Intervening/Superseding Cause of Plaintiff's Injury — A Viable Approach to Defending Medical Malpractice Cases at Trial?

Anthony J. Breschi and Kaitlan M. Skrainar

Your client, a physician, is sued along with a co-defendant for negligence in the care of a patient. It is alleged that your doctor's negligence occurred first, followed by the negligence of the co-defendant. Plaintiff claims both defendants caused the injury.

During the course of discovery, defense counsel agree to cooperate and not "point the finger" of blame. However, the co-defendant settles with the plaintiff, leaving your client as the sole defendant.

In evaluating the case law and the facts, you determine that your best defense is to assert that the former co-defendant's negligence was the sole proximate cause of the plaintiff's injury and superseded any negligence on the part of your client. The question is: are you in a position to prove this? Can you also deny liability while asserting this defense? Are you entitled to the intervening/superseding cause instruction in MPJI 19:11?

In a recent case we were able to utilize the Plaintiff's expert's video testimony to illustrate the superseding negligence of the dismissed defendant. The Court gave the pattern jury instruction as we requested and the jury found in favor of our client based on the superseding negligence of former party.

Development of the intervening/superseding cause defense.

The concepts of intervening and superseding cause have existed in Maryland jurisprudence for some time. Indeed, the defense has been utilized in medical malpractice cases for decades. *See e.g. Thomas v. Corso*, 265 Md, 84 (1972) (on-call doctor presented evidence of the nurses' subsequent negligence in attempt to prove he was not liable); *Mehlman v. Powell*, 281 Md. 269 (1977) (court upheld jury's verdict that co-defendant's negligence was not a superseding cause but did not preclude admission of evidence to support the defense).

A superseding cause may be found where an unusual and extraordinary independent intervening negligent act occurs that could not have been anticipated by the original tortfeasor. *Pittway Corp. v. Collins*, 409 Md. 218, 253 (2009). Maryland courts apply Section 442 of the Restatement (Second) of Torts to determine when an intervening negligent act rises to the level of a superseding cause using the following criteria:

> (a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;
> (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;
> (c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation;
> (d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act;
> (e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;
> (f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.[1]

The Impact of *Martinez* and *Copsey*

To introduce evidence of an intervening act as a superseding cause of the plaintiff's injuries, a defendant must deny negligence altogether or concede negligence, for purposes of the argument, but deny causation, thereby opening the door for admission of evidence concerning a third party's negligence. Such evidence may relate to the negligent acts occurring before the defendant's own alleged negligence (*Martinez*), or after the defendant's claimed negligence (*Copsey*).

A defendant is responsible for all con-

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The MDC expert list is designed to be used as a contact list for informational purposes only. It provides names of experts sorted by area of expertise with corresponding contact names and email addresses of MDC members who have information about each expert as a result of experience with the expert either as a proponent or as an opponent of the expert in litigation. A member seeking information about an expert will be required to contact the listed MDC member(s) for details. The fact that an expert's name appears on the list is not an endorsement or an indictment of that expert by MDC; it simply means that the listed MDC members may have useful information about that expert. MDC takes no position with regard to the licensure, qualifications, or suitability of any expert on the list.

To check out the **MDC Expert List**, visit **www.mddefensecounsel.org** and click the red "Expert List" button in the left hand corner of the home page or access it from the directory menu.

[1] It should be noted that there is no strict requirement that the intervening act be that of a present or former defendant. The Restatement refers only to the intervening force being due to the act of a "third person."

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sequences of his negligent acts. *Morgan v. Cohen*, 309 Md. 304, 310 (1987). Most courts, including Maryland's, have ruled that, in the absence of some prolonged period between the negligent act and injury, or a clearly unforeseeable action on the part of a third party, the defendant's negligence and proximate cause are jury questions. Therefore, prior to *Martinez* and *Copsey*, many Maryland courts would exclude evidence of the acts of a non-party as irrelevant to the negligence of the defendant.

In both *Martinez* and *Copsey* the defendant denied negligence and sought to bring in evidence of the settling defendant's negligence. In *Martinez v. The Johns Hopkins Hospital*, 212 Md. App. 634 (2013), the hospital sought to present evidence of the negligence of the nurse midwife that preceded the patient's admission to the hospital. The Court of Special Appeals explained why such evidence was relevant where the defendant asserts a complete denial of liability:

> Here, the Hospital was entitled to try to convince the jury that not only was it *not* negligent and *not* the cause of Martinez's injuries, but that Midwife Muhlhan *was* negligent and *did* cause the injuries. There was a void of evidence that left a logical hiatus in the story because the jury was not allowed to hear what role Midwife Muhlhan's conduct played…. Accordingly, because the Hospital was precluded from presenting any evidence that Midwife Muhlhan breached the standard of care and was therefore negligent, it follows that the jury was left to wonder whether anyone other than the Hospital — the sole defendant — *could* have caused Martinez's injuries.

