PROVING CAUSATION IN PROFESSIONAL NEGLIGENCE

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I. ELEMENTS OF CAUSATION

The basic approach to proving causation in a professional negligence action involves the same analysis and elements as presented in a simple negligence action. The complications are created not by the rules pertinent to proving causation but because of the technical nature and the necessity of expert testimony on the issue of causation in a professional negligence action[1]. This paper will focus on the analysis of causation which must be made in all cases and particular problems created in the arena of professional negligence. The emphasis on medical negligence actions is a function not only of this writer's interest but also the sparsity of cases addressed to other categories of professional negligence. Since the development of the law of causation has largely taken place in cases not involving professionals, many of those cases are discussed and cited hereinafter. However, the approach to proving causation will be the same regardless of the profession involved. For an excellent article on proximate cause in North Carolina, read Professor Robert Byrd's article "Proximate Cause in North Carolina Tort Law", 51 N.C.L.Rev. 951 (1973).

[1] As discussed later, expert testimony is not always required, but is certainly always advised.

In any negligence action against a professional, there are three essential elements: a duty of care, a breach of that duty, and an injury proximately caused by the breach. The concept of "proximate cause" or "legal cause" is a concept which limits a tort feasor's liability for the consequences of a wrongful act.[2] Although there are a multitude of definitions available for proximate cause, it has proven to be a difficult term to define precisely for all situations.[3] Words such as "direct chain of events", Taney v. Brown, 262 N.C. 438, 137 S.E.2d 827 (1964); "real, efficient cause", Rowe v. Murphy, 250 N.C. 627, 109 S.E.2d 474 (1959); "direct result", Hodges v. Virginia-Carolina Ry., 179 N.C. 566, 103 S.E. 145 (1920); "consequences which follow in unbroken sequence... are natural and proximate", Hudson v. Railroad, 142 N.C. 198, 55 S.E. 103 (1906), have all been used by the North Carolina Supreme Court over the years in the context of finding a causal relationship which justifies imposition of liability. A definition generally recognized today in North Carolina may be stated as follows:

> Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or some similar injurious result, was probable under the facts as they existed.

9 Strong's North Carolina Index 3d, NEGLIGENCE, §8.

It is error to instruct the jury that the defendant's negligence must be the proximate cause as opposed to a proximate cause. Pugh v. Smith, 274 N.C. 264, 100 S.E.2d 503.

The pattern jury instructions used in medical negligence actions defines probable cause as follows:

> Proximate cause is a real cause - a cause without which the claimed injury would not have occurred, and one which, under the same or similar circumstances, a reasonably careful and prudent person could foresee would probably produce such injury or some similar injurious result. A person seeking damages as a result of negligence has the burden of persuading you by the greater weight of the evidence not only of the negligence of the defendant, but also that such negligence was a proximate cause of plaintiff's injury. There may be more than one proximate cause of

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[2]Byrd, Proximate Cause in North Carolina Tort Law, 51 N.C.L. Rev. 951 (1973).

[3] See 57 Am Jur 2d NEGLIGENCE, §§425-433 for a detailed discussion of the numerous definitions which have been recognized by various jurisdictions.

> an injury. Therefore, the plaintiff need not satisfy you that the negligence of the defendant was the sole proximate cause of the injury. The plaintiff must satisfy you, by the greater weight of the evidence, only that the negligence of the defendant was one of the proximate causes. (North Carolina Pattern Jury Instructions, Civil 809.00).

As can be seen, there are two essential components of proximate cause, an actual causal relationship between the conduct and the injury, and foreseeability. Some harm of the general type that occurs must be a foreseeable consequence of the negligent act or omission. However, injury in the precise form in which it occurs need not be foreseeable. Williams v. Boulerice, 268 N.C. 62, 149 S.E.2d 590 (1966).

II. WHAT EVIDENCE IS REQUIRED TO GET TO THE JURY?

What must your evidence show, and more importantly what words must be used, on the issue of causation in order to avoid a directed verdict? It is clear that evidence that only establishes that the plaintiff's injury was possibly caused by the Defendant's negligence is insufficient. Lippard v. Johnson, 215 N.C. 384, 1 S.E.2d 889 (1939).

> Evidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict and should not be left to the jury. (citations omitted) ... The plaintiff must do more than show the possible liability of the defendant for the injury. He must go further and offer at least some evidence which reasonably tends to prove every fact essential to his success.

Byrd v. Express Co., 139 N.C. 273, 275-76, 51 S.E. 851, 852 (1905).

Likewise, if you have expert testify that the expert has an opinion to a reasonable degree of medical (or other expertise as appropriate to the case) certainty based on his personal knowledge that the injury complained of was actually caused by the negligent of the defendant, then you are safe. Lowery v. Newton, 52 N.C.App. 234, 278 S.E.2d 566 (1981). Anything between those two extremes is open to debate. I hope the following examples will provide some guidance for you.

Many judges are still accustomed to the phrase to be used in questioning an expert as: "Do you have an opinion to a reasonable degree of certainty that the defendant's act could or might have caused the plaintiff's injury". This language was required prior to the adoption of the present rules of evidence. Lockwood v. McCaskill, 262 N.C. 663, 138 S.E.2d 541 (1964). In Lockwood the Supreme Court stated:

> [T]he rule in North Carolina is that "If the opinion asked for is one relating to cause and effect, the witness should be asked whether in his opinion a particular event or condition could or might have produced the result in question, not whether it did produce such result." Stansbury: North Carolina Evidence (2d Ed.), S. 137, p. 332.

