

Utilizing causation

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The medical community is probably well aware of the importance of causation in health care liability claims. To establish recovery, the claimant must prove 1) the existence of a duty and the specifics of the duty; 2) breach of that duty by the health care provider; 3) resulting injury to the claimant; and 4) a reasonably close causal connection between the breach of duty in question and the claimant's injuries (1). These last 2 elements constitute what is referred to as causation in a legal claim. Causation is of great concern to both sides of a lawsuit and is often one of the health care provider's best defenses. If the claimant fails to establish causation, the health care provider will prevail. Given developing case law in the areas of causation and expert witness qualifications, we should not overlook this useful and potentially devastating defense. Health care provider defendants and expert witnesses should carefully consider causation issues in the claims in which they participate.

CAUSATION BASICS

The judicial resolution and analysis of causation issues in pretrial, trial, and posttrial motions involve consideration of 2 facets: 1) a causal nexus between the defendant's conduct and the occurrence sued upon; and 2) a causal nexus between the occurrence sued upon and the claimant's injuries (2).

The first facet, a nexus between the conduct at issue and the occurrence sued upon, is established by showing proximate cause (2). Proximate cause is part of the claimant's attempt to establish liability. The second facet constitutes damages; the claimant shows that he or she has compensable injuries.

The definition of proximate cause that is submitted to the jury at trial is as follows:

"Proximate cause," when used with respect to *Dr. Davis*, means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that *a physician* using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event (3).

The italicized parts of this definition are changed to reflect the defendant's name and specific specialty or area of practice.

This definition sets forth the 2 elements of proximate cause, cause in fact and foreseeability. In a health care liability claim, these elements must be established by reasonable medical prob-

ability. They cannot be established through conjecture, guess, or speculation (4, 5).

For cause in fact to exist, the health care provider's act or omission in question must be "a substantial factor in bringing about injury, without which the harm would not have occurred" (4, 5). This constitutes the first part of the proximate cause definition.

Foreseeability focuses on the broader policy issue of whether or not the defendant should be responsible for the claimant's injuries (6). Inclusion of this element in the definition of proximate cause represents recognition that "at some point in the causal chain, the defendant's conduct or product may be too remotely connected with the plaintiff's injury to constitute legal causation" (7). Essentially, this element requires the injury to be reasonably contemplated as a result of the defendant's conduct (8). Foreseeability is the part of the proximate cause definition that requires "that *a physician* using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom" (3). Foreseeability, however, requires more than "someone, viewing the facts in retrospect, theorizing an extraordinary sequence of events whereby the defendant's conduct brings about the injury" (9). The result must have been one that could be reasonably anticipated.

Let us not forget the second causation facet, in which the claimant must show "a causal nexus between the occurrence sued upon and the plaintiff's injuries." This element requires a demonstration by the claimant of the injuries caused by the events on which the suit is based. This is a necessary element because the claimant may only "recover damages for those injuries caused by the event made the basis of the suit." To establish this facet of causation, the claimant must 1) prove the event sued upon caused the claimant's damages, and 2) present evidence about the amount of damages he or she should recover. If the claimant does not show that the injuries at issue were caused by the occurrence that forms the basis of the suit, there is no recovery (10).

APPLICATION OF THE BASICS TO FACTS

To enhance understanding of these principles, let us look at some examples of how they have been applied in previous cases.

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The easiest way to examine the cause-in-fact element of the proximate cause nexus is to look at “loss-of-chance” claims. Loss-of-chance claims primarily involve claims of misdiagnosis or mistreatment in patients who suffered from cancer or some other disease process with a high rate of mortality. In these claims, the claimants submit that improper conduct deprived the deceased of whatever chance of survival he or she may have had.

The Texas Supreme Court addressed loss-of-chance claims in *Kramer v. Lewisville Memorial Hospital*. *Kramer* involved a claim for failure to make a timely diagnosis of cervical cancer in the decedent. Specifically, the claim stated that the hospital failed to properly interpret Pap smear slides. In their pleadings, the Kramers claimed that the hospital’s conduct caused “the significant and substantial reduction in the chance of saving” Mrs. Kramer’s life. The Texas Supreme Court refused to recognize loss of chance as a claim or basis for recovery under Texas law. The court focused on the need to establish that the defendant’s conduct was a probable cause of the outcome. For example, the court noted that in the absence of establishing liability based on the reasonable probability that the defendant’s conduct caused another’s death, it did not believe “a sufficient number of alternative explanations and hypotheses for the cause of the harm are eliminated to permit a judicial determination of responsibility.” It added, “Legal responsibility under the loss of chance doctrine is in reality assigned based on the mere *possibility* that a tortfeasor’s negligence was a cause of the ultimate harm” (11). For this reason, the court declined to recognize loss-of-chance claims. The court was saying that since the defendant’s conduct was not established to probably be the cause in fact of the death, no liability exists.

