

5.50E PRE-EXISTING CONDITION — INCREASED RISK/LOSS OF CHANCE — PROXIMATE CAUSE (Approved 10/2014; Revised 04/2018)

NOTE TO JUDGE

In a series of cases, including *Fosgate v. Corona*, 66 N.J. 268 (1974); *Evers v. Dollinger*, 95 N.J. 399 (1984); *Scafidi v. Seiler*, 119 N.J. 93 (1990); *Gardner v. Pawliw*, 150 N.J. 359 (1997), and most recently *Reynolds v. Gonzales*, 172 N.J. 266 (2002), the New Jersey Supreme Court has established a modified standard of proximate cause for use in certain medical negligence cases. The following charge is to be used only in cases where it is alleged that the plaintiff has a pre-existing condition which, by itself, had a risk of causing the plaintiff the harm he/she ultimately experienced in this case. Under the sequence of this charge and accompanying interrogatory, the plaintiff has to prove (1) a deviation from accepted standards of medical practice, (2) that the deviation increased the risk of harm posed by the pre-existing condition, and (3) that the increased risk was a substantial factor in causing the plaintiff's ultimate injury. The defendant is responsible for all of plaintiff's injuries unless the defendant can prove (4) what portion of plaintiff's injuries were the result of the pre-existing condition.

Furthermore, in *Reynolds, supra*, the Supreme Court held that failure to specifically explain the charge in the context of the facts of the case was reversible error. Therefore, to assist trial judges and practitioners this Model Civil Jury Charge uses typical medical negligence theories as illustrative examples.

In cases involving an allegation that the failure to perform a diagnostic test increased the risk of harm from a pre-existing condition, the trial court must also give that portion of the charge derived from *Gardner, supra*, as indicated below.

Additionally, in *Komlodi v. Picciano*, 217 N.J. 387 (2014), the Supreme Court addressed the misapplication of a *Scafidi* charge where the defenses are based on avoidable consequences and/or superseding/intervening causes and not a pre-existing condition.

In this case, the Plaintiff had a pre-existing condition which, by itself, had a risk of causing the plaintiff the harm he/she ultimately experienced in this case. However, the plaintiff contends that he/she lost the chance of a better outcome because of the Defendant's deviation from accepted standards of medical practice. *[Insert here a detailed factual description of the case, such as, (1) the plaintiff contends that she told the defendant that she felt a lump in her breast in January of 2000, that the defendant was negligent in not ordering a mammogram or other test for cancer until January 2001, and that as a result of the delay the cancer spread to her lungs, liver and brain, and is now likely to cause her death; or (2) the plaintiff contends that her husband went to the defendant hospital emergency room after suffering a heart attack. The plaintiff further asserts that the defendant negligently misdiagnosed her husband's heart attack, and sent her husband home, where he died.]*

If you determine that the defendant deviated from accepted standards of medical practice you must then consider whether the Plaintiff has proven that the deviation increased the risk of harm posed by the Plaintiff's pre-existing condition.¹ You must then consider whether the Plaintiff has proven that the increased risk of harm was a substantial factor in producing the ultimate harm or injury. To be a substantial factor, the defendant's deviation must play a role that is both relevant and

¹ See *Reynolds v. Gonzales*, *supra* at 282.

significant in bringing about the ultimate injury. A defendant's deviation need not be the only cause, or even a primary cause, of an injury for the deviation to be a substantial factor in producing the ultimate harm or injury. You, the jury, may decide that any percentage increase in the risk of harm is substantial. However, if the deviation was only remotely or insignificantly related to the ultimate harm or injury, then the deviation does not constitute a substantial factor.²

If under all of the circumstances here [*here insert specific circumstances such as the delay in the diagnosis of the breast cancer or the heart attack*] you find that the plaintiff may have suffered lesser injuries if the defendant did not deviate from accepted standards of medical practice, then the defendant is liable for the plaintiff's increased injuries. On the other hand, if you find that the plaintiff would have