Lockwood, 138 S.E.2d at 545. The rationale of that rule was that the expert was not allowed to render an expert opinion on an ultimate issue and thereby invade the province of the jury.

However, such constraints on the precise wording of the expert's opinion have been eliminated. Since the adoption of the Rules of Evidence, particularly rule 704, which states, "Testimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact". The North Carolina Supreme Court has expressly rejected the requirement of the "could or might" phraseology. State v. Smith, 315 N.C. 76, 100, 337 S.E.2d 833, 849 (1985). See also Simons v. Georgiade, 286 S.E.2d 596, (N.C.App. 1982)(Rendering causation opinion without use of the "could" or "might" qualifying language was proper).

Thus, in Cherry v. Harrell, 84 N.C.App. 598, 353 S.E.2d 433, cert. den. 320 N.C. 167, 358 S.E.2d 49 (1987), The court reversed the trial court's exclusion of the expert testimony, finding that the words used by the expert were sufficient under Rule 702. In Cherry, the Court of Appeals held that the following was sufficient:

> It is clear that Dr. Appert's testimony was not expressly qualified by the Lockwood formula of "reasonable probability". Instead, Dr. Appert testified in part that: (1) his impression was that the accident and injury were "related"; (2) when asked what "most likely caused plaintiff's ruptured disk, he stated the only "event in time" he could find was the automobile accident; (3) when asked what "most likely happened" to plaintiff, he again responded that, based on what the plaintiff told him, he would have to relate the injury to the accident.

Therefore, in Cherry the expert causation testimony was allowed without the strict compliance with the magic words "reasonable probability" or "could" or "might".

The trend in lessening the requirement of strict adherence to any particular magic word phraseology is reflected in the recent North Carolina Court of Appeals decision in Felts v. Liberty Emergency Service, 97 N.C.App. 381, 388 S.E.2d 619 (1990). Felts, a medical negligence action for personal injury arising out of the defendant's delay in admitting the plaintiff to the hospital. The plaintiff, after being released, subsequently suffered a heart attack. The plaintiff was seeking damages on the grounds that had he been admitted to the hospital's care when he first presented the symptoms, his heart attack would not have occurred. The Felts case is noteworthy for the language which was permitted on the issue of the alleged violation of care. However, I will limit my discussion only to the issue of causation. The pertinent testimony at trial was:

> Q. Dr. Bokesch, do you have an opinion satisfactory to yourself and to a reasonable medical certainty that the heart attack suffered by Mr. Felts on November 11, 1988, (sic) might have been prevented had the plaintiff, had the plaintiff's cardiac condition been diagnosed on November 8, 1986?
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> A. Yes.

Cherry was an automobile collision case. However, the opinion addresses the issue of the sufficiency of the wording used by the expert in rendering an opinion that the injury was caused by the collision. The same should apply to actual causation questions in the professional liability context.

> Q. What is that opinion?
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> A. It's possible that the heart attack could have been prevented if he had been admitted to the Coronary Unit, or for that matter, to the hospital. There are certain drugs that can be given now to help prevent a heart attack. Simply rest and Oxygen can help prevent a heart attack. But there are other drugs that can be administered in the Coronary Care Unit that can possibly prevent a heart attack.
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> Also, if a patient is admitted and observed in a Coronary Care Unit and they do start to deteriorate at this hospital, or hospital of similar size in a community this size, you can transport them by helicopter.... They can then undergo cardiac catheterization and certain other procedures that may be necessary to possibly alleviate a heart attack or at least limit its damage.

Id. 388 S.E.2d at 623 (emphasis added). The trial court granted the Defendant's motion for a directed verdict. The North Carolina Court of Appeals concluded that this language raised more than a mere possibility or conjecture as to causation sufficient to withstand a directed verdict. The Court reaffirmed the rule that evidence which raises only a mere possibility is insufficient, but opined that the expert in Felts had given a detailed explanation of how the admission would have helped the patient. Therefore, the use of the word "possible", rather than "probable" or "more likely than not" was found to be sufficient. Therefore, under Felts, it appears that the choice of words which characterize the effect of the negligence in terms of "probable" or "possible" is not as important as the explanation given by the expert as to how the course of events would have differed but for the negligence.

The Supreme Court will not have an opportunity to address this case. Although Judge Hedrick dissenting on the issue of the sufficiency of the evidence, and the Defendant appealed as a matter of right, the case was settled pending that appeal.

Certainly the trend appears to be one of lessening the stringent requirements of having causation established with the use of any strict compliance with a specifically approved phraseology. One of the most recent cases to address the sufficiency of causation in a professional negligence action is Turner v. Duke, 325 N.C. 152, 381 S.E.2d 706 (1989), known best for it holding regarding the review of trial court's rulings on Rule 11 matters. However, the Turner case also addressed the sufficiency of evidence on the issue of causation and only that issue is discussed here.

In Turner, a wrongful death action, the trial court granted the Defendant's motion for a directed verdict against Dr. Friedman and the Private Diagnostic Clinic due to insufficient evidence to establish proximate cause. The Supreme Court reversed and remanded for a new trial against Dr. Friedman and the PDC. The plaintiff's deceased had been admitted for treatment of chronic pain associated with shingles. However, at the time of her admittance she was suffering from constipation and was given medication and an enema for the constipation without results. Dr. Friedman, her treating physician, did not actually examine her during her admission at Duke. She had been admitted on August 25, 1983 and died at 4:10 a.m. on August 27, 1983. At the time of the afternoon rounds, 6:00 pm on August 26th, the physicians did not examine the patient despite her husband's requests that they do so. Approximately 1 to 2 hours later, at the request of the plaintiff's husband, a physician did examine her and at that

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The jury returned a verdict in favor of Duke on the issue of liability.

time they suspected a perforated colon. The enema apparently perforated her colon and she ultimately died of acute peritonitis after unsuccessful emergency surgery.

