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Supreme Court No. 91374-9
King Co. Superior Court Cause No. 13-2-21191-2 SEA

SUPREME COURT OF THE STATE OF WASHINGTON

DAVID DUNNINGTON and JANET WILSON,

Plaintiffs-Petitioners,

vs.

VIRGINIA MASON MEDICAL CENTER,

Defendants-Respondents.

PETITIONERS' REPLY/RESPONSE BRIEF

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 ORIGINAL

TABLE OF CONTENTS

| | |
|--|-----|
| TABLE OF AUTHORITIES | iii |
| I. REPLY REGARDING STANDARD OF CAUSATION | 1 |
| A. VMMC's argument that the but for standard of causation is the exclusive means of establishing cause in fact is incorrect, as this Court has previously recognized that the substantial factor standard of causation may be used to establish cause in fact in appropriate circumstances. | 1 |
| B. VMMC does not meaningfully address the threat of a de facto directed verdict and jury confusion resulting from the <i>interplay</i> between loss of a chance less than 50%, the but for standard of causation, and the preponderance of the evidence burden of proof. | 5 |
| C. The substantial factor standard of causation should be applied here because both cancer and the conduct of Ngan could have caused the recurrence of Dunnington's cancer..... | 8 |
| D. Chapter 7.70 RCW, governing medical negligence actions, does not preclude use of the substantial factor standard of causation..... | 11 |
| E. VMMC's discussion of the standard of causation set forth in the Restatement (Second) of Torts § 431 is irrelevant because this Court has adopted the Prosser & Keeton formulation of the substantial factor standard..... | 12 |
| II. RESPONSE REGARDING COMPARATIVE FAULT DEFENSE | 14 |
| A. Restatement of issues regarding comparative fault defense. | 14 |
| B. Restatement of the case regarding comparative fault defense. | 14 |
| 1. Factual background. | 14 |

| | |
|---|----|
| 2. Procedural history..... | 18 |
| C. Argument regarding comparative fault defense. | 21 |
| 1. On summary judgment, VMMC has the burden to produce evidence sufficient to support a finding that any alleged comparative fault on the part of Dunnington was a cause of his injuries. | 21 |
| 2. The superior court did not err in dismissing VMMC's comparative fault defense because it failed to produce evidence of causation in response to Dunnington's motion for summary judgment. | 22 |
| 3. VMMC's discussion of the duty of a patient to follow his or her physician's instructions is immaterial to the issue of causation. | 24 |
| D. Conclusion regarding comparative fault defense. | 25 |
| CERTIFICATE OF SERVICE..... | 26 |
| APPENDIX | |

TABLE OF AUTHORITIES

Cases

| | |
|---|-----------------|
| <i>Allison v. Housing Authority</i> , 118 Wn. 2d 79, 821 P.2d 34 (1991) | 13 |
| <i>Christen v. Lee</i> , 113 Wn. 2d 479, 780 P.2d 1307 (1989) | 2 |
| <i>Cox v. Spangler</i> , 141 Wn. 2d 431, 5 P.3d 1265 (2000) | 22 |
| <i>Daugert v. Pappas</i> , 104 Wn. 2d 254, 704 P.2d 600 (1985)..... | 3-4, 7-8, 13-14 |
| <i>Eckerson v. Ford's Prairie Sch. Dist.</i> , 3 Wn. 2d 475, 101 P.2d 345 (1940) | 1-2 |
| <i>Estate of Dormaier v. Columbia Basin Anesthesia, PLLC</i> , 177 Wn. App. 828, 313 P.3d 431 (2013) | 6 |
| <i>Fabrique v. Choice Hotels Int'l, Inc.</i> , 144 Wn. App. 675, 183 P.3d 1118 (2008)..... | 4 |
| <i>Herskovits v. Group Health Coop.</i> , 99 Wn. 2d 609, 664 P.2d 474 (1983)..... | 7-10 |
| <i>Koenig v. Thurston Cty.</i> , 175 Wn. 2d 837, 287 P.3d 523, 532 (2012) | 23 |
| <i>Matsuyama v. Birnbaum</i> , 890 N.E.2d 819 (Mass. 2008) | 6 |
| <i>Mohr v. Grantham</i> , 172 Wn. 2d 844, 262 P.3d 490 (2011) | 4, 7-10, 12 |
| <i>Sharbono v. Universal Underwriters Ins. Co.</i> , 139 Wn. App. 383, 161 P.3d 406 (2007), <i>rev. denied</i> , 163 Wn. 2d 1055 (2008) | 4 |

| | |
|---|----|
| <i>State ex rel. Lemon v. Langlie</i> , 45 Wn. 2d 82, 273 P.2d 464 (1954) | 3 |
| <i>State v. McDonald</i> , 90 Wn. App. 604, 953 P.2d 470 (1998), <i>aff'd</i> , 138 Wn. 2d 680, 981 P.2d 443 (1999) | 4 |
| <i>Young v. Key Pharms., Inc.</i> , 112 Wn. 2d 216, 770 P.2d 182 (1989)..... | 21 |

Statutes and Rules

| | |
|--------------------|--------|
| Ch. 7.70 RCW | 12 |
| CR 12 | 18, 21 |
| CR 56 | 18, 21 |
| RCW 4.22.015..... | 11 |
| RCW 7.70.040 | 11-12 |

Other Authorities

| | |
|---|-------|
| 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 11.01 (6 th ed.) .. | 22 |
| Restatement (Second) of Torts § 431 (1965) | 12-13 |
| W. Page Keeton, et al., <i>Prosser & Keeton on the Law of Torts</i> (5 th ed. 1984) | 12-14 |

David Dunnington and Janet Wilson (collectively “Dunnington”) submit the following reply regarding the standard of causation to be applied in this case, and response to the brief filed by Virginia Mason Medical Center (“VMMC”) regarding its comparative fault defense:

I. REPLY REGARDING STANDARD OF CAUSATION

A. VMMC’s argument that the but for standard of causation is the exclusive means of establishing cause in fact is incorrect, as this Court has previously recognized that the substantial factor standard of causation may be used to establish cause in fact in appropriate circumstances.

VMMC appears to be arguing that the but for standard of causation is the exclusive means of proving cause in fact in a tort case. Specifically, in its response brief VMMC states:

“But for causation is the first, essential element of proximate cause, cause-in-fact. Cause-in-fact is not a mere technicality but the “*sine qua non* of legal liability.” *Eckerson v. Ford’s Prairie Sch. Dist.*, 3 Wn. 2d 475, 482, 101 P.2d 345 (1940).

VMMC Br., at 2 (unmatched quotation marks & citation in original; footnotes omitted); *accord id.* at 23 (quoting *Eckerson*). The second sentence of the foregoing quotation from VMMC’s brief, indicating that a plaintiff must establish cause in fact in order to prevail on a tort claim, is not disputed by Dunnington. However, the first sentence of the quotation is incorrect because it indicates that the

but for standard of causation is the only means by which a plaintiff can establish cause in fact. Although the sentence contains an open quotation mark, the language is not contained in the *Eckerson* case and no other citation appears in the text or the footnotes. In actuality, the language of the first sentence is contrary to *Eckerson*, which states that the but for standard of causation is merely “[t]he most usual definition” of cause in fact, not the exclusive definition. *See* 3 Wn. 2d at 482 (brackets added). *Eckerson* does not preclude application of the substantial factor standard of causation under appropriate circumstances.¹

VMMC also equates cause in fact with the but for standard of causation in quoting *Christen v. Lee*, 113 Wn. 2d 479, 507-08, 780 P.2d 1307 (1989), for the proposition that “[c]ause in fact refers to the ‘but for’ consequences of an act[.]” VMMC Br., at 16 (brackets added). However, *Christen* did not involve the substantial factor standard of causation, and the Court did not purport to eliminate

¹ Dunnington relies on *Eckerson* for the proposition that the standard of causation employed in a given case reflects considerations of justice and public policy that may require more or less proximity between tortious conduct and the resulting harm. *See* Dunnington Br., at 9.

use of the substantial factor standard under appropriate circumstances. *See* 113 Wn. 2d at 507-08 & n.71.²

This Court has recognized that the substantial factor standard of causation can satisfy the requirement to establish cause in fact in *Daugert v. Pappas*, 104 Wn. 2d 254, 262, 704 P.2d 600 (1985). Although the Court declined to apply the substantial factor standard under the facts of *Daugert*, the statement of the rule regarding the substantial factor standard is nonetheless precedential. *See State ex rel. Lemon v. Langlie*, 45 Wn. 2d 82, 90, 273 P.2d 464 (1954) (stating “[e]ven though we held [in a prior case] that he [i.e., the plaintiff] had not shown compliance with the rule, the statement of this legal principle was still necessary to the decision reached,” and holding that the statement of the inapplicable legal principle was “controlling” as precedent in a subsequent case; brackets added). VMMC implicitly acknowledges

² VMMC makes similar types of statements throughout its response brief, which are not supported by citation to authority. *See* VMMC Br., at 3 (stating “[n]o important policy arguments support eviscerating traditional causation doctrine by removing cause-in-fact from medical malpractice lost chance cases”; brackets added); *id.* at 16 “stating “[t]he request to jettison the but for test is therefore essentially a request to eviscerate traditional tort law by removing the plaintiff’s burden of proving cause-in-fact”; brackets added); *id.* at 25 (stating that the substantial factor standard “results in the traditional two prong inquiry for proximate cause (cause-in-fact plus legal causation) being reduced to a single, policy driven inquiry as to how far the consequences of a defendant’s acts should extend”).

the rule and precedential status of *Daugert* in its briefing. See VMMC Br., at 27 & 29.³

Medical negligence claims involving loss of a chance incorporate “established tort theories of causation, without applying a particular causation test to *all* lost chance cases.” *Mohr v. Grantham*, 172 Wn. 2d 844, 857, 262 P.3d 490 (2011) (emphasis in original). “To prove causation, a plaintiff would then rely on established causation doctrines permitted by the law and the specific evidence of the case.” *Id.*, 172 Wn.2d at 862. This language from *Mohr* confirms that the plaintiff in a loss of chance claim is not limited to the but for standard of causation. VMMC quotes some of the pertinent language from *Mohr* in its brief, but it does not acknowledge that established tort theories of causation include the substantial factor standard as well as the but for standard of causation. See VMMC Br., at 37 (quoting *Mohr*, at 862).

The question that remains is which standard of causation should be applied in a case such as this one, involving loss of chance less than 50%.

³ *Daugert* has also been treated as precedential with respect to the substantial factor standard of causation by the Court of Appeals. See, e.g., *Fabrique v. Choice Hotels Int'l, Inc.*, 144 Wn. App. 675, 684, 183 P.3d 1118 (2008); *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 419-20, 161 P.3d 406 (2007), *rev. denied*, 163 Wn. 2d 1055 (2008); *State v. McDonald*, 90 Wn. App. 604, 612-14, 953 P.2d 470 (1998), *aff'd*, 138 Wn. 2d 680, 981 P.2d 443 (1999).

B. VMHC does not meaningfully address the threat of a de facto directed verdict and jury confusion resulting from the *interplay* between loss of a chance less than 50%, the but for standard of causation, and the preponderance of the evidence burden of proof.

Dunnington previously pointed out how a claim for loss of a chance less than 50% is jeopardized by the interplay between this type of injury, the but for standard of causation, and the preponderance of the evidence burden of proof:

- Because loss of a chance is defined as a percentage of the plaintiff's ultimate injury, the but for standard of causation places plaintiff claiming loss of a chance less than 50% in the untenable position of having to prove that something likely to happen regardless of whether the defendant was negligent (such as a recurrence of cancer in Dunnington's case) would not have happened in the absence of defendant's negligence, *see* Dunnington Br., at 12-13;
- The but for standard of causation requires the jury to make a categorical choice (i.e., would the plaintiff's injury have occurred in the absence of the defendant's negligence, or not?), whereas loss of a chance requires the jury to evaluate the plaintiff's injury along a continuum (i.e., assigning a percentage that corresponds to the chance of a better outcome in the absence of the defendant's negligence), *see id.* at 14-15;
- The preponderance of the evidence burden of proof requires the plaintiff to persuade the jury that s/he has established the elements of the case (including causation of the plaintiff's injury) with a confidence level greater than 50%, but, in cases involving loss of a chance less than 50%, the confidence level required by the burden of proof is greater than the but for

standard of causation and the nature of the injury will permit, *see id.* at 13-14.

In its response brief, VMMC completely ignores the burden of proof, and does not otherwise address the potential for prejudice or confusion resulting from the interplay between these concepts. *See* VMMC Br., at 38-40.⁴

VMMC argues that there is “no authority for the proposition that the but for standard is ‘tantamount to directing a verdict in favor of the defendant,’” and that “plaintiffs have certainly prevailed in these cases.” *See* VMMC Br., at 38. In support of this argument, VMMC cites two cases, both of which are distinguishable. The first case involves loss of chance greater than 50%. *See id.* at 38-39 (citing *Estate of Dormaier v. Columbia Basin Anesthesia, PLLC*, 177 Wn. App. 828, 313 P.3d 431 (2013), involving a 70% loss of chance). The second case involves a different standard of causation under Massachusetts law. *See id.* at 39 (citing *Matsuyama v. Birnbaum*, 890 N.E.2d 819, 842 (Mass. 2008), holding instructions

⁴ VMMC does state, without explanation, that loss of chance and causation represent “two different inquiries,” seeming to suggest that they are independent of each other. *See* VMMC Br., at 39. In actuality, they are not wholly independent because a causal determination is embedded within the percentage assigned to the loss of a chance in a particular case, even if the loss of a chance is conceived as a form of injury. For example, in this case, the 40% chance of a better outcome lost by Dunnington as a result of Ngan’s conduct necessarily entails a determination that his conduct did not cause the loss of a greater (or lesser) chance.

requiring that the defendant's negligence must be a substantial contributing factor in the death of plaintiff's decedent did not prejudice the defendant). Aside from these distinctions, anecdotal evidence that plaintiff's claims for loss of a chance less than 50% have been successful, albeit in a small number of cases, is no substitute for conceptual clarity regarding the relationship between injury in the form of loss of a chance, the standard of causation, and the burden of proof.

This Court has only had the opportunity to address recovery for loss of a chance in three cases. Initially, a divided Court recognized a cause of action for loss of a chance of survival on differing grounds in *Herskovits v. Group Health Coop.*, 99 Wn. 2d 609, 610-19, 664 P.2d 474 (1983) (Dore, J., lead opinion); *id.*, 99 Wn. 2d at 619-36 (Pearson, J., concurring). Then, in *Mohr*, the Court adopted Justice Pearson's plurality opinion in *Herskovits*, which conceived of loss of chance as a form of injury, and recognized a cause of action for loss of a chance of a better outcome. *See Mohr*, 172 Wn. 2d at 859. Lastly, in *Daugert*, the Court declined to apply loss of a chance to a claim for legal malpractice. *See* 104 Wn. 2d at 262. None of these cases presented the Court with an opportunity to elaborate upon the relationship between injury in

the form of loss of a chance, the standard of causation, and the preponderance of the evidence burden of proof. The majority opinion in *Mohr* adopted Justice Pearson's plurality in part because it does not prescribe a particular standard of causation for all loss of chance cases, and thereby reserved the issue of causation for future determination. *See Mohr*, at 857.⁵

C. The substantial factor standard of causation should be applied here because both cancer and the conduct of Ngan could have caused the recurrence of Dunnington's cancer.

