

Complex Causation Issues in Medical Malpractice

Rodrigo Lugo || Hall Booth Smith, P.C.

Emma Feeney || Warren Law Group, LLC



Elements of a Medical Malpractice Claim

Like other negligence actions, the plaintiff must show:

- ▶ a legal duty of care on the defendant's part,
- ▶ breach of that duty,
- ▶ injury to the plaintiff, and
- ▶ that the defendant's breach caused the plaintiff's injury.

Day v. Johnson, 255 P.3d 1064, 1068-69 (Colo. 2011)

Expert Testimony by a Physician is Required

A medical malpractice plaintiff must prove each element of their case through expert testimony.

- ▶ Expert testimony is particularly necessary to establish causation when several possible causes exist.

Generally, nonphysician healthcare providers are not qualified to render opinions as to medical causation.

Day v. Johnson, 255 P.3d 1064, 1069 (Colo. 2011).

Smith v. Curran, 472 P.2d 769, 771 (Colo. App. 1970); *Conrad v. Imatani*, 724 P.2d 89, 94 (Colo. App. 1986); *McBrayer v. Zordel*, 257 P.2d 962, 965 (Colo. 1953).

32 C.J.S. Evidence § 863; *see also* 32 C.J.S. § 721.

Causation

To recover on a negligence claim, a plaintiff must show that the defendant's alleged negligence **proximately caused** the claimed injury.

Proximate cause has two aspects:

- ▶ causation in fact and
- ▶ legal causation.

Reigel v. SavaSeniorCare L.L.C., 292 P.3d 977, 985 (Colo. App. 2011)

Causation in Fact (But-for Causation)

As to causation in fact,

- ▶ “The test ... is the ‘but for’ test—whether, but for the alleged negligence, the harm would not have occurred. The requirement of ‘but for’ causation is satisfied if the negligent conduct in a ‘natural and continued sequence, unbroken by any efficient, intervening cause, produce[s] the result complained of, and without which the result would not have occurred.’”

Reigel, 292 P.3d at 985 (quoting *N. Colo. Med. Ctr., Inc. v. Comm. on Anticompetitive Conduct*, 914 P.2d 902, 908 (Colo.1996))

Substantial Factor & Increased Risk of Harm

Sharp v. Kaiser Found. Health Plan of Colorado, 710 P.2d 1153, 1155 (Colo. App. 1985), aff'd, 741 P.2d 714 (Colo. 1987)

- ▶ Plaintiffs contend [the] test which the trial court should have applied...is whether defendants' negligence was a substantial factor in causing injury and damage to plaintiffs. Plaintiffs argue that in applying the substantial factor test of causation to a misdiagnosis and treatment case, the jury should be allowed to decide the issue of causation because there is expert testimony that defendants substantially increased plaintiff's risk of the resulting harm or substantially diminished the chance of recovery.

Sharp: Factual Background

- ▶ Ms. Sharp, a 35-year-old woman, contacted her PCP to report increasing chest pains for the past 2-3 weeks. The PCP advised Ms. Sharp to come to the clinic.
- ▶ The PCP concluded that Ms. Sharp's symptoms might be indicative of a heart disorder. He referred her to a cardiologist, and prescribed nitroglycerin and a beta blocker. He also recommended EKG, Chest XR and blood work.
- ▶ Ms. Sharp called the cardiologist for referral but was unable to get an appointment for another week. Her condition worsened, and she attempted to contact her PCP three or four times over the next few days. She ultimately presented to the ED and was found to have myocardial infarction.

Sharp: Expert Testimony as Characterized by COA

- ▶ Issue on appeal: whether plaintiff presented sufficient evidence that PCP's negligence was a cause of Ms. Sharp's MI.
- ▶ Ms. Sharp submitted expert testimony that her chances of a heart attack would have been reduced if she received different or more prompt medical treatment.
- ▶ Even though evidence shows that Ms. Sharp had less than a 50% chance of suffering a heart attack, her expert's testimony that her chances of suffering a heart attack were increased by 20 to 25% is sufficient evidence of causation in fact to allow a jury to consider whether defendants' failure to properly treat Ms. Sharp was a substantial factor in causing her injuries.

Sharp: Expert Testimony as Characterized by CSC

- ▶ Because Ms. Sharp was not hospitalized and was not provided with appropriate treatment earlier in the week, it is impossible to state with any degree of certainty what her particular course and outcome would have been.
- ▶ However, no matter what course her angina took, it is more probable than not that, with adequate treatment, Ms. Sharp should not have sustained an acute myocardial infarction.
- ▶ CSC declined to address the COA's "substantial factor" analysis, or its application of Section 323(a) of the Restatement (Second) of Torts.