Plaintiff's expert witness had testified that in his opinion the Defendant's violation of the standard of care proximately caused her death and that her perforated colon was reversible. However, on cross examination, in response to a hypothetical question, he acknowledged that had the Defendant examined the plaintiff that "It probably wouldn't have made much difference". The Court of Appeals found this testimony insufficient. The Supreme Court, in reversing, held that the Court of Appeals should not consider the answers given in response to cross examination because that violated the rule that all evidence be construed, and conflicts be resolved in the light most favorable to the plaintiff upon the Defendant's motion for a directed verdict. The Court went on to hold that the plaintiff's expert testimony had clearly created a question of fact on causation to be submitted to the jury.

Therefore, even if your expert is effectively cross examined on the question of whether non-negligent conduct would have altered the outcome, under Turner the case must be submitted to the jury if a question of fact on causation has been created by the testimony during the direct examination.

The Turner opinion does not do much in the way of espousing a particular set of rules to be applied in determining whether proximate cause has been sufficiently proven to submit the case to the jury. The opinion recited the evidence, the rules regarding how to view the evidence upon a motion for directed verdict and then cited the following legal concepts regarding proximate cause:

> Causation is an inference of fact to be drawn from other facts and circumstances. Hairston v. Alexander Tank & Equipment Co., 310 N.C. 227, 311 S.E.2d 559 (1984). Proximate cause is ordinarily a jury question.

Turner, 381 S.E.2d at 712.

The above quoted language from Turner, and the facts of that case, should be relied upon when you argue against the directed verdict. The standard articulated in Turner is one which will give any trial judge sufficient authority to deny directed verdict as long as there is some evidence that the negligence caused the injury.

A recent landmark decision by the North Carolina Supreme Court has liberalized the cause of action for the negligent infliction of emotional distress. In Johnson v. Ruark, 395 S.E.2d 85 (N.C. 1990, the Court held that the parents of a stillborn child had stated a claim against the physicians involved in the prenatal care for the negligent infliction of emotional distress without a showing of physical impact from the negligent act or physical manifestation of the emotional distress. This case is noteworthy as to proximate cause since it held that the claim of parents for emotional distress caused by the negligent death of a child is foreseeable:

> Common sense and precedent tell us that a defendant's negligent act toward one person may proximately and foreseeably cause emotional distress to another person and justify his recovering damages, depending upon their relationship and other factors present in the particular case. Id. 395 S.E.2d at 95.

In discussing foreseeability, (which is a necessary element of proximate cause, the Court stated the following:

> Factors to be considered on the question of foreseeability in cases such as this include the plaintiff's proximity to the negligent act, the relationship between the plaintiff and the other person for whose welfare the plaintiff is concerned, and whether the plaintiff personally observed the negligent act. Questions of foreseeability and proximate cause must be determined under all the facts presented, and should be resolved on a case-by-case basis by the trial court and, where appropriate, by a jury. Id. at 98.

Although the Court in Johnson was basing its decision on the allegations, which must be deemed true for purposes of ruling on a motion to dismiss, it is clear that emotional distress of a negligently injured child are foreseeable and if prove of actual causation is submitted, the claim should be submitted to the jury. Since "foreseeability and proximate cause" must be resolved on "a case-by-case basis", everyone should review the opinion in detail and consider amending complaints for any existing actions involving the injury to death of a child.

III. CAUSATION IN ATTORNEY MALPRACTICE

The principles of proving causation in an attorney malpractice action do not differ from those of an ordinary negligence case. Rorrer v. Cooke, 313 N.C. 338, 329 S.E.2d 355 (1985); see Murphy v. Edwards an Warren, 36 N.C.App. 653, 245 S.E.2d 212, disc. rev. denied, 295 N.C. 551, 248 S.E.2d 728 (1978).

In Rorrer the court reversed the Court of Appeals reversal of the trial court's grant of summary judgment, finding that, among other things, there had been no showing of evidence indicated what, if anything, the attorney did or failed to do which altered the outcome. There must be an affirmative showing that had the attorney not been negligent, that the first trial would have been won and a money judgment awarded. The Court held that in a legal malpractice action alleging negligence in a former law suit, "The Plaintiff must prove that:

(1) The original claim was valid;

(2) It would have resulted in a judgment in his favor; and

(3) The judgment would have been collectible."

Id. 329 S.E.2d at 369. The plaintiff in Rorrer had only presented evidence that the Defendant's alleged negligence "contributed greatly to the loss of Mrs. Rorrer's claim when it was tried". The Court found this to be insufficient without specific evidence as to what could or should have been done and that had it been done, the plaintiff would have prevailed at trial. The Court utilized the "but for" test of causation.