The parties appear to agree that the substantial factor standard of causation is justified when either one of two causes would have produced the identical harm, thereby making it impossible to satisfy the but for standard of causation. *See Dunnington Br.*, at 15-16 (quoting and discussing *Daugert*, 104 Wn. 2d at 262); *VMMC Br.*, at 27-28 (also quoting and discussing *Daugert*).⁶ The parties also appear to agree that there are two potential causes of the harm to Dunnington. Either cancer or VMMC's employee, Alvin T. Ngan, DPM ("Ngan"), could have caused the recurrence of Dunnington's cancer, including radiation,

⁵ A dissenting opinion in *Mohr* also highlighted the need to harmonize injury in the form of loss of a chance with the standard of causation and the burden of proof. *See id.* at 864-65 (Madsen, J., dissenting).

⁶ *See also VMMC Br.*, at 36-37 (quoting Justice Brachtenbach's dissent in *Herskovits* for the proposition that the substantial factor standard "is applied 'only in situations where there are two causes, either of which could have caused the event alone, and it cannot be determined which was the actual cause'").

chemotherapy, and amputation of his leg. *See* Dunnington Br., at 16; VMMC Br., at 28.⁷

However, VMMC argues that the substantial factor standard is inapplicable because cancer and the conduct of Ngan did not cause Dunnington to suffer identical harm. *See* VMMC Br., at 28-29. In order to make this argument, VMMC abstracts the percentages corresponding to the risk of harm caused by cancer and the risk of harm caused by Ngan from the harm itself. Thus, VMMC contends that the risk of recurrence caused by cancer (60%) is a separate harm from the risk of recurrence caused by Ngan (40%), even though both risks involve the same recurrence of cancer. *See id.* at 28-29 (stating “[t]he chances of having a better outcome are reduced to a 60/40 ratio” and “each ‘cause’ relates to different portions of the 60/40 ratio”; brackets added).

VMMC’s approach is incompatible with the Court’s definition of loss of a chance in terms of the ultimate harm of death or disability. *See Mohr*, at 858; *Herskovits*, at 635 (Pearson, J., concurring). Injury in the form of loss of a chance merely represents a difference in *degree* rather than a difference in *kind* from the

⁷ VMMC states that “Ngan did not *cause* Mr. Dunnington’s cancer.” VMMC Br., at 28 (*italics in original*). In context, this appears to refer to the original occurrence of Dunnington’s cancer, not the recurrence of his cancer. VMMC otherwise appears to acknowledge that Ngan’s conduct is a potential cause of the recurrence. *See id.*

ultimate harm. The risk of harm represented by the loss of a chance cannot be separated from the harm itself. If the risk of harm could be separated from the ultimate harm in the way that VMMC proposes, then presumably one could recover for loss of a chance even if the ultimate harm never occurs.

Furthermore, it is not possible to equate the risk of harm, expressed as a percentage, with a corresponding percentage of the ultimate harm. The percentage corresponding to the risk of harm caused by the defendant's conduct merely serves as a policy-based damage-reducing factor. *See Mohr*, at 858; *Herskovits*, at 635 (Pearson, J., concurring). It does not reflect a legal or factual determination that the defendant caused only a percentage of the ultimate harm. For example, in the context of this case, Ngan's conduct caused a 40% risk of the recurrence of Dunnington's cancer in its entirety. He did not cause a recurrence of only 40% of the cancer. A recurrence of cancer cannot be apportioned in this way among the various risks that may have caused it.

The Court should reject VMMC's approach, and hold that the substantial factor standard of causation applies to this case because

either cancer or the conduct of Ngan could have caused the recurrence of Dunnington's cancer.⁸

D. Chapter 7.70 RCW, governing medical negligence actions, does not preclude use of the substantial factor standard of causation.

VMMC contends that “the traditional but for causation test is most consistent with RCW § 7.70.040,” which requires proof that a health care provider’s violation of the standard of care is “a proximate cause of the injury complained of.” VMMC Br., at 41-42 (quoting RCW 7.70.040). However, other than noting that the but for standard of causation “has been applied consistently to medical malpractice actions,” VMMC does not otherwise appear to contend that RCW 7.70.040 requires use of the but for standard in a case

⁸ VMMC questions whether the substantial factor standard of causation should apply to an affirmative defense of comparative fault. *See* VMMC Br., at 30. The answer is conceivably yes, if the requirements for applying the substantial factor standard are met. In most cases, a plaintiff’s comparative fault may augment an injury caused by a defendant’s tortious conduct, and the resulting combined injury may be indivisible in the sense that the damage caused by the plaintiff’s comparative fault and the defendant’s tortious conduct cannot be segregated, but the injury could not have been caused by comparative fault alone, as required to apply the substantial factor standard. In allocating fault, RCW 4.22.015 requires the finder of fact to consider “both the nature of the conduct of the parties to the action and the extent of the causal relation between such conduct and the damages.” The language referring to “the extent of the causal relation” would appear to contemplate application of different standards of causation to different claims or defenses.

such as this, involving loss of a chance less than 50%. VMMC Br., at 42.⁹

VMMC acknowledges that the phrase “proximate cause,” as used in RCW 7.70.040 is undefined. VMMC Br., at 42 & n.24 (citing *Mohr*, at 856). VMMC also acknowledges that medical negligence claims for loss of a chance brought under Ch. 7.70 RCW “rely on established tort causation doctrines permitted by law and the specific evidence of the case.” VMMC Br., at 37 (quoting *Mohr*, at 862). Accordingly, there is nothing in the statutes governing medical negligence actions that precludes use of the substantial factor standard of causation.

E. VMMC’s discussion of the standard of causation set forth in the Restatement (Second) of Torts § 431 is irrelevant because this Court has adopted the Prosser & Keeton formulation of the substantial factor standard.

VMMC includes an extended discussion of the standard of causation set forth in the Restatement (Second) of Torts § 431 (1965) in its response brief. *See* VMMC Br., at 21-25. In particular, VMMC contends that, while § 431 uses “substantial factor” language, it is qualified by other sections of the Restatement that render the standard of causation contained therein equivalent to

⁹ The argument seems to be linked to the mistaken assumption that use of the substantial factor standard of causation effectively eliminates the requirement to establish cause in fact, which has been addressed above. *See supra* part I.A.

the but for standard. *See id.* This discussion is irrelevant because the Court has not adopted the Restatement standard of causation. Instead, it has adopted the substantial factor standard described by Prosser & Keeton, which is an alternative to the but for standard. *See Daugert*, at 262 (citing *W. Prosser & W. Keeton, Torts* § 41 (5th ed. 1984)).¹⁰ According to Prosser & Keeton:

the “but for” rule serves to explain the greater number of cases; but there is one type of situation in which it fails. If two causes concur to bring about an event, and either one of them, operating alone, would have been sufficient to cause the identical result, some other test is needed In such cases it is quite clear that each cause has in fact played so important a part in producing the result that responsibility should be imposed upon it; and it is equally clear that neither can be absolved from that responsibility on the ground that the identical harm would have occurred without it, or there would be no liability at all.

W. Page Keeton, et al., Prosser & Keeton on the Law of Torts § 41, at 266-67 (5th ed. 1984) (ellipses added). The substantial factor standard of causation described by Prosser & Keeton appears to differ from the Restatement standard, and “is an improvement over the ‘but for’ rule for this special class of cases.” *Id.* at 267. The

¹⁰ *See also Allison v. Housing Authority*, 118 Wn. 2d 79, 94, 821 P.2d 34 (1991) (describing Prosser & Keeton formulation of “the ‘substantial factor’ test as a substitute for ‘but for’ causation where multiple events have caused a tort”).

Prosser & Keeton standard adopted by the Court in *Daugert* should be applied here.¹¹

II. RESPONSE REGARDING COMPARATIVE FAULT DEFENSE

A. Restatement of issues regarding comparative fault defense.

Did VMMC satisfy its burden on summary judgment to produce evidence supporting the causation element of its affirmative defense of comparative fault, and establish that there are genuine issues of material fact for trial regarding this defense?

In particular:

1. Did VMMC produce any evidence that Ngan would have properly diagnosed the lesions on Dunnington's foot if Dunnington had returned for a follow up visit in early October 2011, given that the lesions appeared to be responding to conservative treatment and improving at that time?
2. Did VMMC produce any evidence that the time necessary to seek a second opinion after Dunnington's visit with Ngan on December 27, 2011, affected Dunnington's chance of a better outcome?

B. Restatement of the case regarding comparative fault defense.

1. Factual background.

Ngan first saw Dunnington for lesions on the bottom of his left foot on September 1, 2011. During this visit, Ngan misdiagnosed

¹¹ This appears to be the same edition of Prosser & Keeton on which the Court relied in *Daugert*, and is reproduced in the Appendix.

the lesions as “a benign lesion of capillaries” known as pyogenic granuloma. CP 449. Ngan rendered what he described in his chart note as “conservative” treatment with silver nitrate and liquid nitrogen. *Id.*¹² He did not consider whether the lesions might be cancerous, he did not provide Dunnington with any warning or sense of heightened concern regarding the possibility of cancer, and he did not take or recommend any steps to rule out cancer. CP 784-85.

The September 1 chart note also states that “[o]ccasionally they [i.e., pyogenic granulomas] are refractory and may require more aggressive tx [treatment] such as surgical excision, although bleomycin may be worth a trial, albeit painful.” *Id.* (brackets added). However, Ngan preferred conservative treatment and was reluctant to recommend surgery for pyogenic granulomas. CP 769 & 773-74.

On September 15, 2011, Dunnington returned to Ngan after the lesions did not improve. CP 452. Ngan continued to misdiagnose the lesions as pyogenic granuloma. *Id.* The chart note states “[a]s this is appearing recalcitrant, other options would include bleomycin, a painful injection, versus surgical. I would

¹² A copy of the September 1, 2011, chart note, CP 448-49, is reproduced in the Appendix.

likely favor the latter, but this is his decision[.]” *Id.* (brackets added).¹³ However, Ngan again provided conservative treatment with liquid nitrogen. *Id.* As with the prior visit, he did not consider whether the lesions might be cancerous, he did not provide Dunnington with any warning or sense of heightened concern regarding the possibility of cancer, and he did not take or recommend any steps to rule out cancer. CP 778-83.

After September 15, the lesions on Dunnington’s foot appeared to be responding to conservative treatment and improving. CP 482. The parties disagree whether Ngan instructed Dunnington to make another appointment regardless of any improvement. The chart note merely says “RTC [i.e., return to clinic] 2 wks.” CP 452 (brackets added). Ngan contends “I did not tell Mr. Dunnington that he did not have to return if his condition improved.” CP 732. For his part, Dunnington understood that he did not need to return if the lesions improved with treatment. CP 482.

¹³ A copy of the September 15, 2011, chart note, CP 452, is reproduced in the Appendix.

Dunnington returned to Ngan on December 27, 2011, after the lesions reopened and started bleeding. CP 454.¹⁴ Ngan continued to misdiagnose the lesions as “presumed” pyogenic granulomas. *Id.* Although he “considered the diagnosis could be something else other than a pyogenic granuloma” at this point in time, he still did not consider whether the lesions might be cancerous, he still did not provide Dunnington with any warning or sense of heightened concern regarding the possibility of cancer, and still he did not take or recommend any steps to rule out cancer. CP 786-87. He stated “[t]his appears benign” and recommended “surgical excisional biopsy and closure” at an unspecified time in the future. CP 454.

After the December 27 visit, Dunnington sought a second opinion and treatment from another health care provider. On January 31, 2012, he underwent a biopsy that revealed the lesions were, in fact, cancerous. CP 87-88. The lesions were then surgically removed. CP 89. Although the surgery initially appeared to be successful, Dunnington’s cancer returned in June 2012, and he required numerous treatments, including chemotherapy and

¹⁴ A copy of the December 27, 2011, chart note, CP 454, is reproduced in the Appendix.

radiation. CP 122. Ultimately, the recurrence of the cancer required his left leg to be amputated below the knee. *Id.*

2. Procedural history.

Dunnington and his wife, Janet Wilson, subsequently filed suit against Ngan and his employer, VMMC.¹⁵ Dunnington supported his complaint with expert testimony that Ngan violated the standard of care by failing to consider and rule out the possibility that the lesions were cancerous, which deprived him of a 40% chance of a better outcome. CP 121-22, 206-09 & 229-31, 491-503 & 513-16.

In answer to Dunnington's complaint, VMMC raised an affirmative defense of comparative fault, alleging "[t]hat the plaintiffs' injuries and damages, if any, may be caused in part by the conduct of David Dunnington, thus barring or diminishing any right to recover." CP 343 (brackets added).

Dunnington moved to strike the defense as "insufficient" under CR 12, or, in the alternative, for partial summary judgment dismissing the defense under CR 56, based on the lack of evidence of causation. CP 432-43. Dunnington acknowledged the conflict in the testimony regarding whether Ngan had asked him to return for

¹⁵ Ngan was dismissed from the lawsuit individually, after VMMC acknowledged that it is vicariously liable for his conduct.

a follow up visit in early October. CP 441. However, he pointed to the lack of evidence that Ngan would have done anything different if Dunnington had returned in early October, or that a follow up visit would have led to an earlier diagnosis of Dunnington's cancer.

In support of the motion, Dunnington noted:

- If Dunnington had returned for a follow up visit in early October, Ngan would *not* have considered whether the lesions might be cancerous, he would *not* have provided Dunnington with any warning or sense of heightened concern regarding the possibility of cancer, and he would *not* have taken or recommended any steps to rule out cancer. CP 435-36 & 484.

- In the visits occurring before and after October 2011, Ngan failed to consider whether the lesions might be cancerous, he did not provide Dunnington with any warning or sense of heightened concern regarding the possibility of cancer, and he did not take or recommend any steps to rule out cancer. CP 752-54 & 778-85.

- Given Ngan's preference for conservative treatment and his reluctance to recommend surgery for pyogenic granulomas, CP 754, 769 & 773-74, and the fact that the lesions appeared to be responding to conservative treatment and were improving in early October, CP 435, there was no evidence that Ngan would have done anything different if Dunnington had returned for a follow up visit at that time.

In response to Dunnington's motion, Ngan submitted an affidavit stating:

I would have explored other options, ***especially if Mr. Dunnington's lesion had not responded to conservative treatment.*** I would have thus

reached the conclusion that we should surgically excise the granuloma and obtain a biopsy at an earlier date. This was the same recommendation I made in December.

CP 733 (emphasis added). Ngan did not state that he still would have explored other options even if the lesions appeared to be responding to conservative treatment and were improving. When Ngan did recommend surgical excision and biopsy on December 27, 2011, the lesions had reopened and started bleeding. CP 454.

In his affidavit, Ngan also stated:

Mr. Dunnington further delayed his diagnosis by not agreeing to the surgical excision and biopsy I recommended on December 27, 2011. Had he acted on my recommendation for surgical excision and biopsy, the melanoma would have been discovered in late December or early January at the latest. Instead, Mr. Dunnington went to another doctor apparently for a second opinion about my recommendation for surgical excision of the lesion.

