LEGAL MALPRACTICE AND PROXIMATE CAUSATION

Whose Burden is it Anyway?

by Marshall D. Bilder and Jason S. Feinstein

Since all professional negligence cases derive from tort law, they all share certain characteristics, whether the professional being sued is a doctor, lawyer, accountant or engineer. The claimant must prove the existence of a duty, a breach of that duty, proximate causation and damages. However, the process by which a claimant goes about proving a claim for professional negligence varies depending on the type of professional being sued and the nature of the claim. In the area of legal malpractice, the method by which a claimant establishes a claim against an attorney, particularly the element of proximate causation, has evolved and still may be evolving.

Traditionally, a legal malpractice claimant was required to prove a suit within a suit in order to establish proximate causation. In the suit within a suit format, a plaintiff must present the evidence that would have been submitted at trial had no malpractice occurred. In other words, the legal malpractice plaintiff must prove two cases—the legal malpractice action against the defendant attorney, as well as demonstrating that the plaintiff would have prevailed in the underlying action in which the malpractice is alleged to have been committed. The suit within a suit approach aims to clarify what would have taken place *but for* the attorney's alleged malpractice.

The New Jersey Supreme Court increasingly has incorporated certain flexibility into the suit within a suit format. The Court held that a legal malpractice claimant was not necessarily required to prove the likelihood of success in the underlying action by presenting the same evidence that would have been offered in the underlying action. Instead, the Court recognized other alternatives to establish the proximate cause requirement, including the use of expert testimony.

Even under this flexible approach, the burden of establishing proximate cause remains with the legal malpractice claimant. While the Court has expressed an inclination toward flexibility in establishing proximate cause in legal malpractice cases, whether it is willing to depart from traditional notions of who bears the burden of proof in such cases remains to be seen. An understanding of the development of the case law in the area of proximate cause and the suit within a suit approach is needed in order to appreciate these issues.

Historical Background

Twenty-five years ago, New Jersey's Supreme Court established the framework for proving proximate causation in a professional negligence action against an attorney. The case of *Lieberman v. Employers Ins. of Wausau*[1] presented an uncommon claim of legal malpractice. Whereas in many legal malpractice cases the aggrieved client is a claimant or plaintiff in the original underlying action, the professional mishandling of which gives rise to the malpractice lawsuit, the aggrieved client in *Lieberman* was a defendant in the original suit—causing what the Court referred to as a "reversal of roles."[2]

[I]t is within the trial court's discretion to determine the manner in which a plaintiff in a legal malpractice case should present proof of proximate cause. Among the available alternatives are the suit within a suit approach, any reasonable modification of the suit within a suit approach, or the use of expert testimony regarding what would have transpired in the underlying action had it been handled appropriately.

Lieberman, a doctor, was sued by his patient for medical malpractice. At some point in the medical malpractice action, Lieberman provided his written consent to his medical malpractice insurance company to settle the action. Such written consent was required under the insurance policy. Thereafter, Lieberman communicated to the insurance company his intent to revoke his consent to settle. The insurance company refused to recognize Lieberman's intent to revoke his consent, and permitted Lieberman's assigned defense counsel to settle the claim. Lieberman then brought an action against the insurance company for breach of contract, and against the attorney for legal malpractice, alleging that the settlement resulted in a surcharge to his insurance premium.

Lieberman had to demonstrate proximate cause. Accordingly, the Court observed that in order to prevail on his claim, Lieberman would be required to show either: 1) that he would have received in the underlying medical malpractice action a verdict in his favor or a verdict for less than the insurance premium surcharge; or 2) that the insurance company would have settled the claim for less than the insurance premium surcharge.[3]

The Court noted that with respect to a legal malpractice claim, the procedure generally followed to prove proximate causation is the suit within a suit approach. In examining the applicability of that approach to Lieberman's claims, the Court determined that Lieberman should not be restricted to this conventional mode of proving a legal malpractice claim for three reasons. First, the existence of the insurance company as a co-defendant on a breach of contract theory did not lend itself to the suit within a suit approach. Second, the role reversal of Lieberman as a defendant in the underlying action and as claimant in the malpractice action made it "awkward and impracticable" to proceed by way of a suit within a suit. The parallel between the underlying action and malpractice action where the plaintiff is claimant in both actions regarding the identity of witnesses and the nature of the evidence was absent. Third, the passage of time also was a factor militating against the suit within a suit approach.[4]

The Court concluded that if not otherwise agreed upon by the parties, it is within the trial court's discretion to determine the manner in which a plaintiff in a legal malpractice case should present proof of proximate cause. Among the available alternatives are the suit within a suit approach, any reasonable modification of the suit within a suit approach, or the use of expert testimony regarding what as a matter of reasonable probability would have transpired in the underlying action had it been handled appropriately.[5]

The Flexible Proximate Cause

The Court reaffirmed and arguably expanded its holding in *Lieberman* in *Garcia v. Kozlov, Seaton, Romanini & Brooks, P.C.*[6] In that case, the plaintiff sued her former attorneys for failing to join an integral defendant in her personal injury lawsuit arising from a multi-vehicle auto accident. In the legal malpractice action, the plaintiff claimed she was forced to settle the personal injury case for less than full value as a result of the absence of the omitted party. The plaintiff hired a new attorney in the underlying action, who was unsuccessful in joining the omitted party due to the statute of limitations. The issue presented in the legal malpractice case was whether the original attorney's failure to sue the omitted party proximately caused the plaintiff damage.