Reigel v. SavaSeniorCare L.L.C., 292 P.3d 977, 987 (Colo. App. 2011)

- ▶ The Colorado Supreme Court has continued to adhere to the but-for test. Though the court has spoken in terms of the defendant's negligence being a “substantial factor” where other potential causes may be at play, the court has not retreated from the requirement that the defendant's conduct be a cause without which the injury would not have occurred.
- ▶ **The fact that a defendant's conduct increased the victim's risk of injury does not necessarily mean that the defendant's conduct was a but-for cause of the injury or a necessary component of a causal set of events that would have caused the injury. The victim's injury may well have occurred regardless of whether the defendant's conduct increased the risk that it would.**

Lorenzen v. Pinnacol Assurance, 2019

COA 54

- ▶ The “sooner is better than later” theory amounts to a common sense and universal axiom that expedited treatment is preferable to delayed treatment... That axiom is undoubtedly sound, **but it is not a theory of causation.**
- ▶ A general principle or axiom does not explain the cause of an injury in a particular case.
- ▶ What is necessary is evidence that would allow a jury to find that, **but for** the delay, Plaintiff would not have suffered the impairment.

Pre-existing Conditions

Thin Skull or
Eggshell
Plaintiff

Aggravation of
a Pre-existing
Condition

Eggshell Plaintiff

- ▶ In determining the amount of plaintiff's actual damages, you cannot reduce the amount of or refuse to award any such damages because of any (*insert appropriate description, e.g., physical frailties, mental condition, illness, etc.*) of the plaintiff that may have made them more susceptible to injury, disability, or impairment than an average or normal person.

6:7 PERSONAL INJURIES — NON-REDUCTION OF DAMAGES — “THIN SKULL” DOCTRINE

Schafer v. Hoffman, 831 P.2d 897, 900 (Colo. 1992)

- ▶ Under Colorado law, it is fundamental that a tortfeasor must accept his or her victim as the victim is found.
- ▶ A tortfeasor “may not seek to reduce the amount of damages [owed to the victim] by spotlighting the physical frailties of the injured party at the time the tortious force was applied to him.”
- ▶ A thin skull instruction is appropriately given when the defendant seeks to avoid liability by asserting that the victim's injuries would have been less severe had the victim been an average person.
- ▶ The negligent defendant is liable for the resulting harm even though the harm is increased by the particular plaintiff's condition at the time of the negligent conduct.
- ▶ The thin skull doctrine declares that foreseeability of plaintiff's injuries is not an issue in determining the extent of injury suffered.

Aggravation - 6:8 Aggravation of Preexisting Condition

- ▶ For the plaintiff, to recover damages for the aggravation of a preexisting condition, you must find all of the following have been proved:
 - ▶ 1. Before DATE the plaintiff suffered from (an ailment or disability);
 - ▶ 2. The defendant, _____, was negligent; and
 - ▶ 3. The defendant's negligence made the plaintiff's (ailment or disability) worse.
- ▶ If you find that all of these statements have been proved by a preponderance of the evidence, it is your duty to determine, if possible, the amount of damages, if any, caused only by the negligence of the defendant.
- ▶ If you are able to separate the amount of damages, if any, caused by the negligence of the defendant from the amount of damages, if any, caused by the ailment or disability which existed before DATE, then the plaintiff is entitled to recover damages caused only by the negligence of the defendant.
- ▶ If you are unable to separate the damages caused by the ailment or disability which existed before DATE and the damages caused by the negligence of the defendant, then the defendant is legally responsible for the entire amount of damages.

McLaughlin v. BNSF Ry. Co., 2012 COA 92

- ▶ A tortfeasor cannot be held liable for damages that it did not actually cause.
- ▶ Consequently, the aggravation doctrine provides generally that, “notwithstanding the eggshell skull rule, a ‘defendant ... is liable only for the extent to which the defendant's conduct has resulted in an aggravation of the pre-existing condition, and not for the condition as it was.’”
- ▶ The doctrine makes a tortfeasor liable for damages to the extent the tortious conduct “has increased the severity of a pre-existing ... condition of the plaintiff.”

Eggshell and Aggravation

- ▶ Asymptomatic condition > negligence > symptoms appear: aggravation does not apply
- ▶ Symptomatic condition > negligence > symptoms **worsen**: aggravation applies

Examples + Discussion