CP 733. Ngan did not submit any evidence that the period of time necessary to obtain a second opinion affected Dunnington's chance of a better outcome. On the contrary, he acknowledged evidence that the failure to biopsy the lesions on Dunnington's foot by early October 2011 deprived him of that chance. CP 736.

The superior court granted Dunnington's motion, denied VMMC's motion for reconsideration, and dismissed the defense of

comparative fault. CP 797-98 & 807-08. The superior court certified this decision for review, and this Court accepted direct review.

C. Argument regarding comparative fault defense.

1. On summary judgment, VMMC has the burden to produce evidence sufficient to support a finding that any alleged comparative fault on the part of Dunnington was a cause of his injuries.

Although the underlying motion was brought under both CR 12 and CR 56, the parties agree that the dismissal of VMMC's affirmative defense of comparative fault is subject to the standard of review for summary judgment. *See* VMMC Br., at 17-18. However, VMMC does not appear to acknowledge the effect of the burden of proof on the standard of review. *See id.* The party with the burden of proof must produce evidence in response to a motion for summary judgment that is sufficient to support a finding on every essential element of its claim or defense. *See Young v. Key Pharms., Inc.*, 112 Wn. 2d 216, 225-26, 770 P.2d 182 (1989). If it cannot produce evidence sufficient to support a finding regarding a single essential element, then summary judgment should be granted (and affirmed). *See id.*

VMMC does not address the burden of proof in its brief filed in this Court, but, based on its superior court filings, the parties appear to agree that VMMC bears the burden of proof on its

comparative fault defense. *See* CP 727 (VMMC citing *Cox v. Spangler*, 141 Wn. 2d 431, 447, 5 P.3d 1265 (2000), for the proposition that “[t]he defendant bears the burden of proving contributory negligence”; brackets added). The parties also agree that an essential element of VMMC’s comparative fault defense is causation. *See* VMMC Br., at 18 (quoting 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 11.01 (6th ed.)). Thus, in order to avoid summary judgment, VMMC was obligated to produce evidence in the superior court sufficient to support a finding that any alleged comparative fault on the part of Dunnington was a cause of his injuries.

2. The superior court did not err in dismissing VMMC’s comparative fault defense because it failed to produce evidence of causation in response to Dunnington’s motion for summary judgment.

VMMC has identified two instances of alleged comparative fault on the part of Dunnington: not returning for a follow up visit in early October 2011, and taking time to obtain a second opinion after the December 27, 2011, visit. *See* VMMC Br., at 3. There is no evidence that either of these allegedly negligent acts caused Dunnington’s loss of a chance, and any inference of causation is wholly speculative.

With respect to the follow up visit, there is no evidence that Ngan would have done anything different if Dunnington had returned because the lesions appeared to be responding to conservative treatment and were improving. Ngan's affidavit in opposition to summary judgment merely states that he would have explored other options *if the lesion had not responded to conservative treatment*. CP 733. He did *not* state that he still would have explored other options *even though the lesions were responding to such treatment*. *See id.* Since the lesions were, in fact, responding to treatment, VMMC cannot prove that Ngan would have done anything. CP 482.

With respect to time needed to obtain a second opinion, there is no evidence that this delay affected Dunnington's chance of a better outcome, and VMMC acknowledged evidence that this time period was immaterial to his chances. CP 736.¹⁶ Given the absence

¹⁶ The Court does not need to address the time needed to obtain a second opinion because VMMC does not include any argument regarding this issue in its brief. *See* VMMC Br., at 17-21; *see also* *Koenig v. Thurston Cty.*, 175 Wn. 2d 837, 857, 287 P.3d 523, 532 (2012) (“declin[ing] to address issues that are not adequately briefed by the parties”; brackets added).

of evidence of causation, the superior court's order dismissing VMMC's comparative fault defense should be affirmed.¹⁷

3. VMMC's discussion of the duty of a patient to follow his or her physician's instructions is immaterial to the issue of causation.

VMMC includes in its brief an extended discussion of the general principle that a patient has a duty to follow the instructions of his or her physician. *See* VMMC Br., at 19-21. The issues of duty and breach were not the basis for Dunnington's motion for summary judgment in the superior court, and the existence of a duty and questions of fact regarding breach were assumed for the sake of argument. *See* CP 441. The issues of duty and breach are immaterial to the issue of causation, and do not eliminate VMMC's burden on summary judgment to produce evidence sufficient to support a finding that any alleged comparative fault on the part of Dunnington was a cause of his loss of a chance.

¹⁷ In the complete absence of causation evidence, the superior court order should be affirmed regardless of whether the but for standard or the substantial factor standard applies. Nonetheless, the substantial factor standard is inapplicable because VMMC acknowledges that Dunnington's alleged comparative fault could not have caused the same injury as the cancer or the conduct of Ngan. *See* CP 343 (alleging that Dunnington's comparative fault only caused his injuries "in part").

D. Conclusion regarding comparative fault defense.

The superior court order dismissing VMMC's comparative fault defense should be affirmed.

Respectfully submitted this 20th day of July, 2016.

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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On July 20, 2016, I served the document to which this is annexed by email and First Class Mail, postage prepaid, as follows:

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and via email to co-counsel for Plaintiffs/Petitioners pursuant to prior agreement to:

James L. Holman at jlh@theholmanlawfirm.com
Jessica F. Holman at jhd@theholmanlawfirm.com

Signed on July 20, 2016 at Moses Lake, Washington.



Shari M. Canet, Paralegal

APPENDIX

PROSSER AND KEETON
ON
THE LAW OF TORTS

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Chapter 7

PROXIMATE CAUSE

Table of Sections

| Sec. |
|--|
| 41. Causation in Fact. |
| 42. Proximate Cause: Scope of the Problem. |
| 43. Unforeseeable Consequences. |
| 44. Intervening Causes. |
| 45. Functions of Court and Jury. |

dence)

seeing Co., 1928,
Wolk, 1950, 312
g v. Windemuth,
ter v. Souderton
398.

v. Cathey, 1957,
a Bottling Co. v.
V.2d 833; Bagre
ma. 659, 13 A.2d
v. Gate City Co.
.W.2d 121 (glass
g Co. v. Burke,
exploding bottle).
Co., 1915, 132
g Co. v. Savage,
lla v. Providence
v. 884; Webb v.
, 121 W.Va. 115,

ing Corp., 1924,
Beverage Co. v.
cf. Rozumailski
, 1929, 296 Pa.
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230 Cal.App.2d
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§ 41. Causation in Fact

An essential element of the plaintiff's cause of action for negligence, or for that matter for any other tort, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered. This connection usually is dealt with by the courts in terms of what is called "proximate

cause," or "legal cause." There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion. Nor, despite the manifold attempts which have been made to clarify the subject,¹ is there yet any general agreement as to the best approach. Much of this confusion is due to the fact that no one problem is involved, but a number of different prob-

§ 41

1. Green, Rationale of Proximate Cause, 1927; Bohlen, The Probable or the Natural Consequences as the Test of Liability in Negligence, 1901, 49 Am.L.Rev. 79, 148; Bingham, Some Suggestions Concerning "Legal Cause" at Common Law, 1909, 9 Col.L.Rev. 16, 136; Nauth, Legal Cause in Actions of Tort, 1911, 26 Harv.L.Rev. 102, 238; Beale, The Proximate Consequences of an Act, 1920, 33 Harv.L.Rev. 633; Green, Are Negligence and "Proximate" Cause Determined by the Same Test, 1923, 1 Tex.L.Rev. 224, 423; Edgerton, Legal Cause, 1924, 72 U.Pa.L.Rev. 211, 343; McLaughlin, Proximate Cause, 1925, 39 Harv.L.Rev. 149; Green, Are There Dependable Rules of Causation, 1929, 77 U.Pa.L.Rev. 601; Carpenter, Workable Rules for Determining Proximate Cause, 1932, 20 Cal.L.Rev. 229, 396, 471; Prosser, The Minnesota Court on Proximate Cause, 1936, 21 Minn.L.Rev. 19; Campbell, Duty, Fault and Legal Cause, [1938] Wis.L.Rev. 402; Gregory, Proximate Cause in Negligence—A Retreat from Ra-

tionalization, 1938, 6 U.Chi.L.Rev. 36; Carpenter, Proximate Cause, 1940-43, 14 So.Cal.L.Rev. 1, 115, 416, 15 So.Cal.L.Rev. 187, 304, 427, 16 So.Cal.L.Rev. 1, 61, 275; Morris, Proximate Cause in Minnesota, 1950, 34 Minn.L.Rev. 185; Green, Proximate Cause in Texas Negligence Law, 1950, 28 Tex.L.Rev. 71, 621, 755; Prosser, Proximate Cause in California, 1950, 38 Cal.L.Rev. 369; James and Perry, Legal Cause, 1951, 60 Yale L.J. 761; Myers, Causation and Common Sense, 1951, 5 U.Miami L.Q. 238; Morris, Duty, Negligence and Causation, 1952, 101 U.Pa.L.Rev. 139; Pound, Causation, 1957, 67 Yale L.J. 1. Williams, Causation in the Law, [1961] Camb.L.J. 62; Green, The Causal Relation Issue in Negligence Law, 1962, 60 Mich.L.Rev. 543; R. Keeton, Legal Cause in the Law of Torts, 1963; Hart, Varieties of Legal Responsibility, 1967, 33 L.Q.Rev. 346; Thode, Tort Analysis: Duty-Risk v. Proximate Cause and the Rational Allocation of Functions Between Judge and Jury, 1977 Utah L.Rev. 1.

lems, which are not distinguished clearly, and that language appropriate to a discussion of one is carried over to cast a shadow upon the others.²

"Proximate cause"—in itself an unfortunate term—is merely the limitation which the courts have placed upon the actor's responsibility for the consequences of the actor's conduct. In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would "set society on edge and fill the courts with endless litigation."³ As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability. Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy.

This limitation is to some extent associated with the nature and degree of the connection in fact between the defendant's acts and the events of which the plaintiff complains. Often to greater extent, however, the legal limitation on the scope of liability is associated with policy—with our more or less inadequately expressed ideas of what justice de-

mands, or of what is administratively possible and convenient. Where the defendant excavated a hole by the side of the road, and the plaintiff's runaway horse ran into it,⁴ it scarcely could be pretended that the hole was not a cause of the harm, and a very important one. If the defendant escaped responsibility, it was because the policy of the law did not require the defendant to safeguard the plaintiff against such a risk. On the same basis, if the defendant drives through the state of New Jersey at an excessive speed, and arrives in Philadelphia in time for the car to be struck by lightning,⁵ speed is a cause of the accident, since without it the car would not have been there in time; and if the defendant driver is not liable to a passenger, it is because in the eyes of the law the negligence did not extend to such a risk. The attempt to deal with such cases in the language of causation leads often to confusion.⁶

Causation as Fact

Although it is not without its complications, the simplest and most obvious problem connected with "proximate cause" is that of causation in "fact."⁷ This question of "fact" ordinarily is one upon which all the learning, literature and lore of the law are largely lost. It is a matter upon which lay opinion is quite as competent as that of the most experienced court. For that reason, in

er, and so arrives at a point in the street just at the moment that a child unexpectedly darts out from the curb. Is speed a cause of the death of the child? Cf. *Dombek v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 1964, 24 Wis.2d 420, 129 N.W.2d 185.

Suppose that the defendant knows in advance the precise moment when the child will dash into the highway, and purposely operates the car at a carefully calculated speed, to arrive precisely at that instant, in order to kill the child. Is the speed a cause of the death? Are your answers more influenced by perceptions of causal connection in fact or by policy considerations related to differences between intent and negligence?

7. See, generally, Hart and Honore, *Causation in the Law*, 1959; Becht and Miller, *The Test of Factual Causation*, 1961; Malone, *Ruminations on Cause-in-Fact*, 1956, 9 *Stan.L.Rev.* 60; Green, *The Causal Relation Issue in Negligence Law*, 1962, 80 *Mich.L.Rev.* 643.

2. See Prosser, *Proximate Cause in California*, 1950, 38 *Cal.L.Rev.* 369.

3. Mitchell, J., in *North v. Johnson*, 1894, 53 *Minn.* 242, 59 *N.W.* 1012. The same problems arise in the criminal law, where the limits of criminal responsibility are in question; and they are dealt with, broadly speaking, in the same manner. See Note, 1962, 56 *Northw. U.L.Rev.* 791. As to the comparative law, see Ryu, *Causation in Criminal Law*, 1958, 106 *U.Pa.L.Rev.* 773.

4. Cf. *La Londe v. Peake*, 1901, 82 *Minn.* 124, 84 *N.W.* 725; *Alexander v. Town of New Castle*, 1883, 116 *Ind.* 51, 17 *N.E.* 200; *Milostan v. City of Chicago*, 1909, 148 *Ill.App.* 540.

5. Cf. *Berry v. Sugar Notch Borough*, 1899, 191 *Pa.* 345, 48 *A.* 240; *Balfe v. Kramer*, 1936, 249 *App.Div.* 746, 291 *N.Y.S.* 842; *Doss v. Town of Big Stone Gap*, 1926, 145 *Va.* 520, 134 *S.E.* 563; *Lewis v. Flint & P. M. Railway Co.*, 1884, 54 *Mich.* 55, 19 *N.W.* 744.

6. Defendant operates an automobile over five miles of highway at a speed in excess of what is prop-

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the ordinary case, it is peculiarly a question for the jury.

Although we speak of this issue as one of "fact," curiously the classic test for determining cause in "fact" directs the "factfinder" to compare what did occur with what would have occurred if hypothetical, contrary-to-fact conditions had existed. Some comparison between factual and contrary-to-fact conditions is implicit in the classic formulation that a cause is a *necessary* antecedent, and in the explication that in a very real and practical sense, the term "cause in fact" embraces all things which have so far contributed to the result that without them it would not have occurred.

In a few types of cases, special difficulties arise from this inherent necessity of turning to hypothetical contrary-to-fact conditions for comparison in deciding whether a cause-in-fact relation existed.⁸ In most cases, however, the general idea that a basic essential of legal cause is causal connection in fact serves well enough.

The conception of causation in fact extends not only to positive acts and active physical forces, but also to pre-existing passive conditions which have played a material part in bringing about the event.⁹ In partic-

8. See *infra*, this section, "The But-For and Substantial-Factor Rules," and "An Alternative to the Substantial-Factor Rule."

9. See *infra*, § 42, Proposed Formulae, Cause and Condition.

10. *McNally v. Colwell*, 1892, 81 Mich. 527, 52 N.W. 70; *Cobb v. Twitchell*, 1926, 91 Fla. 539, 108 So. 186; *Musgrove v. Pandelis*, [1919] 2 K.B. 48.

11. *Hayes v. Michigan Central Railroad Co.*, 1884, 111 U.S. 228, 4 S.Ct. 369, 28 L.Ed. 410; *Heiting v. Chicago, Rock Island & Pacific Railway Co.*, 1911, 252 Ill. 466, 96 N.E. 842.