Id. at 665-666 (emphasis in original). The Court concluded that the defendant at trial is entitled to present evidence that a non-party was at fault and was the sole, proximate cause of the plaintiff's injuries.

Copsey v. Park, 228 Md. App. 107 (2016), involved a wrongful death claim by plaintiffs who claimed that Dr. Park misread the patient's MRI six days before the patient suffered a massive and ultimately fatal stroke. They also claimed that the subsequent treating physicians were negligent in caring for the decedent. The Plaintiffs objected and moved *in limine* to exclude Dr. Park's introduction of evidence concerning the negligence of subsequent treating physicians who had settled or had been dismissed. The trial court overruled the objection and instructed the jury on superseding cause. Citing its earlier decision in *Martinez*, the Court of Special Appeals stated:

However, just like the defendant in *Martinez*, Dr. Park, in addition to claiming that Drs. Blum, Viswanathan, and Alkaitis were superseding causes, completely denied liability. Therefore, the reason why evidence of third-party negligence was admissible in *Martinez* applies here as well-because without it, "the jury [would have been] given a materially incomplete picture of the facts, which [would have] denied [Dr.

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Editors' Corner

The Editors are proud to publish the Summer edition of *The Defense Line*. Once again, a huge shout out goes to you, members of the MDC, who answered the call for articles, advice, resources, and spotlights. Since our last edition, MDC's Trial Academy proved to be a continued success. Thanks to **Andrew Gaudreau**, of Leder & Hale, PC, for providing a summary and highlights of this year's event. The articles in this edition deal with a variety of legal issues and are reflective of the diversity of practice areas within our membership. **Anthony J. Breschi** and **Kaitlan M. Skrainer**, of Waranch & Brown, LLC, share their insight on the viability of defending a medical malpractice case on the basis of an intervening or superseding cause. **Kambon Williams**, of Pessin Katz Law, provides an update on data breach suits against Equifax and the potential impact of Attorney General suits on attorney's fees. An article by **Patricia McHugh Lambert**, of Pessin Katz Law, provides very helpful advice on preparation for corporate depositions, a task often faced by defense counsel. Finally, **Andrew Gaudreau** and **Tom Hale**, of Leder & Hale, PC, explain the benefits, criticisms, and pitfalls of LEED construction.

You will notice a new section in this edition — Spotlights. We want to hear from you and showcase the success of our members! The next time you win a case or are recognized, let us know.

The Editors sincerely hope the members of the MDC enjoy this edition of *The Defense Line*. If you have any comments, suggestions, or would like to submit an article or spotlight for publication for a future edition, please contact one of the editors below. See you at the Crab Feast to celebrate a fantastic year for the MDC!