The Court observed that the most common way to prove proximate cause in legal malpractice is to proceed by way of a suit within a suit, but observed that this approach had its shortcomings. For example, the Court noted that in some situations, a suit within a suit cannot accurately reconstruct the underlying action, as the parties may not have the same access to evidence or evidence may grow stale with the passage of time. Also, the suit within a suit format may be viewed as unfair to plaintiffs, who must litigate the underlying claim against the lawyer who originally prepared it.[7]

In trying the legal malpractice action, the plaintiff in *Garcia* availed herself of the flexibility described by the Court in *Lieberman*. She produced evidence in accordance with the suit within a suit format of what would have been submitted at trial in the underlying action if no malpractice occurred. The plaintiff

testified regarding the occurrence of the auto accident, and evidence obtained in the underlying action was introduced at trial. The plaintiff offered the testimony of her second attorney in the underlying action to provide his opinion on the "full value" of her claim. Additionally, the plaintiff presented the testimony of a legal malpractice expert. The expert testified regarding the effect of the attorney's negligence on the underlying suit, including the impact of New Jersey's comparative negligence statute and how, in combination with the omission of the missing defendant, it hampered the plaintiff's ability to recover the full value, and the reasonableness of the settlement she accepted.

The Court approved of the plaintiff's hybrid approach of establishing proximate cause by presenting a suit within a suit, complemented by expert testimony to address the alleged inadequacy of the settlement. The Court held that "the proper approach in each case will depend upon the facts, the legal theories, the impediments to one or more modes of trial, and, where two or more approaches are legitimate, to plaintiff's preference."[8]

Many in the professional negligence community viewed the Court's decision in *Garcia* as a departure from *Lieberman* and the traditional framework of the suit within a suit methodology. While the *Lieberman* Court held that alternatives exist to the suit within a suit approach to proximate cause, the Court relied on the existence of certain factors to require a more flexible approach. The factors present in *Lieberman* were not, however, necessarily present in *Garcia*. For instance, *Garcia* did not involve different types of causes of actions against multiple defendants. Likewise, *Garcia* did not have the role reversal present in *Lieberman*—the plaintiff in *Garcia* was also the plaintiff in the underlying action. The last factor, the passage of time, is almost always present in a legal malpractice action. However, the passage of time in *Garcia* was not alleged to cause the plaintiff any unusual prejudice that does not otherwise exist in such actions.

The *Lieberman* and *Garcia* decisions make it clear that the plaintiff in a legal malpractice action has significant latitude and flexibility in how to prove the proximate cause element of such a claim. It is, of course, understood from these decisions that the burden to prove proximate cause rests with the former client.

The Burden of Proof

Does there exist a set of circumstances where a plaintiff may be relieved of the proximate cause burden? One plaintiff recently made such an argument to the Court. In *Jerista v. Murray*,[9] a legal malpractice claimant asked the Court to create an exception to the traditional proximate cause requirement by affording an inference of proximate cause and shifting the burden to the defendant attorney to demonstrate the absence of a causal connection between his alleged negligence and the plaintiff's damages.

The facts in *Jerista* are not complicated. The plaintiff alleged she was injured when the electronic automatic doors at a supermarket malfunctioned and closed on her. She hired the defendant attorney to file a complaint against the supermarket. The supermarket filed a third-party action against the company that installed and maintained the automatic doors.

After many years had passed, the plaintiff learned that her complaint had been dismissed for failure to answer interrogatories. Her attorney never advised her that the action had been dismissed. By the time she learned of the dismissal, the attorneys who had represented the supermarket and the third-party defendant had destroyed their files. She had some limited information concerning the automatic doors from the defendant attorney's file. There were two service reports that identified the manufacturer and model number of the automatic doors. The service reports also indicated that a component of the automatic door mechanism was damaged a few days before the accident, and that it was replaced after the accident. The plaintiff did not investigate whether the automatic doors involved in her accident were still present at the supermarket or otherwise available for inspection. Additionally, she did not seek discovery from the automatic doors' manufacturer/installer, whose identity was known to her.