12. *Stacy v. Knickerbocker Ice Co.*, 1893, 84 Wis. 614, 54 N.W. 1091; *Sowles v. Moore*, 1898, 65 Vt. 322, 26 A. 629. Cf. *Ellis v. H. S. Finks, Inc.*, 6th Cir. 1960, 278 F.2d 54 (fall would not have been prevented by safety device on a hoist); *Southern Bell Telephone & Telegraph Co. v. Spears*, 1956, 212 Ga. 537, 93 S.E.2d 659, conformed to 94 Ga.App. 329, 94 S.E.2d 514 (location of pole too close to highway; would have been hit if at proper distance); *People's Service Drug Stores v. Somerville*, 1931, 161 Md. 662, 168 A. 12 (poison label on prescription medicine would not have prevented too heavy a dose).

ular, it applies to the defendant's omissions as well as the defendant's acts. The failure to extinguish a fire may be quite as important in causing the destruction of a building as setting it in the first place.¹⁰ The failure to fence a railway track may be a cause, and an important one, that a child is struck by a train.¹¹ It is familiar law that if such omissions are culpable they will result in liability.

The But-For and Substantial-Factor Rules

An act or an omission is not regarded as a cause of an event if the particular event would have occurred without it. A failure to fence a hole in the ice plays no part in causing the death of runaway horses which could not have been halted if the fence had been there,¹² though of course making the hole did play a part. A failure to have a lifeboat ready is not a cause of the death of a person who sinks without trace immediately upon falling into the ocean,¹³ though taking the person out to sea was a cause. The failure to install a proper fire escape on a hotel is no cause of the death of a man suffocated in bed by smoke.¹⁴ The omission of crossing signals by an approaching train is of no significance when an automobile driver runs into the sixty-eighth car.¹⁵ The presence of a railroad embankment may be no cause of

13. *Ford v. Trident Fisheries Co.*, 1919, 232 Mass. 400, 122 N.E. 380; *New York Central Railroad Co. v. Grimstad*, 2d Cir. 1920, 264 F. 334; *Russell v. Merchants & Miners Transportation Co.*, E.D.Va.1937, 19 F.Supp. 349. But cf. *Kirincich v. Standard Dredging Co.*, 3d Cir. 1940, 112 F.2d 163, and *Zinnel v. United States Shipping Board Emergency Fleet Corp.*, 2d Cir. 1925, 10 F.2d 47, where there was evidence that the drowning man might have been saved.

Cf. *Berryhill v. Nichols*, 1935, 171 Miss. 769, 158 So. 470, and *Lippold v. Kidd*, 1928, 126 Or. 160, 269 P. 210, where the evidence was that the best possible medical treatment would not have averted the injury.

14. *Weeks v. McNulty*, 1898, 101 Tenn. 495, 48 S.W. 309; *Lee v. Garwile*, La.App.1964, 168 So.2d 469; *Smith v. The Texan, Inc.*, Tex.Civ.App.1944, 180 S.W.2d 1010, error refused (no showing guest made any effort to use it); *Tibbits v. Crowell*, Tex.Civ.App.1963, 484 S.W.2d 919 (no showing could have used it); *Rosser v. Atlantic Trust & Security Co.*, 1937, 168 Va. 389, 191 S.E. 651 (at least two available exits).

15. *Sullivan v. Boone*, 1939, 205 Minn. 437, 286 N.W. 350; *Wink v. Western Maryland Railway Co.*, 1935, 116 Pa.Super. 374, 176 A. 760. Accord: *Holman*

the inundation of the plaintiff's land by a cloudburst which would have flooded it in any case.¹⁶ On similar reasoning it has been said¹⁷ that the omission of a traffic signal to an automobile driver who could not have seen it if it had been given is not a cause of the ensuing collision.¹⁸

From such cases¹⁹ many courts²⁰ have derived a rule, commonly known as the "but for" or "sine qua non" rule, which may be stated as follows: The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it.²¹ As a rule regarding legal responsibility, at most this must be a rule of exclusion: if the event would not have occurred "but for" the defendant's negligence, it still does not follow that there is liability, since other considerations remain to be discussed and may prevent liability.²² It should be quite obvious that, once events are set in motion, there is, in terms of causation alone, no place to stop. The event without millions of causes is simply inconceiv-

able; and the mere fact of causation, as distinguished from the nature and degree of the causal connection, can provide no clue of any kind to singling out those which are to be held legally responsible. It is for this reason that instructions to the jury that they must find the defendant's conduct to be "the sole cause," or "the dominant cause," or "the proximate cause" of the injury are rightly condemned as misleading error.²³

Restricted to the question of causation alone, and regarded merely as a rule of exclusion, the "but for" rule serves to explain the greater number of cases; but there is one type of situation in which it fails. If two causes concur to bring about an event, and either one of them, operating alone, would have been sufficient to cause the identical result, some other test is needed. Two motorcycles simultaneously pass the plaintiff's horse, which is frightened and runs away; either one alone would have caused the fright.²⁴ A stabs C with a knife, and B fractures C's skull with a rock; either wound would be fatal, and C dies from the effects of both.²⁵ The defendant sets a fire,

v. Chicago, Rock Island & Pacific Railway Co., 1876, 62 Mo. 562 (a whistle means nothing to a cow); New Orleans & N. E. Railroad Co. v. Burge, 1941, 191 Miss. 308, 2 So.2d 825 (would not have been heard); Haive v. Brooks, 1938, 42 N.M. 634, 88 P.2d 980 (good brakes would not have stopped in time).

16. Baltimore & Ohio Railroad Co. v. Sulphur Spring Independent School District, 1880, 96 Pa. 65; City of Piqua v. Morris, 1918, 98 Ohio St. 42, 120 N.E. 800; Illinois Central Railroad Co. v. Wright, 1924, 135 Miss. 435, 100 So. 1; Cole v. Shell Petroleum Corp., 1939, 149 Kan. 25, 86 P.2d 740.

17. But see *infra*, this section, An Alternative to the Substantial Factor Rule.

18. Ronleau v. Blotner, 1931, 84 N.H. 589, 152 A. 916; Harvey v. Chesapeake & Potomac Telephone Co., 1956, 198 Va. 213, 93 S.E.2d 309. Accord: Gunnels v. Roach, 1963, 243 S.C. 243, 133 S.E.2d 757 (motorist inattentive, boy running into side of car); Peterson v. Nielsen, 1959, 9 Utah 2d 302, 348 P.2d 731 (slower speed would not have avoided collision); Sun Cab Co. v. Faulkner, 1932, 163 Md. 477, 163 A. 194 (same); Waugh v. Suburban Club Ginger Ale Co., 1943, 83 U.S. App.D.C. 226, 167 F.2d 758 (no lookout, but would not have seen).

19. Accord: Laidlaw v. Sage, 1899, 158 N.Y. 73, 52 N.E. 879; Powers v. Standard Oil Co., 1923, 98 N.J.L. 730, 119 A. 275, affirmed 98 N.J.L. 893, 121 A. 926; Boronkay v. Robinson & Carpenter, 1928, 247 N.Y. 365,

160 N.E. 400; Ham v. Greensboro Ice & Fuel Co., 1938, 204 N.C. 614, 169 S.E. 180; Schoonmaker v. Kaltanbach, 1940, 236 Wis. 133, 294 N.W. 794; Second Restatement of Torts, § 432(1).

20. Including the Supreme Court of the United States. See, e.g., Mt. Healthy City School District Board of Education v. Doyle, 1977, 429 U.S. 274, 285-87, 97 S.Ct. 553, 575, 50 L.Ed.2d 471.

21. See Smith, Legal Cause in Actions of Tort, 1911, 25 Harv.L.Rev. 103, 106, 109; McLaughlin, Proximate Cause, 1925, 39 Harv.L.Rev. 149, 155.

22. See Gilman v. Noyes, 1876, 57 N.H. 627, 631.

23. Barringer v. Arnold, 1960, 355 Mich. 594, 101 N.W.2d 365; Strobel v. Chicago, Rock Island, & Pacific Railway Co., 1959, 255 Minn. 201, 96 N.W.2d 195; Hemthorne v. Hopwood, 1959, 218 Or. 336, 345 P.2d 246; Pigg v. Brockman, 1963, 25 Idaho 492, 321 P.2d 236; Gantt v. Sissell, 1954, 222 Ark. 902, 268 S.W.2d 916.

24. Corey v. Havenar, 1902, 132 Mass. 250, 65 N.E. 69. Cf. Oulighan v. Butler, 1905, 189 Mass. 237, 75 N.E. 726; Crton v. Virginia Carolina Chemical Co., 1913, 142 La. 790, 77 So. 632; Navigazione Libera Triestina Societa Anonima v. Newtown Creek Towing Co., 2d Cir. 1938, 98 F.2d 634.

25. Wilson v. State, Tex.Cr.1893, 24 S.W. 409. Accord: Glick v. Ballentine Produce, Inc., Mo.1966, 396 S.W.2d 609, appeal dismissed 385 U.S. 5, 87 S.Ct. 44, 17

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which merges with a fire from some other source; the combined fires burn the plaintiff's property, but either one would have done it alone.²⁶ In such cases it is quite clear that each cause has in fact played so important a part in producing the result that responsibility should be imposed upon it; and it is equally clear that neither can be absolved from that responsibility upon the ground that the identical harm would have occurred without it, or there would be no liability at all.²⁷

It was in a case of this type²⁸ that the Minnesota court applied a broader rule, which has found general acceptance:²⁹ The defendant's conduct is a cause of the event if it was a material element and a substantial factor in bringing it about. Whether it was such a substantial factor is for the jury

L.Ed.2d 5; *Thompson v. Louisville & Nashville Railroad Co.*, 1890, 91 Ala. 496, 8 So. 496; *People v. Lewis*, 1899, 124 Cal. 551, 57 P. 470. A further situation might be suggested, where no one of the acts would alone have caused the result, and no one act was essential to it—as where five persons independently beat a sixth, who dies from the effect of all of the beatings, and would have died from any three.

Cf. *McAllister v. Workmen's Compensation Appeals Board*, 1968, 69 Cal.2d 408, 71 Cal.Rptr. 697, 445 P.2d 812 (lung cancer from smoke inhaled in fighting fires, and from smoking cigarettes); *Basko v. Sterling Drug Co.*, 2d Cir. 1969, 416 F.2d 417 (blindness resulting from use of two drugs).

26. *Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co.*, 1920, 146 Minn. 430, 179 N.W. 45; *Sockerson v. Sinclair*, 1913, 24 N.D. 625, 140 N.W. 239. Cf. *Appalachian Power Co. v. Wilson*, 1925, 142 Va. 458, 129 S.E. 277.

In *Cook v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co.*, 1898, 98 Wis. 324, 74 N.W. 561, the court drew a fine distinction between the case of two fires, both of responsible origin, and the case where one fire has no responsible source, holding that in the latter case there is no liability upon the responsible defendant. Later, in *Kingston v. Chicago & Northwestern Railway Co.*, 1927, 191 Wis. 610, 211 N.W. 913, the court more or less nullified the effect of the rule by holding that the burden was upon the defendant to prove the natural origin of the other fire. The distinction has been rejected elsewhere. See *Carpenter, Concurrent Causation*, 1935, 83 U.Pa.L.Rev. 941.

27. An interesting occasion for application of the same principle, where the negligence of each of two parties prevents the other from being a but-for cause, is suggested by *Saunders System Birmingham Co. v. Adams*, 1923, 217 Ala. 621, 117 So. 72, and *Rouleau v. Blotner*, 1931, 84 N.H. 539, 152 A. 916, neither of which

to determine, unless the issue is so clear that reasonable persons could not differ. It has been considered³⁰ that "substantial factor" is a phrase sufficiently intelligible to furnish an adequate guide in instructions to the jury, and that it is neither possible nor desirable to reduce it to any lower terms.

The "substantial factor" formulation is one concerning legal significance rather than factual quantum.³¹ Such a formulation, which can scarcely be called a test, is an improvement over the "but for" rule for this special class of cases. It aids in the disposition of these cases and likewise of two other types of situations which have proved troublesome. One is that where a similar, but not identical result would have followed without the defendant's act;³² the other where one defendant has made a clearly

considered the point. A supplies B with a car with no brakes; B makes no attempt to apply the brakes, and C is hit. Or A fails to signal for a left turn; B is not looking; there is a collision, and C is injured.

28. *Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co.*, 1920, 146 Minn. 430, 179 N.W. 45. The court no doubt was influenced by the suggestion of the test in *Smith, Legal Cause of Actions of Tort*, 1911, 25 Harv.L.Rev. 193, 223, 229.

29. *Carney v. Goodman*, 1954, 83 Penn.App. 55, 270 S.W.2d 572; *Walton v. Blauert*, 1949, 256 Wis. 125, 40 N.W.2d 545; *New Orleans & N. E. Railroad Co. v. Burge*, 1941, 191 Miss. 303, 2 So.2d 825; *Duham v. Village of Canisteo*, 1952, 303 N.Y. 493, 104 N.E.2d 872; *Edgecomb v. Great Atlantic & Pacific Tea Co.*, 1941, 127 Conn. 483, 18 A.2d 364; *Second Restatement of Torts*, §§ 431, 433. See Note, 1964, 15 West.Res.L. Rev. 807.

30. *Green, Rationale of Proximate Cause*, 1927, 132-141; *Green, The Causal Relation Issue*, 1962, 60 Mich.L.Rev. 543, 554. *Hart and Honoré, Causation in the Law*, 1959, 216-218, 263-266, object strongly to the phrase as undefinable. So, *Green* suggests, is "reasonable;" but that does not prevent its use to pose an issue for the jury.

31. *McDowell v. Davis*, 1969, 104 Ariz. 69, 448 P.2d 869.

As to the use of "substantial factor" in a broader sense, to include elements of "proximate" cause, see *infra*, § 42.

32. Thus the case put by *Carpenter, Workable Rules for Determining Proximate Cause*, 1932, 20 Cal. L.Rev. 229, 396, where A and B each sell a rope to C, who is bent on hanging himself, and C hangs himself with A's rope. A's act is a substantial factor in causing C's death, while B's is not. Whether A is liable is

proved but quite insignificant contribution to the result, as where he throws a lighted match into a forest fire.³³ But in the great majority of cases, it produces the same legal conclusion as the but-for test. Except in the classes of cases indicated, no case has been found where the defendant's act could be called a substantial factor when the event would have occurred without it;³⁴ nor will cases very often arise where it would not be such a factor when it was so indispensable a cause that without it the result would not have followed.³⁵

If the defendant's conduct was a substantial factor in causing the plaintiff's injury, it follows that he will not be absolved from liability merely because other causes have contributed to the result, since such causes, innumerable, are always present. In particular, however, a defendant is not necessarily relieved of liability because the negligence of another person is also a contributing cause, and that person, too, is to be held liable.³⁶ Thus where two vehicles collide and injure a bystander, or a passenger in one of them, each driver may be liable for the harm inflicted.³⁷ The law of joint tortfeasors rests very largely upon recognition of the fact that each of two or more causes may be charged with a single result.³⁸

It cannot be repeated too often that, although causation is essential to liability, it does not determine it. Other considerations,

not a question of causation, but of the effect of the intervening act of C. See *infra*, § 51.

33. See *Golden v. Larch Brothers*, 1938, 203 Minn. 211, 281 N.W. 249; *Connellan v. Coffey*, 1996, 122 Conn. 136, 187 A. 901; *Husy v. Milligan*, 1961, 242 Ind. 98, 175 N.E.2d 698.