² *Reynolds, supra* at 288. The determination of what constitutes a "substantial factor" was analyzed in *Velazquez v. Jiminez*, 336 N.J. Super. 10 (App. Div. 2000), *aff'd*, 172 N.J. 240 (2002), where the jury found that 5% of the ultimate injury resulted from a pre-existing condition, that a settling defendant contributed to 92% of the ultimate injury and that the non-settling defendant was 3% responsible. The jury awarded damages totaling \$2,500,000.00. The trial judge then ruled, *sua sponte*, that the non-settling defendant was not negligent as a matter of law. In reversing, the Appellate Division held that the jury's finding that a defendant was 3% negligent satisfies the substantial factor test announced in *Scafidi, supra*. The *Velazquez* court cited *Dubak v. Burdette Tomlin Memorial Hospital*, 233 N.J. Super. 441, 452 (App. Div.), *certif. denied*, 117 N.J. 48 (1989) which held that a finding of 10% fault satisfied the substantial factor test. *Velazquez v. Jiminez, supra* at 31-32. If there was testimony regarding specific percentages, it may be appropriate for the court to further tailor the charge at this point to explain to the jury that a specific percentage increase in the risk of harm can be considered by the jury to be substantial, and the court is permitted to use actual percentages testified to by the experts as examples of what is substantial, but the court is not required to do so.

suffered the same injuries even if the defendant did not deviate from accepted standards of medical practice, then the defendant is not liable to the plaintiff.³

[Add where the allegation is that the failure to perform a diagnostic test increased the risk of harm:]

If you determine that the defendant deviated from accepted standards of medical practice in not having a diagnostic test performed, in this case [*here indicate the test(s)*], but it is unknown whether performing the test would have helped to diagnose or treat a pre-existent condition, the plaintiff does not have to prove that the test would have resulted in avoiding the harm. In such cases the plaintiff must merely demonstrate that the failure to give the test increased the risk of harm from the pre-existent condition. A plaintiff may demonstrate an increased risk of harm even if such tests are helpful in a small proportion of cases.⁴

³ In *Gonzalez v. Silver, et al.*, 407 N.J. Super. 576, 588 (App. Div. 2009), the court noted: “...where a physician defendant’s negligence combines with a patient-plaintiff’s preexistent condition to cause harm, it is reversible error to instruct the jury on the “but for” proximate cause standard either alone or in conjunction with the substantial factor test.”

⁴ See *Gardner v. Pawliw, supra* at 387. In *Gardner v. Pawliw, supra*, the Supreme Court applied the increased risk/substantial factor test to the failure to perform diagnostic testing. In that case, the plaintiff’s high risk pregnancy was being managed by the defendant. 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 preexistent 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,

[In all cases continue here:]

If you find that the plaintiff has proven that the defendant deviated from accepted standards of medical practice and that the deviation increased the risk of harm posed by the Plaintiff's pre-existing condition and was a substantial factor in producing the ultimate harm/injury, the plaintiff is not required to quantify or put a percentage on the extent to which the defendant's deviation added to all of the

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.

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 [the defendant's] failure to perform the NST and BPP tests increased the risk that the fetus would die *in utero* . . . [the plaintiff's expert] answered affirmatively when asked whether he could say to a reasonable degree of medical probability that because [the defendant] failed to perform either an NST or a BPP test there had been an increased risk that a condition that could cause the fetus's death would not be recognized. Accordingly, [the 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 v. Pawliw, *supra* at 388-389. *See also, Greene v. Memorial Hospital*, 299 N.J. Super. 372 (App. Div. 1997), *remanded*, 151 N.J. 67 (1997), *rev'd*. 304 N.J. Super. 416 (App. Div. 1997).

plaintiff's final injuries. In cases where the defendant's deviation accelerated or worsened the plaintiff's pre-existing condition, the defendant is responsible for all of the plaintiff's injuries unless the defendant is able to reasonably apportion the damages.⁵ If the injuries can be so apportioned, then the defendant is only responsible for the amount of ultimate harm caused by the deviation.