IV. IS EXPERT TESTIMONY REQUIRED

Although there is case law to support that expert testimony on the issue of causation is not essential, certainly the better rule to follow is to have the appropriate expert in the field which is the subject of your professional liability action to state affirmatively that in her opinion the defendant's negligence is cause of the injury and to state the opinion with a reasonable

degree of certainty. However, for those who find themselves unable to find expert testimony of causation, you may find comfort in some of our Supreme Court rulings:

Jackson v. Mountain Sanitarium, 234 N.C. 222, 67 S.E.2d 57 (1951), reh. den. 235 N.C. 758, 69 S.E.2d 29 (1952). This was a wrongful death action arising out of a tonsillectomy. The defendants were a physician, Dr. Joyner, the corporate hospital and an assistant to the physician. The trial court entered judgments of nonsuit as to the hospital and the assistant. Those were both affirmed due to insufficient evidence. As to the jury verdict for the defendant physician, a new trial was ordered. The Supreme Court stated that the trial court's instructions were such as to imply that expert testimony was required on the issue of causation. The Court stated:

> Thus the court laid down the rule that in cases of this kind proximate cause can be established only through the medium of expert testimony and, in effect, eliminated 'the greater weight of the evidence' rule as to burden of proof which applies in civil cases. ... Yet this Court has not and could not go so far as to say that in no event may a physician or surgeon be held liable for the results of his negligence unless the causal connection between the negligence and the injury or death be established by the testimony of a brother member of defendant's profession. ... In any event, such a rule would erect around the medical profession a protective wall which would set it apart, freed of the legal risks and responsibilities imposed on all others.
> ...
> When the standard of care, that is, what is in accord with proper medical practice, is once established, departure therefrom may, in most cases, be shown by non-expert witnesses.

Wilson v. Martin Memorial Hospital, 232 N.C. 362, 61 S.E.2d 102 (1950). Wilson, a medical negligence action for personal injury against the corporate hospital and two physicians ended in the trial court by the entry of nonsuit at the close of plaintiff's case. The Supreme Court affirmed as to the hospital but reversed and remanded for new trial as to the two physicians. In holding that expert testimony was not necessary the Court stated:

> It is not in all cases essential that plaintiff's assertion of claim for compensation for an injury alleged to have resulted from the failure of the physician to exercise due care in the treatment of his patient should be supported by expert testimony. When the evidence of lack of ordinary care is patent and such as to be within the comprehension of laymen, requiring only common knowledge and experience to understand and judge it, expert testimony is not required.

The Wilson case involved a particularly egregious failure on the part of the defendants to tend to an expectant mother whom, according to one of the defendants, definitely needed a caesarian delivery. The caesarian delivery was not done and the plaintiff was discharged from

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A collection of cases addressing the issue of the need for expert testimony to establish the causal link between medical treatment necessitated by injury for which defendant is liable and allegedly harmful effects of such treatment, see 27 ALR2d 1263.

the hospital with significant injuries requiring additional care and resulting in some lasting injuries.

In Waynick v. Reardon, 236 N.C. 116, 72 S.E.2d 4 (1952), in reversing the entry of nonsuit for lack of expert testimony, stated:

> The absence of expert medical testimony, disapproving the treatment or lack of it, is not perforce fatal to the case. There are many known and obvious facts in the realm of common knowledge which speak for themselves, sometimes even louder than witnesses, expert or otherwise.

(quoting Gray v. Weinstein, 227 N.C. 463, 42 S.E.2d 616).

See also, Smithers v. Collins, 52 N.C.App. 255, 278 S.E.2d 286, cert. den. 303 N.C. 546, 281 S.E.2d 394 (1981), wherein Judge Becton states "It has never been the rule in this State, however, that expert testimony is needed in all medical malpractice cases to establish either the standard of care or proximate cause." Id. 278 S.E.2d at 289.

However, to go to trial without expert testimony is not advised. See Hawkins v. McCain, 239 N.C. 160, 79 S.E.2d493 (1954), affirming nonsuit on grounds of no expert testimony.

V. ESTABLISHING PROXIMATE CAUSE NECESSARY WHEN THERE IS NEGLIGENCE PER SE

Proximate cause must also be shown to impose liability on a Defendant for conduct which is negligence per se, for example, the violation of a statute must be shown to have caused the injury and that the injury was foreseeable. Bell v. Page, 271 N.C. 396, 156 S.E.2d 711. North Carolina has expressly rejected a trend on the part of other jurisdictions to impose liability for injury actually caused by a violation of a statute, without regard to whether the injury was foreseeable. Ratcliff v. Duke Power Co., 268 N.C. 605, 151 S.E.2d641 (1966)(Jury instruction allowing recovery upon finding that a violation of a statute occurred and was the actual cause of injury held erroneous due to failure to instruct on foreseeability). The rationale for such extended liability is that a person who violates a statute adopted by the legislature should be accountable for the consequences of such an act. In Aldridge v. Hasty, 240 N.C. 353, 82 S.E.2d 331 (1954), the North Carolina Supreme Court stated: "When the action is for damages resulting from the violation of a [statute], does the doctrine of foreseeability apply? We are constrained to answer in the affirmative". Id., at 358, 82 S.E.2d at 337. This is important to keep in mind in the context of professional negligence actions. When you discover that a medical care provider has failed to comply with rules and regulations mandated by some governing body, do not stop the analysis there. You must show not only actual causation, but that the injury was a foreseeable result of the violation.

In Grier v. Phillips, 230 N.C. 672, 55 S.E.2d 485 (1949), a case against an unlicensed dentist, the Supreme Court ruled that the failure to hold a license alone was not determinative of liability and that plaintiff still had to show negligence and proximate cause.

VI. SAMPLE OF CASES WHERE EVIDENCE OF CAUSATION DEEMED SUFFICIENT

The following is a sampling of cases finding that the evidence presented by plaintiff was sufficient on the issue of causation to have the issue presented to the jury:

Felts v. Liberty Emergency Service, 97 N.C.App. 381, 388 S.E.2d 619 (1990). See discussion above in Section II of this manuscript. This case is an example of a lessening of the strict requirement of the degree of probability which must exist. The language in this case, as used by the expert, was "possible" as opposed to probable or "more likely than not".

