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How Can Causation Be Established in a Labor and Delivery Malpractice Action?

A malpractice action requires the plaintiff to prove: (1) the defendant caregiver owed a duty of care to the plaintiff-patient, (2) the caregiver departed from that standard of care, and (3) that departure from the standard of care actually *caused* the injury claimed by the plaintiff. "Causation" is often the critical component in a malpractice action because the presence of a duty is often obvious, except perhaps in "Good Samaritan" cases, but the statutorily-required expert witnesses will argue about whether the caregiver departed from *some* standard of care. Because defining "causation" is difficult, there are interesting distinctions in legal versus medical, sociological, or philosophical concepts of cause-and-effect. Applying this difficult concept of "causation" to the very complex world of labor and delivery (L&D) does indeed beg the question, just how *can* causation be established? [For this brief essay, I will address the more typical negligence action against a healthcare provider. For interesting aspects of causation when health care institutions are accused of negligence, including vicarious liability, the reader is referred to Furrow BR, et al. Health Law, 2nd Edition: Ch. 7, *The Liability of Health Care Institutions*, West Group, St. Paul, 2000, pp 372-93. Please note this hornbook has been updated very recently.]

In an alleged malpractice action, causation requires the caregiver to have actually caused the plaintiff's claimed loss, termed "factual causation." This is the mechanism underlying the "but-for" test: *but-for* the caregiver's action, or lack of action, the plaintiff would *not* have suffered injury. However, the "but-for" test fails in the complex world of health care, hosting potentially multiple defendants (e.g., ob/gyns, anesthesiology staff, nurses), multiple diagnoses, preexisting diseases, and negligence or lack of compliance by the plaintiff herself. One way to deal with these complexities regarding causation has been the development of the concept, "proximate cause". [See: Furrow et al., *Liability of Health Care Providers*, b. Basic Causation Tests, pp 302-3, citing **Stecker v. First Commercial Trust Company,** 962 S.W.2d 792 (Ark 1998).]

Proximate cause doctrines allow the trier of fact flexibility in imposing duties on defendant caregivers in complex situations. The court instructs the jury that the jury may find the defendant liable "…if the injury is the natural and probable consequence of the original negligent act or omission *and* as such might reasonably have been foreseen as probable." [See: Furrow et al., *Liability of Health Care Providers*, b. Basic Causation Tests, pp 302-3, citing **Stecker v. First Commercial Trust Company,** 962 S.W.2d 792 (Ark 1998).] Often, the defendant "proximately causing" the injury is that actor closest to, or most "proximate" to the alleged injury. But that is not necessarily true in all situations – perhaps especially in L&D.

Proximate cause is difficult to apply when there are multiple defendants. What if each alleged act of negligence, by itself, was not enough to cause the injury, i.e. there is a lack of independently sufficient causation? Is the admitting ob/gyn liable for a nonreassuring fetal electronic monitoring result if the labor nurse fails to alert the doctor as to the ominous new finding? The ob/gyn will be accused of failing to timely deliver, but isn't the nurse, at least, co-negligent as