For example, if the defendant claims that: [(1) *the plaintiff would still have suffered the spread of her cancer even if the diagnosis had been made in January 2001; or (2) that the plaintiff's husband still would have died of a heart attack even if treated earlier*], and if the defendant can prove that an apportionment can be reasonably made, separating those injuries the plaintiff would have suffered anyway, even with timely treatment, from those injuries the plaintiff suffered due to the delay in treatment, then the defendant is only liable for that portion/percentage of the injuries the defendant proves is related to the delay in treatment of the plaintiff's original condition. On the other hand, if you find that the defendant has not met the defendant's burden of proving that plaintiff's injuries can be reasonably apportioned, then the defendant is responsible for all of the plaintiff's harm or injury.

⁵ If there is no evidence submitted as to apportionment of damage, then the defendant is responsible for the full injury and all damages. *See, Fosgate v. Corona, supra. See also, Lanzet v. Greenberg*, 126 N.J. 168 (1991), where the Supreme Court reiterated that the defendant has the burden of separating the damages attributable to the pre-existing condition from the damages attributable to the negligence. *See also, Ginsberg v. St. Michael's Hospital*, 292 N.J. Super. 21 (App. Div. 1996), and *Golinsky v. Hackensack Medical Center*, 298 N.J. Super. 650 (App. Div. 1997). In such cases the judge should eliminate those paragraphs from the charge relating to apportionment as well as eliminate from the verdict sheet questions relating to apportionment.

When you are determining the amount of damages to be awarded to the plaintiff, you should award damages for all of the plaintiff's injuries. Your award should not be reduced by the percentages. The adjustment in damages, which may be required, will be performed by the court.

NOTE TO JUDGE

The trial court should give an ultimate outcome charge on the apportionment question in conjunction with a *Scafidi* charge. *Fischer v. Canario*, 143 N.J. 235, 251 (1996), citing *Roman v. Mitchell*, 82 N.J. 336, 345 (1980). Noting that the purpose of an ultimate outcome charge is to inform the jury about the impact of its decision, the *Fischer* Court explained that juries should understand the impact of their findings. Therefore, the *Fischer* Court concluded that the trial court's failure to give the ultimate outcome charge, as reflected in Model Civil Jury Charge 7.31, was error.

CHARGE 5.50E – INTERROGATORIES

(Approved 04/2014)

JURY INTERROGATORIES

1) Has the Plaintiff proven by the preponderance of the evidence that Dr. _____ deviated from accepted standard of medical practice?

Yes _____ If your answer is “Yes” proceed to question 2.

No _____ If your answer is “No” return your verdict for the defendant.

2) Has the Plaintiff proven that Dr. _____’s deviation from accepted standard of medical practice increased the risk of harm posed by the plaintiff’s pre-existing condition?

Yes _____ If your answer is “Yes” proceed to question 3.

No _____ If your answer is “No” return your verdict for the defendant.

3) Was the increased risk a substantial factor in causing the Plaintiff’s ultimate injury?⁶

Yes _____ If your answer is “Yes” proceed to question 4.

No _____ If your answer is “No” return your verdict for the defendant.

4) Has the Defendant met his burden of proving that some portion of the ultimate injury was a result of the pre-existing condition?

Yes _____ If your answer is “Yes” proceed to question 5.

No _____ If your answer is “No” proceed to question 6.

5) State in percentages, what portion of the ultimate injury is a result from:

A. The pre-existing condition. _____ %

B. Dr. _____’s deviation from the accepted standard of medical practice _____ %

Total 100 %

The total must equal 100%.

⁶ See *Flood v. Aluri-Vallabhaneni*, 431 N.J. Super. 365 (App. Div. 2013).

- 6) What amount of money would fairly and reasonably compensate the plaintiff for his/her injuries?⁷

Total Damages: \$ _____

- 7) What amount of money would fairly and reasonably compensate the plaintiff's spouse [per quod claimant] for his/her loss of services? \$ _____

⁷ The court may include specific line items for specific categories of damages, such as past/future pain and suffering, medical bills, lost income damages, etc., as may be justified by the evidence.