Hart v. Warren, 46 N.C.App. 672, 266 S.E.2d 53 (1980). In this wrongful death action based upon a failure to diagnose, the Court of Appeals reversed the entry of a directed verdict and held that sufficient evidence of causation had been submitted. There was clear expert testimony at trial that in the expert's opinion the defendant's negligence was a cause of death. There was no showing that the plaintiff's deceased would not have died but for the negligence of the Defendant. However, the Court had no difficulty find sufficient evidence for the jury.

Haney v. Alexander, 71 N.C.App. 731, 323 S.E.2d 430, cert.den. 313 N.C. 329, 327 S.E.2d 889 (1985). This case involved the negligence of a hospital's nurses in monitoring the deceased plaintiff's condition. The Court of Appeals reversed the entry of directed verdicts against the hospital. Here the Court found that physicians could properly testify as to a nursing standard of care, that those witnesses specifically stated how the nurses were negligent and the such negligence caused the patient's death. The Court of Appeals reversed without much discussion in that it appears clear that even a stringent burden had been met.

Lowery v. Newton, 52 N.C.App. 234, 278 S.E.2d 566, reconsideration of den. of disc. rev. den. 304 N.C. 195, 291 S.E.2d 148 (1981). Action for personal injuries from medical negligence against a plastic surgeon. Judgment for plaintiff appealed by Defendants on grounds, among others, that there was insufficient evidence of causation. Plaintiff is not required to prove that the complained of injury would not have eventually developed as a result of pre-existing injuries. Plaintiff's expert properly allowed to testify that the negligence caused the injury, rather than the negligence could have caused the injury. Strict Adherence to the statutory language in establishing standard of care was not error.

Mashburn v. Hedrick, 63 N.C.App. 454, 305 S.E.2d 61, cert.den. 309 N.C. 821, 310 S.E.2d 350 (1983). The Plaintiff filed this medical negligence seeking damages for the amputation of his left leg as a result of the Defendant's negligence in failing to properly diagnose and failure to refer the plaintiff to a specialist. The plaintiff first went to the Defendant with symptoms including two toes that had turned purple and pain when walking, in March, 1977. Subsequently, in August, 1977 the lower portion of his left leg was amputated as a result of peripheral vascular disease. He had gone untreated from March until May, 1977. The trial court's entry of a directed verdict at the close of plaintiff's evidence was reversed by the Court of Appeals, holding that sufficient evidence of causation had been presented.

In Mashburn, the plaintiff's expert witnesses testified that vascular diseased is a progressive one, therefore between March and May the disease was progressing and was not being monitored. The court relied upon the following summarized evidence:

> "Dr. Stocks' opinion was that the success rate of an operation on plaintiff's leg was about 50% in May but only about 25% in August. The opinion of another expert, Dr. Conley, was that, based upon the arteriogram, the operation success rate was 75% to 80% on May 23, 1977 and it had declined to 8% to 10% by 11 August 1977.

The Court found that had he been properly diagnosed and referred in March, there would have been an increased possibility of saving the plaintiff's leg from amputation. Id. 305 S.E.2d at 64.

Mitchell v. Parker, 68 N.C.App. 458, 315 S.E.2d 76, cert. den. 311 N.C. 760, 321 S.E.2d 140 (1984). The Court of Appeals reversed the trial court's entry of a directed verdict and found that sufficient evidence had been presented on whether the defendant's negligence had caused postoperative injuries arising out of infection. The evidence, presented through expert witness sufficiently established that the defendants breached the standard of care by not properly monitoring the administration of Garamycin, a medication for infection which can cause damage to the kidney. The testimony also indicated that she did in fact suffer permanent damage to her kidneys and that as a result, her and her husband did not have sexual relations for two year. The court found this to be sufficient evidence of causation on both the medical negligence and loss of consortium claim.

Mitchell v. Saunders, 219 N.C. 178, 13 S.E.2d 242 (1941). This case applied the res ipsa doctrine to a case involving sponges left in the patient during an operation. The mere fact of leaving the sponge and the infection and injury about the sponges was sufficient, under the doctrine of res ipsa, to require that the case be submitted to the jury. The Defendant's evidence in explanation does not alter the sufficiency of the presumption for purposes of whether a non-suit at the close of all the evidence should be granted. The verdict for the plaintiff was affirmed.

Simons v. Georgiade, 55 N.C.App. 483, 286 S.E.2d 596, cert. den. 305 N.C. 587, 292 S.E.2d 571 (1982). Directed verdict as to physician and Duke University reversed and new trial as to Dr. Georgiade. This case addresses the proper form of a hypothetical question on causation. The court concluded that the question was proper. Additionally, the court held that the expert may base his opinion on reasonable inferences drawn from the facts and that the expert may utilize his expertise in making those inferences. Here the expert testified that the negligent act could or might have caused the injury and that the deviation from the standard of care caused the injury.