Some interesting background on the foreseeability element of proximate cause is provided by a case almost invariably analyzed by first-year law students. *Palsgraf v. Long Island R.R.* addressed whether the Long Island Railroad was responsible for some rather extraordinary events that took place at a train terminal in 1924. Ms. Palsgraf was on a platform waiting for a train to Rockaway Beach. Some distance away, a train was leaving. Two passengers were running to catch that train. One boarded easily. The other, carrying a package, looked as if he were about to fall as he jumped to board the train. A guard on the train reached to pull the passenger in, while another guard on the platform pushed the man in from behind. In the process, the package that the passenger was carrying fell onto the tracks. Unknown to the guards, this package contained fireworks. When the package hit the rails, the fireworks exploded. At the other end of the platform, scales were knocked over by the force of the explosion onto Ms. Palsgraf. Ms. Palsgraf sued the Long Island Railroad for her personal injuries. The issue submitted to the jury was whether the railroad was negligent in the manner in which it handled the passenger with the explosives. The jury found that the conduct was negligent, and judgment was entered in favor of Ms. Palsgraf for her injuries (12).

The case was appealed, with the crux of the matter being whether or not the railroad should be responsible for such an unexpected consequence of its actions. In deciding this matter in favor of the railroad, the court noted, “The risk reasonably to be perceived defines the duty to be obeyed.” Further, it noted, “By concession, there was nothing in the situation to suggest to the

most cautious mind that the parcel wrapped in newspaper would spread wreckage through the station.” The court found that notions of public policy did not favor the application of liability to the railroad in this instance. The injuries to Ms. Palsgraf were prospectively too remote a consequence of the conduct at issue for there to be any liability to Ms. Palsgraf for her injuries (12).

A more recent application of this reasoning to a health care claim involved the alleged misdiagnosis of terminal cancer in a patient. In this matter, a patient consulted her gastroenterologist for complaints of illness and abdominal pains. The doctor ordered an x-ray film, computed tomographic (CT) scans of the abdomen and pelvis, and a mammogram. After the x-ray and CT scans were done, the doctor advised the patient that she had cancer of the liver and peritoneum from metastatic breast cancer and had 3 to 6 months to live. He canceled the mammogram, believing he had already made the diagnosis. In the course of continuing treatment, biopsy results revealed that the patient had lymphoma, not metastatic breast cancer. Apparently, the actual prognosis was not so dire. During the time that had passed since the grim prognostication, the patient had sold her house, gifted personal possessions to her relatives and friends, made funeral arrangements, and even put her dog to sleep. Suit was filed (13).

In her suit, the patient claimed, among other things, that the doctor’s misdiagnosis caused her “to make ill-advised property dispositions.” She felt the doctor should be liable for her resulting economic losses. The appeals court found that the cause-in-fact element of proximate cause was met. This was established because the doctor’s opinion about her diagnosis and short-term survival were the substantial factor in bringing about the patient’s belief that she needed to dispose of her assets. The foreseeability element was another matter. The court held that the foreseeable risk of harm from the misdiagnosis of a patient’s condition was possible bodily injury. The economic damages sought by the patient were not within the type of harm that the doctor should have reasonably anticipated from his actions. Accordingly, the patient’s claims for economic losses were dismissed (14).

In looking at damages—the application of the second facet of the causation requirement—there is some overlap with the proximate cause discussion above. The requirement to prove that the occurrence sued upon caused the injuries at issue is really the cause-in-fact element of proximate cause. Legally, however, the fact that this must be established for 2 separate legal purposes is significant. For example, since this facet of causation is associated with the damages portion of a claimant’s claim and is not part of the claimant’s liability case, the defendant can contest this “damages” element, including the cross-examination of witnesses and the presentation of evidence, in an effort to rebut damage claims, even if he has defaulted or had his pleadings stricken (15). Thus, while the defendant cannot contest proximate cause in this situation, he can contest damages.

In showing the amount of damages suffered, the claimant must present evidence that separates injuries not caused by the conduct at issue. In *Texarkana Memorial Hospital v. Murdock*, a claimant’s award for \$500,000 in medical expenses was reversed and the claim remanded for retrial because this segregation was not done. In *Murdock*, the claimants sought damages for their child’s meconium aspiration at birth. In addition to injuries from that aspiration, however, the child had numerous congenital

abnormalities, such as the absence of certain portions of her brain. The jury awarded the family \$500,000 in medical expenses. The total bill for the child's hospitalization and treatment was \$748,710.44. On appeal, the defendant argued that this award was improper because the evidence did not establish that all of the child's medical expenses were the result of her meconium aspiration. The Texas Supreme Court agreed and held that the claimant suffered from different conditions, each from a different cause, and each required treatment. The court ruled that it was incumbent on the claimant to "prove which treatments were due to meconium aspiration and its effects, and the specific costs associated with those treatments sufficient to support a jury award of \$500,000 for medical expenses. Because they have failed to do so, we must reverse." The court was unmoved by the argument that the jury must have made the determination that certain expenses were unrelated because it did not award the full amount of the medical expenses incurred. Nonetheless, the court held that it was incumbent on the claimant to provide the jury with specific guidance in the form of expert testimony as to which specific treatment was provided for the meconium aspiration, as well as the costs of such treatment (16).

