the Supremes must address this complicated and confusing law so that the jury instructions and questions are clear to avoid verdicts that do not accurately reflect the deliberations.

**Ethics: Don't Press Clients to Drop Ethics Complaint.** In In re Pocaro, the Supremes adopted the DRB's recommendation to censure an attorney for attempting to have a client withdraw an ethics complaint by trying to horse trade a withdrawal for not filing a lawsuit against the client. The Supremes concluded this conduct is improper and warranted a sanction..

**COURT SCHEDULE:** Judge Polifroni has

advised the bar that he decided to alter the trial schedule for the month of August as follows: (1) there will be NO jury trials the last two weeks of August, and (2) for the week of August 12<sup>th</sup>, Judge Polifroni will have jury trials for those lawyers who pick to try their cases that week. So, please choose August 12 for short trials that can be moved that week. We thank Judge Polifroni for the reprieve as it is a well-needed opportunity for lawyers and judges to re-charge the batteries. Enjoy the rest of the summer!

**Good-bye and Thank you.** We here at the Civil Practice Update would like to thank Judge Conte for his years of service and wish him well on his next venture. Judge Conte has always been a supporter of the Bergen Bar as well as this column. We will miss appearing before Judge Conte!

**Contributions.** If you have an interesting case, rule interpretation, ethics issue, or civil-related story, please contact me at (201) 845-5962, (f) (201) 845-5973, or e-mail [mjepstein@theepsteinlawfirm.com](mailto:mjepstein@theepsteinlawfirm.com).

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