Smithers v. Collins, 52 N.C.App. 255, 278 S.E.2d 286, cert. den. 303 N.C. 546, 281 S.E.2d 394 (1981). Court of Appeals reversed the trial courts entry of a directed verdict at close of plaintiff's evidence and found that the evidence as to causation was sufficient. Here, the plaintiff, following a hysterectomy, subsequently developed an intestinal obstruction caused by adhesions after surgery. The plaintiff's evidence was presented through the plaintiff, the defendant and the physician who ultimately operated to correct the plaintiff's blockage. Judge Becton, after discussing the fact that expert testimony is not necessary in cases not involving highly specialized knowledge with respect to which a layman can have no reliable information, found that this was such a case. On the issue of causation, Judge Becton found that the testimony elicited from the defendant during the plaintiff's case was sufficient from which the jury could have found that an earlier diagnosis of bowel blockage (during the first few weeks following surgery when the plaintiff complained of symptoms of bowel blockage to the

defendant) and an earlier insertion of a bowel tube would have obviated surgery. The defendant had testified that "And by the process of decompression many times the bowel is relieved of this distention and, on occasion, adhesions can break with this procedure without doing the surgery".

In the Smithers case there was no expert testimony that directly opined that in their opinion the delay was negligent and caused the need for the second surgery.

Turner v. Duke, 325 N.C. 152, 381 S.E.2d 706 (1989). See discussion above in Section II of this manuscript.

VIII. SAMPLE OF CASES WHERE EVIDENCE OF CAUSATION DEEMED INSUFFICIENT

The following is a sampling of cases finding that the evidence presented by plaintiff was insufficient on the issue of causation:

Bridges v. Shelby Women's Clinic, 72 N.C.App. 15, 323 S.E.2d 372 (1984). Plaintiff sued for permanent brain injury allegedly caused by medical negligence. The Court of Appeals affirmed the trial court's entry of a directed verdict at close of plaintiff's evidence due to lack of sufficient evidence on causation. Plaintiffs alleged that the failure to timely diagnose the plaintiff mother's premature labor caused the intercranial hemorrhages causing severe retardation, epilepsy and cerebral palsy. The Court found that the causal link was too speculative and remote. Plaintiff's causation theory was that had the premature labor been diagnosed earlier, she would have been transferred to Charlotte Memorial earlier, would have qualified for an experimental drug to suppress premature labor, would not have rejected the drug and carried the child for an additional five to six weeks, which was beyond the period during which the risk of intercranial hemorrhage remained a substantial risk. The court found this to be too speculative, especially since the plaintiff mother appeared to have clear symptoms that would have rejected her from the experimental drug program. Additionally, the effectiveness of the drug was questionable, therefore the required degree of probability was not present in the evidence.

Grier v. Phillips, 230 N.C. 672, 55 S.E.2d 485 (1949). In Grier, a wrongful death action, the Supreme Court affirmed the trial court's entry of nonsuit at the close of the plaintiff's case. The case was one against a person who extracted her teeth without holding a dental license. Although it was admitted that the Defendant did not have the knowledge and skill of a licensed dentist, there was insufficient evidence to show that the lack of skill caused her harm. The primary weakness in the evidence was the lack of any evidence as to the condition of the plaintiff's mouth on the day the teeth were extracted so it was speculation as to whether a trained dentist would have known of any risk in pulling the teeth at that time. As to guidance on what constitutes a showing of proximate cause, the Grier case can be cited for the following definition: The evidence is sufficient if a fair preponderance of the evidence shows facts and circumstances proving a reasonable probability that the Defendant's negligence or want of skill was the proximate cause of the injury. Grier v. Phillips, 230 N.C. 672, 55 S.E.2d 485 (1949).

Hawkins v. McCain, 239 N.C. 160, 79 S.E.2d 493 (1954). This is another case wherein the Court discusses whether expert testimony is required and in this particular fact situation they

held that it was. The plaintiff sued for personal injuries arising out of the prescribing of medicine containing arsenic for the treatment of a skin disease. However, the plaintiff presented no expert evidence that the arsenic caused the injury, nor any evidence that the prescription was not proper treatment for the ailment. The entry of directed verdict was affirmed.

Howard v. Piver, 53 N.C.App. 46, 279 S.E.2d 876 (1981). Here, although the Court remanded for new trial as to the defendant physician because of the trial court's refusal of proper expert testimony. However, as to the directed verdict for the hospital, the decision was affirmed due to insufficient evidence of causation. On that issue, apparently the only evidence offered by the plaintiff against the hospital was that the nurses failed to verbally report all of the patient's complaints. However, there was no evidence indicating that such a failure, even if negligent, proximately resulted in any harm. Therefore, the directed verdict as to the hospital was proper.

Lindsey v. The Clinic for Women, P.A., 40 N.C.App. 456, 253 S.E.2d 304 (1979). The Court of Appeals reversed the denial of the defendant physicians' motion for a directed verdict, finding that there was insufficient evidence on the issue of causation. However, rather than directing entry of judgment for the physicians, the Court ordered a new trial. The plaintiff was seeking damages for medical negligence causing delivery of a stillborn child. The Court ruled that although the evidence was sufficient to show a violation of the standard of care, there was no evidence given establishing that the death was caused by something which the Defendants did or failed to do. The expert failed to state that had proper treatment been given, that the child would not have been stillborn and that the failure to elicit such evidence was fatal to the plaintiff's claim.

The Lindsey opinion also has interesting comments regarding the plaintiff's hypothetical questions in the trial as guidance during any retrial.

Weatherman v. White, 10 N.C.App. 480, 179 S.E.2d 134 (1971). In this case the plaintiff alleged that the defendant's negligent failure to timely diagnose her breast cancer caused her to undergo a radical mastectomy. The Court affirmed the directed verdict. Each of the four physicians that testified for the plaintiff opined that the standard treatment when a lump in the breast is determined to be malignant, the treatment requires the removal of the entire breast. Therefore, the delay in diagnoses, even assuming negligence, did not cause the loss of the breast since it would have been removed upon discovery in any event.