Although the plaintiff served the report of a legal malpractice expert regarding the defendant attorney's negligence, she did not obtain an expert's report on the alleged malfunction of the automatic doors. At trial, the defendant was granted summary judgment due to the plaintiff's failure to demonstrate proximate cause, because she was unable to prove her suit within a suit. Under traditional approaches to establishing proximate cause, the plaintiff was required to prove that *but for* the alleged malpractice, she would have prevailed in her underlying personal injury action. The trial court rejected the argument that the defendant's misconduct prevented the plaintiff from producing evidence of a defect in the automatic door.

In a 2-1 decision, the Appellate Division affirmed the dismissal of the complaint.[10] The majority determined that the facts of the case did not merit relieving the plaintiff from the requirement of having to prove a suit within a suit in order to sustain her legal malpractice claim. The majority was concerned primarily with the lack of evidence in support of the underlying claim of negligent maintenance of the automatic doors.

Although the court recognized that the plaintiff was not confined to the conventional mode of trying a suit within a suit, it strictly interpreted *Lieberman* to require the existence of the three factors set forth therein as a predi-

cate to the availability of alternative approaches to proximate cause. The court found that the plaintiff was not proceeding against dual defendants on different theories; there was no reversal of roles; and the plaintiff failed to establish that the passage of time created an insurmountable proof problem. In the absence of these factors, the majority could "discern no basis to craft an alternative procedure by which plaintiff can prove her legal malpractice claim."[11] Notably, the Appellate Division did not discuss *Garcia* and the flexible approach to proximate cause in its decision.

In his dissent, Judge Howard H. Kestin stated that the court owed the plaintiff "a creative treatment of the issues," so as not to deprive her of her day in court.[12] Judge Kestin found it "remarkable—and paradoxical—an attorney who so clearly breached his duties of care and diligence in handling his clients' cause, and so completely defaulted on his duty of fidelity and full disclosure as this defendant is alleged to have done, should benefit from his own transgressions when finally called to account in a lawsuit for professional malpractice."[13] Judge Kestin thus indicated that the suit within a suit rule should not be an "unvarying rule of liability or damages in all legal malpractice suits."[14] He suggested rather that it may be appropriate to consider applying a legal malpractice version of the increased risk of harm standard available in certain medical malpractice actions.[15]

The Supreme Court reversed. In so doing, however, the Court did not shift the burden of proof of proximate causation from the plaintiff to the defendant. Instead, the Court applied the doctrine of *res ipsa loquitur* and held that the plaintiff was not required to present expert testimony of the automatic door malfunction in order to prove her suit within a suit. Although the Court decided *Jerista* on a legal issue unrelated to the suit within a suit doctrine, at the end of its opinion, the Court did afford further flexibility to the proximate cause requirement in legal malpractice actions by way of a different legal issue—spoliation of evidence.

The Court noted that if a jury accepted the plaintiff's claim of the defendant attorney's dishonesty and dereliction resulting in evidence being purged or lost, it would "mak[e] it difficult, if not impossible, for plaintiff[ ] to prosecute the 'suit within a suit' malpractice action."[16] The Court ruled that if the plaintiff can make a threshold showing that the defendant's recklessness caused the loss or destruction of relevant evidence, the jury should be instructed that it may infer that the missing evidence would have been helpful to the plaintiff's case and inured to defendant's detriment. The spoliation inference ensures that one party will not benefit by recklessly depriving another party of evidence needed to present a claim.

Although *Jerista* may occupy a small class of legal malpractice cases involving plaintiffs who have an alleged inability to establish a suit within a suit due to the claimed misconduct and negligence of the defendant attorney, the Court advanced its flexible approach to the proximate causation requirement. While the burden of proving proximate cause still remains with the plaintiff after *Jerista*, the availability of a spoliation of evidence inference is another step in the Court's flexible approach to proximate cause.

Conclusion

It remains to be seen just how much flexibility will continue to evolve from the Court's approach to the proximate cause requirement in legal malpractice cases. With each successive case, the Court has advanced and expanded the flexibility afforded to claimants. However, its recent decision in *Jerista* may be an indication that such flexibility has its limits, as the Court still did not shift the burden of proof. ⚖

Endnotes

1. 84 N.J. 325 (1980).
2. *Id.* at 343.
3. *Id.* at 342.
4. *Id.* at 342-43.
5. *Id.* at 343-44.
6. 179 N.J. 343 (2004).
7. *Id.* at 359.
8. *Id.* at 346.
9. 185 N.J. 175 (2005).
10. *Jerista v. Murray*, 367 N.J. Super. 292 (App. Div. 2004), *rev'd*, 185 N.J. 175 (2005).
11. *Id.* at 304.
12. *Id.* at 306.
13. *Id.* at 304-05.
14. *Id.* at 305.
15. *See Evers v. Dollinger*, 95 N.J. 399 (1984) (recognizing in a medical malpractice action a cause of action for increased risk of harm resulting from a failure to make an accurate diagnosis and to render proper treatment).
16. *Jerista, supra,* note 9.

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