EXPANDING OUR HORIZONS

Review of these opinions illustrates that all facets of causation should be considered when evaluating, reviewing, and defending health care liability claims. As stated in the introduction, causation defenses can be devastating to a lawsuit. They can make a case with a strong liability defense almost unwinnable for the plaintiff and can make a case with poor liability facts defensible.

Consider some further examples. A patient undergoing medical or surgical treatment for a significant disease process suffers a terrible outcome. A claim follows. Based on the medical facts and knowledge, was the treatment provided lifesaving or merely life-prolonging? What survival statistics are associated with this disease at 3 and 5 years, even with unflawed treatment? Are they still <50%? If so, the patient would be likely to succumb to his disease in the near future regardless. Posture and defend this as a loss-of-chance case.

A patient's death is claimed to be the result of failure to provide a specific therapy. Has this therapy really been shown to prevent death in this situation? Do studies support such a contention? If not, use the *Daubert* requirement for reliable expert testimony to try to strike such contentions (17, 18).

Thrombus is found in a grafted coronary artery in a postsurgical arrest. Is this the result of a graft problem at surgery? Con-

sider other possibilities. Could it be due to low flow following a postoperative arrhythmia? Or due to cardiopulmonary resuscitation performed in response to a postoperative arrhythmia? Can these plausible explanations be excluded?

Lastly, a patient dies suddenly after anticoagulation therapy for a lower extremity occlusion. On autopsy, some blood is found in the pericardium. Is the death really due to tamponade? Can this be established by autopsy? What are other reasonable explanations? Can they be excluded?

As mentioned above, in all of these circumstances, keep in mind that the inability of your opponent to exclude other plausible explanations or to support his contentions with medical literature provides your counsel the opportunity to limit or eliminate the claimant's causation opinions through *Daubert* motions (17, 18). Thus, it is important to consider these issues.

The lesson, simply put, is to carefully consider causation issues when involved in legal matters. Consider whether the outcome is probably the result of the conduct in question. Would a different course of action probably change the end result? Are such contentions supported by studies? Do other causes exist? Can these be excluded? Remember, while attorneys who handle health care liability claims often have an extensive knowledge of medical issues and medicine, you are the physician. Think carefully and extensively about these issues and provide your attorneys with the benefits of your training, education, and knowledge.

1. *Price v. Hurt*, 711 S.W.2d 84, 86 (Tex. App.—Dallas 1986, no writ).
2. *Kirkpatrick v. Memorial Hospital of Garland*, 862 S.W.2d 762, 772 (Tex. App.—Dallas 1993, writ denied).
3. Pattern Jury Charge, Malpractice, Premises and Products, §50.1 (1998).
4. *Duff v. Yelin*, 751 S.W.2d 175, 176 (Tex. 1988).
5. *Bradley v. Rogers*, 879 S.W.2d 947, 953–954 (Tex. App.—Houston [14th Dist.] 1994, writ denied).
6. See *Wyatt v. Longoria*, 33 S.W.3d 26, 32 (Tex. App.—El Paso 2000, no writ).
7. *Union Pump v. Allbritton*, 898 S.W.2d 773, 775 (Tex. 1995).
8. *McClure v. Allied Stores of Texas, Inc.*, 608 S.W.2d 901, 903 (Tex. 1980).
9. See Restatement (Second) of Torts, Section 435(2) (1965).
10. *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 732 (Tex. 1984).
11. *Kramer v. Lewisville Memorial Hosp.*, 858 S.W.2d 397, 405 (Tex. 1993).
12. *Palsgraf v. Long Island R.R.*, 1162 N.E. 99 (N.Y. 1928).
13. *Wyatt*, 33 S.W.3d at 29.
14. *Ibid.* at 34.
15. *Kirkpatrick*, 862 S.W.2d at 773–774.
16. *Texarkana Memorial Hosp. v. Murdock*, 946 S.W.2d 836, 840–841 (Tex. 1996).
17. See *Helm v. Swan*, 2001 WL 716423 (Tex. App.—San Antonio).
18. Thornton RG. Judicial decision-making in litigation. *BUMC Proceedings* 2000;13:94–96.