White v. Hunsinger, 88 N.C.App. 382, 363 S.E.2d 203 (1988). An action for the wrongful death of a child for failure to timely refer the child to a neurosurgeon. The child was in an automobile accident, admitted to the hospital during the evening, but not referred to a neurosurgeon until the next day. Summary Judgment granted on motion of Defendant for lack of sufficient evidence on probable cause affirmed by the Court of Appeals. The Plaintiff's physician expert, by affidavit in opposition the motion of summary judgment, opined that the child's chances of survival would have been increased if he had been transferred to a neurosurgeon earlier. Court relied on the cases holding that merely showing that a different treatment would have improved the patient's chance of recovery is insufficient.

Query whether this would be sufficient under the test for showing loss of chance in Shumaker, discussed infra.

IX. INTERVENING NEGLIGENCE

Often you may be confronted with the issue of a defendant contending that another force, such as the negligence or wrongful act of another, or an act of god, which occurs after his negligence, intervened and became the real cause of injury and therefore the original actor is insulated from liability for his negligence. If the force or event in fact comes into existence after the defendant's act of negligence, then it may be an intervening cause which insulates liability. See Nance v. Parks, 266 N.C. 206, 146 S.E.2d 24 (1966); Toone v. Adams, 262 N.C. 403, 137 S.E.2d 132 (1964). However, if the force or event is already in motion at the time of the Defendant's act, may not insulate. Tart v. Register, 257 N.C. 161, 125 S.E.2d 754 (1962). This may well arise in medical cases where the actions of many different potential defendants result in the injury. Foreseeability again appears to be the key determining fact. If the intervening act is a foreseeable event following a tortfeasor's negligent act, then the tort feasor will not be insulated from liability.

A negligent tortfeasor is not insulated from liability for injuries which are caused during the course of having the first injury treated, even if the second injury is the result of medical negligence. Bost v. Metcalf, 219 N.C. 607, 14 S.E.2d 648 (1941). In Bost the plaintiff, in response to the defendant's counterclaim for injuries caused in an automobile collision, made the Defendant's physician a defendant because of injuries caused by alleged malpractice. The Supreme Court dismissed the action against the physician and expressly reaffirmed the existing rule that the original tortfeasor is liable for all damages proximately resulting from the original injuries, including such as were partly caused by the unsuccessful or negligent treatment by the physician or surgeon. Sears v. R.R. Co., 169 N.C. 446, 86 S.E. 176 (1915).

The fact that the different acts of medical care providers combine to produce a single injury will make them all jointly and severally liable and non will be insulated from damages to the plaintiff. McEachern v. Miller, 268 N.C. 591, 151 S.E.2d 209 (1966). In McEachern the North Carolina Supreme Court reversed the trial court's dismissal of the plaintiff's action for wrongful death against the Hospital and the physician on the grounds of misjoinder of parties. In reversing the Court said:

> The well established and familiar rule that a plaintiff may consistently and properly join as defendants in one complaint several joint tortfeasors applies where different persons, by related and concurring acts, have united in producing a single or common result upon

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A related issue which all litigants must be aware is that although G.S. §1-540.1 specifically provides that the release of a person responsible for personal injury shall not bar an action by the injured party against a physician treating the injury, it has been held that the statute does not apply in a wrongful death action. Therefore, if a negligent driver who struck your deceased plaintiff is released, any action against the treating physician for medical negligence will be barred. Simmons v. Wilder, 6 N.C. App. 179, 169 S.E.2d 480 (1969).

> which the action is based.... There may be two or more proximate causes of an injury. These may originate from separate and distinct sources or agencies operating independently of each other, yet if they join and concur in producing the result complained of, the author of each cause would be liable for the damages inflicted, and action may be brought against any one or all as joint tortfeasors.

Therefore, if faced with the defense of intervening negligence in a medical case, the plaintiff wants to establish that the various acts combined to create one injury.

X. LOSS OF CHANCE

The recovery for the loss of chance is an action seeking damages for medical negligence where the patient's chance of a better result was less than certain, even in the absence of medical negligence, but the negligence either deprived the patient of that chance or increased the risk of an unfavorable outcome. Alternatively, did the negligence decrease the opportunity for recovery. No North Carolina cases have addressed such a claim in precisely those terms. However, the claim "loss of chance" simply raises a causation question: was the plaintiff's injury or death the result of a pre-existing condition, typically the one being treated; or was that existing risk of harm increased by the medical negligence? And more importantly, is the loss of that opportunity compensable as a separate item from the actual risk which is realized?

Although no reported North Carolina decision has addressed this claim, in the case of Shumaker v. U.S., 714 F. Supp. 154 (M.D.N.C. 1988), Judge Bullock, District Court Judge for the Middle District of North Carolina, had to determine whether a claim for loss of chance was recognized under North Carolina law. The issue was before the Court on Defendant's motion for summary judgment on the grounds of, among other things, whether there was sufficient evidence of causation and whether North Carolina recognized a claim of loss of chance. Subsequent to Judge Bullock's ruling the case was settled. Therefore, this case appears to be the only discussion of the doctrine in North Carolina. Judge Bullock, in a well reasoned opinion, concluded that such a claim was viable in North Carolina and that the forecast of evidence was sufficient on the issue of causation.