34. Well stated in *Texas & Pacific Railway Co. v. McCleery*, Tex.1967, 418 S.W.2d 484.

35. See, indicating the identity of the two rules, *Schultz v. Brogan*, 1947, 251 Wis. 390, 29 N.W.2d 719; *New Orleans & N. E. Railroad Co. v. Burge*, 1941, 191 Miss. 308, 2 So.2d 826; *West Texas Utilities Co. v. Harris*, Tex.Civ.App.1950, 281 S.W.2d 558, refused n. r. e.

36. *Washington & G. R. Co. v. Hickey*, 1897, 166 U.S. 521, 17 S.Ct. 661, 41 L.Ed. 1101; *Nees Brothers v. Minneapolis Street Railway Co.*, 1944, 218 Minn. 532, 16 N.W.2d 755; *Erie County United Bank v. Berk*, 1948, 73 Ohio App. 814, 56 N.E.2d 285, motion over-

which remain to be considered, may prevent liability for results clearly caused.

An Alternative to the Substantial-Factor Rule

The substantial-factor rule was developed primarily for cases in which application of the but-for rule would allow each defendant to escape responsibility because the conduct of one or more others would have been sufficient to produce the same result.³⁹ It is possible—and more helpful it would seem—to apply an alternative formulation that addresses directly the need for declining to follow the but-for rule in this context. The alternative formulation is this: When the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them, the conduct of each is a cause in fact of the event.⁴⁰

Under this alternative rule, such a grouping of the defendants is permissible only in this limited type of fact situation, which occurs relatively infrequently. These are cases in which each of the defendants bears a like relationship to the event. Each seeks to escape liability for a reason that, if recognized, would likewise protect each other defendant in the group, thus leaving the plaintiff without a remedy in the face of the fact that had none of them acted improperly⁴¹

ruled; *Hill v. Edmonds*, 1966, 26 A.D.2d 554, 270 N.Y.S.2d 1020.

37. *Chiles v. Rohl*, 1924, 47 S.D. 580, 201 N.W. 154; *Kinley v. Hines*, 1927, 106 Conn. 82, 187 A. 9; *Peters v. Johnson*, 1928, 124 Or. 237, 264 P. 469; *Glazener v. Safety Transit Lines*, 1929, 196 N.C. 504, 146 S.E. 134; *McDonald v. Robinson*, 1929, 207 Iowa 1293, 224 N.W. 820.

38. See *infra*, § 47.

39. See *supra*, this section.

40. Although no judicial opinion has approved this formulation, results reached in reported cases are almost uniformly consistent with it.

41. Of course a defendant whose conduct violated no legal standard would not be legally liable, since another element of the cause of action would be missing, even if causation in fact were established.

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42. As to the torsors, see *infra*.

43. *Kramer* 86 186 So. 625; *Gip* 1902, 51 Tenn.App. Modern Bakery, Sears, Roebuck & Tumbigbee Electr 216 Miss. 444, 82

44. *Winterstee* 12d 138; *Sears* Neb. 175, 132 N. 136 N.W.2d 428; *Co. v. Hamilton* 1 Alling v. Northw Minn. 60, 194 N Railway Co., 196:

45. *Farmers I* Forks Implement 315; *Lane v. Han* Beckley v. Seese, trichter v. Shell Phillips Petroleum S.W.2d 196, raf. tween two enus shown as to ea Brum v. Good 699.

46. *Dunham* 498, 104 N.E.2d bacco Co., 3d Ct 1945, 131 Conn Gas Co. v. Gray ley v. Pittsburg A.2d 517. See: 1953, 31 Tex.L.

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the plaintiff would not have suffered the harm. Candid recognition of this fact as a reason for holding that the conduct of each of such similarly situated defendants is a cause in fact of the event seems preferable to the substantial-factor rule.

Proof

On the issue of the fact of causation, as on other issues essential to the cause of action for negligence, the plaintiff, in general,⁴² has the burden of proof. The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough;⁴³ and when the matter remains one of pure speculation or conjecture,⁴⁴ or the probabilities are at best evenly balanced,⁴⁵ it becomes the duty of the court to direct a verdict for

42. As to the special situation of alternative tortfeasors, see *infra*, this section.

43. *Kramer Service v. Wilkins*, 1939, 184 Miss. 433, 186 So. 625; *Gipson v. Memphis Street Railway Co.*, 1962, 51 Tenn.App. 31, 364 S.W.2d 110; *Rutherford v. Modern Bakery*, Ky.1958, 310 S.W.2d 274; *Florig v. Sears, Roebuck & Co.*, 1957, 388 Pa. 419, 130 A.2d 445; *Tombigbee Electric Power Association v. Gandy*, 1953, 216 Miss. 444, 62 So.2d 567.

44. *Wintersteen v. Semler*, 1953, 197 Or. 601, 255 P.2d 138; *Sears v. Mid-City Motors, Inc.*, 1965, 178 Neb. 175, 182 N.W.2d 361, withdrawn 179 Neb. 100, 136 N.W.2d 423; *Atchison, Topeka & Santa Fe Railway Co. v. Hamilton Brothers*, 8th Cir. 1951, 192 F.2d 817; *Alling v. Northwestern Bell Telephone Co.*, 1923, 156 Minn. 60, 194 N.W. 313; *Gipson v. Memphis Street Railway Co.*, 1962, 51 Tenn.App. 31, 364 S.W.2d 110.

45. *Farmers Home Mutual Insurance Co. v. Grand Forks Implement Co.*, 1952, 79 N.D. 177, 55 N.W.2d 315; *Lane v. Hampton*, 1955, 197 Va. 46, 87 S.E.2d 303; *Pickley v. Seese*, 1955, 352 Pa. 425, 115 A.2d 227; *Altrichter v. Shell Oil Co.*, D.Minn.1953, 161 F.Supp. 46; *Phillips Petroleum Co. v. West*, Tex.Civ.App.1955, 284 S.W.2d 196, *ref. n. r. e.* But where the choice is between two causes, with negligence of the defendant shown as to each, the plaintiff's case is made out. *Brunn v. Goodall*, 1953, 16 Ill.App.2d 312, 147 N.E.2d 699.

46. *Dunham v. Village of Canistota*, 1952, 303 N.Y. 493, 104 N.E.2d 372; *Pritchard v. Liggett & Myers Tobacco Co.*, 3d Cir. 1961, 295 F.2d 292; *Lee v. Blessing*, 1945, 131 Conn. 569, 41 A.2d 337; *Oklahoma Natural Gas Co. v. Gray*, 1951, 204 Okl. 362, 280 P.2d 256; *Poley v. Pittsburgh-Des Moines Co.*, 1949, 363 Pa. 1, 63 A.2d 517. See *Small, Gaffing at a Thing Called Cause*, 1953, 31 Tex.L.Rev. 630.

the defendant. Where the conclusion is not one within common knowledge, expert testimony may provide a sufficient basis for it,⁴⁶ but in the absence of such testimony it may not be drawn.⁴⁷ But on medical matters within common knowledge, no expert testimony is required to permit a conclusion as to causation.⁴⁸

The plaintiff is not, however, required to prove the case beyond a reasonable doubt. The plaintiff need not negative entirely the possibility that the defendant's conduct was not a cause,⁴⁹ and it is enough to introduce evidence from which reasonable persons may conclude that it is more probable that the event was caused by the defendant than that it was not.⁵⁰ The fact of causation is incapable of mathematical proof, since no one can say with absolute certainty what would have occurred if the defendant had

As to the medical problem of cancer following traumatic injury, see *Dyke, Traumatic Cancer?* 1966, 15 Cleve.Marsh.L.Rev. 472; *Parsons, Sufficiency of Proof in Traumatic Cancer Cases*, 1961, 45 Corn.L.Q. 581; *Elliot, Traumatic Cancer and "An Old Misunderstanding Between Doctors and Lawyers,"* 1964, 13 Kan.L.Rev. 79; *Note*, 1961, 46 Corn.L.Q. 531.

As to the meaning of "causation" to a doctor, see *Powers, After All, Doctors Are Human*, 1963, 15 U.Fla.L.Rev. 463.

47. *Kramer Service v. Wilkins*, 1939, 184 Miss. 433, 186 So. 625; *Christensen v. Northern States Power Co.*, 1946, 222 Minn. 474, 25 N.W.2d 659; *Blizzard v. Fitzsimmons*, 1942, 193 Miss. 484, 10 So.2d 843; *Blarjeske v. Thompson's Restaurant Co.*, 1945, 325 Ill.App. 189, 59 N.E.2d 320; *Goodwin v. Misticos*, 1943, 207 Miss. 361, 42 So.2d 397.

48. See for example *Mitchell v. Coca Cola Bottling Co.*, 1960, 11 A.D.2d 679, 200 N.Y.S.2d 478, where a child drank a beverage containing an insect, immediately vomited, and was subsequently made ill.

49. *Ominsky v. Charles Weinhagen & Co.*, 1911, 113 Minn. 422, 129 N.W. 845; *Gatas v. Boston & Maine Railroad Co.*, 1926, 255 Mass. 297, 151 N.E. 320; *Cornbrooks v. Terminal Barber Shops*, 1940, 232 N.Y. 217, 26 N.E.2d 25, *conformed to* 259 App.Div. 275, 19 N.Y.S.2d 390.

50. *State of Maryland for Use of Pumphrey v. Manor Real Estate & Trust Co.*, 4th Cir. 1949, 176 F.2d 414; *Saad v. Pappageorge*, 1926, 82 N.H. 294, 133 A. 24; *MacIntosh v. Great Northern Railway Co.*, 1922, 151 Minn. 527, 188 N.W. 551; *Harmon v. Richardson*, 1936, 83 N.H. 312, 133 A. 463 ("a little more probable than otherwise"); *Simpson v. Logan Motor Co.*, Minn.App. D.C.1963, 192 A.2d 122.

acted otherwise. Proof of what we call the relation of cause and effect, that of necessarily antecedent and inevitable consequence, can be nothing more than "the projection of our habit of expecting certain consequents to follow certain antecedents merely because we had observed these sequences on previous occasions."⁵¹ If as a matter of ordinary experience a particular act or omission might be expected, under the circumstances, to produce a particular result, and that result in fact has followed, the conclusion may be permissible that the causal relation exists.

Circumstantial evidence,⁵² expert testimony,⁵³ or common knowledge may provide a basis from which the causal sequence may be inferred. Thus it is every day experience that unlighted stairs create a danger that someone will fall. Such a condition "greatly multiplies the chances of accident, and is of a character naturally leading to its occurrence."⁵⁴ When a fat person tumbles down the steps, it is a reasonable conclusion that it is more likely than not that the fall would not have occurred but for the bad lighting.

51. See Wolf, Causality, 5 *Encyclopedia Britannica*, 14th ed. 1929, 61, 62; Pearson, *The Grammar of Science*, 1911, 113 ff.

52. *Emery v. Tilo Roofing Co.*, 1937, 89 N.H. 165, 195 A. 409; *Paine v. Gamble Stores*, 1938, 202 Minn. 462, 279 N.W. 267; *Messing v. Judge & Delph Drug Co.*, 1929, 322 Mo. 901, 18 S.W.2d 408; *Mulligan v. Atlantic Coast Line Railroad Co.*, 1918, 104 S.C. 173, 88 S.E. 445, affirmed 1917, 242 U.S. 620, 37 S.Ct. 241, 61 L.Ed. 532; *Casey v. Phillips Pipeline Co.*, 1967, 199 Kan. 538, 431 P.2d 518.

53. See *supra*, this section.

54. *Reynolds v. Texas & Pacific Railway Co.*, 1885, 27 La. Ann. 694, Cf. *Sullivan v. Hamacher*, 1959, 239 Mass. 190, 158 N.E.2d 801; *Ingersoll v. Liberty Bank*, 1933, 278 N.Y. 1, 14 N.E.2d 828; *Parkinson v. California Co.*, 10th Cir. 1956, 233 F.2d 432; *Kirineich v. Standard Dredging Co.*, 3d Cir. 1940, 112 F.2d 163; *Texas Sling Co. v. Emanuel*, Tex. Civ. App. 1967, 418 S.W.2d 565, affirmed in part, reversed in part, Tex., 431 S.W.2d 538.

55. *Rovegno v. San Jose Knights of Columbus Hall Association*, 1930, 108 Cal. App. 591, 291 P. 843. Otherwise when there is evidence indicating the person could not have been saved. *Blacka v. James*, 1964, 205 Va. 646, 139 S.E.2d 47.

56. *Finch v. McKee*, 1936, 18 Cal. App.2d 90, 62 P.2d 1880.

When a child is drowned in a swimming pool, no one can say with certainty that a life-guard would have saved the child; but the experience of the community permits the conclusion that the absence of the guard played a significant part in the drowning.⁵⁵ Such questions are peculiarly for the jury, and whether proper construction of a building would have withstood an earthquake,⁵⁶ or whether reasonable police precautions would have prevented a boy from shooting the plaintiff in the eye with an airgun,⁵⁷ are questions on which a court can seldom rule as a matter of law. And whether the defendant's negligence consists of the violation of some statutory safety regulation, or the breach of a plain common law duty of care, the court can scarcely overlook the fact that the injury which has in fact occurred is precisely the sort of thing that proper care on the part of the defendant would be intended to prevent, and accordingly allow a certain liberality to the jury in drawing its conclusion.⁵⁸

There is one special type of situation in which the usual rule that the burden of

57. *Stockwell v. Board of Trustees of Leland Stanford Jr. University*, 1944, 64 Cal. App.2d 197, 148 P.2d 405. Cf. *Chavira v. Carnahan*, 1967, 77 N.M. 467, 428 P.2d 938; *Tullgren v. Amoskeag Manufacturing Co.*, 1926, 82 N.H. 268, 133 A. 4; *Gates v. Boston & Maine Railroad Co.*, 1926, 255 Mass. 297, 151 N.E. 320; *Houven v. Chicago, Milwaukee & St. Paul Railway Co.*, 1908, 236 Ill. 620, 86 N.E. 611.

58. See for example *Louisville Trust Co. v. Morgan*, 1918, 180 Ky. 609, 208 S.W. 555; *Kohn v. Clark*, 1912, 236 Pa. 18, 84 A. 692. This is well discussed in Malone, *Ruminations on Cause-in-Fact*, 1956, 9 *Stan.L.Rev.* 60.

Two striking exceptional cases, both based on statutory policy, appear to have carried this to an extreme length. One is *Pierce v. Albanese*, 1957, 144 Conn. 241, 129 A.2d 606, appeal dismissed 355 U.S. 15, holding that where the Dramshop Act is violated, the defendant will not be heard to say that there is no causation of intoxication. As a constitutional exercise of the police power, there is a complete departure from "the common law precepts of proximate cause." The other is *Wilson v. Hanley*, 1960, 224 Or. 570, 356 P.2d 556, where apparently much the same effect is given to a regulation of the State Industrial Commission. See also *Rogers v. Missouri Pacific Railroad Co.*, 1957, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493, rehearing denied 353 U.S. 943, 77 S.Ct. 808, 1 L.Ed.2d 515, (plaintiff in FELA case prevails if negligence of the employer

proof as to cause been relaxed. It is fully established doctrine that if negligently shot the same time, a one shot, which either gun, it is were at fault, an one, has caused missing the act of preponderance of courts have dis find concert of ery against both

In this situation the court solved the problem of proof on the two defendants. This in Canadian automobile case which the plaintiff or more negligence prove which. In a situation where no defendant is a choice of causation where the choice must be loss due to fault of innocent plaintiff. But where the where culpabil

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59. *Oliver v. B. Henson v. Ross*, *Kuha v. Bader*, 11 of *Regina v. Sah berg*, 1929, 129 C

60. *Summers* The court merely proof on the issue infra, § 52.