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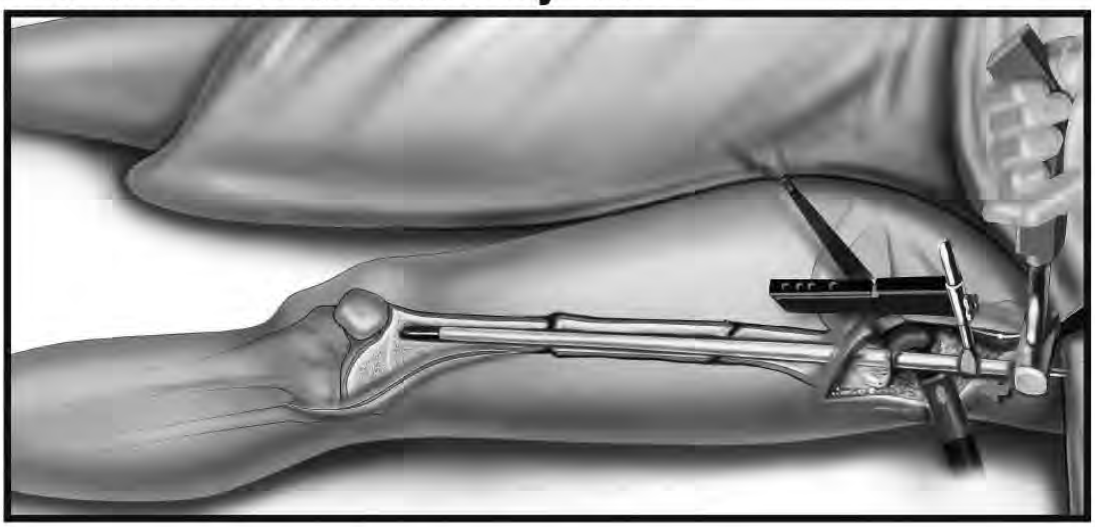
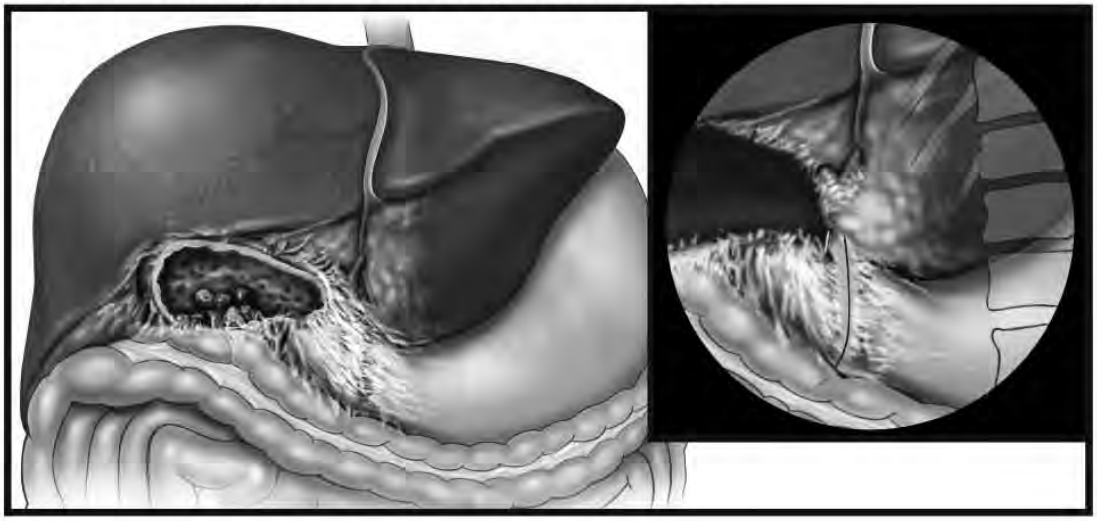
Antibiotic Intramedullary Nail



Laparoscopic Cholecystectomy



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> Park] a fair trial." *Id.* at 666, 70 A.3d 397. Our holding in *Martinez* that "evidence of both negligence and causation attributable to a non-party is relevant where a defendant asserts a complete denial of liability," *id.* at 664, 70 A.3d 397, was unqualified.

Id. at 120-21. Recognizing that liability may be cut off by the subsequent negligence of another physician, the Court concluded that Dr. Park was also entitled to pursue the superseding cause defense and to present evidence of the negligence of the subsequent treating physicians in support of that defense. *Id.* at 121-23.

- How do you present evidence of the co-defendant's negligence?

  Since you had an agreement with the co-defendant not to criticize each other, how can you cooperate in the defense while preserving your ability to allege negligence on the part of the co-defendant after he has settled with the plaintiff? One solution is to take advantage of the plaintiff's expert witnesses. If the plaintiff calls an expert witness at trial who criticized the care of the settled, now non-party, *Martinez* and *Copsey* permit you to cross-designate the expert and elicit such testimony. Alternatively, when taking the deposition of the plaintiff's expert, ensure that you note the deposition for use at trial so that you can introduce the deposition testimony in your case. You would also have the right to introduce the plaintiff's answers to interrogatories which may contain admissible evidence of the former co-defendant's negligence.

  Be sure to have your own expert witness prepared to testify on causation issues. Despite the non-disparagement agreement with your co-defendant, you can legitimately have your expert negate any claimed negligence and the causal connection between your client's actions and the injury. If you have been successful in introducing evidence of the plaintiff's criticisms of your former co-defendant, such testimony will be even more persuasive.

- Will you be able to get the claim of intervening/superseding cause instruction?

  In *Copsey*, unlike *Martinez*, the negligence of the non-parties was after the negligence of the defendant at trial. In this circumstance the defendant is entitled to the Maryland Pattern Jury Instruction 19:11 on intervening/superseding cause.[2] This instruction recites that while there may be additional causes of an injury that occur after the defendant's conduct, the event or act must be so extraordinary that it was not reasonably foreseeable. To take advantage of this instruction, it is important to stress the circumstances that should lead a jury to find that the settled or non-party's negligence was the cause of the injury rather than your client's actions.

In the appropriate case, invoking a superseding/intervening causation defense may be a viable and effective approach to defending a medical malpractice case at trial.

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[2] Maryland Pattern Jury Instruction 19:11 provides:

> There can be additional causes for the injury that occur after the defendant's conduct. If a later event or act could have been reasonably foreseen, the defendant is not excused for responsibility for any injury caused by the defendant's negligence. But if any event or act is so extraordinary that it was not reasonably foreseeable, the defendant's conduct is not a legal cause of the injury