In Shumaker the plaintiff suffered from bilateral retino-blastoma which went underdiagnosed by the defendants for some period of time. Once diagnosed, the treatment was unsuccessful and the child ultimately lost both of her eyes. The plaintiff's treating physician, Dr. Ellsworth, an expert on the treatment of retinoblastoma, first saw the plaintiff in January of 1983. The symptoms had been brought to the attention of the Defendants as early as May of 1982. The Court summarized his deposition testimony on causation as follows:

> Dr. Ellsworth concluded that, while he could not be certain, the chances that the ultimate result in Jessica's case would have been different had the retinoblastoma been diagnosed in September 1982 rather than January 1983 could have been as great as one in two, though he believe they were more likely one in three. ... By comparison, had diagnosis and treatment begun in May 1982, Dr. Ellsworth opined that more likely than not the end result would have been different.

Id. at 162.

In response to the Defendant's arguments that this testimony was insufficient as a matter of law to show that the loss of the plaintiff's eyes were proximately caused by the defendant's negligence, the plaintiffs averred that their "claims were based not only on the ultimate loss of Jessica's eyes but also on a contention that were it not for the Defendants'

See the following sources for a detailed discussion of loss of chance. "Causation - Loss of Chance", 54 ALR4th 10; Smith, Increased Risk of Harm: A new Standard for Sufficiency of Evidence of Causation in Medical Malpractice Cases, 65 BU L Rev 275 (1985); Andel, Medical Malpractice: The Right to Recover for the Loss of a Chance of Survival, 12 Pepperdine L Rev 973 (1985);

negligence Jessica would have had a substantially better chance of retaining her sight". Id. at 163. Therefore, they were basing their claim on the loss of the chance, as opposed to solely on the loss of the eyes.

Judge Bullock first stated that the Fourth Circuit had previously recognized lost possibility as a new type of harm, not as a new test for causation and then proceeded to determine whether North Carolina would do the same, since no North Carolina court had yet confronted the issue. The Court then stated that cases, such as White V. Hunsinger, 88 N.C.App. 382, 363 S.E.2d 203 (1988), which hold that proximate cause "requires more than a showing that a different treatment would have improved the chances of recovery . . . can, but need not, be construed as inconsistent with recognizing lost possibility as a compensable loss." Those cases were addressing the quantum of causation evidence necessary in a medical negligence claim and were not addressing whether a separate claim exists for the loss of opportunity. Based on that conclusion, Judge Bullock stated "the court cannot say at this time that the current status of the law is such that the North Carolina Supreme Court would reject the theory.

The Court in Shumaker then found that the above summarized evidence from Dr. Ellsworth was sufficient to show that the delay in treatment affected the results. "Whether the decrease in her chances amounted to a substantial lost possibility is a jury question". Id. at 164. The court made the following comment in footnote seven, "The court does not determine at this time what amount of damages might be recoverable for lost possibility of recovery, compared with the ultimate loss of Jessica's eyes." Therefore, the Court is clearly recognizing a claim for a distinct harm for the loss of chance which is separate from the claim for the loss of her eyes.

Mashburn v. Hedrick, 63 N.C.App. 454, 305 S.E.2d 61, cert.den. 309 N.C. 821, 310 S.E.2d 350 (1983), certainly reads like a "loss of chance" case. In that case the Plaintiff filed sought damages for the amputation of his left leg as a result of the Defendant's negligence in failing to properly diagnose and failure to refer the plaintiff to a specialist. The plaintiff first went to the Defendant with symptoms including two toes that had turned purple and pain when walking, in March, 1977. Subsequently, in August, 1977 the lower portion of his left leg was amputated as a result of peripheral vascular disease. He had gone untreated from March until May, 1977. The trial court's entry of a directed verdict at the close of plaintiff's evidence was reversed by the Court of Appeals, holding that sufficient evidence of causation had been presented.

In Mashburn, the plaintiff's expert witnesses testified that vascular diseased is a progressive one, therefore between March and May the disease was progressing and was not being monitored. The court relied upon the following summarized evidence:

> "Dr. Stocks' opinion was that the success rate of an operation on plaintiff's leg was about 50% in May but only about 25% in August. The opinion of another expert, Dr. Conley, was that, based upon the arteriogram, the operation success rate was 75% to 80% on May 23, 1977 and it had declined to 8% to 10% by 11 August 1977.

The Court found that had he been properly diagnosed and referred in March, there would have been an increased possibility of saving the plaintiff's leg from amputation. Id. 305 S.E.2d at 64. this sounds remarkably similar to the type of language in Shumaker which constituted a claim for loss of chance. However, it is clear that in Mashburn the plaintiff was seeking

recovery for the actual injury as opposed to the loss of opportunity to be healed. This case seems to highlight that the difference between a traditional medical negligence claim, and one denominated "loss of chance" is very gray indeed.

Certainly, there are numerous North Carolina cases which state that "Proof of proximate cause in a malpractice case requires more than a showing that a different treatment would have improved the patient's chance of recovery". White v. Hunsinger, supra.; Gower v. Davidian, 212 N.C. 172, 193 S.E. 28 (1937); Bridges v. Shelby Women's Clinic, 72 N.C.App. 15, 323 S.E.2d 372 (1984), disc. rev. denied, 313 N.C. 596 330 S.E.2d 605 (1985). As recognized by Judge Bullock in Shumaker these cases may be read to preclude a claim for loss opportunity. The distinction must be drawn, however, to a traditional claim for the actual injury and what causation proof is required, and a claim to be compensated for the lost possibility of having a greater chance of avoiding the ultimate injury. Certainly the North Carolina Supreme Court, in Johnson v. Ruark, supra., indicates a willingness to broaden recognized claims. It will remain to be seen what position North Carolina ultimately takes on the claim of loss chance and the proper measure of damages in such a case.