61. *Cook v. I* C. Rep. 830 (s 1961, 31 Dom. L [1957] Que. Rep. boys). The first *Cook v. Lewis F*

62. *Murphy* 330 S.W.2d 896 App.2d 549, 10 Bakery Corp. 1

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proof as to causation is on the plaintiff has been relaxed. It may be called that of clearly established double fault and alternative liability. Where, for example, two defendants negligently shoot across a public highway at the same time, and the plaintiff is struck by one shot, which might have been fired from either gun, it is clear that both defendants were at fault, and that one of them, and only one, has caused the injury. Instead of dismissing the action against both for lack of a preponderance of proof against either, the courts have displayed some eagerness to find concert of action, and so permit recovery against both.⁵⁸

In this situation the California supreme court solved the problem by placing the burden of proof on the issue of causation upon the two defendants.⁵⁹ There is support for this in Canadian decisions,⁶⁰ and in American automobile cases of "chain collisions," in which the plaintiff is injured by one of two or more negligently driven cars, but cannot prove which.⁶¹ It seems a very desirable solution where negligence on the part of both defendants is clear, and it is only the issue of causation which is in doubt, so that the choice must be made between letting the loss due to failure of proof fall upon the innocent plaintiff or the culpable defendants. But where there is no evidence even as to where culpability lies, the hardship may be

"played any part, however small, in the injury or death which is the subject of the suit").

59. *Oliver v. Miles*, 1927, 144 Miss. 852, 110 So. 606; *Henson v. Ross*, 1906, 143 Mich. 452, 106 N.W. 1120; *Kuhn v. Bader*, 1951, 89 Ohio App. 203, 101 N.E.2d 322; cf. *Regina v. Salmon*, 1880, 6 Q.B.D. 79; *State v. Newberg*, 1929, 129 Or. 504, 278 P. 568.

60. *Summers v. Tice*, 1948, 33 Cal.2d 80, 199 P.2d 1. The court merely extended the rule as to the burden of proof on the issue of apportionment of damages. See *infra*, § 52.

61. *Cook v. Lewis*, [1952] 1 Dom.L.Rep. 1, [1951] S.C.Rep. 830 (similar facts); *Woodward v. Begbie*, 1961, 31 Dom.L.Rev.2d 22; *Saint-Pierre v. McCarthy*, [1967] Qua.Rep. 421 (merchants selling cartridges to boys). The first of these cases is attacked in *Hogan, Cook v. Lewis Re-examined*, 1961, 24 Mod.L.Rev. 331.

62. *Murphy v. Toxicals of Louisville, Inc.*, Ky.1959, 330 S.W.2d 395; *Cummings v. Kendall*, 1940, 41 Cal. App.2d 549, 107 P.2d 282; *Eramdjian v. Interstate Bakery Corp.*, 1957, 153 Cal.App.2d 590, 315 P.2d 19;

equally great upon an innocent defendant; and except in very special cases⁶² the courts have refused to shift the burden of proof.⁶⁴

A similar problem has arisen in products liability cases. As phrased in a leading case,⁶⁵ the question is, "[M]ay a plaintiff, injured as the result of a drug administered to her mother during pregnancy, who knows the type of drug involved but cannot identify the manufacturer of the precise product, hold liable for her injuries a maker of a drug produced from an identical formula?"⁶⁶ A divided court held that upon proof supporting liability in other respects and proof that the defendants were manufacturers of a substantial share of the drug on the market in which plaintiff's mother purchased the drug, each defendant would be liable for the proportion of plaintiff's damages represented by its share of that market unless it demonstrated that it could not have made the product which caused plaintiff's injuries. This rule, of course, goes beyond merely placing the burden of proof on the issue of causation upon two negligent actors one of whose negligent conduct was a cause in fact of plaintiff's injuries.⁶⁷ The development of further support for this rule has occurred in products liability cases.⁶⁸ It is an extension of principles underlying rules developed in cases of multiple fault and single impact upon the claimant (allowing the factfinder to

Copley v. Putter, 1949, 93 Cal.App.2d 453, 207 P.2d 376. Cf. *Micelli v. Hirsch*, Ohio App.1948, 83 N.E.2d 240 (result accomplished by presumption of continuing life). See also, as to apportionment of damages, *infra*, § 52.

A badly confused case is *Clark v. Gibbons*, 1967, 66 Cal.2d 309, 58 Cal.Rptr. 126, 426 P.2d 525, where this principle apparently was applied, under the misnomer of *res ipsa loquitur*, to the negligence of two physicians, which might possibly have been causal.

63. See *supra*, § 40.

64. See *supra*, § 39.

65. *Sindell v. Abbott Laboratories*, 1980, 26 Cal.3d 588, 163 Cal.Rptr. 132, 607 P.2d 924, certiorari denied 449 U.S. 912, 101 S.Ct. 285, 66 L.Ed.2d 140. See, ch. 17, § 103 for further discussion.

66. *Id.*

67. This fact is acknowledged by the majority opinion in *Sindell*, *supra* n. 65.

68. See *infra*, § 103.

make an allocation of responsibility among defendants rather than denying all recovery to the plaintiff where the proof is sufficient to show that the conduct of each of the defendants violated a legal standard and one of them caused plaintiff's injuries⁶⁹ and in cases of multiple fault and successive impacts.⁷⁰

A distinctive issue of causal connection involving multiple factors arises where evidence is offered tending to show that the risk of a specified future loss has been increased by an allegedly tortious act. For example, suppose that evidence offered at trial tends to show that plaintiff's decedent, having contracted a form of cancer, had a 40% chance of cure and that defendant physician's negligent failure to make a correct diagnosis on first visit reduced the chance of cure to 25%.⁷¹ In such a case, if we view the "death" of plaintiff's decedent, or even "death from cancer," as the relevant event, plaintiff's evidence falls short of supporting a fact finding that the negligence was, more probably than not, a but-for cause of that event.⁷² More probably than not, it would have happened anyway because of the cancer. One ground for criticism of this outcome is that it does not take adequate account of the fact that in all cases death is even more certain than taxes. Only the time and cause of death may be in doubt. If evidence supports a finding that, more probably than not, negligence hastened death, ordinarily a wrongful death action lies. Should an action lie, also, when evidence supports a finding that, more probably than not, negligence reduced the patient's chance of survival? Expressed another way, the question is: should we view reduction of the

patient's chance of survival as the relevant event, and allow recovery if more probably than not negligence was a cause of that event? If yes, one might argue in the hypothetical case just stated that plaintiff should recover as compensation 40% of the damages ordinarily allowable in a wrongful death action.⁷³ Or one might argue that only 15% of the ordinarily allowable damages should be recovered.⁷⁴ The choice between these rules would raise an issue that might be regarded as analogous to those regarding liability for aggravation of existing infirmity⁷⁵ and for proportional rather than joint liability.⁷⁶ As expert opinion evidence quantifying risk becomes more readily available, advocates will present more issues in these areas for resolution by courts and legislatures.



WESTLAW REFERENCES

causation +2 fact

Causation as Fact

headnote(proximate /s actual** /s causal)

The But-For and Substantial-Factor Rules
substantial /s factor /s "proximate cause"
"proximate cause" /p "sine qua non"

An Alternative to the Substantial-Factor Rule
summers +s lca

Proof

"proximate cause" /s circumstantial
proof proving /s multiple /s causal

§ 42. Proximate Cause: Scope of the Problem

Once it is established that the defendant's conduct has in fact been one of the causes of

Gas & Electric Co., 1932, 85 N.H. 449, 163 A. 111 (boy falling from bridge to substantially certain death struck defendant's wires and was electrocuted; damages allowed to compensate for value of his prospects for life and health). See *infra*, § 52.

74. One-might view this as a logical extension of the principle of the *Dillon* case, *supra*, n.73.

75. See *infra*, § 49, Liability Beyond the Risk.

76. See *infra*, § 52.

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4. "In
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69. See *supra*, this section.

70. See *infra*, § 52.

71. This hypothetical is a variation on *Herskovits v. Group Health Cooperative of Puget Sound*, 1983, 99 Wn.2d 609, 664 P.2d 474.

72. See the dissenting opinions in *Herskovits*, *supra*, n.71.

73. See the concurring opinion of Pearson, J., in *Herskovits*, *supra*, n.71. Compare *Dillon v. Twin State*

Prosser and Keeton
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By

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1988 Pocket Part

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Prosser & Keeton, Torts 5th Ed.—1
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18. Cf. District of C. 477 A.2d 713 (as a main factor in bringing about struck child pedestrian unfamiliar with area of contradicted evidence t

21. Westinghouse El 5th Cir. 1984, 734 F.2d 1984, 739 F.2d 693 (w negligence not a cause; not have averted circum Sagadin v. Ripper, 198 Rptr. 875 (evidence sufficient); Wing v. Marti 1173 (alleged failure to herbicide and to label concluded not a "but for" judgment; affirmed); 7 1985, 466 So.2d 1230 (tr to react); Saporta v. St. 2d 788 (upholding finding for schizophrenic patient would not have accident); Sumnicht v. 1984, 121 Wis.2d 388, harm to back seat passenger defective front-seat injury producing quadri plaintiff affirmed).

29. Snow v. A. H. I 120, 211 Cal.Rptr. 27, fraud as proximate cause Metropolitan Dade Cou

30. Streich v. Hilton Mont. 1984, 692 P.2d buyers sued manufacturer concurring opinion says "for" rule combined with cause" was not reversible discouraged and "sul on Restatement § 431

New text at end of II the first sentence

Even if "substantially intelligible as a factor, the developer and conflicting material factor" has and misunderstood court, on an adverb phrase without excluding its conflicting meaning

Chapter 7

PROXIMATE CAUSE

§ 41. Causation in Fact

Page 263

To original text, quoted below, add new note:

An essential element of the plaintiff's cause of action for negligence, or for that matter for any other tort, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered.⁵

5. Martin v. Abbott Laboratories, 1984, 102 Wash.2d 581, 689 P.2d 368 ("some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered" is required traditionally; majority of courts have followed this rule in DES cases as well, "finding no cause of action when the plaintiff cannot identify the particular manufacturer of the pills which caused her injury"; but court adopts a "market share alternate liability" theory). As to DES cases, see also recent cases cited in n. 62.5 on page 271, n. 60 on page 288, n. 63 on page 300, and nn. 8 and 11 on p. 323, infra.

Page 264

To original text, quoted below, add new note:

Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy.^{5.5}

5.5. Weyerhaeuser Co. v. Atropos Island, 9th Cir. 1986, 777 F.2d 1344 (negligence of a vessel in failing to prepare for storm did not proximately cause damages from second collision; consequences not so closely connected with negligent conduct as to justify imposition of liability); Anglin v. Florida Dep't of Transportation, Fla.App. 1985, 472 So.2d 784, quashed, Fla. 1987, 502 So.2d 896 (negligence in creating pool of water on rural highway; trial court ruling that plaintiffs' pushing disabled truck down

road was independent intervening cause of would-be Good Samaritan's collision 15 minutes later was error).

To original text, quoted below, add new note:

Often to greater extent, however, the legal limitation on the scope of liability is associated with policy—with our more or less inadequately expressed ideas of what justice demands, or of what is administratively possible and convenient.^{5.6}

5.6. Cates v. Eddy, Wyo. 1988, 669 P.2d 912, 50 A.L.R.4th 821 (evidence sufficient to support finding that corruptly manufacturing evidence of crime was cause of plaintiff's arrest).

5. Buf. of Littlefield v. Pillsbury Co., 1985, 6 Ohio St. 3d 389, 653 N.E.2d 570 ("special hazard rule" allows compensation for injuries occurring off work premises, before or after work, if injury occurs because of the hazard created by employment and risk is distinctive and greater than risks common to the public; this rule applies if "but for" employment the employee "would not have been making a left turn into the plant"). If understood as requiring only that "but for" employment the employee would not have been at the location where the injury occurred, this decision would be inconsistent with the text above; however, that interpretation may be inappropriate because the court emphasized the "quantitatively greater" risk incident to left turn into plant.

Page 265

8. See also the concurring opinion in Nelson v. Krusen, Tex. 1984, 678 S.W.2d 918, 929 ("wrongful life" cause of action rejected, among other reasons, because no "injury" is shown; the same medical advice that caused the affliction "must be assumed to be the cause of his life itself"; to find "injury" on this evidence the court would have to compare "life with physical impairment" to "non-existence").

Page 266

18. Cf. *District of Columbia v. Freeman*, D.C. 1984, 477 A.2d 713 (as a matter of law, absence of sign warning motorists of approach to crosswalk was not a substantial factor in bringing about accident in which motorist struck child pedestrian; no evidence that motorist was unfamiliar with area or did not know of crosswalk; uncontradicted evidence to the contrary).

21. *Westinghouse Electric Corp. v. M/V Leslie Lykes*, 6th Cir. 1984, 734 F.2d 199, rehearing denied, 6th Cir. 1984, 739 F.2d 633 (as a matter of law, alleged crew negligence not a cause; allegedly required conduct would not have averted circumstances creating risk from fire); *Sagadin v. Ripper*, 1986, 175 Cal.App.3d 1141, 221 Cal. Rptr. 675 (evidence sufficient to sustain "social host liability"); *Wing v. Martin*, 1984, 107 Idaho 267, 638 P.2d 1172 (alleged failure to take action to prevent misuse of herbicide and to label herbicide properly; trial court concluded not a "but for" cause and allowed summary judgment; affirmed); *Thomas v. Missouri Pac. RR, La.* 1986, 466 So.2d 1280 (train speed reducing time for driver to react); *Saporta v. State*, 1985, 220 Neb. 142, 368 N.W.2d 788 (upholding finding that had proper search procedure for schizophrenic mental patient been undertaken, patient would not have been located in time to prevent accident); *Sumnicht v. Toyota Motor Sales, U.S.A., Inc.*, 1984, 121 Wis.2d 338, 360 N.W.2d 2 ("second collision" harm to back seat passenger in one-car accident; allegedly defective front-seat system as substantial factor in injury producing quadriplegia; judgment on verdict for plaintiff affirmed).

Page 267

29. *Snow v. A. H. Robins Co.*, 1985, 165 Cal.App.3d 120, 211 Cal.Rptr. 271 (Dalkon shield; allegations of fraud as proximate cause present triable issue); *Stahl v. Metropolitan Dade County, Fla.* App. 1983, 438 So.2d 14.

30. *Streich v. Hilton-Davis, Div. of Sterling Drug, Inc.*, Mont. 1984, 692 P.2d 440 (seed potato grower and his buyers sued manufacturer of potato sprout suppressant; concurring opinion says trial court's charge on "old 'but for' rule combined with an instruction on concurrent cause" was not reversible error but such practice should be discouraged and "substantial factor" instruction based on Restatement § 431 should be given).

New text at end of line 7, column 2, and replacing the first sentence in the next paragraph:

Even if "substantial factor" seemed sufficiently intelligible as a guide in time past, however, the development of several quite distinct and conflicting meanings for the term "substantial factor" has created risk of confusion and misunderstanding, especially when a court, or an advocate or scholar, uses the phrase without explicit indication of which of its conflicting meanings is intended. Three

different usages are discussed here, and a fourth is noted.

The first of these different usages is that concerned with cases in which the conduct of each of two negligent defendants would have been sufficient to cause plaintiff's harm and application of the "but for" rule would allow both to escape liability. When the "substantial factor" formulation is used in this context to hold both liable, it is a formulation concerning legal significance rather than factual quantum.³¹

31. As in the original.

Page 268

New paragraph of text after n. 35:

The second of the principal usages of the "substantial factor" formulation has developed to serve a sharply contrasting purpose. As stated above, the genesis of the "substantial factor" rule was a perceived need to aid plaintiffs (in cases in which the "but for" rule would have excused all wrongdoers because the conduct of each would have been sufficient to cause all of plaintiff's harm). In contrast, the rule is now more often invoked to aid a defendant. That is, it is invoked in cases in which a defendant's conduct is clearly a "but for" cause of plaintiff's harm, and defense counsel contends that defendant's conduct made such an insubstantial contribution to the outcome that liability should not be imposed.

The usage here referred to is not that form of defense argument in which counsel uses a "substantial factor" test as a synonym for "proximate" cause, masking ill-defined considerations of policy unrelated to the causal relation in fact. That is a fourth usage, which has been criticized elsewhere as more hindrance than help to understanding the basis of decision.^{35.1}

Instead, the second usage, referred to here, is one in which counsel proposes a "substantial factor" test as an additional requirement regarding the nature of cause-in-fact relation. This usage is at least understandable, regard-

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less of how controversial it may be. It is also clear that, in contrast with the first usage discussed above (which is associated with the genesis of the "substantial factor" formulation) this usage definitely is concerned with factual quantum of causal relation; it focuses upon degrees of causal contribution of different antecedents of the harm for which the plaintiff seeks damages. It proposes to deny liability for insubstantial contributions, even when "but for" causal relation is established. Many modern decisions support a requirement of this kind, under the terminology of "substantial factor" or something closely similar.^{35.2} When a court so uses "substantial factor," it imposes a prerequisite to legal responsibility that must be satisfied even in those cases in which the "but for" test is plainly satisfied.^{35.3} Used in this way, the "substantial factor" test becomes an additional barrier to liability, primarily useful to defendants, though also useful to plaintiffs in meeting the defense of contributory fault.

Closely analogous to the body of precedent using a "substantial factor" formulation in this second way are cases, both old and new, concerned with acts generated by "mixed motives" (or purposes)—one or more permissible motives and one or more impermissible.

Court opinions and other writings often speak of "the purpose" (or "the motive") of an actor in circumstances in which human experience tells us that the actor probably was influenced by multiple purposes (or motives). This problem of "mixed motives," as it is often called, arises in numerous contexts, civil and criminal, both in relation to decisional law and in relation to statutory construction. The possible rules for determining the legal consequences of acting with multiple purposes range from making outcomes depend on whether a legally relevant purpose was the actor's "sole purpose," through "primary" or "dominant" or "but for" and other variations, to making outcomes depend on whether a legally relevant purpose was to any extent, even the slightest, one of the actor's purposes. Some support can be found in precedents for

rules located at each of these points along the spectrum of possibilities.^{35.4}

When a plaintiff can show that a defendant's act caused harm to the plaintiff, what must plaintiff prove to show that the act itself was done with (or "caused by") an impermissible motive or purpose? In federal decisional law, "substantial factor" formulations have sometimes been used to answer this question in resolving claims of impermissible discrimination^{35.5} and in other contexts.^{35.6} Also, other formulations somewhat similar, though with potentially different meanings, have appeared in the cases.^{35.7} One such formulation, "determinative factor,"^{35.8} is perhaps closer to being a synonym for "but for" cause than for the second of the meanings of "substantial factor" identified here. Another formulation, the meaning of which may be debated, is "motivating factor."^{35.9}

"Substantial factor" and similar formulations have appeared also in specialized bodies of state law, which make outcomes depend on degree of causal contribution in a sense beyond merely exceeding the threshold between insubstantial and substantial.^{35.10}

Distinct from all of the foregoing usages is a third usage of "substantial factor" that has emerged even more recently. It is an effort to respond to problems associated with difficulties of proof in certain specialized types of cases under the traditional requirement that a fact finder make a yes or no finding as to whether it is more probable than not that defendant's wrongful conduct was a cause in fact of plaintiff's harm. A few courts have, in particular circumstances, sustained a fact finding that defendant's negligence was a "substantial factor" on evidence that did not go as far as showing that it was more probable than not a contributing factor.^{35.11} For example, evidence of a "substantial possibility" that prompt rescue efforts would have succeeded in saving the life of a person attempting suicide was held sufficient to support a finding that negligent failure to under-

take such efforts leading to death.¹¹

Using "substant substitute for sation seems likely usage blends the ("but for" or a substitution) with the requirement of the evidence that standard of seems likely to depend upon the disputed each of these judgments about the substantial about the burden purpose of avoiding injustice, some referred to tradition and proof but have of harm, allowing tiously causing loss ty" of survival.^{35.12}

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35.2 *Davis v. AVCO* 1984, 789 F.2d 1057, 88 105 S.Ct. 1359, 84 L.Ed. at one point the court tion of the proximate whose efforts were a 's securities," but elsewhe reasoning that finding ' not satisfy "proximate Navigators Co., S.A. v.

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take such efforts was a "substantial factor" leading to death.^{35.12}

Using "substantial factor" in this way as a substitute for satisfying a "but for" require- ment seems likely to create confusion. This usage blends the substantive requirement ("but for" or a substitute for "but for" causa- tion) with the requirement of proof ("prepon- derance of the evidence" or a substitute for that standard of proof). Such a blending seems likely to distract from a clear focus upon the disputed policy issues upon which each of these judicial choices is based—one about the substantive rule and the other about the burden of proof. With the explicit purpose of avoiding risks of confusion and injustice, some recent precedents have adhered to traditional standards of causation and proof but have fashioned a new definition of harm, allowing a cause of action for tortiously causing loss of a "substantial possibili- ty" of survival.^{35.13}

One may wonder how much of all this de- velopment Jeremiah Smith could have prophesied when in 1911 he published his seminal article proposing the "substantial factor" formulation.^{35.14} With the benefit of hindsight, however, we may conclude that some such development was bound to occur as advocates, judges, and scholars capitalized up- on the ambiguities and nuances of "substan- tial." Indeed, it seems inevitable that still more distinct meanings, and shadings of meanings, of "substantial factor" are yet to be developed, bringing with them potential con- fusions and setbacks, as well as potential ad- vances, in the quest for principled and rea- soned administration of "proximate cause" rules.

35.1 *Infra*, § 42.

35.2 *Davis v. AVCO Financial Services, Inc.*, 6th Cir. 1984, 739 F.2d 1057, cert. denied, 1985, 470 U.S. 1005, 105 S.Ct. 1359, 84 L.Ed.2d 381 (securities fraud claim; at one point the court refers to a "broadened applica- tion of the proximate cause touchstone to include one whose efforts were a 'substantial factor' in the sale of securities," but elsewhere the court adopts 9th Circuit reasoning that finding "but for" causation, alone, does not satisfy "proximate cause" requisites); *Transorient Navigators Co., S.A. v. M/S Southwind*, 5th Cir. 1983,

714 F.2d 1858, ("substantial and material factor in causing the collision"); *Challis Irrigation Co. v. State*, 1984, 107 Idaho 338, 689 P.2d 230 ("a material element and a substantial factor"); *Mitchell v. Pearson Enter- prises*, Utah 1985, 697 P.2d 240 ("a substantial causa- tive factor"). See also, *Restatement Second, Torts*, §§ 481-483; *Rudeck v. Wright*, Mont. 1985, 709 P.2d 621 (in medical mismanagement case, substantial factor test is appropriate; however, the opinion did not ad- dress explicitly the choice among different meanings of "substantial factor").

35.3 *Davis v. AVCO Financial Services, Inc.*, 6th Cir. 1984, 739 F.2d 1057, cert. denied, 1985, 470 U.S. 1005, 105 S.Ct. 1359, 84 L.Ed.2d 381 (see n. 35.2, *supra*); *Challis Irrigation Co. v. State*, 1984, 107 Idaho 338, 689 P.2d 230 ("but for" and "substantial factor" are two closely related but separate elements of "cause in fact").

35.4 See discussion of the problem in *United States v. Vest*, D. Mass. 1986, 639 F.Supp. 899, 902-905, affirmed, 1st Cir. 1987, 819 F.2d 477. See also *Love*, *Retaliatory Discharge for Filing a Workers' Compensation Claim: The Development of a Modern Tort Action*, 37 *Hastings L.J.* 551, 671-78 (discussing precedents and policy consid- erations bearing upon the choice among "the sole reason" for discharge, "a substantial factor," a "significant" fac- tor, and a "determinative factor" as the standard for deciding whether discharge was "motivated by unlawful considerations"; also discussing burdens of producing evi- dence and burdens of persuasion).

35.5 *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 1977, 429 U.S. 252, 87 S.Ct. 555, 50 L.Ed.2d 450, on remand, 7th Cir. 1977, 558 F.2d 1283, cert. denied, 1978, 434 U.S. 1025, 98 S.Ct. 752, 54 L.Ed.2d 772 (referring in court's n. 21 to claim of racially discriminatory purpose and shifting burdens explained in *Mt. Healthy*, cited in n. 35.3, *infra*). Cf. *Miller v. Staats*, D.C. Cir. 1983, 706 F.2d 838 (claim for attorney fees in Title VII litigation depends on showing that "fee claim- ants' participation contributed" to defendants' actions— so that the relief granted [by defendants' actions] cannot be ascribed to other influences"; fee claimants satisfy this requirement only if the court determines "that the lawsuit was a catalyst motivating defendants to provide the requested relief . . . or that the lawsuit was a necessary factor in obtaining the relief").

35.6 *O'Brien v. Papa Gino's of America, Inc.*, 1st Cir. 1986, 780 F.2d 1067 (claims for defamation, invasion of privacy, and wrongful discharge of employee; special verdict of jury interpreted as finding that polygraph test results were preeminent substantial factor causing dis- charge, and retaliatory motives arising from personal grudge because of employee's refusal to promote another were not as substantially causal; judgment for employee on other claims but for employer on wrongful discharge claim affirmed); *Feather v. United Mine Workers of America*, 3d Cir. 1983, 711 F.2d 630, on remand, W.D.Pa. 1985, 621 F.Supp. 926 (by requiring employer to show that union's violation was "a substantial factor in or materially contributed to union's decision to call and maintain" strike, court preserves employer's right to compensation for losses proximately caused by union's unfair labor practice, without jeopardizing union's right to engage in lawful primary picketing). See also, *Metro-*

politan Edison Co. v. People Against Nuclear Energy, 1983, 480 U.S. 766, 103 S.Ct. 1556, 75 L.Ed.2d 534 (NRC not required by NEPA to consider psychological health damage from risk of nuclear accident; analogy to law of causation in tort noted, but without meaning to suggest that cause-effect relation too attenuated to merit damages in a tort action would also be too attenuated to merit notice in EIS; "nor do we mean to suggest the converse"; courts must look to underlying policies or legislative intent to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not).

35.7 See the O'Brien case, cited in n. 35.6, supra ("preeminent substantial factor"). See also, the cases cited in nn. 35.8 and 35.9, infra; § 130, p. 1010, Main Volume (dominant motive test in interference with contract claims).

35.8 See Mt. Healthy City School District Board of Education v. Doyle, 1977, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 60 L.Ed.2d 471, 484, appeal after remand, 6th Cir. 1982, 670 F.2d 59 (plaintiff must show that his conduct in the exercise of First Amendment rights "was a 'substantial factor'—or to put it in other words, that it was a 'motivating factor'—in school board's decision not to rehire him; plaintiff having carried that burden, district court should have determined whether school board would have reached the same decision in the absence of protected conduct); Monteiro v. Poole Silver Co., 1st Cir. 1980, 616 F.2d 4, 9 ("it is by now clear, where motives are mixed, that the impermissible motive must be a determinative factor in the employer's decision if plaintiff is to prevail . . .").

35.9 See Mt. Healthy, n. 35.8, supra.

35.10 Rudeck v. Wright, Mont. 1985, 709 P.2d 621 (medical mismanagement case, see n. 35.2, supra). See also, the cases cited in n. 35.11, infra; § 130, p. 1010, Main Volume (dominant motive test in interference with contract claims).

35.11 Roberson v. Counselman, 1984, 235 Kan. 1006, 686 P.2d 149 (medical malpractice action against chiropractor who failed to recognize patient was experiencing symptoms consistent with acute heart disease; most favorable expert testimony proffered estimated chances of survival if prompt measures had been taken at 40%; summary judgment for chiropractor reversed; substantial factor question for the jury); Hake v. Manchester Township, 1985, 98 N.J. 302, 486 A.2d 836 (juvenile arrestee found hanged at police station; judgment for defendants against parents reversed in part; in establishing causation, it would have been sufficient for plaintiffs to show that defendant's negligent conduct negated a substantial possibility that prompt rescue efforts would have been successful). The opinion in Hake does, however, fully consider reasons for the ruling rather than leaving the conclusion of "substantial factor" unexplained; the reasons stated relate to conduct that reduces chances of survival, discussed in original text at nn. 71-74, infra. See also, noting that certiorari has been granted, Sharp v. Kaiser Foundation Health Plan of Colorado, Colo. App. 1985, 710 P.2d 1153, cert. granted (showing that chances of suffering a heart attack "were increased by 20 to 25%—from 15% to 35 to 40%—"is sufficient evidence of causation in fact to allow jury to consider

whether defendants' failure properly to treat Mrs. Sharp was a substantial factor in causing' her heart attack). See also, nn. 71-74 and accompanying text, infra.

35.12 See Hake, n. 35.11, supra.

35.13 Waffan v. United States Department of Health & Human Services, 4th Cir. 1986, 799 F.2d 911 (under Maryland law, even if malpractice is not shown to be more probably than not a cause of death, a cause of action exists for causing, more probably than not, a loss of a "substantial possibility" of survival; "[w]e cannot accept a *de minimis* standard"; but "the chance of survival need not have been fifty-one percent or more before it was reduced" by the malpractice; in this instance the claim fails because plaintiff showed only an "undefinable" chance that she "might have survived had she been treated" promptly, which "is not enough to constitute proof of a legal harm").

35.14 See supra, nn. 21, 28.

Add new text after n. 38:

In some contexts, however, a legal outcome may be determined by a finding that one cause contributed preeminently, primarily, or more substantially than another.^{38.5}

38.5 O'Brien v. Papa Gino's of America, Inc., 1st Cir. 1988, 780 F.2d 1067 (claims for defamation, invasion of privacy, and wrongful discharge of employee; special verdict of jury interpreted as finding that polygraph test results were preeminent substantial factor causing discharge, and retaliatory motive arising from employee's refusal to promote another were not as substantially causal; judgment for employee on other claims but for employer on wrongful discharge claim affirmed). See also, nn. 35.4-35.10, supra.

39. Daugert v. Pappas, 1985, 104 Wash.2d 254, 704 P.2d 600 (claim by frustrated client based on failure of attorney to file a timely appeal "is not the type of case which necessitates the use of the substantial factor test"; preferable to retain "but for" test and emphasize "that this does not require a showing of certainty as suggested by other courts").

40. Cf. Daugert v. Pappas, cited in n. 39, supra. See also, Rudeck v. Wright, Mont. 1985, 709 P.2d 621 (medical mismanagement case where, on the facts, it would seem that each of the negligent acts might have been found to be a "but for" cause rather than each being alone sufficient to cause all the harm in the absence of the other).

Page 269

43. Grain Dealers Mut. Ins. Co. v. Porterfield, 1985, 287 Ark. 27, 695 S.W.2d 833 (reversing and dismissing action for wrongful death of welder who was using extension cord with grounding prongs snipped off and cord plugged into receptacle upside down, reversing the polarity).

45. Gooding v. University Hosp. Bldg., Inc., Fla. 1984, 445 So.2d 1015 (evidence showed no better than an even chance of surviving if correct diagnosis had been made immediately; finding that malpractice was a cause in

fact of death cannot be contrary, in relation to cussed in text at nn. 7 Stores, Inc., 1984, 70 Or denied, 1985, 298 Or. 4¹ dence as to whether leav been on floor two secon

49. Daugert v. Papp P.2d 600 (claim by frust attorney to file a timely which necessitates the u preferable to retain "bu this does not require a s by other courts").

Page 270

55. Cf. Coleman v. S.E.2d 154 (patron's bo swimming pool).

Page 271

62. Deoney v. Bucke 1985, 695 S.W.2d 427 (struck by truck, death r owner and driver of tru

New text following r
Also, the principle i
native liability" ha
tain other types of

62.5 Abel v. Eli Lilly N.W.2d 164, cert. denie 123, 83 L.Ed.2d 65 (acti had taken DES during unable to identify the s turned the injury-product defendants under "DES which this court fashion supporting "double fault defendants cannot meet selves, joint and severa nish v. Ashland Oil Co N.E.2d 1199 (rule appl ethyl acetate, in action sion). Compare Board v 894, cert. denied, 1984, L.Ed.2d 48 (sister of co supervisory officials, an summary judgment fo ground, because of jury v od action; held, present sion, but even under a causation, evidence was claim because no connec distinguished from inae

64. See cases cited in

67. As to support for alternative liability" in

oporly to treat Mrs. Sharp using" her heart attack).
npanying text, *infra*.

supra.

ices Department of Health
1986, 799 F.2d 911 (under
actice is not shown to be
ause of death, a cause of
a probably than not, a loss
of survival; "[w]e cannot
"; but "the chances of sur-
one percent or more before
actice; in this instance the
showed only an "undefina-
ave survived had she been
not enough to constitute

38.

4.

ever, a legal outcome
y a finding that one
nentially, primarily, or
n another.^{38.5}

's of America, Inc., 1st Cir.
for defamation, invasion of
arge of employee; special
inding that polygraph test
stantial factor causing dis-
ve arising from employee's
were not as substantially
yee on other claims but for
arge claim affirmed). See

1985, 104 Wash.2d 254, 704
d client based on failure of
eal "is not the type of case
f the substantial factor test";
r" test and emphasize "that
ing of certainty as suggested

s, cited in n. 39, *supra*. See
t. 1985, 709 F.2d 621 (medical
, on the facts, it would seem
ets might have been found to
than each being alone suffi-
in the absence of the other).

Ins. Co. v. Porterfield, 1985,
33 (reversing and dismissing
welder who was using exten-
prongs snapped off and cord
de down, reversing the polari-

y Hosp. Bldg., Inc., Fla. 1984,
owed no better than an even
ect diagnosis had been made
malpractice was a cause in

fact of death cannot be sustained; but see decisions to the
contrary, in relation to reducing chances to survive, dis-
cussed in text at nn. 71-74, *infra*; *Dubry v. Safeway*
Stores, Inc., 1984, 70 Or.App. 183, 639 P.2d 319, review
denied, 1985, 298 Or. 470, 693 P.2d 49 (absence of evi-
dence as to whether leaves on which plaintiff slipped had
been on floor two seconds or two hours).

49. *Daugert v. Pappas*, 1985, 104 Wash.2d 254, 704
P.2d 600 (claim by frustrated client based on failure of
attorney to file a timely appeal "is not the type of case
which necessitates the use of the substantial factor test";
preferable to retain "but for" test and emphasize "that
this does not require a showing of certainty as suggested
by other courts").

Page 270

50. *Cf. Coleman v. Shaw*, 1984, 281 S.C. 107, 314
S.E.2d 154 (patron's body found at bottom of motel's
swimming pool).

Page 271

62. *Denney v. Buckeye Gas Products, Inc.*, Ky. App.
1985, 695 S.W.2d 427 (passenger thrown from car and
struck by truck, death resulting; summary judgment for
owner and driver of truck reversed).

New text following n. 62:

Also, the principle of "double fault and alter-
native liability" has been recognized in cer-
tain other types of cases.^{62.5}

62.5 *Abel v. Eli Lilly and Co.*, 1984, 418 Mich. 311, 343
N.W.2d 164, cert. denied, 1984, 469 U.S. 833, 105 S.Ct.
123, 83 L.Ed.2d 85 (action by daughters of women who
had taken DES during pregnancy; plaintiffs, who are
unable to identify the specific defendant that manufac-
tured the injury-producing drug may shift the burden to
defendants under "DES-modified alternative liability,"
which this court fashions as an extension of precedents
supporting "double fault and alternative liability"; if
defendants cannot meet this burden to exculpate them-
selves, joint and several liability will be imposed); *Min-
nich v. Ashland Oil Co.*, 1984, 15 Ohio St.3d 396, 473
N.E.2d 1199 (rule applicable against two suppliers of
ethyl acetate, in action for personal injuries from explo-
sion). Compare *Beard v. O'Neal*, 7th Cir. 1984, 728 F.2d
894, cert. denied, 1984, 469 U.S. 825, 105 S.Ct. 104, 83
L.Ed.2d 48 (alster of contract murder victim sued FBI
supervisory officials, among others; trial court entered
summary judgment for defendants on *res judicata*
ground, because of jury verdict for contact agent in relat-
ed action; held, present claim not barred by issue preclu-
sion, but even under alternatives to "but for" test of
causation, evidence was insufficient to support present
claim because no connection between defendants' acts, as
distinguished from inaction, and victim's death).

64. See cases cited in n. 62.5, *supra*.

67. As to support for an analogy to "double fault and
alternative liability" in drug cases, see n. 62.5, *supra*.

Page 272

71. *Contra* to *Herskovitz v. Gooding v. University*
Hosp. Bldg., Inc., Fla. 1984, 445 So.2d 1015. Compare
Daugert v. Pappas, 1985, 104 Wash.2d 254, 704 P.2d 600
(claim by frustrated client based on failure of attorney to
file a timely appeal; court considers this case to be
different from *Herskovitz*; in that case medical malprac-
tice was a "but for" cause of the patient's loss of all
chances of survival whereas in this case the legal mal-
practice did not cause the client's loss of the chance of
winning on appeal; courts are still able to determine
whether the client would have won on appeal). The
opinion does not address the possible argument (compare
text at nn. 73-76, *infra*), that legal malpractice was a
"but for" cause of the client's loss of settlement value of
the case—that is, the value of the chance of settling while
a timely appeal was pending. See also, nn. 35.11-35.13,
and accompanying text, *supra*.

To original text, quoted below, add new note:

If evidence supports a finding that, more
probably than not, negligence hastened death,
ordinarily a wrongful death action lies.^{73.5}

72.5 *Cf. Matter of Eliason's Estate*, 1983, 105 Id. 234,
668 P.2d 110 (slayer's statute applied to prevent widow,
who shot decedent, from inheriting; gunshot wound
weakened victim and hastened death from cancer).

73. See, *Thompson v. Sun City Community Hosp.*,
Inc., 1984, 141 Ariz. 597, 638 P.2d 605 (increasing chance
of harm by transferring patient to county hospital in
emergency); *Hake v. Manchester Township*, 1985, 98 N.J.
302, 486 A.2d 836 (discussed in n. 35.11, *supra*).

74. See cases cited, n. 73, *supra*.

§ 42. Proximate Cause: Scope of the Problem

Page 273

2. *Vattimo v. Lower Bucks Hospital, Inc.*, 1983, 502
Pa. 241, 465 A.2d 1231 (health care claim); *D.R.R. v.*
English Enterprises, Iowa App. 1984, 356 N.W.2d 580
(action against cable television franchisee and its inde-
pendent contractor, employer of installer who raped
plaintiff); *McAuley v. Wills*, 1983, 251 Ga. 3, 303 S.E.2d
258 (negligence of driver that rendered mother a paraple-
gic was, as a matter of law, not "proximate cause" of
injury to and death of child later conceived).

3. *Cf. Hartley v. Slate*, 1985, 103 Wash.2d 762, 698
P.2d 77 (failure of county and state to revoke a person's
driver's license was too remote and insubstantial to be
legal cause of injury from that person's drunk driving).

5. *Michalak v. LaSalle*, 1984, 121 Ill.App.3d 574, 77
Ill.Dec. 36, 459 N.E.2d 1131 (action against county for
negligent installation and maintenance of guardrail,
which car struck, resulting in amputation of motorist's
left leg; county's conduct not so remote as to require a
ruling that it was not a contributing legal cause).

Outpt Clinic Note

DUNNINGTON, DAVID J - 1959667

* Final Report *

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 Encounter Info: 18403392, VM Issaquah, Clinic -Z Office Visit, 09/01/2011 - 09/01/2011

* Final Report *

Virginia Mason Medical Center

CC: L foot lesion

HPI: David presents with a L foot lesion that arose after a puncture wound months ago. He was in the yard, and suspects a wooden object. He is unsure if remnants were left behind. It continues to be a sore spot that spontaneously bleeds when he plays tennis, or the area gets rubbed. It does not spontaneously bleed otherwise. It is painful. There are actually two spots, and the more proximal lesion is less tender. He covers the area with neosporin and a bandaid. David is referred by Dr. Kirshner.

Problems

Medicats

- UNSPECIFIED HEARING LOSS - [388,9]
- BPW - 01/01/2010 []

Restricted Views

- Restrictofed from view - 09/29/2005

Surgical History

- no known surgery - 01/01/2005 []
- Colonoscopy, flexible, proximal to splenic flexure; diagnostic, with or without collection of specimen(s) by brushing or washing, with or without colon decompression (separate procedure) - 02/01/2010 [46378]

Allergies

- penicillin (Active, Allergy)

Outpatient Medications

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Page 1 of 2
 (Continued)



Outpt Clinic Note

DUNNINGTON, DAVID J - 1959567

* Final Report *

Prescriptions:

(R)-Refill Review

(R) propranolol 40 mg oral tablet; See instructions

Instructions: <1 po prior to public speaking>

Start date/time: 10/26/2010

(R) LAMISIL 250 mg oral tablet (terbinafine); 1 tab(s) Oral Daily

Start date/time: 09/01/2011

PE:

Integ - the L sub 1st MPJ is notable for a 6-8 mm diameter full thickness ulceration with proliferating granulation tissue. It appears connected to a more proximal lesion that is less tender than the first. It is not currently actively bleeding. Surrounding skin appears normal, without SOs, erythema. The mass is nonpulsatile.
N/A - palpable pedal pulses, no ecchymosis or other foot discoloration. CRT normal.
M/S - other than the lesion being tender, there are no gross m/s deformities or loss of function. ROM normal, slightly painful.

A/R: L sub 1st MPJ pyogenic granuloma, likely post-traumatic.

This is a benign lesion of capillaries that can arise spontaneously, but more typically after puncture wounds, esp in the foot. Conservative tx options include chemical desiccation or thermal. Occasionally they are refractory and may require more aggressive tx such as surgical excision, although bleomycin may be worth a trial, albeit painful.

Today, we cleansed the lesion and tried a round of silver nitrate. This was only partially successful as a majority of the lesion was fairly dry, and no active bleeding was occurring. We then switched to liquid nitrogen 3 cycles. Covered area with a bandaid. Instructed to take measures to prevent friction and reinjury to cause bleeding, such as covering with a bandaid, and apply neosporin to reduce friction. A quickslide modified with a reverse motion's extension is provided to reduce pressure to this area. F/u 10 days.

Completed Action List:

- * Perform by Ngan DPM, Alvin T on 01 September 2011 14:59
- * Sign by Ngan DPM, Alvin T on 01 September 2011 14:59
- * Verify by Ngan DPM, Alvin T on 01 September 2011 14:59
- * Review by Krishner MD, William H on 01 September 2011 15:19 Requested by Ngan DPM, Alvin T on 01 September 2011 15:00

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Page 2 of 2
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DUNNINGTON, DAVID J - 1959567

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* Final Report *

Virginia Mason Medical Center

S: David returns f/u pyogenic granuloma L foot sub 1st. He thought the initial freeze seemed to help, and it left a dry black blister. However, it soon deroofed and is now potentially about the same as previous. He continues to have pain when ambulating. The inserts do help remove pressure. He has stopped exercising / playing tennis on it.

O: The L sub 1st granuloma appears essentially unchanged. It is tender to palpation. No SOIs, however.

A/P: L sub 1st MPJ granuloma.

Discussed again all tx options. Since he is here today I would recommend at least another attempt at cryotherapy. We can also be more strict about removing pressure and would like to try a darco shoe with sub 1st MPJ cutout to further offload the area. As this is appearing recalcitrant, other options would include bleomycin, a painful injection, versus surgical. I would likely favor the latter, but this is his decision, and he is aware the nature of plantar incisions require 2-3 wks NWB and the potential for scar formation.

Procedure: LN2 applied 4 cycles planter foot.

RTC 2 wks.

Completed Action List:

- * Perform by Ngan DPM, Alvin T on 15 September 2011 16:16
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DUNNINGTON, DAVID J - 1959567

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* Final Report *

Virginia Mason Medical Center

S: David returns f/u pyogenic granulomas after MRI. He states it scabbed over for a few weeks, but re-opened and started bleeding. It continues to be painful.

O: The L foot is notable for 3 islands of pyogenic granulomas. They all seem enlarged from previous.

MRI: no deep extensions. appears to be localized in the skin

A/P: Presumed L foot pyogenic granulomas

Discussed MRI findings, and tx options. This appears benign, but is clearly painful to walk on. I recommend surgical excisional biopsy and closure. Closure could prove difficult and would likely entail skin plasty / rotational skin flap. Recovery would involve 3 weeks strict NWB, followed by orthotic to offload sub 1st and return to normal activities such as running would be 2-3 months. He will discuss with family. Meanwhile I will check with my colleagues to get their impression as well upon his request.

Signature Line
(Electronically Signed on 12/27/11 14:04)
Ngan DPM, Alvin T

Completed Action List:

- * Perform by Ngan DPM, Alvin T on 27 December 2011 14:04
- * Sign by Ngan DPM, Alvin T on 27 December 2011 14:04
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